

BEFORE THE METRO CONTRACT REVIEW BOARD

FOR THE PURPOSE OF AUTHORIZING AN	)	RESOLUTION NO. 19-4978
EXEMPTION FROM COMPETITIVE	)	
BIDDING AND PROCUREMENT OF	)	Introduced by Chief Operating
PROGRESSIVE DESIGN BUILD	)	Officer Martha Bennett in
CONSTRUCTION SERVICES BY REQUEST	)	concurrence with Council President
FOR PROPOSALS FOR DESIGN AND	)	Lynn Peterson
CONSTRUCTION OF A RETAINING WALL	)	
AT LONE FIR CEMETERY	)	

WHEREAS, Metro intends to reconstruct the retaining wall along the northern boundary of Lone Fir Cemetery; and

WHEREAS, ORS 279C.335 and Metro Local Contract Review Board Administrative Rule ("LCRB Rule") 49-0130 require that all Metro public improvement contracts shall be procured based on competitive bids, unless exempted by the Metro Council, sitting as the Metro Contract Review Board; and

WHEREAS, Metro's LCRB Rules 49-0600 to 49-0670 authorize the Metro Contract Review Board to exempt a public improvement contract from competitive bidding and direct the appropriate use of alternative contracting methods that take account of market realities and modern innovative contracting and purchasing methods, so long as they are consistent with the public policy of encouraging competition, subject to the requirements of ORS 279C.335; and

WHEREAS, ORS 279C.335(5)(a) and LCRB Rules 49-0630 through 49-0670 require that the Metro Contract Review Board hold a public hearing and adopt written findings establishing, among other things, that the exemption of a public improvement contract from competitive bidding is unlikely to encourage favoritism or substantially diminish competition for public improvement contracts; and that said exemption will likely result in substantial cost savings to Metro; now therefore

BE IT RESOLVED THAT THE METRO CONTRACT REVIEW BOARD:

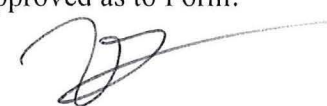
1. Exempts from competitive bidding the procurement and award of a Progressive Design-Build public improvement contract for the reconstruction of the Lone Fir Cemetery Retaining Wall.
2. Adopts as its findings in support of such exemption the justification, information and reasoning set forth on the attached Exhibit A, which is incorporated herein by reference as if set forth in full; and
3. Authorizes the Chief Operating Officer to:

- 3.1 Prepare a form of Request for Proposals for Progressive Design Build Contractor services that includes as evaluation criteria for contractor selection:
- Contractor's proposed fees for design and pre-construction services
  - Contractor's proposed overhead and profit for construction services
  - Contractor's demonstrated public improvement design build project experience and expertise
  - Contractor's record of completion of projects of similar type, scale and complexity
  - Contractor's demonstrated quality and schedule control
  - Contractor's experience with design, permitting and managing construction in the context of sensitive historic resources
  - Contractor's experience in incorporating sustainability construction practices and design into projects
  - Contractor's demonstrated commitment to workforce diversity and record of use of subcontractor businesses certified by the Certification Office of Business Inclusion and Diversity (COBID)
  - Any other criteria that ensure a successful, timely, and quality project, in the best interest of Metro and in accord with ORS 279C.335(4)(c) and LCRB Rule 49-1670; and
- 3.2 Following the approval of said form of Request for Proposals and Contract by the Office of the Metro Attorney, to issue such approved form, and thereafter to receive responsive proposals for evaluation; and
- 3.3 Following evaluation of the responses to the Request for Proposals, authorizes the Chief Operating Officer to execute a contract with the most advantageous proposer to design and construct the Lone Fir Cemetery retaining wall.

ADOPTED by the Metro Council this 25<sup>th</sup> day of April, 2019

  
\_\_\_\_\_  
Lynn Peterson, Council President

Approved as to Form:

  
\_\_\_\_\_  
Nathan A. S. Sykes, Acting Metro Attorney

**Findings in Support of an Exemption from Competitive Bidding and Authorizing the Procurement by RFP of the Progressive Design-Build Lone Fir Retaining Wall Project**

Pursuant to ORS 279C.335(2) and (4), and Metro Contract Review Board Administrative Rules Sections 49-600-670, the Metro Contract Review Board makes the following findings in support of exempting the procurement of the Lone Fir Retaining Wall Project from competitive bidding, and authorizing use of an RFP solicitation for a Progressive Design-Build public improvement construction contract:

