

HOME FORWARD

PUBLIC CONTRACTING RULES AND PROCEDURES MANUAL

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DIVISION 46

GENERAL PROVISIONS

46-0100

Application; Commentary; Federal Law Supremacy.

(1) These Supplemental Rules and the Attorney General's Model Public Contract Rules set forth the procedures for Public Contracting of Home Forward. Home Forward is subject to the Attorney General's Model Public Contract Rules, as supplemented herein, including all modifications that the Attorney General may adopt. Home Forward is not subject to the Department of Administrative Services' procurement rules found in OAR Chapter 125. Pursuant to ORS 279A.065(5), Home Forward adopts these Rules, which supplement the Attorney General's Model Public Contract Rules. The Rules set forth in Divisions 46 and 47 of this Public Contracting Rules and Procedures Manual supplement OAR chapter 137, divisions 46 and 47, respectively.

(2) In the event of a conflict or inconsistency between the Attorney General's Model Public Contract Rules and these Supplemental Rules, these Supplemental Rules take precedence over the Attorney General's Model Public Contract Rules; provided, however, that if these Supplemental Rules conflict or are inconsistent with the Attorney General's Model Public Contract Rules in such a way that would result in a violation of the Oregon Revised Statutes, the Attorney General's Model Public Contract Rules shall apply unless doing so would also result in a violation of the Oregon Revised Statutes.

(3) Except as otherwise expressly provided in ORS 279C.800 through ORS 279C.870, and notwithstanding ORS chapters 279A and 279B, and ORS 279C.005 through 279C.670, applicable federal statutes and regulations govern when federal funds, including but not limited to HUD federal grant funds, are involved and the federal statutes or regulations conflict with any provision of ORS chapters 279A and 279B, and ORS 279C.005 through 279C.670 or these Rules, or require additional conditions in Public Contracts not authorized by ORS chapters 279A and 279B, and ORS 279C.005 through 279C.670 or these Rules.

(4) These Rules become effective immediately and apply to all Public Contracts entered into prior to this date and all Public Contracts from this date forward.

(5) All terms used but not defined in these Rules shall have the meanings given to them in ORS chapters 279A, 279B, and ORS 279C and the Attorney General's Model Public Contract Rules.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.030; ORS 279A.065

46-0110

Definitions.

As used in the Public Contracting Code and these Rules, unless the context or a specifically applicable definition requires otherwise:

(1) **“As-Is, Where-Is”** applies to the sale of Goods and means that the Goods are of the kind, quality, and locale represented, even though they are in a damaged condition. It implies that the buyer takes the entire risk as to the quality of the Goods involved, based upon the buyer's own inspection. Implied and express warranties are excluded in sales of Goods **“As-Is, Where-Is.”**

(2) **“Board”** means Home Forward's Board of Commissioners pursuant to ORS chapter 456.

(3) **“Contract”** for the purposes of these Rules means **“Public Contract.”**

“Executive Director” means Home Forward’s Executive Director or the Executive Director’s designee.

(4) **“Independent Contractor”** means a Person who provides services to Home Forward in which Home Forward neither controls nor has the right to control the means or manner by which Work is performed. Home Forward may control the results of the services, but not control the means or manner of a Contractor’s performance of the Work. The person providing the services must meet the tests of “Independent Contractor” as defined by the Internal Revenue Service’s (“IRS”) Ruling 87-41 and the Public Employees Retirement System’s OAR 459-010-0030.

(5) **“Local Contract Review Board”** or **“LCRB”** means the governing body of Home Forward unless the governing body designates another body, board or commission to serve as the local contract review board pursuant to ORS 279A.060.

(6) **“OAR”** means the Oregon Administrative Rules.

(7) **“Original Contract”** means the initial Contract or Price Agreement as solicited and awarded by Home Forward.

(8) **“ORS”** means the Oregon Revised Statutes.

(9) **“Price Agreement”** means a Public Contract for the Procurement of Goods or Services at a set price with:

(a) No guarantee of a minimum or maximum purchase; or

(b) An initial order or minimum purchase combined with a continuing Contractor obligation to provide Goods or Services in which Home Forward does not guarantee a minimum or maximum additional purchase.

(10) **“Procurement”** means the act of purchasing, leasing, renting or otherwise acquiring: Goods or Services; Architectural, Engineering, and Land Surveying Services and Related Services; and Public Improvements. Procurement includes each function and procedure undertaken or required to be undertaken by Home Forward to enter into a Public Contract, administer a Public Contract and obtain the performance of a Public Contract under the Public Contracting Code and these Rules.

(11) **“Proposer”** means a Person who submits a proposal in response to a Request for Proposals, except for Architectural, Engineering and Land Surveying Services and Related Services, whereby “Proposer” means a Consultant who submits a proposal to Home Forward in response to a Request for Proposals.

(12) **“Provider”** means collectively or in the alternative: the supplier, Contractor or Consultant, providing Goods or Services or Public Improvements.

(13) **“Purchase Order”** means Home Forward’s document to formalize a purchase transaction with a Provider. Acceptance of a Purchase Order constitutes a Public Contract. Home Forward’s use of a Purchase Order must comply with Home Forward Policy, the Public Contracting Code and these Rules.

(14) **“Quote”** means a verbal or Written Offer obtained through an Intermediate Procurement.

(15) **“Request for Qualifications”** or **“RFQ”** means a Written document describing Home Forward’s circumstances and the type of service(s) desired; setting forth all significant evaluation factors and their relative importance and, if appropriate, price; and soliciting competitive Written qualifications. The RFQ will not result in a Contract, but is intended to establish an open, inclusive list of qualified Contractors from which to seek Proposals and select a Contractor.

(16) **“Rules”** mean the Attorney General’s Model Public Contract Rules as supplemented and amended herein.

(17) “**Specifications**” means any description of the physical or functional characteristics, or of the nature of Goods or Services or a construction item, including any requirement for inspecting, testing, or preparing Goods or Services or a construction item for delivery and the quantities or qualities of materials to be furnished under the Contract. Specifications generally will state the result to be obtained and may, on occasion, describe the method and manner of doing the Work to be performed. See ORS 279B.200(3).

(18) “**State**” means the State of Oregon.

(19) “**State Government**,” subject to ORS 174.108, means the Executive Department, the Judicial Department and the Legislative Department.

(20) “**Surplus Property**” means all personal property, including but not limited to vehicles and titled equipment owned by Home Forward that Home Forward no longer has a use for, is unsuitable for use, has become too costly to repair, or is obsolete.

(21) “**Work**” means the furnishing of all materials, equipment, labor, and incidentals necessary to successfully complete any individual item or the entire Contract and successful completion of all duties and obligations imposed by the Contract.

(22) “**Written**” or “**Writing**” means conventional paper documents, whether hand Written, manuscript or printed, in contrast to spoken words. It also includes electronic transmissions or facsimile documents when required or permitted by applicable law, or to the extent permitted by the Solicitation Document or Contract.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.065; ORS 279A.200; ORS 279B.005; ORS 279C.110

46-0120

Use of Prison Labor on Home Forward’s Contracts.

Except to the extent required by the Oregon Constitution, Home Forward prohibits, and requires its contracting parties to prohibit, the use of prison labor, products and services in the performance of any Home Forward Contract. This rule is effective 4/19/2022 and it shall apply to all Contracts advertised or, if not advertised, executed on or after the effective date.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A; ORS 279B; ORS 279C

AUTHORITY

46-0140

Procurement Authority.

Pursuant to ORS 279A.050, except as otherwise provided in the Public Contracting Code, Home Forward has all of the procurement authority necessary to carry out the provisions of the Public Contracting Code, and Home Forward must exercise all procurement authority in accordance with the Public Contracting Code. Home Forward is the Local Contracting Agency described in the Public Contracting Code, except as delegated pursuant to Rule 46-0170.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.050(1), (2)

46-0170

Delegation of Authority.

(1) **Policy.** Pursuant to ORS 279A.075 and ORS 456.135, the Board delegates to the Executive Director or his/her designee, the authority to enter into and approve payment on contracts and amendments for products, materials, capital outlay, equipment, and services (including but not limited to design and construction services) if:

(a) The Contract or amendment is within appropriations made by the Board pursuant to ORS 294.456; and

(b) The total amount of the Contract is \$1,000,000 or less and the total amount of the amendment is \$500,000 or less.

(2) Except as provided in Subsection (1) of this section, the Board must approve all Home Forward Contracts and Contract amendments.

(3) **Authority to Dispose of Surplus Property.** If the estimated value of any single item of Surplus Property exceeds \$25,000, the Board shall formally declare the property as surplus and authorize its disposal. If the estimated value of any single item of Surplus Property is less than or equal to \$25,000, the Executive Director or the Executive Director's designee may declare the property as surplus and authorize its disposal.

(4) **Authority to Declare an Emergency and Enter Into Emergency Contracts.** The Executive Director or the Executive Director's designee may declare an emergency and enter into the emergency Contract(s).

Stat. Auth: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.050; ORS 279A.075

Personal Services Contracts

46-0330

Authority and Standards for Personal Services Contracts.

(1) **Application.** For purposes of this Rule only, "Personal Services" include but are not limited to the following:

(a) Contracts for services performed in a professional capacity, including services of an accountant, attorney, insurance agent, social worker, property manager, leasing agent, real estate agent, real estate broker, escrow agent, title insurer, lender, appraiser, medical professional (e.g., doctor, dentist, nurse, foot care specialist, dietician, nutritionist, counselor), information technology consultant, or broadcaster;

(b) Contracts for services as an artist in the performing or fine arts, including any person identified as a photographer, filmmaker, actor, director, painter, weaver, or sculptor;

(c) Contracts for services that are specialized, creative, or research-oriented;

(d) Contracts for services as a consultant;

(e) Contracts for resident services; and

(f) Contracts for human custodial care, childcare, mental health care, health services, social and emergency services, and other human services.

"Personal Services" does not include architect, engineer, land surveyor and related services as defined in ORS 279C.100(5).

(2) Identification of Personal Services Contracts.

(a) **Authority.** Pursuant to ORS 279A.055(2), the LCRB may designate Contracts or classes of Contracts as Personal Services Contracts for the purposes of reporting Personal Services Contracts

in accordance with ORS 279A.055 and identifying the appropriate required procedures in accordance with ORS 279A.070. In the event of uncertainty or disagreement as to the status of any particular Contract or class of Contracts, the LCRB may determine whether the Work calls for the performance of Personal Services.

(b) Contract Requirements. Home Forward must identify within the Contract that it is contracting for Personal Services. A failure to adequately describe Personal Services within the Contract will not invalidate the procurement or Contract if Home Forward properly used a sourcing method pursuant to ORS 279B.055 through 279B.085 and substantially followed the related Rules regarding screening, selection, evaluation, award, and approval in accordance with these Rules. In addition, Home Forward Personal Services Contracts must comply with all applicable provisions of ORS 279B.220 to 279B.240.

Stat. Auth.: ORS 279A.055; ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.

46-0335

Selection Procedures.

(1) Informal Selection Procedures.

Home Forward may use an informal selection process to obtain services where the anticipated cost of the service is expected to be more than \$50,000 but less than or equal to \$150,000. If the anticipated cost of the service is expected to be \$50,000 or less, Home Forward may procure the service through direct appointment as defined in OAR 137-48-0200.

(a) The informal selection process must solicit responses/Proposals from at least three qualified contractors offering the required services.

(b) The informal selection process is competitive. The selection and ranking may be based on criteria including but not limited to each Proposer's:

(i) Particular capability to perform the services required;

(ii) Experienced staff available to perform the services required, including each Proposer's recent, current, and projected workloads;

(iii) Performance history;

(iv) Approach and philosophy used in providing services;

(v) Fees or costs;

(vi) Geographic proximity to the project or the area where the services are to be performed; and

(vii) Work volume previously awarded by Home Forward, with the object of effecting an equitable distribution of Contracts among qualified contractors. But distribution must not violate the policy of selecting the most highly qualified contractor to perform the services at a fair and reasonable price.

(b) Written confirmation of solicitation attempts and responses with contractor names and addresses shall be maintained in the Procurement file.

(2) Formal Selection Procedures.

(a) Home Forward will use a formal selection procedure when the anticipated cost of the Contract will exceed \$150,000 or whenever the Executive Director determines that the amount of the Contract or complexity of the project requires use of the formal process. All formal RFP and RFQ solicitations must comply with the requirements for RFPs contained in Division 47 of these Rules.

(b) Additional Requirements for a Request for Qualifications (RFQ). An RFQ may be used to determine whether competition exists to perform the needed services or to establish a list of qualified contractors for RFPs, for informal solicitations, or for individual negotiation, as provided

in these Rules.

(c) The RFQ must at least describe the particular specialty desired, the qualifications the contractor must have in order to be considered, and the evaluation factors and their relative importance.

(d) The RFQ may require information, including but not limited to:

(i) The contractor's particular capability to perform the required services;

(ii) The number of experienced staff available to perform the required services, including specific qualifications and experience of personnel;

(iii) A list of similar services the contractor has completed, with references concerning past performance; and

(iv) Any other information necessary to evaluate contractor qualifications.

(e) A qualifications presubmission meeting may be held for all interested contractors to discuss the proposed services. The RFQ must include the date, time, and place of the meeting and indicate whether it is voluntary or mandatory.

(f) Unless the RFQ establishes that competition does not exist or unless the solicitation process is canceled or all qualification statements are rejected, all respondents (who met the published qualifications) will receive a notice (or other materials as appropriate) of any required services and have an opportunity to submit a Proposal in response to a contracting agency's subsequent RFP.

Stat. Auth.: ORS 279A.055; ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A

46-0340

Selection by Negotiation.

Home Forward may procure Personal Services with contractors directly through negotiation, if:

(1) Home Forward has, through an RFQ, established a list of qualified contractors for the particular project or class of projects; or

(2) The nature of the Work is not project-driven but requires an ongoing, long-term relationship of knowledge and trust. Examples include legal services, property management services, lenders, real estate brokers, title insurance companies, escrow agents, appraisers and audit services.

Stat. Auth.: ORS 279A.055; ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A

46-0345

Procedures for Personal Services Contracts.

(1) **Contract Forms for Architectural, Engineering and Land Surveying Services and Related Services.** Home Forward must comply with OAR 137-48-0300(1).

(2) **Amendments and Reinstatements.** The procedures that shall apply to amendments and reinstatements are found in Division 47 of these Supplemental Rules and the Attorney General's Model Public Contract Rules. Procedures for amendments and reinstatements for Architectural, Engineering and Land Surveying Services and Related Services are found in Division 48 of the Attorney General's Model Public Contract Rules.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.70; ORS 279A.140(h)(B)

DIVISION 47

PUBLIC PROCUREMENTS FOR GOODS OR SERVICES

47-0288

Special Procurements; by Rule.

(1) Amendments; Renegotiations of Existing Contracts with Incumbent Contractors.

(a) **Authorization.** The Local Contract Review Board hereby grants approval of this special procurement. The Executive Director, acting on behalf of Home Forward, or the Executive Director's designee may renegotiate and amend existing Contracts with incumbent Contractors if doing so is in the best interest of Home Forward.

(b) **Process and Criteria.** The Executive Director or the Executive Director's designee may renegotiate various items of the Contract, including but not limited to: price, term, delivery and shipping, order size, item substitution, warranties, discounts, online ordering systems, price adjustments, product availability, product quality, and reporting requirements. The Executive Director must meet the following conditions in his/her renegotiations with incumbent Contractors:

(A) **Favorable Result.** The Executive Director shall determine that, with all things considered, the renegotiated Contract is at least as favorable to Home Forward as the Original Contract and document this in the Procurement file. For example, Home Forward and the Contractor may adjust terms and conditions within the Original Contract to meet different needs;

(B) **Scope; Value Limits.** The Goods or Services provided under the renegotiated Contract must be reasonably related to the Original Contract's Solicitation. For example, Home Forward may accept functionally equivalent substitutes for any Goods or Services in the Original Contract's Solicitation. If the Original Contract was procured as a small procurement or intermediate procurement, Home Forward may amend the Contract to include additional Goods or Services, provided that the total increase in value of the additional Goods or Services do not exceed a value equal to 125% of the value set forth in ORS 279B.065 for small Procurements and ORS 279B.070 for intermediate Procurements. For the avoidance of doubt, extensions of a Contract term are not considered additional Goods or Services for the purposes of this Rule.

(C) **Optional Term or Condition.** If a Contractor offers a term or condition that was rejected in the original Solicitation, Home Forward may not renegotiate for a lower price based on this Rejected Term or Condition as a mandatory term or condition in the renegotiated Contract. If, however, a Contractor offers a lower price pursuant to a rejected term or Condition without additional consideration from Home Forward and as only an option to Home Forward, then Home Forward may accept the option of a lower price under the rejected term or Condition. For example, if Home Forward initially rejected a Contractor's proposed condition that the price required a minimum order, any renegotiated Contract may not mandate this condition; but Home Forward may agree to the option to order lesser amounts or receive a reduced price based upon a minimum order; and

(c) Findings/Compliance.

It is unlikely that this special procurement will encourage favoritism in the awarding of public contracts or substantially diminish competition for such contracts as required by ORS 279B.085(4)(a). This Rule requires Home Forward to make a good faith effort to determine the

best value for the specified product or service before renegotiating. In addition, Home Forward is required to evaluate the current market to determine that the Contract renegotiation will result in a favorable outcome for Home Forward. Accordingly, this Rule is reasonably expected to result in substantial cost savings to the contracting agency or to the public.

(2) Equipment Repair and Overhaul.

(a) **Authorization.** The Local Contract Review Board grants approval of this special procurement for equipment repair and overhaul, as described in this Rule. The Executive Director, acting on behalf of Home Forward, shall comply with the requirements of this Rule for the Procurement of equipment repair or overhaul services.

(b) **Conditions.** The Executive Director may enter into a Public Contract for equipment repair or overhaul without competitive bidding, subject to the following conditions:

(A) Service or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing; or

(B) Service or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source; and

(C) Home Forward purchases within the limits and pursuant to the methods in (4)(c) of this Rule.

(c) **Process and Criteria.** The Executive Director will use competitive methods wherever possible to achieve best value and must document in the Procurement file the reasons why a competitive process was deemed to be impractical. If the anticipated purchase is \$10,000 or more but less than \$150,000 competitive quotes must be solicited and any quotes received must be retained in the Procurement file pursuant to the Rules governing Intermediate Procurements. If the anticipated purchase exceeds \$150,000, Home Forward will publish notice pursuant to OAR 137-47-0300. The resulting Contract must be in Writing and the Procurement file must document the use of this special procurement Rule by number to identify the sourcing method.

(d) **Findings/Compliance.** It is unlikely that this special procurement will encourage favoritism in the awarding of public Contracts or substantially diminish competition for such Contracts as required by ORS 279B.085(4)(a). The need for equipment repair or overhaul cannot be anticipated by Home Forward and generally needs to be repaired immediately so as to avoid unnecessary downtime. Home Forward may incur additional costs as well as liability exposure if it experiences downtime or is forced to rent replacement equipment. Home Forward is also required to make a good faith effort to secure competitive quotes under this Rule. In those instances where it is not practical to obtain quotes or quotes are not available, Home Forward will document that in writing and maintain this information as a part of the Procurement file. When compared to the potentially significant costs associated with unnecessary downtime, this Rule is reasonably expected to result in substantial cost savings to the contracting agency or to the public. In the alternative, because there is a strong public interest in maintaining services provided by equipment, this Rule will substantially promote the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under ORS 279B.055, 279B.060, 279B.065 or 279B.070 or under any rules adopted thereunder.

(3) Information Technology Contracts.

(a) **Authorization.** The Local Contract Review Board grants approval of this special procurement for information technology Contracts as described in this Rule. The Executive Director, acting on behalf of Home Forward, shall comply with the requirements of this Rule for the Procurement of information technology Contracts.

(b) **Process and Criteria.** Competitive methods will be used wherever possible to achieve best value. The reasons why a competitive process was deemed to be impractical must be documented in the Procurement file.

(A) If the anticipated purchase is \$10,000 or more but less than \$150,000 competitive quotes will be solicited, if practicable, and any quotes received will be retained in the Procurement file pursuant to the Rules governing Intermediate Procurements.

(B) If the anticipated purchase exceeds \$150,000, Home Forward will solicit written proposals, if practicable, in accordance with OAR 137-47-0260.

(C) The resulting Contract must be in Writing and the Procurement file must document the use of this special procurement Rule by number to identify the sourcing method.

(c) **Findings/Compliance.** It is unlikely that this special procurement will encourage favoritism in the awarding of public Contracts or substantially diminish competition for such contracts as required by ORS 279B.085(4)(a). Rapid changes in technology and technology pricing make it necessary for Home Forward to be able to purchase needed computer equipment (including but not limited to audio visual equipment, servers, security systems, telephones, telecommunications devices and equipment, copiers, printers and scanners) and software quickly. It is frequently possible to take advantage of lower pricing due to the frequent price changes in the marketplace. Generally there is sufficient competition among vendors in the area of information technology hardware and software for Home Forward to secure competitive quotes. Home Forward is required to make a good faith effort to secure competitive quotes under this Rule. In those instances where it is not practical to obtain quotes or quotes are not available, Home Forward will document that in Writing and maintain this information as a part of the Procurement file. This Rule gives Home Forward some flexibility in selecting the method of competitive procurement but requires adherence to the Rule on brand name or sole source procurements if those situations occur. Accordingly, this Rule is expected to result in substantial cost savings to the contracting agency or to the public. Alternatively, because the ability to keep pace with rapid changes in technology is important for the continued provision of services to the public, this Rule will substantially promote the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under ORS 279B.055, 279B.060, 279B.065 or 279B.070 or under any rules adopted thereunder.

(4) Telecommunications Services.

(a) **Authorization.** The Local Contract Review Board grants approval of this special procurement for telecommunications services as described in this Rule. The Executive Director, acting on behalf of Home Forward, shall comply with the requirements of this Rule for the Procurement of telecommunications services.

(b) **Conditions.** The Executive Director may enter into a Public Contract for telecommunications services without competitive bidding, if no competition exists within the area for the service required. To determine whether competition exists, the Executive Director will consider the following factors:

(A) Determination of alternative providers available within the geographic and service market area;

(B) The extent to which alternative services offered are comparable or substitutable in technology, service provided, and performance; and

(C) The extent to which alternative providers can respond to Home Forward's interest in consistency and continuity of services throughout its service area, volume discounts, equitable service for all users, centralized management and limiting Home Forward liability.

(c) **Process and Criteria.** The Executive Director will use competitive methods wherever possible to achieve best value. If competition exists as defined above and the anticipated purchase is \$10,000 or more but less than \$150,000 competitive quotes will be solicited and any quotes received will be retained in the Procurement file pursuant to the Rules governing Intermediate Procurements. If the anticipated purchase exceeds \$150,000, Home Forward will solicit written proposals in accordance with OAR 137-47-0260. The resulting Contract must be in Writing and the Procurement file must document the use of this special procurement Rule by number to identify the sourcing method.

(d) **Findings/Compliance.** It is unlikely that this special procurement will encourage favoritism in the awarding of public Contracts or substantially diminish competition for such Contracts as required by ORS 279B.085(4)(a). Since deregulation, there is generally sufficient competition among vendors of telecommunications services for Home Forward to secure competitive quotes. It is important that Home Forward take advantage of price competition in the marketplace. There may be circumstances, however, where sufficient competition does not exist in the relevant geographic and service market area. In such cases, Home Forward will follow this Rule in determining whether sufficient competition exists to make a competitive procurement. Home Forward is required to make a good faith effort to secure competitive quotes under this Rule. In those instances where it is not practical to obtain quotes or quotes are not available, Home Forward will document that in Writing and maintain this information as a part of the Procurement file. This Rule gives Home Forward some flexibility in selecting the method of competitive procurement but requires adherence to the Rule on brand name or sole source procurements if those situations occur. Accordingly, this Rule is expected to result in substantial cost savings to the contracting agency or to the public. Alternatively, because the ability to keep pace with rapid changes in technology is important for the continued provision of services to the public, this Rule will substantially promote the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under ORS 279B.055, 279B.060, 279B.065 or 279B.070 or under any rules adopted thereunder.

(5) Copyrighted Materials.

(a) **Authorization.** The Local Contract Review Board grants approval of this special procurement for copyrighted materials as described in this Rule. The Executive Director, acting on behalf of Home Forward, may purchase copyrighted materials, regardless of dollar value, without competitive bidding, pursuant to this Rule.

(b) **Process and Criteria.** The Executive Director may also purchase copyrighted materials as a sole source procurement in accordance with applicable law. Examples of copyrighted materials covered by this exemption may include, but are not limited to, artwork, photography, film, video, reference materials, audio and visual media and non-mass-marketed software from a particular publisher or its designated distributor.

(c) **Findings/Compliance.** It is unlikely that this special procurement will encourage favoritism in the awarding of public Contracts or substantially diminish competition for such Contracts as required by ORS 279B.085(4)(a). By their nature, copyrighted materials are protected for the use of a single owner and often are produced by a single supplier who may be the owner of the copyright or his/her licensee. Instructional materials are examples of copyrighted materials that Home Forward purchases through a sole source.

(6) Insurance and Employee Benefits.

(a) **Authorization.** The Local Contract Review Board grants approval of this special procurement for insurance and employee benefits as described in this Rule. The Executive

Director, acting on behalf of Home Forward, shall comply with the requirements of this Rule for the Procurement of insurance and employee benefits.

(b) **Process and Criteria.** Home Forward may purchase liability, builder’s risk, property damage, workers’ compensation, and other insurance and insurance services Contracts, and employee benefits, without competition and regardless of dollar amount, by appointing an agent of record who shall conduct a competitive process to procure such services. For the purposes of this special procurement rule, “employee benefits” includes, but is not limited to, employee “benefit plans” as defined in ORS 243.105(1); plans provided through flexible benefit plans as defined in ORS 243.221; insurance or other benefit based on life, supplemental medical, supplemental dental, optical, accidental death or disability insurance plans; long-term care insurance; health care coverage to retired officers, employees, spouses, and children; employee assistance plans; and expense reimbursement plans.

(c) **Findings/Compliance.** It is unlikely that this special procurement will encourage favoritism in the awarding of public Contracts or substantially diminish competition for such Contracts as required by ORS 279B.085(4)(a). Home Forward will enter into insurance and employee benefits Contracts that result from competitive bidding or proposal processes conducted by Home Forward’s agent of record. Because agents are knowledgeable about the insurance and employee benefits markets, Home Forward can reasonably expect to achieve substantial cost savings by using an agent of record to conduct the Procurement.

(7) **Purchase Under Contracts Solicited by Nonprofit Procurement Organization of Which Home Forward Is a Member.** Home Forward may purchase goods and/or services under a Contract or Procurement solicited by a Nonprofit Procurement Organization of which Home Forward is a member. For the purposes of this Special Procurement, such a Procurement Organization will be considered to be an “Administering Contracting Agency” and a “Contracting Purchasing Group” under OAR 137-46-0400 through 137-46-0480. Such Procurement must otherwise comply with the requirements for permissive, joint, or interstate cooperative Procurements, as applicable.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279B.085

DIVISION 50

SURPLUS PROPERTY

50-0100

Surplus Property Definitions.

In addition to the definitions contained in ORS 279A.250 and Rule 46-0110, the following definitions apply to these Rules on Surplus Property:

- (1) **“Bid”** means a competitive Offer to purchase advertised Surplus Property at a price specified by the bidder.
- (2) **“Cash”** includes U.S. currency, cashier’s checks, certified checks, traveler’s checks, money orders made payable to Home Forward, or approved credit cards.
- (3) **“Direct Labor”** includes all Work required for preparation, production, processing and packing of Surplus Property, but does not include supervision, administration, inspection or shipping.
- (4) **“Employee’s Household”** means all persons residing with employee.
- (5) **“Employee’s Immediate Family”** means the children, step-children, parents, step-parents, grandparents and spouse of employee, separately or in any combination thereof.
- (6) **“Government Agency”** means every federal and state officer, board, commission, department, institution, branch or agency of federal or State Government.
- (7) **“Invitation to Bid”** means a competitive Offer to bid on Surplus Property available for public sale and is also known as a bid advertisement.
- (8) **“Not-for-Profit Organization”** is defined in ORS 279A.250(2) and means a nonprofit corporation as defined in ORS 307.130.
- (9) **“Photographic Identification”** means a document that shows the bearer’s current name, address, and photographic portrait.
- (10) **“Political Subdivision”** includes divisions or units of Oregon local government having separate autonomy such as Oregon counties, cities, municipalities or other public corporate entities having local governing authority.
- (11) **“Private Not-for-Profit Agencies”** means those Agencies meeting the criteria specified in the Oregon Administrative Rules.
- (12) **“Property”** is defined in ORS 279A.250(3) and means personal property.

