

PROSPER PORTLAND

Portland, Oregon

**ACTING IN ITS CAPACITY AS THE
LOCAL CONTRACT REVIEW BOARD**

RESOLUTION NO. 7437

**ADOPTING FINDINGS IN SUPPORT OF AND EXEMPTING THE NICK FISH
RETAIL SPACE TENANT IMPROVEMENTS PROJECT FROM LOW-BID
SOLICITATION**

WHEREAS, the Nick Fish Retail Space Tenant Improvements Project (“Tenant Improvements Project”) is a part of the mixed-use redevelopment of Prosper Portland-owned real property located at 10550 NE Halsey Street in the Gateway Regional Center Tax Increment Finance District (“Building”);

WHEREAS, the Project involves Prosper Portland’s build-out of the approximately 11,000 square feet of ground floor commercial space within the Building, which Prosper Portland owns and anticipates marketing as part of its Affordable Commercial Tenanting initiatives;

WHEREAS, the Prosper Portland Board of Commissioners (“Board”) has previously authorized the execution of contracts and grant agreements to facilitate the Project, and has allocated funding to the Project, pursuant to Resolution No. 7366, adopted April 8, 2020, and Resolution No. 7430, adopted July 14, 2021;

WHEREAS, by adoption of Resolution No. 3550, the Prosper Portland Board was established as Prosper Portland’s Local Contract Review Board (“LCRB”) pursuant to State law;

WHEREAS, Oregon Revised Statutes (“ORS”) Chapter 279C and the LCRB Administrative Rules (“LCRB Rules”) generally require that all public improvement contracts shall be awarded on a low-bid basis, and treat demolition projects as public improvements;

WHEREAS, ORS 279C.335(2) and LCRB Rules Part 4(II)(B)(2) allow exemptions to the general requirement for competitive bidding upon LCRB approval of written findings;

WHEREAS, Prosper Portland staff proposes to use a competitive Request for Proposals (“RFP”) selection process resulting in a construction services contract for the Project; and

WHEREAS, after due public notice, staff held a public hearing to receive comments on the draft Low Bid Exemption Findings (“Findings Report”) (see Exhibit A) for the exemption for the Project as required by ORS 279C.335(5) and LCRB Rule Part 4(II)(B)(2).

NOW, THEREFORE, BE IT RESOLVED, the Prosper Portland Board acting as the LCRB hereby adopts the findings set forth in Exhibit A in support of exempting the Project from competitive bidding;

BE IT FURTHER RESOLVED, that based on approval of the Findings Report, the LCRB hereby exempts the Project from the competitive bidding requirements of ORS Chapter 279C.335(1) and the LCRB Rules and specifically approves the Project for the alternative contracting approach substantially consistent with that forth in the Findings Report; and

BE IT FURTHER RESOLVED, that this resolution shall become effective immediately upon its adoption.

Adopted by the Prosper Portland Commission on November 10, 2021



Pam Feigenbutz, Recording Secretary

Findings Report

DATE: November 10, 2021

TO: The Prosper Portland Board of Commissioners acting in its capacity as Prosper Portland’s Local Contract Review Board (“LCRB”)

FROM: Kimberly Branam, Executive Director

SUBJECT: Findings in Support of an Exemption from the least-cost policy for public improvements (e.g., low-bid contract award) for the retail space tenant build-outs project at The Nick Fish, located at 10550 NE Halsey Street, Portland, Oregon 97220.

1.0 BACKGROUND AND CONTEXT

1.1 **Building History.** The Nick Fish (Halsey 106) is a mixed-use mixed-income development project in the Halsey/Weidler business district in the Gateway Regional Center TIF District. Prosper Portland was a partner in the development through several loans pursuant to the Commercial Property Redevelopment (CPRL) program to Human Solutions and affiliates, as well as a ground lease and a construction funding agreement for the ground floor retail space to be owned and leased out by Prosper Portland. This project was approved by the Prosper Portland Board of Commissioners via Board Resolutions No. 7321 on July 10, 2019 and No. 7366 on April 8, 2020. The Project delivers on multiple Strategic Plan objectives – most notably, by creating vibrant communities and corridors, providing wealth creation opportunities for business owners, and delivering affordability and neighborhood solutions to a rapidly changing mixed-use community.

