

EXHIBIT A

PRICE AGREEMENTS FOR CONSTRUCTION SERVICES FOR WASTEWATER TREATMENT PLANT AND PUMP STATION PROJECTS FACTUAL FINDINGS FOR PROPOSED CONTRACT EXEMPTION FROM COMPETITIVE BIDDING

The Portland Bureau of Environmental Services (BES) and the City of Portland Procurement Services (“Procurement Services”) recommend that the Portland City Council (“Council”) approve the following factual findings, including the Additional Findings (as hereinafter defined) (collectively, the “Findings”) to exempt Price Agreements for Construction Services for Wastewater Treatment and Pump Station Projects (“the Agreements”) from the competitive bidding requirements of ORS Chapter 279C and PCC 5.34 and to approve the alternative contracting method for the selection of Contractors through the Negotiated Request for Proposals (“RFP”) solicitation process. Capitalized terms used herein have the meaning ascribed to them in the Ordinance.

I. BACKGROUND

BES owns and operates the Columbia Boulevard Wastewater Treatment Plant (CBWTP), Tryon Creek Wastewater Treatment Plant (TCWTP) and nearly 100 sewage pump stations for the purposes of collecting, conveying and treating the City of Portland’s wastewater and a portion of the stormwater.

BES has an ongoing need for construction services for multiple smaller scale (<\$1,000,000 construction cost) projects to maintain acceptable levels of service of the assets located at CBWTP, TCWTP, and associated pump stations under the Pump Station Improvement and Repair, Rehabilitation, and Modifications capital improvement shell programs.

Currently, BES has two Price Agreements in place that have been extremely effective in delivering urgent projects to repair, rehabilitate and modify existing capital assets.

Price Agreements for construction services are a type of delivery method for construction and repair/maintenance projects where task orders are negotiated for a specific scope of work using contract established rates for labor, equipment, and markups for overhead and profit on labor, equipment, material and subcontractor direct costs. The Price Agreements allow for an increase in effectiveness and efficiency of project delivery at CBWTP, TCWTP, and associated pump stations. Projects that are constructed using the Price Agreements could be low bid at the time of procurement but normally would require significantly more additional design effort and time delays to finalize the design-bid-build method of project delivery. The Price Agreements are used because the scope of work to be performed is

urgent and is not overly complex and the full design is not fully defined until task orders are negotiated and executed.

BES estimates that up to three Price Agreements valued at \$6M each over a 5-year period are required for treatment plant and pump station smaller scale, urgent projects to repair, rehabilitate and modify existing capital assets.

The City's operations at the treatment plant and pump station project sites must continue throughout construction. The successful proposers will have significant flexibility in the means and methods of construction, but they will be required to coordinate closely with BES operations, maintenance and engineering staff in their execution and comply with the final design documents and all required permits.

The Agreements replace the existing Price Agreements for construction services that have reduced staff time and associated costs and have provided BES with a contracting tool that has enabled rapid response to urgent projects that could result in the release of partially treated or raw sewage to the environment.

Based on the Findings and conditions below, using an alternate competitive RFP procurement method for the Agreements will support successful completion of projects in the most efficient and cost-effective manner. Ordinarily, the City is required to use competitive sealed bidding (traditional low bid) as the process to award contracts for the proposed projects. Accordingly, the Agreements need to be exempted from the competitive bidding requirements of ORS 279C.300 and PCC 5.34.150 ("Exemption") which includes, among other things, the solicitation of competitive bids. The Council is the Local Contract Review Board with the authority to exempt contracts from the competitive bidding requirements of ORS 279C and PCC 5.34 if it can approve certain findings justifying an alternative approach.

With the present action, the Council will exempt the Agreements from the competitive bidding requirements of ORS 279C and PCC 5.34 and will authorize the RFP procurement method for up to three Price Agreements for construction services, valued at no more than \$6,000,000 per agreement, for treatment plant and pump station projects. The factual basis to support the required findings, including the Additional Findings, are set forth below.

