

**DRAFT**  
**FINDINGS OF FACT SUPPORTING AN EXEMPTION FROM COMPETITIVE BIDDING**  
**REQUIREMENTS AND ALLOWING THE USE OF**  
**THE CONSTRUCTION MANAGER/GENERAL CONTRACTOR (CM/GC)**  
**COMPETITIVE SELECTION PROCESS**

**EXEMPTION #2007-51**

Before the Director, Department of Transportation  
of the State of Oregon

In the Matter of the Exemption Request	)	FINDINGS OF FACT,
For the Willamette River Bridge, Bundle 220 on	)	CONCLUSIONS AND ORDER
Interstate 5, a National Highway System Highway	)	
located in Lane County, Oregon by the	)	
Oregon Department of Transportation	)	

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 lowest responsive and responsible bidder. ORS 279C.335(2) permits the Director of the Department of Transportation (“ODOT”), to grant, under certain conditions, specific exemptions to the Oregon Department of Transportation 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(5) a public hearing must be held before these findings are adopted, allowing the opportunity for all interested parties to comment on the draft findings.

This request for exemption was advertised in the *Daily Journal of Commerce* and *Reed Business Information* on [REDACTED]. It was also posted on the ODOT website at:  
[http://www.oregon.gov/ODOT/HWY/OPD/DB\\_Home.shtml#CM\\_GC\\_Projects](http://www.oregon.gov/ODOT/HWY/OPD/DB_Home.shtml#CM_GC_Projects).

The hearing for review of these findings was held at [REDACTED], at the Department of Transportation, 680 Cottage St. NE, Salem, Oregon 97301. There were [REDACTED] 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.

**I**  
**FINDINGS OF FACT**

**A) Background**

## **1. Project Description - I-5 Willamette River Bridge (WRB), Bundle 220 in Lane County, Oregon.**

ODOT proposes to enter into a Construction Manager/General Contractor (CM/GC) contract on or about April 10, 2008. The I-5 Willamette River Bridge Project will replace two (2) bridges on Interstate 5 (I-5) in Lane County: the 1,800-foot Willamette River Bridge and the 100-foot Canoe Canal Bridge. ODOT built detour bridges at both locations in 2004 and the existing bridges have been decommissioned. Both detour bridges will be removed as part of this project.

In addition to crossing the Willamette River, both the existing bridge and the 1,993-foot detour bridge cross bicycle/pedestrian paths on both sides of the river, Franklin Boulevard, the mainline Union Pacific Railroad, and the northbound I-5 to westbound Franklin Boulevard off-ramp.

The estimated value of the CM/GC contract is \$150 million. Construction is expected to be completed by December 2012.

## **2. Agency Considerations**

Prior to adoption of the OTIA funding packages, ODOT was delivering projects with a total value averaging approximately \$300 million annually. Since the advent of the OTIA I, II and III funding sources, that average has risen to over \$600 million annually. Volumes are expected to continue at that level through at least 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 legislature mandated that ODOT deliver the OTIA program with current staffing. One of the project delivery approaches encompassing economic efficiency is appropriate use of CM/GC.

In 2002, ODOT identified shear cracks in the Willamette River Bridge. Weight limits were posted that forced heavy haul trucks to detour 200 miles on an alternate route. ODOT constructed a temporary bridge as an interim solution to keep the route open for freight and other vehicles until a new bridge could be built. When the temporary bridge opened in 2004, the old bridge was decommissioned and left in place.

This project involves several issues that require close coordination between the designer and construction contractor to assure the project can be built rapidly and efficiently. The project includes three (3) major transportation corridors: I-5, the primary north-south highway on the west coast; the Union Pacific Railroad mainline, the primary north-south rail line on the west coast; and Franklin Boulevard, a state highway and a primary link between Springfield and Eugene. Traffic on these important transportation facilities must be maintained during construction and delays minimized. The bridges also cross three (3) bicycle/pedestrian paths, the Willamette River and Canoe Canal which are used for recreation. Bridge demolition and construction will create safety hazards for people using the paths and waterways which can be minimized by reducing the construction schedule. In addition, in-water work is restricted to a five (5) month window to protect natural resources. Maintaining the construction schedule while addressing these constraints will require constructible plans and very complex scheduling. It may also be beneficial to accomplish some construction activities such as removal of the decommissioned bridges prior to completion of the design.

