

Exemption Number 2009-01

FINDINGS AND ORDER

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

Before the Director of Transportation
Of the State of Oregon

In the Matter of the Exemption Request by the)	
Oregon Department of Transportation for)	FINDINGS OF FACT,
I-84: Sandy River – Jordan Road, Bundle 210)	CONCLUSIONS AND ORDER
Project located in Multnomah County)	

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

This request for exemption was advertised in the Daily Journal of Commerce on Friday, February 6, 2009 and Reed Business Information on Monday, February 16, 2009. Additional advertisements were in The Asian Reporter and El Hispanic News on February 17, 2009, The Oregonian, The Observer and The Skanner on February 18, 2009. It was also posted on the ODOT Highway & Bridge Construction web site at:

<http://www.oregon.gov/ODOT/CS/CONSTRUCTION/contractorplans/2009/05-2009.shtml>

The hearing for review of these findings was held at 9:30 a.m. on Wednesday, February 25, 2009 at the 1st Floor Public Meeting Room of the Oregon Department of Transportation, Region 1 Headquarters Building, 123 NW Flanders Street, Portland, Oregon. There were **[Insert #]** comments from the public, either oral or written, during this hearing or during the time for comments.

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

FINDINGS OF FACT

A. BACKGROUND

1. Project Description: I-84: Sandy River – Jordan Road, Bundle 210 Project located in Multnomah County.

ODOT proposes to enter into a Best Value construction contract on or about May, 2009. This Project bundles two planned projects located between mile point (MP) 17.35 and MP 18.20 on Interstate 84, into a single procurement for a single project, identified as Bundle 210 under the OTIA III Bridge Delivery Program. The

Project has been placed in the Statewide Transportation Improvement Plan.

The goal of the single-project approach is to obtain the benefit of cost efficiencies.

Project Component Name/ ODOT Bridge #	Mile Point	Work Scope
06875 - Sandy River, Hwy 2 EB	17.68	Replace
06875A - Sandy River, Hwy 2 WB	17.68	Replace
06945 - Hwy 2 EB over Conn #2 (Jordan Rd)	17.82	Repair
06945A - Hwy 2 WB over Conn #2 (Jordan Rd)	17.82	Repair

The total estimated Project budget is between \$85 and \$90 million dollars. The Project will be funded with a combination of Federal Highway Administration and state funds. Work on the Project is anticipated to begin in 2009 and is expected to take four construction seasons to complete. The work will include construction, quality management, contract administration and all necessary support services. The work will be done in accordance with ODOT-approved construction standards, performance requirements, and specifications. In its solicitation, ODOT may reserve the right to include additional related work within the general Project vicinity.

Two of the Project bridges span the Sandy River, which is a sensitive environmental area. Specifications have been developed for control of construction activities that are required to meet the permits for the Project. The existing Sandy River bridges will be replaced with four-span cast-in-place, post-tensioned, concrete box girder bridges. Each bridge will consist of three 12-foot lanes and two 12-foot shoulders. The eastbound bridge will include a 16-foot wide multi-use path on the south side. The bridge will be founded on large, drilled-shaft foundations. As a seismic mitigation, ground modification will be required on the west approaches. Construction within the ordinary high water of the Sandy River will be limited to the allowable in-water-work window of July 15 through August 31. This includes the construction of the interior bents for the permanent bridges, temporary bridges, and work bridges.

The existing Jordan Road bridges will be widened to include three 12-foot lanes and two 12-foot shoulders. The eastbound bridge will also include a structural overlay on the deck.

I-84 is Oregon's main east – west commercial and recreational travel corridor. Because of the lack of acceptable alternative access routes, the current number of I-84 traffic lanes must be maintained during construction. Work must be scheduled, staged where possible, and prosecuted so as to minimize construction time and interference with traffic flow while maintaining safe driving conditions. A temporary bridge will be required in the median of I-84. This will allow demolition of the existing bridges and construction of the replacement bridges to occur without impacting I-84 traffic. It is essential that the work be vigorously pursued and completed with minimal impact to the traveling public. Once the Project is complete, motorists will have safe and reliable bridges that will provide efficient traffic flow along this important highway.

For these reasons, this Project is being procured using the Best Value method as described below.

2. Agency Considerations: In January 2003, ODOT completed a statewide study of the economic and safety conditions of its bridges, summarizing the information in an Economic and Bridge Options Report (EBOR). The EBOR recommended the repair or replacement of over 360 state bridges and 125 local bridges in the next ten years.