II. NO FAVORITISM OR DIMINISHED COMPETITION

ORS 279C.335 (2) and PCC 5.34.830 require that Council make certain findings as a part of exempting public contracts or classes of public contracts from competitive bidding. ORS 279C.335 (2) (a) requires Council to make a finding that, "[i]t is unlikely that such an exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts," while PCC 5.34.830(A)(1) requires a finding that "[i]t is unlikely that the exemption will encourage favoritism in the Awarding of Public Improvement Contracts or substantially diminish competition for Public Improvement Contracts as further described in Subsection

5.34.830(F).” This finding is appropriate for the Project and is supported by the following facts.

The Contractors will be selected through a competitive Request for Proposals (RFP process). The RFP for the Contracts will be advertised in Portland’s Daily Journal of Commerce and on the City’s Online Procurement Center at least three weeks in advance of the deadline set for submitting responses to the RFP. The proposals will be evaluated by a Selection Committee using criteria established in the RFP advertisement. Scoring criteria will consider key project delivery factors, such as experience, technical expertise, project approach, key personnel and staffing, prime and subcontractor D/M/W/ESB/SDBE utilization, diversity programs, workforce training and hiring programs, safety record, and percentage profit and overhead markup. The Selection Committee will review and score the written proposals, hold interviews if needed, and recommend Contractors for award. As a result of the competitive RFP process, the use of an alternative contracting method for the class of Contracts is unlikely to encourage favoritism in the awarding of public contracts and will maintain competition.

III. SUBSTANTIAL COST SAVINGS

ORS 279C.335 (2) and PCC 5.34.830 requires that the Council make certain findings as part of exempting public contracts or classes of public contracts from competitive bidding. ORS 279C.335 (2) (b) requires Council to find that “[t]he awarding of public improvement contracts under the exemption will result in substantial cost savings to the public contracting agency,” while PCC 5.34.830(A)(2)-(3) requires a finding that “[t]he exemption will likely result in substantial costs savings and other substantial benefits to the City in accordance with ORS 279C.335(2)(b),” or for “the operation, maintenance or construction of highways, bridges and other transportation facilities, that the exemption will result in substantial cost savings to the City or to the public.” This finding is appropriate for the Project and is supported by the following facts.

The Agreements provide a mechanism for the project team to include the contractor in the project team during the design phase of each task order similar to the role of the contractor during project design during the preconstruction services phase of a CMGC contract. This early involvement of the construction contractor provides substantial cost savings by:

- reducing the level of design detail required in the plans and specifications to the level required by the contractor to complete the work;
- decreasing the cost of design clarification preparation and the administrative cost and staff time required to develop response contractor requests for information during construction;
- mitigating the risk and reducing the cost associated with contractor delays that may result from design revisions and change order processing and execution during construction;

- allowing the designer to tailor the project design to suit the contractor's proposed means and methods rather than preparing a design that can accommodate multiple contractor means and methods approaches;
- providing for value engineering reviews and recommendations by the contractor during project design to reduce overall cost without sacrificing function or quality of the finished product; and
- having contractors compete on markup and overhead during the RFP process, which locks in those percentages moving forward.

Additionally, the price agreement contracting method reduces costs because the task order negotiation, review, and approval process requires less staff and administrative time to get to a construction notice to proceed than is required for a competitively bid project. The expedited process also provides the bureau with a valuable tool to rapidly mobilize a contractor to address urgent construction needs without paying a premium or market factor adjustment.

The Contracts will establish labor rates, equipment costs and markups for overhead and profit on labor, equipment, material and subcontractor direct costs to be used for negotiation of task orders to complete each project. The transparency provided by the open book task order negotiation process using established contract rates together with cost and pricing data are anticipated to result in substantial cost savings.

IV. THE FACTUAL BASIS TO SUPPORT THE ADDITIONAL FINDINGS

In order to declare the exemption, the Council must approve additional findings in the areas set forth below (collectively, the "Additional Findings").

A. How Many Persons are Available to Bid

The pool of contractors eligible to propose on the RFP is not reduced by the negotiated Request for Proposal solicitation process. All qualified general contractors will have an opportunity to submit proposals as part of the RFP process.

B. The Construction Budget and the Projected Operating Costs for the Project

The projects completed under the Agreements will be funded by the Sewer System Operating Fund under the Pump Station Improvement Program and the Repair, Rehabilitation, and Modifications shell programs in the adopted CIP budget.