ODOT performed an internal evaluation of the project delivery factors and concluded that using the traditional design-bid-build project delivery method has an unacceptable risk that the project will not be delivered within budget targets and by the targeted completion date. Conversely, an extensive evaluation

of the CM/GC delivery method for the project resulted in ODOT's determination that there is a high probability of meeting the project delivery goal using that method.

The CM/GC process, as a proposed alternative to the competitive bid process, is becoming a more common approach for certain types of projects by public agencies both within and outside the State. The Public Contracting Coalition, composed of a diverse group of professionals involved with public contracting, developed a White Paper to help guide the process for considering the CM/GC process. Some recommendations contained in the document were incorporated into ORS 279C by the legislature. The White Paper has been followed by a new publication called the Oregon Public Contracting Coalition Guide to CM/GC Contracting written by Construction Engineering Management Program, Department of Civil, Construction, and Environmental Engineering Oregon State University, February 2002, available on-line at ([http://www.agc-oregon.org/public/resource\\_center/CM\\_GC\\_Guide\\_final.pdf](http://www.agc-oregon.org/public/resource_center/CM_GC_Guide_final.pdf)). Additionally, there is a growing recognition that, for certain projects, better delivery methods exist than competitive bid. 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 competitive bid process was the least efficient. This data and a growing pool of other information from other states and the Federal government continue to support the need to consider alternatives to competitive bidding for certain projects.

## II FINDINGS REGARDING REQUIRED INFORMATION

ORS 279C.330 provides that: *“‘Findings’ means the justification for an agency conclusion that includes, but is not limited to, information regarding: (a) Operational, budget and financial data. (b) Public benefits. (c) Value Engineering. (d) Specialized expertise required. (e) Public safety. (f) Market conditions. (g) Technical complexity. (h) Funding sources.”* Many of these criteria support the decision to use the CM/GC contracting method for this Project. This finding is supported by the following facts:

### A) **Operational, Budget and Financial Data**

ODOT has \$150 million in OTIA III funding for the bridge replacements and an additional \$30 million in federal funds earmarked for this project. ODOT considers completing this project a high priority. The total project cost is estimated to be approximately \$180 million dollars.

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

The project will require as much knowledge as possible regarding the constructability and long term cost/benefit analysis of innovative design. That knowledge is best obtained directly from the construction industry. Many decisions will have to be made during the design process that will require immediate feedback on constructability and pricing. Under the traditional design-bid-build process, there is a significant risk of a high amount of change orders and schedule impacts for a project of this size and complexity. ODOT uses a 4.3% inflation factor when estimating construction costs. With an estimated construction cost of \$150 million, inflation of this project will be approximately \$540,000/month. Since there are significant costs associated with delay, time is of the essence. The CM/GC process will assist in providing a scope of work and constructible design that best meet the requirements of the project with significantly lower risk of cost overruns do to delay and redesign. Involving the contractor during design

will allow potential risks to be addressed early and provide the contractor with a detailed knowledge of the project which are expected to result in lower construction costs.

**B) Public Benefits**

The CM/GC method of delivery will ensure rapid completion of this project, and therefore contribute toward meeting the goals and schedule objectives of the OTIA III Bridge Delivery Program. The fast-track delivery process provided by the CM/GC method for this project provides the means for ODOT to meet the goals and objectives of the 1999 Oregon Highway Plan by improving safety and maintaining connectivity and mobility for all users of Interstate 5 corridor crossing the Willamette River in the Eugene/Springfield Metropolitan Area. Traffic will be moved off the temporary detour bridge, which is not designed to withstand earthquakes, and does not meet federal standards for permanent interstate bridges. In-addition, completion of this project will also benefit the public by supporting regional and statewide economies.

