EXEMPTION NUMBER - 2021-01

FINDINGS
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 by the	)
Oregon Department of Transportation for the	) FINDINGS,
U.S. 97/U.S. 20 Bend North Corridor Project, on	) CONCLUSIONS AND
U.S. 97 and U.S. 20	) ORDER
located in Deschutes County, Oregon	)

ORS 279C.335(1) requires, with certain exceptions, that all public improvement contracts be based on competitive bidding and, under ORS 279C.375, be awarded to the responsible bidder submitting the lowest responsive bid.

ORS 279C.335(2) permits the Director of the Oregon Department of Transportation to grant, under certain conditions, exemptions to the Oregon Department of Transportation ("ODOT") from the requirement for competitive bidding by issuing an order stating conditions and approving specified findings that comply with ORS 279C.330, ORS 279C.335(2)(a) and (b), ORS 279C.350, and OAR 731-007-0370.

ORS 279C.335(2) and (4) and ORS 279C.350 require findings to support the exemption.

ORS 279C.330(1) defines "findings" as used in ORS 279C.350, and ORS 279C.330(2) defines "findings" as used in ORS 279C.335, and together with ORS 279C.335(2) identify required findings, factors to be considered and specific information to be provided as part of the agency justification for the exemption. ORS 279C.335(2) sets forth exemption criteria that must be addressed in the findings. OAR 731-007-0370 also addresses the required findings.

ORS 279C.330(2) provides that "findings" as used in ORS 279C.335, "means the justification for a conclusion that a contracting agency or state agency, in seeking an exemption from competitive bidding requirements of ORS 279C.335(1), reaches based on the considerations set forth in ORS 279C.335(2)." ORS 279C.350(1) provides that, with respect to an exemption request for a specific public improvement contract described in ORS 279A.050(3((b), the Director of Transportation shall issue an order that sets forth findings supporting the decision, and those findings are as described in ORS 279C.330(1).

Under ORS 279C.335(5), a public hearing must be held before the findings are finally adopted, allowing an opportunity for interested parties to comment on the draft findings.

The public hearing and this request for exemption were advertised in the Business Tribune and the Daily Journal of Commerce on February 4, 2021. The request for exemption was posted on the ODOT Procurement Office web site at:

http://www.oregon.gov/ODOT/Business/Procurement/Pages/Letting_Schedules.aspx

The public hearing for review of these findings was held at 1:00 p.m., on February 19, 2021, via WebEx Attendee Link https://ordot.webex.com/ordot/onstage/g.php?MTID=ef1c5964d7eb1b31ac43e3e03db1790f6 and WebEx Attendee Call in Option 1-408-418-9388 Event number: 146 213 7174. There were no comments from the public, either oral or written, during this hearing or during the time for comments.

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.

If the exemption is granted by the Director of ODOT, the signed order will be promptly posted after the date it is signed to the following ODOT Procurement Office website under the "Alternative Contracting" section:

https://www.oregon.gov/ODOT/Business/Procurement/Pages/Bid_Award.aspx

FINDINGS

A. BACKGROUND

1. Project Description: The U.S. 97/U.S. 20 Bend North Corridor project requires a realignment of U.S. 97 to the east of its existing location and supporting transportation network improvements to improve intersection operations. This includes a roundabout at U.S. 20 and Cooley and ramp connections to U.S. 97 at Cooley and Robal.

ODOT proposes to use the Design-Build alternative contracting method (design-build method") and then enter into a design and construction contract with the selected design-builder ("contractor"). The project includes, but is not limited to design, construction, quality, environmental management, safety, contract administration and all necessary support services. The project area for U.S. 97/U.S. 20 Bend North Corridor project ("the project" or "this project") is located on U.S. 97 in Bend, Oregon.

U.S. 97 is the main north-south highway through the central portion of Oregon and complements the I-5 corridor, connecting Oregon to California and Washington. In the Bend area, U.S. 97 is the primary route for local residents to commute through town and is a connection to area shopping, dining, businesses, schools and recreation. Oregon's population growth over the last decade has led to an increase in traffic congestion and delay and an increase in the number and severity of vehicular crashes along U.S. 97.

The project will realign U.S. 97 to the east of its existing location, increase freight mobility, support economic vitality, increase safety to reduce crashes, reduce congestion and improve traffic flow within the corridor.

This project will:

- Realign U.S. 97 to the east of its current location, which includes:
    - Northbound 3rd Street off ramp from U.S. 97 to the existing alignment
    - 3rd Street through connection
    - Southbound ramp from Robal Road.

  - Grade separation of U.S. 97 at Cooley Road
  - Preservation work on U.S. 97
- Perform intersection improvements, active transportation and preservation work on U.S. 20 which includes:
  - Sisters loop ramp bridge deck preservation
  - Preservation work on U.S. 20
  - Roundabout construction at U.S. 20 and Cooley Road
  - Roundabout construction at U.S. 20 and Robal Road
  - Widen and add lanes to U.S. 20 between Robal & Cooley

The Bend North Corridor Project is funded in part by both HB2017 funds (Cooley Mid-Term named project) and a Federal Highway Administration (FHWA) INFRA Grant, as well as additional state and local funding, and possibly private development funds.

As a function of federal INFRA grant award and funding, the project will be tied to the performance metrics and timelines outlined in the signed INFRA term sheet for this project including funding responsibilities, scope, and schedule. The INFRA term sheet also outlines a very tight delivery and funding obligation schedule. The design-build method will allow ODOT to meet the construction obligation requirements outlined in the grant award.

