

Exemption Number 2006-51

**FINDINGS AND ORDER
SUPPORTING AN EXEMPTION FROM COMPETITIVE BIDDING REQUIREMENTS
AND THE USE OF THE DESIGN-BUILD
ALTERNATIVE CONTRACTING METHOD**

Before the Director of Transportation
Of the State of Oregon

In the Matter of the Exemption Request for the)
Wilsonville to Hayesville Interchange project on I-5,)
a National Highway System Interstate Highway)
Clackamas and Marion Counties)
by the Oregon Department of Transportation)

FINDINGS OF FACT,
CONCLUSIONS AND ORDER

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 February 16, 2006. It was also posted on the ODOT web site at:
<http://www.oregon.gov/ODOT/HWY/OPD/DBprocurement.shtml>.

The hearing for review of these findings was held at 1:00 PM on March 2, 2006 at the Department of Transportation office at 680 Cottage St. NE, Salem, Oregon. There were no 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 the 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:** Wilsonville to Hayesville Interchange (I-5) project, Marion and Clackamas Counties.

ODOT proposes to enter into a design-build contract on or near March 30, 2006. This project combines or bundles several planned projects located between mile point (MP) 259.10 and MP 281.33 on Interstate-5, a National Highway System highway, into a single procurement for a single project. The goal of the single-project approach is to obtain the benefit of cost efficiencies.

The individual components listed below have been combined by ODOT into a single project and placed in the Statewide Transportation Improvement Plan (STIP).

Bridge Bundle 211 Project Component Name/ ODOT Bridge #	Mile Point to Mile Point (I-5)	Construction Work Classification	Previous ODOT Key Number
I-5 NB over Hwy 51 SB, Br. No. 07794A	282.25	Bridge Replacement	
I-5 SB over Hwy 51 SB, Br. No. 07794B	282.25	Bridge Replacement	
I-5 Hayesville Interchange to Baldock Roadway	259.10 – 281.33	Interstate Maintenance (IM)	12578
I-5 Hayesville Interchange to Baldock Roadway	259.10 – 281.33	Cable Guardrail Re-Tensioning	

The two (2) OTIA III-funded bridge replacements are scheduled for the 2006 construction season. The work will include design, construction, contract administration and all necessary support services.

The IM component of the project is scheduled for 2007. Interstate maintenance will include highway improvements between the designated mile points, including pavement grinding, guard rail replacement and cable guardrail re-tensioning. Other improvements may include modification of concrete barriers, roadside obstacles, fencing, illumination, attenuators, rumble strips, pavement markings, signal loops, etc. This component will also include all contract administration and necessary support services.

The work under this design-build contract consists of design, construction, contract administration and all support needed to complete construction.

The work will be done in accordance with ODOT-approved geometric design standards, performance requirements, and specifications. The estimated value of the construction contract is between \$20 and \$25 million dollars. The project is to be funded with a combination of funds provided by the Federal Highway Administration, State and local agencies.

In its solicitation, ODOT may reserve the right to include additional related work within the general project vicinity.

It is essential that the work be vigorously initiated, pursued and completed, with a minimal impact to the traveling public. Interstate-5 is a major route connecting Portland and the Willamette Valley with northern California. It is an important commercial and recreational travel corridor and is the State's major north-south transportation corridor. Commercial truckers and tourists heavily use the highway. It is critical that this project be completed with as little interference as possible to traffic flow while assuring safety to the traveling public. For these reasons, this project is being procured using the design-build method as described below.

2. Agency Considerations:

ODOT has been contracting for road improvement projects since 1914. In recent years, the average number of projects per year has been approximately 150 to 200, at a cost of approximately \$200 to \$300 million. With the advent of the OTIA I, II, and III funding sources, it is expected that ODOT may expend up to \$600 million annually over the next ten years. The OTC is mandated to "encompass economic efficiency" (ORS 184.618), and therefore ODOT strives to continually improve its procurement and project delivery approaches. One of those improvements encompassing economic efficiency is appropriate use of the design-build project delivery method of contracting.