C. Public Benefits That May Result from Granting the Exemption

There are multiple potential public benefits in connection with granting the Exemption for the class of Contracts.

The time required for task order negotiation and development is significantly shorter than the time required for the competitive bidding process. This provides a public benefit by facilitating the completion of projects with a reduction in risk of interrupting the ability of existing facilities to treat or convey wastewater. During the design phase of each task order, contractor participation and feedback to the design team will be invaluable in determining design features that are critical to successful completion of each task order without impacting existing plant or pump station operations or neighboring businesses and residences. The public benefit is a lower risk of water quality issues related to impaired plant and pump station operations and a better ability to have the contractor participate in development of a design that allows for means and methods that minimize construction impacts on neighboring properties.

The alternative contracting method also allows the City opportunities to partner with the contractor and the contracting community during the Contractor's outreach during task order development to optimize utilization of D/M/W/ESB/SD/VE subcontractors to achieve equity goals.

The RFP process allows the contractor's expertise and commitment to furthering the City's equity contracting goals to factor into Project award, maximizing the opportunity to gain the stated benefits.

A public benefit of the procurement is that investment in developing workforce and contractor capacity is anticipated to increase the pool of available contractors and skilled tradespersons, providing economic and employment opportunities to communities currently underrepresented in the construction trades.

D. Whether Value Engineering Techniques May Decrease the Cost of the Project

Value engineering is defined as a process by which multiple subject experts evaluate and propose the most cost-effective ways to deliver a project without reducing project quality and functionality. Value engineering will be enhanced on the Price Agreement projects as it is on other projects where the contractor can be selected before the design is completed. In that way, the contractor's suggestions can be incorporated into the schematic design and design development stages, rather than have the value engineering proposals come after the design or after some of the construction is already completed, which may limit the amount of value engineering change that can be accomplished to the project and still meet schedule requirements as well as the design intent and design and permit requirements. Changes after a project is competitively bid can result in project delays for permit revisions and higher costs for the City.

Having the Contractor review the design prior to the start of construction best leverages the value engineering ideas that are accepted and incorporated into the final design. It is less expensive to implement ideas during the design phase than to wait and provide a change order and potential redesign during construction. The Task Order process for

this class of Contracts will allow for the contractor to participate on the project team during the design and permitting phase, allowing the City to realize the full benefits of value engineering.

E. The Cost and Availability of Specialized Expertise Required for the Project

The RFP process has no impact on the cost or availability of the specialized expertise required for the work to be completed under the price agreements because cost and competition are maintained through that process.

F. Likely Increases in Public Safety

The RFP contracting method allows a contractor's actual safety performance on similar projects to be considered as selection criteria. It also permits the City to work closely with the contractor to ensure that the contractor understands the City's safety concerns and that the contractor will take appropriate steps to address them. Because the treatment plant and pump station facilities are continuously operating, they must remain accessible for operations and maintenance activities by City staff at all times.

G. Whether Granting the Exemption May Reduce Risks to the City related to the Project

The work completed under the Price Agreements will be constructed on and adjacent to existing wastewater treatment plants and pump stations. The City's risk for a discharge permit violation is higher when temporary facilities required to modify an existing plant or pump station are in place. Using an alternative procurement method for the Price Agreements will allow the City to work with the contractor during the design phase of each project to minimize the risk of discharge permit violations. The interaction between the project design team and the contractor during the design process and task order negotiation process makes it far more likely that the final design will take into account any potential construction problems and allow early coordination of construction phases to minimize impacts to the plants, pump stations, and surrounding residents and businesses.

The RFP process for selecting contractors allows BES the opportunity to question the respondents to discern their expertise on contracting methods and phasing and maintenance of operations. This approach also offers the greatest flexibility, risk reduction, reliability, and ease of construction.

H. Whether Granting the Exemption will Affect the Funding Sources for the Project

The projects are funded by the Sewer System Operating Fund. The exemption will not impact funding of the projects.

I. Whether Granting the Exemption will Better Enable the City to Control the Impact That Market Conditions May Have on the Cost of and Time Necessary to Complete the Project

The RFP contracting method for the Price Agreements would reach the same, or greater, market of construction contractors as the traditional low bid process. The high-profile nature of the contracts will likely attract a strong regional market. Additionally, the evaluation criteria presented in the RFP may motivate Contractors that may be new to the City to participate in the procurement process.

