

Exemption Number 2008-01

FINDINGS AND ORDER SUPPORTING AN EXEMPTION FROM COMPETITIVE BIDDING REQUIREMENTS AND THE USE OF THE PRICE PLUS TECHNICAL BEST VALUE ALTERNATIVE CONTRACTING METHOD

Before the Director of Transportation
Of the State of Oregon

In the Matter of the Exemption Request by the)
Oregon Department of Transportation for OR 217:) FINDINGS OF FACT,
Sunset Highway - Tualatin Valley Highway Section,) CONCLUSIONS AND ORDER
Beaverton-Tigard Highway, located in Washington County,)

ORS 279C.335(1) requires, with certain exceptions, that all public contracts be based on competitive bidding and, under ORS 279C.375, be awarded to the lowest responsive and responsible bidder. ORS 279C.335(2) permits the Director of Transportation to grant exemptions to the Oregon Department of Transportation (ODOT) from the requirement for competitive bidding upon the approval of specified findings. ORS 279C.330 defines "Findings" and identifies specific information to be provided as part of the agency justification. Under ORS 279C.335(4) a public hearing must be held before the findings are adopted, allowing an opportunity for interested parties to comment on the draft findings.

This request for exemption was advertised in the Daily Journal of Commerce on July 31st, August 4th, 7th, 11th, and 14th and Reed Construction Data on August 4th and 11th. Additional advertisements were in The Oregonian, The Skanner, The Portland Observer, Asian Reporter, El Hispanic News and Latin News/Noticias Latinas. It was also posted on the ODOT Highway & Bridge Construction web site at:

<http://www.oregon.gov/ODOT/CS/CONSTRUCTION/>

The hearing for review of these findings was held at 1:30 pm on August 15, 2008, at the 1st Floor Public Meeting Room of the Oregon Department of Transportation, Region 1 Headquarters Building, 123 NW Flanders Street, Portland, Oregon. There were Insert #1 comments from the public, either oral or written, during this hearing or during the time for comments.

ORS 184.610 to 184.733 describes the Oregon Department of Transportation (ODOT) and the responsibilities of the Oregon Transportation Commission (OTC), the Director of Transportation and managers. ORS 366.400 authorizes ODOT to enter into all contracts deemed necessary for the construction, operation, maintenance, improvement, or betterment of highways. ORS 279A.050(3)(b) provides ODOT with independent contracting authority for public improvement contracts relating to the operation, maintenance or construction of highways, bridges and other transportation facilities. ORS 366.505 describes the composition and use of the Highway Fund, including Federal funds.

FINDINGS OF FACT

A. BACKGROUND

1. Project Description: OR 217: Sunset Highway - Tualatin Valley Highway Section, Beaverton-Tigard Highway, located in Washington County (the "STV Project" or the "Project")

In 1991, a multi-modal partnership was formed among ODOT, TriMet, the City of Portland and Washington and Multnomah counties to address how transportation projects would be developed in response to the population growth in Washington County. As a result, the Westside Corridor Project was created as a long-range plan defining and prioritizing future transportation projects. Major projects already completed as part of the Westside Corridor Project are the Westside MAX, the Camelot to Sylvan Project, and the addition of a third

southbound lane on the north end of OR 217.

The OR 217 Modernization Project was defined in the Westside Corridor Project and designed to help relieve congestion on one section of OR 217. The STV Project is one of many past and future projects, consistent with the final Environmental Impact Statement (EIS) written for the entire Westside Corridor Project dated August 28, 1991. The STV Project was originally solicited using the low bid process on May 31, 2007 and was not awarded.

ODOT proposes to award a contract on or about January 2009, to accomplish the Project. Construction is anticipated to begin in early 2009. The estimated value of the contract is between \$20 and \$40 million dollars. The Project is anticipated to be funded with a combination of state and federal funds. Work on the Project is anticipated to begin in 2009 and is expected to take two construction seasons to complete.

The Project will include the following elements:

- Adding a third northbound lane on OR 217 from the Tualatin Valley Highway (OR 8) on-ramp to the Sunset Highway (US 26)
- Building retaining walls along OR 217
- Improving drainage on the Tualatin Valley Highway (OR 8)
- Paving and striping the Project area and all the OR 217/US 26 interchange ramps
- Lengthening the Wilshire Street overpass to accommodate the wider highway which will include extensive bridge work to reconstruct the Wilshire Street off-ramp.
- Improving visibility and safety on the Wilshire Street off-ramp in the OR 217/US 26 interchange
- Excavation, including rock blasting

The Project work items appear to include abundant subcontracting and supply opportunities. Such opportunities promote diversification of work throughout the overall community and in the achievement of projects in ways that provide diversification that meets or exceeds what is reflected in the overall workforce and business community.