Stat. Auth.: ORS 283.060; ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.250

50-0110

Eligibility of Government Agencies, Political Subdivisions and Nonprofit Organizations.

Prior to offering Surplus Property for public sale, Home Forward may make Surplus Property available to the following:

- (1) Public housing authorities;
- (2) Federal or state agencies;
- (3) Political Subdivisions of the federal or state government; and
- (4) Any nonprofit organization qualified to acquire property as determined by Home Forward.

Stat. Auth.: ORS 283.060; ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.260

50-0120

Surplus Property Acquisition.

- (1) Recipients of Surplus Property must have funds available at the time the property is acquired, and pay all costs and charges incidental to the acquisition within 30 calendar days from the date of the invoice. Invoices outstanding in excess of 90 calendar days may result in suspension of purchasing privileges until such invoices have been paid in full.
- (2) Surplus Property must be available to qualified organizations (those organizations referenced in Rule 50-0110) prior to public sale. Nonqualifying private entities and private citizens, separately or combined, must not be eligible to acquire Surplus Property except at public sales.
- (3) Surplus Property acquired by qualified organizations must be used in the conduct of their official public programs and not for resale or distribution unless otherwise preapproved by Home Forward.

Stat. Auth.: ORS 279A.065 (5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.260; ORS 279A.280

50-0130

Public Sales for Disposal of Surplus Personal Property.

- (1) **Conduct.** Home Forward must conduct public sales for the disposal of Surplus Property not sold or transferred pursuant to Rules 50-0110 and 0120. Methods of disposal may include, but are not limited to: internet auctions, oral auctions, sealed bid sales and fixed price retail sales, separately or in any combination thereof.
- (2) **Eligibility.** Members of the general public may participate as buyers at public sales. No employee of Home Forward, whether full-time, part-time, temporary or unpaid (volunteer), member of the Employee's Household or Employee's Immediate Family, or any person acting on the employee's behalf may participate in public sales if the employee has had any role in declaring the item surplus, processing the item or related paperwork, or offering it for sale.
- (3) **Conduct of Internet Auctions.**
 - (a) Home Forward may offer Surplus Property for public sale on the internet using its own website or the services of an internet auction provider. The public may inspect Property offered for sale at the time and place specified in the public Invitation to Bid;
 - (b) Home Forward reserves the right to reject any and all Bids regarded as not in the best interests of the public;
 - (c) All items must be sold to the highest bidder. All Property must be offered "As-Is, Where-Is" with no warranty or other guarantee as to its condition or fitness for any use or purpose. Terms and conditions of the sale will be made a part of the internet posting. A purchaser or disappointed bidder will have no recourse against Home Forward, or any of its respective officers, employees or agents. All sales will be final.
- (4) **Payment.**
 - (a) Full payment must be made within 10 calendar days from the date of the auction's close unless otherwise specified in the public Invitation to Bid.
- (5) **Claiming Items Purchased.**
 - (a) Items not paid in full by the time specified in the sales terms and conditions will be canceled;

(b) **Unclaimed Property.** Property paid for but not claimed within the time specified in the sales terms and conditions shall be considered abandoned and ownership shall be retained by Home Forward;

(c) **Title.** Title to Property sold will be transferred to the purchaser when full and final payment is made, unless otherwise specified by Home Forward. For vehicles, receipt of payment of the sale price and delivery of key to the purchaser constitutes delivery and possession. Titles to vehicles must be transferred upon receipt of full payment. Home Forward rejects any liability once a purchaser takes possession of a vehicle.

(6) **Failure to Comply.** Home Forward may establish criteria to debar participants from internet auctions and other sales pursuant to this Rule. Such criteria shall be based on:

(a) Conviction of fraud;

(b) Unsatisfactory internet auction service ratings;

(c) Failure to claim purchases; or

(d) Other documented activities determined by Home Forward to warrant debarment.

Based upon these criteria, Home Forward may debar participants from internet auctions and participation in other sales.

(7) Conduct of Auctions and Sealed Bid Sales.

(a) Home Forward must advertise the date, time and location of public auction or sealed Bid sales. A public Invitation to Bid shall be available at the auction site or sales location one week before an auction or sealed Bid sale. The public may inspect Property offered for sale at the time and place specified in the public Invitation to Bid;

(b) Home Forward reserves the right to reject any and all Bids regarded as not in the best interests of the public;

(c) All items must be sold to the highest bidder. All Property will be offered “As-Is, Where-Is” with no warranty or other guarantee as to its condition or fitness for use. A purchaser or disappointed bidder will have no recourse against Home Forward or any of its respective officers, employees or agents. All sales will be final.

(d) Home Forward may require a Bid security check (payable to Home Forward) equal to at least 10 percent of the Bid to accompany all sealed Bids. The Invitation to Bid shall define any Bid security requirements. The Bid security of unsuccessful bidders will be returned within 30 calendar days following a Bid Opening. The successful bidder’s Bid security will be applied as partial payment on Property purchased.

(8) Payment.

(a) Full payment must be made on the day of the sale for all purchases unless the Invitation to Bid states otherwise. In those instances where full payment is not required, a 10 percent down payment is required on the day of the sale. The time limit for making full payment, and the place where payment must be made, will be specified in the public Invitation to Bid;

(b) Payment by personal check may be accepted, at the absolute discretion of Home Forward, when presented with two pieces of acceptable identification, one of which must be a Photographic Identification. Other acceptable identification may include major credit cards, a valid driver’s license, or a valid voter’s registration card. Home Forward reserves the right, in its absolute discretion, to refuse any tender of payment by personal check and, further, the right to require that payment be made by Cash, cashier’s check or money order.

(9) Claiming Items Purchased.

(a) Items not paid in full by the time specified in the sales terms and conditions will be canceled and Bid security forfeited;

- (b) Property paid for but not claimed within the time specified in the sales terms and conditions shall be considered abandoned and ownership shall be retained by Home Forward unless prior Written approval is obtained from Home Forward;
- (c) Title to Property sold must be transferred to the purchaser when full and final payment is made, unless otherwise specified by Home Forward. For vehicles, receipt of payment of the sale price and delivery of key to the purchaser constitutes delivery and possession. Titles to vehicles must be transferred upon receipt of full payment. If payment is made by personal check, the title must be released to the vehicle purchaser in 21 calendar days, or when the check clears the bank. Home Forward rejects any liability once a purchaser takes possession of a vehicle;
- (10) **Failure to Comply.** In addition to Section (6) of this Rule, Home Forward may debar participants from state sales based upon the following criteria:
 - (a) Failure to observe the procedures set forth in the sales terms and conditions; or
 - (b) Payment for purchase or Bid security with a personal check, which is dishonored by a payer's financial institution.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070
Stats. Implemented: ORS 279A.280

SELLING GOODS OR SERVICES

50-0200

Policy; Applicability; Methods

- (1) **Policy.** A sound and responsive Public Contracting system, pursuant to ORS 279A.015, may include both purchasing and selling activities. By definition, a Public Contract includes sales by Agencies pursuant to ORS 279A.010(z). The policies of ORS 279A.015 apply to public selling activities.
- (2) **Applicability.** This Rule applies to the sales of Goods or Services. The sale of Goods or Services includes but is not limited to: concessions and personal property.
- (3) **Methods.** Home Forward must use a method, as feasible for selling, pursuant to ORS 279B.055 through ORS 279B.085. For the sale of Goods, the value of the sale transactions for the purpose of selecting the appropriate sourcing method must be based on the gross amount of receipts anticipated.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070
Stats. Implemented: ORS 279A.010(x); ORS 279A.015; ORS 279A.050(1), (2); ORS 279A.065(5)(a)

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Chapter 137

Division 45

REVIEW OF PUBLIC CONTRACTS

137-045-0010

Definitions

The following definitions apply to all Oregon Administrative Rules contained in OAR chapter 137, division 045:

- (1) "Agency" means "State agency" as defined in ORS 291.045.
- (2) "Agency Contract Administration" means an action undertaken by an Agency in accordance with the terms of a Public Contract that has been approved for legal sufficiency if required, or is exempt from legal sufficiency approval, and does not change the Public Contract. Agency Contract Administration does not include an assignment of rights or delegation of duties under a Public Contract to a third party. Examples of Agency Contract Administration include, but are not limited to, actions that result in:
 - (a) A notice to proceed, the exercise of an option, or any other exercise of a contractual right, whereby the Agency causes a Public Contract to be implemented in accordance with its terms; and
 - (b) A purchase order, work order or similar ordering instrument issued under a binding contract such as a Requirements Contract or Variable Delivery Contract.
- (3) "Architectural and Engineering Services Contract" means a Public Contract for architectural, engineering and land surveying services as defined in ORS 279C.100(2) or related services as defined in 279C.100(6).
- (4) "Assistant Attorney General" means a person appointed by the Attorney General under ORS Chapter 180 as an Assistant Attorney General or as a Special Assistant Attorney General and who is authorized in writing by the Chief Counsel, General Counsel Division, to review and approve Public Contracts for legal sufficiency. Such authorization may be limited by the Public Contract type and amount.
- (5) "Attorney in Charge, Business Transactions Section" means the Assistant Attorney General the Attorney General appoints as Attorney in Charge of the Business Transactions Section, General Counsel Division, Department of Justice or an alternate designated by the Chief Counsel, General Counsel Division.
- (6) "Attorney General" means the Attorney General of the State of Oregon.
- (7) "Chief Counsel, General Counsel Division" means the Assistant Attorney General the Attorney General appoints as Chief Counsel of the General Counsel Division, Department of Justice or an alternate designated by the Attorney General.
- (8) "Emergency" means circumstances that create a substantial risk of loss, damage to property, interruption of services or threat to public health or safety that require prompt execution of a Public Contract to deal with the risk.
- (9) "Federal Cooperative Agreement" means a Public Contract under which an Agency receives money or property from a federal agency for the purpose of supporting or stimulating an Agency program or activity and substantial involvement is expected between the federal agency and the Agency when carrying out the program or activity contemplated in the agreement. A Federal Cooperative Agreement does not include a procurement contract under 31 U.S.C. section 6303.
- (10) "Grant" means:
 - (a) A Public Contract under which an Agency receives money, property or other value from a grantor for the purpose of supporting or stimulating an Agency program or activity, and in which no substantial involvement by grantor is
 - (a)

anticipated in the contemplated program or activity other than activities associated with monitoring compliance with Grant conditions; or

(b) A Public Contract under which an Agency provides money, property or other value to a recipient for the purpose of supporting or stimulating a program or activity of the recipient, and in which no substantial involvement by Agency is anticipated in the contemplated program or activity other than activities associated with monitoring compliance with Grant conditions.

(11) "Information Technology Contract" means a Public Contract for the acquisition, disposal, repair, maintenance or modification of hardware, software, or services for data processing, office automation, or Telecommunications.

(12) "Interagency Agreement" means any agreement solely between state officers, boards, commissions, departments, institutions, branches or agencies of this state.

(13) "Intergovernmental Agreement" means any agreement between an Agency and a unit of local government of this state, the United States, a United States governmental agency, an American Indian tribe or an agency of an American Indian tribe and includes Interstate Agreements and International Agreements.

(14) "International Agreement" means any agreement between an Agency and a nation or a public agency in any nation other than the United States.

(15) "Interstate Agreement" means any agreement between an Agency and a unit of local government or state agency of another state.

(16) "Last Reviewed Contract" means a Public Contract that has been approved for legal sufficiency, and includes all amendments that were effective prior to an amendment that has been approved for legal sufficiency.

(17) "Non-Negotiable Public Contract" means a Public Contract that is a preprinted form of contract comprised of terms and conditions offered to an Agency for acceptance without a commercially reasonable opportunity to negotiate and that is attached to or included with products that are available to the public for purchase at retail, through the mail or direct sales. Examples of a Non-Negotiable Public Contract may include a shrink-wrapped or click-wrapped license agreement attached to or included with a packaged or electronic copy of computer software.

(18) "Personal Services Contract" means a contract whose primary purpose is to acquire specialized skills, knowledge and resources in the application of technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment, including, without limitation, a contract for the services of an accountant, physician or dentist, educator, consultant (including a provider under an Architectural and Engineering Services Contract), broadcaster, or artist (including a photographer, filmmaker, painter, weaver or sculptor).

(19) "Price Agreement" means an agreement for the procurement of goods or services at a set price or prices, or at a price or prices established using a method prescribed by the agreement, with:

(a) No guarantee of a minimum or maximum purchase; or

(b) An initial order or minimum purchase combined with a continuing obligation to provide goods or services with no guarantee of a minimum or maximum additional purchase. Price Agreements are sometimes referred to as flexible services agreements, agreements to agree, master agreements or retainer agreements.

(20) "Procurement Document" means an invitation to bid, request for proposals, request for quotes, or other similar document, including, when available, the anticipated Public Contract, and including addenda that modify the anticipated Public Contract. The following are not Procurement Documents unless they invite offers from prospective contractors: a request for information, a request for qualifications, a prequalification of bidders or a request for product prequalification. A project-specific selection document under a Price Agreement that has resulted from a previous Procurement Document that an Assistant Attorney General authorized for release, or an addendum that modifies only Technical Specifications, is not a Procurement Document.

(21) "Public Contract" means any contract, including any amendments, entered into by an Agency for the acquisition, disposition, purchase, lease, sale or transfer of rights of real or personal property, public improvements, or services, including any contract for repair or maintenance. An Intergovernmental Agreement entered into for any of the foregoing actions is a Public Contract. An Interagency Agreement is not a Public Contract. Agency Contract Administration is not a Public Contract.

(22) "Public Improvement Contract" means any Public Contract for construction, reconstruction, or major renovation on real property by or for an Agency.

(23) "Requirements Contract" means a Public Contract that requires that all of the purchaser's requirements for the goods or services specified in the Public Contract for the period of time, or for the project(s) specified in the Public Contract, shall be purchased exclusively from the seller.

(1)

(24) "Statement of Work" means all provisions of a Public Contract that specifically describe the services or work to be performed or goods to be delivered by either the contractor, its subcontractor(s), or the Agency, as applicable, including any related Technical Specifications, deadlines, or deliverables.

(25) "Technical Specifications" with respect to equipment, materials and goods, means descriptions of dimensions, composition and manufacturer and quantities and units of measurement that describe quality, performance, and acceptance requirements. With respect to services, "Technical Specifications" means quantities and units of measurement that describe quality, performance and acceptance requirements.

(26) "Telecommunications" means 1-way and 2-way transmission of information over a distance by means of electromagnetic systems, electro-optical systems, or both.

(27) "Variable Delivery Contract" means a Public Contract that, during its term, uses purchase orders, work orders or similar ordering instruments to provide for incremental delivery of the amount of goods or services, or both, that is specified in the Public Contract. A Variable Delivery Contract identifies goods or services by any method that is both commercially reasonable and in accordance with industry standards, including but not limited to, Technical Specifications, time of delivery, place of delivery, manufacturer, form of delivery, or any combination of the foregoing.

Statutory/Other Authority: ORS 291.047(3)

Statutes/Other Implemented: ORS 291.045, 291.047 & 291.049

History:

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 19-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

DOJ 3-1998, f. & cert. ef. 4-1-98

Temporary repealed by DOJ 3-1998, f. & cert. ef. 4-1-98

JD 5-1997(Temp), f. & cert. ef. 10-17-97

JD 4-1997(Temp), f. & cert. ef. 10-3-97

137-045-0015

Legal Sufficiency Approval

(1) Legal sufficiency approval pursuant to this rule does not affect any other applicable review or approval requirement, except that legal sufficiency approval of a Public Contract that is an Interstate Agreement or an International Agreement satisfies requirements for Attorney General review under ORS 190.430 and ORS 190.490, as applicable.

(2) The Attorney General, through Assistant Attorneys General, provides legal sufficiency approval of a Public Contract solely for the benefit of Agencies, to determine compliance with this rule. Approval of a Public Contract for legal sufficiency is based upon the individual determination by the Assistant Attorney General reviewing the Public Contract and does not preclude the State of Oregon from later asserting any legally available claim or defense arising from or relating to the Public Contract.

(3) Approval of a Public Contract for legal sufficiency must be noted in written form by the Assistant Attorney General reviewing the Public Contract and must be either affixed directly to the Public Contract or set forth in a separate correspondence that identifies the Public Contract with particularity. An Assistant Attorney General may approve Public Contracts as a group if they are substantially in the same form, are substantially for the same purpose and have the same expiration date if the Assistant Attorney General identifies the manner in which individual contracts within the group may vary.

(4) Sections (4) and (5) are adopted to provide guidance to Agencies regarding criteria used for, and factors excluded from, the Attorney General's legal sufficiency approval of Public Contracts. Except as provided in section (5) of this rule, approval for legal sufficiency means that the reviewing Assistant Attorney General finds that:

(a) The Public Contract has been reduced to written form;

(b) The subject matter, promised performance and consideration of the Public Contract are within the Agency's statutory authority;

(c) The Public Contract, on its face, contains all the essential elements of a legally binding contract, such as a description of consideration (money, performance, or forbearance) when consideration is required;

(d) The Public Contract, on its face, complies with federal and State of Oregon statutes and administrative rules regulating the Public Contract, and that all provisions required by Oregon law to be incorporated have been included;

(e) The Public Contract includes or requires, as required by Oregon law, execution of any certification;

(a)

- (f) The Public Contract, on its face, does not violate any State of Oregon constitutional limitation or prohibition, such as by creating unlawful "debt" under section 7, Article XI, of the Oregon Constitution, or impermissibly binding a future Legislative Assembly to fund the Public Contract, or any federal constitutional provision;
- (g) The Statement of Work or comparable provisions and business or commercial terms are sufficiently clear and definite under the circumstances to be enforceable; and
- (h) The Public Contract allows the Agency, if appropriate, to terminate the Public Contract, declare defaults, and pursue its rights and remedies.
- (5) Approval for legal sufficiency does not include:
- (a) Consideration of facts or circumstances that are not apparent on the face of the Public Contract, unless the Assistant Attorney General reviewing the Public Contract has actual knowledge of those facts or circumstances;
- (b) A determination that the individual signing the Public Contract on behalf of the Agency possesses lawful authority to do so;
- (c) A determination that the technical provisions used in the Public Contract that are particular to a profession, trade or industry reflect the Agency's intentions, are appropriate to further the Agency's stated objectives or are sufficiently clear and definite to be enforceable;
- (d) A determination that the Public Contract is a good business deal for the Agency, weighing relative risks and benefits, although the Assistant Attorney General reviewing the Public Contract may provide advice regarding significant risks and issues in any particular transaction. The Agency is responsible for risk assessment and the decision whether to proceed with a Public Contract despite exposure to risks;
- (e) A determination that any particular remedy, whether or not expressly set forth in the Public Contract, will be available to the Agency. The requesting Agency may request the Assistant Attorney General reviewing the Public Contract to address the availability of specific remedies;
- (f) A determination that the Public Contract complies with grant conditions or federal funding requirements or contains terms or assurances required under a grant or federal funding program. The requesting Agency may request the Assistant Attorney General reviewing the Public Contract to address the compliance with grant conditions, federal funding requirements, or required assurances; or
- (g) A stylistic or grammatical review, including spelling, punctuation and the like, unless such errors create ambiguity or otherwise are substantive. The Assistant Attorney General reviewing the Public Contract may address matters of this nature as time allows; however, these matters are primarily the responsibility of the Agency submitting a Public Contract for review.
- (h) A determination that, except for setting off amounts owed under the Public Contract, the Agency will have court-enforceable damages, specific performance, or setoff remedies under a Public Contract with another sovereign in the event the sovereign fails to comply with the contract's terms unless the Assistant Attorney General determines in a separate writing that any such remedies are available to the Agency.

Statutory/Other Authority: ORS 291.045(7) **Statutes/Other**

Implemented: ORS 291.045 & 291.047 **History:**

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08DOJ

17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

Reverted to DOJ 3-1998, f. & cert. ef. 4-1-98

DOJ 5-1999(Temp), f. 9-14-99, cert. ef. 9-15-99 thru 3-13-00DOJ

3-1998, f. & cert. ef. 4-1-98

Temporary repealed by DOJ 3-1998, f. & cert. ef. 4-1-98

JD 5-1997(Temp), f. & cert. ef. 10-17-97JD

4-1997(Temp), f. & cert. ef. 10-3-97

137-045-0020

Mixed Contracts

A mixed Public Contract requires the contractor to render certain services and also to provide the Agency with other kinds of services, goods or products. Classification of a mixed Public Contract as a Personal Services Contract, Architectural and Engineering Services Contract, Information Technology Contract, or other kind of Public Contract is determined by the mixed Public Contract's predominant purpose. A mixed Public Contract's predominant purpose is determined by whether the majority of the amounts paid or received under the mixed Public Contract will be for a

particular kind of service (personal, architectural, engineering, land surveying or related services, information technology, or other kinds of service) or for the acquisition of goods or products. An Assistant Attorney General shall defer to the reasonable classification of Public Contract type by the Department of Administrative Services for Public Contracts subject to Department of Administrative Services statutes and rules.

Statutory/Other Authority: ORS 291.047(3)

Statutes/Other Implemented: ORS 291.045, 291.047 & OL 1997 & Ch. 869

History:

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08DOJ

2-2001, f. & cert. ef. 1-18-01

DOJ 3-1998, f. & cert. ef. 4-1-98

137-045-0020(Temp) repealed by DOJ 3-1998, f. & cert. ef. 4-1-98JD

5-1997(Temp), f. & cert. ef. 10-17-97

JD 4-1997(Temp), f. & cert. ef. 10-3-97

137-045-0030

Review of Public Contracts

(1) Except as described in section (2), before a Public Contract is binding on the State of Oregon, and before any service may be performed or payment may be made under the Public Contract, the Attorney General must approve for legal sufficiency in accordance with these rules:

(a) Any Public Contract calling for or providing for payment in excess of \$150,000.

(b) An amendment to a Public Contract described in subsection (1)(a).

(c) An amendment that makes the amended Public Contract subject to legal sufficiency approval under subsection (1)(a).

(2) The legal sufficiency approval requirement described in section (1) does not apply to Public Contracts that are exempt from legal sufficiency approval under these division 45 rules.

(3) For purposes of determining whether a Public Contract exceeds the amounts set forth in section (1), a Public Contract calls for or provides for payments in excess of the applicable amount if one of the following applies:

(a) The Public Contract expressly provides that the Agency will make or receive payments in money, services or goods over the term of the Public Contract with a value that will, in aggregate, exceed the applicable threshold, whether or not the total amount or value of the payments is expressly stated. For purposes of this subsection, when an agency is lending money, and the only payment to the Agency is in money, "payments" receivable by the Agency mean principal, only.

(b) The Public Contract expressly provides for a guaranteed maximum price or a maximum not to exceed amount payable or receivable by the Agency with a value that exceeds the applicable threshold.

(c) Based on historical or other data available to the contracting Agency at the time of entering into the Public Contract, the contracting Agency determines that the value of the benefit, loss or detriment to the Agency that is called for by the Public Contract will likely exceed the applicable threshold.

(4) An Agency shall not fragment or segregate transactions for purposes of circumventing the legal sufficiency approval requirement.

(5) A program or activity of a recipient of a Grant that is financed by the Grant does not constitute a service performed under a Public Contract for purposes of this rule.

Statutory/Other Authority: ORS 291.047(3)

Statutes/Other Implemented: ORS 291.047

History:

DOJ 9-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08DOJ

17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

DOJ 3-1998, f. & cert. ef. 4-1-98

JD 5-1997(Temp), f. & cert. ef. 10-17-97JD

4-1997(Temp), f. & cert. ef. 10-3-97

137-045-0035

Review of Anticipated Public Contract

(1) Except as provided in this rule, if an Agency expects the resulting Public Contract to require legal sufficiency approval, the Agency must also submit to the Attorney General any associated Agency Procurement Documents for review of the anticipated Public Contract. The Agency must obtain authorization from an Assistant Attorney General to release the Procurement Documents before the Agency releases them. These requirements may be waived in writing by an Assistant Attorney General if the Assistant Attorney General determines that the resulting Public Contract is legally sufficient and resolicitation of the Public Contract would not materially reduce the risk to the State.

(2) Review of the anticipated Public Contract includes determining what law applies to the procurement and applying that law to the procurement documents to determine whether the procurement process complies with applicable law and Agencies' reasonable interpretations of their own rules. The reviewing attorney is not required to inquire into facts concerning the procurement process that are not apparent on the face of the documents. The reviewing attorney may require changes to the Procurement Documents that are necessary for compliance with applicable law. If the reviewing attorney determines that nothing in the Procurement Documents, or otherwise apparent to the attorney, would prevent approval of the anticipated Public Contract for legal sufficiency, the attorney shall authorize release of the Procurement Documents. The attorney may condition an authorization to release Procurement Documents as necessary for compliance with these rules. Authorization to release the Procurement Documents does not ensure subsequent legal sufficiency approval of the Public Contract contemplated by the procurement and any accepted response. Authorization to release includes a determination that the solicitation process on the face of the Procurement Documents complies with applicable statutes or rules.

Statutory/Other Authority: ORS 291.047(3)

Statutes/Other Implemented: ORS 291.047

History:

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 19-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

137-045-0050

Exemptions from Legal Sufficiency Approval Based on Risk Assessment

The Attorney General has determined that the degree of risk assumed by Agencies is not materially reduced by legal review and approval of individual Public Contracts within the types of Public Contracts listed below. The Attorney General exempts from the legal sufficiency approval requirement under ORS 291.047 the Public Contracts falling within the types of Public Contracts listed below:

(1) Adoption Assistance Agreements. A document of understanding between the Department of Human Services and adoptive parents of a special needs child as defined under title IV-E at section 473(c) of the Social Security Act.

(2) Amendments to Contracts Other than Public Improvement and Loan Contracts. A written amendment to a Public Contract that is not a Public Improvement or loan Contract, if all of the following apply:

(a) The Public Contract being amended was approved for legal sufficiency.

(b) The amendment modifies only one or more of the following, and related payment obligations as necessary:

(A) The Statement of Work to require the contractor to provide additional or fewer goods, services or other work within the general scope of the Last Reviewed Contract.

(B) The expiration date of the Public Contract; Technical Specifications; time, place, quantity or form of delivery, or price.

(C) Any provisions as specified in writing at the time of approval by the Assistant Attorney General who provided legal sufficiency approval of the Last Reviewed Contract, based on the Assistant Attorney General's finding that the degree of risk assumed by the Agency will not be materially reduced by legal review and approval of the provisions.

(c) The aggregate increase in payments scheduled to be made by the Agency, or the aggregate decrease in payments scheduled to be received by the Agency, under the amendment, and all prior amendments exempted from the legal sufficiency approval requirement under this section subsequent to the Last Reviewed Contract, does not exceed the greater of:

(A) \$150,000; or

(B) Any limits specified in writing at the time of approval by the Assistant Attorney General who provided legal sufficiency approval of the Last Reviewed Contract, based on the Assistant Attorney General's finding that the degree of risk assumed by the Agency will not be materially reduced by legal review and approval of the provisions.

(3) Amendments to Public Improvement Contracts.

(1)

- (a) A written change order or other amendment to a Public Improvement Contract, other than a construction manager/general contractor contract, as provided in subsection (b) or a design-build contract or an energy savings performance contract as provided in subsection (c) of this section, if all of the following apply:
- (A) The Public Improvement Contract being amended was approved for legal sufficiency.
- (B) The change order or other amendment is within the general scope of the Public Improvement Contract.
- (C) The change order or other amendment is implemented in accordance with the provisions of the Public Improvement Contract governing change orders and other types of amendments.
- (D) The change order or other amendment modifies only one or both of the following and related payment obligations as necessary:
- (i) The Statement of Work so as to require the contractor to provide additional or fewer materials, tools, equipment, labor or professional or non-professional services within the general scope of the Last Reviewed Contract;
- (ii) The substantial completion date, the final completion date, or interim milestone dates of the Public Improvement Contract; Technical Specifications; time, place, quantity or form of delivery of materials, tools, equipment or services; price.
- (E) Any increase in Agency payments under the change order or other amendment does not exceed ten percent (10%) of the total amount of Agency payments scheduled to be made under the Last Reviewed Contract, and the aggregate increase in Agency payments scheduled to be made under that change order or other amendment, and all prior change orders or other amendments subsequent to the Last Reviewed Contract do not exceed thirty-three percent (33%) of that total amount.
- (b) An amendment to a CM/GC contract (as defined in OAR 137-049-0610) that complies with either subsection (A) or (B) below, whether the amendment is in the form of a change order or other amendment:
- (A) The amendment is made before construction services have been authorized under the CM/GC contract and complies with all of the following:
- (i) The CM/GC contract being amended was approved for legal sufficiency.
- (ii) The amendment is implemented in accordance with the provisions of the CM/GC contract governing change orders and other amendments.
- (iii) The amendment modifies only one or more of the following and related payment obligations as necessary:
- (I) The Statement of Work so as to require the CM/GC to provide additional or fewer materials, equipment, or pre-construction services within the general scope of the Last Reviewed Contract.
- (II) The substantial completion date, the final completion date, or interim milestone dates of the CM/GC contract; Technical Specifications; time, place, quantity or form of delivery of services; or price.
- (iv) Any increase in Agency payments under the amendment does not exceed ten percent (10%) of the total amount of Agency payments scheduled to be made under the Last Reviewed Contract, and the aggregate increase in Agency payments scheduled to be made under that amendment and all prior amendments subsequent to the Last Reviewed Contract do not exceed thirty-three percent (33%) of that total amount.
- (B) The amendment is made after construction services have been authorized under the CM/GC contract and complies with all of the following:
- (i) The CM/GC contract being amended was approved for legal sufficiency.
- (ii) The amendment is implemented in accordance with the provisions of the CM/GC contract governing change orders and other types of amendments.
- (iii) The amendment is not the first amendment that authorizes construction services under the CM/GC contract.
- (iv) The amendment does not establish the guaranteed maximum price ("GMP") under the CM/GC contract.
- (v) The amendment modifies only one or both of the following and related payment obligations as necessary:
- (I) The Statement of Work so as to require the CM/GC to provide additional or fewer materials, tools, equipment, labor or professional or non-professional services within the general scope of the Last Reviewed Contract.
- (II) The substantial completion date, the final completion date, or interim milestone dates of the CM/GC contract; Technical Specifications; time, place, quantity or form of delivery of materials, tools, equipment or services; or the price.

