

“FINAL”
EXEMPTION NUMBER 2023-02

FINDINGS
SUPPORTING AN EXEMPTION FROM COMPETITIVE BIDDING REQUIREMENTS
FOR CLASS OF PUBLIC IMPROVEMENT CONTRACTS 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 (ODOT) for the) FINDINGS,
Design-Build Statewide Curb Ramp Inventory) CONCLUSIONS AND
Remediation Class of Public Improvement Contracts) ORDER
)

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 for a public improvement contract or a class of public improvement contracts 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 or class of public improvement contracts 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).

Pursuant to ORS 279C.335(5)(c), a public hearing will be held in response to a written request before the findings are approved, allowing an opportunity for interested parties to comment on the draft findings.

This request for exemption and the opportunity to request a public hearing were advertised in the *Business Tribune* on December 5, 2023, and the *Daily Journal of Commerce* on December 4, 2023. The request for exemption was posted on the ODOT Procurement Office web site at:

https://www.oregon.gov/odot/Business/Procurement/Pages/Letting_Schedules.aspx

No written request for a public hearing was received and no public hearing was held. There were no written comments from the public 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

The Oregon Department of Transportation and the Association of Oregon Centers for Independent Living, et al. entered into a 15-year settlement agreement on Nov. 2, 2016, to make state highways more accessible to people with disabilities (“Settlement Agreement”). The Settlement Agreement contains certain requirements with respect to remediation of the curb ramp inventory subject to the Settlement Agreement (“Settlement Agreement Curb Ramp Inventory” or “Curb Ramp Inventory”). The Curb Ramp Inventory (as updated from time to time) identifies the locations of over 25,000 non-compliant and missing curb ramps at signalized and non-signalized intersections and mid-block crossings on or along the State Highway system that ODOT agrees to remediate. By December 31, 2027, ODOT is required to remediate at least 75 percent of the non-compliant curb ramp locations in the curb ramp inventory. By December 31, 2032, ODOT shall complete remediation of all of the non-compliant curb ramp locations in the curb ramp inventory.

The Settlement Agreement sets forth the “Applicable Standards” required for curb ramp mediation:

- Americans With Disabilities Act (ADA) and its implementing regulations,
- PRO WAG (Public Right of Way Accessibility Guidelines),
- the ADA Standards for Accessibility Guidelines (ADAAG), Section 504 of the Rehabilitation Act of 1973, and
- Part 4 (Highway Traffic Signals) and Part 6 (Temporary Traffic Control) of the MUTCD (Manual on Uniform Traffic Control Devices).

In addition to its ongoing efforts to remediate ramps through multiple design-bid-build projects, ODOT has identified several Curb Ramp Remediation projects that will be best completed utilizing the Design-Build delivery method (“D-B Curb Ramp Inventory Remediation Projects”).

1. Project Description: D-B Curb Ramp Remediation Class of Public Improvement Contracts. (Statewide)

ODOT proposes to use the design-build alternative contracting method (“D-B” or “Design-Build”) to supplement its ongoing Curb Ramp Inventory remediation efforts using the design-bid-build method by exempting class of public improvement contracts for the D-B Curb Ramp Inventory Remediation Projects. ODOT’s ability to deliver multiple D-B projects in addition to its ongoing efforts through traditional methods will support ODOT’s need for capacity and efficiency for construction of compliant curb ramps statewide and promote compliance with the Settlement Agreement obligations.

As of December 31, 2022, remediation of 6,176 ramps has been completed, inspected and approved under the traditional design-bid-build method. While this is a large number of ramps, ODOT must supplement its ongoing design-bid-build efforts with additional delivery methods in order to meet the production rate in accordance with the milestone dates.

ODOT has evaluated contractor capacity and determined it will achieve an improvement in number of the curb ramps remediated by utilizing the Design-Build Method, which will allow for an accelerated design and construction schedule for identified projects. ODOT will identify multiple D-B Curb Ramp Remediation Projects from the remaining inventory which will consist of a grouping of a large number of curb ramps that can be effectively bundled in a single design-build agreement. Each D-B Curb Ramp Remediation Project will be identified by ODOT to promote the most efficient delivery process to remediate groupings of curb ramps, considering similar characteristics or common features (such as design requirements or location).