**1. The exemption is unlikely to encourage favoritism or substantially diminish competition.**

The Metro Contract Review Board finds that exempting the procurement of the construction of the Progressive Design-Build Lone Fir Retaining Wall Project from competitive bidding is “unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts” as follows: The RFP will be formally advertised with public notice and disclosure of the planned Progressive Design Build contracting method and made available to all qualified contractors. Award of the contract will be based on the identified selection criteria and dissatisfied proposers will have an opportunity to protest the award. Full and open competition based on the objective selection criteria set forth in the Metro Contract Review Board resolution will be sought, with the contract award going to the most advantageous proposer. Competition for the RFP will be encouraged by: Posting on ORPIN (Oregon Procurement Information Network), utilizing the Oregon Daily Journal of commerce and a minority business publication for the public advertisement; performing outreach to local business groups representing minorities, women, and emerging small businesses and by contacting contractors known to Metro to potentially satisfy the RFP criteria. Those proposers not selected by Metro will have an opportunity to protest the award.

**2. The exemption will likely result in substantial cost savings to Metro.**

The Metro Contract Review Board finds that exempting the procurement of the Lone Fir Retaining Wall Project from competitive bidding will likely result in substantial costs savings to Metro, considering the following factors required by OAR 137-049-0630 and ORS 279C-335 2(b):

*(A) How many persons are available to bid;*

As this procurement pertains to an established trade, there are dozens of firms in the Portland metro area, including numerous COBID-certified firms, that are independently qualified to meet Metro’s needs, or can partner with other firms to qualify as a team to provide the desired services.

*(B) The construction budget and the projected operating costs for the completed public improvement;*

This procurement addresses work that will likely be subjected to significant public comment, design review and conditions of approval by authorities having jurisdiction. By integrating design and construction services into a single contract, the project will be better able to respond to public input and control costs by determining the most cost-effective methods of satisfying conditions of approval. Metro will retain the ability to cancel the Construction Contract prior to the construction phase and procure construction services through

competitive bid should continuing the relationship with a Progressive Design-Build contractor prove undesirable.

*(C) Public benefits that may result from granting the exemption;*

Expected benefits include:

- Obtaining, through a Progressive Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;
- Improved ability to respond to public input and conditions of approval by integrating design consultant and construction contractor expertise into a single point of contact;
- Reduction of risk of design flaws, misunderstandings and conflicts inherent to contractors performing based on designs in which they have had no opportunity for input, therefore reducing the likelihood of contract claims and increasing the likelihood of cost-savings through increased efficiency;
- Increased quality of work due to greater coordination of efforts between design and construction phases and the ability to evaluate prospective contractors on multiple factors including experience, expertise, and commitment to sustainability and diversity/inclusion, not just pricing;
- Shortening project time as construction activity may commence prior to completion of a biddable design;
- Reduced project duration as multiple procurement processes are reduced to a single request for procurement early in the project.

*(D) Whether value engineering techniques may decrease the cost of the public improvement;*

By bringing an experienced contractor on early in the project to perform design and constructability assessments simultaneously, the potential for change orders during construction is greatly reduced, which translates into savings of both time and money when compared to other approaches to the design and construction of similar projects.

*(E) The cost and availability of specialized expertise that is necessary for the public improvement;*

The scopes of work to be performed under this procurement require technical expertise in construction on and around protected historic resources. Granting this exemption will allow an RFP process that allows for selection criteria accounting for such experience as well as cost, and not just low bid.

*(F) Any likely increases in public safety;*

Construction impacts from this project are anticipated to temporarily reduce pedestrian and/or vehicle access along the south side of SE Stark Street adjacent to Lone Fir Cemetery. Integrating design and construction services into a single contract will help ensure close coordination and management of any potential public safety considerations for pedestrians.

*(G) Whether granting the exemption may reduce risks to the contracting agency, the state agency or the public that are related to the public improvement;*

An exemption will allow for better control of risks related to:

- Project costs and schedule delays by reducing/eliminating unforeseen conditions and associated change orders through advanced collaboration between designers and those constructing the improvements;
- Communication and misinterpretation or misunderstandings between the designer and builder as design and construction will be performed by the same contractor;
- Design flaws and contractor claims due to design inadequacies as the designer and builder will be one and the same. This reduces the likelihood of Contract claims as Metro will be better able to hold a contractor accountable for a design or construction error because the contractor will not be able to deflect responsibility toward another firm.

*(H) Whether granting the exemption will affect the sources of funding for the public improvement;*

This exemption is not expected to affect the sources of funding for related public improvements.

*(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;*

The exemption will allow for better control of increases to project costs and schedules by reducing/eliminating unforeseen conditions and associated change orders through advanced and continuous coordination of the design and construction tasks being performed by a common contractor. Metro will retain the ability to procure construction service through competitive bid should continuing the relationship with a Progressive Design-Build contractor prove undesirable.

