

**Date:** January 22, 2019

**To:** Board of Directors

**From:** Doug Kelsey

**Subject:** **RESOLUTION NO. 20-01-06 OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET) AUTHORIZING MODIFICATION OF THE SHARED USE AGREEMENT (SUA) WITH PORTLAND & WESTERN RAILROAD, INC. FOR WESTSIDE EXPRESS SERVICE (WES) OPERATIONS**

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**1. Purpose of Item**

This Resolution requests that the TriMet Board of Directors (Board) authorize the General Manager or his designee to execute a modification (Amendment #5) to the Shared Use Agreement (SUA) with Portland & Western Railroad, Inc. (P&W) for Westside Express Service (WES) operations.

**2. Type of Agenda Item**

- Initial Contract
- Contract Modification
- Other: Modification of Shared Use Agreement

**3. Reason for Board Action**

Board authorization is required for all goods or services contracts obligating TriMet to pay in excess of \$1,000,000.

**4. Type of Action:**

- Resolution
- Ordinance 1<sup>st</sup> Reading
- Ordinance 2<sup>nd</sup> Reading
- Other:

**5. Background**

On November 22, 2006, the Board passed Resolution No. 06-11-83, authorizing a fifty-year SUA with P&W for the operations and maintenance of the WES commuter rail line from November 27, 2006 to November 26, 2056. Under the SUA, TriMet is obligated to pay P&W annually for certain railroad personnel and dispatching costs, track and signal maintenance and other basic maintenance services essential for WES operations.

Periodic Amendments to the SUA are made to update overhead billing rates for costs of annual operations and maintenance services provided by P&W, and these overhead billing rates ordinarily are made effective each February 2 for a new five-year period. Historically, these costs have ranged from approximately \$2,000,000 to \$2,500,000 per year.

Upon the opening of WES service in 2009, the SUA was amended (Amendment #1) to establish P&W overhead billing rates from February 2, 2009 through February 1, 2014.

These overhead billing rates are established in accordance with Schedules 2.2(c) and 4.1(a) to the SUA. Schedule 2.2(c) covers operations services including dispatchers, operators, conductors, trainmaster, and contract administrators. Schedule 4.1(a) covers maintenance services including cab signal inspectors, track inspectors, foreman, track laborers, signal maintainers, maintenance of way supervisor, and basic maintenance materials. TriMet and P&W continued to perform under the terms of Amendment #1, despite the expiration of the Amendment on February 1, 2014.

On May 28, 2015, an Amendment #3 to the SUA was executed for overhead billing rates for P&W's services from February 2, 2014 through February 1, 2019 (Amendment #2 did not address overhead billing rates). Even though Amendment #3 to the SUA expired on February 1, 2019, TriMet and P&W continued to perform in accordance with its existing overhead billing rates, instead of entering into another five-year Amendment.

In the interim, P&W worked on a new overhead billing rate structure to be incorporated into the anticipated Amendment #4. P&W did not provide the final details of the new rate structure to TriMet until approximately November 2019.

The methodology used by Amendment #3 to determine overhead billing rates in Schedules 2.2(c) and 4.1(a) was not auditable, and did not comply with federal guidance as specified in Title 23 Code of Federal Regulations (CFR) Part 140, Subpart I "Reimbursement for Railroad Work," and Title 48 CFR Part 31 "Contract Cost Principals and Procedures." Beginning with the retroactive, one-year Amendment #4, a new methodology will comply with federal guidance, be easier to audit and simplify reporting. Amendment #4 will expire on February 1, 2020.

This Resolution authorizes a four-year Amendment #5 to the SUA, for the period February 2, 2020 through February 1, 2024, which will bring TriMet and P&W back to their ordinary five-year contract schedule.

The contract periods for each Amendment\* to the SUA are shown in the following table:

|              |                      |         |
|--------------|----------------------|---------|
| Amendment #1 | 2/2/2009 to 2/1/2014 | 5 years |
| Amendment #3 | 2/2/2014 to 2/1/2019 | 5 years |
| Amendment #4 | 2/2/2019 to 2/1/2020 | 1 year  |
| Amendment #5 | 2/2/2020 to 2/1/2024 | 4 years |

\*Amendment #2 did not address overhead billing rates.

In proposed Amendment #5, the methodology to determine overhead billing rates for Schedules 2.2(c) and 4.1(a) will comply with federal guidance as specified in 23 CFR Part 140, Subpart I "Reimbursement for Railroad Work" and 48 CFR Part 31 "Contract Cost Principals and Procedures." In Amendment #5, the annual revisions required for Schedules 2.2(c) and 4.1(a) will be accomplished by comparing end-of-year actual hours, fringe, and overhead rates with the Schedules' estimated hours and rates, by category listed on the Schedules. The percentage differences by category will be used to predict the annual estimates.