Once the Project is complete, motorists will have three northbound through-lanes on OR 217 between the Tualatin Valley Highway and the Sunset Highway. This will help reduce the traffic weaving that occurs between the Tualatin Valley Highway (OR 8) and Walker Road as motorists are simultaneously entering and exiting the highway. In addition, sight distance and safety will be improved when traveling between OR 217 northbound and US 26 eastbound. In addition, as described further in the next section, ODOT desires that this Project demonstrate a focus on enriching the process for public participation in subcontracting and supply opportunities. Such activities meet the public's best interests through the inclusion of the broader community of business entities in the Project's vicinity and supporting Oregon's overall economy.

2. Agency Considerations:

Nature of Business

ODOT has been contracting for road improvement projects since 1914. In recent years, the average number of projects has been approximately 150 to 200, at a cost of approximately \$200 to \$300 million annually. With the advent of the Oregon Transportation Investment Act (OTIA) I, II, and III funding sources and projects, it is expected that ODOT is expending between \$500 to \$600 million per year with anticipated resumption of the \$200 to \$300 million range in 2012.

The Oregon Transportation Commission (OTC) is mandated to "encompass economic efficiency" (ORS 184.618) and, therefore, ODOT strives to continually improve its procurement and project delivery approaches. The need for economic efficiency was accentuated when the Oregon Legislature passed OTIA, which includes modernization efforts such as the improvements encompassed by the STV Project. The Legislature further provided guidance to ODOT that project implementation should focus on stimulating Oregon's economy. One project delivery method that encompasses economic efficiency is the appropriate use of "Price plus Technical" procurement process, a Best Value contracting method.

For the STV Project ODOT has determined that:

1) It is in the public's best interest to build the Project with a high level of community participation in subcontracting and supply opportunities to promote inclusion of local businesses and diversity in the distribution of work and to achieve a high level of economic benefit. The participation ODOT intends for the Project is that which encourages broad contributions in the Project both by the workforce and the local communities. ODOT foresees that the Project's contractor, subcontractors and suppliers will succeed in the Project's delivery through utilizing both existing and specific broad based and inclusive planning. ODOT anticipates that the contractor will closely monitor and adapt their efforts to seize opportunities as they are identified through active engagement within the contracting and supply industries.

2) The ability of the construction workforce to work near home within the corridor serviced reduces the distance or time in travel, thereby lessening congestion and reducing vehicle emissions. Furthermore, a regional approach is considered to maximize the benefits to the Oregon economy and promote logistics efficiencies in the construction of the Project.

Circumstances

The high traffic volumes on OR 217 require that all lanes be open during daytime hours. Closing of any lanes during the day would create backups and serious safety concerns. As a result, work that requires lane closures has to take place during nighttime hours when traffic volumes are lower. Motorists will experience single and double lane closures on OR 217 during the overnight work hours. As much as possible, daytime work will take place outside the travel lanes behind barriers.

Traffic staging to maintain traffic throughout the job is complex, with few options existing for traffic staging and detours in the urban environment. A similar technical challenge is presented by staged bridge construction with a limited time constraint to reopen to traffic. Required traffic control and work zones while working with many subcontractors and utilities in small spaces with a high average daily traffic volume are among the required work activities that present complex technical challenges and the need for expert project management, coordination and integration skills. Additional technical challenges exist with varying soil properties and the shoring requirements on the Wilshire structure.

Wilshire Street overpass and off-ramp work will require a temporary traffic pattern change. For up to an 80-day period during the summer, the Wilshire Street overpass will be reduced to one westbound travel lane 24 hours a day. Motorists heading east across the Wilshire Street overpass during the closure period will be detoured onto OR 217 southbound, exit on Walker Road, head northbound on OR 217 and then exit onto Wilshire Street.

While there are no bicyclist and pedestrian issues regarding highway use during construction, there are potential issues on Wilshire Street. During construction on Wilshire Street, pedestrians will face sidewalk closure on one side of the roadway during all bridge construction stages. This will force pedestrians to detour back and forth across traffic to the open side within the busy, fairly complex, and tight work zone. Pedestrians that stray outside the detour subject themselves to risks presented by competition for the roadway with vehicles. Bicyclists for all bridge construction stages will have no shoulder room for travel. The options will be limited to sharing the roadway with traffic or walking their bikes on the sidewalk detour. Sharing the roadway in particular with faster traffic may compromise safety. After the Wilshire Street overpass lanes are reopened, there will be a temporary closure of the Wilshire Street off-ramp for up to 45 days to complete the ramp reconstruction work.

