

**EXHIBIT A**  
**MILL PARK CONSTRUCTION**  
**FACTUAL FINDINGS FOR**  
**PROPOSED EXEMPTION FROM COMPETITIVE BIDDING**

The Portland Bureau of Parks and Recreation (“PP&R”) 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 the Mill Park Construction Project (the “Project”) from the competitive bidding requirements of ORS Chapter 279C and PCC 5.34 and to approve the Construction Manager/General Contractor (“CM/GC”) as the alternative contracting method for the selection of a Construction Manager/General Contractor (“Contractor”) for the Project. Capitalized terms used herein have the meaning ascribed to them in the Ordinance.

**I. BACKGROUND**

PP&R is in the position to greatly improve its service delivery in the East side of the City through the use of System Development Charge (SDC) funds. The development and construction of the Project is a very important step in the direction of equity for all Portlanders. The Project property covers a 5.66 acres of existing neighborhood park surrounded by single family residences, multi-family housing and Mill Park Elementary School in the Mill Park neighborhood (the “Property”). Street access to the site is limited to the south end of the park and north end of the park.

The area has a highly diverse community with a large number of children that are economically disadvantaged. The Project will be a significant, new neighborhood park in this area that is generally described as park deficient. The Property was acquired from Multnomah County in 1986 in a Transfer Agreement. The Property has been undeveloped since 1986. An existing walking loop trail and open lawn areas dotted with existing mature trees are currently used by adjacent community members and children at Mill Park Elementary School. A Master Plan for the Property was adopted by Council in November 2017. One of the main community goals identified during the process was to develop a park that reflects community pride and is safe, clean, and accessible for all ages, cultures, and abilities.

The completed Project will be the central element in this underserved community that will provide many important community functions including a space for cultural activities, picnic sites for family and group gathering, play and active

recreation areas for school use, two U12 soccer fields, areas for free play, and a large community garden. The Project may also include water play.

The Project has the potential to fill a big void. To meet the community expectations, to ensure equity in service delivery, and to avoid high future maintenance costs, Contractor collaboration and input in the Project design efforts is critical to successfully delivering the Project. Timely construction is a high priority for PP&R in its efforts to create equity in service delivery across the City as well as minimize neighborhood impact due to temporary closure of the existing 5.66-acre park as well as impacts to adjacent schools. Design is anticipated to occur in 2021 and 2022 with construction of the Project to commence in Spring of 2023. Completion is anticipated for Spring of 2024.

Based on the Findings, using a CM/GC contracting method will support successful completion of the Project in the most efficient and cost-effective manner to achieve community and PP&R goals. Ordinarily, the City is required to use competitive sealed bidding as the process to award a contract for the proposed Project. Accordingly, the Project needs to be exempted from the competitive bidding requirements of ORS 279C.300 and PCC 5.34.830. Council is the Local Contract Review Board with the authority to exempt certain public contracts from the competitive bidding requirements of ORS 279C and PCC 5.34 based on the Findings. With the present action, Council will exempt the Project from the competitive bidding requirements of ORS 279C and PCC 5.34 and will authorize the CM/GC contracting method. State and City law permits the City to exempt certain contracts if Council is able to approve certain findings justifying an alternative approach. The factual bases to support the Findings in connection with the Project, including the Additional Findings (as hereinafter defined) 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 “[i]t is unlikely that the exemption will encourage favoritism in 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 Contractor will be selected through a competitive Request for Proposals (“RFP”) process. The RFP will be advertised in Portland’s Daily Journal of Commerce and on the City’s online procurement portal three to four weeks in advance of the deadline set for submitting responses to the RFP. The proposals will be evaluated by a selection committee based on criteria such as experience,

technical expertise, key personnel and staffing, diversity program, safety record, and percentage profit and overhead markup. The selection committee will review and rank the written proposals; hold interviews if necessary; and recommend a Contractor for the CM/GC contract award. As a result of the competitive RFP process, the use of an alternative contracting method for the Project is unlikely to encourage favoritism in the awarding of public contracts.