The OTIA III Bridge Delivery Program is part of ODOT's 10-year, \$3 billion Oregon Transportation Investment Act (OTIA) program. OTIA funds will repair or replace hundreds of bridges, pave and maintain city and county roads, improve and expand interchanges, add new capacity to Oregon's highway system, and remove freight bottlenecks statewide.

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

The Oregon Transportation Commission (OTC) is mandated to "encompass economic efficiency" (ORS 184.618) and, therefore, ODOT strives to continually improve its procurement and project delivery approaches. The need for economic efficiency was accentuated when the Oregon Legislature passed OTIA, which includes modernization efforts such as the improvements encompassed by this Project. The Legislature further provided guidance to ODOT that project implementation should focus on stimulating Oregon's economy.

ODOT performed an internal evaluation of the delivery goals and alternative contract delivery mechanisms for the Project. ODOT traditionally uses a low bid process, but has concluded that using that project delivery method entails an unacceptable risk that this Project will not be delivered in a timely manner and will not provide the local community with significant public participation in contracting opportunities. For the Project, ODOT reviewed other available procurement options that could provide maximized benefit to the public and determined that an alternative contracting process that considers key elements for project success beyond price is most appropriate for the Project.

For this Project ODOT has determined that:

- 1) The ability of the contractor to complete necessary in-water work within each of the six week in-water work windows for this Project location is critical to meeting the Project schedule. The amount and nature of the in-water work, including large drilled shafts, makes it necessary for ODOT to ensure that the contractor has a solid, comprehensive plan to complete the necessary in-water work.
- 2) It is in the public's best interest to build the Project with a high level of community participation in subcontracting and supply opportunities to promote inclusion of local businesses and diversity in the distribution of work and to achieve a high level of economic benefit. The participation ODOT intends for the Project is that which encourages broad contributions in the Project both by the workforce and the local communities. ODOT foresees that the Project's contractor, subcontractors and suppliers will succeed in the Project's delivery through utilizing both existing and specific broad based and inclusive planning. ODOT anticipates that the contractor will closely monitor and adapt their efforts to seize opportunities as they are identified through active engagement within the contracting and supply industries.
- 3) The ability of the construction workforce to work near home within the corridor serviced reduces the distance or time in travel, thereby lessening congestion and reducing vehicle emissions. Furthermore, a regional approach is considered to maximize the benefits to the Oregon economy and promote logistics efficiencies in the construction of the Project.

As described in the Procurement Process section, ODOT proposes an alternative contracting process that addresses Project needs by evaluating components which include the contractor's qualifications and technical approach, as well as price, and results in a "Best Value" selection. This procurement method encompasses the Oregon Legislature's focus on economic efficiency and stimulation and provides recognition of the value to the public of employing enhanced contracting methods which will accomplish the required work in the most effective manner.

The Best Value contracting process assigns weight to price as well as specified non-price factors that are important to the success of the Project, such as schedule, qualifications and technical approach. There are various contracting methods that may be used under the Best Value process, commonly referred to as "A + B", "A + C", or "A + D", with "A" referring to "Price" and "B" or "C" or "D" referring respectively to "Time",

“Qualifications”, or “Technical” evaluation components. For this Project, ODOT proposes to use the form of Best Value that is expressed as “Price plus Qualifications plus Technical” (also referred to as “A+C+D”), wherein the procurement process includes the evaluation of a Price component, (A element), a Qualifications component (C element) and a Technical approach component (D element). The Qualifications component covers a proposer’s qualifications and history. The Technical component covers how a proposer addresses select technical issues and diversity factors. A contract is awarded to the contractor whose proposal is most advantageous to the owner, and gives the most quality per price.

The purpose for using the A+C+D contracting method is to best meet Project requirements by using a knowledgeable and experienced contractor that will perform this highly technical and complex Project under a price proposal that will realistically deliver the best value project to the State. Some of the features of Best Value contracting beyond price are: reduction in contract time or time needed to achieve critical milestones; focus on the execution of complex technical aspects and planning for technical constraints; encouraging innovations; and integration of the locally affected and traveling public’s needs into the execution of projects. This method will reduce the potential for Project work delays, including the possibility of large cost overruns, and will encourage innovation and avoid or minimize adverse impacts to the environment, local communities and the traveling public.