Further, the urban environment creates challenges related to temporary disruptions to the traveling public and residents during construction. Impacts to and delays associated with public access to and egress from local businesses and noise considerations for businesses and neighborhoods in the Project area, have an indirect cost impact. These issues, in the list of Project complexities, could easily be the most challenging for the contractor. The Project has technical and engineering requirements as well as important complexity challenges, including multiple utility coordination issues. These challenges put the contractor in the position of balancing the public's best interests, Project schedule, associated traffic delays, and other environmental constraints including but not limited to water quality and erosion control.

ODOT performed an internal evaluation of the delivery goals and alternative contract delivery mechanisms for the Project. ODOT traditionally uses a low bid process, but concluded that using that project delivery method entails an unacceptable risk that the STV Project will not be delivered in a timely manner or a manner that minimizes impacts to the traveling public and will not provide the local community with significant public

participation in contracting opportunities. For the Project, ODOT reviewed other available procurement options that could provide maximized benefit to the public and determined that an alternative contracting process that considers key elements for project success beyond price is most appropriate for the Project. ODOT has determined and proposes that an alternative contracting process that focuses on Price plus Technical Best Value is most appropriate for the STV Project. This procurement method provides recognition of the value to the public of employing enhanced contracting methods which will accomplish the required work in the most effective manner.

The Best Value contracting process assigns weight to price as well as other factors that are important to the success of the project such as schedule, qualifications and technical approach. There are various contracting methods that may be used under the Best Value process, commonly referred to as "A + B", "A + C", or "A + D", with "A" referring to "Price" and "B" or "C" or "D" referring to "Qualifications", "Technical" or one or more other major evaluation components. For the STV Project, ODOT proposes to use the form of Best Value that is expressed as "Price plus Technical", wherein the technical portion of the process combines the evaluation of two elements: qualifications and a work plan (referred to in this document as "A + C" or "Price plus Technical").

Advantage

The purpose for using the Price plus Technical Best Value contracting method is to best serve the traveling public by having a knowledgeable and experienced contractor that will perform this highly technical and complex Project with a price proposal that will realistically deliver the best value project to the State. This method will reduce the potential for Project work delays, including the possibility of large cost overruns, and will encourage innovation and avoid or minimize adverse impacts to the local communities and the traveling public.

Best Value contracting for this Project contributes to ODOT's broader economic efforts by encouraging contracting opportunities that improve the skills of the workforce and enhance employment opportunities for Oregon residents and regional businesses. This Best Value approach is congruent with ODOT's commitment to improving Oregon's economy. Another collateral benefit to the use of Best Value contracting on this Project is that it provides greater opportunity for the contractor to add significant value to the Project by supplying a Technical Proposal that meets ODOT's quality standard through an emphasis on Best Value (Price plus Technical). These critical factors are not considered in the low bid contracting method.

Studies That Have Compared Low Bid

On typical construction projects with routine levels of complexity, the low bid contracting process has demonstrated predictable success in providing the best value to the public. However, for complex and complicated projects there is a growing body of data extending back to the early 1990s that supports alternative contracting methods, including Best Value, that consider other elements beyond low price in order to achieve the best value for the public. Some of the features of Best Value contracting beyond price are: reduction in contract time or time needed to achieve critical milestones; focus on the execution of complex technical aspects and planning for technical constraints; encouraging innovations; and integration of the locally affected and traveling public's needs into the execution of projects.

There is a growing recognition that, for certain projects, better competitive delivery methods exist than the low bid contracting process. An article in the November 1997 edition of Engineering News Record indicates that, on the basis of 350 projects studied by the Construction Industry Institute, the traditional low bid competitive bid process was the least efficient. This data and a growing pool of other information from other states and the federal government continue to support the need to consider alternatives to competitive bidding for certain projects.