**C) Value Engineering**

Value Engineering (VE) is encouraged on all projects by ODOT, and has resulted in both initial savings as well as long-term savings for other ODOT projects. The unique process and relationship of the owner, construction contractor and the designer under the CM/GC process fosters a team approach to value engineering which features continuous constructability reviews. In essence, this method allows the value engineering process to happen all the way through the project, not just during the design process. Multiple options for high cost or impact items, such construction methods, materials, environmental permitting and local design requirements are analyzed in real time to determine cost/benefit analysis.

Under the traditional design/bid/build method, value engineering occurs once during the design phase. With design-bid-build, any savings from value engineering measures suggested by the construction contractor is divided between ODOT and the contractor. Under CM/GC, those savings accrue to the State.

**D) Specialized Expertise Required**

Expertise and innovation are required in coordinating with design development; pre-construction and construction phase services in a “fast track” CM/GC contracting method; providing value engineering and constructability reviews; scheduling and estimating, assessing and mitigating risks, competitively bidding and selecting subcontractors and managing subcontractors. In addition, specialized expertise is required to successfully address the public safety issues noted below.

**E) Public Safety**

Safe traffic flow must be maintained while construction proceeds. It is crucial that all work be coordinated between work sites to avoid unnecessary delay and safety risks to the traveling public, and to ensure efficiency in construction.

The coordination between the owner, designer and the contractor in the CM/GC method of contracting should assure coordination of work, resulting in shorter lane closure and detour times. It will also assure full consideration for the safety of users of the waterways and pedestrian paths crossed by the project. In addition, CM/GC contracting of this project will ensure all is being done in a “fast track” mode to minimize delays.

**F) Market Conditions**

Unemployment rates recently posted on the Oregon Employment Department's Oregon Labor Market Information System web site states that Oregon's unemployment rate remains one of the 10 highest in the country and the second-highest among the 11 western states. The Governor and the Legislature have strongly encouraged ODOT to contract for and construct projects quickly to both take advantage of lower bid and proposal prices in the current market and to improve local employment. ODOT conservatively estimates that the OTIA III Bridge Program will sustain an annual average of 5,000 family-wage jobs over the life of the program. The OTIA III program makes a significant contribution to Oregon jobs and the Oregon economy: for every \$1 million invested in transportation construction related spending supports about 17 family-wage jobs on a year-to-year basis. Once the program is complete, a revitalized transportation infrastructure will continue to positively affect the state's economy. Over the project life cycle, this project could therefore generate approximately 2550 local jobs (\$ 150 million X 17 jobs/million)/ 5 year job life = 510 jobs per year), assuming a \$ 150 million construction contract value for purposes of this calculation.

The CM/GC approach to this Project could leverage more direct jobs in Oregon at prevailing wage rates and increase the potential of local business opportunities for Minority Owned, Women Owned, and Emerging Small Business Enterprises. Furthermore, since use of the CM/GC contracting method on this project is expected to accelerate start of construction by approximately one (1) year, such a jump start would make those jobs available that much sooner.

#### **G) Technical Complexity**

Technical expertise will be required for environmental management, quality management, scheduling, estimating, traffic control, and construction. However, the project will draw upon existing skills and capabilities available in the construction community, and presents overall challenges similar to those faced on many ODOT projects. Specialized skills will be required of the CM/GC to negotiate and price multiple options and schedule complex tasks. A high level of coordination between the owner, design and construction entities is required and facilitated by the CM/GC approach.

The ODOT project management team for this project will ascertain and utilize the lessons learned, processes and guidance from other state agencies, and knowledgeable consultants who have demonstrated capacity of managing the CM/GC process.

#### **H) Funding Sources**

As mentioned earlier, ODOT has obligated funding for this project in the Statewide Transportation Improvement Program, OTIA III Bridge Delivery Program and federal funding earmarked for this project.

### **III FINDINGS REGARDING COMPETITION**

ORS 279C.335(2) requires that an agency make certain findings as a part of exempting certain public contracts or classes of public contracts from competitive bidding. ORS 279C.335(2)(a) requires an agency to find that: *"It is unlikely that such exemption will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts"*. ODOT finds that selecting the CM/GC through an exempted competitive proposal selection process will not inhibit competition or encourage favoritism. This finding is supported by the following facts:

As outlined below, ODOT anticipates that competition for this contract will be similar to that expected in other projects of this type. ODOT processes for procurement of the CM/GC will be developed to maintain competition.

