

**Findings in Support of an Exemption from Competitive Bidding and Authorizing the Procurement by RFP of the Progressive Design-Build Lone Fir Retaining Wall Project**

Pursuant to ORS 279C.335(2) and (4), and Metro Contract Review Board Administrative Rules Sections 49-600-670, the Metro Contract Review Board makes the following findings in support of exempting the procurement of the Lone Fir Retaining Wall Project from competitive bidding, and authorizing use of an RFP solicitation for a Progressive Design-Build public improvement construction contract:

**1. The exemption is unlikely to encourage favoritism or substantially diminish competition.**

The Metro Contract Review Board finds that exempting the procurement of the construction of the Progressive Design-Build Lone Fir Retaining Wall Project from competitive bidding is “unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts” as follows: The RFP will be formally advertised with public notice and disclosure of the planned Progressive Design Build contracting method and made available to all qualified contractors. Award of the contract will be based on the identified selection criteria and dissatisfied proposers will have an opportunity to protest the award. Full and open competition based on the objective selection criteria set forth in the Metro Contract Review Board resolution will be sought, with the contract award going to the most advantageous proposer. Competition for the RFP will be encouraged by: Posting on ORPIN (Oregon Procurement Information Network), utilizing the Oregon Daily Journal of commerce and a minority business publication for the public advertisement; performing outreach to local business groups representing minorities, women, and emerging small businesses and by contacting contractors known to Metro to potentially satisfy the RFP criteria. Those proposers not selected by Metro will have an opportunity to protest the award.

**2. The exemption will likely result in substantial cost savings to Metro.**

The Metro Contract Review Board finds that exempting the procurement of the Lone Fir Retaining Wall Project from competitive bidding will likely result in substantial costs savings to Metro, considering the following factors required by OAR 137-049-0630 and ORS 279C-335 2(b):

*(A) How many persons are available to bid;*

As this procurement pertains to an established trade, there are dozens of firms in the Portland metro area, including numerous COBID-certified firms, that are independently qualified to meet Metro’s needs, or can partner with other firms to qualify as a team to provide the desired services.

*(B) The construction budget and the projected operating costs for the completed public improvement;*

This procurement addresses work that will likely be subjected to significant public comment, design review and conditions of approval by authorities having jurisdiction. By integrating design and construction services into a single contract, the project will be better able to respond to public input and control costs by determining the most cost-effective methods of satisfying conditions of approval. Metro will retain the ability to cancel the Construction Contract prior to the construction phase and procure construction services through

competitive bid should continuing the relationship with a Progressive Design-Build contractor prove undesirable.

*(C) Public benefits that may result from granting the exemption;*

Expected benefits include:

- Obtaining, through a Progressive Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;
- Improved ability to respond to public input and conditions of approval by integrating design consultant and construction contractor expertise into a single point of contact;
- Reduction of risk of design flaws, misunderstandings and conflicts inherent to contractors performing based on designs in which they have had no opportunity for input, therefore reducing the likelihood of contract claims and increasing the likelihood of cost-savings through increased efficiency;
- Increased quality of work due to greater coordination of efforts between design and construction phases and the ability to evaluate prospective contractors on multiple factors including experience, expertise, and commitment to sustainability and diversity/inclusion, not just pricing;
- Shortening project time as construction activity may commence prior to completion of a biddable design;
- Reduced project duration as multiple procurement processes are reduced to a single request for procurement early in the project.

*(D) Whether value engineering techniques may decrease the cost of the public improvement;*

By bringing an experienced contractor on early in the project to perform design and constructability assessments simultaneously, the potential for change orders during construction is greatly reduced, which translates into savings of both time and money when compared to other approaches to the design and construction of similar projects.

*(E) The cost and availability of specialized expertise that is necessary for the public improvement;*

The scopes of work to be performed under this procurement require technical expertise in construction on and around protected historic resources. Granting this exemption will allow an RFP process that allows for selection criteria accounting for such experience as well as cost, and not just low bid.

*(F) Any likely increases in public safety;*

Construction impacts from this project are anticipated to temporarily reduce pedestrian and/or vehicle access along the south side of SE Stark Street adjacent to Lone Fir Cemetery. Integrating design and construction services into a single contract will help ensure close coordination and management of any potential public safety considerations for pedestrians.