Bend North Corridor is a unique project in that it requires a large volume of new construction work to be performed in an urban region of Central Oregon and completed within a highly compressed schedule. The design-build method will allow ODOT to select a contractor based on, in addition to price, their proposed approach to the project, qualifications, and ability to design and construct the project within ODOT's specified time frame. The design-build method will also allow the contractor to complete components of the project concurrently while other components are under design, using innovative and streamlined methods, and will help keep the overall cost of the project within the fixed price provided by the contractor during the RFP stage.

ODOT's Alternative Delivery Services unit performed a Delivery Method Selection Tool analysis for this project on February 12, 2020 which identified the design-build method as the preferred delivery method for this project. ODOT also performed two mini risk sessions in April 2020 which lead to the conclusion that delivery risks would be minimized by use of the design-build method, in conjunction with closely monitoring and managing other risks by Region 4.

The key objective of the design-build method for this project is to select a contractor with necessary and relevant qualifications, expertise and experience in design and construction that will provide the best value to ODOT, given ODOT's contractor selection criteria and requirements, to accomplish ODOT's goals, which include but are not limited to:

- Fast-tract design and construction;
- A strong and reliable technical approach for managing critical elements of the Project, including but not limited to a reliable, innovative and detailed approach to address challenges in design and constructability of the project;
- Ensure that INFRA Grant related metrics are met and grant money will not have to be returned

Additionally, the design-build method is anticipated to minimize mobility restrictions and impacts to road users.

Specific work items for each major project component are noted below. The individual project components listed below will be combined by ODOT into a single project and placed in the Statewide Transportation Improvement Plan (STIP).

Project Component Name	Scope of Work
U.S. 20 and Cooley Road Intersection Upgrade	Roundabout construction at U.S. 20 and Cooley Road intersection.
U.S. 20 Sisters Interchange Preservation	U.S. 20 loop ramp deck preservation.
Existing U.S. 97 Updates	Improvements to U.S. 97 between Robal and Cooley including preservation work.
U.S. 20 at Cooley Roundabout	Roundabout construction at U.S. 20 and Cooley, potential roundabout at U.S. 20 and Robal and median barrier included.
Preservation and widening of U.S. 20	Roadway preservation of U.S. 20 and widening to add lanes, shoulders, and median barrier along U.S. 20.
Realignment of U.S. 97	Construction of new U.S. 97 from Empire Avenue to just north of Cooley Road with corresponding connections at Cooley Road, Robal Road, Empire Avenue, and U.S. 97.

The current estimated project design and construction cost for the contract with the contractor is approximately $*85 million* to $*95 million*. It is anticipated that the project will be funded with a combination of Federal Highway Administration (FHWA) INFRA Grant, State of Oregon money, local funding, and possibly private development funds.

The work will include, but is not necessarily limited to:

- Bridge deck preservation
- Roadway design and construction
- Survey
- Contract administration
- Technology enhancements
- Pedestrian and bicycle infrastructure enhancements
- Bridge structure design and construction
- Traffic construction control
- Intersection design and construction
- General construction management and services
- Paving

The work will be done in accordance with approved ODOT design standards, performance requirements, and specifications.

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

ODOT proposes to use the design-build method for the solicitation and project delivery process for the project as a proposed alternative to the competitive (low) bid process. In accordance with the applicable statutes and administrative rules, ODOT will use a competitive two-phase procurement process utilizing a Request for Qualifications (RFQ) and a Request for Proposals (RFP) as described in Section A.3 Procurement Process of this document.

The project will be procured using the design-build method as described herein, for the reasons and considerations stated herein.

2. Agency Considerations: ODOT has been contracting road improvement projects since 1914. To operate, maintain, and modernize approximately 8,000 miles of state highways throughout Oregon, ODOT contracts an average of 100 highway and bridge construction projects per year.

The Oregon Transportation Commission is mandated to "encompass economic efficiency" (ORS 184.618), and therefore, ODOT strives to continually improve its procurement and project delivery approaches. One of the improvements that encompasses economic efficiency is appropriate use of alternative selection (and contracting) methods.

ODOT performed an internal evaluation of the delivery goals and alternative selection and contracting delivery mechanisms for this project. ODOT traditionally uses a competitive low bid process, but ODOT has concluded that using that project delivery method entails unacceptable risks, which include delivery of the project in an untimely manner as well as cost uncertainty during project development. For this project, ODOT reviewed other available procurement options that could provide maximized benefit to the public. ODOT determined that an alternative contracting process that considers key elements for project success beyond price is most appropriate for this project, specifically the design-build method.

ODOT determined that the most cost-effective approach to design and construct the proposed realignment of U.S. 97 was through the design-build process. U.S. 20 and U.S. 97 can be designed and constructed in a more timely manner through use of the design-build method by having the contractor and its design team navigating the design and construction to minimize impacts to roadways due to temporary traffic control as well as reducing the timeline of the project from an anticipated six years to two years from design through construction.