The D-B Curb Ramp Remediation class of contracts will include several contracts over the next ten years. ODOT anticipates that a minimum of six D-B Ramp Remediation Projects will be needed to fulfill the Settlement Agreement obligations, but additional project groupings may be identified as work progresses and those projects will be included in the class. The initial D-B Ramp Remediation Projects in the 24-27 STIP are in Region 2 and Region 3. In the Region 2 project, approximately 2000 Inventory Curb Ramps will be remediated in the following communities: Newberg, Astoria, Cottage Grove, Salem, Independence, Monmouth, Springfield, and Corvallis. For the Region 3 project (K22570), approximately 200 Inventory Curb Ramps will be remediated in North Bend and Coos Bay.

The current estimated design and construction budget for each contract in the class of public improvement contracts is in the range of approximately \$40 million to \$100 million, which may be adjusted as needed for the individual contracts based on work to be performed, the volume of work, location, and complexity.

In accordance with the applicable statutes and administrative rules, ODOT will select firms in accordance with a competitive two-phase procurement process involving a Request for Qualifications (RFQ) and Request for Proposals (RFP) as described in Section A.3 (Procurement Process). Pursuant to the resulting D-B Remediation Contracts, Design Builders will provide design, pre-construction, and construction services, environmental and quality management, safety, contract administration and all necessary support services. D-B Remediation contracts will include the design and construction work related to reconstruction, repair or construction of curb ramps, curbs, sidewalks and other pedestrian facilities, pedestrian-activated signals and related elements other pedestrian-related intersection appurtenances, asphalt patching and repairs, additional related work within the general project vicinity, temporary traffic control including applicable Temporary Pedestrian Accessible Route (TPAR), any work that could impact

pedestrian accessibility at a given location, quality management, safety, contract administration and all necessary support services, and work necessary to comply statewide with the Applicable Standards and related legal requirements for pedestrian infrastructure that is accessible and usable by people of all abilities. The work will be done in accordance with the Applicable Standards and ODOT performance requirements and specifications, including other applicable contract terms, provisions and requirements as will be included in any awarded contracts.

These Findings of Fact shall apply to the entire class of public improvement contracts described herein.

2. Agency Considerations: 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 and approaches.

ODOT’s ADA Delivery Program performed an internal evaluation of the ODOT delivery goals and reviewed several alternative contracting delivery mechanisms for the subject projects. ODOT typically uses a competitive low bid process for construction contracts but concluded that an alternative project delivery method is needed to supplement ODOT’s design-bid-build efforts to remediate the Curb Ramp Inventory due to the number of ramps to be remediated and the current pool of design and construction teams that can complete the work in accordance with the required timelines. Inclusion of additional of D-B curb ramp remediation projects in ODOT’s overall curb ramp remediation strategy will allow ODOT to consider key elements for project success beyond just price and includes qualifications and the ability to include timelines for completion of work in the impacted communities.

The design-build process is becoming a more common approach for certain types of projects by public agencies both within and outside the State. Additionally, there is a growing recognition that, for certain projects with unique needs, delivery methods other than competitive low bid could better serve the Owner in reaching its project goals.

Potential benefits of the Design-Build Method are that it can accelerates project delivery and shortens the project duration. The contractor also works closely with the designer, sharing his or her expertise, to reduce the risk of design errors and the need for redesigns, which can add to project costs and project delays.

ODOT assigns weight to price as well as to specified non-price factors that are important to the success of the project on a design-build contract. These factors include, but are not necessarily limited to, the proposer’s qualifications, experience, key personnel expertise, roles, responsibilities, goals, and project approach.

The Design-Build Method will reduce the potential for work delays, reduce the possibility of cost overruns, and will encourage innovation and avoid or minimize adverse impacts to the project.

ODOT believes that the Design-Build Method is the best method for the selection of contractors for the contracts in the class of public improvement contracts and the projects under those contracts in order to accelerate project delivery in accordance with the required milestone dates.

Agency is well-equipped to employ the design-build method to this class of contracts. To date, ODOT has successfully completed 15 projects using the Design-Build Method. See Appendix A for the most recent completed projects.