(l)

- (vi) The amendment does not increase the contract price (whether a GMP, fixed price, lump sum or other price) established under the Last Reviewed Contract by more than \$500,000.
- (vii) The amendment and all prior amendments subsequent to the Last Reviewed Contract in the aggregate do not increase the contract price (whether a GMP, fixed price, lump sum or other price) established under the Last Reviewed Contract by more than ten percent (10%).
- (c) An amendment to a Design-Build contract (as defined in OAR 137-049-0610), or an amendment to an Energy Savings Performance Contract (as defined in ORS 279A.010(1)(g)) that is in the construction phase, whether the amendment is in the form of a change order or a conventional amendment, if all of the following apply:
 - (A) The contract being amended was approved for legal sufficiency.
 - (B) The amendment is implemented in accordance with the provisions of the Design-Build or Energy Savings Performance Contract governing change orders and other types of amendments.
 - (C) The amendment modifies only one or both of the following and related payment obligations as necessary:
 - (i) The Statement of Work so as to require the Design/Builder or Energy Savings Performance Contract contractor, as applicable, to provide additional or fewer materials, tools, equipment, labor or professional or non-professional services within the general scope of the Last Reviewed Contract;
 - (ii) The substantial completion date, the final completion date, or interim milestone dates of the contract; Technical Specifications; time, place, quantity or form of delivery of materials, tools, equipment or services; or the price.
 - (D) The amendment does not increase the contract price (whether a GMP, fixed price, lump sum or other price) established under the Last Reviewed Contract by more than \$500,000 or five percent (5%), whichever is less.
 - (E) The amendment and all prior amendments subsequent to the Last Reviewed Contract in the aggregate do not increase the contract price (whether a GMP, fixed price, lump sum or other price) established under the Last Reviewed Contract by more than \$500,000 or ten percent (10%), whichever is less.
- (d) For purposes of this rule, "change order" means a mutually agreed upon change order or a unilateral construction change directive or similar instruction issued by the Agency or its authorized representative to the contractor requiring a change in the work within the general scope of a Public Improvement Contract and issued under the provisions of the Public Improvement Contract governing the implementation, addition, reduction or other revisions to the work and, if applicable, adjusting the contract price or contract time for the changed work.
- (4) Bonds and Confirmation Statements.
 - (a) A Public Contract entered into, issued or established in connection with the issuance of a bond or other borrowing of the State of Oregon, including an interest rate exchange agreement and any associated confirmation statement, if the Oregon State Treasurer has issued or authorized the bond or other borrowing obligation to which the Public Contract relates and if bond counsel appointed in accordance with applicable law has issued an approving opinion for the benefit or use of purchasers of the bond or other borrowing with respect to the enforceability of the bond or other borrowing upon closing of the transaction.
 - (b) A confirmation statement associated with an Agency's investment-related interest rate or currency swap agreement or other investment transaction, if the agreement under which the confirmation statement arises has been approved for legal sufficiency or is exempt from legal sufficiency approval.
- (5) Employment Agreements. Employment agreements; collective bargaining agreements negotiated under applicable federal or state laws, including collective bargaining agreements entered into pursuant to ORS 410.612; or notices of appointment provided in accordance with OAR chapter 580, division 021. Agreements with third-party providers of temporary services are not exempt.
- (6) Federal Contracts. A contract with a federal agency consisting substantially of provisions prescribed in Federal Acquisition Regulations or federal agency supplemental acquisition clauses (48 CFR), except a contract allowed under Section 211 of the federal E-Government Act of 2002.
- (7) Federal Cooperative Agreements. A Federal Cooperative Agreement.
- (8) Federal Grants. A grant from a federal agency under which an Agency is the grantee, provided that the Agency has a grants coordinator.
- (9) Federal Pass-Through Grants. A grant under which an Agency passes through to another recipient all or a portion of the money or property received by the Agency under a grant from a federal agency, provided that:
 - (a) The Agency does not add to or modify the federal grant except as necessary to provide for proper administration; and
 - (a)

(b) The grant contains a clause substantially in the following form: "The recipient of grant funds, pursuant to this agreement with the State of Oregon, shall assume sole liability for recipient's breach of the conditions of the grant, and shall, upon recipient's breach of grant conditions that causes or requires the State of Oregon to return funds to the grantor, hold harmless and indemnify the State of Oregon for an amount equal to the funds which the State of Oregon is required to pay to grantor."

(10) Foster Care Agreements. An agreement between the Department of Human Services or the Oregon Youth Authority and a foster parent for the provision of foster care to an individual under the age of 21, or a youth placed with the Department of Human Services or Oregon Youth Authority pursuant to ORS 419C.478.

(11) Home Care Services Agreements. An agreement for the provision of and payment for home care services as defined in ORS 410.600(6).

(12) Membership Agreements. A Public Contract that calls for the payment of dues or fees in consideration of membership of individual officers, employees or agents of the State of Oregon in a club, institution, or association in which the State of Oregon acquires no ownership interest.

(13) Non-Negotiable Public Contracts. A Non-Negotiable Public Contract.

(14) Prescribed Contracts. A Public Contract that is in the form prescribed in Procurement Documents and any conditions on authorization for release under OAR 137-045-0035. Prescribed Contracts do not vary from the form prescribed in Procurement Documents other than to fill in blanks in the form, as is commonly done with invitations to bid for goods and services other than personal services.

(15) Purchase Order Contracts. A Public Contract formed by a purchase order, work order or a similar ordering instrument for the purchase of goods or services under a Price Agreement, provided that the Price Agreement was approved by an Assistant Attorney General and the ordering instrument complies with any conditions of the approval.

(16) Settlement Agreements. Agreements settling disputed claims, provided that they do not have the effect of amending Public Contracts that are subject to the legal sufficiency approval requirement.

(17) Amendments to Loan Contracts. A written amendment to a Public Contract solely for an Agency loan of money to another party that requires repayment to the Agency, if all of the following apply:

(a) The Public Contract being amended was approved for legal sufficiency.

(b) The amendment modifies only:

(A) The description of the project being financed, but only to the extent that the modified project remains eligible for financing by the same source of funds as the project before modification; or

(B) Business terms in the Public Contract which:

(i) Except as provided in subsection (17)(c), do not increase or decrease the total principal repayment obligations under the Public Contract;

(ii) Change the interest rate or payment due dates, except for the final maturity date; or

(iii) Describe the non-financial terms and conditions of performance, such as performance start or completion dates for the project being financed or job creation or retention requirements.

(c) The aggregate increase in the loan amount under the amendment or the aggregate decrease in principal payments scheduled to be received by the Agency, and all prior amendments exempted from the legal sufficiency approval requirement subsequent to the Last Reviewed Contract, does not exceed the greater of:

(A) \$150,000; or

(B) Any particular amounts specified in writing at the time of approval by the Assistant Attorney General who provided legal sufficiency approval of the Last Reviewed Contract.

(18) Personal Services Contracts, Information Technology Contracts and Architectural and Engineering Services Contracts not calling for or providing for payment in excess of \$150,000.

(19) Technology Transfer and Related Agreements. Agreements that govern the transfer of tangible research materials between Oregon University System ("OUS") and another organization, agreements with a predominant purpose to grant a license to OUS intellectual property and related agreements. Related agreements are agreements to manage interests in OUS intellectual property, agreements to combine management of interests in OUS intellectual property with management of interests in intellectual property from other parties, agreements that transfer ownership of intellectual property between OUS and other parties, agreements governing revenue sharing from licensing, and confidentiality agreements regarding intellectual property.

(1)

Statutory/Other Authority: ORS 291.047(4), 190.430 & 190.490

Statutes/Other Implemented: ORS 291.047, 190.430 & 190.490

History:

Reverted to DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10
 DOJ 12-2014(Temp), f. 9-25-14, cert. ef. 10-1-14 thru 11-14-14
 DOJ 11-2014(Temp), f. & cert. ef. 7-11-14 thru 9-30-14DOJ
 14-2009, f. 12-1-09, cert. ef. 1-1-10
 DOJ 10-2009, f. 7-2-09, cert. ef. 7-6-09
 DOJ 2-2009(Temp), f. & cert. ef. 2-26-09 thru 8-25-09DOJ
 18-2007, f. 12-28-07, cert. ef. 1-1-08
 DOJ 19-2005, f. 12-27-05, cert. ef. 1-1-06
 DOJ 17-2003, f. & cert. ef. 12-9-03
 DOJ 2-2001, f. & cert. ef. 1-18-01
 DOJ 3-1998, f. & cert. ef. 4-1-98
 JD 5-1997(Temp), f. & cert. ef. 10-17-97JD
 4-1997(Temp), f. & cert. ef. 10-3-97

137-045-0052

Exemptions from ORS 190.430 and ORS 190.490 review

Contracts that are exempt from legal sufficiency review under ORS 291.047 or OAR chapter 137, division 045 are also exempt from the Attorney General review requirements under ORS 190.430 and 190.490.

Statutory/Other Authority: ORS 190.430 & 190.490

Statutes/Other Implemented: ORS 190.430 & 190.490

History:

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10
 DOJ 10-2009, f. 7-2-09, cert. ef. 7-6-09

137-045-0055

Special Public Contract Exemption Program for Exemptions from Legal Sufficiency Approval Based on Risk Assessment

(1) In addition to the Public Contracts described in OAR 137-045-0050, the Attorney General has determined that the degree of risk assumed by Agencies is not materially reduced by legal review and approval of individual Public Contracts that satisfy the requirements of the Special Public Contract Exemption Program and fall within the types of contract described in this rule. The Attorney General exempts from the legal sufficiency approval requirement the Public Contracts that satisfy the requirements of the Special Public Contract Exemption Program and fall within the types of contract described in this rule.

(2) The requirements of the Special Public Contract Exemption Program are:

(a) The Agency's representative responsible for the Public Contract must satisfactorily complete the Attorney General's initial and any continuing, as it is scheduled, legal sufficiency review training for that type of contract, which may be specifically tailored for that Agency, and hold a current legal sufficiency review exemption certificate for that type of contract issued by the Attorney in Charge, Business Transactions Section.

(b) The Public Contract must be substantially composed of provisions that have been preapproved by an Assistant Attorney General for use in the Special Public Contract Exemption Program and any modifications to such provisions as may be communicated to the Agency by an Assistant Attorney General.

(c) The Agency must agree that the Attorney in Charge, Business Transactions Section may:

(A) Periodically, select any Public Contract that is exempted from legal sufficiency review under the Special Public Contract Exemption Program for a quality control review; and

(B) Depending upon the results of any such review, provide comments to the Agency about the review, require changes to preapproved provisions, or suspend the Agency's or an Agency's representative's eligibility to participate in the Special Public Contract Exemption Program until further training or other reasonable conditions are met by the Agency or Agency representative.

(d) Costs for the activities specified in subsection (2)(c) of this rule shall be at the expense of the Agency unless otherwise agreed.

(e) An Agency must delete, modify with the specific advice of an Assistant Attorney General, or include only with the specific advice of an Assistant Attorney General, any provision in a proposed Public Contract that is substantially in any of the following forms:

(a)

- (A) Governing law or choice of law: The laws of a state other than Oregon govern this contract.
- (B) Jurisdiction or venue: A lawsuit to enforce, or arising out of, this contract must be brought in a state court located outside Oregon or any federal court.
- (C) Arbitration: This contract is subject to binding arbitration.
- (D) Indemnity, Hold Harmless: The State of Oregon or the Agency shall indemnify or hold harmless the other party.
- (E) Responsibility: The State of Oregon or the Agency assumes or becomes responsible for unfunded liabilities or obligations, such as under uncapped, contingent, or open-ended responsibility clauses, unless such liabilities or obligations are expressly made subject to the limits of Oregon law in the contract, including Article XI, section 7 of the Oregon Constitution and the Oregon Tort Claims Act.
- (F) Attorney fees or collection costs: The State of Oregon or the Agency shall pay the other party's attorney fees or the prevailing party in any lawsuit recovers its attorney fees from the losing party.
- (G) Punitive or exemplary damages: The State of Oregon or the Agency shall pay punitive, exemplary, or treble damages for the breach of contract or for any claims arising out of the contract.
- (H) Interest: The State of Oregon or the Agency is obligated to pay interest on an overdue account if the payment is less than forty-five days overdue or the interest is higher than eight per cent per annum.
- (I) Third party beneficiary: A person not a party to the contract is stated to be a beneficiary of the contract or has the right to bring a legal action under the contract or to enforce the contract.
- (J) Commitment to pay for performance beyond the end of the current biennium or with funds not currently available: The State of Oregon or the Agency has an unconditional (i.e., not limited by the potential non-appropriation or non-allotment of funds) obligation to pay funds that are not currently available for expenditure for that obligation by the Agency.
- (K) Taxes: The State of Oregon or the Agency must pay taxes incident to the contract that are not directly imposed upon the State of Oregon or the Agency.
- (L) Confidentiality: The State of Oregon or the Agency is obligated to keep information confidential unless the obligation is made subject to the provisions of the Oregon Public Records Law.
- (M) Statute of Limitations: The State of Oregon or the Agency must file a legal action arising out of the contract within a specified time period.
- (N) Contractor as agent or employee: The contractor is deemed to be an agent of the State of Oregon or the Agency for liability or other purposes or is the equivalent of an employee of the State of Oregon or the Agency.
- (O) Financing agreements: Agreements as defined in ORS 283.095, including installment sales and lease purchase agreements.
- (P) Representation, legal advice or legal opinions by counsel not authorized by the Attorney General.
- (f) Unless otherwise requested by the Agency, the Assistant Attorney General will not provide advice regarding provisions in the proposed Public Contract that are not affected by modifying or including the provisions in subsection (2)(e).
- (3) Classes of Public Contracts identified by the Attorney in Charge, Business Transactions Section, based on risk assessments developed in collaboration with an executive officer of an Agency who is responsible for oversight of Public Contracts, are eligible for exemption from legal sufficiency review under the Special Public Contract Exemption Program.

Statutory/Other Authority: ORS 291.047(4)

Statutes/Other Implemented: ORS 291.047

History:

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 17-2003, f. & cert. ef. 12-9-03

137-045-0060

Class Exemptions Based on Attorney General's Pre-Approval

The Attorney General may exempt Public Contracts falling within a class from the legal sufficiency approval requirement. The Attorney General delegates to the Attorney in Charge, Business Transactions Section, the authority to exempt Public Contracts falling within a class, and to otherwise act on behalf of the Attorney General, in accordance with this rule.

- (1) An Agency requesting an exemption for Public Contracts falling within a class must submit a written exemption request to the Attorney in Charge, Business Transactions Section, for approval. The exemption request must be signed by an executive officer of the Agency who is responsible for oversight of Public Contracts and must be accompanied by:
- (a) A statement that the exemption request is made pursuant to this rule;
 - (b) Citation to the requesting Agency's statutory authority for procuring and entering into the Public Contracts within the class;
 - (c) A description of the nature of the business transacted with the Public Contracts within the class;
 - (d) A description of the circumstances in which the Public Contracts within the class will be used;
 - (e) Samples of form Public Contracts used for the Public Contracts within the class and any form of amendment to be used in connection with the Public Contracts within the class;
 - (f) A description of the Agency's internal contract approval process and signatures required for the Public Contracts within the class; and
 - (g) A statement by the Agency that:
 - (A) The nature of the business transacted under Public Contracts within the class is substantially the same from transaction to transaction; and
 - (B) The form of Public Contract and any form of amendment submitted in accordance with OAR 137-045-0060(1)(e) do not vary from transaction to transaction, other than one or more of the following and related payment obligations, as necessary: the expiration date or project completion date of the Public Contract; Technical Specifications; time, place, quantity or form of delivery; price; or other provisions as specified in the statement; and
 - (C) The Agency will not modify the form of Public Contract and any form of amendment, other than as specifically provided for in OAR 137-045-0060(1)(g)(B) above, without review and approval for legal sufficiency by the Attorney General, nor will the Agency use such Public Contract other than in transactions described in the exemption request; and
 - (h) Any other information that the Attorney General or the Attorney in Charge, Business Transactions Section, requests in connection with the exemption request.
- (2) If the Attorney General has determined that the degree of risk assumed by an Agency is not materially reduced by legal review and approval of individual Public Contracts falling within a class reviewed by the Attorney General in accordance with section (1) of this rule, the Attorney General will provide the Agency a written exemption, subject to any terms, conditions or limitations the Attorney General deems appropriate, including but not limited to, the duration of the exemption, restrictions on the use of the submitted forms of Public Contract, form of purchase order or similar instrument or any form of amendment.
- (3) The Attorney General may at any time review an exemption granted under section (2) of this rule. The Attorney General may revoke or modify such exemption at any time upon written notice to the Agency that it is in the best interest of the State of Oregon that the exemption be revoked or modified. Revocation or modification of an exemption granted under this rule shall not affect the validity of Public Contracts entered into under the exemption prior to the revocation or modification.

Statutory/Other Authority: ORS 291.047(5) **Statutes/Other**

Implemented: ORS 291.047(5)(a) **History:**

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08DOJ

17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

DOJ 3-1998, f. & cert. ef. 4-1-98

137-045-0060(Temp) repealed by DOJ 3-1998, f. & cert. ef. 4-1-98JD

5-1997(Temp), f. & cert. ef. 10-17-97

JD 4-1997(Temp), f. & cert. ef. 10-3-97

137-045-0070

Emergency Public Contract Exemption

- (1) Upon the Agency's compliance with the procedures set forth in section (2), a Public Contract entered into in an Emergency is exempt from the legal sufficiency approval requirement.

(1)

- (2) An executive officer of the Agency who is responsible for oversight of the Public Contract must prepare and sign a written report that contains:
- (a) A concise summary of the circumstances that constitute the Emergency and the character of the risk of loss, damage, interruption of services or threat to public health or safety created or anticipated to be created by the Emergency circumstances;
 - (b) A statement of the reason or reasons why the prompt execution of the proposed Public Contract was required to deal with the risk created or anticipated to be created by the Emergency circumstances;
 - (c) A brief description of the services or goods to be provided under the Public Contract, together with its anticipated cost; and
 - (d) A brief explanation of how the Public Contract, in terms of duration, services or goods provided under it, was restricted to the scope reasonably necessary to adequately deal only with the risk created or anticipated to be created by the Emergency circumstances.
- (3) The executive officer shall prepare and sign the written report no later than 10 business days after execution of the Public Contract. The Agency shall maintain a copy of the report in the Agency's Emergency Public Contract file. The Agency shall provide a copy of the report to the Attorney in Charge, Business Transactions Section within 30 days after preparing the report.

Statutory/Other Authority: ORS 291.047(5) **Statutes/Other**

Implemented: ORS 291.047(5)(b) **History:**

DOJ 14-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 19-2005, f. 12-27-05, cert. ef. 1-1-06 DOJ

17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

137-045-0080

Authorization of Services Prior to Legal Sufficiency Approval

At an Agency's request and upon the Agency's compliance with the procedures set forth in this rule, the Attorney General, through the Attorney in Charge, Business Transactions Section, may authorize services to be performed under specific types of written Public Contracts or under written Public Contracts for specific Agency programs, before legal sufficiency approval as follows:

- (1) An Agency requesting authorization for performance of services under Public Contracts prior to legal sufficiency approval must submit a written authorization request signed by an executive officer of the Agency who is responsible for oversight of the Public Contracts to the Attorney in Charge, Business Transactions Section. The request must include:
- (a) A statement that the authorization request is made pursuant to this rule;
 - (b) A description of the specific type of Public Contracts within the authorization request and a description of the circumstances in which the Agency will use these Public Contracts, or a description of the specific program for which the Agency will use the Public Contracts to be covered by the authorization;
 - (c) A citation to the requesting Agency's statutory authority for entering into the specific type of Public Contracts to be covered by the authorization;
 - (d) The form of Public Contracts comprising the type of Public Contracts within the exemption request or the form of Public Contracts used for the specific Agency program;
 - (e) A description of the Agency's internal contract approval process and the signatures required for the type of Public Contracts within the authorization request; and
 - (f) Any other information that the Attorney General requests in connection with the authorization request.
- (2) If the Attorney General determines that the authorization for performance of services prior to legal sufficiency approval will not result in undue risk to the State of Oregon under the type of Public Contracts within the authorization request or under Public Contracts used for the specific Agency program described in accordance with section (1) of this rule, the Attorney General may authorize the services under those Public Contracts prior to legal sufficiency approval.
- (3) If the Attorney General authorizes services under a Public Contract prior to legal sufficiency approval, the Attorney General, through the Attorney in Charge, Business Transactions Section, will provide the Agency with a written pre-
- (1)

approval service authorization, subject to any conditions or limitations the Attorney General deems appropriate, including but not limited to a condition that the Public Contract may not be amended prior to legal sufficiency approval.

(4) Any Public Contract under which the Attorney General authorizes services to be performed before approval for legal sufficiency must be submitted to the Attorney General, through the Attorney in Charge, Business Transactions Section, for legal sufficiency approval within a reasonable time after the Public Contract is signed by the parties, but in all cases before the Agency makes any payments under the Public Contract. As a condition for legal sufficiency approval, the Attorney in Charge, Business Transactions Section may require that the Public Contract be amended as necessary to make it legally sufficient.

(5) After the Public Contract has been approved for legal sufficiency, the Agency may make payments on the Public Contract even if the payments are for services rendered prior to legal sufficiency approval. An Agency is not authorized to make payments on the Public Contract before the Public Contract is approved for legal sufficiency and all other required approvals are obtained.

(6) The Attorney General, through the Attorney in Charge, Business Transactions Section, may at anytime review an authorization for pre-approval services granted under this rule. The Attorney General, through the Attorney in Charge, Business Transactions Section, may revoke or modify such authorization at any time upon written notice to the Agency that it is in the best interest of the State of Oregon that such authorization be revoked or modified. Revocation or modification of an authorization for pre-approval services granted under this rule shall not affect the validity of Public Contracts entered into under the authorization prior to the revocation or modification.

Statutory/Other Authority: ORS 291.047(3) & 291.047(6)

Statutes/Other Implemented: ORS 291.047(6)

History:

DOJ 19-2005, f. 12-27-05, cert. ef. 1-1-06DOJ

2-2001, f. & cert. ef. 1-18-01

137-045-0090

Ratification of Public Contracts

Before ratifying a Public Contract under ORS 291.049, an Agency shall do all of the following:

(1) Submit to the Attorney in Charge, Business Transactions Section, a copy of the Public Contract and the proposed ratification document. The ratification document is to be executed, after approval for legal sufficiency, by an executive officer of an Agency who is responsible for oversight of the Public Contract. The ratification document must contain:

- (a) An explanation of why performance began or payment was made before the Public Contract was approved by the Attorney General for legal sufficiency;
- (b) A description of the steps being taken to prevent similar occurrences in the future; and

(2) A proposed ratification of the Public Contract.

(3) Obtain approval of the Public Contract for legal sufficiency from the Attorney General, through the Attorney in Charge, Business Transactions Section;

(4) Obtain all other approvals required for the Public Contract.

Statutory/Other Authority: ORS 291.049(3)

Statutes/Other Implemented: ORS 291.049

History:

DOJ 9-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 18-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 17-2003, f. & cert. ef. 12-9-03

DOJ 2-2001, f. & cert. ef. 1-18-01

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Chapter 137

Division 46

MODEL RULES GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTING

137-046-0100

Content and General Application; Federal Law Supremacy

(1) These Model Rules are rules of procedure for Public Contracting as required under ORS 279A.065 and consist of the following four divisions:

- (a) This division 46, which applies to all Public Contracting;
- (b) Division 47, which describes procedures for Public Contracting for Goods, Services and Personal Services other than Architectural, Engineering and Land Surveying Services and Related Services;
- (c) Division 48, which describes procedures for Public Contracting for Architectural, Engineering and Land Surveying Services and Related Services; and
- (d) Division 49, which describes procedures for Public Contracting for Construction Services.

(2) If a conflict arises between these division 46 rules and rules in divisions 47, 48 and 49, the rules in divisions 47, 48 and 49 take precedence over these division 46 rules.

(3) Except as otherwise expressly provided in ORS 279C.800 through 279C.870, and notwithstanding ORS Chapters 279A, 279B, and 279C.005 through 279C.670, applicable federal statutes and regulations govern when federal funds are involved and the federal statutes or regulations conflict with any provision of ORS Chapters 279A, 279B, or 279C.005 through 279C.670 or these Model Rules, or require additional conditions in Public Contracts not authorized by ORS Chapters 279A, 279B, and 279C.005 through 279C.670 or these Model Rules.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other**

Implemented: ORS 279A.030 & 279A.065 **History:**

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0110

Definitions for the Model Rules

Unless the context of a specifically applicable definition in the Code requires otherwise, capitalized terms used in the Model Rules have the meaning set forth in the division of the Model Rules in which they appear, and if not defined there, the meaning set forth in these division 46 rules, and if not defined here, the meaning set forth in the Code. The following terms, when capitalized in these Model Rules, have the meaning given below:

- (1) "Addendum" or "Addenda" means an addition to, deletion from, a material change in, or general interest explanation of a Solicitation Document.
- (2) "Administering Contracting Agency" has the meaning set forth in ORS 279A.200(1)(a) and for Interstate Cooperative Procurements includes the entities specified in ORS 279A.220(4).
- (3) "Award" means, as the context requires, either identifying or the Contracting Agency's identification of the Person with whom the Contracting Agency intends to enter into a Contract following the resolution of any protest of the Contracting Agency's selection of that Person and the completion of all Contract negotiations.

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- (4) "Bid" means a Written response to an Invitation to Bid.
- (5) "Closing" means the date and time specified in a Solicitation Document as the deadline for submitting Offers.
- (6) "Code" means the Public Contracting Code.
- (7) "Competitive Range" means the Proposers with whom the Contracting Agency will conduct discussions or negotiations if the Contracting Agency intends to conduct discussions or negotiations in accordance with OAR 137-047-0261 or 137-049-0650.
- (8) "Contract" means a contract for sale or other disposal, or a purchase, lease, rental or other acquisition, by a Contracting Agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. "Contract" does not include grants.
- (9) "Contract Price" means, as the context requires, the maximum monetary obligation that a Contracting Agency either will or may incur under a Contract, including bonuses, incentives and contingency amounts, if the Contractor fully performs under the Contract.
- (10) "Contract Review Authority" means:
- (a) For State Contracting Agencies, generally the Director of the Oregon Department of Administrative Services;
 - (b) For Local Contracting Agencies, the Local Contracting Agency's Local Contract Review Board determined as specified in ORS 279A.060; and
 - (c) Where specified by statute, the Director of the Oregon Department of Transportation.
- (11) "Contractor" means the Person, including a Consultant as defined in OAR 137-048-0110(1), with whom a Contracting Agency enters into a Contract.
- (12) "Descriptive Literature" means Written information submitted with the Offer that addresses the Goods and Services included in the Offer.
- (13) "Disqualification" means a disqualification, suspension or debarment under ORS 200.065, 200.075 or 279A.110.
- (14) "Electronic Advertisement" means a Contracting Agency's Solicitation Document, Request for Quotes, request for information or other document inviting participation in the Contracting Agency's Procurements made available over the Internet via:
- (a) The World Wide Web or some other Internet protocol; or
 - (b) A Contracting Agency's Electronic Procurement System.
- (15) "Electronic Offer" means a response to a Contracting Agency's Solicitation Document or Request for Quotes submitted to a Contracting Agency via:
- (a) The World Wide Web or some other Internet protocol; or
 - (b) A Contracting Agency's Electronic Procurement System.
- (16) "Electronic Procurement System" means an information system that Persons may access through the Internet using the World Wide Web or some other Internet protocol or that Persons may otherwise remotely access using a computer, that enables Persons to send Electronic Offers and a Contracting Agency to post Electronic Advertisements, receive Electronic Offers, and conduct other activities related to a Procurement.
- (17) "Invitation to Bid" or "ITB" means the Solicitation Document issued to invite Offers from prospective Contractors under either ORS 279B.055 or 279C.335.
- (18) "Model Rules" means the Attorney General's model rules of procedure for Public Contracting as required under ORS 279A.065.
- (19) "Offer" means a Written offer to provide Goods or Services in response to a Solicitation Document.
- (20) "Offeror" means a Person who submits an Offer.
- (21) "Opening" means the date, time and place specified in the Solicitation Document for the public opening of Offers.
- (22) "Person" means any of the following with legal capacity to enter into a Contract: individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation or any other legal or commercial entity.