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

On typical construction projects with routine levels of complexity, the low bid contracting process has demonstrated predictable success in providing the best value to the public. However, an article in the November 1997 edition of Engineering News Record indicates that, on the basis of 350 projects studied by the Construction Industry Institute, the traditional low bid competitive bid process was the least efficient. For complex and complicated projects, there is a growing body of data extending back to the early 1990s that supports alternative contracting methods, including Best Value, that consider other elements beyond low price in order to achieve the best value for the public. This data and information from other states and the federal government continue to support the need to consider alternatives to competitive bidding for certain projects. The Best Value contracting is being used by federal agencies, such as the U.S. Army Corps. of Engineers, the U.S. Department of the Navy, and the Federal Aviation Administration, and other state transportation agencies. ODOT has successfully utilized Best Value selection method for its Design-Build program.

The use of A + C Best Value contracting allowed ODOT to accomplish the Lift Span Trunnion Replacement Project on the Columbia River (NB) Section of the Pacific Highway (I-5), and the St. John’s Bridge Rehabilitation Project. Additionally ODOT is using the A + C + D form of Best Value contracting on the Martin Luther King, Jr. Blvd. OR99E: MLK/Grand Viaduct O-Xing UPRR 02115 & 08905 Section Project. This project is anticipated to complete construction in 2012.

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

The St John’s Bridge Project, a \$35 million deck replacement, lead paint removal and recoating project with

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

Best Value contracting is used by federal agencies, including the Department of Defense with generally good results. Based on its successes in federally funded projects, ODOT has received a federal programmatic Special Experimental Project Number 14 exemption from the Federal Highway Administration for continued use of the Best Value contracting method. This means that, while the FHWA still requires project level engagement on such unique projects, FHWA approval and detailed documentation associated with a special exemption from low bid are not anticipated.

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

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

A Request for Proposals (RFP) will be issued for the Project and proposals must be submitted by a specified date. The proposals submitted will be required to contain a price proposal component and a technical proposal component containing a qualifications component and technical component. The price component presents the total cost to ODOT for delivering the project, broken down by price centers per work location. The technical proposal may be required to describe such factors as the proposer's qualifications history and understanding of the Project, identification of key personnel to be committed to the Project, the proposer's success in delivering similar projects and the proposer's approach to delivering project key elements described in the project RFP. The technical proposal may also be required to include a description of the proposer's current workforce diversity plan, history of utilizing certified disadvantaged, minority, women or emerging small business subcontractors, consultants and suppliers as well as the proposer's outreach program or plan for achieving diversity on this Project.

The qualifications and technical components of each proposer's technical proposal will be evaluated and scored by the proposal evaluation committee. This committee will consist of individuals from ODOT, but may include non-scoring members who are not from ODOT. Other ODOT and ODOT consultant personnel may act as observers, technical support or facilitators during evaluation and scoring, but will act as non-voting members during the scoring process.

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

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

B. FINDINGS REGARDING REQUIRED INFORMATION

ORS 279C.330 states that: *“Findings” means the justification for a contracting agency conclusion that includes, but is not limited to, information regarding: (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 (h) Funding sources.*

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

1. Operational, Budget and Financial Data: The Project was approved in the 2008-2011 Statewide Transportation Improvement Plan. The total Project budget is in the range of \$85 to \$90 million. The Project is anticipated to be funded with a combination of state and federal funding resources.

In ODOT’s view, the A+C+D Best Value method of contracting is the best available procurement method that allows this Project to begin in the next construction season and be completed, while ensuring that ODOT will not incur additional costs beyond those budgeted. This method stresses technical expertise, diversity, quality, minimizes construction time delays, promotes participation in the Project’s contracting opportunities and requires that critical in-water work window timelines are met.

Best Value contracting is a recognized mechanism for agencies to obtain more value for their money, not necessarily at the lowest original contract price, but over the life cycle of a project. It is also a means of contracting for technically complex projects that require assurance of special knowledge or past experience of a contractor.

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

2. Public Benefits: The Best Value contracting method, when coupled with Value Engineering, provides an optimal way to focus on the Project’s impacts on the public. The Best Value method focuses on project components that are most valuable to ODOT through the ability to evaluate proposers based on their technical approaches. ODOT anticipates that the complex work which must be accomplished within each of the six week in-water work windows will be properly addressed by the technical approach a successful contractor proposes. The Best Value method also allows for consideration of inclusion of many entities in subcontracting and supply opportunities, which creates economic benefits to the general public.