ODOT proposes to use an alternative contracting process that addresses project needs by evaluating components that include the contractor's experience, expertise, qualifications and technical approach to design and construction as well as price, resulting in a best value selection. This selection method encompasses the Oregon Legislature's focus on economic efficiency and stimulation. ODOT considered the following benefits that could be achieved for this project by using the design-build method:

- The greatest motivation and realized benefit to a contracting agency of using the design-build method instead of design-bid-build contracting is the ability to reduce the overall duration of the project development process by eliminating a second procurement process for the construction contract, reducing the potential for design errors and omissions, and allowing for more concurrent processing of design and construction activities for different portions of the same project.
- Integrating the design and construction activities to reduce the potential for design errors and discontinuities between the design plans and construction efforts that can result in fewer change orders and extra work orders.
- Shifting to greater use of performance-based specifications that promote contractor creativity and decrease change orders.
- Significantly lower cost and number of claims for design-build projects reflect a fundamental shift in the adversarial nature of transportation construction contracting and bodes well for the future implementation of this procurement method, particularly for high visibility projects where cooperation between contracting agencies and their design and construction contractors is essential to project success.
- Allow design-build proposers to submit Alternative Technical Concepts (ATCs) in their technical and price proposals (if ATCs are permitted by the agency).Encouraging the contractor to use the latest innovative technologies and methodologies to more fully leverage available public resources.
- Permits multiple notices-to-proceed to enable work to proceed on specific project sections when environmental, utility, permit, and right-of-way clearances have been completed for those sections.
- Fast-tracking of the design and construction portions of the project, with overlapping (concurrency) of design and construction phases for different segments of the project
- Fixed price payment structure allows for greater cost certainty to the agency and contractor earlier in the project lifecycle

By using the design-build method and other alternative contracting methods (including Construction Manager/General Contractor (CM/GC), A+B (price plus time), A+C (price plus qualifications) and A+C+D (price plus qualifications plus technical approach), ODOT has had and continues to have success selecting construction contractors with the necessary qualifications, experience, and approach to successfully deliver complex projects. With the unique project features and considerations described above, ODOT believes that the design-build method is appropriate for the selection of the contractor for the U.S. 97/U.S. 20 Bend North Corridor project.

To date, ODOT has completed 15 projects using the design-build method. See Appendix A.

ODOT personnel, and ODOT's legal counsel, the Oregon Department of Justice (Oregon DOJ), have gained the necessary experience, expertise, and knowledge in using alternative selection and contracting methods to successfully deliver multiple projects varying in scope, size, and complexity, and within schedule and budget constraints.

For this project, ODOT's project team will consist of ODOT personnel, possibly third-party consultant personnel and Oregon DOJ legal counsel that have the necessary experience, expertise and knowledge to develop the design-build procurement and contract administration documents and process and the resulting contract. Upon this foundation,

ODOT will select the contractor, negotiate (to the extent negotiations, if any, are permitted by ODOT), award the contract, and administer the contract.

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 to solicit price and technical proposals for the design and construction of the project described above using the alternative design-build method.

Because the value of construction work predominates the design-build form of contracting, the qualifications based selection process mandated by ORS 279C.110 for state contracting agencies in obtaining certain consultant personal services does not apply.

In lieu of the competitive low bid process, ODOT will utilize the following competitive two-phase procurement process as described in the RFQ and RFP. Below is a summary of the two-phase procurement process:

- RFQ advertised industry-wide
- Statement of Qualification (SOQ) to short-list proposers
- RFP issued to shortlisted proposers
- Technical evaluation committee evaluation and scoring of technical and price proposals
    - Proposals will be evaluated according to criteria set forth in the RFP and applicable law
- Best value selection (combined price and technical proposals scores)
    - Best value scores will be calculated and verified according to criteria set forth in the RFP
- Award contract to the highest ranked responsive proposer from the shortlisted proposers

B. FINDINGS REGARDING REQUIRED INFORMATION

ORS 279C.330(1) provides that as used in ORS 279C.350: *"findings" means the justification for a contracting agency conclusion that includes, but is not limited to, information regarding: (1) Operational, budget and financial data; (2) Public benefits; (3) Value Engineering; (4) Specialized expertise required; (5) Public safety; (6) Market conditions; (7) Technical complexity; and (8) Funding sources.*

ODOT finds that many of these criteria support the decision to use the design-build selection method best value contracting process. This request for exemption is supported by the following:

1. Operational, Budget, and Financial Data: "The project is partially funded by an Oregon House Bill (HB) 2017 (Keep Oregon Moving) project. ODOT and the Oregon Legislature consider completion of this project to be a high priority." The project includes funding that was approved in the 2021-2024 Statewide Transportation Improvement Plan." Additional funding will be provided by an FHWA INFRA grant, local agency dollars, and possibly private development dollars. It is anticipated that the project will be funded with a combination of current and anticipated State of Oregon and federal (FHWA)

funding resources. The current estimated project design and construction cost for the contract with the contractor is approximately $85 million to $95 million ODOT anticipates that all funding and necessary approvals for the project will be obtained.

The design-build process provides ODOT the means to develop a scope of work and contract documents that clearly identify minimal project requirements for design and construction, with significantly lower risk of cost overruns, particularly with the use of a fixed-price contract amount where most of the risk of the unknowns will be absorbed by the design-builder. The design-build method provides ODOT an opportunity to select a firm to design and construct complex projects with schedule constraints within a fixed price. ODOT anticipates substantial cost savings and other substantial benefits on this project by using the design-build method, as more particularly described in this Section B and in Section D.

With the complex technical project requirements or unique work elements, a traditional design-bid-build procurement approach would expose ODOT to greater risk of extended contract time, quality control challenges and associated cost overruns. Historically, these factors, by their nature, result in increased construction claims and claim management costs often resulting in protracted ligation.

