DEPARTMENT OF TRANSPORTATION

395 John Ireland Boulevard
Saint Paul, Minnesota 55155

December 23, 2024

The Honorable Frank Hornstein, Chair
House Transportation Finance & Policy Committee
658 Cedar Street
5th Floor, Centennial Office Building
Saint Paul, Minnesota 55155

The Honorable John Petersburg, GOP Lead
House Transportation Finance & Policy Committee
658 Cedar Street
2nd Floor, Centennial Office Building
Saint Paul, Minnesota 55155

The Honorable Scott Dibble, Chair
Senate Transportation Committee
3107 Minnesota Senate Building
Saint Paul, Minnesota 55155

The Honorable John Jasinski, Ranking Minority Member
Senate Transportation Finance & Policy Committee
2227 Minnesota Senate Building
Saint Paul, Minnesota 55155

Re: MnDOT Oversight Reporting on Light Rail Transit

Dear Legislators,

The Minnesota Department of Transportation is pleased to provide this report as required by Minn. Stat. 473.3999, which was amended by Minn. Session Law Ch. 127, Article 3, Section 107 during the 2024 Regular Session.

The amendment increased MnDOT's role in providing assistance and oversight to light rail transit projects and requires that the commissioner submit all recommendations to the chairs and ranking minority members of the legislative committees with jurisdiction over transportation policy and finance within 30 days of submitting its recommendations to the Metropolitan Council.

This oversight report details MnDOT's recommendations related to the identification of the appropriate delivery method selection of its construction contracts as defined in Subd. 2(a)(1). This was submitted to the Metropolitan Council on December 23, 2024. MnDOT anticipates a future report on the Blue Line extension project scope, schedule, and budget no later than August 2025.

Please contact me if you have questions or comments about this report at nancy.daubenberger@state.mn.us.

Sincerely,

Nancy Daubenberger

Nancy Daubenberger, P.E.
Commissioner

cc: Charlie Zelle, Chair, Metropolitan Council

DEPARTMENT OF TRANSPORTATION

395 John Ireland Boulevard
Saint Paul, Minnesota 55155

Legislative Request

This report is issued to comply with Minn. Session Law Ch. 127, Article 3, Section 107.

473.3999 LIGHT RAIL TRANSIT CONSTRUCTION; COUNCIL AUTHORITY; STAFF ASSISTANCE; PROJECT MANAGER QUALIFICATIONS.

Subdivision 1. Powers.

The council may exercise the powers granted in this chapter and in other applicable law, as necessary, to plan, design, acquire, construct, and equip light rail transit facilities in the metropolitan area as defined in section 473.121, subdivision 2.

Subd. 2. Staff and project assistance required; Department of Transportation.

(a) Notwithstanding any cooperative agreement between the commissioner of transportation and the council in section 473.3994, subdivision 1a, if the council is the responsible authority, the commissioner of transportation must provide staff and project assistance to the council for review and oversight of the project's development. The council must utilize the Department of Transportation staff and project assistance for:

(1) the appropriate delivery method selection for the design, planning, acquisition, construction, and equipping of light rail transit projects;

(2) risk assessment analysis and cost analysis in the planning, designing, and construction of a light rail transit facility or a new light rail transit project, including but not limited to:

(i) a critical path schedule for the planning and design phases of a project developed jointly by the council and the commissioner of transportation;

(ii) peer reviews or value engineering reviews at various milestones established in the critical path schedule created under item (i); and

(iii) council participation in cost estimate reviews by third-party independent cost estimators in conformance with Federal Transit Administration regulations and guidance;

(3) contractor and subcontractor schedule analysis and contractual requirements, including but not limited to:

(i) development and review of requests for proposals and bid documents prior to advertisement and solicitation;

(ii) review of bids submitted prior to the award of bids;

(iii) review of draft contractual language prior to the execution of project contracts;

(iv) review of change orders for major cost items exceeding $500,000 and schedule delays of more than 30 calendar days prior to the execution of a change order; and

(v) participation in any dispute resolution process that may arise to address competing claims or disputes between a contractor and the council;

(4) light rail transit project cost management and budget analysis for the planning, designing, and construction of a light rail transit facility or new light rail transit project, including but not limited to:

(i) recommendations to address or manage cost overruns or discrepancies, funding sources, contingency funding sources and availability, and the management of state or county financial resources;

(ii) recommendations on appropriate contractual enforcement mechanisms and penalties for any council agreement with a contractor for a light rail transit project; and

(iii) the development of future cost estimates and communication of projected cost increases for a light rail transit project; and

(5) any other areas of expertise that the Department of Transportation may offer.