ODOT personnel, and ODOT's legal counsel, the Oregon Department of Justice (Oregon DOJ), have gained the necessary experience, expertise, and knowledge necessary in using alternative selection and contracting methods to successfully deliver multiple projects varying in scope, size, and complexity, and within schedule and budget constraints. (ODOT may also use third-party consultants.) Upon this foundation, ODOT will select design-build contractors, negotiate (to the extent negotiations, if any, are permitted by ODOT), award and administer the contracts in the class of public improvement contracts.

3. Procurement Process: This is a request to the Director of the Oregon Department of Transportation, on behalf of ODOT, for an exemption from competitive bidding requirements for a class of public improvement contracts. The exemption would allow ODOT to solicit price, qualifications and technical proposals for the design and construction of curb ramp remediation and other work described above using the alternative Design-Build Method, through a two-step Request for Qualifications (RFQ) and Request for Proposal (RFP) procurement process.

An RFQ will be issued (formally advertised) for individual contracts within the class of public improvement contracts associated with curb ramp remediation (and other work as described above). Qualified firms selected from the RFQ step will be allowed to submit proposals in response to the RFP. Those proposers must submit proposals by a date specified in the RFP. Each proposer will be required to submit a proposal that responds to the evaluation criteria requirements and provides other required information which includes required project specific price elements.

The RFPs for contract opportunities may permit proposers to submit Alternative Technical Concepts (ATCs) as part of their proposals. ATCs encourage the contractor to use the latest innovative technologies and methodologies to more fully leverage available public resources.

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

Development of the Design-build RFQ, RFP and contract will be coordinated with the Oregon DOJ.

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: (a) Operational, budget and financial data; (b) Public benefits; (c) Value Engineering (VE); (d) Specialized expertise required; (e) Public safety; (f) Market conditions; (g) Technical complexity; and (h) Funding sources.*

ODOT finds that many of these criteria as set forth below supports the use of the Design-Build selection Method. This request for exemption is supported by the following:

1. Operational, Budget, and Financial Data [ORS 279C.330(1)(a)]: The current estimated design and construction cost range for a contract with a Design-Builder in the class of public improvement contracts is approximately \$40 million to \$75 million per contract. ODOT has obtained full funding necessary for ramp remediation for all proposed design-build contracts through 2027 and anticipates that it will obtain all required necessary funding for ramp remediation through 2030.

In ODOT’s view when compared to the design-bid-build method the Design-Build Method of contracting is the most efficient method for completion of ramp remediation projects within the class, and it will be more likely that ODOT will not incur additional costs beyond those budgeted for these projects. The Design-Build Method of contracting is a recognized method of minimizing construction costs and time while ensuring that critical schedule requirements are met. As outlined below, it is anticipated this may be a cost savings to ODOT and the public by using the Design-Build Method of contracting for the identified projects within the class.

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 projects with schedule constraints within a fixed price. ODOT anticipates substantial cost savings and other substantial benefits to the projects by using the Design-Build Method, as more particularly described in this Section B and in Section D.

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. As a result, cost savings to ODOT and the public are anticipated by using the Design-Build Method.

2. Public Benefits [ORS 279C.330(1)(b)]: The fostering of innovation, mitigating risks, optimizing control of costs and schedule advantages of the design-build method will provide ODOT the means to meet the goals and objectives of delivering the projects as quickly and efficiently as possible, which will help increase safety and pedestrian accessibility on a more timely basis.

3. Value Engineering [ORS 279C.330(1)(c)]: Value Engineering (“VE”) is encouraged on all projects by ODOT and has resulted in both initial savings as well as long-term savings. VE is the systemic application of recognized techniques by multi-disciplined teams that identifies the function of a product or service, proves a worth for that function, generates alternatives through creative thinking, and provides the needed functions at the lowest overall cost.

VE Studies may be conducted during one or more of the project development stages and during construction. VE has proven to be an effective tool for product value improvement and design enhancement and assisting ODOT in obtaining its goal of providing cost-effective projects and procedures, and improved productivity and efficiency. VE can be used in all aspects of the project such as design, operations, construction, maintenance, specifications, standard drawings, and planning.