A design-build team, prime contractor and subcontractor(s) with demonstrated qualifications, experience and sound technical approach to design and construction will provide better overall value, which is expected to support a reduction in change orders and overruns. As a result, cost savings to ODOT and the public are anticipated by using the design-build method.

2. Public Benefits: The design-build method focuses on project components that are most valuable to ODOT through the ability to evaluate proposers based on the specialized experience and qualifications of the proposer's team, and therefore contributes toward meeting project goals and schedule. The proposer's technical approach will include their means and methods for efficiently designing, constructing and completing the U.S. 97/U.S. 20 Bend North Corridor Project, including but not limited to, the realignment of U.S. 97 to the east of its existing location and supporting transportation network improvements.
This project meets the goals and objectives of the 1999 Oregon Highway Plan, including amendments from November 1999 through May 2015, by ensuring an increase in freight mobility, support of economic vitality, an increase in safety, a reduction in congestion, and improvement in traffic flow within the corridor.

3. Value Engineering: Per FHWA's VE Final Rule (Docket No. FHWA-2013-0039), published on September 5, 2014 and ODOT Highway Directive DES-01-03, effective January 2, 2020 projects using the design-build method are exempt from the VE study requirement. However, the design-build method promotes the use of innovative approaches, and the ODOT Contract allows for cost reduction proposals.

4. Specialized Expertise Required: Using the design-build method will allow ODOT to select a contractor that has the necessary expertise, experience, qualifications and understanding of the project site conditions and the specific design, construction and staging methodologies to successfully complete work elements in the allotted time. The proposer's technical proposal describing their approach to designing and constructing the project is deemed highly important in ODOT's selection of a contractor that provides the best value to ODOT and the public and ensuring the success of this project.

This project will require specialized expertise for the following identified critical issues and technical complexities:

- This project will require construction of three new structures on the state system which are adjacent to a high-traffic BNSF rail line and high voltage power lines.
- Critical construction activities within this high-traffic volume freight and shipping corridor which could have major impacts to the public.
- Minimal allowable impacts to freight and shipping as well as ensuring a critical north-south corridor remains open for emergency response purposes
- Minimal allowable impacts to a highly commercial corridor consisting of numerous local and big-box businesses as well as Bend's "northern gateway" (the northern entry to Bend)
- Highly compressed design and construction schedule to meet state and federal goals for safety and function

The consequences of construction issues with staging, scheduling or quality will increase traffic impacts, direct costs and the likelihood of failing to meet the completion deadline. It is imperative that the construction contractor proactively develops and completes a reliable approach plan for accomplishing the necessary interrelated work elements.

The most complicated staging, and cause for delays at the bridge work site, requires maximizing the number of travel lanes in each direction during the morning and afternoon peak hours. This will require the contractor to provide a reversible lane at various times during the day. Lane capacity must be managed in such a way that any delays caused by congestion are minimized to avoid unnecessary costs to freight and recreational traffic. Seamless execution of a thorough staging plan is necessary to address these concerns.

The design-build method emphasizes innovation in contractor's approach for management and coordination, providing scheduling and estimating, assessing risks, 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 design-build contracts, the contractor providing the
best value in price, qualifications and approach is sought, rather than just simply contracting with the lowest bidder. In addition, specialized expertise and understanding is required to successfully address the public safety issues noted below.

ODOT and the public will benefit from ODOT acquiring a design-build team that has established experience, and specialized expertise to manage and perform the work for this project. A low bid process does not provide an opportunity for ODOT to obtain the most qualified and experienced contractor with the specialized expertise needed for this project.

ODOT personnel and ODOT's legal counsel, the Oregon DOJ, have gained the necessary experience, expertise and knowledge in using the design-build method and other alternative contracting methods to successfully deliver multiple projects varying in scope, size, complexity, and within schedule and budget constraints.

5. Public Safety: A proposer with a strong approach to the challenging project elements will minimize additional traffic impacts, as described in Section B.4. Specialized Expertise Required**.**

The selected contractor will be required to perform and stage all work necessary so that the areas within the project's footprint can be safely occupied and used by all modes of transportation for the duration of the project.

The relationship between ODOT and the contractor will ensure coordination of work within the project site, resulting in mitigation of potential safety hazards to the traveling public.

6. Market Conditions: ODOT does not anticipate any measurable difference in market conditions if this project is contracted under the traditional low bid method or the design-build method. ODOT has reason to believe the market appears favorable for attracting in state and out of state firms that have the desired experience and expertise. As described in Section A, BACKGROUND, contractors have experience with alternative contracting methods in Oregon, and have become more accepting of alternative contracting processes, in particular when bidding for technically complex projects with specialized needs, ensuring adequate competition. Using the design-bid-build method for a project of this size and complexity can result in a low-bid contractor that lacks the necessary qualifications, expertise and experience, which can be at a higher risk for performance, timeliness, safety and financial issues. The design-build method will allow ODOT to consider the proposers' qualifications, expertise and experience necessary to successfully deliver this high-impact project.

The Oregon Governor and the Legislature have encouraged ODOT to contract projects quickly to improve employment. Economic studies have shown that highway construction projects nationally create between 30 and 40 jobs per million dollars spent.

7. Technical Complexity: Technical expertise will be required for environmental management, quality management, scheduling, estimating, traffic control, staging, and design and construction services. To be successful in completing this project, the contractor must be qualified, experienced and capable to address the issues, goals, concerns and technical complexities of the project as described in this document, including but not limited to Section B.4.