(b) The council must provide the commissioner of transportation all relevant information required by this section.

(c) Staff from the Department of Transportation providing project assistance to the council must report to the commissioner of transportation. Staff assistance from the Department of Transportation must include at least one licensed professional engineer.

(d) If the commissioner of transportation provides the council with staff and project assistance for the development of a light rail transit project as provided under this section, the commissioner must submit and detail all recommendations made to the council to the chairs and ranking minority members of the legislative committees with jurisdiction over transportation policy and finance within 30 days of submitting its recommendations to the council.

(e) The council must give strong consideration to utilizing input or recommendations developed by the commissioner of transportation. If the council decides against utilizing input or recommendations from the department, the council must reconcile significant deviations to the extent practicable and that portion of the project cannot move forward from the critical path schedule's milestone until the recommendation is reconciled. If the council has sufficient reasoning to justify not utilizing input or recommendations from the department, the council must, within 30 business days, provide written notice and documentation of the decision to the department and the chairs and ranking minority members of the legislative committees with jurisdiction over transportation policy and finance. The notice and documentation must provide the reasons why the council is not utilizing the input or recommendations provided by the department.

Subd. 3. Project costs.

The project budget is responsible for costs incurred by the commissioner of transportation for duties required in this section. The council must only use direct appropriations in law or federal sources to pay its portion of light rail transit capital construction costs.

Subd. 4. Project manager; qualifications.

If the Metropolitan Council is the responsible authority, the council must select a qualified project manager and lead project engineer with at least ten years' transportation industry experience to lead the planning, design, acquisition, construction, or equipping of a new light rail transit project.

EFFECTIVE DATE; APPLICATION.

This section is effective the day following final enactment. Subdivision 2 does not apply to the Southwest light rail transit (Green Line Extension) project. This section applies in the counties of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington.

Report #1: Selection of appropriate delivery methods

The 2024 legislative session created new legislation which increased MnDOT's involvement in the Blue Line Extension (BLE) and future light rail projects. The legislation seeks to leverage MnDOT expertise in contracting, project management, and program delivery to provide greater accountability and oversight in these large-scale infrastructure projects. The legislation requires that the Metropolitan Council (Council) use the Department of Transportation staff and project assistance for "the appropriate delivery method selection for the design, planning, acquisition, construction, and equipping of light rail transit projects" as noted in Minn. Stat. 473.3999, subd. 2(a)(1).

In this capacity, MnDOT's Office of Construction and Innovative Contracting (OCIC) has provided its expertise in contract management to support BLE in this phase of construction delivery method selection. MnDOT interprets the legislation on delivery method selection as mandating an advisory role focused on aligning the correct delivery approach with desired outcomes.

First meeting

The purpose of this meeting was to discuss appropriate contract delivery methods with BLE leadership and MnDOT staff. In the 2023 legislative session, the Council received authorization to use construction manager at risk (CMAR) for "non-right-of-way construction projects over $175,000"; however, the "non-right-of-way" restriction limits the applicability to vertical construction like stations and any operations and maintenance facilities but leaves out and – more importantly – means it cannot be used for any future large-scale civil horizontal contract(s).

BLE discussed a best value (BV) approach as an appropriate delivery method to capture a balance between contractor input and traditional consultant/owner-led design. MnDOT primarily uses design-build-best value (DB) and construction manager/general contractor (CM/GC) as its alternate delivery methods, but their similarities lend valuable insights to discussions involving the risks and timing of other approaches like CMAR and BV. Next steps included engagement with the Council's procurement department on BV processes and timelines.

Second Meeting

A second discussion was called to build upon the BV discussion. BV criteria were discussed, including price and qualitative factors like claim management history, with fewer points awarded for contractors with negative records. BV was used in the Orange Line BRT and I-35W projects and included disadvantaged business enterprise (DBE) plans in scoring.