On April 2021, the project was completed and on July 14, 2021, the Board approved Resolution No. 7430 authorizing lease terms for the approximately 11,000 square feet of retail space, including a tenant improvement build-out budget of \$3,650,000.

1.2 **Current Usage.** Currently, the entire retail space is vacant. The residential portion of the building has been 100% leased and Human Solutions is already occupying the office space on the 2nd floor of the building.

Prosper Staff are currently in discussions with prospective tenants for the some of the spaces, which need to be built-out from their current warm/cold shell states to suit each tenant’s unique needs. Buildout needs will continue at different times, as leases are signed.

1.3 **Project Summary.** These findings support the competitive procurement of a construction manager/general contractor (CM/GC) to build-out the ground floor retail space owned by the agency in an attempt to realize tenants’ visions for the space and reduce barriers to tenants participating in our Affordable Commercial Tenanting initiatives. The selected CM/GC would be offered to any prospective tenants as a solution to build-out the spaces to their unique needs. If these findings are adopted and the exemption to allow for CM/GC is approved, the CM/GC will be engaged early in the design process for each tenant’s space. The CM/GC will provide input on design, constructability, efficient/effective materials, methods, and other input aimed at lowering project risks, achieving cost certainty in design, and other outcomes that will ensure retail space construction meets tenants’ needs. Through a phased approach, the CM/GC will be

able to immediately engage with tenants as they reach the point in the tenancing process where the design input of a general contractor becomes appropriate (usually following completion of schematic design).

2.0 REQUIRED ELEMENTS OF THIS REQUEST

Prosper Portland’s Local Contract Review Board Administrative Rules (“**LCRB Rules**”) Part 1, Section III, Subsection C, Item 1, require that a request to the LCRB for an exemption from competitive solicitation requirements contain the following information:

- a. The nature of the project or type of procurement. *See Section 1 above.*
- b. Estimated cost of the project or anticipated value of procurement. *Construction costs are estimated to be approximately \$3, 650,000.*
- c. Findings to support the substantial cost savings anticipated by the exemption from competitive solicitation. *See Section 3.2, below.*
- d. Findings to support the reason that an exemption would be unlikely to encourage favoritism or diminish competition for the public Contract. *See Section 3.1, below.*
- e. Proposed Alternative Contracting Methods to be employed if any. *See Section 3.1, below.*
- f. The estimated date by which it would be necessary to award the Contract(s). *Winter 2021*

3.0 REQUIRED LEGAL FINDINGS

Oregon Revised Statutes (“**ORS**”) Chapter 279C.335(2) and the LCRB Rules Part 4, Section II(B)(2) provide that Prosper Portland’s Board of Commissioners, acting as Prosper Portland’s LCRB, may exempt certain public improvement contracts from a competitive low bid process upon the LCRB making the following Findings:

- a. It is unlikely that such exemption will encourage favoritism in the awarding of a public improvement contract or substantially diminish competition for public improvement contracts; and
- b. The awarding of public improvement contract under the exemption will result in substantial cost savings to the agency and other substantial benefits to Prosper Portland or the public.

In making these Findings, the LCRB will, to the extent it believes applicable to the public improvement contract, consider the type, cost, and amount of the contract, the number of persons available to bid, any likely increases in public safety, value engineering techniques that may be applied to reduce the cost, and other factors noted in ORS 279C.335(2)(b). Please see the “ORS 279C Findings Report” (Exhibit 1) for additional findings on these matters.

3.1 **Finding of No Favoritism or Diminished Competition.** The contractor selection will be accomplished by issuing a competitive Request for Proposals (“**RFP**”) with best value selection criteria to seek a Construction Manager/General Contractor (“**CM/GC**”) delivery method for the Project. Any general contractor may respond to the RFP. Among other things, the RFP will require:

- a proven track record of successful completion of comparable projects, including involvement during the design process to collaborate with an established design

team and to provide advice and expertise on issues such as construction feasibility and risks, evaluation of existing design for potential cost reductions or value-engineering, cost-estimating services, project phasing and schedule;

- inclusion opportunities for Minority, Women, and Emerging Small Business and Disadvantaged Business Enterprise firms and demonstrated ability to comply with Prosper Portland’s Construction Business and Workforce Equity Policy;
- a proposed project schedule based on the current design; and
- a competitive cost proposal for pre-construction services.