8. Funding Sources: As stated earlier, it is anticipated this project will be funded by HB 2017 (Keep Oregon Moving), FHWA INFRA Grants, local funding, and possibly private developer dollars.

C. FINDINGS ADDRESSING COMPETITION

ORS 279C.330(2) states that "findings" as used in ORS 279C.335 "means the justification for a conclusion that a contracting agency in seeking an exemption from the competitive bidding requirement of ORS 279C.335(1) reaches based on the considerations set forth in ORS 279C.335(2)." ORS 279C.335(2) also requires that a public agency make certain findings as a part of exempting public improvement contracts or classes of public improvement contracts from competitive bidding requirements.

ORS 279C.335(2)(a) requires an agency to find that: "*The exemption is unlikely to encourage favoritism in awarding public improvement contracts or substantially diminish competition for public improvement contracts.*"

ODOT finds that selecting a contractor through an exempted design-build method is unlikely to encourage favoritism in awarding public improvement contracts or substantially diminish competition for public improvement contracts. This finding is supported by the following:

ODOT anticipates that competition for this project is likely to be similar to that experienced with other ODOT projects. ODOT has observed early indications of interest and intent to participate in the procurement process for this project, and ODOT processes for procurement of a contractor using alternative methods have been developed with maintenance of competition in mind. As noted in Section B.6, ODOT expects proposals from Oregon construction firms and out of state and national construction firms.

1. The competition remains open to all qualifying proposers. The contracting community is aware of ODOT's use of alternative contracting processes and success with contractors on similar past projects. During ODOT's history of using alternative contracting methods, more than 150 firms have expressed interest in pursuing the alternative contracting projects. ODOT expects that with this experience, normal competition will prevail. Based on the level of contractor participation for previous alternative contracting projects, and the size and nature of this project, ODOT anticipates approximately five (5) to ten (10) contractors are available for the project and three (3) to five (5) contractors will submit SOQs in response to the RFQ.

2. ODOT, through direct contacts and at scheduled ODOT/Associated General Contractors and ODOT/American Council of Engineering Companies meetings, has been communicating regularly with both the construction contracting community and the engineering consulting community about the design-build method and other non-traditional selection and contracting methods.

3. The design-build evaluation and selection process ODOT intends to employ for this project is summarized in Section A.3. Procurement Process. The process is open and impartial, competition will be obtained, and proposers will be equally evaluated based on criteria that is reflective of the significant work elements for this type of project. Selection will be made on the basis of final scores derived from the evaluation process described in Section A. BACKGROUND (A.1 and A.2) and Section A.3 Procurement Process. This method expands the grounds of competition in the evaluation process beyond price alone to include consideration of the technical qualifications and experience of key individuals and major subcontractors and technical approach for design and construction, timely completion of previous work, and past experience with similar work in order to deliver the best value project to the State of Oregon.

4. Pursuant to ORS 279C.360, the project solicitation documents (RFQ and RFP) will be formally advertised in the Business Tribune and the Daily Journal of Commerce, and posted on the ORPIN website:

https://orpin.oregon.gov/open.dll/welcome

5. The objective of using the design-build method is to select the contractor most likely to successfully deliver this difficult project, with very effective execution of design and staged construction, effective management of very challenging traffic staging, and a maximum degree of safety to the public as it travels through the project area, and completion of the work while ensuring a competitive price.

6. ODOT will utilize the two-phase procurement process outlined in Section A.3 Procurement Process and as described in the project's RFQ and RFP.

ODOT will conduct the procurement for design-builder design and construction services in accordance with the applicable Oregon DOJ model rules for design-build procurements and contracting. The solicitations and contract forms to be used will be ODOT's own

design-build template documents that were developed in coordination with the Oregon DOJ, and then adapted for this particular project to include any needed revisions to address project specific requirements. The final solicitation and sample contract documents will be reviewed and authorized for release by the Oregon DOJ prior to advertisement and the resulting contract will be reviewed and approved for legal sufficiency by the Oregon DOJ prior to award and execution.

If determined to be necessary or appropriate, adjustments may be made in the details of the procurement process.

D. FINDINGS REGARDING SUBSTANTIAL COST SAVINGS AND OTHER SUBSTANTIAL BENEFITS

ORS 279C.335(2) also 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: *Awarding a public improvement contract under the exemption will likely result in substantial cost savings and other substantial benefits to the contracting agency or, if the contract is for a public improvement described in ORS 279A.050(3)(b)* [such as this project], *to the contracting agency or to the public.* This finding, therefore, considers 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 and other substantial benefits will likely accrue to ODOT and the general public.

This finding is supported by the following:

1. Direct Cost Savings: The current estimated project design and construction cost for the design-build contract with the contractor is approximately $85 million to $95 million. ODOT uses an annual inflation rate of 4.0% when estimating project costs. ODOT could save approximately $350,000 in inflation for each month construction can be accelerated. For example, when compared to the design-bid-build method; if ODOT estimates that construction completion may be accelerated by one (1) year, that could result in a savings of approximately $4,400,000 million or 4% of the project cost.

Acceleration of project completion can also reduce ODOT's costs for some outside consultants working on the project. Reducing the completion time by a year, for example, may save approximately $100,000 in consultant fees. Less time required for completion can also provide internal benefits for ODOT, as ODOT will be able to redirect personnel to other projects and initiatives sooner.