Overall success will be more likely as a result of application of this alternative contracting method on this Project. The Project requires a large variety of work items, some of which are significantly technical, specialized and complex, and which are suitable to the Best Value approach. Along with supporting subcontracting opportunities, inclusion of diversity factors supports the Oregon Legislature's, Oregon Governor's and the ODOT Director's, as well as the Oregon public's, interests in diversity, as evidenced by budget notes, executive orders and other documentation. The variety of work appears to include subcontracting and supply opportunities appropriate for engagement of small and diverse businesses. Such opportunities promote diversification of work throughout the overall community and in the achievement of projects in ways that provide diversification that meets or exceeds what is reflected in the overall workforce and business community. Other benefits, along with price reasonability, include positive environmental impacts associated with working where one resides such as reducing carbon footprint of commuting workers, on-time completion of scheduled first year work, which is critical in maintaining ease of mobility within the corridor, as well as collateral effects on rural communities.

Completion of the Project will also benefit the public by supporting local and statewide economies. Over time, the indirect cost benefits of the east-west corridor improvements included in this Project transcend the Project itself.

3. Value Engineering: Value Engineering is encouraged on all projects by ODOT and has resulted in both initial savings as well as long-term savings for other ODOT projects. It is also required on projects with over \$25 million in federal funding. ODOT completed a value engineering study for the Project in August 24, 2006. The A plus C plus D contracting method is anticipated to result in more reliable and higher quality Value Engineering solutions for the Project. This project delivery method also has the inherent advantage that the contractor may identify cost reducing proposals in its technical approach so that ODOT can expect to realize benefits in the initial contract price. In addition, the Contractor will be able to submit cost reduction proposals under Section 00140.70 of the Oregon Standard Specifications for Construction.

4. Specialized Expertise Required: By using the Best Value contracting method ODOT will ensure that the prospective prime contractor has the necessary knowledge and experience as illustrated in its technical proposal to successfully complete this complex Project. This expertise may include utilization of a diverse workforce that further includes subcontractors and suppliers, congruent with ODOT's heightened emphasis on diversity. The contractor must have an excellent understanding of the Project and the ability to perform. The work is a complex combination of challenges and the final product must be capable of a long service life. The contractor's technical proposal is deemed highly important to the success of this Project.

This Project involves significant technical, specialized and complex work items. Construction of the Project will require large (10 foot diameter) drilled shafts with post-grouting which are not commonly used in Oregon. The consequences of relatively small errors in such complex projects, including construction staging, foundation, demolition, and shoring work have been documented as causing increased project costs, safety problems, schedule deviations and other significant, negative project impacts. The Best Value contracting method proposed for this Project specifically is anticipated to reduce similar potential risks.

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

5. Public Safety: Safe traffic flow must be maintained while construction proceeds. The high traffic volumes on I-84 require that all lanes be open during all hours and closing any lanes would create traffic backups and safety concerns for the traveling public. As the Project is staged, the contractor will be required to design and build temporary traffic detours that provide the same level of traffic carrying capacity and meet with current standards.

The integrated relationship between ODOT and the contractor will assure coordination of work within the Project site and east - west corridor, 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 or the Price plus Qualifications plus Technical Best Value method. As described in Section A, contractors have some experience with alternative contracting methods in Oregon and have become more accepting of alternative contracting processes, ensuring adequate competition.

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

The Governor and the Legislature have encouraged ODOT to contract projects quickly to take advantage of lower construction prices in the current market, and to improve employment. Economic studies have shown that highway construction projects nationally create between 30 and 40 jobs per million dollars spent. The OTIA program makes a significant contribution to Oregon jobs and the Oregon economy: every \$1 million invested in transportation construction supports about 14 jobs. Each year during the remainder of the OTIA Program, construction projects are projected to sustain an average of approximately 4,100 family-wage jobs.

7. Technical Complexity: To be successful in completing this Project the contractor must be able to develop and follow an accurate work plan that incorporates the large variety of work items with certain attention to ODOT's focus on small businesses and public engagement in contracting opportunities. In addition to the contractor's qualifications, technical approach and diversity element, this Project will require excellent communication and coordination skills and experience with large diameter drilled shafts.