To prevent favoritism, the contractor selection process will include:

- an evaluation of the proposals by committee based defined evaluation criteria including the proposers demonstrated experience and capacity to complete similar project,
- negotiations with the most qualified, responsive and responsible bidder to enter into a pre-construction services contract,
- and subsequent negotiations to establish and enter into a Guaranteed Maximum Price (“GMP”) contract following the completion of the pre-construction services contract.

The LCRB should find that the alternative contracting process neither results in favoritism nor diminished competition due to the competitive nature of the procurement process used to award the contract and the evaluation committee’s use of defined evaluation criteria.

3.2 **Finding of Substantial Cost Savings and other substantial benefits.** Using a CM/GC contract will likely result in cost savings over a low-bid selection method due to Project-specific factors, including the following:

- **Reduces the risk of change orders during construction due to risks and challenges of working in an occupied building:**

Building-out the Nick Fish retail spaces to meet tenants’ needs has some complexity that increases the risk of change orders if a low bid contracting process is used. The build-outs will take place while the building is occupied. The selected contractor will need to work with property management to limit construction impacts to residents, guests, and the public and to mitigate risks including noise, dust, safety, and other impacts of construction. Moreover, constructability issues may factor into design decisions so as to ensure that tenants are building their spaces within a budget, and according to a schedule that is conducive to their business plans. Using a CM/GC contract allows the contractor to work with the Project team to understand and thoroughly evaluate the existing conditions, inform the design process to mitigate these risks, and develop a project schedule and cost estimate based on the knowledge gained during the pre-construction phase that will result in fewer change orders during construction and likely substantial cost savings.

For example, the contractor will need to put measures in place, such as additional dust containment and temporary traffic control, which falls under means and methods and not typically shown on construction documents. In addition, the contractor may need to

modify the Project schedule, sequencing and staging to limit disruptions to guest and adjacent property owners, account for supply chain issues, and meet tenants' business needs. These impacts can be difficult to define in the construction documents and may be missed in the low-bid process leading to change orders, schedule delays, and increased costs.

- **Risk of construction cost overruns disrupting tenants' business plans, leading to loss of rent-paying tenants:**

Cost overruns by way of higher-than-expected bids for the design and change orders as described above could lead to the loss of rent-paying tenants at the Nick Fish. The retail spaces will be marketed especially to small, local, BIPOC-owned businesses and other priority organizations. The target market of prospective lessees may not have the capital to absorb significant construction cost overruns. Unlike the low bid method, CM/GC allows for a general contractor to engage during the design process to consult on the cost implications of design decisions, advise on value engineering that allows designs to achieve tenants' visions within budget parameters, and collaborate in other ways that ensure the build-outs are more likely to be completed on time and within budget. Minimizing the risk that construction costs will threaten tenants' business plans for the space will likely realize costs savings by lessening prospective vacancies for the spaces. Moreover, if a tenancy were to fail after construction initiates, there would be additional costs related to adapting the built-out space to another tenant's needs or demolishing it. Build out costs are shared by Prosper Portland and tenants.

4.0 PUBLIC HEARING

In accordance with ORS 279C.335(5) and the LCRB Rules, Part 4(II)(B)(2), Prosper published notice of the required public hearing on October 20, 2021 and the hearing was held on November 4, 2021. At the hearing, interested parties had the opportunity to appear and present comment.

5.0 RECOMMENDATION

Staff recommends that the LCRB adopt a resolution to accept the Findings and authorize the use of an RFP to select a CM/GC rather than awarding the renovation contract through a low-bid process.