ODOT established a goal to commence construction on the bridge components of this project in the winter of 2005/2006 due to the condition of the two bridges (stage 3 cracking), and to complete IM improvements to the selected roadway in 2007 (useful life expires in 2007). An evaluation of internal delivery for this project determined that there was unacceptable risk that the schedule goal would not be met using the traditional hard bid (design-bid-build) project delivery method. An extensive evaluation of the design-build delivery method for the project resulted in an ODOT determination that there is a high probability of meeting the goal using that method.

3. Procurement Process:

This is a request to the Director of Transportation, on behalf of ODOT, for a contract-specific exemption from competitive bidding requirements. The exemption would allow ODOT to solicit proposals for the design and construction of the project described above using the design-build alternative contracting method.

The procurement "Selection Process Description and Objectives" to be implemented under the ODOT design-build Program is described in Attachment A. The design-builder selected will be responsible for both design and construction of the project. The selection will involve a qualification round to determine the three most qualified firms or teams. Those three (or more depending on the quality and distribution of scores) teams will be asked to each provide a quality proposal and a price proposal. 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 design-builder submitting the proposal determined to be most favorable to ODOT in light of previously-announced evaluation factors. Those will consist of the proposal price (likely including demolition, removal, design, environmental management, and construction costs), and quality factors (likely including experience, personnel, schedule aggressiveness, capabilities, concept designs, and plans in areas such as quality, environmental impact, traffic management, project staging, staffing and organization.)

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 design-build contracting process. This request for exemption is supported by the following facts:

1. **Operational, Budget and Financial Data:** ODOT currently has funding identified in the draft 2004-2007 Statewide Transportation Improvement Program (STIP) for the IM portion of the project, and OTIA III Stage 2 funding for the bridge replacement portion of the project. In addition, ODOT has asked for federal funding for the project. ODOT considers completing this project a high priority. The total project design and construction cost is estimated to be between \$20 and \$25 million.

In ODOT's view, the design-build method of contracting is the quickest method of getting this project underway and completed, while ensuring that ODOT will not incur additional costs beyond those budgeted. The design-build method of contracting is a recognized method of minimizing construction time and ensuring that critical scheduling is met. As outlined below, it is anticipated there will be a cost saving to ODOT and the public by using this method of contracting on this project.

2. **Public Benefits:** The Design-Build method of delivery will ensure rapid completion of this project and therefore contribute toward meeting the goals and schedule objectives of the OTIA III Bridge Delivery Program. Accelerating the replacement of the deteriorating bridges on the project will improve safety, and increase both the rate of traffic flow and the allowable load capacity, thus avoiding the possibility of weight restrictions along this portion of the interstate highway system thereby meeting the goals and objectives of the 1999 Oregon Highway Plan. These improvements integrated into the other recent improvements and future planned improvements to the I-5 corridor, will result in consistent accommodation of traffic along the corridor. Completion of this project will also benefit the public by supporting regional and statewide economies, and by ensuring that transportation facilities will accommodate regional land use plans.
3. **Value Engineering:** Value Engineering (VE) is encouraged on all projects by ODOT, and has resulted in both initial savings as well as long-term savings for other ODOT projects. ODOT will perform an initial VE study of key project elements prior to release of the RFP. A second VE study may be performed on the proposals submitted for this project.

The Design-Build method of contracting is anticipated to result in more reliable and higher quality VE solutions for the project. The design-build project delivery method has the inherent advantage that the design-builder is required to engineer into the project cost-reducing elements to the extent environmental criteria allows. Since this up-front project design and planning will be accomplished during the proposal phase, and cost-effectiveness of the design will be included in the proposal evaluation, ODOT can expect to realize benefits in the initial contract price.

4. **Specialized Expertise Required:** Expertise and innovation is required in managing and coordinating both design and construction in a "fast track" Design-Build model,

implementing performance specifications, providing value engineering and constructability reviews, scheduling and estimating, assessing risk, and providing a complete project as a single point of responsibility. As is typical for Design-Build contracts, qualified engineering design services are required along with general contractor construction services.

In addition, specialized expertise is required to successfully address the public safety issues noted below.

5. **Public Safety:** This project involves work on a high-speed highway. Safe traffic flow must be maintained while construction proceeds. It is crucial that all work be coordinated between work sites to avoid unnecessary delay and safety risks to the traveling public, and to ensure efficiency in construction.