The alternative process can result in even broader participation and greater competition than the traditional bidding process. All qualified General Contractors and Construction Management firms will have an opportunity to compete. These firms include some that might not be willing to face the uncertainties and potential financial risks associated with bidding and contracting for construction under a traditional design-bid-build competitive (“DBB”) bid process. Structuring the Project under a CM/GC contract that includes the Contractor in the design phase allows the selected firm to improve constructability, develop phasing and staging plans to efficiently perform the work, and determine effective construction methods. This may make the Project more attractive to qualified firms because of the opportunity to better understand the Project prior to providing the City with a price for the Project and to reduce their risk in undertaking the Project. Therefore, competition will not be diminished, and may even be enhanced by procuring the Project construction services through a CM/GC process.

### **III. SUBSTANTIAL COST SAVINGS**

ORS 279C.335 (2) and PCC 5.34.830 require that 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 requires Council to find that “[the] exemption will likely result insubstantial costs savings and other substantial benefit 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 CM/GC contracting process affords the opportunity for the Contractor to participate during the design phases of the Project, lending its expertise, knowledge, and experience to provide feedback as to whether the Project’s proposed design is feasible within the Project parameters. Similarly, this allows the Contractor to make value engineering suggestions, that is, suggestions that propose alternative and less expensive ways of achieving the same result. This can result in more practical, constructible, and economic design solutions while maintaining the design’s integrity. Participation in the design process also enables the Contractor to become more familiar with the Project features and requirements before it prepares its price for the work. This familiarity means that the Contractor may not include cost contingencies that other contractors

frequently include in their bids to take account of uncertainties that are not resolvable during the brief bidding period under a traditional DBB competitive bid process. This is especially true for the Project, which has a number of unique design features as well as environmental challenges. The CM/GC contracting method allows the Contractor to understand and incorporate value-engineering ideas during the design phase to reduce the overall cost of the Project and to avoid costly change orders or disputes that impact PP&R's budget for the Project.

#### **IV. THE FACTUAL BASES TO SUPPORT THE ADDITIONAL FINDINGS**

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

##### **A. How Many Persons are Available to Bid**

The CM/GC contracting method will result in broader participation and greater competition than the traditional bidding process. All qualified General Contractors and Construction Management firms will have an opportunity to compete. These firms include some that might not be willing to face the uncertainties and potential financial risks associated with bidding and contracting for construction under a traditional DBB competitive bid process.

The CM/GC contracting method has the added benefit of allowing the selected Contractor to solicit competitive bids for various aspects of work as the work is ready to be bid. The Contractor will be able to prepare materials and equipment submittals early and issue bid packages to suppliers and vendors during design for timely delivery.

Additionally, this method provides increased opportunity to identify and outreach to Service-Disabled Veterans Business Enterprises, Disadvantaged, Minority, Women, and Emerging Small Business minority-owned businesses (SDV/D/M/W/ESB) that may otherwise not have an opportunity to participate in the Project. The RFP will include equity in contracting and workforce outreach and utilization requirements to maximize diverse participation on the Project.

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

The Project will be funded by SDCs. The anticipated construction cost is estimated at \$7.5 million with a total budget of \$12 million. The budget for the new park was set based on the goals outlined through the community supported master planning process. The CM/GC contract method will provide the opportunity for careful consideration of means and methods of construction as well as cost saving measures through construction sequencing and timing which will make the delivery of the full design program more likely.

The anticipated Operating Costs (Operations and Maintenance) are in the range of \$470,000, which will add a substantial commitment to the PP&R operating budget. Using the CM/GC contracting method will allow the construction of the Project to meet the highest possible construction standards and support a high level of expertise to successfully complete the specialized aspects of the Project. This will ensure the delivery of a high-quality project which will be cost effective to maintain thus keeping the anticipated operating costs for the park at a manageable level while providing a high level of service to the East Portland community.

### **C. Public Benefits That May Result from Granting the Exemption**

There are multiple public benefits in connection with exempting the Project.