(23) "Personal Services" as used in division 47 and as used in division 46 when applicable to division 47 means the services performed under a Personal Services Contract. "Personal Services" as used in division 48 and division 49, and as used in this division 46 when applicable to division 48 or division 49, or both, has the meaning set forth in ORS 279C.100.

(24) "Personal Services Contract" means:

(a) For a Local Contracting Agency, a Contract or member of a class of Contracts, other than a Contract for the services of an Architect, Engineer, Land Surveyor or Provider of Related Services (as defined in ORS 279C.100), that the Local Contracting Agency's Local Contract Review Board has designated as a personal services contract pursuant to ORS 279A.055; or

(b) For a State Contracting Agency, a Contract, or member of a class of Contracts, other than a Contract for the services of an Architect, Engineer, Land Surveyor or Provider of Related Services (as defined in ORS 279C.100), whose primary purpose is to acquire specialized skills, knowledge and resources in the application of technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment, including, without limitation, a Contract for the services of an accountant, physician or dentist, educator, consultant, broadcaster or artist (including a photographer, filmmaker, painter, weaver or sculptor).

(25) "Product Sample" means the exact Goods or a representative portion of the Goods offered in an Offer, or the Goods requested in the Solicitation Document as a sample.

(26) "Proposal" means a Written response to a Request for Proposals.

(27) "Recycled Materials" means recycled paper (as defined in ORS 279A.010(1)(gg)), recycled PETE products (as defined in ORS 279A.010(1)(hh)), and other recycled plastic resin products and recycled products (as defined in ORS 279A.010(1)(ii)).

(28) "Request for Qualifications" or "RFQ" means a Written document issued by a Contracting Agency to which Contractors respond in Writing by describing their experience with and qualifications for the Services, Personal Services or Architectural, Engineering or Land Surveying Services, or Related Services, described in the document.

(29) "Request for Quotes" means a Written or oral request for prices, rates or other conditions under which a potential Contractor would provide Goods or perform Services, Personal Services or Public Improvements described in the request.

(30) "Responsible" means meeting the standards set forth in OAR 137-047-0640 or 137-049-0390(2), and not debarred or disqualified by the Contracting Agency under OAR 137-047-0575 or 137-049-0370.

(31) "Responsible Offeror" means, as the context requires, a Responsible Bidder, Responsible Proposer or a Person who has submitted an Offer and meets the standards set forth in OAR 137-047-0640 or 137-049-0390(2), and who has not been debarred or disqualified by the Contracting Agency under OAR 137-047-0575 or 137-049-0370.

(32) "Responsive" means having the characteristic of substantial compliance in all material respects with applicable solicitation requirements.

(33) "Responsive Offer" means, as the context requires, a Responsive Bid, Responsive Proposal or other Offer that substantially complies in all material respects with applicable solicitation requirements.

(34) "Signature" means any Written mark, word or symbol that is made or adopted by a Person with the intent to be bound and that is attached to or logically associated with a Written document to which the Person intends to be bound.

(35) "Signed" means, as the context requires, that a Written document contains a Signature or that the act of making a Signature has occurred.

(36) "Solicitation Document" means an Invitation to Bid, Request for Proposals, Request for Quotes, or other similar document issued to invite Offers from prospective Contractors under ORS Chapter 279B or 279C. The following are not Solicitation Documents unless they invite Offers from prospective Contractors: a Request for Qualifications, a prequalification of bidders, a request for information, a sole source notice, an approval of a Special Procurement, or a request for product prequalification. A project-specific selection document under a Price Agreement that has resulted from a previous Solicitation Document is not itself a Solicitation Document.

(37) "Writing" means letters, characters and symbols inscribed on paper by hand, print, type or other method of impression, intended to represent or convey particular ideas or meanings. "Writing," when required or permitted by law, or required or permitted in a Solicitation Document, also means letters, characters and symbols made in electronic form and intended to represent or convey particular ideas or meanings.

(38) "Written" means existing in Writing.

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Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.065

History:

DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0120

Policy

Contracting Agencies subject to the Code shall conduct Public Contracting to further the policies set forth in ORS 279A.015, elsewhere in the Code, and in these Model Rules.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 **History:**

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0130

Application of the Code and Model Rules; Exceptions

(1) Except as set forth in this section, a Contracting Agency shall exercise all procurement authority related to Public Contracting in accordance with the Code and the Model Rules.

(2) A Contracting Agency that has specifically opted out of the Model Rules and adopted its own rules of procedure for Public Contracting pursuant to 279A.065 in the exercise of its own contracting authority is not subject to these Model Rules, except for those portions of the Model Rules that the Contracting Agency has prescribed for its own use for Public Contracting and except for those portions of the Model Rules pertaining to the procurement of Construction Manager/General Contractor Services under ORS 279A.065(3), where the Contracting Agency is not permitted to optout of the Model Rules.

(3) Contracts or classes of Contracts for Personal Services of a Local Contracting Agency designated as such by the Local Contracting Agency's Local Contract Review Board pursuant to ORS 279A.055, are not subject to these Model Rules, unless the Local Contracting Agency adopts OAR 137-047-0250 through 137-047-0290 as the procedures the Local Contracting Agency will use to screen and select persons to perform Contracts for Personal Services other than Architectural, Engineering and Surveying Services and Related Services.

(4) These Model Rules do not apply to the Contracts or the classes of Contracts described in ORS 279A.025(2).

(5) These Model Rules do not apply to the contracting activities of the public bodies listed in ORS 279A.025(3).

(6) Contracting Agencies otherwise subject to the Code and these Model Rules may enter into Contracts for Goods or Services with non-profit agencies providing employment opportunities for individuals with disabilities pursuant to ORS 279.835 through 279.855 without following the source selection procedures set forth in either 279A.200 through 279A.225, or 279B.050 through 279B.085. However, Contracting Agencies must enter into such Contracts in accordance with administrative rules promulgated by the Department.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.050, 279A.055, 279A.065 & 279A.180

History:

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0140

Solicitation Document Templates; Contract Forms and Contract Templates; Accountability for Advice

(1) The Attorney General and the Director of the Oregon Department of Administrative Services will make available to state agencies Solicitation Document templates, Contract forms, and Contract templates as described in 2015 Oregon

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Laws, chapter 646, section 2. State agencies shall use approved Solicitation Document templates, Contract forms or Contract templates as required by 2015 Oregon Laws, chapter 646, section 2.

(2) The Attorney General, in cooperation with the Oregon Department of Administrative Services, will develop and make available to state agencies the process the Attorney General and the department will use to approve and designate Solicitation Document templates, Contract forms and Contract templates for required use, including the process for revising, updating or approving agency-specific variations of the approved Solicitation Document templates, Contract forms, and Contract templates.

(3) Contract forms and Contract templates include amendments to Contracts, including change orders, purchase orders, and other ordering instruments issued under Contracts, when the amendments, change orders, purchase orders, or other ordering instruments provide for payment in excess of \$150,000.

(4) The Attorney General may exempt from required use a Solicitation Document template, Contract form, or Contract template that is approved by the Attorney General, subject to any conditions the Attorney General may impose on the continued use of the exempted and approved Solicitation Document template, Contract form or Contract template.

(5) The Attorney General, in cooperation with the Department of Administrative Services, shall specify how state agencies may access the approved Solicitation Document templates, Contract forms or Contract templates and shall also provide a list of the Solicitation Document templates, Contract forms or Contract templates that are exempt from the required use.

(6) Before a State Contracting Agency executes a Contract with a Contract Price that exceeds \$150,000, the State Contracting Agency must designate in Writing the state employee who will oversee a specific Contract, or specifically identified Contracts, or a specifically identified category of Contracts. The Written designation must identify the employee as the "Contract Administrator" for the Contract or Contracts. The director or other head of the State Contracting Agency (or that officer's designee under 2015 Oregon Laws, chapter 646, section 4(2)) must verify that the Contract Administrator has read and understands all advice and recommendations given with respect to the Contract and Procurement. The director or other head of the State Contracting Agency (or that officer's designee) shall sign and preserve as an Agency record a statement acknowledging that the officer reviewed the advice and recommendations, and made the verification, in accordance with 2015 Oregon Laws, chapter 646, section 4.

(7) As used in 2015 Oregon Laws, chapter 646, section 4, "advice and recommendations" means material advice and recommendations from the Oregon Department of Justice or the Oregon Department of Administrative Services to a State Contracting Agency with respect to a specific Contract and amendments to the Contract, or a Procurement that resulted in the Contract. The term does not include advice or recommendations provided to a State Contracting Agency that were not directed to a specific Contract or Procurement. For example, programmatic advice or recommendations that address the general scope of authority or required procedures of a State Contracting Agency program do not constitute advice and recommendations. Material advice or recommendations are Written communications that address: (i) subject matter that modifies or influences the meaning, performance, administration, or means of enforcement of a Contract; or (ii) the allocation of significant liabilities or risk under a Contract.

Statutory/Other Authority: ORS 279A.065, OL 2015 & ch 646 (HB 2375)

Statutes/Other Implemented: OL 2015 & ch 646 (HB 2375)

History:

DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

137-046-0200

Notice to Governor's Policy Advisor for Economic and Business Equity

In accordance with ORS 200.035, State Contracting Agencies shall provide timely notice of all Procurements and Contract Awards to the Governor's Policy Advisor for Economic and Business Equity if the estimated Contract Price exceeds \$10,000.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 200.035, OL 2015 & ch 325 (HB 2716)

History:

DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0210

Subcontracting to and Contracting with Emerging Small Businesses; Disqualification

(1) For purposes of ORS 279A.105, a subcontractor certified under 200.055 as an emerging small business is located in or draws its workforce from economically distressed areas if:

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Oregon Secretary of State Administrative Rules

- (a) Its principal place of business is located in an area designated as economically distressed under administrative rules adopted by the Oregon Business Development Department; or
- (b) The Contractor certifies in a Signed Writing to the Contracting Agency that a substantial number of the subcontractor's employees or subcontractors that will manufacture or provide the Goods or perform the Services or Personal Services under the Contract reside in an area designated as economically distressed under administrative rules adopted by the Oregon Business Development Department. For the purposes of making the foregoing determination, the Contracting Agency shall determine in each particular instance what proportion of a Contractor's subcontractor's employees or subcontractors constitutes a substantial number.
- (2) Contracting Agencies shall include in each Solicitation Document a requirement that Offerors certify in their Offers, in a form prescribed by the Contracting Agency, that the Offeror has not discriminated, and will not discriminate, against a subcontractor in the awarding of a subcontract because the subcontractor is certified under ORS 200.055 as a disadvantaged business enterprise, a minority-owned business, a woman-owned business, an emerging small business, or a business that a service-disabled veteran owns.
- (3) Disqualification.
- (a) A Contracting Agency may disqualify a Person from consideration for Award of the Contracting Agency's Contracts under ORS 200.065(5), or suspend a Person's right to bid on or participate in any Contract under ORS 200.075(1), after providing the Person with notice and a reasonable opportunity to be heard in accordance with subsections (b) and (c) of this Section.
- (b) The Contracting Agency shall provide Written notice to the Person of a proposed Disqualification. The Contracting Agency shall deliver the Written notice by personal service or by registered or certified mail, return receipt requested. This notice shall:
- (A) State that the Contracting Agency intends to disqualify or suspend the Person;
- (B) Set forth the reasons for the Disqualification;
- (C) Include a statement of the Person's right to a hearing if requested in Writing within the time stated in the notice and that if the Contracting Agency does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived the right to a hearing;
- (D) Include a statement of the authority under which the hearing will be held;
- (E) Include a reference to the particular sections of the statutes and rules involved;
- (F) State the proposed Disqualification period; and
- (G) State that the Person may be represented by legal counsel.
- (c) Hearing. The Contracting Agency shall schedule a hearing upon the Contracting Agency's receipt of the Person's timely hearing request. Within a reasonable time prior to the hearing, the Contracting Agency shall notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing.
- (d) Notice of Disqualification. The Contracting Agency shall provide Written notice of the Disqualification to the Person. The Contracting Agency shall deliver the Written notice by personal service or by registered or certified mail, return receipt requested. The notice shall contain:
- (A) The effective date and period of Disqualification;
- (B) The grounds for Disqualification; and
- (C) A statement of the Person's appeal rights and applicable appeal deadlines.
- (4) Contract and Subcontract Conditions. If a Contracting Agency awards a Contract to an Offeror that has been determined to be responsible under ORS 200.005(8) and 200.045(3), or awards a Contract under ORS 279A.100:
- (a) The Contracting Agency must provide, as a material condition of the Contract:
- (A) That the Contractor must maintain its certification under ORS 200.055 throughout the term of the Contract and any extensions (if the Contracting Agency used the certification as a factor in or as a basis for the award of the Contract);
- (B) That the Contractor must promptly pay each subcontractor that is certified under ORS 200.055 in accordance with ORS 279B.220, or 279C.570 and ORS 279C.580, whichever apply to the Contract;
- (C) That the Contractor must include, in any subcontract the Contractor establishes in connection with the Contract, a provision that requires the subcontractor to maintain the subcontractor's certification under ORS 200.055 throughout the term of the subcontract and any extensions (if the Contractor used the certification as a factor in or as a basis for the award of the subcontract);

- (D) That the Contracting Agency may require the Contractor to terminate a subcontract with a subcontractor that fails to maintain its certification under ORS 200.055 throughout the term of the subcontract and any extensions.
- (b) In the administration of Contracts that are subject to section (4) of this rule, the Contracting Agency must verify the Contractor's and any subcontractor's compliance with subsection (4)(a) of this rule.
- (c) Subparagraph (4)(a)(A) of this section does not apply to an emerging small business that ceases to qualify as a tier one firm or a tier two firm (as ORS 200.005 defines those terms) due to the growth in the business's number of full-time equivalent employees or in average annual gross receipts during the term of the Contract. This section (4) does not apply to an emerging small business for which a certification under ORS 200.055 expires during the term of the Contract or any extensions.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 200.065, 200.075, 279A.065, 279A.105, 279A.110, OL 2015, ch 325 (HB 2716), OL 2015 & ch 565 (HB 3303)

History:

DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0252

Personnel Employment Disclosure and Preference — State Agency Contracts for Goods or Services

- (1) As authorized by subsection 6(2) of Oregon Laws 2012, chapter 53 (Senate Bill 1518), a state contracting agency may state, in its Solicitation Documents for a procurement of goods or services, that the state contracting agency will consider, and award a preference based on, personnel deployment disclosures submitted by bidders or proposers in response to the solicitation.
- (2) A state contracting agency may not reject a bidder or proposer on the ground that it submitted a non-responsive bid or proposal solely due to the bidder's or proposer's failure to submit a personnel employment disclosure. However, the state contracting agency may not apply the preference authorized by subsection 6(2) of Oregon Laws 2012, chapter 53 (Senate Bill 1518) in favor of a bidder or proposer that fails to submit a complete and accurate personnel disclosure form with its bid or proposal on or before the date and time bids or proposals are due.
- (3) To qualify for the application of the preference under subsection 6(2) of Oregon Laws 2012, chapter 53 (Senate Bill 1518), a bidder's or proposer's personnel deployment disclosure form must state:
- (a) The number of workers the bidder or proposer and the bidder's or proposer's subcontractors will, if awarded a contract, deploy to perform the overall contract work described in the Solicitation Documents.
- (b) The number of workers the bidder or proposer and the bidder's or proposer's first-tier subcontractors will, if awarded a contract, employ in this state to perform contract work described in the Solicitation Documents.
- (c) The number of jobs to be held by workers employed by the bidder or proposer and by the bidder's or proposer's subcontractors to perform the contract work described in the Solicitation Documents that will be newly created jobs that result from the award of the contract.
- (d) The duration of the work of any workers (stated in number of work days) who will be employed in this state to perform contract work described in the Solicitation Documents for all workers (including workers of first-tier subcontractors) for whom the work duration will not be as long as the initial term of the contract.
- (e) The rates of pay of all reported workers (including workers of first-tier subcontractors), described either individually, by position, or by job classification, who will be employed in this state to perform contract work described in the Solicitation Documents.
- (4) To qualify for the application of the preference under subsection 6(2) of Oregon Laws 2012, chapter 53 (Senate Bill 1518), a bidder or proposer must make a promise in its bid or proposal to ensure that the deployment of workers will comply, in terms of worker positions, duration of the work, and the location of the employment of workers, with the personnel deployment disclosure submitted with its bid or proposal. If awarded a contract, a bidder or proposer must commit, in the contract, to ensure that the deployment of workers will comply, in terms of worker positions, duration of the work, and the location of the employment of workers, with the personnel deployment disclosure submitted with its bid or proposal. In the contract, the contractor must agree to pass this obligation to all first-tier subcontractors.

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- (5) A state contracting agency may require a contractor under a contract awarded with the application of the preference under subsection 6(2) of Oregon Laws 2012, chapter 53 (Senate Bill 1518) to submit, on a monthly or other periodic basis, the contractor's certification of its employment of workers and its first-tier subcontractors' workers) within this state in accordance with the contractor's personnel deployment disclosure.
- (6) A state contracting agency may give a preference of not more than ten percent to a bid or proposal that states that the bidder or proposer (and its first-tier subcontractors) will employ more workers within this state than competing bidders or proposers. In determining the bidder or proposer who will employ more workers within this state, the state contracting agency may take the rates of pay and the duration of the work into account by averaging the rates of pay for all disclosed in-state work positions and averaging the duration of the in-state work positions among all disclosed in-state work positions. Before granting the preference to a bid or proposal, the agency must determine that the competing proposals otherwise suit the state agency's specifications for the procurement equally well.
- (7) In applying the preference, a state contracting agency must achieve fairness by assigning a standard work-deployment period for each solicitation that does not exceed the duration of the initial term of any contract awarded with the application of the preference, or in project completion-based contracts, does not exceed the probable duration of the project work exclusive of a contractor's performance of warranty work and maintenance.
- (8) Where a state contracting agency determines that a personnel deployment disclosure unreasonably or unrealistically overstates the number of workers a bidder or proposer (and first-tier subcontractors) will employ within this state, the state contracting agency may reject the bid or proposal on grounds of bidder or proposer non-responsibility, or in a proposal situation, may deduct proposal evaluation points.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: 2012 OL & ch 53

History:

DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12

137-046-0300

Preference for Oregon Goods and Services

- (1) Tiebreaker Preference and Award When Offers Are Identical. Under ORS 279A.120, when a Contracting Agency receives Offers identical in price, fitness, availability and quality, and chooses to Award a Contract, the Contracting Agency shall Award the Contract based on the following order of precedence:
- (a) The Contracting Agency shall Award the Contract to the Offeror among those submitting identical Offers who is offering Goods or Services, or both, or Personal Services, that are manufactured, produced or to be performed in Oregon.
- (b) If two or more Offerors submit identical Offers, and they all offer Goods or Services, or both, or Personal Services, that are manufactured, produced or to be performed in Oregon, the Contracting Agency shall Award the Contract by drawing lots among the identical Offers. The Contracting Agency shall provide the Offerors who submitted the identical Offers notice of the date, time and location of the drawing of lots and an opportunity for these Offerors to be present when the lots are drawn.
- (c) If the Contracting Agency receives identical Offers, and none of the identical Offers offer Goods or Services, or both, or Personal Services, that are manufactured, produced or to be performed in Oregon, then the Contracting Agency shall award the Contract by drawing lots among the identical Offers. The Contracting Agency shall provide to the Offerors who submitted the identical Offers notice of the date, time and location of the drawing of lots and an opportunity for these Offerors to be present when the lots are drawn.
- (2) Determining if Offers are Identical. A Contracting Agency shall consider Offers identical in price, fitness, availability and quality as follows:
- (a) Bids received in response to an Invitation to Bid are identical in price, fitness, availability and quality if the Bids are Responsive, and offer the Goods or Services, or both, or Personal Services, described in the Invitation to Bid at the same price.
- (b) Proposals received in response to a Request for Proposals are identical in price, fitness, availability and quality if they are Responsive and achieve equal scores when scored in accordance with the evaluation criteria set forth in the Request for Proposals.
- (c) Offers received in response to a Special Procurement conducted under ORS 279B.085 are identical in price, fitness, availability and quality if, after completing the contracting procedure approved by the Contract Review Authority, the Contracting Agency determines, in Writing, that two or more Offers are equally advantageous to the Contracting Agency.

(d) Offers received in response to an intermediate Procurement conducted pursuant to ORS 279B.070 are identical if the Offers equally best serve the interests of the Contracting Agency in accordance with 279B.070(4).

(3) Determining if Goods or Services or Personal Services are Manufactured or Produced in Oregon. In applying Section 1 of this rule, Contracting Agencies shall determine whether a Contract is predominantly for Goods, Services or Personal Services and then use the predominant purpose to determine if the Goods, Services or Personal Services are manufactured, produced, or performed in Oregon. Contracting Agencies may request, either in a Solicitation Document, following Closing, or at any other time the Contracting Agency determines is appropriate, any information the Contracting Agency may need to determine if the Goods, Services or Personal Services are manufactured or produced in Oregon. A Contracting Agency may use any reasonable criteria to determine if Goods, Services or Personal Services are manufactured, produced, or performed in Oregon, provided that the criteria reasonably relate to that determination, and provided that the Contracting Agency applies those criteria equally to each Offer.

(4) Procedure for Drawing Lots. When this rule calls for the drawing of lots, the Contracting Agency shall draw lots by a procedure that affords each Offeror subject to the drawing a substantially equal probability of selection and that does not allow the person making the selection the opportunity to manipulate the drawing of lots to increase the probability of selecting one Offeror over another.

(5) Discretionary Preference and Award. Under ORS 279A.128, a Contracting Agency may provide, in a Solicitation Document for Goods, Services or Personal Services, a specified percentage preference of not more than ten percent for Goods fabricated or processed entirely in Oregon or Services or Personal Services performed entirely in Oregon. When the Contracting Agency provides for a preference under this Section, and more than one Offeror qualifies for the preference, the Contracting Agency may give a further preference to a qualifying Offeror that resides in or is headquartered in Oregon. A Contracting Agency may establish a preference percentage higher than ten percent by written order that finds good cause to establish the higher percentage and which explains the Contracting Agency's reasons and evidence for finding good cause to establish a higher percentage. A Contracting Agency may not apply the preferences described in this Section in a Procurement for emergency work, minor alterations, ordinary repairs or maintenance of public improvements, or construction work that is described in ORS 297C.320.

Statutory/Other Authority: ORS 279A.065; OL 2011 & ch 237

Statutes/Other Implemented: ORS 279A.065; 279A.120 & 279A.128; OL 2011 & ch 237

History:

DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0310

Reciprocal Preferences

When evaluating Bids pursuant to OAR 137-047-0255, 137-047-0257 or 137-049-0390 and applying the reciprocal preference provided under ORS 279A.120(2)(b) a Contracting Agency may rely on the list prepared and maintained by the Department pursuant to ORS 279A.120(4) to determine:

- (1) Whether the Nonresident Bidder's state gives preference to in-state bidders; and
- (2) The amount of such preference.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 & 279A.120

History: DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0320

Preference for Recycled Materials

(1) In comparing Goods from two or more Offerors, if at least one Offeror offers Goods manufactured from Recycled Materials, and at least one Offeror does not, a Contracting Agency shall select the Offeror offering Goods manufactured from Recycled Materials if each of the conditions specified in ORS 279A.125(2) exists. When making the determination under 279A.125(2)(d), the Contracting Agency shall consider the costs of the Goods following any adjustments the Contracting Agency makes to the price of the Goods after evaluation pursuant to OAR 137-046-0310.

(2) A Contracting Agency shall determine if Goods are manufactured from Recycled Materials in accordance with standards established by the Contracting Agency.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.065 & 279A.125

History:

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0330

Federally Funded Transit Projects — Preference for Exceeding Federal Buy America Requirements

(1) A contracting agency, in its Solicitation Documents to award a contract for a transit project that will be funded in whole or in part with funds from the federal government or a federal government agency, may provide for the application of a preference in favor of an Offeror whose bid or proposal exceeds the applicable federal Buy America requirements.

(a) A contracting agency has discretion to adjust the amount or character of the preference to account for variations in the nature of the contract or project, and the degree to which each Offeror's bid or proposal exceeds the federal Buy America requirements.

(b) For example, in an invitation to bid procurement the contracting agency may authorize a range of preference price percentages to account for the various degrees to which the bidders might exceed the federal Buy America requirements. In no event, however, may the percentage preference given to a bidder exceed ten percent of the total bid price.

(c) Similarly, under a request for proposals, the contracting agency may allocate and award evaluation points to reflect the degrees to which the proposers might exceed the applicable federal Buy America requirements. In no event, however, may those percentage points exceed ten percent of the total number of points available for award under the request for proposals.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** 2012 OL & ch 58 **History:**

DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12

137-046-0400

Authority for Cooperative Procurements

(1) Contracting Agencies may participate in, sponsor, conduct or administer Joint Cooperative Procurements, Permissive Cooperative Procurements and Interstate Cooperative Procurements in accordance with ORS 279A.200 through 279A.225.

(2) Each Purchasing Contracting Agency shall determine in Writing whether the solicitation and award process for an Original Contract arising out of a Cooperative Procurement is substantially equivalent to those identified in ORS 279B.055, 279B.060 or 279B.085, consistent with 279A.200(2).

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 & 279A.205 **History:**

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0410

Responsibilities of Administering Contracting Agencies and Purchasing Contracting Agencies

(1) If a Contracting Agency is an Administering Contracting Agency of a Cooperative Procurement, the Contracting Agency may establish the conditions under which Persons may participate in the Cooperative Procurement administered by the Administering Contracting Agency. Such conditions may include, without limitation, whether each Person who participates in the Cooperative Procurement must pay administrative fees to the Administering Contracting Agency, whether each Person must enter into a Written agreement with the Administering Contracting Agency, and any other matters related to the administration of the Cooperative Procurement and the resulting Original Contract. A Contracting Agency that acts as an Administering Contracting Agency may, but is not required to, include provisions in the Solicitation Document for a Cooperative Procurement and advertise the Solicitation Document in a manner to assist Purchasing Contracting Agencies' compliance with the Code or these Model Rules.

(2) If a Contracting Agency acting as a Purchasing Contracting Agency enters into a Contract based on a Cooperative Procurement, the Contracting Agency shall comply with the Code and these Model Rules, including without limitation those sections of the Code and these Model Rules that govern:

(1)

- (a) The extent to which the Purchasing Contracting Agency may participate in the Cooperative Procurement;
- (b) The advertisement of the Solicitation Document related to the Cooperative Procurement; and
- (c) Public notice of the Purchasing Contracting Agency's intent to establish Contracts based on a Cooperative Procurement.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.065 & 279A.205

History:

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0420

Joint Cooperative Procurements

A Contracting Agency that chooses to participate in, sponsor, conduct or administer a Joint Cooperative Procurement may do so only in accordance with ORS 279A.210.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.065 & 279A.210

History:

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0430

Permissive Cooperative Procurements

A Contracting Agency that chooses to participate in, sponsor, conduct or administer a Permissive Cooperative Procurement may do so only in accordance with ORS 279A.215.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 & 279A.215**History:**

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0440

Advertisements of Intent to Establish Contracts through a Permissive Cooperative Procurement

(1) For purposes of determining whether a Purchasing Contracting Agency must give notice of intent to establish a Contract through a Permissive Cooperative Procurement as required by ORS 279A.215(2)(a), the estimated amount of the procurement will exceed \$250,000 if:

- (a) The Purchasing Contracting Agency's Contract arising out of the Permissive Cooperative Procurement expressly provides that the Purchasing Contracting Agency will make payments over the term of the Contract that will, in aggregate, exceed \$250,000, whether or not the total amount or value of the payments is expressly stated;
- (b) The Purchasing Contracting Agency's Contract arising out of the Permissive Cooperative Procurement expressly provides for payment, whether in a fixed amount or up to a stated maximum amount, that exceeds \$250,000; or
- (c) At the time the Purchasing Contracting Agency enters into the Contract, the Purchasing Contracting Agency reasonably contemplates, based on historical or other data available to the Purchasing Contracting Agency, that the total payments it will make for Goods or Services, or both, or Personal Services, under the Contract will, in aggregate, exceed \$250,000 over the anticipated duration of the Contract.