As the project is staged, the design-builder may be required to design and build temporary traffic detours. Any detour must meet the requirements of the Manual on Uniform Traffic Control Devices.

The integrated relationship between the designer and the constructor in the design-build method of contracting should assure coordination of work, resulting in shorter lane closure and detour times. In addition, design-build contracting of this project will ensure all is being done as quickly as possible to minimize delays.

6. **Market Conditions:** Unemployment rates in Oregon have been much higher than the National Average over the past four years. Oregon had the highest or second highest unemployment rate in the nation for 43 consecutive months between April 2001 and October 2004, and is currently ranked among the top five states in the nation. The Governor and the Legislature have strongly encouraged ODOT to contract and construct projects quickly to both take advantage of lower bid and proposal prices in the current market and to improve local employment. Economic studies by the Federal Highway Administration have shown that highway construction projects nationally create over 40 jobs per million dollars spent. ODOT conservatively estimates that during the life of a highway construction project 19 jobs are created in Oregon per million dollars of project cost. This project could therefore generate approximately 380 local jobs ($\$20 \text{ million} \times 19 \text{ jobs/million}$)/ 2 year job life = 190 job years), assuming a \$20 million value for purposes of this calculation and others in the "Cost Savings" section below. Furthermore, since use of the design-build contract model on this project is expected to accelerate construction by at least one year, such a jump start would make those jobs available that much sooner.
7. **Technical Complexity:** Technical expertise will be required for environmental management, quality management, roadway and structural design (including geotechnical and seismic design), traffic control, and construction. However, the project will draw upon existing skills and capabilities available in the design and construction community, and presents overall challenges similar to those faced on many ODOT projects.
8. **Funding Sources:** As mentioned earlier, ODOT has obligated funding for this project in the Statewide Transportation Improvement Program and has also requested federal funding.

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 this contract will be similar to that expected in other projects of this type. ODOT finds that selecting a design-builder through the design-build alternative contracting method will not inhibit competition or encourage favoritism. This finding is supported by the following:

As outlined below, ODOT anticipates that competition may be similar to that experienced in other ODOT projects. ODOT has early indications of interest and intent to participate in this procurement, and ODOT processes for procurement of a design-builder have been developed with maintenance of competition in mind.

1. The competition remains open to all qualifying proposers. There are over 150 firms who have directly expressed interest in pursuing ODOT design-build projects. Numerous firms have expressed interest in this project. These firms should be able to locate needed complementary skills to form viable design-build teams to pursue this project. The nine projects ODOT has completed, are currently under design-build contract, or are in the procurement process had solid participation in the Qualification stage with several teams submitting for each project. The Proposal stage for each of these projects was very competitive.
2. ODOT has been communicating regularly with both the construction contracting community and the engineering consulting community about design-build and other non-traditional contracting methods.
3. The design-build evaluation and selection process ODOT intends to employ is summarized in Attachment A. It is open and impartial; all requirements for both the qualification and proposal stages will be determined by and reflective of the significant work elements of this type of project. Design-builder selection will be made on the basis of final proposal scores derived from a price component and a quality component, as described in Attachment A, which expands the grounds of competition beyond price alone to include quality and innovation factors. While it is not clear this induces increased competition, ODOT's experience, literature search and discussions with other jurisdictions indicate competition has remained strong.
4. Pursuant to ORS 279C.360, the solicitation has been advertised in the *Daily Journal of Commerce*. In addition, the notice has been advertised in *Washington State Civil Bulletin* and on the ODOT Office of Project Delivery website at:
<http://www.oregon.gov/ODOT/HWY/OPD/DBprocurement.shtml>
5. ODOT decisions about grouping related projects or work elements into a single solicitation for one or more contracts involve contract packaging issues. Those decisions are separate from the consideration of whether to use competitive proposals under an alternative contracting method. For example, several related construction projects might be bundled into a single hard bid procurement for which a competitive bidding exemption would not be required. Accordingly, the project effects on competition resulting from contract packaging decisions, including the resulting size or estimated dollar amount of contracts, are not part of the impact of utilizing an alternative contracting method and are therefore not required to be considered within these findings in support of an exemption from competitive bidding.