Exhibit 1. ORS 279C Findings Report

(A) How many persons are available to bid;

- Construction manager/general contractor (“CM/GC”) is commonly used by public and private entities to deliver projects of similar size and scope to the Nick Fish Retail Space Tenant Improvements project (the “Project”). As such, numerous contractors are capable of submitting a proposal to serve as this Project’s CM/GC. Pursuant to ORS 279C.337, the CM/GC that is selected to complete this project will be required to follow a competitive process to procure sub-contractors to perform the work. Prosper Portland has oversight of the CM/GC’s procurement activities and can use this power to ensure that sufficient bidders (including those from COBID certified firms) were solicited and given a fair opportunity to bid prior to executing a GMP contract or amendment. In contrast, general contractors who would submit bids under the “least-cost policy for public improvements” (pursuant to ORS 279C.305) from which staff are seeking exemption are not required to publicly solicit sub-contractor bids. In that low-bid solicitation context, Prosper Portland has limited oversight over a general contractor’s sub-contractor bidding practices beyond that which we may require for compliance with the Construction Business and Workforce Equity policy. Accordingly, staff expects the CM/GC method to increase the number of prospective bidders (including both prime and sub-contractor bidders).

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

- The construction costs will be shared between Prosper Portland and future tenants of the Nick Fish building’s retail spaces for whom the build-outs under this Project will be performed. Accordingly, the construction costs and projected operating costs must be acceptable to both parties. The CM/GC method of project delivery allows for a level of transparency of costs, negotiation of costs, and negotiation of cost-drivers (e.g., scope, material selections, etc.) that is not possible through the least cost method. This higher level of transparency and ability to negotiate supports the higher level of collaboration that is needed to achieve mutual acceptability of the construction costs, determine how costs might be shared amongst the parties, and create spaces that fit the tenants’ visions for the businesses and organizations that will serve the community within limited operating budgets. Also, studies have found CM/GC to save overall costs (e.g., through increased efficiencies, reduced change orders, etc.) when compared to the lost cost method (design-bid-build).

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

- In addition to the potential cost savings and ability to effectively cost share with tenants, the CM/GC method affords Prosper Portland opportunities to advance equitable contracting in ways that are not possible with the least-cost method of project delivery. For example, Prosper Portland can, and will require innovative and effective methods related to equity contracting to be included in CM/GC proposals and performed by the CM/GC when selecting sub-contractors to perform the work. Because Prosper Portland has limited, if any, involvement in sub-contracting decisions in a least-cost model, this

lesser involvement may at times result in less scrutiny over equity considerations on the least-cost model. By contrast, a contracting agency has an opportunity to scrutinize and provide feedback on sub-contractor procurement as it occurs in the CM/GC model, and to develop selection criteria that will help maximize opportunities for COBID certified firms.

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

- Under least cost method, contract negotiations using value engineering (“V-E”) can only be used when the lowest bid is over Prosper Portland’s pre-bid cost estimate. Under the CM/GC method, Prosper Portland can require the use of V-E involving the construction manager when not only negotiating the cost of work, but also when completing the design of the work to be done. This will be essential to maximizing our tenants’ ability to realize their visions for their businesses.

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

- This project may require several specialized sub-trades (e.g., commercial kitchen specialists, stainless steel fabricating/welding, kitchen fire system installation, etc.). Under the low-cost method, bidders must gather quotes from these sub-trades within the fixed duration of the ITB and Prosper Portland will not have oversight as to the level of competition actually realized by the General Contractor in obtaining costs for these specialized types of work. Under CM/GC, Prosper Portland can assure that sufficient competition has been realized prior to accepting any GMP proposals provided by the CM/GC. Moreover, under CM/GC, Prosper Portland may waive the CM/GC’s procurement requirements when certain conditions exist. This might be a tool that could help mitigate the timely procurement of specialty sub-trades in the event that they are scarcely available.

(F) Any likely increases in public safety;

- The work performed under this project will be completed in a building for which the residential space is one hundred percent (100%) occupied. The second floor of the building is occupied by Human Solutions. The retail spaces are on the first floor of an occupied building, adjacent to pedestrian routes, adjacent to a major street with a bicycle lane and spaces, and near Discovery Park. Accordingly, the safety of pedestrians, children, families, cyclists, and motorists must be considered in site planning.. A good plan to stage, move materials, and complete the work will be essential to ensuring public safety. The CM/GC method allows Prosper Portland to collect, evaluate, and consider a site safety plan in awarding a CM/GC. Moreover, the CM/GC method allows Prosper Portland to consider a general contractor’s experience in safely delivering projects with similar site conditions (e.g., occupied, multi-use, including family/residential setting). The least cost method has very limited mechanisms to consider experience/outcomes in making a contract award. The least cost method does not have any mechanisms for evaluating a project-specific site plan that is proposed by prospective contractors.