(2) An Administering Contracting Agency that intends to establish a Contract arising out of the Permissive Cooperative Procurement it administers may satisfy the notice requirements set forth in ORS 279A.215(2)(a) by including the information required by 279A.215(2)(b) in the Solicitation Document related to the Permissive Cooperative Procurement, and including instructions in the Solicitation Document to potential Offerors describing how they may submit comments in response to the Administering Contracting Agency's intent to establish a Contract through the Permissive Cooperative Procurement. The content and timing of such notice shall comply in all respects with 279A.215(2), 279A.215(3) and these Model Rules.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 & 279A.215**History:**

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0450**Interstate Cooperative Procurements**

A Contracting Agency that chooses to participate in, sponsor, conduct or administer an Interstate Cooperative Procurement may do so only in accordance with ORS 279A.220.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 & 279A.220 **History:** DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0460**Advertisements of Interstate Cooperative Procurements**

(1) The Solicitation Document for an Interstate Cooperative Procurement is advertised in Oregon for purposes of ORS 279A.220(2)(a) if it is advertised in Oregon in compliance with 279B.055(4) or 279B.060(4) by:

- (a) The Administering Contracting Agency;
- (b) The Purchasing Contracting Agency;
- (c) The Cooperative Procurement Group, or a member of the Cooperative Procurement Group, of which the Purchasing Contracting Agency is a member; or
- (d) Another Purchasing Contracting Agency that is subject to the Code, so long as such advertisement would, if given by the Purchasing Contracting Agency, comply with ORS 279B.055(4) or 279B.060(4) with respect to the Purchasing Contracting Agency.

(2) A Purchasing Contracting Agency or the Cooperative Procurement Group of which the Purchasing Contracting Agency is a member satisfies the advertisement requirement under ORS 279A.220(2)(b) if the notice is advertised in the same manner as provided in 279B.055(4)(b) and (c).

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 & 279A.220 **History:** DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0470**Protests and Disputes**

(1) An Offeror or potential Offeror wishing to protest the procurement process, the contents of a solicitation document related to a Cooperative Procurement or the award or proposed award of an Original Contract shall make the protest in accordance with ORS 279B.400 through 279B.425 unless the Administering Contracting Agency is not subject to the Code. If the Administering Contracting Agency is not subject to the Code, then the Offeror or potential Offeror shall make the protest in accordance with the processes and procedures established by the Administering Contracting Agency.

(2) Any other protests related to a Cooperative Procurement, or disputes related to a Contract arising out of a Cooperative Procurement, shall be made and resolved as set forth in ORS 279A.225.

(3) The failure of a Purchasing Contracting Agency to exercise any rights or remedies it has under a Contract entered into through a Cooperative Procurement shall not affect the rights or remedies of any other Contracting Agency that participates in the Cooperative Procurement, including the Administering Contracting Agency, and shall not prevent any other Purchasing Contracting Agency from exercising any rights or seeking any remedies that may be available to it under its own Contract arising out of the Cooperative Procurement.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 & 279A.225 **History:** DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0480**Contract Amendments**

A Purchasing Contracting Agency may amend a Contract entered into pursuant to a Cooperative Procurement as set forth in OAR 137-047-0800.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 **History:**

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-046-0500

Repealed Rules

As required by Or Laws 2003, Chapter 794, Section 334, OAR 137-030-0000, 137-030-0005, 137-030-0006, 137-030-0008, 137-030-0010, 137-030-0011, 137-030-0012, 137-030-0013, 137-030-0014, 137-030-0015, 137-030-0020, 137-030-0030, 137-030-0035, 137-030-0040, 137-030-0050, 137-030-0055, 137-030-0060, 137-030-0065, 137-030-0070, 137-030-0075, 137-030-0080, 137-030-0085, 137-030-0090, 137-030-0095, 137-030-0100, 137-030-0102, 137-030-0104, 137-030-0105, 137-030-0110, 137-030-0115, 137-030-0120, 137-030-0125, 137-030-0130, 137-030-0135, 137-030-0140, 137-030-0145, 137-030-0155, 137-035-0000, 137-035-0010, 137-035-0020, 137-035-0030, 137-035-0040, 137-035-0050, 137-035-0060, 137-035-0065, 137-035-0070, 137-035-0080, 137-040-0000, 137-040-0005, 137-040-0010, 137-040-0015, 137-040-0017, 137-040-0020, 137-040-0021, 137-040-0025, 137-040-0030, 137-040-0031, 137-040-0035, 137-040-0045, 137-040-0500, 137-040-0510, 137-040-0520, 137-040-0530, 137-040-0540, 137-040-0550, 137-040-0560, 137-040-0565, 137-040-0570, 137-040-0590 are repealed effective March 1, 2005. The repealed rules will continue to apply to the solicitation of Public Contracts first advertised, but if not advertised then entered into, before March 1, 2005.

Statutory/Other Authority: ORS 279A.065 & OL 2003, Ch. 795 & 334 **Statutes/Other Implemented:** ORS 279A.065 & OL 2003, Ch. 795 & 334 **History:**

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

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Chapter 137

Division 47

MODEL RULES PUBLIC PROCUREMENTS FOR GOODS OR SERVICES

137-047-0000

Application

These division 47 rules implement ORS Chapter 279B, Public Procurements and apply to the Procurement of Goods and Services. State Contracting Agencies shall also procure Personal Services, except for Architectural, Engineering, Land Surveying and Related Services, in the same manner other Services are procured under these division 47 rules. Local Contracting Agencies, pursuant to 279B.050(4), may also adopt these division 47 rules to govern the Procurement of Personal Services Contracts or elect to award Personal Services Contracts under procedures set forth in 279B.055 through 279B.085.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279B.015**History:**

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0100

Definitions

(1) "Advantageous" means in the Contracting Agency's best interests, as assessed according to the judgment of the Contracting Agency.

(2) "Affected Person" or "Affected Offeror" means a Person whose ability to participate in a Procurement is adversely affected by a Contracting Agency decision. See ORS 279B.410.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.065**History:**

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0250

Source Selection

Methods of Source Selection; Feasibility Determination; Cost Analysis

(1) Except as permitted by ORS 279B.065 through 279B.085 and 279A.200 through 279A.225, a Contracting Agency shall Award a Contract for Goods or Services, or both based on Offers received in response to either competitive sealed Bids pursuant to 279B.055 or competitive sealed Proposals pursuant to 279B.060.

(2) Written Cost Analysis for Contracts for Services. Before conducting the Procurement of a Contract for Services that is subject to sections 2 to 4 of Oregon Laws 2009, chapter 880, a Contracting Agency must, in the absence of a determination under section 34 of that enactment that performing the services with the Contracting Agency's own personnel and resources is not feasible, conduct a Written cost analysis.

(1)

- (3) Feasibility Determination for Contracts for Services. A Contracting Agency may proceed with the procurement of a Contract for Services without conducting a cost analysis under Oregon Laws 2009, chapter 880, section 3, if the Contracting Agency makes Written findings that one or more of the special circumstances described in Oregon Laws 2009, chapter 880, section 4, make the Contracting Agency's use of its own personnel and resources to provide the Services not feasible.
- (4) Special Circumstances. The special circumstances identified in Oregon Laws 2009, section 4 that require a Contracting Agency to procure the Services by Contract include any circumstances, conditions or occurrences that would make the Services, if performed by the Contracting Agency's employees, incapable of being managed, utilized or dealt with successfully in terms of the quality, timeliness of completion, success in obtaining desired results, or other reasonable needs of the Contracting Agency.
- (5) Written Cost Analysis under Section 3 of Oregon Laws 2009, chapter 880.
- (a) Basic Comparison. The Written cost analysis must compare an estimate of the Contracting Agency's cost of performing the Services with an estimate of the cost a potential Contractor would incur in performing the Services. However, The Contracting Agency may proceed with the Procurement for Services only if it determines that the Contracting Agency would incur more cost in performing the Services with the Contracting Agency's own personnel than it would incur in procuring the Services from a Contractor. In making this determination, the cost the Contracting Agency would incur in procuring the Services from a Contractor includes the fair market value of any interest in equipment, materials or other assets the Contracting Agency will provide to the Contractor for the performance of the Services.
- (b) Costs of Using Contracting Agency's Own Personnel and Resources. When estimating the Contracting Agency's cost of performing the Services, the Contracting Agency shall consider cost factors that include:
- (A) The salary or wage and benefit costs for the employees of the Contracting Agency who would be directly involved in performing the Services, to the extent those costs reflect the proportion of the activity of those employees in the direct provision of the Services. These costs include those salary or wage and benefit costs of the employees who inspect, supervise or monitor the performance of the Services, to the extent those costs reflect the proportion of the activity of those employees in the direct inspection, supervision, or monitoring of the performance of the subject Services.
- (B) The material costs necessary to the performance of the Services, including the costs for space, energy, transportation, storage, equipment and supplies used or consumed in the provision of the Services.
- (C) The costs incurred in planning for, training for, starting up, implementing, transporting and delivering the Services.
- (D) Any costs related to stopping and dismantling a project or operation because the Contracting Agency intends to procure a limited quantity of Services or to procure the Services within a defined or limited period of time.
- (E) The miscellaneous costs related to performing the Services. These costs exclude the Contracting Agency's indirect overhead costs for existing salaries or wages and benefits for administrators, and exclude costs for rent, equipment, utilities and materials, except to the extent the cost items identified in this sentence are attributed solely to performing the Services and would not be incurred unless the Contracting Agency performed the Services.
- (F) Oregon Laws 2009, chapter 880, section 3(1)(a) provides that an estimate of the Contracting Agency's costs of performing the Services includes the costs described in subsections (5)(b)(A) through (E) of this rule. Therefore, those costs do not constitute an exclusive list of cost information. A Contracting Agency may consider other reliable information that bears on the cost to the Contracting Agency of performing the Services. For example, if the Contracting Agency has accounted for its actual costs of performing the Services under consideration, or reasonably comparable Services, in a relatively recent Services project, the Contracting Agency may consider those actual costs in making its estimate.
- (c) Costs a Potential Contractor Would Incur. When estimating the costs a potential Contractor would incur in performing the Services, the Contracting Agency shall consider cost factors that include:
- (A) The average or actual salary or wage and benefit costs for Contractors and Contractor employees:
- (i) Who work in the business or industry most closely involved in performing the Services; and
- (ii) Who would be necessary and directly involved in performing the Services or who would inspect, supervise or monitor the performance of the Services.
- (B) The material costs necessary to the performance of the Services, including the costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies used or consumed in the provision of the Services.
- (C) The miscellaneous costs related to performing the Services. These miscellaneous costs include reasonably foreseeable fluctuations in the costs listed in subsections (5)(c)(A) and (B) of this rule over the expected duration of the
- (A)

Procurement.

(D) Oregon Laws 2009, chapter 880, section 3(1)(b) provides that an estimate of the costs a potential Contractor would incur in performing the Services includes the costs described in subsections (5)(c)(A) through (C) of this rule. Therefore, those costs do not constitute an exclusive list of cost information. A Contracting Agency may consider other reliable information that bears on the costs a potential Contractor would incur. For example, if the Contracting Agency, in the reasonably near past, received Bids or Proposals for the performance of the Services under consideration, or reasonably comparable Services, the Contracting Agency may consider the pricing offered in those Bids or Proposals in making its estimate. Similarly, the Contracting Agency may consider what it actually paid out under a Contract for the same or similar Services. For the purposes of these examples, the reasonably near past is limited to Contracts, Bids or Proposals entered into or received within the five years preceding the date of the cost estimate. The Contracting Agency must take into account, when considering the pricing offered in previous Bids, Proposals or Contracts, adjustments to the pricing in light of measures of market price adjustments like the consumer price indexes that apply to the Services.

(6) Decision Based on Cost Comparison. After comparing the difference between the costs estimated for the Contracting Agency to perform the Services under section (5)(b) and the estimated costs a potential Contractor would incur in performing the Services under section (5)(c), the Contracting Agency may proceed with the Procurement only if the Contracting Agency would incur more cost in performing the Services with the agency's own personnel and resources than it would incur in procuring the Services from a Contractor.

(7) Exception Based on Salaries or Wages and Benefits. If the sole reason that the costs estimated for the Contracting Agency to perform the Services under section (5)(b) exceed the estimated costs a potential Contractor would incur in performing the Services under section (5)(c) is because the average or actual salary or wage and benefit costs for Contractors and their employees estimated under subsection (5)(c)(A) are lower than the salary or wage and benefit costs for employees of the Contracting Agency under subsection (5)(b)(A), then the Contracting Agency may not proceed with the Procurement.

(8) Exception Based on Lack of Contracting Agency Personnel and Resources; Reporting. In cases in which the Contracting Agency determines that it would incur less cost in providing the Services with its own personnel and resources, the Contracting Agency nevertheless may proceed with the Procurement if, at the time the Contracting Agency intends to conduct the Procurement, the Contracting Agency determines that it lacks personnel and resources to perform the Services within the time the Contracting Agency requires them. When a Contracting Agency conducts a Procurement under this section, the Contracting Agency must:

(a) Make and keep a Written determination that it lacks personnel and resources to perform the Services within the time the Contracting Agency requires them and of the basis for the Contracting Agency's decision to proceed with the Procurement.

(b) If the Contracting Agency is a Local Contracting Agency, provide to its Local Contract Review Board, each calendar quarter, copies of each Written cost analysis and Written determination.

(c) If the Contracting Agency is a State Contracting Agency, provide to the Emergency Board, each calendar quarter, copies of each Written cost analysis and Written determination.

(d) If the Contracting Agency is a State Contracting Agency, prepare a request to the Governor for an appropriation and authority necessary for the State Contracting Agency to hire personnel and obtain resources necessary to perform the Services that are the subjects of the Written cost analyses and Written determinations within the time needed by the State Contracting Agency. The request to the Governor must include copies of the records submitted to the Emergency Board under subsection (8)(c) of this rule.

Statutory/Other Authority: ORS 279A.065, OL 2009, c 880, §§ 3 & 4 **Statutes/Other Implemented:** ORS 279B.050, OL 2009, c 880 & § 2-4 **History:**

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0255**Competitive Sealed Bidding**

(1) Generally. A Contracting Agency may procure Goods or Services by competitive sealed bidding as set forth in ORS 279B.055. An Invitation to Bid is used to initiate a competitive sealed bidding solicitation and shall contain the information required by 279B.055(2) and by section 2 of this rule. The Contracting Agency shall provide public notice of the competitive sealed bidding solicitation as set forth in OAR 137-047-0300.

(2) Invitation to Bid. In addition to the provisions required by ORS 279B.055(2), the Invitation to Bid shall include the following:

(1)

- (a) General Information.
 - (A) Notice of any pre-Offer conference as follows:
 - (i) The time, date and location of any pre-Offer conference;
 - (ii) Whether attendance at the conference will be mandatory or voluntary; and
 - (iii) A provision that provides that statements made by the Contracting Agency's representatives at the conference are not binding upon the Contracting Agency unless confirmed by Written Addendum.
 - (B) The form and instructions for submission of Bids and any other special information, e.g., whether Bids may be submitted by electronic means (See OAR 137-047-0330 for required provisions of electronic Bids);
- (C) The time, date and place of Opening;
- (D) The office where the Solicitation Document may be reviewed;
- (E) A statement that each Bidder must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120(1);
- (F) Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-046-0210(2)); and
- (G) How the Contracting Agency will notify Bidders of Addenda and how the Contracting Agency will make Addenda available (See OAR 137-047-0430).
- (b) Contracting Agency Need to Purchase. The character of the Goods or Services the Contracting Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by Oregon Laws 2009, chapter 880, section 5, the Contracting Agency's description of its need to purchase must:
 - (A) Identify the scope of the work to be performed under the resulting Contract, if the Contracting Agency awards one;
 - (B) Outline the anticipated duties of the Contractor under any resulting Contract;
 - (C) Establish the expectations for the Contractor's performance of any resulting Contract; and
 - (D) Unless the Contracting Agency for Good Cause specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the Contracting Agency is purchasing.
- (c) Bidding and Evaluation Process.
 - (A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;
 - (B) The Contracting Agency shall set forth objective evaluation criteria in the Solicitation Document in accordance with the requirements of ORS 279B.055(6)(a). Evaluation criteria need not be precise predictors of actual future costs, but to the extent possible, the evaluation factors shall be reasonable estimates of actual future costs based on information the Contracting Agency has available concerning future use; and
 - (C) If the Contracting Agency intends to Award Contracts to more than one Bidder pursuant to OAR 137-047-0600(4) (c), the Contracting Agency shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award.
- (d) Applicable preferences pursuant to ORS 279B.055(6)(b).
 - (e) For Contracting Agencies subject to ORS 305.385, Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
 - (f) All contractual terms and conditions in the form of Contract provisions the Contracting Agency determines are applicable to the Procurement. As required by Oregon Laws 2009, chapter 880, section 5, the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:
 - (A) The Contracting Agency's reduction or withholding of payment under the Contract;
 - (B) The Contracting Agency's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the statement of work or to meet the performance standards established by the resulting Contract; and
 - (C) The Contracting Agency's rights, which the Contracting Agency may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available
- (A)

under the resulting Contract or applicable law.

(3) Good Cause. For the purposes of this rule, "Good Cause" means a reasonable explanation for not requiring Contractor to meet the highest standards, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of the Contracting Agency. The Contracting Agency shall document in the Procurement file the basis for the determination of Good Cause for specification otherwise. A Contracting Agency will have Good Cause to specify otherwise under the following circumstances:

(a) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;

(b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the Goods or Services will be compatible with or will operate efficiently or effectively with components, equipment, parts, Services or information technology including hardware, Services or software with which the Goods or Services will be used, integrated, or coordinated;

(c) The circumstances of the industry or business that provides the Goods or Services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, scientific developments, that a reliable highest prevalent standard does not exist or has not been developed;

(d) Any other circumstances in which Contracting Agency's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs the Contracting Agency's practical need for the highest prevalent standard in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.055 **History:**

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0257

Multistep Sealed Bidding

(1) Generally. A Contracting Agency may procure Goods or Services by using multistep sealed bidding under ORS 279B.055(12).

(2) Phased Process. Multistep sealed bidding is a phased Procurement process that seeks information or unpriced submittals in the first phase combined with regular competitive sealed bidding, inviting Bidders who submitted technically eligible submittals in the first phase to submit competitive sealed price Bids in the second phase. The Contract must be Awarded to the lowest Responsible Bidder.

(3) Public Notice. When a Contracting Agency uses multistep sealed bidding, the Contracting Agency shall give public notice for the first phase in accordance with OAR 137-047-0300. Public notice is not required for the second phase. However, a Contracting Agency shall give notice of the second phase to all Bidders, inform Bidders of the right to protest Addenda issued after the initial Closing under OAR 137-047-0430, and inform Bidders excluded from the second phase of the right, if any, to protest their exclusion under OAR 137-047-0720.

(4) Procedures Generally. In addition to the procedures set forth in OAR 137-047-0300 through 137-047-0490, a Contracting Agency shall employ the procedures set forth in this rule for multistep sealed bidding and in the Invitation to Bid.

(5) Procedure for Phase One of Multistep Sealed Bidding.

(a) Form. A Contracting Agency shall initiate multistep sealed bidding by issuing an Invitation to Bid in the form and manner required for competitive sealed Bids except as provided in this Rule. In addition to the requirements set forth OAR 137-047-0255(2), the multistep Invitation to Bid must state:

(A) That the solicitation is a multistep sealed Bid Procurement and describe the process the Contracting Agency will use to conduct the Procurement;

(B) That the Contracting Agency requests unpriced submittals and that the Contracting Agency will consider price Bids only in the second phase and only from those Bidders whose unpriced submittals are found eligible in the first phase;

(C) Whether Bidders must submit price Bids at the same time as unpriced submittals and, if so, that Bidders must submit the price Bids in a separate sealed envelope;

(D) The criteria to be used in the evaluation of unpriced submittals;

(A)

- (b) Evaluation. The Contracting Agency shall evaluate unpriced submittals in accordance with the criteria set forth in the Invitation to Bid.
- (6) Procedure for Phase Two of Multistep Sealed Bidding.
 - (a) After the completion of phase one, if the Contracting Agency does not cancel the Solicitation, the Contracting Agency shall invite each eligible Bidder to submit a price Bid.
 - (b) A Contracting Agency shall conduct phase two as any other competitive sealed Bid Procurement except:
 - (A) As specifically set forth in this rule or the Invitation to Bid;
 - (B) No public notice need be given of the invitation to submit price Bids because such notice was previously given.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.055 **History:**

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0260

Competitive Sealed Proposals

- (1) Generally. A Contracting Agency may procure Goods or Services by competitive sealed Proposals as set forth in ORS 279B.060. A Contracting Agency shall use a Request for Proposal to initiate a competitive sealed Proposal solicitation. The Request for Proposal must contain the information required by 279B.060(2) and by section (2) of this rule. The Contracting Agency shall provide public notice of the Request for Proposal as set forth in OAR 137-047-0300.
- (2) Request for Proposal. In addition to the provisions required by ORS 279B.060(2), the Request for Proposal must include the following:
 - (a) General Information.
 - (A) Notice of any pre-Offer conference as follows:
 - (i) The time, date and location of any pre-Offer conference;
 - (ii) Whether attendance at the conference will be mandatory or voluntary; and
 - (iii) A provision that provides that statements made by the Contracting Agency's representatives at the conference are not binding on the Contracting Agency unless confirmed by Written Addendum.
 - (B) The form and instructions for submission of Proposals and any other special information, e.g., whether Proposals may be submitted by electronic means. (See OAR 137-047-0330 for required provisions of electronic Proposals);
 - (C) The time, date and place of Opening;
 - (D) The office where the Solicitation Document may be reviewed;
 - (E) Proposer's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-046-0210(2)); and
 - (F) How the Contracting Agency will notify Proposers of Addenda and how the Contracting Agency will make Addenda available. (See OAR 137-047-0430).
- (b) Contracting Agency Need to Purchase. The character of the Goods or Services the Contracting Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.060(2)(c), the Contracting Agency's description of its need to purchase must:
 - (A) Identify the scope of the work to be performed under the resulting Contract, if the Contracting Agency awards one;
 - (B) Outline the anticipated duties of the Contractor under any resulting Contract;
 - (C) Establish the expectations for the Contractor's performance of any resulting Contract; and
 - (D) Unless the Contractor under any resulting Contract will provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services that are subject to ORS 279C.100 to 279C.125, or the Contracting Agency for Good Cause specifies otherwise, the scope of work must require the
 - (A)

Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the Contracting Agency is purchasing.

- (c) Proposal and Evaluation Process.
- (A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;
- (B) The Contracting Agency shall set forth selection criteria in the Solicitation Document in accordance with the requirements of ORS 279B.060(3)(e). Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, the criteria shall:
- (i) Afford the Contracting Agency the ability to compare the Proposals and Proposers, applying the same standards of comparison to all Proposers;
- (ii) Rationally reflect Proposers' abilities to perform the resulting Contract in compliance with the Contract's requirements; and
- (iii) Permit the Contracting Agency to determine the relative pricing offered by the Proposers, and to reasonably estimate the costs to the Contracting Agency of entering into a Contract based on each Proposal, considering information available to the Contracting Agency and subject to the understanding that the actual Contract costs may vary as a result of the Statement of Work ultimately negotiated or the quantity of Goods or Services for which the Contracting Agency contracts.
- (C) If the Contracting Agency's solicitation process calls for the Contracting Agency to establish a Competitive Range, the Contracting Agency shall generally describe, in the Solicitation Document, the criteria or parameters the Contracting Agency will apply to determine the Competitive Range. The Contracting Agency, however, subsequently may determine or adjust the number of Proposers in the Competitive Range in accordance with OAR 137-047-0261(6).
- (d) Applicable Preferences, including those described in ORS 279A.120, 279A.125(2) and 282.210.
- (e) For Contracting Agencies subject to ORS 305.385, the Proposers' certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
- (f) All contractual terms and conditions the Contracting Agency determines are applicable to the Procurement. The Contracting Agency's determination of contractual terms and conditions that are applicable to the Procurement may take into consideration, as authorized by ORS 279B.060(3), those contractual terms and conditions the Contracting Agency will not include in the Request for Proposal because the Contracting Agency either will reserve them for negotiation, or will request Proposers to offer or suggest those terms or conditions. (See OAR 137-047-0260(3)).
- (g) As required by ORS 279B.060(2)(h), the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:
- (A) The Contracting Agency's reduction or withholding of payment under the Contract;
- (B) The Contracting Agency's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the scope of work or to meet the performance standards established by the resulting Contract; and
- (C) The Contracting Agency's rights, which the Contracting Agency may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available under the resulting Contract or applicable law.
- (3) The Contracting Agency may include the applicable contractual terms and conditions in the form of Contract provisions, or legal concepts to be included in the resulting Contract. Further, the Contracting Agency may specify that it will include or use Proposer's terms and conditions that have been pre-negotiated under OAR 137-047-0550(3), but the Contracting Agency may only include or use a Proposer's pre-negotiated terms and conditions in the resulting Contract to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. The Contracting Agency shall not agree to any Proposer's terms and conditions that were expressly rejected in a solicitation protest under OAR 137-047-0420.
- (4) For multiple Award Contracts, the Contracting Agency may enter into Contracts with different terms and conditions with each Contractor to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. The Contracting Agency shall not agree to any Proposer's terms and conditions that were expressly rejected in a solicitation protest under OAR 137-047-0420.
- (5) Good Cause. For the purposes of this rule, "Good Cause" means a reasonable explanation for not requiring Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services under the Contract, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of the Contracting Agency. The
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Contracting Agency shall document in the Procurement file the basis for the determination of Good Cause for specifying otherwise. A Contracting Agency will have Good Cause to specify otherwise when the Contracting Agency determines:

- (a) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;
- (b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the Goods or Services will be compatible with, or will operate efficiently or effectively with, associated information technology, hardware, software, components, equipment, parts, or on-going Services with which the Goods or Services will be used, integrated, or coordinated;
- (c) The circumstances of the industry or business that provides the Goods or Services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, or scientific developments, that a reliable highest prevalent standard does not exist or has not been developed;
- (d) That other circumstances exist in which the Contracting Agency's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs the Contracting Agency's practical need for the highest standard prevalent in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract.
- (6) Waiver of Thirty-Percent-to-Contract-Price Weighting Requirement. ORS 279B.060(3)(e) and (9)(a) generally require a state Contracting Agency, when soliciting a Contract for Goods or Services using a Request-for-Proposal Contractor selection method, to give the proposed Contract price not less than thirty percent of the total weight that the agency gives to the total of all factors in the agency's final evaluation of a Proposal. ORS 279B.060(9)(b), however, empowers the director or other head of a state Contracting Agency to waive the at least thirty-percent-to-Contract-price final evaluation weighting requirement if the director or agency head makes a determination that a waiver is in the best interest of the state Contracting Agency. For the purposes of ORS 279B.060(9)(b), a determination that the waiver of the weighting requirement in ORS 279B.060(3)(e) and (9)(a) is in the best interest of the state Contracting Agency may be based on factors that may include, but are not limited to, any one or a combination of the following:
 - (a) Circumstances that support a finding that the requirement would unreasonably limit competition for the advertised Contract or would frustrate the procurement objectives of the state Contracting Agency. For example, where the state Contracting Agency is attempting to attract competition from smaller firms (like businesses owned by service-disabled veterans or emerging small business enterprises that are certified under ORS 200.055), allocating a substantial proportion of the weighting to Contract price may make larger, higher-volume firms disproportionately price-competitive, thereby impairing the smaller firms' chances of securing a Contract award.
 - (b) Where the state Contracting Agency will use the Goods or Services over a significant period, so that the long-term costs of acquiring, using, or maintaining them constitutes a more important consideration than just the Contract price. Procurements in which the evaluation of life cycle costing will yield a more accurate assessment of the overall cost to the Contracting Agency or to the public fall within this category.
 - (c) Procurements in which the value or results of a successfully performed Contract or project are more important than the amount of direct payments under the Contract to be awarded.
 - (d) Procurements in which the adverse effects (which may include costs or losses) of project failure or of a failure in Contract performance can be anticipated to significantly outweigh the state Contracting Agency's burden of paying the Contract price.
 - (e) Circumstances in which the Contract price for the development or production of a design, process, or business solution are projected to be significantly less than the cost to the state Contracting Agency of implementing, operating, or maintaining the resulting design, process, or solution.
 - (f) Circumstances in which the Contract price for the development or production of a design, process, or business solution is projected to be significantly less than the monetary value to the state Contracting Agency of the successful implementation or the successful operation of the resulting design, process, or solution.
 - (g) Situations in which the savings the state Contracting Agency will realize from using the design, process, or solution that will result from the performance of the anticipated Contract will be more significant than the amount of the Contract price the state Contracting Agency will pay under the Contract.
 - (h) Conditions under which the consulting guidance or value-engineering assistance to be provided by the Contractor have the potential to produce long-term savings for the state Contracting Agency or for the public that will significantly exceed the anticipated Contract price of the advertised Contract. Examples may include circumstances in which Contractor expertise or experience in the selection of "next stage" products, configurations, or components for the completion of a project or for the operation of a system or of equipment likely will yield savings or efficiencies that eclipse the amount of the Contract price.