The BV procurement method offers significant advantages, particularly in complex projects where both quality and cost matter. A planned request for industry feedback (RFIF) will incorporate input from the contractor community on favored delivery methods and contract types. The Council's procurement department reported that the additional staffing positions necessary to support BLE, and other capital projects, remained unfilled. It also indicated that the process of developing templates and training staff would take additional time.

Third Meeting

At this meeting, the benefits and drawbacks of contract packaging types were discussed. Topics included the pool of likely contractors, interfaces between contracts, geographical approaches, and bonding/insurance limitations based

on the likely magnitude of contract amounts. MnDOT shared its experience with the Council about using various contract package types.

Fourth Meeting

BLE's RFIF feedback approach was discussed. MnDOT provided feedback on best practices.

Fifth Meeting

The results of BLE's RFIF information gathering process were discussed. Many contractors, particularly those within the track and systems community, saw the potential benefit of a BV design/bid/build (DBB) contract. Contractors shared concerns over risk-sharing and the Council's contractual terms and conditions.

The benefits and limitations of certain BV strategies were also discussed, and the qualitative factors that contribute to the non-price factors and non-price scoring system used to evaluate and rank BV bids. Of those potential factors, MnDOT raised questions about potential alternative technical concepts, which would allow a feedback mechanism for contractor input into design constructability. MnDOT sees the BV process as mirroring DBB where design is completed at the time of bid, yet acknowledges other processes exist to incorporate constructability prior to bids.

MnDOT Recommendations

1. MnDOT supports the continued development of the best value (BV) approach. While specific details about the evaluation criteria are not available at this stage of the project, MnDOT would like to see the Council's plan for using the BV delivery method to attract additional bidders and solicit constructability feedback. *MnDOT recommends the development of BV criteria that are structured to increase bidder participation and solicit constructability feedback.*

2. MnDOT sees potential staffing gaps that may affect the execution of any intended procurement strategies and the achievement of goals. The implementation of a potential BV strategy or a future CMAR project will require the development of programs with processes, documents, and resources in place and the capability of delivering on those potential strategies. This will take time and resources to develop. *MnDOT recommends the Council increase its staffing capability and expertise in the roles related to contract delivery.*

3. BLE would benefit from the combination of early contractor input and owner-controlled design that alternative delivery methods can provide, particularly with regards to its large-scale civil contracts. Benefits would include early and direct input into constructability, value engineering and potential risks. *MnDOT recommends Council seek additional alternative delivery authority for horizontal construction in a future legislative session.*

Alternative Delivery Methods

The goal of alternative delivery is to better equip project owners, such as MnDOT or the Metropolitan Council, to address projects that present unique and complex challenges not well suited to the traditional design-bid-build method and to benefit the public by providing best-value contracting options as compared to low-bid.

- Best-value (BV) contracting is a procurement process allows owners to consider other factors in addition to price in the award and execution of construction contracts.
- Design-build (DB) is a contracting process that brings designers and contractors together early in the detail design portion of a project. The owner clearly defines the standards and general specifications they expect for a project, and the design-build team works together to satisfy those requirements. MnDOT uses the flexibility design-build offers to maximize the value received per dollar spent in a variety of situations.
- Construction manager / general contractor (CM /GC), like construction manager at-risk, is an integrated approach to planning, designing, and constructing a project. Owners, designers, and contractors work collaboratively to develop the project scope, optimize the design, improve quality, and manage cost.
    - CMGC is an innovative delivery method that allows MnDOT to hire a construction contractor early in a project's design phase to serve as a "construction manager," advising MnDOT and MnDOT's designer. In this role, the contractor provides, among other services, input on constructability, risk, cost, and schedule during the project's design phase. Once the design is nearing completion, the contractor is given an opportunity to provide a bid to MnDOT to construct the project. If the contractor's bid is acceptable to MnDOT, the contractor then enters into a construction contract with MnDOT to serve as the "general contractor."
    - The intent of the CMGC delivery method is to allow for an integrated approach to planning, designing, and constructing a project. MnDOT works collaboratively with the designer (consultant or MnDOT staff), builder (contractor) and stakeholders during a project's design phase to develop a plan to meet the project goals and avoid pitfalls that can lead to schedule delays and increased costs during construction. This collaborative process makes CMGC well suited to unique and/or complex projects with significant risk. Although CMGC projects represent a small number (about one per year) of the projects MnDOT delivers, they can be relatively large.

The cost of producing this report was approximately $10,000.