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 result in substantial cost savings to the contracting agency or, if the contracts are for public improvements described in ORS 279A.050(3)(b) (such as this one), to the contracting agency or to 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 accrue to ODOT.

This finding is supported by the following:

1. Direct Contract Cost Saving:

1.1 Cost and Time – Indications from the experiences of other state DOT's are that, in general, initial contract prices are expected to be comparable between design-build and conventional contracting methodologies, but considerable time savings are reasonably anticipatable.

A. Cost - The Construction Industry Institute (CII) found that design-build construction methods have an edge over other methods in limiting cost and schedule creep. The CII study reviewed 350 building construction projects (20% Construction Management (CM), 45% design-build and 35% Design-Bid-Build (DBB)). The DBB method showed the greatest median cost escalation at 4.84%, followed by CM at 3.34% and design-build at 2.37%. The CM and design-build projects experienced almost no delays, with DBB running an average of 4.44% longer. "Design-Build Has Cost, Time Edge" *Engineering News Record*, November 17, 1997.

If ODOT's experience on this project follows the results announced in the CII study, its use of the design-build contracting model could result in ODOT's avoidance of approximately \$494,000 in additional costs associated with schedule creep that it might otherwise incur under the traditional DBB mode ($\$20,000,000 \times (4.84\% - 2.37\%) = \$494,000$).

B. Time – A recent 2002 Survey by Science Applications International Corporation (SAIC) for the Illinois Department of Transportation on the current use of design-build contracting cites responses from eleven states, Oregon was not a respondent, (<http://www.fhwa.dot.gov/programadmin/contracts/survey02.htm>).

All respondents noted a time saving from the design-build method. Florida, for example, reported average time saving of 33% relative to conventional project delivery processes. Other states reported time savings of over two years for large projects. A separate design-build Practice Report in 2002 by Parsons Brinkerhoff Quade and Douglas for the New York State Department of Transportation included in-depth survey results that further support the time savings potential of the DB method (Oregon was not a respondent).

- 1.2 Contract Changes – Analyses of design-build contracting by other transportation jurisdictions indicate that the number and cost of contract changes (change orders after bid opening which affect the work to be completed) decreases, and that changes may tend to result in modest *decreases* to contract price. For example, Florida has experienced a swing from +8.8% average contract cost growth using conventional DBB approaches to 2% average contract cost *reduction* for design-build projects (“Final Evaluation of the Florida Department of Transportation’s Pilot Design/Build Program”, *Transportation Research Record No. 1351*, 1992). This swing of over 10% may be attributable to the continual value engineering opportunities the design-build team has by working together from proposal preparation through project completion and delivery. The 2002 SAIC design-build survey previously noted contains response data that appears to substantiate the decrease in contract claims on design-build projects.

Applying Florida’s experience to Oregon’s situation, ODOT could see a shift from the +2.5% contract cost growth experienced by ODOT under its current conventional approaches to Florida’s 2% contract cost reduction, a 4.5% swing. For this project, such a 4.5% swing would equate to a savings of approximately \$900,000 (\$20,000,000 X 4.5%). (In Section 3 below, ODOT uses the more conservative figure of \$494,000 from Section 1.1A above in calculating direct cost savings.)

- 1.3 Bid Documents – There are areas of savings to be expected related to ODOT bid documentation preparation. For example, under current DBB, it is necessary for preliminary engineering design plans and specifications, adequate for identifying project performance, to be further formalized to design specifications standards (rather than performance specifications) appropriate for inclusion in formal bid packages. By eliminating the separation between design and build phases of the project, formalization costs can be decreased. ODOT estimates that preliminary engineering will be reduced by approximately \$100,000 for this contract.
- 1.4 Maintenance – Maintenance that would otherwise be required over the next several years, either as routine maintenance or as maintenance necessitated by the current condition of the roadway and bridges in question, will be avoided by early completion of construction. Construction is anticipated to commence in early 2006, and ODOT estimates that the Project will be completed a full 12 months earlier than would be possible under the traditional design-bid-build model. The early completion is attributable to incremental completion of engineering, allowing early start of some construction tasks, and a shortened project performance time span. Early completion of construction is therefore expected to result in cost savings to the State, although the specific amount is not calculable.