The consequences of relatively small errors in planning, erection, construction staging work, problems with the drilled shafts and failure to complete necessary work within each of the four six week in-water work windows have the potential to delay the Project work and produce large cost overruns in the following areas:

- Extending contract and construction duration due to failing to complete required work within each of the constrained in-water work windows
- Constructability of drilled shafts, foundations, temporary structures, work bridges and false work
- Safety

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

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

C. FINDINGS ADDRESSING COMPETITION

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

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

1. The competition remains open to all qualifying proposers. The contracting community is well aware of ODOT's use of alternative contracting processes and success with contractors on similar past projects. ODOT expects that with this experience, normal competition will prevail.
2. ODOT has been communicating with the construction contracting community through direct contacts and at scheduled ODOT/Associated General Contractors meetings about various Best Value and other unique contracting methods. ODOT met with industry on January 8, 2009 to discuss the procurement approach for this Project. Eight construction firms participated in this voluntary meeting.
3. The Price plus Qualification plus Technical evaluation and selection process ODOT intends to employ is summarized in Section A.3. The process is open and impartial. Proposers will be evaluated equally based on criteria that is reflective of the significant work elements of this type of project. Selection will be made on the basis of final proposal scores derived from a price component and technical proposal component that includes

qualifications and technical approach elements as described in Section A. This method expands the grounds of competition beyond price alone to include qualifications, past history, technical approach and diversity factors in order to deliver the best value project to the State.

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

http://www.oregon.gov/ODOT/CS/CONSTRUCTION/Bid_Award.shtml

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

D. FINDINGS REGARDING SIGNIFICANT COST SAVINGS

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

This Project finding is supported by the following;

1. Direct Contract Cost Saving: In general, initial contract prices are expected to be comparable between Price and Technical Best Value and conventional contracting methodologies, but considerable time savings for the public can be reasonably anticipated. Through A + C + D alternative contracting ODOT will select the Proposer who is most capable of handling specialized work identified for this Project based on the comprehensive set of tasks and cost presented in the bid packages, which will become part of the contract. Cost saving will be realized in the reduction of change orders, inspections, and potential claims. The current estimated cost of this Project is between \$85,000,000 and \$90,000,000. ODOT uses an inflation rate of 4.3% when estimating Project costs. ODOT will save approximately \$197,083 in inflation for each month the Project is not delayed. Project-related delays totaling one year could cost ODOT approximately \$2,365,000.

2. Indirect Savings: Indirect savings are real and recognizable by the public and for this Project. By awarding to a contractor who can realistically meet ODOT's quality, technical approach, schedule and safety expectations, the State and the contractor jointly save the traveling public significant inconvenience and additional estimated per month road user cost of \$240,640, which could be created by construction completion extending beyond the original contract completion date. In addition, maintenance that would otherwise be required, either as routine maintenance or as maintenance necessitated by the current condition of the highway in question, will be avoided by timely completion of construction.

3. Total Expected Savings: The competitive nature of selecting a Best Value contractor will minimize total expected savings to ODOT for the Project. There is an estimated savings to ODOT and the public by not delaying the scheduled Project completion date. This estimate does not include additional indirect savings through future application of standard accounting practices, when costs that, by their nature, are difficult to determine, can be quantified. In total, the minimum estimated monthly savings, based on the direct and indirect savings described above, is expected to exceed \$437,723 by ODOT selecting a contractor that has the needed experience and most efficient technical approach and schedule in completing the complex work within the constrained timelines for this Project.

4. 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 Price plus Qualifications plus Technical Best Value contracting method will be evaluated based upon the accomplishment of ODOT's primary objectives as noted below:

- The Project was executed using a high level of technical quality expected of a contractor team experienced in the work items and overall supervision and coordination efforts of such a complicated and complex Project
- The Project met the completion date, including allowed closure and delay impacts
- The Project provided additional contract indirect savings through the successes of technical approaches as provided by the contractor in its proposal
- The Project met budget with a minimum of modifications based on a final analysis of the Project change orders.
- The Project met or exceeded proposed diversity requirements

CONCLUSIONS OF LAW

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

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

ORDER OF DIRECTOR

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

1. To the extent possible and consistent with this exemption, this procurement will follow the provisions of ORS Chapters 279A and 279C, ORS Chapter 291; OAR Chapter 137, Division 149.
2. ODOT, in concert with the Department of Justice (DOJ), shall establish and follow standards for evaluating proposals under this procurement.
3. ODOT shall work with DOJ to adapt standard contract language for the contract and shall incorporate into the contract such additional or substitute additional terms that DOJ may determine to be necessary for compliance with Oregon law.

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

Matt Garrett, Director of Oregon Department of Transportation

Date

REVIEWED BY THE DEPARTMENT OF JUSTICE

Glen Driveness, Assistant Attorney General

Date