*(G) Whether granting the exemption may reduce risks to the contracting agency, the state agency or the public that are related to the public improvement;*

An exemption will allow for better control of risks related to:

- Project costs and schedule delays by reducing/eliminating unforeseen conditions and associated change orders through advanced collaboration between designers and those constructing the improvements;
- Communication and misinterpretation or misunderstandings between the designer and builder as design and construction will be performed by the same contractor;
- Design flaws and contractor claims due to design inadequacies as the designer and builder will be one and the same. This reduces the likelihood of Contract claims as Metro will be better able to hold a contractor accountable for a design or construction error because the contractor will not be able to deflect responsibility toward another firm.

*(H) Whether granting the exemption will affect the sources of funding for the public improvement;*

This exemption is not expected to affect the sources of funding for related public improvements.

*(I) Whether granting the exemption will better enable the contracting agency to control the impact that market conditions may have on the cost of and time necessary to complete the public improvement;*

The exemption will allow for better control of increases to project costs and schedules by reducing/eliminating unforeseen conditions and associated change orders through advanced and continuous coordination of the design and construction tasks being performed by a common contractor. Metro will retain the ability to procure construction service through competitive bid should continuing the relationship with a Progressive Design-Build contractor prove undesirable.

*(J) Whether granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement;*

The exemption will allow for closer and continuous coordination of investigation, design and implementation efforts, thus allowing the Progressive Design-Build contractor the opportunity to either simplify a project's relative complexity or ensure that those performing construction have a sufficient understanding of the technical requirements of the work. This increases the likelihood of stimulating innovative design solutions while addressing public input through the collaboration of the construction contractor and design team.

*(K) Whether the public improvement involves new construction or renovates or remodels an existing structure;*

This project will modify and repair an existing structural wall adjacent to a public right-of-way. As such, new construction and/or significant modifications in the public right-of-way may be necessary as a condition of approval from authorities having jurisdiction.

*(L) Whether the public improvement will be occupied or unoccupied during construction;*

It is anticipated that Lone Fir Cemetery will remain open during construction, though access to areas adjacent to the work site may be temporarily restricted. Additionally, access to public right-of-ways adjacent to the work site will be temporarily restricted to facilitate the safe performance of construction tasks.

*(M) Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions; and*

A single phase of construction work is anticipated at this time. Conditions of approval imposed by authorities having jurisdiction may require additional phasing. The Progressive Design-Build method of contracting will allow the project team to efficiently adapt the Project to these requirements prior to subcontractor bidding.

*(N) Whether the contracting agency or state agency has, or has retained under contract, and will use contracting agency or state agency personnel, consultants and legal counsel that have necessary expertise and substantial experience in alternative contracting methods to assist in developing the alternative contracting method that the contracting agency or state agency will use to award the public improvement contract and to help negotiate, administer and enforce the terms of the public improvement contract.*

Metro has the internal personnel expertise and experience, and if needed, access to consultants who can ensure the successful use of an alternative Progressive Design-Build contracting method. Several members of the Metro Procurement staff have recently completed training specific to the administration of Design-Build procurements. The staff of Metro's Construction Project Management Office (cPMO) are well-versed in the strategies and business practices necessary to effectively implement, monitor and control Design-Build capital projects. Third-party consultants may be enlisted to provide cultural resource assessments and monitoring, and independent cost estimate reviews to inform Metro personnel in their negotiation, administration and enforcement of the contract.

### **3. Additional Findings:**

*A. Industry practices, surveys, trends.* The industry-accepted benefits of the Progressive Design-Build method include:

- Integrated design process results in a better, more “constructable” design that meets the owner’s objectives
- Encourages competition, especially for COBID subcontractors
- Can be completed in a faster time frame
- Costs less than a design-bid-build project that is designed and constructed in the traditional manner
- Reduces the risks of delays, cost overruns, and disputes
- Reduces the likelihood of change orders for unforeseen conditions

*B. Past experience and evaluation of Metro Progressive Design-Build projects.* The Progressive Design method is a relatively new hybrid of the Design-Build and CM/GC construction methods, and as such Metro has no experience with the model. However, Metro has extensive past experience with both the Design Build and CM/GC methods upon which the method is based.

*C. Benefits and drawbacks of Progressive Design Build to Lone Fir Retaining Wall Project.*  
The benefits are as stated above in these findings, with the additional benefit that the use of the Progressive Design-Build method of construction and procurement on this relatively small project allows Metro to gain experience with the hybrid and provide a post-project evaluation informing Metro's use of the method for future projects. Metro staff sees no drawbacks in the approach.

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