- A) The competition will remain open to all qualifying proposers. Numerous firms have expressed interest in this project.
- B) ODOT has been communicating with the construction contracting community about the CM/GC contracting method.
- C) Pursuant to ORS 279C.360, the CM/GC solicitation was advertised in the *Daily Journal of Commerce* and *Reed Business Information*. In addition, it was posted on the ODOT Major Projects Branch website at:  
[http://www.oregon.gov/ODOT/HWY/OPD/DB\\_Home.shtml#CM\\_GC\\_Projects](http://www.oregon.gov/ODOT/HWY/OPD/DB_Home.shtml#CM_GC_Projects)
- D) **Full Disclosure and Competitive Bidding**

To ensure full disclosure of all Project requirements, the Request for Proposals (RFP) solicitation package will include the following elements:

- 1) Purpose, Definitions, Background, Overview
- 2) Services to be provided
- 3) Proposal requirements
- 4) Evaluation of proposals
- 5) Selection and award
- 6) Solicitation schedule and procedures

**E) Selection Process:**

The Selection Process will include the following elements:

- (1) A mandatory pre-proposal meeting, open to all interested parties, will be held at least ten (10) days prior to the close of the solicitation and will offer the opportunity for potential proposers to ask questions, request clarifications, and suggest changes to the solicitation documents. Only those attending this mandatory meeting will be allowed to submit proposals.
- (2) The evaluation process will include the following steps:
  - a) Proposals will be evaluated by an Evaluation Committee for completeness and compliance with the requirements listed in the RFP.
  - b) Proposals considered complete and responsive will be evaluated under the criteria of the RFP.
  - c) Members of the Evaluation Committee will independently score the proposals.
  - d) A group of up to eight (8) of the highest scoring Proposers will be short-listed through the receipt of an invitation to interview. Only those proposers receiving an invitation to interview will move to the next phase of the evaluation process.

- e) The Evaluation Committee will conduct interviews of the short-listed proposers.
  - f) After completion of interviews, the Evaluation Committee will perform a final scoring of the proposals. Based upon these revised scores, the Evaluation Committee will rank the Proposers, and provide an award recommendation.
  - g) ODOT will attempt to negotiate a contract with the top ranked firm. If negotiations are not successful, negotiations will be conducted with the next ranked firm. Upon expiration of the mandatory award protest period, ODOT will enter into a contract with the successful CM/GC.
- (3) Competing proposers will be notified in writing of the selection and be given a copy of their evaluation scores.
  - (4) The contract awarded through this process will require the CM/GC to use an open competitive selection process for all subcontracted components of the job, unless waived by ODOT.
- F) Subcontractor Selection for Competitively Bid Construction Work -** The competitive process used to award subcontracts for all competitively bid construction work will be specified in the contract and will be monitored by ODOT. The following specific minimum requirements shall apply:
- (1) ODOT will designate in the contract the percentage of construction work that must be competitively bid.
  - (2) ODOT will designate in the contract the percentage of competitively bid construction work that must be subcontracted and may not be self-performed by the CM/GC.
  - (3) The CM/GC will be required to self-perform a percentage of all non pre-construction phase services work.
  - (4) For those items of construction work for which the CM/GC or any of its subsidiaries, or affiliates, or businesses in which it has a financial interest intends to provide a bid, such intention must be publicly announced in the approved manner at least 21 calendar days prior to receipt of bids, unless a shorter time is approved by ODOT. Bids will then be required to be delivered to ODOT, and opened by ODOT at an announced time, date and place.
  - (5) Solicitations will be advertised at least 21 calendar days prior to subcontractor bid opening, unless a shorter time period is approved by ODOT. Solicitations will be advertised in the Daily Journal of Commerce and at least one (1) other newspaper.
  - (6) All bids will be written and submitted to a specific location by a specified time unless other prior arrangements have been made with ODOT. All bidders will be required to be registered with the Construction Contractors Board and/or the State Landscape Contractors Board.
  - (7) The subcontract will be awarded to the lowest bidder, unless this requirement is specifically waived by ODOT in accordance with ODOT specifications.
  - (8) If fewer than three (3) bids are submitted, ODOT approval will be required prior to acceptance of the bid.