Prior Projects

The use of this Best Value contracting method allowed ODOT, through an exemption based on the success of Department of Defense with the Price plus Technical method, to accomplish the Lift Span Trunnion Replacement Project on the Columbia River (NB) Section of the Pacific Highway (I-5) and the St. Johns Bridge Rehabilitation Project. Additionally ODOT is using the Price plus Technical plus Approach form of Best Value contracting method on the Martin Luther King, Jr. Blvd. OR99E: MLK/Grand Viaduct O-Xing UPRR 02115 &

08905 Section Project. This project is anticipated to complete construction in 2011.

The results of both the Lift Span Trunnion Replacement Project and the contracting method employed were deemed to be successful and subsequent evaluation of the Best Value contracting process showed that it can provide a number of benefits on transportation projects. The objective of using the Best Value contracting method was to select the construction contractor most likely to successfully deliver this difficult and unusual project with minimum delays, problems and rework, while ensuring a competitive price. All these objectives were met. The Best Value method for contractor selection for this project resulted in fewer traffic and safety issues, and less impact on local jurisdictions and businesses than would have been expected from a low bid process. The project was completed approximately 2 weeks earlier than the original schedule anticipated. The reduced construction time on this pilot project was extremely beneficial to the traveling public by reducing delays. Through the Trunnion Project, ODOT learned that quality can be sought and found through a competitive Best Value contracting method.

The St Johns Bridge Project, a \$35 million deck replacement, lead paint removal and recoating project with significant restoration of historical detailing to this landmark bridge, also used Best Value contracting. The method of contracting was selected by a unique Value Engineering approach that looked at all possible contracting methods, including incentives, to ensure a high quality and cost-effective result. The project was completed in summer 2005, and has been profiled in The Oregonian newspaper as a highly successful project. The results of the St. Johns Bridge Project led ODOT's Bridge and Contracts Sections to conclude that ODOT was in a far better position to work with the contractor than if the project had been low bid and that this method reduces the State's risks on critical projects.

The Price plus Qualifications method, another variation of Best Value, is an innovative contracting practice used by federal agencies, including the Department of Defense with generally good results. It is found in the Federal Acquisition Regulations at FAR Part 15 Contracting by Negotiation, Subpart 15.6 Source Selection, which provides a number of contracting methods to achieve higher value in contracts. The process bases contract award on Price and Quality. Quality is addressed through one or more factors such as technical excellence, management capability, personnel, qualifications, prior experience, past performance or schedule adherence.

The Price plus Technical method is similar to Price plus Qualifications. The proposing contractor provides a Price Proposal for the work and a Technical Proposal relating to the factors determined to be critical for the success of the project, which may include the qualifications of the firm and individual key personnel. The submission of the Technical Proposal (describing the proposer's project work plan including qualifications) is a similar process to the submission of special pre-qualifications, but focuses on the important technical aspects within the project that are factored into the determination of overall best value to the State. While the Price plus Technical method requires an exemption from competitive bidding under Oregon law, the method is allowed under federal procurement practices (FHWA Contract Administration Core Curriculum Manual, FHWA, 2001).

Based on its successes, ODOT has received a federal programmatic exemption from SEP-14 from the Federal Highway Administration for continued use of the Best Value contracting method. This means that, while the FHWA still requires project level engagement on such unique projects, FHWA approval and detailed documentation associated with a special exemption from low bid are not anticipated.

Further ODOT experience with alternative contracting methods includes other Best Value variations, including Price plus Schedule (A+B) and Design-Build. All of these contracts illustrate ODOT's ability to identify projects and implement alternative contracting methodology when it best suits project and public needs. These ODOT projects have benefited from the reduction of risk, quicker execution, and lower impacts to the traveling public while meeting ODOT's values for diversification of the workforce and subcontracting, and OTC mandates related to economic efficiencies and reducing vehicle emissions. ODOT expects that its continued use of alternative contracting methods may actually reduce the total construction and ownership costs of projects.

The STV Project involves a large variety of work items, some of which are significantly technical, specialized and complex, and which are suitable to the Best Value approach. This variety of work appears to include contracting opportunities appropriate for engagement of small and diverse businesses.

The implementation of projects using alternative contracting methods will be controlled within the Advanced

Contracting Unit of the Major Projects Branch until such time as ODOT's body of knowledgeable practitioners is sufficient to decentralize it to the regional level.

3. Procurement Process

This is a request to the Director of the Oregon Department of Transportation, on behalf of ODOT, for a contract-specific exemption from competitive bidding requirements. The exemption would allow ODOT, through a single step procurement process, to solicit proposals for construction of the STV Project using the Price plus Technical alternative contracting method.