By establishing direct cost markups and labor and equipment rates, and with an open-book task order negotiation process, the City will be able to avoid paying market adjustment factors that can be included in competitive bids when contractor availability is low or when projects are specialized and risky in nature.

J. Whether Granting the Exemption Will Better Enable the City to Address the Size and Technical Complexity of the Project

The anticipated work to be completed under the Agreements is relatively small in scale and low in technical complexity.

K. Whether the Project Involves New Construction or Renovates an Existing Structure.

The projects will involve renovations to existing developed sites and structures.

L. Whether the Project Will be Occupied or Unoccupied During Construction

The facility surrounding the projects will be occupied during construction.

M. Whether the Project Will Require a Single Phase or Multiple Phases of Construction Work to Address Specific Project Conditions.

The Price Agreements will provide for multiple task orders for construction work. Each task order will be completed in a single phase once construction commences.

N. Whether the City Has or Will Retain Personnel, Consultants and Legal Counsel that Have Necessary Expertise and Substantial Experience in Alternative Contracting Methods to Assist in Developing the Alternative Contracting Method and to Help Negotiate, Administer and Enforce the Terms of the Project Contract

City Staff have the expertise and experience necessary to effectively implement the procurement and to negotiate, administer and enforce the terms of the resultant contracts. Additionally, for many projects the City will use contracted design consultants that have the cost estimating, project management, construction management, and special project delivery experience to provide support to the City in task order development and construction administration, if necessary.

IMPACT STATEMENT

Legislation title: Approve findings to authorize an exemption for a class of public improvement contracts from the competitive bidding requirements and authorize the use of the alternative contracting method of Price Agreements for construction services (Ordinance)

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Purpose of proposed legislation and background information:

The purpose of this Ordinance is to authorize a class exemption to use the alternative contracting method of Price Agreements for construction services. In order to authorize a class exemption, City Council must approve findings that support the use of an alternative procurement and contracting delivery method for the projects covered under the class exemption. This Ordinance will allow BES to proceed with issuing a competitive solicitation to implement a more efficient contracting means than the traditional low bid process. The solicitation will be for up to three Price Agreements for Construction Services at the Columbia Boulevard Wastewater Treatment Plant (CBWTP), Tryon Creek Wastewater Treatment Plant (TCWTP), and associated Pump Stations. The Contractors will be selected on the basis of their proposals, with up to the three Contractors being selected. If there are not three (3) responsive proposals, the City may award less contracts, with the total sum of the contracts remaining consistent. The selected Contractors will each be issued a Price Agreement for construction work. The sum of all contracts shall be for \$18-million over a period of 5 years and will be split evenly among the successful proposers. Work shall be determined by issuing a written Task Order , with an individual Task Order limit of \$1,000,000.

The Price Agreements will allow the Treatment and Pumping System Division (TPSD) to deliver small to medium treatment plant rehabilitation, replacement, and modification (RR&M) and Pump Station Improvement Plan (PSIP) projects through an expedited approach, by issuing Task Orders to the selected contractors, as opposed to issuing an Invitation to Bid for each individual project. This delivery approach, especially on smaller projects, will significantly reduce the overall project schedule, allowing the City to effectively and efficiently deliver more projects and better meet the intent of the two shell programs. The Price Agreement will also allow for constructability reviews during design from the selected on-call contractors, to improve the quality of design, and reduce risks during construction. Task Orders issued will be paid on a Time and Materials (T&M) basis, based on the rates and mark-ups submitted on the initial Contractor Bid Form. The T&M payment method provides increased flexibility during construction with decreased risks, as it allows for changes in design during construction to occur without paying a premium for a change order. The T&M approach guarantees that the City will only be paying for the work that is completed. This approach provides increased flexibility during the construction phase, and a streamlined process.

Financial and budgetary impacts:

The engineer's final estimate of the probable cost of construction for this project is \$18,000,000. The level of confidence in the estimated cost of construction is high. Funds are available in the Sewer System Operating Fund, FY 2021 Budget, Bureau of Environmental Services with the Bureau of Environmental Services' FY 2021-25 Capital Improvement Plan (CIP.). A project number will be assigned for each individual Task Order.