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- (i) Where the expertise, experience, or precision that a Contractor must provide in the performance of a service Contract or of a Contract for both Goods and Services is demonstrably more critical to the satisfaction of the state Contracting Agency's procurement objectives than the direct Contract price.
- (j) Circumstances in which giving greater weight to the Proposers' satisfaction of technical, standard, dimensional, or mathematical specifications, and lesser weight to Contract price, will better ensure that the Goods or Services will be compatible with or will operate efficiently or effectively with components, equipment, parts, Services, or information technology (including hardware, Services, or software) with which the Goods or Services will be used, integrated, or coordinated.
- (k) Where the Procurement represents the first or an early phase in a multiple phase project or in a multiple set of related Contract solicitations and the results of the Contract award under the Procurement can be anticipated to significantly affect the amount of the state Contracting Agency's costs in subsequent phases or solicitations.
- (L) Where the state Contracting Agency employs serial negotiations or competitive simultaneous negotiations under ORS 279B.060(8), and the application of the weighting requirement in ORS 279B.060(3)(e) and (9)(a) could inhibit flexibility in negotiations or impede the ability of the agency or the Proposers to arrive at the most beneficial overall combination of Public Contract elements.
- (m) Any other circumstances in which the Contracting Agency's interest in achieving economy, efficiency, compatibility, or availability in the Procurement of the Goods or Services significantly outweighs the Contract price the state Contracting Agency anticipates to pay under the advertised Contract.
- (7) The director or head of a state Contracting Agency, or the designee of the director or agency head, must document in the Procurement file the basis for any determination that the waiver of the thirty-percent weighting requirement is in the best interest of the Contracting Agency. A director or head of a state Contracting Agency, or the designee of the director or agency head, must report each waiver of that requirement to the Director of the Department of Administrative Services in a Written report that outlines the reasons for the waiver. The requirement to report each waiver to the Director of the Department of Administrative Services does not apply to the Secretary of State or the State Treasurer.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279B.060, OL 2015 & ch 325 (HB 2716)

History:

[DOJ 27-2018, amend filed 12/10/2018, effective 01/01/2019](#) DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0261

Multi-tiered and Multistep Proposals

(1) Generally. A Contracting Agency may use one or more, or any combination, of the methods of Contractor selection set forth in ORS 279B.060(7), 279B.060(8) and this rule to procure Goods or Services. In addition to the procedures set forth in OAR 137-047-0300 through 137-047-0490 for methods of Contractor selection, a Contracting Agency may provide for a multi-tiered or multistep selection process that permits award to the highest ranked Proposer at any tier or step, calls for the establishment of a Competitive Range, or permits either serial or competitive simultaneous discussions or negotiations with one or more Proposers.

(2) When conducting a multi-tiered or multistep selection process, a Contracting Agency may use any combination or series of Proposals, discussions, negotiations, demonstrations, offers, or other means of soliciting information from Proposers that bears on the selection of a Contractor or Contractors. In multi-tiered and multistep competitions, a Contracting Agency may use these means of soliciting information from prospective Proposers and Proposers in any sequence or order, and at any stage of the selection process, as determined in the discretion of the Contracting Agency.

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- (3) When a Contracting Agency's Request for Proposals prescribes a multi-tiered or multistep Contractor selection process, a Contracting Agency nevertheless may, at the completion of any stage in the competition and on determining the Most Advantageous Proposer (or, in multiple-award situations, on determining the awardees of the Public Contracts), award a Contract (or Contracts) and conclude the Procurement without proceeding to subsequent stages. The Contracting Agency also may, at any time, cancel the Procurement under ORS 279B.100.
- (4) Exclusion Protest. A Contracting Agency may provide, before the notice of an intent to Award, an opportunity for a Proposer to protest exclusion from the Competitive Range or from subsequent phases of multi-tiered or multistep sealed Proposals as set forth in OAR 137-047-0720.
- (5) Award Protest. A Contracting Agency shall provide an opportunity to protest its intent to Award a Contract pursuant to ORS 279B.410 and OAR 137-047-0740. An Affected Offeror may protest, for any of the bases set forth in 137-047-0720(2), its exclusion from the Competitive Range or from any phase of a multi-tiered or multistep sealed Proposal process, or may protest an Addendum issued following initial Closing, if the Contracting Agency did not previously provide Proposers the opportunity to protest the exclusion or Addendum. The failure to protest shall be considered the Proposer's failure to pursue an administrative remedy made available to the Proposer by the Contracting Agency.
- (6) Competitive Range. When a Contracting Agency's solicitation process conducted under ORS 279B.060(8) calls for the Contracting Agency to establish a Competitive Range at any stage in the Procurement process, the Contracting Agency may do so as follows:
- (a) Determining Competitive Range.
- (A) The Contracting Agency may establish a Competitive Range after evaluating all Responsive Proposals in accordance with the evaluation criteria in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria in the Request for Proposals, the Contracting Agency may determine and rank the Proposers in the Competitive Range. Notwithstanding the foregoing, however, in instances in which the Contracting Agency determines that a single Proposer has a reasonable chance of being determined the most Advantageous Proposer, the Contracting Agency need not determine or rank Proposers in the Competitive Range. In addition, notwithstanding the foregoing, a Contracting Agency may establish a Competitive Range of all Proposers to enter into discussions to correct deficiencies in Proposals.
- (B) The Contracting Agency may establish the number of Proposers in the Competitive Range in light of whether the Contracting Agency's evaluation of Proposals identifies a number of Proposers who have a reasonable chance of being determined the most Advantageous Proposer, or whether the evaluation establishes a natural break in the scores of Proposers that indicates that a particular number of Proposers are closely competitive or have a reasonable chance of being determined the most Advantageous Proposer.
- (b) Protesting Competitive Range. The Contracting Agency must provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Contracting Agency may provide an opportunity for Proposers excluded from the Competitive Range to protest the Contracting Agency's evaluation and determination of the Competitive Range in accordance with OAR 137-047-0720.
- (7) Discussions. The Contracting Agency may initiate oral or written discussions with all "eligible Proposers" on subject matter within the general scope of the Request for Proposals. In conducting discussions, the Contracting Agency:
- (a) Shall treat all eligible Proposers fairly and shall not favor any eligible Proposer over another;
- (b) May disclose other eligible Proposers' Proposals or discussions only in accordance with ORS 279B.060(8)(b) or (c);
- (c) May adjust the evaluation of a Proposal as a result of discussions. The conditions, terms, or price of the Proposal may be changed during the course of the discussions provided the changes are within the scope of the Request for Proposals.
- (d) At any time during the time allowed for discussions, the Contracting Agency may:
- (A) Continue discussions with a particular eligible Proposer;
- (B) Terminate discussions with a particular eligible Proposer and continue discussions with other eligible Proposers; or
- (C) Conclude discussions with all remaining eligible Proposers and provide, to the then-eligible Proposers, notice requesting best and final Offers.
- (8) Negotiations. A Contracting Agency may commence serial negotiations with the highest-ranked eligible Proposer or commence simultaneous negotiations with all eligible Proposers. A Contracting Agency may negotiate:
- (a) The statement of work;
- (b) The Contract Price as it is affected by negotiating the statement of work and other terms and conditions authorized for negotiation in the Request for Proposals or Addenda thereto; and
- (a)

(c) Any other terms and conditions reasonably related to those authorized for negotiation in the Request for Proposals or Addenda thereto. Proposers shall not submit for negotiation, and a Contracting Agency shall not accept, alternative terms and conditions that are not reasonably related to those authorized for negotiation in the Request for Proposals or any Addendum.

(9) Terminating Negotiations. At any time during discussions or negotiations a Contracting Agency conducts under this rule, the Contracting Agency may terminate discussions or negotiations with the highest-ranked Proposer, or the eligible Proposer with whom it is currently discussing or negotiating, if the Contracting Agency reasonably believes that:

- (a) The eligible Proposer is not discussing or negotiating in good faith; or
- (b) Further discussions or negotiations with the eligible Proposer will not result in the parties agreeing to the terms and conditions of a Contract in a timely manner.
- (c) Continuing Serial Negotiations. If the Contracting Agency is conducting serial negotiations and the Contracting Agency terminates negotiations with an eligible Proposer, the Contracting Agency may then commence negotiations with the next highest scoring eligible Proposer, and continue the sequential process until the Contracting Agency has either:

(A) Determined to Award the Contract to the eligible Proposer with whom it is currently discussing or negotiating; or

(B) Decided to cancel the Procurement under ORS 279B.100.

(d) Competitive Simultaneous Negotiations. If the Contracting Agency chooses to conduct competitive negotiations, the Contracting Agency may negotiate simultaneously with competing eligible Proposers. The Contracting Agency:

(A) Shall treat all eligible Proposers fairly and shall not favor any eligible Proposer over another;

(B) May disclose other eligible Proposers' Proposals or the substance of negotiations with other eligible Proposers only if the Contracting Agency notifies all of the eligible Proposers with whom the Contracting Agency will engage in negotiations of the Contracting Agency's intent to disclose before engaging in negotiations with any eligible Proposer.

(e) Any oral modification of a Proposal resulting from negotiations must be reduced to Writing.

(10) Best and Final Offers. If a Contracting Agency requires best and final Offers, a Contracting Agency must establish a common date and time by which eligible Proposers must submit best and final Offers. If a Contracting Agency is dissatisfied with the best and final Offers, the Contracting Agency may make a written determination that it is in the Contracting Agency's best interest to conduct additional discussions, negotiations or change the Contracting Agency's requirements and require another submission of best and final Offers. A Contracting Agency must inform all eligible Proposers that if they do not submit notice of withdrawal or another best and final Offer, their immediately previous Offers will be considered their best and final Offers. The Contracting Agency shall evaluate Offers as modified by the best and final Offers. The Contracting Agency shall conduct the evaluations as described in OAR 137-047-0600. The Contracting Agency may not modify evaluation factors or their relative importance after the date and time that best and final Offers are due.

(11) Multistep Sealed Proposals. A Contracting Agency may procure Goods or Services by using multistep competitive sealed Proposals under ORS 279B.060(8)(b)(g). Multistep sealed Proposals is a phased Procurement process that seeks necessary information or unpriced technical Proposals in the first phase and, in the second phase, invites Proposers who submitted technically qualified Proposals to submit competitive sealed price Proposals on the technical Proposals. The Contracting Agency must award the Contract to the Responsible Proposer submitting the most Advantageous Proposal in accordance with the terms of the Solicitation Document applicable to the second phase.

(a) Public Notice. When a Contracting Agency uses multistep sealed Proposals, the Contracting Agency shall give public notice for the first phase in accordance with OAR 137-047-0300. Public notice is not required for the second phase. However, a Contracting Agency shall give notice of the subsequent phases to all Proposers and inform any Proposers excluded from the second phase of the right, if any, to protest exclusion under OAR 137-047-0720.

(b) Procedure for Phase One of Multistep Sealed Proposals. A Contracting Agency may initiate a multistep sealed Proposals Procurement by issuing a Request for Proposals in the form and manner required for competitive sealed Proposals except as provided in this rule. In addition to the requirements required for competitive sealed Proposals, the multistep Request for Proposals must state:

(A) That unpriced technical Proposals are requested;

(B) That the solicitation is a multistep sealed Proposal Procurement and that, in the second phase, priced Proposals will be accepted only from those Proposers whose unpriced technical Proposals are found qualified in the first phase;

(C) The criteria for the evaluation of unpriced technical Proposals; and

(A)

- (D) That the Goods or Services being procured shall be furnished generally in accordance with the Proposer's technical Proposal as found to be finally qualified and shall meet the requirements of the Request for Proposals.
- (c) Addenda to the Request for Proposals. After receipt of unpriced technical Proposals, Addenda to the Request for Proposals shall be distributed only to Proposers who submitted unpriced technical Proposals.
- (d) Receipt and Handling of Unpriced Technical Proposals. Unpriced technical Proposals need not be opened publicly.
- (e) Evaluation of Unpriced Technical Proposals. Unpriced technical Proposals shall be evaluated solely in accordance with the criteria set forth in the Request for Proposals.
- (f) Discussion of Unpriced Technical Proposals. The Contracting Agency may seek clarification of a technical Proposal of any Proposer who submits a qualified, or potentially qualified technical Proposal. During the course of such discussions, the Contracting Agency shall not disclose any information derived from one unpriced technical Proposal to any other Proposer.
- (g) Methods of Contractor Selection for Phase One. In conducting phase one, a Contracting Agency may employ any combination of the methods of Contractor selection that call for the establishment of a Competitive Range or include discussions, negotiations, or best and final Offers as set forth in this rule.
- (h) Procedure for Phase Two. On the completion of phase one, the Contracting Agency shall invite each qualified Proposer to submit price Proposals. A Contracting Agency shall conduct phase two as any other competitive sealed Proposal Procurement except as set forth in this rule.
- (j) No public notice need be given of the request to submit price Proposals because such notice was previously given.
- (12) Waiver of Thirty-Percent-to-Contract-Price Weighting Requirement. Under ORS 279B.060(9)(b), the director or other head of a state Contracting Agency may waive the at least thirty-percent-to-Contract-price final evaluation weighting requirement of ORS 279B.060(3)(e) and (9)(a) in the conduct of a multi-tiered or multistep selection process. In making a determination that a waiver is in the best interest of the state Contracting Agency, the director or agency head may consider the factors identified in OAR 137-047-0260(6). A director or agency head that waives the thirty percent weighting requirement must comply with the documentation and reporting requirements of OAR 137-047-0260(7).
- (13) Unless the Legislative Assembly extends the thirty-percent weighting requirement of ORS 279B.060(3)(e) and (9)(a) beyond the January 2, 2020 expiration date anticipated by 2018 Oregon Laws, chapter 85, sections 4 and 8(2), OAR 137-047-0260(6) and (7) and section (12) of this rule expire on January 2, 2020.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.060 **History:**
[DOJ 27-2018, amend filed 12/10/2018, effective 01/01/2019](#) DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12
 DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
 DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0265

Small Procurements

- (1) Generally. For Procurements of Goods or Services less than or equal to the dollar amount stated in ORS 279B.065, a Contracting Agency may Award a Contract as a small Procurement pursuant to ORS 279B.065.
- (2) Amendments. A Contracting Agency may amend a Contract Awarded as a small Procurement in accordance with OAR 137-047-0800, but the cumulative amendments may not increase the total Contract Price to greater than one hundred twenty-five percent (125%) of the dollar amount stated in ORS 279B.065.

Statutory/Other Authority: ORS 279A.065 & 279B.065

Statutes/Other Implemented: ORS 279B.065

History:

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0270**Intermediate Procurements**

- (1) Generally. For Procurements of Goods or Services greater than the dollar amount stated in ORS 279B.065 and less than or equal to the higher dollar amount stated in ORS 279B.070, a Contracting Agency may Award a Contract as an intermediate Procurement pursuant to ORS 279B.070.
- (2) Negotiations. A Contracting Agency may negotiate with a prospective Contractor who offers to provide Goods or Services in response to an intermediate Procurement to clarify its quote or Offer or to effect modifications that will make the quote or Offer more Advantageous to the Contracting Agency.
- (3) Amendments. A Contracting Agency may amend a Contract Awarded as an intermediate Procurement in accordance with OAR 137-047-0800, but the cumulative amendments may not increase the total Contract Price to a sum that exceeds the higher dollar amount stated in ORS 279B.070 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater.

Statutory/Other Authority: ORS 279A.065 & 279B.070

Statutes/Other Implemented: ORS 279B.070

History:

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 5-2012, f. & cert. ef. 2-27-12

DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14DOJ 5-2012, f. & cert. ef. 2-27-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0275**Sole-source Procurements**

- (1) Generally. A Contracting Agency may Award a Contract without competition as a sole-Source Procurement pursuant to the requirements of ORS 279B.075.
- (2) Public Notice. If, but for the Contracting Agency's determination that it may enter into a Contract as a sole-source, a Contracting Agency would be required to select a Contractor using source selection methods set forth in either ORS 279B.055 or 279B.060, a Contracting Agency shall give public notice of the Contract Review Authority's determination that the Goods or Services or class of Goods or Services are available from only one source. The Contracting Agency shall publish such notice in a manner similar to public notice of competitive sealed Bids under 279B.055(4) and OAR 137-047-0300. The public notice shall describe the Goods or Services to be acquired by a sole-source Procurement, identify the prospective Contractor and include the date, time and place that protests are due. The Contracting Agency shall give Affected Persons at least seven (7) days from the date of the notice of the determination that the Goods or Services are available from only one source to protest the sole source determination.
- (3) Protest. An Affected Person may protest the Contract Review Authority's determination that the Goods or Services or class of Goods or Services are available from only one source in accordance with OAR 137-047-0710.

Statutory/Other Authority: ORS 279A.065 & 279B.075

Statutes/Other Implemented: ORS 279B.075

History:

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0280**Emergency Procurements**

A Contracting Agency may Award a Contract as an Emergency Procurement pursuant to the requirements of ORS 279B.080. When an Emergency Procurement is authorized, the Procurement shall be made with competition that is reasonable and appropriate under the circumstances. However, for emergency Procurement of construction services, see 279B.080(2).

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.080**History:**

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0285**Special Procurements**

- (1) Generally. A Contracting Agency may Award a Contract as a Special Procurement pursuant to the requirements of ORS 279B.085.
- (2) Public Notice. A Contracting Agency shall give public notice of the Contract Review Authority's approval of a Special Procurement in the same manner as public notice of competitive sealed Bids under ORS 279B.055(4) and OAR 137-047-0300. The public notice shall describe the Goods or Services or class of Goods or Services to be acquired through the Special Procurement. The Contracting Agency shall give Affected Persons at least seven (7) days from the date of the notice of approval of the Special Procurement to protest the Special Procurement.
- (3) Protest. An Affected Person may protest the request for approval of a Special Procurement in accordance with ORS 279B.400 and OAR 137-047-0700.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.085 **History:**

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0290**Cooperative Procurements**

A Contracting Agency may participate in, sponsor, conduct, or administer Cooperative Procurements as set forth in ORS 279A.200 through 279A.225 and OAR 137-046-0400 through 137-046-0480.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.205 **History:**

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0300**Public Notice of Solicitation Documents**

- (1) Notice of Solicitation Documents; Fee. A Contracting Agency shall provide public notice of every Solicitation Document in accordance with section (2) of this rule. The Contracting Agency may give additional notice using any method it determines appropriate to foster and promote competition, including:
- (a) Mailing notice of the availability of the Solicitation Document to Persons that have expressed an interest in the Contracting Agency's Procurements;
 - (b) Placing notice on the Contracting Agency's Electronic Procurement System; or
 - (c) Placing notice on the Contracting Agency's Internet World Wide Web site.
- (2) Advertising. A Contracting Agency shall advertise every notice of a Solicitation Document as follows:
- (a) The Contracting Agency shall publish the advertisement for Offers in accordance with the requirements of ORS 279B.055(4) and 279B.060(5); or
 - (b) A Contracting Agency may publish the advertisement for Offers on the Contracting Agency's Electronic Procurement System instead of publishing notice in a newspaper of general circulation as required by ORS 279B.055(4)
 - (b) if, by rule or order, the Contracting Agency's Contract Review Authority has authorized the Contracting Agency to publish notice of Solicitation Documents on the Contracting Agency's Electronic Procurement System.
- (3) Content of Advertisement. All advertisements for Offers shall set forth:
- (a) Where, when, how, and for how long the Solicitation Document may be obtained;
 - (b) A general description of the Goods or Services to be acquired;
 - (c) The interval between the first date of notice of the Solicitation Document given in accordance with section (2)(a) or (b) above and Closing, which shall not be less than fourteen (14) Days for an Invitation to Bid and thirty (30) Days for a

Request for Proposals, unless the Contracting Agency determines that a shorter interval is in the public's interest, and that a shorter interval will not substantially affect competition. However, in no event shall the interval between the first date of notice of the Solicitation Document given in accordance with section (2)(a) or (b) above and Closing be less than seven (7) Days as set forth in ORS 279B.055(4)(f). The Contracting Agency shall document the specific reasons for the shorter public notice period in the Procurement file;

- (d) The date that Persons must file applications for prequalification if prequalification is a requirement and the class of Goods or Services is one for which Persons must be prequalified;
- (e) The office where Contract terms, conditions and Specifications may be reviewed;
- (f) The name, title and address of the individual authorized by the Contracting Agency to receive Offers;
- (g) The scheduled Opening; and
- (h) Any other information the Contracting Agency deems appropriate.

(4) Posting Advertisement for Offers. The Contracting Agency shall post a copy of each advertisement for Offers at the principal business office of the Contracting Agency. An Offeror may obtain a copy of the advertisement for Offers upon request.

- (5) Fees. The Contracting Agency may charge a fee or require a deposit for the Solicitation Document.

(6) Notice of Addenda. The Contracting Agency shall provide potential Offerors notice of any Addenda to a Solicitation Document in accordance with OAR 137-047-0430.

Statutory/Other Authority: ORS 279A.065, 279B.055 & 279B.060 **Statutes/Other Implemented:** ORS 279B.055 & 279B.060
History:

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0310

Bids or Proposals are Offers

- (1) Offer and Acceptance. The Bid or Proposal is the Bidder's or Proposer's Offer to enter into a Contract.

(a) In competitive bidding and competitive Proposals, the Offer is always a "Firm Offer," i.e. the Offer shall be held open by the Offeror for the Contracting Agency's acceptance for the period specified in OAR 137-047-0480. The Contracting Agency may elect to accept the Offer at any time during the specified period, and the Contracting Agency's Award of the Contract constitutes acceptance of the Offer and binds the Offeror to the Contract.

(b) Notwithstanding the fact that a competitive Proposal is a "Firm Offer" for the period specified in OAR 137-047-0480, the Contracting Agency may elect to discuss or negotiate certain contractual provisions, as identified in these rules or in the Solicitation Document, with the Proposer. Where negotiation is permitted by the rules or the Solicitation Document, Proposers are obligated to negotiate in good faith and only on those terms or conditions that the rules or the Solicitation Document have reserved for negotiation.

(2) Contingent Offers. Except to the extent the Proposer is authorized to propose certain terms and conditions pursuant to OAR 137-047-0262, a Proposer shall not make its Offer contingent upon the Contracting Agency's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

(3) Offeror's Acknowledgment. By Signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits Proposers to propose alternative terms or conditions under OAR 137-047-0261, the Offeror's Offer includes any nonnegotiable terms and conditions, any proposed terms and conditions offered for negotiation upon and to the extent accepted by the Contracting Agency in Writing, and Offeror's agreement to perform the scope of work and meet the performance standards set forth in the final negotiated scope of work.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.065, 279B.055 & 279B.60

History:

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0320**Facsimile Bids and Proposals**

(1) Contracting Agency Authorization. A Contracting Agency may authorize Offerors to submit facsimile Offers. If the Contracting Agency determines that Bid or Proposal security is or will be required, the Contracting Agency should not authorize facsimile Offers unless the Contracting Agency has another method for receipt of such security. Prior to authorizing the submission of facsimile Offers, the Contracting Agency shall determine that the Contracting Agency's equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time. In addition, the Contracting Agency shall establish administrative procedures and controls:

- (a) To receive, identify, record, and safeguard facsimile Offers;
 - (b) To ensure timely delivery of Offers to the location of Opening; and
 - (c) To preserve the Offers as sealed.
- (2) Provisions To Be Included in Solicitation Document. In addition to all other requirements, if the Contracting Agency authorizes a facsimile Offer, the Contracting Agency will include in the Solicitation Document the following:
- (a) A provision substantially in the form of the following: "A 'facsimile Offer,' as used in this Solicitation Document, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by the Contracting Agency via a facsimile machine";
 - (b) A provision substantially in the form of the following: "Offerors may submit facsimile Offers in response to this Solicitation Document. The entire response must arrive at the place and by the time specified in this Solicitation Document";
 - (c) A provision that requires Offerors to Sign their facsimile Offers;
 - (d) A provision substantially in the form of the following: "The Contracting Agency reserves the right to Award the Contract solely on the basis of a facsimile Offer. However, upon the Contracting Agency's request the apparent successful Offeror shall promptly submit its complete original Signed Offer";
 - (e) The data and compatibility characteristics of the Contracting Agency's receiving facsimile machine as follows:
 - (A) Telephone number; and
 - (B) Compatibility characteristics, e.g. make and model number, receiving speed, communications protocol; and
 - (f) A provision that the Contracting Agency is not responsible for any failure attributable to the transmission or receipt of the facsimile Offer including, but not limited to the following:
 - (A) Receipt of garbled or incomplete documents;
 - (B) Availability or condition of the receiving facsimile machine;
 - (C) Incompatibility between the sending and receiving facsimile machine;
 - (D) Delay in transmission or receipt of documents;
 - (E) Failure of the Offeror to properly identify the Offer documents;
 - (F) Illegibility of Offer documents; and
 - (G) Security and confidentiality of data.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 **History:**
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0330**Electronic Procurement**

- (1) Electronic Procurement Authorized.
- (1)

- (a) A Contracting Agency may conduct all phases of a Procurement, including without limitation the posting of Electronic Advertisements and the receipt of Electronic Offers, by electronic methods if and to the extent the Contracting Agency specifies in a Solicitation Document, a Request for Quotes, or any other Written instructions on how to participate in the Procurement.
- (b) The Contracting Agency shall open an Electronic Offer in accordance with electronic security measures in effect at the Contracting Agency at the time of its receipt of the Electronic Offer. Unless the Contracting Agency provides procedures for the secure receipt of Electronic Offers, the Person submitting the Electronic Offer assumes the risk of premature disclosure due to submission in unsealed form.
- (c) The Contracting Agency's use of electronic Signatures shall be consistent with applicable statutes and rules. A Contracting Agency may limit the use of electronic methods of conducting a Procurement as Advantageous to the Contracting Agency.
- (d) If the Contracting Agency determines that Bid or Proposal security is or will be required, the Contracting Agency should not authorize Electronic Offers unless the Contracting Agency has another method for receipt of such security.
- (2) Rules Governing Electronic Procurements. The Contracting Agency shall conduct all portions of an electronic Procurement in accordance with these division 47 rules, unless otherwise set forth in this rule.
- (3) Preliminary Matters. As a condition of participation in an electronic Procurement the Contracting Agency may require potential Contractors to register with the Contracting Agency before the date and time on which the Contracting Agency will first accept Offers, to agree to the terms, conditions, or other requirements of a Solicitation Document, or to agree to terms and conditions governing the Procurement, such as procedures that the Contracting Agency may use to attribute, authenticate or verify the accuracy of an Electronic Offer, or the actions that constitute an electronic Signature.
- (4) Offer Process. A Contracting Agency may specify that Persons must submit an Electronic Offer by a particular date and time, or that Persons may submit multiple Electronic Offers during a period of time established in the Electronic Advertisement. When the Contracting Agency specifies that Persons may submit multiple Electronic Offers during a specified period of time, the Contracting Agency must designate a time and date on which Persons may begin to submit Electronic Offers, and a time and date after which Persons may no longer submit Electronic Offers. The date and time after which Persons may no longer submit Electronic Offers need not be specified by a particular date and time, but may be specified by a description of the conditions that, when they occur, will establish the date and time after which Persons may no longer submit Electronic Offers. When the Contracting Agency will accept Electronic Offers for a period of time, then at the designated date and time that the Contracting Agency will first receive Electronic Offers, the Contracting Agency must begin to accept real time Electronic Offers on the Contracting Agency's Electronic Procurement System, and shall continue to accept Electronic Offers in accordance with section (5)(b) of this rule until the date and time specified by the Contracting Agency, after which the Contracting Agency will no longer accept Electronic Offers.
- (5) Receipt of Electronic Offers.
- (a) When a Contracting Agency conducts an electronic Procurement that provides that all Electronic Offers must be submitted by a particular date and time, the Contracting Agency shall receive the Electronic Offers in accordance with these division 47 rules.
- (b) When the Contracting Agency specifies that Persons may submit multiple Electronic Offers during a period of time, the Contracting Agency shall accept Electronic Offers, and Persons may submit Electronic Offers, in accordance with the following:
- (A) Following receipt of the first Electronic Offer after the day and time the Contracting Agency first receives Electronic Offers the Contracting Agency shall post on the Contracting Agency's Electronic Procurement System, and updated on a real time basis, the lowest Electronic Offer price or the highest ranking Electronic Offer. At any time before the date and time after which the Contracting Agency will no longer receive Electronic Offers, a Person may revise its Electronic Offer, except that a Person may not lower its price unless that price is below the then lowest Electronic Offer.
- (B) A Person may not increase the price set forth in an Electronic Offer after the day and time that the Contracting Agency first accepts Electronic Offers.
- (C) A Person may withdraw an Electronic Offer only in compliance with these division 47 rules. If a Person withdraws an Electronic Offer, it may not later submit an Electronic Offer at a price higher than that set forth in the withdrawn Electronic Offer.
- (6) Failure of the E-Procurement System. In the event of a failure of the Contracting Agency's Electronic Procurement System that interferes with the ability of Persons to submit Electronic Offers, protest or to otherwise participate in the Procurement, the Contracting Agency may cancel the Procurement in accordance with OAR 137-047-0660, or may extend the date and time for receipt of Electronic Offers by providing notice of the extension immediately after the Electronic Procurement System becomes available.