A Request for Proposals (RFP) will be issued for the Project and proposals must be submitted by a specified date. The proposals submitted will be required to contain two components, a price component (Price Proposal) and a technical component (Technical Proposal). Proposers will submit these components simultaneously as two separate, sealed proposals. The process will culminate in award of a lump sum contract (with progress payment provisions) for the Project under this exemption. The contract will be awarded to the construction contractor submitting the proposal determined to be the best value to ODOT and the general public in light of the combined price and technical evaluation factors.

The Price Proposal component constitutes the total cost to ODOT for delivering the Project. The Price Proposal component will be in the same standard, unit price format as a low-bid contract. It is anticipated that the Price Proposal will represent fifty-percent or more of the final score. A detailed description of the Price and Technical Proposal contributions to the final score will be included in the RFP. Price Proposals will be scored separately from the Technical Proposals.

Technical Proposals will be comprised of a work plan, including a diversity plan. Work plan evaluation criteria may include such elements as the proposer's understanding of the Project, experience, key personnel to be committed to the Project, schedule aggressiveness, capabilities, the proposer's approach or work plan for delivering Project key elements described in the RFP and plans in areas such as quality, environmental impact, traffic management, Project staging, diversity, staffing and organization. The Technical Proposal component score will be used in conjunction with the Price Proposal component, resulting in a final overall score, as described in the RFP.

With respect to Technical Proposals it is anticipated that proposing contractors will assemble a team of in-house staff and subcontractors and suppliers which is closely matched to the technical needs the State is seeking for this Project while jointly addressing the need to provide a competitive price. The successful contractor will provide the greater value to the State by submitting a more thoroughly thought-out Technical Proposal that minimizes adverse impacts to the public, reduces risks of missing its schedule and provides a high quality work plan.

The Technical Proposal component will be evaluated and scored by the proposal evaluation team. This team will consist of individuals from ODOT, but may include members who are not from ODOT. Other ODOT and ODOT consultant personnel may serve in technical and administrative support capacities. The scoring of Technical Proposals will be completed by the proposal evaluation team prior to the public opening of Price Proposals.

Once the Technical Proposal component scoring is completed, the Price Proposals will be publicly opened, the final scores calculated and initial determination of the Best Value proposer announced. The final scores and ranking, and notice of intent to award, will be announced by ODOT in accordance with the procedures set forth in the RFP. Based on the final scores and ranking, the responsive and responsible proposer that provides the best value to ODOT will be selected for award and finalization of contract terms and conditions. In the event that prior to contract execution the selected proposal is found to be non-responsive or the proposer not responsible, or contract finalization proves unsuccessful, ODOT may, if it is in the public's best interest, select the proposer that offers the next best value for contract finalization and award.

The contract form to be used will be standard ODOT Construction Contract form, modified to facilitate the "Price plus Technical" approach. Development of the modified contract will be coordinated with the Department of Justice.

B. FINDINGS REGARDING REQUIRED INFORMATION

ORS 279C.330 states that: *"Findings" means the justification for a contracting agency conclusion that includes, but is not limited to, information regarding: (a) Operational, budget and financial data. (b) Public benefits. (c) Value Engineering. (d) Specialized expertise required. (e) Public safety. (f) Market conditions. (g) Technical complexity. (h) Funding sources.*

Many of these criteria support the use of the Price plus Technical Best Value contracting process. This request for exemption is supported by the following facts:

1. Operational, Budget and Financial Data: The Project was approved in the 2008-2011 Statewide Transportation Improvement Plan (STIP). The total Project construction cost is estimated to be in the range of \$20-40 million. The Project is anticipated to be funded with a combination of state and federal funding resources.

In ODOT's view, the Price plus Technical Best Value method of contracting is the best available procurement method that allows this Project to begin in the next construction season and be completed, while ensuring that ODOT will not incur additional costs beyond those budgeted. This method stresses quality, minimizes construction time delays, promotes participation in the Project's contracting opportunities and requires that critical scheduling is met.

Best Value contracting will reduce ODOT's risk that the contractor might not be able to construct this Project while minimizing the impacts to the traveling public within budget and schedule constraints. A contractor with demonstrated qualifications and a sound work plan will provide better overall value and should reduce change orders and overruns. As a result, it is anticipated there will be a cost savings to ODOT and the public by using this method of contracting on the Project.

2. Public Benefits: The use of a Best Value contracting method when coupled with Value Engineering provides an optimal way to focus on the Project's impacts on the public. The Best Value method focuses on project components that are most valuable to ODOT through the ability to evaluate proposers based on their technical approaches. ODOT anticipates that the estimated Project schedule will be compressed by the technical approach a successful contractor may propose, which will likely reduce disruption of local businesses and neighborhoods. The Best Value method also allows for consideration of inclusion of many entities in subcontracting and supply opportunities, which creates maximum economic benefits to the general public.