The unique process and relationship of the owner, construction Contractor and the designer under the Design-build process fosters an on-going VE approach that features continuous constructability reviews. In essence, this method allows the VE process to happen all the way through the Project, not just during the design process. Multiple options for high cost or impact items, such as construction methods, materials, environmental permitting, and local design requirements are analyzed in real time to determine cost/benefits analysis.

ODOT is and will conduct on-going risk evaluations, constructability review, and VE evaluations through contract development of curb ramp remediation work that will be included in contracts in the class of public improvement contracts, including in future such contracts awarded pursuant to this exemption, if it granted.

4. Specialized Expertise Required [ORS 279C.330(1)(d)]: The subject projects require firms that have specialized expertise and knowledge of construction of ADA compliant pedestrian facilities and an understanding of the unique project site conditions and

constraints. Contractors with specialized expertise includes training and certification on construction and inspection of ADA curb ramps and pedestrian-activated signals.

The Design-Build Method involves the design-build construction contractors in the design phase, allowing for: ongoing VE and constructability reviews; quick cost comparisons between various design options; ability to identify and mitigate potential construction risks early; and a substantial amount of time for the design-build contractor to become very familiar with all aspects of the project. In general, the Design-Build Method provides ODOT great confidence in completion of complex work, and fast-tracking completion of the project can be reasonably anticipated using the Design-Build Method. Through the Design-Build Method, ODOT will select design-build contractors who are most capable of handling the projects, including specialized work identified for the projects.

Using the Design-Build Method will allow ODOT to select contractors that have the necessary expertise, experience, qualifications and understanding of the project sites, conditions and the specific design, construction and staging methodologies to successfully complete work elements in the allotted time.

The Design-Build Method emphasizes innovation in the 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 Contractors providing the best value in price, qualifications and approach is sought, rather than simply contracting with the lowest bidder. In addition, specialized expertise and understanding is required to successfully address public safety issues.

ODOT and the public will benefit from ODOT engaging design-build teams that have established experience and specialized expertise to manage and perform the work for the contracts in the class of public improvement contracts. A low bid process does not provide an opportunity for ODOT to obtain the most qualified and experienced contractors with the specialized expertise needed.

5. Public Safety [ORS 279C.330(1)(e)]: All work will be performed in accordance with Oregon Occupational Safety and Health-(OSHA) safety regulations and ADA regulations. The selected design-build contractors will be required to perform and stage all work within the various areas identified in their respective contracts.

The projects under the contracts in the class of public improvement contracts will improve pedestrian safety by improving pedestrian access, curb ramps and crossings and by making curb ramps and pedestrian signals ADA compliant.

ODOT will require that temporary pedestrian routes provided through or around the project work zones are safe and accessible to pedestrians and persons with disabilities.

6. Market Conditions [ORS 279C.330(1)(f)]: ODOT does not anticipate any measurable difference in market conditions if the class of projects are procured under the traditional low bid method or the Design-Build Method.

The Design-Build Method will allow ODOT to consider proposer qualifications, expertise and experience necessary to successfully deliver the projects.

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 [ORS 279C.330(1)(g)]: Technical expertise will be required for, design services, value engineering, environmental management, quality management, scheduling, and construction services in compliance with ADA regulations and standards and related requirements.

To be successful in completing the projects, contractors must be qualified, experienced and capable to address the issues, goals, concerns and technical complexities of the class of projects as described in this document, including but not limited to Section B.4.

8. Funding Sources [ORS 279C.330(1)(h)]: As stated earlier, it is anticipated the projects will be funded with State of Oregon funds.

C. FINDINGS ADDRESSING COMPETITION [ORS 279C.335(2)(b)]

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:

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 past projects using alternative contracting methods. During ODOT's history of using alternative contracting methods, many firms have expressed interest in pursuing the alternative contracting projects. ODOT expects that with this experience, normal competition will prevail. ODOT's issuance of additional (beyond the initial RFQ and RFP) RFQs and RFPs for contracts in the class of public improvement contracts under this exemption will also provide future open competition for additional qualifying contractors. ODOT will reach out to Associated General Contractors representatives in advance of issuance of the initial RFQ to inform the contracting community about these contracting opportunities.