(1)

Statutory/Other Authority: ORS 279A.065 & 279B.055

Statutes/Other Implemented: ORS 279A.065

History:

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0400

Offer Preparation

(1) Instructions. An Offeror shall submit and Sign its Offer in accordance with the instructions set forth in the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to Opening in accordance with the requirements for submitting an Offer set forth in the Solicitation Document.

(2) Forms. An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.

(3) Documents. An Offeror shall provide the Contracting Agency with all documents and Descriptive Literature required by the Solicitation Document.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065**History:**

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0410

Offer Submission

(1) Product Samples and Descriptive Literature. A Contracting Agency may require Product Samples or Descriptive Literature if the Contracting Agency determines either is necessary or desirable to evaluate the quality, features or characteristics of an Offer. The Contracting Agency will dispose of Product Samples, or make them available for the Offeror to retrieve in accordance with the Solicitation Document.

(2) Identification of Offers:

(a) To ensure proper identification and handling, Offers shall be submitted in a sealed envelope appropriately marked on the envelope provided by the Contracting Agency, whichever is applicable. If the Contracting Agency permits Electronic Offers or facsimile Offers in the Solicitation Document, the Offeror may submit and identify Electronic Offers or facsimile Offers in accordance with these division 47 rules and the instructions set forth in the Solicitation Document. The Contracting Agency shall not consider facsimile or electronic Offers unless authorized by the Solicitation Document.

(b) The Contracting Agency is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.

(3) Receipt of Offers. The Offeror is responsible for ensuring the Contracting Agency receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065**History:**

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0420

Pre-Offer Conferences

(1) Purpose. A Contracting Agency may hold pre-Offer conferences with prospective Offerors prior to Closing, to explain the Procurement requirements, obtain information, or to conduct site inspections.

(2) Required Attendance. The Contracting Agency may require attendance at the pre-Offer conference as a condition for making an Offer.

(1)

(3) **Scheduled Time.** If a Contracting Agency holds a pre-Offer conference, it shall be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference.

(4) **Statements Not Binding.** Statements made by a Contracting Agency's representative at the pre-Offer conference do not change the Solicitation Document unless the Contracting Agency confirms such statements with a Written Addendum to the Solicitation Document.

(5) **Agency Announcement.** The Contracting Agency must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with OAR 137-047-0255(2) or 137-047-0260(2).

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 **History:** DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0430

Addenda to Solicitation Document

(1) **Issuance; Receipt.** The Contracting Agency may change a Solicitation Document only by Written Addenda. An Offeror shall provide Written acknowledgment of receipt of all issued Addenda with its Offer, unless the Contracting Agency otherwise specifies in the Addenda.

(2) **Notice and Distribution.** The Contracting Agency shall notify prospective Offerors of Addenda in a manner intended to foster competition and to make prospective Offerors aware of the Addenda. The Solicitation Document shall specify how the Contracting Agency will provide notice of Addenda and how the Contracting Agency will make the Addenda available before Closing, and at each subsequent step or tier of evaluation if the Contracting Agency will engage in a multistep competitive sealed Bid process in accordance with OAR 137-047-0257, or a multi-tiered or multistep competitive sealed Proposal process in accordance with 137-047-0261. The following is an example of how a Contracting Agency may specify how it will provide notice of Addenda: "Contracting Agency will not mail notice of Addenda, but will publish notice of any Addenda on Contracting Agency's web site. Addenda may be downloaded off the Contracting Agency's web site. Offerors should frequently check the Contracting Agency's web site until Closing, i.e., at least once weekly until the week of Closing and at least once daily the week of the Closing."

(3) **Timelines; Extensions.**

(a) The Contracting Agency shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The Contracting Agency may extend the Closing if the Contracting Agency determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent justified by a countervailing public interest, the Contracting Agency shall not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.

(b) Notwithstanding subsection 3(a) of this rule, an Addendum that modifies the evaluation criteria, selection process or procedure for any tier of competition under a multistep sealed Bid or a multi-tiered or multistep sealed Proposal issued in accordance with ORS 279B.060(6)(d) and OAR 137-047-0261 must be issued no fewer than five (5) Days before the beginning of that tier or step of competition, unless the Contracting Agency determines that a shorter period is sufficient to allow Offerors to prepare for that tier or step of competition. The Contracting Agency shall document the factors it considered in making that determination, which may include, without limitation, the scope of the changes to the Solicitation Document, the location of the remaining eligible Proposers, or whether shortening the period between issuing an Addendum and the beginning of the next tier or step of competition favors or disfavors any particular Proposer or Proposers.

(4) **Request for Change or Protest.** Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in OAR 137-047-0730, by the close of the Contracting Agency's next business day after issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under 137-047-0730, whichever date is later. If the date established in the previous sentence falls after the deadline for receiving protests to the Solicitation Document in accordance with 137-047-0730, then the Contracting Agency may consider an Offeror's request for change or protest to the Addendum only, and the Contracting Agency shall not consider a request for change or protest to matters not added or modified by the Addendum. Notwithstanding any provision of this section (4) of this rule, a Contracting Agency is not required to provide a protest period for Addenda issued after initial Closing during a multi-tier or multistep Procurement process conducted pursuant to ORS 279B.055 or 279B.060.

Statutory/Other Authority: ORS 279A.065 & 279B.060

Statutes/Other Implemented: ORS 279B.060

History:

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0440

Pre-Closing Modification or Withdrawal of Offers

(1) Modifications. An Offeror may modify its Offer in Writing prior to the Closing. An Offeror shall prepare and submit any modification to its Offer to the Contracting Agency in accordance with OAR 137-047-0400 and 137-047-0410, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:

- (a) Bid (or Proposal) Modification; and
- (b) Solicitation Document Number (or other identification as specified in the Solicitation Document).

(2) Withdrawals.

(a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, Signed by an authorized representative of the Offeror, delivered to the individual and location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by the Contracting Agency prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in person prior to the Closing, upon presentation of appropriate identification and evidence of authority satisfactory to the Contracting Agency.

(b) The Contracting Agency may release an unopened Offer withdrawn under subsection (2)(a) of this rule to the Offeror or its authorized representative, after voiding any date and time stamp mark.

(c) The Offeror shall mark the Written request to withdraw an Offer as follows:

- (A) Bid (or Proposal) Withdrawal; and
- (B) Solicitation Document Number (or Other Identification as specified in the Solicitation Document).

(3) Documentation. The Contracting Agency shall include all documents relating to the modification or withdrawal of Offers in the appropriate Procurement file.

Statutory/Other Authority: ORS 279A.065 & 279B.055

Statutes/Other Implemented: ORS 279B.055

History:

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0450

Receipt, Opening, and Recording of Offers; Confidentiality of Offers

(1) Receipt. A Contracting Agency shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The Contracting Agency shall not open the Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If the Contracting Agency inadvertently opens an Offer or a modification prior to the Opening, the Contracting Agency shall return the Offer or modification to its secure and confidential state until Opening. The Contracting Agency shall document the resealing for the Procurement file (e.g. "Contracting Agency inadvertently opened the Offer due to improper identification of the Offer.").

(2) Opening and Recording. A Contracting Agency shall publicly open Offers including any modifications made to the Offer pursuant to OAR 137-047-0440(1). In the case of Invitations to Bid, to the extent practicable, the Contracting Agency shall read aloud the name of each Bidder, and such other information as the Contracting Agency considers appropriate. However, the Contracting Agency may withhold from disclosure information in accordance with ORS 279B.055(5)(c) and 279B.060(6). In the case of Requests for Proposals or voluminous Bids, if the Solicitation Documents so provides, the Contracting Agency will not read Offers aloud.

Statutory/Other Authority: ORS 279A.065 & 279B.055

Statutes/Other Implemented: ORS 279B.055

History:

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0460

Late Offers, Late Withdrawals and Late Modifications

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. An Agency shall not consider late Offers, withdrawals or modifications except as permitted in OAR 137-047-0470 or 137-047-0261.

Statutory/Other Authority: ORS 279A.065 & 279B.055

Statutes/Other Implemented: ORS 279B.055

History:

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0470

Mistakes

(1) Generally. To protect the integrity of the competitive Procurement process and to assure fair treatment of Offerors, a Contracting Agency should carefully consider whether to permit waiver, correction or withdrawal of Offers for certain mistakes.

(2) Contracting Agency Treatment of Mistakes. A Contracting Agency shall not allow an Offeror to correct or withdraw an Offer for an error in judgment. If the Contracting Agency discovers certain mistakes in an Offer after Opening, but before Award of the Contract, the Contracting Agency may take the following action:

(a) A Contracting Agency may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:

(A) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;

(B) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and

(C) Acknowledge receipt of an Addendum to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addendum and intended to be bound by its terms; or the Addendum involved did not affect price, quality or delivery.

(b) A Contracting Agency may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms the Contracting Agency's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example, a missing unit price may be established by dividing the total price for the units by the quantity of units for that item, or a missing or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). Unit prices shall prevail over extended prices in the event of a discrepancy between extended prices and unit prices.

(c) A Contracting Agency may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:

(A) The nature of the error;

(B) That the error is not a minor informality under this subsection or an error in judgment;

(C) That the error cannot be corrected or waived under subsection (b) of this section;

(D) That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;

(E) That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;

(F) That the Offeror will suffer substantial detriment if the Contracting Agency does not grant the Offeror permission to withdraw the Offer;

(G) That the Contracting Agency's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on the Contracting Agency or the public it represents; and

(H) That the Offeror promptly gave notice of the claimed error to the Contracting Agency.

(d) The criteria in subsection (2)(c) of this rule shall determine whether a Contracting Agency will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether a Contracting Agency will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without

(a)

liability to the Contracting Agency based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by the Contracting Agency, whether by Award to the next lowest Responsive and Responsible Bidder or the most Advantageous Responsive and Responsible Proposer, or by resort to a new solicitation.

(3) Rejection for Mistakes. The Contracting Agency shall reject any Offer in which a mistake is evident on the face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents submitted with the Offer.

(4) Identification of Mistakes after Award. The procedures and criteria set forth above are Offeror's only opportunity to correct mistakes or withdraw Offers because of a mistake. Following Award, an Offeror is bound by its Offer, and may withdraw its Offer or rescind a Contract entered into pursuant to this division 47 only to the extent permitted by applicable law.

Statutory/Other Authority: ORS 279A.065 & 279B.055

Statutes/Other Implemented: ORS 279B.055

History:

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0480

Time for Agency Acceptance

An Offeror's Offer is a Firm Offer, irrevocable, valid and binding on the Offeror for not less than thirty (30) Days following Closing unless otherwise specified in the Solicitation Document.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 **History:**

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0490

Extension of Time for Acceptance of Offer

A Contracting Agency may request, orally or in Writing, that Offerors extend, in Writing, the time during which the Contracting Agency may consider their Offer(s). If an Offeror agrees to such extension, the Offer shall continue as a Firm Offer, irrevocable, valid and binding on the Offeror for the agreed-upon extension period.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 **History:**

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0500

Responsibility of Bidders and Proposers

(1) Before Awarding a Contract the Contracting Agency shall determine that the Bidder submitting the lowest Bid or Proposer submitting the most Advantageous Proposal is Responsible. The Contracting Agency shall use the standards set forth in ORS 279B.110 and OAR 137-047-0640(1)(c)(F) to determine if a Bidder or Proposer is Responsible. In the event a Contracting Agency determines a Bidder or Proposer is not Responsible it shall prepare a Written determination of non-Responsibility as required by ORS 279B.110 and shall reject the Offer.

(2) In addition to making the responsibility determination under ORS 279B.110 and OAR 137-047-0640(1)(c)(F), the Contracting Agency may consider (as authorized by House Bill 2094 (2019 Oregon Laws, chapter 124)), as part of the Contracting Agency's evaluation of a Bid or Proposal, whether the Bidder or Proposer owes a liquidated and delinquent debt to the state.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.110 **History:**

[DOJ 15-2019, amend filed 12/23/2019, effective 01/01/2020](#) DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0525

Qualified Products Lists

A Contracting Agency may develop and maintain a qualified products list pursuant to ORS 279B.115.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.115 **History:** DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0550

Prequalification of Prospective Offerors; Pre-negotiation of Contract Terms and Conditions

- (1) A Contracting Agency may prequalify prospective Offerors pursuant to ORS 279B.120 and 279B.125.
 - (2) Notwithstanding the prohibition against revocation of prequalification in ORS 279B.120(3), a Contracting Agency may determine that a prequalified Offeror is not Responsible prior to Contract Award.
 - (3) A Contracting Agency may pre-negotiate some or all Contract terms and conditions including prospective Proposer Contract forms such as license agreements, maintenance and support agreements or similar documents for use in future Procurements. Such pre-negotiation of Contract terms and conditions (including prospective Proposer forms) may be part of the prequalification process of a Proposer in section (1) or the pre-negotiation may be a separate process and not part of a prequalification process. Unless required as part of the prequalification process, the failure of the Contracting Agency and the prospective Proposer to reach agreement on pre-negotiated Contract terms and conditions does not prohibit the prospective Proposer from responding to Procurements. A Contracting Agency may agree to different pre-negotiated Contract terms and conditions with different prospective Proposers. When a Contracting Agency has pre-negotiated different terms and conditions with Proposers or when permitted, Proposers offer different terms and conditions, a Contracting Agency may consider the terms and conditions in the Proposal evaluation process.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.015 & 279B.120 **History:** DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0560

Personal Services Contract to Provide Specifications — State Agency Disqualification as Bidder or Proposer

- (1) For the purposes of ORS 279B.040(1), a reasonable person would believe that a person who assisted a state contracting agency, under a personal services contract, in the development of a solicitation for goods or services (or that person's affiliate), would have an advantage in obtaining the public contract that is the subject of the solicitation if:
 - (a) The specifications recommended by the personal service contractor for the sequence of services, incorporation of special service or fabrication techniques, or design of any goods or components or elements of goods that the state contracting agency published in its solicitation documents call for, expressly or implicitly, requirements that only the personal services contractor (or the contractor's affiliate), or a limited class of individuals in the contractor's area of specialty, have the ability to perform or produce or have the rights to perform or produce.
 - (b) The rendering of solicitation document development assistance under the personal services contract gives the contractor knowledge of the state contracting agency's special needs or procedures, not generally known to the public, that give the contractor (or the contractor's affiliate) a material competitive advantage in competing for the contract for goods or services.
 - (c) The rendering of solicitation document development assistance under the personal services contract gives the contractor, significantly in advance of other prospective bidders or proposers, knowledge of the solicitation document requirements that would allow the personal services contractor (or the contractor's affiliate) a materially longer period in which to craft or refine a proposal in response to the solicitation documents.
- (2) For the purposes of ORS 279B.040(1), a reasonable person would believe that a person who assisted a state contracting agency, under a personal services contract, in the development of a solicitation for goods or services (or that person's affiliate) would appear to have an advantage in obtaining the public contract that is the subject of the solicitation if:
 - (a) Taking into account the personal services contractor's announced areas of specialization, expertise or experience, the personal service contractor (or the contractor's affiliate), or only a limited class of individuals in the contractor's area of specialty, appear to have the capability to conform closely with the solicitation document requirements.
 - (b) Taking into account the personal services contractor's announced areas of specialization, expertise or experience, the personal service contractor (or the contractor's affiliate), or only a severely limited class of individuals in the contractor's area of specialty, appear to have the qualifications, training, experience or capacity to satisfy any minimum requirements that may be stated in the solicitation documents.
 - (a)

(c) The solicitation documents for a contract for goods or services contain restrictions, deadlines or requirements that do not, when viewed objectively, reasonably promote rational procurement objectives of the state contracting agency.

(3) If a state contracting agency engages a personal services contractor to advise or assist in the development of solicitation documents for a public contract for goods or services and the personal services contractor is engaged in the business of providing goods or services described in the solicitation documents, and the agency wishes to accept a bid or proposal from the personal services contractor under conditions described in section (2) or section (3) of this rule, the agency must apply to the Director of the Department of Administrative Services, as permitted by ORS 279B.040(2), for an exemption from the disqualification from the ability to submit a bid or proposal.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.040 **History:**

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12

137-047-0575

Debarment of Prospective Offerors

(1) Generally. A Contracting Agency may Debar prospective Offerors for the reasons set forth in ORS 279A.110 or after providing notice and the opportunity for hearing as set forth in ORS 279B.130.

(2) Responsibility. Notwithstanding the limitation on the term for Debarment in ORS 279B.130(1)(b), a Contracting Agency may determine that a previously Debarred Offeror is not Responsible prior to Contract Award.

(3) Imputed Knowledge. A Contracting Agency may attribute improper conduct of a Person or its affiliate or affiliates having a contract with a prospective Offeror to the prospective Offeror for purposes of Debarment where the impropriety occurred in connection with the Person's duty for or on behalf of, or with the knowledge, approval, or acquiescence of, the prospective Offeror.

(4) Limited Participation. A Contracting Agency may allow a Debarred Person to participate in solicitations and Contracts on a limited basis during the Debarment period upon Written determination that participation is Advantageous to a Contracting Agency. The determination shall specify the factors on which it is based and define the extent of the limits imposed.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.130 **History:**

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0600

Offer Evaluation and Award

(1) Contracting Agency Evaluation. The Contracting Agency shall evaluate Offers only as set forth in the Solicitation Document, pursuant to ORS 279B.055(6)(a) and 279B.060(6)(b), and in accordance with applicable law. The Contracting Agency shall not evaluate Offers using any other requirement or criterion.

(a) Evaluation of Bids.

(A) Nonresident Bidders. In determining the lowest Responsive Bid, the Contracting Agency shall apply the reciprocal preference set forth in ORS 279A.120(2)(b) and OAR 137-046-0310 for Nonresident Bidders.

(B) Public Printing. The Contracting Agency shall for the purpose of evaluating Bids apply the public printing preference set forth in ORS 282.210.

(C) Award When Bids are Identical. If the Contracting Agency determines that one or more Bids are identical under OAR 137-046-0300, the Contracting Agency shall Award a Contract in accordance with the procedures set forth in OAR 137-046-0300.

(b) Evaluation of Proposals.

(A) Award When Proposals are Identical. If the Contracting Agency determines that one or more Proposals are identical under OAR 137-046-0300, the Contracting Agency shall Award a Contract in accordance with the procedures set forth in OAR 137-046-0300.

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- (B) Public Printing. The Contracting Agency shall for the purpose of evaluating Proposals apply the public printing preference set forth in ORS 282.210.
- (c) Recycled Materials. When procuring Goods, the Contracting Agency shall give preference for recycled materials asset forth in ORS 279A.125 and OAR 137-046-0320.
- (2) Clarification of Bids or Proposals. After Opening, a Contracting Agency may conduct discussions with apparent Responsive Offerors for the purpose of clarification to assure full understanding of the Bids or Proposals. All Bids or Proposals, in the Contracting Agency's sole discretion, needing clarification must be accorded such an opportunity. The Contracting Agency shall document clarification of any Bidder's Bid in the Procurement file.
- (3) Negotiations.
- (a) Bids. A Contracting Agency shall not negotiate with any Bidder. After Award of the Contract the Contracting Agency and Contractor may only modify the Contract in accordance with OAR 137-047-0800.
- (b) Requests for Proposals. A Contracting Agency may conduct discussions or negotiate with Proposers only in accordance with ORS 279B.060(6)(b) and OAR 137-047-0261. After Award of the Contract, the Contracting Agency and Contractor may only modify the Contract in accordance with OAR 137-047-0800.
- (4) Award.
- (a) General. If Awarded, the Contracting Agency shall Award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the most Advantageous, Responsive Proposal. The Contracting Agency may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in the public interest.
- (b) Multiple Items. An Invitation to Bid or Request for Proposals may call for pricing of multiple items of similar or related type with Award based on individual line item, group total of certain items, a "market basket" of items representative of the Contracting Agency's expected purchases, or grand total of all items.
- (c) Multiple Awards — Bids.
- (A) Notwithstanding subsection (4)(a) of this rule, a Contracting Agency may Award multiple Contracts under an Invitation to Bid in accordance with the criteria set forth in the Invitation to Bid. Multiple Awards shall not be made if a single Award will meet the Contracting Agency's needs, including but not limited to adequate availability, delivery, service, or product compatibility. A multiple Award may be made if Award to two or more Bidders of similar Goods or Services is necessary for adequate availability, delivery, service or product compatibility and skills. Multiple Awards may not be made for the purpose of dividing the Procurement into multiple solicitations, or to allow for user preference unrelated to utility or economy. A notice to prospective Bidders that multiple Contracts may be Awarded for any Invitation to Bid shall not preclude the Contracting Agency from Awarding a single Contract for such Invitation to Bid.
- (B) If an Invitation to Bid permits the Award of multiple Contracts, the Contracting Agency shall specify in the Invitation to Bid the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services.
- (d) Multiple Awards — Proposals.
- (A) Notwithstanding subsection 4(a) of this rule, a Contracting Agency may Award multiple Contracts under a Request for Proposals in accordance with the criteria set forth in the Request for Proposals. Multiple Awards shall not be made if a single Award will meet the Contracting Agency's needs, including but not limited to adequate availability, delivery, service or product compatibility. A multiple Award may be made if Award to two or more Proposers of similar Goods or Services is necessary for adequate availability, delivery, service or product compatibility. Multiple Awards may not be made for the purpose of dividing the Procurement into multiple solicitations, or to allow for user preference unrelated to obtaining the most Advantageous Contract. A notice to prospective Proposers that multiple Contracts may be Awarded for any Request for Proposals shall not preclude the Contracting Agency from Awarding a single Contract for such Request for Proposals.
- (B) If a Request for Proposals permits the Award of multiple Contracts, the Contracting Agency shall specify in the Request for Proposals the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services, which may include consideration and evaluation of the Contract terms and conditions agreed to by the Contractors.
- (e) Partial Awards. If after evaluation of Offers, the Contracting Agency determines that an acceptable Offer has been received for only parts of the requirements of the Solicitation Document:
- (A) The Contracting Agency may Award a Contract for the parts of the Solicitation Document for which acceptable Offers have been received; or
- (B) The Contracting Agency may reject all Offers and may issue a new Solicitation Document on the same or revised terms, conditions and Specifications.
- (A)

(f) All or none Offers. A Contracting Agency may Award all or none Offers if the evaluation shows an all or none Award to be the lowest cost for Bids or the most Advantageous for Proposals of those submitted.

Statutory/Other Authority: ORS 279A.065 & 279B.060 **Statutes/Other Implemented:** ORS 279B.055 & 279B.060 **History:**
DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12
DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0610

Notice of Intent to Award

(1) Notice of Intent to Award. The Contracting Agency shall provide Written notice of its intent to Award to all Bidders and Proposers pursuant to ORS 279B.135 at least seven (7) Days before the Award of a Contract, unless the Contracting Agency determines that circumstances justify prompt execution of the Contract, in which case the Contracting Agency may provide a shorter notice period. The Contracting Agency shall document the specific reasons for the shorter notice period in the Procurement file.

(2) Finality. The Contracting Agency's Award shall not be final until the later of the following:

(a) The expiration of the protest period provided pursuant to OAR 137-047-0740; or

(b) The Contracting Agency provides Written responses to all timely-filed protests denying the protests and affirming the Award.

Statutory/Other Authority: ORS 279A.065 & 279B.135

Statutes/Other Implemented: ORS 279B.135

History:

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0620

Documentation of Award

(1) Basis of Award. After Award, the Contracting Agency shall make a record showing the basis for determining the successful Offeror part of the Contracting Agency's Procurement file.

(2) Contents of Award Record. The Contracting Agency's record shall include:

(a) For Bids:

(A) Bids;

(B) Completed Bid tabulation sheet; and

(C) Written justification for any rejection of lower Bids.

(b) For Proposals:

(A) Proposals;

(B) The completed evaluation of the Proposals;

(C) Written justification for any rejection of higher scoring Proposals; and

(D) If the Contracting Agency engaged in any of the methods of Contractor selection described in ORS 279B.060(6)(b) and OAR 137-047-0261, Written documentation of the content of any discussions, negotiations, best and final Offers, or any other procedures the Contracting Agency used to select a Proposer to which the Contracting Agency Awarded a Contract.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 **History:**

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0630**Availability of Award Decisions**

- (1) Contract Documents. To the extent required by the Solicitation Document, the Contracting Agency shall deliver to the successful Offeror a Contract, Signed purchase order, Price Agreement, or other Contract documents as applicable.
- (2) Availability of Award Decisions. A Person may obtain tabulations of Awarded Bids or evaluation summaries of Proposals for a minimal charge, in person or by submitting to the Contracting Agency a Written request accompanied by payment. The requesting Person shall provide the Solicitation Document number and enclose a self-addressed, stamped envelope. In addition, the Contracting Agency may make available tabulations of Bids and Proposals through the Electronic Procurement System of the Contracting Agency or the Contracting Agency's website.
- (3) Availability of Procurement Files. After notice of intent to Award, the Contracting Agency shall make Procurement files available in accordance with applicable law.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.055 & 279B.060 **History:** DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0640**Rejection of an Offer**

- (1) Rejection of an Offer.
- (a) A Contracting Agency may reject any Offer as set forth in ORS 279B.100.
- (b) The Contracting Agency shall reject an Offer upon the Contracting Agency's finding that the Offer:
- (A) Is contingent on the Contracting Agency's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;
- (B) Takes exception to terms and conditions (including Specifications) set forth in the Solicitation Document;
- (C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of the Solicitation Document or in contravention of applicable law;
- (D) Offers Goods or Services that fail to meet the Specifications of the Solicitation Document;
- (E) Is late;
- (F) Is not in substantial compliance with the Solicitation Document; or
- (G) Is not in substantial compliance with all prescribed public Procurement procedures.
- (c) The Contracting Agency shall reject an Offer upon the Contracting Agency's finding that the Offeror:
- (A) Has not been prequalified under ORS 279B.120 and the Contracting Agency required mandatory prequalification;
- (B) Has been Debarred as set forth in ORS 279B.130 or has been disqualified under OAR 137-046-0210(3) (Disqualification);
- (C) Has not met the requirements of ORS 279A.105, if required by the Solicitation Document;
- (D) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;
- (E) Has failed to provide the certification of non-discrimination required under ORS 279A.110(4); or
- (F) Is non-Responsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the Contracting Agency must have information that indicates that the Offeror meets the applicable standards of Responsibility. To be a Responsible Offeror, the Contracting Agency must determine, under ORS 279B.110, that the Offeror:
- (i) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to meet all contractual responsibilities;
- (ii) Has completed previous contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that to the extent the costs associated with and time available to perform a previous contract were within the Offeror's control, the Offeror stayed within the time and budget allotted for the Procurement and otherwise performed the contract in a satisfactory manner. A Contracting Agency should carefully scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in contract
- (i)

performance. In reviewing the Offeror's performance, the Contracting Agency should determine whether the Offeror's deficient performance was expressly excused under the terms of the contract, or whether the Offeror took appropriate corrective action. The Contracting Agency may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. The Contracting Agency shall make its basis for determining an Offeror non-Responsible under this subparagraph part of the Procurement file as required by ORS 279B.110(2)(b);

(iii) Has a satisfactory record of integrity. An Offeror may lack integrity if a Contracting Agency determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to a Contracting Agency. A Contracting Agency may find an Offeror non-Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Debarment under ORS 279B.130 may be used to determine an Offeror's integrity. A Contracting Agency may find an Offeror non-responsible based on previous convictions of offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the Offeror's performance of a contract or subcontract. The Contracting Agency shall make its basis for determining that an Offeror is non-Responsible under this subparagraph part of the Procurement file as required by 279B.110(2)(c);

(iv) Is legally qualified to contract with the Contracting Agency;

(v) Has attested in Writing that the Offeror complied with the tax laws of this state and of political subdivisions of this state;

(vi) In State Contracting Agency procurements, possesses an unexpired certificate, issued by the Oregon Department of Administrative Services under 2015 Oregon Laws, chapter 454, section 2, if the Offeror employs 50 or more full-time workers at the time of the Closing and the estimated Contract Price exceeds \$500,000; and

(vii) Has supplied all necessary information in connection with the inquiry concerning Responsibility. If the Offeror fails to promptly supply information requested by the Contracting Agency concerning Responsibility, the Contracting Agency shall base the determination of Responsibility on any available information, or may find the Offeror non-Responsible.