Overall success is more likely as a result of application of this alternative contracting method on the STV Project. Some of the benefits, along with price reasonability, include positive environmental impacts associated with working where one resides, potential schedule compression affecting ease of mobility within the neighborhood, as well as collateral corridor effects. The ODOT Director's keen attention to the "public interest" in subcontracting opportunities is also supported.

Completion of the Project will also benefit the public by supporting local and statewide economies. As part of the full Westside Corridor work/improvements, over time, the indirect cost benefits of the Project transcend the Project itself.

3. Value Engineering: Value Engineering is encouraged on all projects by ODOT, and has resulted in both initial potential savings as well as long-term savings for other ODOT projects. It is also required on projects with over \$25 million in federal funding. ODOT completed a value engineering study for the Project in April 2006.

Because Price plus Technical contracting places a premium on Best Value, this method should result in more reliable and higher quality cost reduction proposals produced for the Project. In addition, the contractor will be able to submit cost reduction proposals under Section 00140.70 of the Oregon Standard Specifications for Construction.

4. Specialized Expertise Required: By using the Best Value contracting method ODOT will ensure that the prospective prime contractor has the necessary knowledge and experience as illustrated in their Technical Proposal, comprised of a work plan that includes a diversity plan, to successfully complete the complex STV

Project. This includes the contractor's utilization of a diverse workforce, congruent with ODOT's heightened emphasis that further includes subcontractors and suppliers. The contractor must have an excellent understanding of the Project and the ability to perform. The work is a complex combination of challenges, and the final product must be capable of a long service life. The contractor's Technical Proposal is deemed highly important to the success of this Project.

The STV Project involves significantly technical, specialized and complex work items. The consequences of relatively small errors in such complex projects, including construction staging, foundation, demolition, and shoring work have been documented as causing project cost, safety, schedule and other significant negative project impacts. The Best Value contracting method proposed for the STV Project specifically is anticipated to reduce similar potential risks.

The Price plus Technical model emphasizes expertise and innovation in management and coordination, providing scheduling and estimating, assessing risk, managing mobility, public relations and safety and quality needs and providing a complete project that is sensitive to wide public participation by all in contracting opportunities. As is typical of Best Value contracts, the most qualified prime contractor construction services are sought, rather than just simply accepting the lowest bid. In addition, specialized expertise is required to successfully address the public safety issues noted below.

5. Public Safety: Safe traffic flow must be maintained at all times while construction proceeds. It is crucial that all work be coordinated among multiple work sites to avoid unnecessary delay and safety risks to the traveling public, and to ensure efficiency in construction. The consequences of relatively small errors in planning, shoring, erection, and construction staging work has the potential to delay the Project work and may impact safety for the traveling public and workers. Such potential risks, if not pro-actively addressed, may produce large cost overruns and create public safety hazards.

The high traffic volumes on OR 217 require that all lanes be open during daytime hours. Closing any lanes during the day would create backups and serious safety concerns. Motorists will experience single and double lane closures on OR 217 during the overnight work hours. As much as possible, daytime work will take place outside the travel lanes behind barriers. Traffic staging to maintain traffic throughout the job is complex, with required traffic control and work zones while working with many subcontractors and utilities in small spaces with a high average daily traffic volume in the required work activities. Expert project management coordination and integration skills are required for the Project. There are potential issues on Wilshire Street for bicyclists and pedestrians as pedestrians will face sidewalk closing on one side of the roadway during all bridge construction stages and pedestrians to detour back and forth across traffic to the open side within the busy and tight work zone, subjecting themselves to risks presented by competition for the roadway with vehicles. Bicyclists for all bridge construction stages will have no shoulder room for travel compromising safety.

6. Market Conditions: ODOT does not anticipate any measurable difference in market conditions if this Project is contracted under the traditional low bid or the "Price plus Technical" Best Value method. As described in Section A, contractors have some experience with alternative contracting methods in Oregon and have become more accepting of alternative contracting processes, assuring adequate competition.

Oregon's 2007 annual average unemployment rate, as reported by the U.S. Bureau of Labor statistics, was 5.2 percent. This was the 10th highest rate in the U.S. and well above the nation's 4.6 percent level. Oregon's rate continued to be above the regional average as well. Oregon had the third highest level of unemployment in the 11 western states, exceeded only by California and Alaska. The preliminary mid-year 2008 rates continue to validate Oregon's much higher than national average unemployment rate and continued above average rate within the 11 western states as well.