During construction, the CM/GC contracting method allows coordination of the subcontractors and development of back-up plans in consideration of the schedule constraints thereby minimizing disruption to the neighborhood as a result of construction staging, parking, and access due to the limited access points and the limited street frontage. The alternative contracting method also allows the City greater opportunities to monitor the Contractor's outreach and utilization of SDV/D/M/W/ESB subcontractors and diverse workforce to achieve equity goals with the Project during pre-construction and construction.

The completed Project will be the central element in this underserved community that will provide many important community functions including a space for cultural activities, picnic sites for family and group gathering, water play, play and active recreation areas, a multipurpose fields for team sports, areas for free play, and a large community garden.

### **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 Project as it is on other projects where the contractor can be selected before the design is completed. In that way, the contractor's expertise and resulting revisions can be incorporated into the project at the design development stage, rather than have the proposals come after the design is already completed, which may limit the amount of change that can be accomplished to the Project and still meet schedule requirements as well as the design intent. During the competitive bid process, bidder questions and clarifications often lead to an extended bid process, which causes delays and increases costs. Changes after a project is competitively bid can result in increased costs for the City as well in a change order process. A traditional competitive bid process cannot take value engineering into account during the design stage because the design is usually complete before bids are received.

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.

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

Through the RFP process, the City will have an opportunity to evaluate and select the Contractor with the specialized expertise required for the Project. The cost for such specialized expertise is included in the overall Project budget. The Project involves several design components that require specialized expertise to implement a high-quality Project as well as to meet the Project schedule. Specifically, the Project likely will include water play, play, native landscaping as well as playing fields.

Another important design component is that the Project will likely include a sizable sustainable landscape component. Implementing natural landscapes certainly requires special expertise to avoid cost overruns and to ensure timely delivery and landscape establishment.

The CM/GC contracting method provides the best opportunity for the City to allocate additional weight in the selection process to contractors with a high degree of specialized expertise necessary for the particular requirements of the Project.

#### **F. Likely Increases in Public Safety**

The CM/GC 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 during the design phase of the Project to ensure that the construction process provides appropriate safety measures, that the Contractor understands the City's safety concerns and that the Contractor will take appropriate steps to address them. Because the Property is directly adjacent to an Elementary School, in close proximity to a public high school, a private elementary school, and a residential neighborhood, and access to the Property is very limited, maintaining good safety practices will be foremost in the Contractor's approach.

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

The CM/GC project delivery method fosters early coordination between designer, Contractor, and City staff which leads to a better outcome than with a traditional low-bid

procurement project; challenges and issues can be anticipated and resolved earlier in the process, allowing the Project to be completed on time.

It is necessary to carefully consider the means and methods of construction and construction sequencing during design to ensure a minimum of delays, construction costs, and impacts to public. Having the Contractor involved during the design phase will provide information on constructability issues and allow development of a logical sequence for construction.

The CM/GC project delivery method will facilitate a much greater Project understanding by the Contractor before construction starts, and involvement throughout the design phase in which to craft a thoughtful and comprehensive construction schedule that accommodates these challenges. It would be challenging for even an experienced contractor to produce a plan of this quality without the lead time and project team interaction the CM/GC project delivery method provides, because traditionally the design-bid build process allows no time or opportunity for interaction with the project team or designers before the construction Notice to Proceed is issued.

By maximizing team collaboration and incorporating cost savings ideas throughout the design phase, it is likely that the City's Project management team can mitigate costly change orders and disputes. Utilization of the CM/GC project delivery method permits the Contractor not only to understand the designer's intent and assumptions, but to be a part of the design process. The design-bid-build project delivery method does not allow for input on the part of the Contractor during the design phase. This lack of involvement can lead to plans and specifications not as well suited to construction means and methods.

The Project will be constructed directly adjacent to Mill Park Elementary Schools and the Project is located on a main pedestrian route to the school from the east on a funded Safe Routes to School crossing of SE 122<sup>nd</sup> Avenue. The Davis Douglas School District Fir Ridge Campus (High School) is located 4 blocks to the northwest of the Project and the Portland Christian Grade School is located 1 block north of the Project. The neighborhood in general does not have sidewalks. To limit the time frame during which children are exposed to construction traffic or activity on their way to school or at school is a major scheduling goal. Using the CM/GC contracting method will allow the City to hire the Contractor during the design phase of the Project. This enables the Contractor to develop a comprehensive construction schedule before initiating the work with input from the Project team. The interaction between the Project team and the Contractor during the design process makes it far more likely that the final design will take into account any potential construction issues and allow early coordination of construction sequencing to minimize impacts to the neighborhood and to the adjacent elementary schools and high school.