(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;

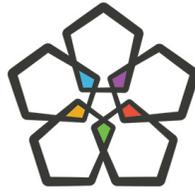
- It is imperative to the financial health of the development that leases are fully executed, spaces are built-out, and tenants' businesses/organizations become fully operational in a timely manner. If each space were to be separately awarded, as would be necessary under the least cost method, project schedule and cost risks would be of failed bids would be compounded (e.g., by each subsequent design process in which builders had no input, procurement process conducted, etc.). Under the CM/GC method, the CM/GC will provide crucial input on the budget and schedule implications of design decisions as they are being made. Also, the CM/GC will have mechanisms available to avert failed bids/lack of sub-contractor bid coverage that are not available to Prosper Portland while delivering the project through the least cost method.
- (H) Whether granting the exemption will affect the sources of funding for the public improvement;
- Not applicable.
- (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;
- Global and local supply chains continue to be in a state such that significant delays are becoming the norm. The CM/GC method provides a mechanism whereby Prosper Portland can authorize "early work packages", which would allow the CM/GC to place orders for long lead time items much sooner than they would be able to do under the least cost method. For example, Prosper Portland can authorize the CM/GC to gather pricing and place orders for critical materials/items as soon as they are identified with certainty as being needed in the design process. Under the least cost method, Prosper Portland cannot authorize the General Contractor to perform any work under the Contract (including procuring long lead time items) until the contract has been executed for the full scope of work – possibly months later than a CM/GC could have been authorized to place orders.
- (J) Whether granting the exemption will better enable the contracting agency to address the size and technical complexity of the public improvement;
- The CM/GC method allows for the same general contractor to be retained for building-out all of the spaces. This will allow Prosper Portland to leverage site and building specific technical expertise gained on spaces completed for the benefit of subsequent build-outs –(e.g., site logistics, safety planning, design/constructability issues for spaces with similar uses, etc.). Additionally, the CM/GC method allows Prosper Portland to consider prospective CM/GCs' experience and expertise in delivering the specific types of spaces that are expected to be built in the Nick Fish Building's retail spaces. Neither of these things could be done under the least cost method.
- (K) Whether the public improvement involves new construction or renovates or remodels an existing structure;
- This project involves building-out the currently vacant commercial spaces in the Nick Fish Building. Prosper Portland intends to use a phased CM/GC project delivery method to build-out spaces to tenants' unique needs as tenants are identified.

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

- The building and site will be occupied. The CM/GC method allows Prosper Portland to select a contractor with a demonstrated ability to conduct occupied construction in a safe and effective manner.

(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.

- Prosper Portland staff have successfully conducted multiple CM/GCs, as well as the Design-Build alternative project delivery method.



**PROSPER
PORTLAND**
Building an Equitable Economy

RESOLUTION NO. 7437

RESOLUTION TITLE:

ADOPTING FINDINGS IN SUPPORT OF AND EXEMPTING THE NICK FISH RETAIL SPACE
TENANT IMPROVEMENTS PROJECT FROM LOW-BID SOLICITATION

Adopted by the Prosper Portland Commission on November 10, 2021

PRESENT FOR VOTE	COMMISSIONERS	VOTE		
		Yea	Nay	Abstain
<input checked="" type="checkbox"/>	Chair Gustavo J. Cruz, Jr.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	Commissioner Francesca Gambetti	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	Commissioner Peter Platt	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	Commissioner Serena Stoudamire Wesley	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	Commissioner William Myers	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> Consent Agenda <input checked="" type="checkbox"/> Regular Agenda				

CERTIFICATION

The undersigned hereby certifies that:

The attached resolution is a true and correct copy of the resolution as finally adopted at a Board Meeting of the Prosper Portland Commission and as duly recorded in the official minutes of the meeting.

	Date: November 17, 2021
Pam Feigenbutz, Recording Secretary	