*(J) Whether granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement;*

The exemption will allow for closer and continuous coordination of investigation, design and implementation efforts, thus allowing the Progressive Design-Build contractor the opportunity to either simplify a project's relative complexity or ensure that those performing construction have a sufficient understanding of the technical requirements of the work. This increases the likelihood of stimulating innovative design solutions while addressing public input through the collaboration of the construction contractor and design team.

*(K) Whether the public improvement involves new construction or renovates or remodels an existing structure;*

This project will modify and repair an existing structural wall adjacent to a public right-of-way. As such, new construction and/or significant modifications in the public right-of-way may be necessary as a condition of approval from authorities having jurisdiction.

*(L) Whether the public improvement will be occupied or unoccupied during construction;*

It is anticipated that Lone Fir Cemetery will remain open during construction, though access to areas adjacent to the work site may be temporarily restricted. Additionally, access to public right-of-ways adjacent to the work site will be temporarily restricted to facilitate the safe performance of construction tasks.

*(M) Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions; and*

A single phase of construction work is anticipated at this time. Conditions of approval imposed by authorities having jurisdiction may require additional phasing. The Progressive Design-Build method of contracting will allow the project team to efficiently adapt the Project to these requirements prior to subcontractor bidding.

*(N) Whether the contracting agency or state agency has, or has retained under contract, and will use contracting agency or state 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 or state agency will use to award the public improvement contract and to help negotiate, administer and enforce the terms of the public improvement contract.*

Metro has the internal personnel expertise and experience, and if needed, access to consultants who can ensure the successful use of an alternative Progressive Design-Build contracting method. Several members of the Metro Procurement staff have recently completed training specific to the administration of Design-Build procurements. The staff of Metro's Construction Project Management Office (cPMO) are well-versed in the strategies and business practices necessary to effectively implement, monitor and control Design-Build capital projects. Third-party consultants may be enlisted to provide cultural resource assessments and monitoring, and independent cost estimate reviews to inform Metro personnel in their negotiation, administration and enforcement of the contract.

### **3. Additional Findings:**

*A. Industry practices, surveys, trends.* The industry-accepted benefits of the Progressive Design-Build method include:

- Integrated design process results in a better, more “constructable” design that meets the owner’s objectives
- Encourages competition, especially for COBID subcontractors
- Can be completed in a faster time frame
- Costs less than a design-bid-build project that is designed and constructed in the traditional manner
- Reduces the risks of delays, cost overruns, and disputes
- Reduces the likelihood of change orders for unforeseen conditions

*B. Past experience and evaluation of Metro Progressive Design-Build projects.* The Progressive Design method is a relatively new hybrid of the Design-Build and CM/GC construction methods, and as such Metro has no experience with the model. However, Metro has extensive past experience with both the Design Build and CM/GC methods upon which the method is based.

*C. Benefits and drawbacks of Progressive Design Build to Lone Fir Retaining Wall Project.*

The benefits are as stated above in these findings, with the additional benefit that the use of the Progressive Design-Build method of construction and procurement on this relatively small project allows Metro to gain experience with the hybrid and provide a post-project evaluation informing Metro's use of the method for future projects. Metro staff sees no drawbacks in the approach.

## **STAFF REPORT**

IN CONSIDERATION OF RESOLUTION NO. 19-4978 FOR THE PURPOSE OF AUTHORIZING AN EXEMPTION FROM COMPETITIVE BIDDING AND PROCUREMENT OF PROGRESSIVE DESIGN BUILD CONSTRUCTION SERVICES BY COMPETITIVE REQUEST FOR PROPOSALS FOR DESIGN AND CONSTRUCTION OF A RETAINING WALL AT LONE FIR CEMETERY

Date: April 11, 2019

Prepared by: Chris Woo, Metro cPMO

### **BACKGROUND**

The retaining wall along the northern boundary of Lone Fir Cemetery is in need of structural repair or reconstruction to protect public safety and preserve the portion of the property adjacent to SE Stark Street.

The north retaining wall is approximately 1,500 feet long and is a mix of construction types, including poured concrete, concreted-skimmed boulders and rubble. The areas of greatest concern are located in the western half of the wall (approx. 800 linear feet) where cracking, bulging, spalling and other damage have been documented. Significant erosion in steeply sloped soils above the wall have also been observed. Wall height in this area ranges between five and seven feet above the adjacent sidewalk along SE Stark Street. In addition to structural and civil scopes of work needed to address the retaining wall deficiencies, permitting and design review by authorities having jurisdiction (AHJs) will increase the complexity of the work given the historic status of the cemetery and the need to minimize disruptions to adjacent properties and avoid disturbing burials inside the cemetery. Improvements to the adjacent public right-of-way and the preservation of trees and historic elements may also be required by AHJs as a condition of approval for this work.