A competitive selection of the Contractor through the RFP process allows the City to minimize disruptions to school children and neighbors during construction,

as well as ensuring that the Project is delivered expeditiously to serve the neighborhood.

The RFP process for selecting the Contractor allows PP&R an opportunity to question the respondents to discern their expertise on contracting methods and sequencing. This approach also offers the greatest flexibility, risk reduction, reliability, and ease of construction. The Project budget is likely to be more stable as a result of this approach and it is less likely that there will be cost overruns.

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

The overall Project budget is \$12 million and includes costs for Professional, Technical and Expert (PTE) services, pre-construction services, construction services, all project soft costs as well as contingency. The Project will be funded using SDCs. The contingency is a percentage of the Project costs above the stated amount that the Project might be expected to exceed. As the design process progresses from preliminary to final design, the confidence rating regarding the Project cost increases and, correspondingly, the contingency percentage decreases. Maximum construction contract amounts within the fixed budget will be negotiated with the selected Contractor. Because the Guaranteed Maximum Price (GMP) is negotiated close to final design, the CM/GC contracting method creates more financial certainty for the City. While funding does not change based on use of the CM/GC contracting method, the Project budget is likely to be more stable as a result of the alternative contracting method and it is less likely that there will be Project cost overruns.

#### **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 CM/GC contracting method for the Project will reach the same or greater market of construction contractors as the traditional low bid process. Considering the size and location of the Project and major components of work, the RFP will reach the regional marketplace. The RFP will require a response addressing the latest market innovations in sequencing and in construction means and methods. Selection of the Contractor will be made by a committee, that will evaluate qualifications, expertise and ability to deliver on the City's policy and social equity goals and community expectations, among other things, in addition to cost to ensure the best combination to achieve the Project objectives.

The construction industry is a volatile industry with prices fluctuating almost constantly. By designing to a GMP, having open books among the entire Project team, and establishing a high degree of trust and collaboration among the Project team, market fluctuation can be accommodated for and folded into the design of the Project. By bringing together a creative set of minds that have a deep and thorough understanding of the Project's intricacies, the design can be more nimble and the approach can be



more efficient. Additionally, the means and methods can be thoroughly integrated into the design.

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

Special technical complexities of the Project include the layout and construction of the water play area, the playground, sports fields, as well as the natural landscapes. The CM/GC contracting method will allow the Contractor to proactively be involved in the design phase to help develop construction approaches and methods to maximize the quality and constructability of these areas. This early involvement during the design phase will allow the Project team and the Contractor to actively work together to find solutions to complete the Project in the most efficient manner possible. The CM/GC process allows for early procurement of plant material and import soil, which often causes delays and scheduling issues on traditional low bid projects.

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

The Project is for new construction of a public park.

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

The Project is a public park and it will be unoccupied during construction.

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

To rectify inequity in the distribution and development of parkland throughout Portland an important goal of the Project is to complete the construction in an expeditious manner. To avoid extra costs and neighborhood impacts, construction needs to be completed expeditiously. This limitation requires a carefully sequenced construction process in order to meet a narrow construction window. Incorporating cost saving ideas in the design phase and avoiding hurried plans or adaptations during the construction phase allows PP&R to avoid costly change orders or disputes that impact the schedule or budget. It is necessary to carefully consider the means and methods of construction and possible phasing options during the design phase of the Project to ensure a minimum of delays and costs during construction.

**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 personnel have the expertise and experience necessary to effectively implement the CM/GC contracting method and to negotiate, administer and enforce the terms of the resultant construction contract for the Project. These will include the principal PP&R project team, OMF Procurement staff, one or more attorneys for the City, and external consultants.