The Schedules for proposed Amendment #5 are summarized below. Year 1 is the projected estimate. Years 2 through 4 are assumed to increase 3% annually:

| Item / Schedule                               | Year 1: Begin<br>Feb 2, 2020 | Year 2: Begin<br>Feb 2, 2021 | Year 3: Begin<br>Feb 2, 2022 | Year 4: Begin<br>Feb 2, 2023 | 4-year Total        |
|---|------------------------------|------------------------------|------------------------------|------------------------------|---------------------|
| Operations services<br>(2.2c)                 | \$1,839,069                  | \$1,894,241                  | \$1,951,068                  | \$2,009,600                  |                     |
| Maintenance<br>services / materials<br>(4.1a) | \$1,076,315                  | \$1,108,604                  | \$1,141,863                  | \$1,176,118                  |                     |
| <b>Estimated<br/>Annual Total</b>             | <b>\$2,915,384</b>           | <b>\$3,002,845</b>           | <b>\$3,092,931</b>           | <b>\$3,185,718</b>           | <b>\$12,196,878</b> |

Note: TriMet must pay actual cost, plus overhead, not the estimated amount

**6. Procurement Process**

The SUA is processed through TriMet's Budgeting and Finance and the Legal Department.

**7. Diversity**

WES Commuter Rail is jointly operated by TriMet vehicle maintenance personnel under the direction of TriMet management, and by P&W maintenance of way and train operating personnel under the direction of P&W management. TriMet is an equal opportunity employer, committed to developing and maintaining a diverse organization that is reflective of and sensitive to the needs of the community it serves, and TriMet encourages its contractors to have similar diversity goals. P&W is subject to federal and state civil rights and equal employment statutes.

**8. Financial/Budget Impact**

The costs of WES operating services are budgeted within the FY20 Transportation Division's operating budget. As shown in the table above, under proposed Amendment #5, the estimated cost of reimbursement to P&W for WES operations from February 2, 2020 to February 1, 2021 is projected to be \$2,915,384. The total estimated costs of reimbursement to P&W for WES operations for the four-year period of February 2, 2020 to February 1, 2024 is projected to be \$12,196,878. However, Amendment #5 to the SUA requires TriMet to pay the actual costs including overhead, not the estimated amount.

**9. Impact if Not Approved**

The working relationship between TriMet and P&W has been collaborative and mutually supportive to date, and maintaining this relationship is important to the efficient operation of WES. The Board's approval of this Resolution and Amendment #5 to the SUA along with its improved overhead billing methodology will bring TriMet and P&W into compliance with federal guidance, make the bills easier to audit and simplify reporting. Approval of Amendment #5 also will restore the ordinary five-year schedule for amendments to the SUA. The passage of this Resolution is strongly recommended.



**RESOLUTION NO. 20-01-06**

**RESOLUTION NO. 20-01-06 OF THE TRI-COUNTY METROPOLITAN  
TRANSPORTATION DISTRICT OF OREGON (TRIMET) AUTHORIZING  
MODIFICATION OF THE SHARED USE AGREEMENT (SUA) WITH  
PORTLAND & WESTERN RAILROAD, INC. FOR WESTSIDE EXPRESS  
SERVICE (WES) OPERATIONS**

**WHEREAS**, on November 22, 2006, the TriMet Board of Directors (Board) approved Resolution 06-11-83 authorizing the General Manager to enter into a fifty-year Shared Use Agreement (SUA) with Portland and Western Railroad (P&W) to permit TriMet's Western Express Service (WES) to operate in the P&W right of way; and

**WHEREAS**, the SUA requires TriMet to reimburse P&W annually for labor and overhead for train operations, dispatching, maintenance of way, signal maintenance and basic maintenance services (P&W Services), which has been accomplished through a series of five-year amendments to the SUA; and

**WHEREAS**, the Board approved a retroactive, one-year Amendment #4 to the SUA for P&W Services, which adopted a more rational, auditable and federally compliant methodology for determining P&W's overhead billing rates, and by which TriMet's total payments to P&W would be reduced by approximately \$129,438 for the February 2, 2019 to February 1, 2020 period; and

**WHEREAS**, upon the termination of Amendment #4, TriMet and P&W propose to enter into Amendment #5 for P&W Services at the total estimated cost of \$12,196,878, for the four-year period from February 2, 2020 through February 1, 2024; and

**WHEREAS**, under Amendment #5, TriMet must pay P&W its actual costs, plus overhead, rather than the estimated costs over the four-year period; and

**WHEREAS**, by Resolution dated October 25, 2017, the Board adopted a Statement of Policies requiring it to approve agreements obligating TriMet to pay in excess of \$1,000,000;

**NOW, THEREFORE, BE IT RESOLVED:**

1. That Amendment #5 to the SUA shall conform with applicable law.
2. That the General Manager or his designee is authorized to execute Amendment #5 to the SUA in an amount not to exceed \$12,196,878, over the four year term of Amendment #5.
3. In the event the costs of P&W Services exceed the amount of \$12,196,878, the General Manager or his designee is authorized to execute modifications to Amendment #5 that reflect P&W's actual costs, plus overhead.

Dated: January 22, 2020

Attest:

\_\_\_\_\_  
Recording Secretary

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Presiding Officer

Approved as to Legal Sufficiency:

  
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Legal Department