2. Indirect Cost Savings: Indirect savings are real and recognizable by the public and for this project. By selecting a contractor that can realistically meet ODOT's key project evaluation factors such as contractor's key individual expertise, major subcontractors, technical approach for design and construction, and safety, quality and schedule expectations, ODOT and the contractor can jointly save the traveling public significant inconvenience due to traffic delays, detours and slower posted speeds.

ODOT also uses its experiences with other projects and the factors identified in Section D.1 to judge impacts of project construction on road users.

U.S. 97 is the main north-south highway through the central portion of Oregon and complements the I-5 corridor, connecting Oregon to California and Washington. In the

Bend area, U.S. 97 is the primary route for local residents to commute through town and is a connection to area shopping, dining, businesses, schools and recreation. Oregon's population growth over the last decade has led to an increase in traffic congestion and delay and an increase in the number of and severity of vehicular crashes along U.S. 97.

ODOT estimates that the project has a benefit of over $350 million dollars related to congestion, safety, delay, and emissions. Based on traffic volumes, that is about $43,750 savings per vehicle.

E. ADDITIONAL CONSIDERATIONS UNDER ORS279C.335(2)(b)

In approving a finding under ORS 279C.335(2)(b), the Director of the Oregon Department of Transportation must consider the type, cost, and amount of the contract (see Sections A, B and D above), and the following factors to the extent applicable to this particular public improvement contract:

1. How many persons are available to propose. Based on the level of outreach by ODOT to the construction industry and response, ODOT anticipates approximately five to ten contractors are available for the project and three to five contractors will submit SOQs in response to the RFQ. See Section C.1.

2. The design and construction budget and the projected operating costs for the completed public improvement. The project is anticipated to be funded with a combination of State of Oregon and federal (FHWA) INFRA Grant funding resources, local funding, and possibly private development dollars. The current estimated design and construction cost for the project is $85 million to $95 million. See Section B.1.

3. Public benefits that may result from granting the exemption. The design-build method provides ODOT the ability to evaluate proposers based on their qualifications, expertise, experience and technical approaches for design and construction for improving public safety, increasing both the rate of traffic flow, and maintaining connectivity and mobility for all road users, and for meeting the goals and objectives of the FHWA INFRA Grant, HB 2017 (Keep Oregon Moving) and the 1999 Oregon Highway Plan. The design-build method also promotes the use of innovative approaches to complex and challenging project work elements, among other benefits discussed in this document. See Sections A.2, B.2, B.3, B.5, Section D and Section E.4.

4. Whether value engineering techniques may decrease the cost of the public improvement. As explained in Section B.3, FHWA and ODOT do not require VE studies for projects utilizing the design-build method. However, the design-build method promotes the use of innovative approaches (including value engineering techniques), which may result in decreased costs, and the ODOT Design-Build Contract allows for cost reduction proposals

5. The cost and availability of specialized expertise that is necessary for the public improvement. The design-build method allows ODOT to select a contractor from a pool of qualified contractors that has expertise in coordinating maintenance of traffic in a high-volume urban area and construction of three structures. Special expertise and maintaining competition are discussed above in this document, including the benefit of using the design-build method to select a contractor that has a team with the necessary qualifications, expertise and experience needed for the project. See Sections B.4, C.1, C.3 and D.

6. Any likely increases in public safety. The coordination between the owner and the contractor in the design-build method of contracting should assure coordination of work, resulting in shorter lane closure and detour times. It will also ensure full consideration for the safety of users of the bicycle and pedestrian paths and multimodal transportation facilities crossed by the project. See Section B.5.

7. Whether granting the exemption may reduce risks to the contracting agency or the public that are related to the public improvement. Potential benefits of the design-build method include saving project costs, lowering operational costs and/or project lifecycle costs, improving constructability, enhancing innovation, reducing risk, and expediting project delivery by use of the contractor's technical approach to design and construction. This method also provides recognition of the value to the public in employing enhanced contracting methods that will accomplish the required work in the most effective manner.

The design-build method emphasizes innovation in management and coordination of design and construction activates, assessing risk, managing mobility needs, and providing a complete project that is sensitive to wide public participation by all in contracting opportunities. See Sections A.2, B.1, B.2, B.4 and B.5.

8. Whether granting the exemption will affect the sources of funding for the public improvement. The project is partially funded by HB 2017 (Keep Oregon Moving) project and is of high importance to the Legislature and ODOT. The project is also partially funded by an FHWA INFRA Grant that has schedule requirements which can be met through the design-build process. Local funding is also available, and possibly private development funds. Granting the exemption would not have a negative impact on sources of funding for the project. See Section B.1.

9. 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. Market conditions are discussed above, as are the potential cost savings benefits of using the design-build method for this project. See Sections B.6 and D.

10. Whether granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement. As is typical of alternative contracting methods, this method allows the contracting agency to select the most qualified contractor, rather than just simply contracting with the lowest bidder. Through the design-build procurement process, ODOT will select a contractor with the specialized qualifications, expertise, skills, experience and understanding that is required to successfully address the project design and construction technical complexities, safety and risks issues and completion timeframes. See Sections A.2, B.4 and B.7.

11. Whether the public improvement involves new construction, or renovation or remodeling of an existing structure. New construction of a realignment of U.S. 97 to the east of its existing location and supporting transportation network improvements to improve intersection operations which will include renovation and remodeling. This includes a roundabout at U.S. 20 and Cooley Road and ramp connections to U.S. 97 at Cooley Road and Robal Road. See Section A.1.