Based on the level of contractor participation for previous alternative contracting opportunities, early outreach and the anticipated size and nature of the contracts in the class of public improvement contracts, ODOT anticipates approximately 7 to 9 contractors may be available for the contracts and 3 to 5 contractors may submit proposals in response to the first RFQ.

2. ODOT, through ongoing ODOT-Associated General Contractors meetings, provides industry with upcoming contract opportunities and the nature of the ADA work is similar to past ADA projects.

3. The design-build evaluation and selection process ODOT intends to employ for the contracts in the class of public improvement contracts are summarized in Section A.3. Procurement Process. The process is open and impartial, competition will be obtained, and proposers will be evaluated equally based on criteria that is reflective of the work elements for the projects in the described class of contracts. 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 which may include consideration of other factors, including but not necessarily limited to the proposer's qualifications, experience, key personnel experience, roles, responsibilities, major subcontractors, goals, approach 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 projects to the State of Oregon.

4. Pursuant to ORS 279C.360, the design-build solicitation (RFP) will be formally advertised in the *Business Tribune* and *Daily Journal of Commerce*, and posted on ODOT's eBids website at:

<https://ecmnet.odot.state.or.us/ebidse/Account/Login>

D. FINDINGS REGARDING SUBSTANTIAL COST SAVINGS AND OTHER SUBSTANTIAL BENEFITS [ORS 279C.335(2)(b)]

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) 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 and pedestrian facility users). ODOT finds that for the class of public improvement contracts under the requested exemption, 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: Each of the Projects within the class have an estimated design and construction cost in the range of approximately \$40 million to \$100 million. ODOT uses an annual inflation rate of 4.0% when estimating project costs. ODOT could save a significant amount of money with a compressed schedule where building can start 1.5 years earlier because the design-build can start construction at the same time as finishing the civil work. For example, when compared to the design-bid-build method, the civil package would need to be finished first before the construction can start. ODOT estimates a cost savings in ODOT overhead by shortening the Projects duration, and ODOT could save additional funding related to construction inflation costs.

2. Indirect Cost Savings: Indirect savings are real and recognizable by the public and for the class of public improvement contracts under the requested exemption. Use of the design-build method can facilitate starting construction on portions of the work before the design is complete for all work under a given contract, which for this class of contracts can mean curb ramp remediation can begin sooner than if all of the design had to occur before starting work which is typical under the design-bid-build method. This can result in cost savings and is a benefit for the pedestrian public.

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 contracts (see Sections A, B and D above), and the following factors to the extent applicable to the contracts in the class of public improvement contracts under the requested exemption:

1. **[ORS 279C.335(2)(b)(A)]** How many persons are available to propose. Based on the level of outreach by ODOT to the construction industry and response, ODOT anticipates approximately 7 to 9 contractors may be available for the initial design-build contract opportunity and 3 to 5 contractors may submit proposals in response to the initial RFQ. See Section C.1.
2. **[ORS 279C.335(2)(b)(B)]** The design and construction budget and the projected costs for the completed public improvements under the class of public improvement contracts. The contracts in the class of contracts are anticipated to be funded with both State and Federal funds. The current estimated design and construction cost for the public improvements under the class of contracts is approximately \$40 million to \$75 million per contract. ODOT may adjust these amounts based on work to be performed, location, and complexity. See Section B.1.
3. **[ORS 279C.335(2)(b)(C)]** 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, in addition to price. Design-build teams have brought certain perspectives to the design and construction process that have proven valuable to the State in other projects. The Design-Build Method also promotes fast-tracking for project completion, among other benefits discussed in this document. See Sections A.2, B.2, B.3, B.5 and D.
4. **[ORS 279C.335(2)(b)(D)]** Whether VE techniques may decrease the cost of the public improvement: A VE study was not performed as part of ODOT's screening for the class of public improvement contracts. See Section B.3
5. **[ORS 279C.335(2)(b)(E)]** The cost and availability of specialized expertise that is necessary for the public improvement. The Design-Build Method allows ODOT to select design-build contractors from a pool of qualified contractors that have expertise in constructing the pedestrian facilities that comply with ADA standards and related requirements, many of which also have expertise in the Design-Build Method of contracting with design development, pre-construction and construction phase services and minimizing risk for the Project. Special expertise and the pool of competition are discussed in this document, including the benefit of using the Design-Build Method to select a design-build Contractor that has a team with the necessary qualifications, expertise and experience needed for these Projects. See Sections B.4, C.1, C.3 and D.
6. **[ORS 279C.335(2)(b)(F)]** Any likely increases in public safety. The coordination between the owner, designer, and the contractors in the Design-Build Method of contracting promotes coordination of work, resulting in a preferred construction approach option for each type and location of proposed work that