2. Total Expected Savings:

While there is some indication that initial contract prices will be reduced through the use of the design-build contracting model, it is difficult to estimate a probable amount. This is also the case with savings related to contract changes. However, using the conservative estimate of direct saving described in Subsection 1.1 above indicates a net savings amounting to nearly \$594,000 (see table below).

Direct Contract Cost Savings Summary:

Subsection	Approximate Savings
1.1 Cost Containment	\$494,000
1.2 Contract Changes	Value not used
1.3 Bid Documents	\$100,000
1.4 Maintenance	Value not used
Total	\$594,000

3. **Post-Project Evaluation Process**

This project will be evaluated in accordance with the requirements of ORS 279C.355, including analysis of project cost and savings.

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 result in a substantial cost savings to ODOT.

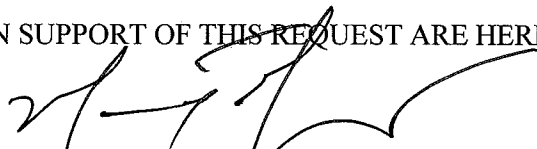
ORDER OF DIRECTOR

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 design-build 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 Chapter 279A and 279C, ORS Chapter 291; OAR Chapter 731, Division 5 (ODOT Public Contract Rules) and Division 7 (ODOT Public Improvement Contracts).
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

3-27-06
Date



Director, Department of Transportation

REVIEWED BY THE DEPARTMENT OF JUSTICE

1/12/06
Date

/s/ Dana Anderson
Assistant Attorney General

Attachment A – Selection Process Description and Objectives

ODOT Design-Build Program

The selection process that will be used for this project consists of two steps as follows

- (1) A Request for Qualifications (RFQ) for the project will be advertised industry wide, the same as with current conventional projects. The RFQ will ask for the specific experience of proposers (design-build teams), key personnel, past performance, and organizational information, which will be compared to standards established for specific key elements of this project. The Statements of Qualifications (SOQs) received will be evaluated, and the three (or more if warranted) highest-scored teams demonstrating that they meet the established experience and organization requirements stated in the RFQ, will be short-listed to advance to the proposal stage.

The SOQs will be evaluated and scored by the evaluation team. This team will consist of a minimum of three individuals, at least two of whom are ODOT personnel. Other ODOT and ODOT Consultant personnel may serve in non-scoring support capacities.

The score of the SOQ factors will be reviewed and compiled by the evaluation team, and then presented to the OTIA III Bridge & Alternative Delivery Deputy Manager, who will ratify the total consensus quality scores. These SOQ scores are not carried over to the proposal evaluation and scoring.

- (2) A Request For Proposals (RFP) will be issued for the project to the short-listed teams, and proposals must be submitted by the short-listed teams by a specified date.

The proposals submitted will be required to contain two components, a price component and a quality component.

The price component presents the total cost to ODOT for delivering the project, broken down by price centers (work locations). The quality component describes the proposer's understanding of the project, identifies key personnel to be committed to the project, and explains the proposer's approach to delivering project key elements described in the project RFP. The proposal quality component score will be used in conjunction with the proposed price, resulting in a final overall score, as described in the RFP and evaluation and selection plan.

The quality component of the Proposals will be evaluated and scored by the proposal evaluation team. This team will consist of a minimum of six individuals from ODOT. Other ODOT and ODOT consultant personnel may serve in technical and administrative support capacities. The consensus quality scores developed by the proposal evaluation team will be presented to the OTIA III Bridge & Alternative Delivery Deputy Program Manager, who will either ratify the consensus scores or remand them to the proposal evaluation team with direction for further review, investigation and/or reassessment. The scores for the proposal quality component will be completed prior to opening of prices.

Once the quality component scores are completed and compiled, the price will be opened and the final score for comparison and award of the contract will be determined in accordance with the procedures set forth in the RFP and the evaluation and selection plan.

The final scores and ranking will be determined and announced by ODOT.

Based on the final scores and ranking the responsive and responsible proposer that provides the best value to ODOT will be selected for final contract negotiation and award. In the event that prior to contract execution the selected proposal is found to be non-responsive or the proposer not responsible, or contract negotiation proves unsuccessful, ODOT may, if it is in the public's best interest, select the proposer that offers the next best value for contract negotiation and award.