12. Whether the public improvement will be occupied or unoccupied during construction. The project area covers the section of U.S. 97 between Empire Avenue and Browery Lane, which is a heavily traveled corridor and experiences high crash rates. Traffic on and along U.S. 97 in this portion of Bend, Oregon and major local street crossroads consists of cars, trucks, busses, bicycles, pedestrians, and multimodal transportation

facilities. The design-build method will ensure all project work is being done in a "fast-track" mode to minimize impacts. All roads impacted will remain in use, except as closures may be permitted for purposes of construction. See Sections A.1 and B.5.

13. Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions, see Section A.1. above.

14. Whether the contracting agency has, or has retained under contract, and will use contracting 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 will use to award the public improvement contract and to help negotiate, administer and enforce the terms of the public improvement contract. For this project, ODOT's project team will consist of ODOT personnel, and Oregon DOJ legal counsel that have experience, expertise, and knowledge necessary to develop the design-build method procurement documents and process and the Contract and to help negotiate, administer and enforce the terms of the public improvement contract. See Section A.2.

F. 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. In addition to the matters to be evaluated under ORS 279C.355(2), the use of the design-build method for this project may be evaluated based upon the accomplishment of ODOT's objectives for the project.

The contracting agency will make the final FFE post-construction evaluation report available for public inspection.

CONCLUSIONS

Findings have been developed in compliance with ORS 279C.330, 279C.335(2) and 279C.335(4) and 279C.350, applying the criteria required by ORS 279C.330 and 279C.335(2), and the additional considerations under ORS 279C.335(2)(b). (ODOT will also perform the post-project evaluation required by ORS 279C.355.) Based upon these findings and the following conclusions, ODOT has determined that an exemption from competitive bidding requirements is justified for the described public improvement contract:

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 substantial cost savings and other substantial benefits to ODOT and the public.

ORDER OF DIRECTOR

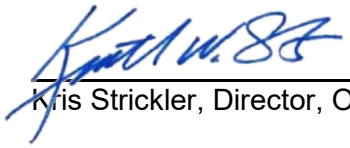
An exemption from public competitive bidding requirements is hereby granted to the Oregon Department of Transportation to enter into the described public improvement contract using the design-build alternative contracting method as described in the preceding findings. This order is subject to the following conditions:

1. To the extent feasible, and consistent with this exemption, this procurement will follow the applicable provisions of ORS Chapter 279A and 279C; ORS Chapter 291; OAR Chapter 731, Division 5 (ODOT Public Contract Rules; Highway and Bridge Projects) and Division 7 (ODOT Public Improvement Contracts; Highway and Bridge Construction).

2. ODOT, in concert with the Oregon DOJ, shall establish and follow standards for evaluating proposals under this procurement and for making a contract award.

3. ODOT shall work with the Oregon DOJ to develop suitable contract language for the contract, and shall incorporate into the contract such additional or substitute terms that ODOT and the Oregon DOJ may determine to be necessary for compliance with Oregon law and other applicable law or otherwise appropriate for the protection of the State.

THE PRECEDING FINDINGS AND CONCLUSIONS AND CONSIDERATION OF OTHER FACTORS SUBMITTED IN SUPPORT OF THIS REQUEST ARE HEREBY INCORPORATED, APPROVED AND ADOPTED.



Kris Strickler, Director, Oregon Department of Transportation — Date: 2/22/2021

Marie Wright — By email: 2/22/2021
Marie Wright, Operations and Construction Manager, Oregon Department of Transportation Procurement Office — Date

REVIEWED BY THE DEPARTMENT OF JUSTICE

Sr. AAG Rob Gebhardt — By email: 2/19/2021
DOJ Attorney — Date

Appendix A – Completed Design-Build Project Summary Table

Project Name: I-5: Evans Creek to Rock Point Pavement Preservation			
Purpose/Scope: Pilot project No. 02 was a surface preservation project of the northbound and southbound lanes of Pacific Highway (I-5).			
Completion Date	12/21/1999	**Total Costs**	$8,650,646.00
Cost Savings (Compared to Original Estimate)	$486,000	**Time Savings** (Compared to ODOT's Contract Completion Date)	12 Months
Project Name: Hwy 99E Willamette River (Harrisburg) Bridge #00583E			
Purpose/Scope: Pilot project No. 01 to replaced existing deck and railing on the three through-truss spans (Bent 1 to Bent 4).			
Completion Date	8/31/2000	**Total Costs**	$2,426,307.00
Cost Savings (Compared to Original Estimate)	$57,832	**Time Savings** (Compared to ODOT's Contract Completion Date)	30 Days
Project Name: I-5: Coast Fork Willamette River (SB) Bridge			
Purpose/Scope: OTIA II project to replace southbound bridge over the Willamette River.			
Completion Date	4/29/2004	**Total Costs**	$7,415,394.00
Cost Savings (Compared to Original Estimate)	$1.595.000	**Time Savings** (Compared to ODOT's Contract Completion Date	8 Months
Project Name: I-84: Lower Perry Interchange (Grande Ronde River) Bridge			
Purpose/Scope: OTIA II project to replace eastbound and westbound bridges over Grande Ronde River.			
Completion Date	10/26/2004	**Total Costs**	$9,572,500.00
Cost Savings (Compared to Original Estimate)	$1,327,500	**Time Savings** (Compared to ODOT's Contract Completion Date)	12 Months