Anticipated Benefits. Metro construction management staff have identified the progressive design-build method of construction as the best approach for executing this project. The progressive design-build method utilizes a single consultant/contractor (a.k.a. design-builder) to carry out both design and construction work. By integrating design, plan preparation, permitting, construction, value engineering, and quality control into a single point of responsibility, Metro will be better able to address the technical needs of the project while simultaneously meeting community expectations and managing associated risks. A single design-build procurement will assist in expediting project timelines and avoid shifting consultant/contractor risk/liabilities to multiple parties. The risk of design flaws, misunderstandings and contract claims will be reduced, because the designer and general contractor will be in continuous coordination. The likelihood of change orders will be reduced because pricing for construction will be



controlled through the establishment of a guaranteed maximum price agreement once a sufficient level of design detail has been reached. Through the alternative procurement process, the design-builder will be selected by way of a value-based Request for Proposals process. This process will allow for selection of a consultant/contractor based on multiple criteria, including price, experience, professional qualifications, diversity and sustainability practices.

The attached resolution and findings in Exhibit A describe the specialized nature of this project. Based on these findings, the Metro procurement manager and cPMO staff believe a value-based selection process is more appropriate than a traditional, competitive bid (which solely considers lowest bid price). Parks & Nature, as well as the Office of the Metro Attorney concur.

Therefore, staff seeks Council authorization to pursue the alternative procurement of Progressive Design Build services by a competitive Request for Proposals, for the design and construction of the retaining wall at Lone Fir Cemetery. This will allow Metro to consider cost as well as experience and expertise in completing similar projects and in selecting the most advantageous contractor for this project.

#### **ANALYSIS/INFORMATION**

1. **Known Opposition:** None
2. **Legal Antecedents:** LCRB Rules 49-0600 through 49-0670; Oregon Revised Statute 279C.335.
3. **Anticipated Effects:** The Public procurement process will be open and competitive, but criteria other than cost will be considered in the awarding of the contract. Increased use of COBID contractors and subcontractors is anticipated.
4. **Budget Impacts:** The Progressive Design Build contracting method offers safeguards for schedule and cost control of the project, including early involvement by the construction contractor in the design process, as well as limited change orders.

#### **RECOMMENDED ACTION**

The Chief Operating Officer recommends adoption of Resolution No. 19-4978.

Structural Analysis – Lone Fir Cemetery Retaining Wall  
April 14, 2016

Photos



Photo 1 – Existing Wall looking east

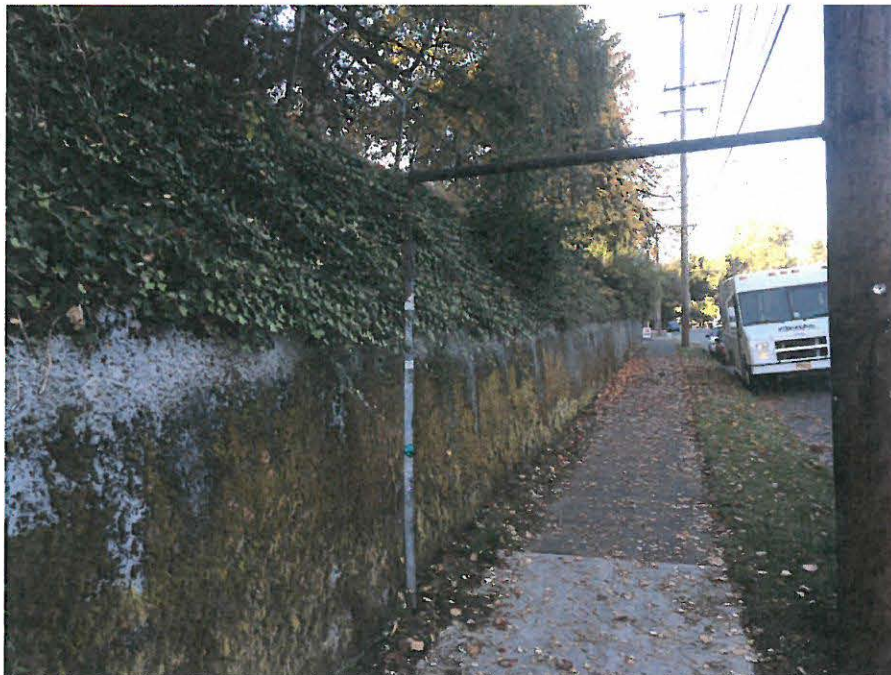


Photo 2 – Existing Wall looking west





Photo 3 – Close-up of deteriorated portion



Photo 4 – Close-up of repaired portion

Structural Analysis – Lone Fir Cemetery Retaining Wall  
April 14, 2016



Photo 5 – Grave site near top of wall and chain link fence