reflects project goals. In addition, the very nature of these public improvements are directed at providing safety and support for the pedestrian public and safe access for those with disabilities. See Section B.5

7. **[ORS 279C.335(2)(b)(G)]** 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 project lifecycle costs, improving constructability, enhancing innovation, reducing risk, and expediting project delivery by contracting with the design-build contractors in the design process, negotiating schedule for construction before the design is complete, and shortening construction schedules. 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, providing scheduling and estimating, assessing risk, public relations, safety, and quality needs, and providing a complete project. See Sections A.2, B.1, B.2, B.4, B.5 and D.2.

8. **[ORS 279C.335(2)(b)(H)]** Whether granting the exemption will affect the sources of funding for the public improvement. Granting the exemption will not affect the sources of funding for these Projects. See Section B.1.
9. **[ORS 279C.335(2)(b)(I)]** Whether granting the exemption will better enable the contracting agency to control the impact that market conditions may have on the cost of and time necessary to complete the public improvement. Granting this exemption will better enable ODOT to control the impact of market conditions by engaging contractors under the Design-Build Method for remediation and other work in specified areas over the course of time to address ODOT's needs and schedule noted above. As discussed above, there are also potential cost savings benefits of using the Design-Build Method for these contracts. See Sections B.6 and D.
10. **[ORS 279C.335(2)(b)(J)]** 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 Contractors 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. The ability to engage multiple contractors over time under the exemption will also assist

ODOT in managing and remediating the very large number of curb ramps and other elements. See Sections A.1, A.2, B.4 and B.7.

11. **[ORS 279C.335(2)(b)(K)]** Whether the public improvement involves new construction, or renovation or remodeling of an existing structure. The work contemplated under the class of public improvement contracts contemplates remediation and reconstruction activities and also new construction activities. See Section A.1.
12. **[ORS 279C.335(2)(b)(L)]** Whether the public improvement will be occupied or unoccupied during construction. The highway and pedestrian facilities may be either occupied or unoccupied during construction. See Section A.1 and B.5.
13. **[ORS 279C.335(2)(b)(M)]** 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 and B.1.
14. **[ORS 279C.335(2)(b)(N)]** 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 these Projects, 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 Sections A.2 and B.4.

F. POST-PROJECT EVALUATION PROCESS

The projects under the contracts in the class of public improvement contracts 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 alternative contracting method may be evaluated based upon the accomplishment of ODOT's objectives for the projects. The contracting agency will make the final FFE post-construction evaluation report available for public inspection after ODOT issues final acceptance on the last public improvement contract in the class of public improvement contracts.

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 class of public improvement contracts using the Design-Build alternative contracting method.

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

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ORDER OF DIRECTOR

An exemption from public competitive bidding requirements for the D-B Curb Ramp Remediation Class of Public Improvement Contracts is hereby granted to the Oregon Department of Transportation to enter into the described public improvement contracts using the Design-Build alternative contracting method. 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 Chapters 279A, 279C, and 291; and 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 contract awards.
3. ODOT shall work with the Oregon DOJ to develop suitable contract language for the contracts and shall incorporate into the contracts 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.

Kristle W. Stein 1/24/2024
Kris Strickler, Director of Oregon Department of Transportation Date

Marie Wright 1/3/2024
Marie Wright, Operations and Construction Manager, Date
Oregon Department of Transportation Procurement Office

REVIEWED BY THE DEPARTMENT OF JUSTICE

SR AAG Jennifer Biesack By email 12.29.2023
DOJ Attorney Date

Oregon Department of Transportation

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|---|----------------|--|-----------------|
| 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: 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: : U.S. 395: McKay Creek to Silvie's 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 |