The Governor and the Legislature have encouraged ODOT to contract projects quickly to both take advantage of lower construction prices in the current market and to improve employment. Economic studies have shown that highway construction projects nationally create between 30 and 40 jobs per million dollars spent. For the OTIA III Statewide Bridge Delivery Program, ODOT estimated that highway construction jobs create more than 19 jobs in Oregon per million dollars of project cost.

7. Technical Complexity: For a contractor to be successful in completing this Project the contractor must be able to develop and follow an accurate work plan that incorporates the large variety of work items with certain

attention to ODOT's focus on small businesses and public engagement in contracting opportunities. In addition to contractor's work plan, including a diversity element, detailing contractor's Technical Proposal, this Project will require excellent communication and coordination skills, parallel work scheduling, multi-shift work, and innovative project management skills.

The consequences of relatively small errors in planning, shoring, erection, construction staging work, consideration of economic efficiencies, and associated localized economic impacts on the public, have the potential to delay the Project work and produce large cost overruns in the following areas:

- traffic staging and detours in an urban environment with few options
- shoring requirements on the Wilshire structure
- varying soil properties, bridge stage construction with a limited time constraint to reopen to traffic, noise considerations for businesses and neighborhood in the area
- traffic control and work zones in small spaces with a high average daily traffic volume
- safety

The work activities will present a complex technical challenge to the construction contractor and ODOT.

8. Funding Sources: As mentioned earlier, this Project is anticipated to be funded with state and federal funds, the use of which has been approved by the Oregon Transportation Commission.

C. FINDINGS ADDRESSING COMPETITION

ORS 279C.335(2) requires that an agency make certain findings as a part of exempting public improvement contracts or classes of public improvement contracts from competitive bidding. ORS 279C.335(2)(a) requires an agency to find that: *It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts.* It is anticipated that competition for the STV Project construction contract will be similar to that expected in other projects of this type. ODOT finds that selecting a contractor through the Price plus Technical contracting method will not inhibit competition or encourage favoritism. This finding is supported by the following:

1. ODOT anticipates that competition will be similar to that experienced in other ODOT projects. The competition remains open to all currently qualified construction contractors. The contracting community is well aware of ODOT's use of alternative contracting processes and success with contractors on similar past projects. ODOT expects that with this experience, normal competition will prevail.

2. ODOT has been communicating regularly with both the construction contracting community and the local business community through direct contacts and at scheduled ODOT-Associated General Contractors meetings about various Best Value and other unique contracting methods.

3. The Price plus Technical evaluation and selection process ODOT intends to employ is summarized in Section A. The process is open and impartial. Proposers will be evaluated equally based on criteria that is reflective of the significant work elements of this type of project. Selection will be made on the basis of final proposal scores derived from a price component and a technical component, as described in Section A. This method expands the grounds of competition beyond price alone to include technical factors in order to deliver the best value project to the State.

4. Pursuant to ORS 279C.360, the solicitation will be advertised in Daily Journal of Commerce and may be placed in Reed Construction Data, The Oregonian, The Skanner, The Portland Observer, Asian Reporter, El Hispanic News and Lain News/Noticias Latinas. The solicitation advertisement will also be posted on the ODOT Highway & Bridge Construction web site at:

<http://www.oregon.gov/ODOT/CS/CONSTRUCTION/>

5. The objective of using the Price plus Technical Best Value (A + C) contracting method is to select the construction contractor most likely to successfully deliver this difficult and unusual Project with minimal delays, problems and rework, while ensuring a competitive price and this objective is expected to be met.

D. FINDINGS REGARDING SIGNIFICANT COST SAVINGS

ORS 279C.335(2) requires that a public agency make certain findings as part of exempting public improvement contracts or classes of public improvement contracts from competitive bidding. ORS 279C.335(2)(b) requires an agency to find that: *The awarding of public improvement contracts under the exemption will likely result in substantial cost savings to the contracting agency, to the state agency based upon the justification and information described in ORS 279C.330 (not applicable here) or, if the contracts are for public improvements described in ORS 279A.050(3)(b) (such as this project), to the contracting agency or the public.* These findings therefore consider whether cost savings accrue directly to ODOT as the contracting agency or indirectly to the general public (particularly for highway users). ODOT finds that on this project substantial cost savings will likely accrue to ODOT and the general public.