Project Name: I-84: Quarry Bridges (La Grande Section)			
Purpose/Scope: OTIA II project to replace two eastbound bridges, two westbound bridges and Lower Quarry bridges over the Grande Ronde River, and reconstruct eastbound and westbound mainline roadways between Upper Quarry and Lower Quarry bridges and associated approaches on the Old Oregon Trail Highway (I-84).			
Completion Date	11/112004	**Total Costs**	$20,286,417.00
Cost Savings (Compared to Original Estimate)	$3,712,978.46	**Time Savings** (Compared to ODOT's Contract Completion Date)	12 Months
Project Name: U.S. 20: Central Oregon Highway Bridges (COHB) Bundle 102			
Purpose/Scope: OTIA III project to replace twelve bridges in Malheur County, four (4) bridges in Harney County, as well as approximately one-half (½) mile of new alignment of U.S. 20 in Malheur County.			
Completion Date	4/3/2006	**Total Costs**	$27,767,254.00
Cost Savings (Compared to Original Estimate)	$198,807.12	**Time Savings** (Compared to ODOT's Contract Completion Date)	12 Months
Project Name: Mt. Hood to Chemult (MHC) Bundle 101			
Purpose/Scope: OTIA III project to replace eleven bridges, repaired one bridge, and added northbound and southbound passing lanes on U.S. 97.			
Completion Date	6/22/2006	**Total Costs**	$33,004,790.00
Cost Savings (Compared to Original Estimate)	$3,114,500	**Time Savings** (Compared to ODOT's Contract Completion Date)	3 Months
Project Name: I-5: Sutherlin to Roseburg Section (SRS) Bundle 353			
Purpose/Scope: OTIA III project to replace nine bridges, repaired one bridge, and 8.4 miles of interstate maintenance which will include guardrail and concrete barrier improvements, drainage, rumble strips, striping, and pavement preservation.			
Completion Date	11/30/2008	**Total Costs**	$49,321.702.72
Cost Savings (Compared to Original Estimate)	$7,833,915.17	**Time Savings** (Compared to ODOT's Contract Completion Date)	None

Project Name: I-5: Clarks Branch to Tunnel Mill Race (CBT) Bundle A02			
Purpose/Scope: OTIA III project to replace nine bridges and repair two bridges.			
Completion Date	5/18/2007	**Total Costs**	$43,316,240.00
Cost Savings (Compared to Original Estimate)	$317,402	**Time Savings** (Compared to ODOT's Contract Completion Date)	None
Project Name: I-5: Wilsonville to Hayesville Interchange (WHI) Bundle 211			
Purpose/Scope: OTIA III project to replace the northbound and southbound bridges on I-5 over Hwy 51 at MP 282.25 and included 22 miles of interstate maintenance work on northbound and southbound lanes, and re-tensioning and repair of the existing cable guardrail.			
Completion Date	6/19/2008	**Total Costs**	$22.995,220.00
Cost Savings (Compared to Original Estimate)	$23,649	**Time Savings** (Compared to ODOT's Contract Completion Date)	2 Months
Project Name: I-5: McKenzie River to Goshen Grade (MRG) Bundle 215			
Purpose/Scope: OTIA III project to replace five bridges, widened the interstate to three lanes in each direction, and repaired three bridges on I-5 and included pavement work.			
Completion Date	11/30/2009	**Total Costs**	$66,993,137.00
Cost Savings (Compared to Original Estimate)	$50,698.64	**Time Savings** (Compared to ODOT's Contract Completion Date)	None
Project Name: I-5 to Weaver Road (I-5 Weaver) Bundle 306			
Purpose/Scope: OTIA III project to replace six bridges and repair one bridge on I-5.			
Completion Date	9/1/2010	**Total Costs**	$51,950,976.43
Cost Savings (Compared to Original Estimate)	$50,556,771.49	**Time Savings** (Compared to ODOT's Contract Completion Date)	None
Project Name: OR38: Elk Creek to Hardscrabble Creek (EHS) Bundle 401			
Purpose/Scope: OTIA III project to replace five bridges along a 14-mile stretch of Oregon 38 and upgrade the OR38/OR138 intersection.			
Completion Date	6/08/2009	**Total Costs**	$49,769,774.00
Cost Savings (Compared to Original Estimate)	$833,984.89	**Time Savings** (Compared to ODOT's Contract Completion Date)	5 Months

Project Name: U.S. 395: McKay Creek to Silvies Slough (MSS) Bundle 414			
Purpose/Scope: OTIA III project to replace seven bridges and repair one bridge on highways U.S. 395, U.S. 26, OR19 and OR78, and guardrail repair, riprap removal and streambank protection.			
Completion Date	11/21/2011	**Total Costs**	$43,944,982.00
Cost Savings (Compared to Original Estimate)	$711,788.05	**Time Savings** (Compared to ODOT's Contract Completion Date)	2 Months
Project Name: I-5 Elkhead Rd to OR126: Knowles Creek Bundle 508			
Purpose/Scope: OTIA III project to replace five bridges, partial replacement and repair of one bridge and repair of one bridge.			
Completion Date	10/31/2011	**Total Costs**	$49,890,833.00
Cost Savings (Compared to Original Estimate)	$2,654,176.05	**Time Savings** (Compared to ODOT's Contract Completion Date)	1 Month