- (9) Prevailing wage rates and selected standard terms and conditions of the CM/GC contract shall apply.

**V  
FINDINGS REGARDING SUBSTANTIAL COST SAVINGS**

ORS 279C.335(2) requires that a public agency make certain findings as part of exempting certain public contracts or classes of public contracts from competitive bidding. ORS 279C.335(2)(b) requires an agency to find that “*The awarding of public contracts pursuant to the exemption will result in substantial cost savings to the public contracting agency*”, or, *if the contracts are for public improvements as described in ORS 279A.050(3)(b)* (such as this one), *to the contracting agency or to the public*. These findings therefore consider whether cost savings accrue directly to ODOT as the contracting agency or indirectly to the general public (particularly for highway users). ODOT projects that on this project substantial cost savings will accrue to ODOT and the public. This finding is supported by the following facts:

**A) Direct Cost Savings**

- 1) The current estimated construction cost of this project is \$150 million. ODOT uses an inflation rate of 4.3% when estimating project costs. ODOT will save approximately \$535,000 in inflation for each month construction can be accelerated. Accelerating construction by one (1) year could result in a savings of approximately \$6.5 million.
- 2) The CM/GC contracting method involves the construction contractor in the design phase, allowing: ongoing constructability review; quick cost comparisons between various design options; the ability to identify and mitigate potential construction risks early; and a substantial amount of time for the contractor to become very familiar with all aspects of the project prior to developing the GMP as opposed to the typical four (4) weeks they have under hard bid. These factors should result in lower risk factors in the GMP and a lower construction cost than under low-bid contracting.
- 3) The Oregon Department of Corrections has significant value engineering experience with the CM/GC process and has achieved identified savings of 5% of the estimated construction costs. Our goal would be to match or exceed this savings. Estimated cost savings for this project, utilizing the project cost of \$150,000,000 and the 5% factor is \$7,500,000.

**B) Total Expected Savings:**

While there is some indication that initial contract prices will be reduced through the use of the CM/GC contracting method, it is difficult to estimate a probable amount. However, accelerating construction on this project by one (1) year and savings from value engineering could save approximately \$14 million (See table below).

Estimated Direct Contract Cost Savings Summary:

<b>Subsection</b>	<b>Anticipated Savings</b>
1.1 Inflation Cost Containment	\$6,500,000
1.2 Value Engineering	\$7,500,000
<b>Total</b>	<b>\$14,000,000</b>

**C) Post Project Evaluation:**

Upon completion of the Project, in accordance with ORS 279C.355, ODOT will perform a post-contract evaluation and include an analysis of project costs and savings. The evaluation report will be made public through the ODOT Major Projects Branch website.

**VI  
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 279C.335(4), and ODOT will perform the post project evaluation required by ORS 279C.355. Based upon the previously listed findings, ODOT specifically concludes that:

- A)** Following the described selection process, an exemption is unlikely to encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts.
- B)** Award of a public contract pursuant to the exemption will result in 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 Construction Manager/General Contractor (CM/GC) alternative contracting method as described in the preceding findings. This order is subject to the following conditions:

- 1) To the extent possible and consistent with this Exemption, this procurement will follow the provisions of ORS Chapter 279A and 279C, ORS Chapter 291; OAR Chapter 731, Division 5 (ODOT Public Contract Rules) and Division 7 (ODOT Public Improvement Contracts).
- 2) ODOT, in concert with the Department of Justice (DOJ), shall establish and follow standards for evaluating proposals under this procurement.
- 3) ODOT shall work with DOJ to adapt standard contract language for the contract, and shall incorporate into the contract such additional or substitute additional terms that DOJ may determine to be necessary for compliance with Oregon law.

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Director, Department of Transportation

REVIEWED BY THE DEPARTMENT OF JUSTICE

\_\_\_\_\_  
Date

\_\_\_\_\_  
Assistant Attorney General