This finding is supported by the following;

1. Direct Contract Cost Saving:

In general, initial contract prices are expected to be comparable between Price plus Technical Best Value and conventional contracting methodologies, but considerable time savings for the public can be reasonably anticipated. The cost savings to ODOT and the public based on the avoiding delays to the improvements to the traffic flow (average daily traffic) is significant and measurable. These improvements will increase traffic flow 4,000 to 10,000 vehicles per day over the Project life. A delay to construction will result in the ongoing additional costs to the public for at least one construction season. The single first year delay cost is estimated at \$563,000 and the ongoing average yearly delay cost is estimated to be \$1,675,000 dollars.

Cost savings may be anticipated through a reduced schedule for completion. Additional weekend or overtime work may be required to maintain a compressed schedule. ODOT does not anticipate significant changes to the Project and any accelerations costs should be covered within the standard project contingency allowance.

2. Indirect Saving:

Indirect savings are real and recognizable by the public and significant for this Project. The identified elements within the indirect savings include savings from combined and distributed effects of avoidance or minimization of impacts to business access, reduction of spot delays to the traveling public (breakdowns and accidents), and potential benefits of schedule compression on the community. In addition, maintenance that would otherwise be required, either as routine maintenance or as maintenance necessitated by the current condition of the highway in question, will be avoided by timely completion of construction.

While this indirect savings element is real and recognizable to the total cost benefit analysis, it is not easily quantifiable, predictable or measurable within standard and universally accepted cost accounting practices. As such these indirect savings are recognized within this document but will not be measured in the required final Project review.

As described, a cost savings to the public will result through the use of time compression to the Project completion time through the Best Value process. The actual savings are determined by the selection and execution of final completion date by the contractor and therefore cannot be quantified.

3. Total Expected Savings:

The minimum total expected savings to the Project includes the approximate costs to develop the road user costs and the minimum expected savings to the public by not continuing a delay in the Project procurement in 2009 construction season. This estimate does not include additional indirect savings through future application of standard accounting practices, when costs that, by their nature, are difficult to determine, can be quantified. In total, the minimum expected savings is expected to exceed \$500,000.

4. Post-Project Evaluation Process:

This Project will be evaluated in accordance with the requirements of ORS 279C.355. The Price plus Technical Best Value contracting method will be evaluated based upon the accomplishment of ODOT's primary

objectives as noted below:

- The Project was executed using a high level of technical quality expected of a contractor team experienced in the work items and overall supervision and coordination efforts of such a complicated and complex Project.
- The Project met the completion date, including allowed closure and delay impacts on the Wilshire Over crossing Structure as provided by ODOT in the initial solicitation.
- The Project provided additional contract indirect savings through schedule reduction and closure/delay minimization as provided by the contractor in their proposal.
- The Project met budget with a minimum of modifications based on a final analysis of the Project change orders.

CONCLUSIONS OF LAW

An exemption from competitive bidding requirements is justified under the criteria outlined in ORS 279C.330, findings have been developed in compliance with ORS 279C.335(2) through 27C.335(4), and ODOT will perform the post-project evaluation required by ORS 279C.355. Based upon the previously listed findings ODOT concludes that:

1. Following the described selection process, an exemption is unlikely to encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts; and
2. Award of a public improvement contract pursuant to the exemption will likely result in a substantial cost savings to ODOT and the public.

ORDER OF DIRECTOR

An exemption from public competitive bidding requirements is hereby granted to the Oregon Department of Transportation to enter into a public improvement contract utilizing the Price plus Technical Best Value alternative contracting method as described in the preceding findings. This order is subject to the following conditions:

1. To the extent possible and consistent with this exemption, this procurement will follow the provisions of ORS Chapters 279A and 279C, ORS Chapter 291; OAR Chapter 731, Divisions 5 and 7.
2. ODOT, in concert with the Department of Justice (DOJ), shall establish and follow standards for evaluating proposals under this procurement.
3. ODOT shall work with DOJ to adapt standard contract language for the contract and shall incorporate into the contract such additional or substitute additional terms that DOJ may determine to be necessary for compliance with Oregon law.

THE FINDINGS OF FACT SUBMITTED IN SUPPORT OF THIS REQUEST ARE HEREBY APPROVED.

Date

Director, Department of Transportation

REVIEWED BY THE DEPARTMENT OF JUSTICE

Date

/s/ Glen Driveness
Assistant Attorney General