(2) For the purposes of subparagraph (1)(c)(F)(v) of this rule:

(a) The period for which the Offeror must attest that it complied with the applicable tax laws must extend no fewer than six years into the past from the date of the Closing.

(b) Tax laws include, but are not limited to, ORS 305.620, ORS chapters 316, 317 and 318, any tax provisions imposed by a political subdivision that apply to the Offeror or to the performance of the Contract, and any rules and regulations that implement or enforce those tax laws.

(c) A Contracting Agency may exercise discretion in determining whether a particular form of attesting to compliance with the tax laws is "credible and convenient" under ORS 279B.110(2)(e), taking into consideration the circumstances in which the attestation is made and the consequences of making a false attestation. Therefore, a Contracting Agency may accept forms of attestation that range from a notarized statement to a less formal document that records the Offeror's attestation. However, State Contracting Agencies may not accept the certificate of compliance with tax laws required by ORS 305.385 unless that certificate embraces, in addition to the tax laws described in ORS 305.380, the tax laws of political subdivisions.

(3) Form of Business Entity. For purposes of this rule, the Contracting Agency may investigate any Person submitting an Offer. The investigation may include that Person's officers, directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this rule or to apply the Debarment provisions of ORS 279B.130.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279B.100, 279B.110, OL 2015, ch 454 (SB 491), OL 2015 & ch 539 (SB 675)

History:

DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0650

Rejection of All Offers

(1) Rejection. A Contracting Agency may reject all Offers as set forth in ORS 279B.100. The Contracting Agency shall notify all Offerors of the rejection of all Offers, along with the reasons for rejection of all Offers.

(2) Criteria. The Contracting Agency may reject all Offers based upon the following criteria:

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- (a) The content of or an error in the Solicitation Document, or the Procurement process unnecessarily restricted competition for the Contract;
- (b) The price, quality or performance presented by the Offerors are too costly or of insufficient quality to justify acceptance of any Offer;
- (c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;
- (d) Causes other than legitimate market forces threaten the integrity of the competitive process. These causes may include, without limitation, those that tend to limit competition, such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the Solicitation Document;
- (e) The Contracting Agency cancels the Procurement or solicitation in accordance with OAR 137-047-0660; or
- (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.100 **History:** DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0660

Cancellation of Procurement or Solicitation

- (1) Cancellation in the Public Interest. A Contracting Agency may cancel a Procurement or solicitation as set forth in ORS 279B.100.
- (2) Notice of Cancellation Before Opening. If the Contracting Agency cancels a Procurement or solicitation prior to Opening, the Contracting Agency shall provide Written notice of cancellation in the same manner that the Contracting Agency initially provided notice of the solicitation. Such notice of cancellation shall:
 - (a) Identify the Solicitation Document;
 - (b) Briefly explain the reason for cancellation; and
 - (c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.
- (3) Notice of Cancellation After Opening. If the Contracting Agency cancels a Procurement or solicitation after Opening, the Contracting Agency shall provide Written notice of cancellation to all Offerors who submitted Offers.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.100 **History:** DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0670

Disposition of Offers if Procurement or Solicitation Canceled

- (1) Prior to Opening. If the Contracting Agency cancels a Procurement or solicitation prior to Opening, the Contracting Agency shall return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the Contracting Agency shall open the Offer to determine the source and then return it to the Offeror. For Electronic Offers, the Contracting Agency shall delete the Offers from the Contracting Agency's Electronic Procurement System or information technology system.
- (2) After Opening. If the Contracting Agency cancels a Procurement or solicitation after Opening, the Contracting Agency:
 - (a) May return Proposals in accordance with ORS 279B.060(56)(c); and
 - (b) Shall keep Bids in the Procurement file.
- (3) Rejection of All Offers. If the Contracting Agency rejects all Offers, the Contracting Agency shall keep all Proposals and Bids in the Procurement file.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.100 **History:**

DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0700**Protests and Judicial Review of Special Procurements**

(1) Purpose. An Affected Person may protest the approval of a Special Procurement. Pursuant to ORS 279B.400(1), before seeking judicial review of the approval of a Special Procurement, an Affected Person must file a Written protest with the Contract Review Authority for the Contracting Agency and exhaust all administrative remedies.

(2) Delivery. Notwithstanding the requirements for filing a writ of review under ORS Chapter 34 pursuant to ORS 279B.400(4)(a), an Affected Person must deliver a Written protest to the Contract Review Authority for the Contracting Agency within seven (7) Days after the first date of public notice of the approval of a Special Procurement by the Contract Review Authority for the Contracting Agency, unless a different protest period is provided in the public notice of the approval of a Special Procurement.

(3) Content of Protest. The Written protest must include:

- (a) A detailed statement of the legal and factual grounds for the protest;
- (b) A description of the resulting harm to the Affected Person; and
- (c) The relief requested.

(4) Contract Review Authority Response. The Contract Review Authority shall not consider an Affected Person's protest of the approval of a Special Procurement submitted after the timeline established for submitting such protest under this rule or such different time period as may be provided in the public notice of the approval of a Special Procurement. The Contract Review Authority shall issue a Written disposition of the protest in a timely manner. If the Contract Review Authority upholds the protest, in whole or in part, it may in its sole discretion implement the sustained protest in the approval of the Special Procurement, or revoke the approval of the Special Procurement.

(5) Judicial Review. An Affected Person may seek judicial review of the Contract Review Authority's decision relating to a protest of the approval of a Special Procurement in accordance with ORS 279B.400.

Statutory/Other Authority: ORS 279A.065 & 279B.400

Statutes/Other Implemented: ORS 279B.400

History:

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0710**Protests and Judicial Review of Sole-Source Procurements**

(1) Purpose. For sole-source Procurements requiring public notice under OAR 137-047-0275, an Affected Person may protest the determination of the Contract Review Authority or designee that the Goods or Services or class of Goods or Services are available from only one source. Pursuant to ORS 279B.420(3)(f), before seeking judicial review, an Affected Person must file a Written protest with the Contract Review Authority or designee and exhaust all administrative remedies.

(2) Delivery. Unless otherwise specified in the public notice of the sole-source Procurement, an Affected Person must deliver a Written protest to the Contract Review Authority or designee within seven (7) Days after the first date of public notice of the sole-source Procurement, unless a different protest period is provided in the public notice of a sole-source Procurement.

(3) Content of Protest. The Written protest must include:

- (a) A detailed statement of the legal and factual grounds for the protest;
- (b) A description of the resulting harm to the Affected Person; and
- (c) The relief requested.

(4) Contract Review Authority Response. The Contract Review Authority or designee shall not consider an Affected Person's sole-source Procurement protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the public notice of the sole-source Procurement. The Contract Review Authority or designee shall issue a Written disposition of the protest in a timely manner. If the Contract Review Authority or designee upholds the protest, in whole or in part, the Contracting Agency shall not enter into a sole-source Contract.

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(5) Judicial Review. Judicial review of the Contract Review Authority's or designee's disposition of a sole-source Procurement protest shall be in accordance with ORS 279B.420.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.075**History:**

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0720

Protests and Judicial Review of Multi-Tiered and Multistep Solicitations

(1) Purpose. An Affected Offeror may protest exclusion from the Competitive Range or from subsequent tiers or steps of a solicitation in accordance with the applicable Solicitation Document. When such a protest is permitted by the Solicitation Document, then pursuant to ORS 279B.420(3)(f), before seeking judicial review, an Affected Offeror must file a Written protest with the Contracting Agency and exhaust all administrative remedies.

(2) Basis for Protest. An Affected Offeror may protest its exclusion from a tier or step of competition only if the Offeror is Responsible and submitted a Responsive Offer and but for the Contracting Agency's mistake in evaluating the Offeror's or other Offerors' Offers, the protesting Offeror would have been eligible to participate in the next tier or step of competition. (For example, the protesting Offeror must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Offerors are removed from consideration, and that those ineligible Offerors are ineligible for inclusion in the Competitive Range because: their Proposals were not Responsive, or the Contracting Agency committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.)

(3) Delivery. Unless otherwise specified in the Solicitation Document, an Affected Offeror must deliver a Written protest to the Contracting Agency within seven (7) Days after issuance of the notice of the Competitive Range or notice of subsequent tiers or steps.

(4) Content of Protest. The Affected Offeror's protest shall be in Writing and must specify the grounds upon which the protest is based.

(5) Contracting Agency Response. The Contracting Agency shall not consider an Affected Offeror's multi-tiered or multistep solicitation protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Solicitation Document. The Contracting Agency shall issue a Written disposition of the protest in a timely manner. If the Contracting Agency upholds the protest, in whole or in part, the Contracting Agency may in its sole discretion either issue an Addendum under OAR 137-047-0430 reflecting its disposition or cancel the Procurement or solicitation under 137-047-0660.

(6) Judicial Review. Judicial review of the Contracting Agency's decision relating to a multi-tiered or multistep solicitation protest shall be in accordance with ORS 279B.420.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.060**History:**

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0730

Protests and Judicial Review of Solicitations

(1) Purpose. A prospective Offeror may protest the Procurement process or the Solicitation Document for a Contract solicited under ORS 279B.055, 279B.060 and 279B.085 as set forth in 279B.405(2). Pursuant to 279B.405(3), before seeking judicial review, a prospective Offeror must file a Written protest with the Contracting Agency and exhaust all administrative remedies.

(2) Delivery. Unless otherwise specified in the Solicitation Document, a prospective Offeror must deliver a Written protest to the Contracting Agency not less than ten (10) Days prior to Closing.

(3) Content of Protest. In addition to the information required by ORS 279B.405(4), a prospective Offeror's Written protest shall include a statement of the desired changes to the Procurement process or the Solicitation Document that the prospective Offeror believes will remedy the conditions upon which the prospective Offeror based its protest.

(4) Contracting Agency Response. The Contracting Agency shall not consider a Prospective Offeror's solicitation protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Solicitation Document. The Contracting Agency shall consider the protest if it is timely filed and meets the conditions set forth in ORS 279B.405(4). The Contracting Agency shall issue a Written disposition of

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the protest in accordance with the timeline set forth in 279B.405(6). If the Contracting Agency upholds the protest, in whole or in part, the Contracting Agency may in its sole discretion either issue an Addendum reflecting its disposition under OAR 137-047-0430 or cancel the Procurement or solicitation under 137-047-0660.

(5) Extension of Closing. If the Contracting Agency receives a protest from a prospective Offeror in accordance with this rule, the Contracting Agency may extend Closing if the Contracting Agency determines an extension is necessary to consider and respond to the protest.

(6) Clarification. Prior to the deadline for submitting a protest, a prospective Offeror may request that the Contracting Agency clarify any provision of the Solicitation Document. The Contracting Agency's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on the Contracting Agency unless the Contracting Agency amends the Solicitation Document by Addendum.

(7) Judicial Review. Judicial review of the Contracting Agency's decision relating to a solicitation protest shall be in accordance with ORS 279B.405.

Statutory/Other Authority: ORS 279A.065 & 279B.405

Statutes/Other Implemented: ORS 279B.405

History:

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0740

Protests and Judicial Review of Contract Award

(1) Purpose. An Offeror may protest the Award of a Contract, or the intent to Award of a Contract, whichever occurs first, if the conditions set forth in ORS 279B.410(1) are satisfied. An Offeror must file a Written protest with the Contracting Agency and exhaust all administrative remedies before seeking judicial review of the Contracting Agency's Contract Award decision.

(2) Delivery. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest to the Contracting Agency within seven (7) Days after the Award of a Contract, or issuance of the notice of intent to Award the Contract, whichever occurs first.

(3) Content of Protest. An Offeror's Written protest shall specify the grounds for the protest to be considered by the Contracting Agency pursuant to ORS 279B.410(2).

(4) Contracting Agency Response. The Contracting Agency shall not consider an Offeror's Contract Award protest submitted after the timeline established for submitting such protest under this rule, or such different time period as maybe provided in the Solicitation Document. The Contracting Agency shall issue a Written disposition of the protest in a timely manner as set forth in ORS 279B.410(4). If the Contracting Agency upholds the protest, in whole or in part, the Contracting Agency may in its sole discretion either Award the Contract to the successful protestor or cancel the Procurement or solicitation.

(5) Judicial Review. Judicial review of the Contracting Agency's decision relating to a Contract Award protest shall be in accordance with ORS 279B.415.

Statutory/Other Authority: ORS 279A.065 & 279B.410 **Statutes/Other Implemented:** ORS 279B.410 & 279B.415

History:

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0745

Protests and Judicial Review of Qualified Products List Decisions

(1) Purpose. A prospective Offeror may protest the Contracting Agency's decision to exclude the prospective Offeror's goods from the Contracting Agency's qualified products list under ORS 279B.115. A prospective Offeror must file a Written protest and exhaust all administrative remedies before seeking judicial review of the Contracting Agency's qualified products list decision.

(2) Delivery. Unless otherwise stated in the Contracting Agency's notice to prospective Offerors of the opportunity to submit goods for inclusion on the qualified products list, a prospective Offeror must deliver a Written protest to the Contracting Agency within seven (7) Days after issuance of the Contracting Agency's decision to exclude the prospective Offeror's goods from the qualified products list.

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- (3) Content of Protest. The prospective Offeror's protest shall be in Writing and must specify the grounds upon which the protest is based.
- (4) Contracting Agency Response. The Contracting Agency shall not consider a prospective Offeror's qualified products list protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Contracting Agency's notice to prospective Offerors of the opportunity to submit goods for inclusion on the qualified products list. The Contracting Agency shall issue a Written disposition of the protest in a timely manner. If the Contracting Agency upholds the protest, it shall include the successful protestor's goods on the qualified products list.
- (5) Judicial Review. Judicial review of the Contracting Agency's decision relating to a qualified products list protest shall be in accordance with ORS 279B.420.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.115 **History:**
DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0750

Judicial Review of Other Violations

Any violation of ORS Chapter 279A or 279B by a Contracting Agency for which no judicial remedy is otherwise provided in the Public Contracting Code is subject to judicial review as set forth in 279B.420.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.420 **History:**
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0760

Review of Prequalification and Debarment Decisions

Review of the Contracting Agency's prequalification and Debarment decisions shall be as set forth in ORS 279B.425.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279B.425 **History:**
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0800

Amendments to Contracts and Price Agreements

- (1) Generally. A Contracting Agency may amend a Contract without additional competition in any of the following circumstances:
- (a) The amendment is within the scope of the Procurement as described in the Solicitation Documents, if any, or if no Solicitation Documents, as described in the sole source notice or the approved Special Procurement, if any. An amendment is not within the scope of the Procurement if the Agency determines that if it had described in the Procurement the changes to be made by the amendment, it would likely have increased competition or affected award of the Contract.
 - (b) These Model Rules otherwise permit the Contracting Agency to Award a Contract without competition for the goods or services to be procured under the Amendment.
 - (c) The amendment is necessary to comply with a change in law that affects performance of the Contract.
 - (d) The amendment results from renegotiation of the terms and conditions, including the Contract Price, of a Contract and the amendment is Advantageous to the Contracting Agency, subject to all of the following conditions:
 - (A) The Goods or Services to be provided under the amended Contract are the same as the Goods or Services to be provided under the unamended Contract.
 - (B) The Contracting Agency determines that, with all things considered, the amended Contract is at least as favorable to the Contracting Agency as the unamended Contract.
 - (A)

(C) The amended Contract does not have a total term greater than allowed in the Solicitation Documents, if any, or if no Solicitation Documents, as described in the sole source notice or the approved Special Procurement, if any, after combining the initial and extended terms. For example, a one-year Contract described as renewable each year for up to four additional years, may be renegotiated as a two to five-year Contract, but not beyond a total of five years.

(2) Small or Intermediate Contract. A Contracting Agency may amend a Contract Awarded as a small or intermediate Procurement pursuant to section (1) of this rule, provided that the total increase in Contract price does not exceed the amount set forth in OAR 137-047-0265 for small Procurements or 137-047-0270 for intermediate Procurements.

(3) Price Agreements. A Contracting Agency may amend a Price Agreement as follows:

- (a) As permitted by the Price Agreement;
- (b) If the circumstances set forth in ORS 279B.140(2) exist; or
- (c) As permitted by applicable law.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 **History:**

DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-047-0810

Termination of Price Agreements

A Contracting Agency may terminate a Price Agreement as follows:

- (1) As permitted by the Price Agreement;
- (2) If the circumstances set forth in ORS 279B.140(2) exist; or
- (3) As permitted by applicable law.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.065 & ORS 279B.140

History:

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

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Chapter 137

Division 48

MODEL RULES CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING AND LAND SURVEYING SERVICES AND RELATED SERVICES CONTRACTS

137-048-0100

Application

(1) The Attorney General is required to prepare and maintain model rules of procedure that govern Public Contracting under the Public Contracting Code and that are appropriate for use by all Contracting Agencies. These division 48 rules apply to the screening and selection of Architects, Engineers, Photogrammetrists, Transportation Planners, Land Surveyors and providers of Related Services, under Contracts and set forth the following procedures:

(a) Procedures through which Contracting Agencies select Consultants to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, or Related Services; and

(b) Two-tiered procedures for selection of Architects, Engineers, Photogrammetrists, Transportation Planners, Land Surveyors and providers of Related Services for certain public improvements owned and maintained by a Local Government.

(2) These division 48 rules apply to any Contracting Agency with independent contracting authority that is seeking the services of a Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, or Related Services, if the Contracting Agency has not adopted its own rules of procedure for the screening and selection of Consultants to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, as provided in ORS 279A.065(a).

(3) The dollar threshold amounts that are applicable to the Direct Appointment Procedure, 137-048-0200, the Informal Selection Procedure, 137-048-0210, and the Formal Selection Procedure, 137-048-0220, are independent from and have no effect on the dollar threshold amounts that trigger the legal sufficiency review requirement for State Contracting Agencies under ORS 291.047.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458

Statutes/Other Implemented: ORS 279A.065, OL 2011 & ch 458

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0110

Definitions

In addition to the definitions set forth in ORS 279A.010, 279C.100, and OAR 137-046-0110, the following definitions apply to these division 48 rules:

(1) "Consultant" means an Architect, Engineer, Photogrammetrist, Transportation Planner, Land Surveyor or provider of Related Services. A Consultant includes a business entity that employs Architects, Engineers, Photogrammetrists, Transportation Planners, Land Surveyors or providers of Related Services, or any combination of the foregoing. Provided, however, when a Contracting Agency is entering into a direct Contract under OAR 137-048-0200(1)(c) or (d), the "Consultant" must be an Architect, Engineer, Photogrammetrist, Transportation Planner or Land Surveyor, as required by ORS 279C.115(1).

- (2) "Estimated Fee" means Contracting Agency's reasonably projected fee to be paid for a Consultant's services under the anticipated Contract, excluding all anticipated reimbursable or other non-professional fee expenses. The Estimated Fee is used solely to determine the applicable Contract solicitation method and is distinct from the total amount payable under the Contract. The Estimated Fee shall not be used as a basis to resolve other Public Contracting issues, including without limitation, direct purchasing authority or Public Contract review and approval under ORS 291.047.
- (3) "Price Agreement," for purposes of this Division 48, is limited to mean an agreement related to the procurement of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, or Related Services, under agreed-upon terms and conditions, including, but not limited to terms and conditions of later work orders or task orders for Project-specific Services, and which may include Consultant compensation information, with:
- (a) No guarantee of a minimum or maximum purchase; or
- (b) An initial work order, task order or minimum purchase, combined with a continuing Consultant obligation to provide Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services in which the Contracting Agency does not guarantee a minimum or maximum additional purchase.
- (4) "Project" means all components of a Contracting Agency's planned undertaking that gives rise to the need for a Consultant's Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, or Related Services, under a Contract.
- (5) "Transportation Planning Services" are defined in ORS 279C.100. Transportation Planning Services include only Project-specific transportation planning involved in the preparation of categorical exclusions, environmental assessments, environmental impact statements and other documents required for compliance with the National Environmental Policy Act, 42 USC 4321 et. seq. Transportation Planning Services do not include transportation planning for corridor plans, transportation system plans, interchange area management plans, refinement plans and other transportation plans not directly associated with an individual Project that will require compliance with the National Environmental Policy Act, 42 USC 4321 et. seq. Transportation Planning Services also do not include transportation planning for Projects not subject to the National Environmental Policy Act, 42 USC 4321 et. seq.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458 **Statutes/Other Implemented:** ORS 279A.065, OL 2011 & ch 458
History:

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0120

List of Interested Consultants; Performance Record

- (1) Consultants who are engaged in the lawful practice of their profession and who are interested in providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, may annually submit a statement describing their qualifications and related performance information to Contracting Agencies' office addresses. Contracting Agencies shall use this information to create a list of prospective Consultants and shall update this list at least once every two years.
- (2) Contracting Agencies may compile and maintain a record of each Consultant's performance under Contracts with the particular Contracting Agency, including information obtained from Consultants during an exit interview and information pertaining to whether the Consultant owes a liquidated and delinquent debt to the State of Oregon. Upon request and in accordance with the Oregon Public Records Law (ORS 192.311 through 192.478), Contracting Agencies may make available copies of the records.
- (3) State Contracting Agencies shall keep a record of all Contracts with Consultants and shall make these records available to the public, consistent with the requirements of the Oregon Public Records Law (ORS 192.311 through 192.478). State Contracting Agencies shall include the following information in the record:
- (a) Locations throughout the state where the Contracts are performed;
- (b) Consultants' principal office address and all office addresses in the State of Oregon;
- (c) Consultants' direct expenses on each Contract, whether or not those direct expenses are reimbursed. "Direct expenses" include all amounts that are directly attributable to Consultants' services performed under each Contract, including personnel travel expenses, and that would not have been incurred but for the services being performed. The record must include all personnel travel expenses as a separate and identifiable expense on the Contract; and
- (d) The total number of Contracts awarded to each Consultant over the immediately preceding 10-year period from the date of the record.

Statutory/Other Authority: OL 2011, ORS 279A.065 & ch 458 **Statutes/Other Implemented:** ORS 279A.065 & 279C.110, OL 2011 & ch 458 **History:**

[DOJ 15-2019, amend filed 12/23/2019, effective 01/01/2020](#) DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0130

Applicable Selection Procedures; Pricing Information; Disclosure of Proposals; Conflicts of Interest

(1) When selecting the most qualified Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Contracting Agencies shall follow the applicable selection procedure under either OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure) or 137-048-0220 (Formal Selection Procedure). State Contracting Agencies selecting a Consultant under this section (1) may solicit or use pricing policies and pricing Proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, to determine a Consultant's compensation only after the State Contracting Agency has selected the most qualified Consultant in accordance with the applicable selection procedure; provided, however, this restriction on a State Contracting Agency's solicitation or use of pricing policies, pricing Proposals or other pricing information does not apply to selection procedures used by the State Contracting Agency to select a Consultant when the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services for the Project do not exceed \$100,000 or in an Emergency, pursuant to ORS 279C.0110(10) and (11). In following the Direct Appointment Procedure under OAR 137-048-0200, a State Contracting Agency or Local Contracting Agency may base its selection of a Consultant on any information available to the Agency prior to beginning the Direct Appointment Procedure for the Project involved. Local Contracting Agencies may solicit or use pricing policies and pricing Proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, in any of the Local Contracting Agencies' selection procedures to select Consultants to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, pursuant to the requirements of ORS 279C.110(5) [House Bill 2769 (2019 Oregon Laws, Chapter 55)].

(2) Contracting Agencies selecting a Consultant to perform Related Services shall follow one of the following selection procedures:

(a) When selecting a Consultant on the basis of qualifications alone, Contracting Agencies shall follow the applicable selection procedure under OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure), or 137-048-0220 (Formal Selection Procedure);

(b) When selecting a Consultant on the basis of price competition alone, Contracting Agencies shall follow the applicable provisions under OAR 137-048-0200 (Direct Appointment Procedure), the applicable provisions of 137-048-0210 (Informal Selection Procedure) pertaining to obtaining and evaluating price Proposals and other pricing information, or the applicable provisions of 137-048-0220 (Formal Selection Procedure) pertaining to obtaining and evaluating price Proposals and other pricing information; and

(c) When selecting a Consultant on the basis of price and qualifications, Contracting Agencies shall follow the applicable provisions under OAR 137-048-0200 (Direct Appointment Procedure), the applicable provisions of 137-048-0210 (Informal Selection Procedure) pertaining to obtaining and evaluating price and qualifications Proposals, or the applicable provisions of 137-048-0220 (Formal Selection Procedure) pertaining to obtaining and evaluating price and qualifications Proposals. For selections under the informal selection procedure of OAR 137-048-0210, Contracting Agencies may use abbreviated requests for Proposals that nevertheless meet the requirements of OAR 137-048-0210, when the Contracting Agency determines, in its sole discretion, that the characteristics of the Project and the Related Services required by the Contracting Agency would be adequately addressed by a more abbreviated request for Proposals document, generally comparable to the intermediate Procurement procedures and related documentation under ORS 279B.070 and OAR 137-047-0270. Contracting Agencies subject to this section (2) may request and consider a Proposer's pricing policies and pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, submitted with a Proposal.

(3) A Contracting Agency is not required to follow the procedures in Section (1) or Section (2) of this rule, when the Contracting Agency has established Price Agreements with more than one Consultant and is selecting a single Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under an individual work order or task order. Provided, however, the criteria and procedures the Contracting Agency uses to select a single Consultant, when the Contracting Agency has established Price Agreements with more than one Consultant, must meet the requirements of OAR 137-048-0270 (Price Agreements).

(1)

- (4) Contracting Agencies may use electronic methods to screen and select a Consultant in accordance with the procedures described in sections (1) and (2) of this rule. If a Contracting Agency uses electronic methods to screen and select a Consultant, the Contracting Agency shall first promulgate rules for conducting the screening and selection procedure by electronic means, substantially in conformance with OAR 137-047-0330 (Electronic Procurement).
- (5) For purposes of these division 48 rules, a "mixed" Contract is one requiring the Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and also provide Related Services, other Services or other related Goods under the Contract. A Contracting Agency's classification of a procurement that will involve a "mixed" Contract will be determined by the predominant purpose of the Contract. A Contracting Agency will determine the predominant purpose of the Contract by determining which of the Services involves the majority of the total Estimated Fee to be paid under the Contract. If the majority of the total Estimated Fee to be paid under the Contract is for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, the Contracting Agency shall comply with the requirements of ORS 279C.110 and section (1) of this rule. If majority of the total Estimated Fee to be paid under the Contract is for Related Services, the Contracting Agency shall comply with the requirements of ORS 279C.120 and section (2) of this rule. If the majority of the total Estimated Fee to be paid under the Contract is for some other Services or Goods under the Public Contracting Code, the Contracting Agency shall comply with the applicable provisions of the Public Contracting Code and divisions 46, 47 and 49 of the Model Rules that match the predominant purpose of the Contract.
- (6) In applying these rules, State Contracting Agencies shall support the State of Oregon's goal of promoting a sustainable economy in the rural areas of the state.
- (7) Consistent with the requirements of ORS 279C.107 and the remaining requirements of ORS 279C.100, 279C.105 and 279C.110 through 279C.125, the following provisions apply to Proposals received by a Contracting Agency for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services:
- (a) The term "competitive proposal," for purposes of ORS 279C.107, includes Proposals under OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure), 137-048-0220 (Formal Selection Procedure) or 137-048-0130(2)(c) (selection based on price and qualifications) and any Proposals submitted in response to a selection process for a work order or task order under 137-048-0270 (Price Agreements).
- (b) For purposes of Proposals received by a Contracting Agency under OAR 137-048-0200 (Direct Appointment Procedure), a formal notice of intent to award is not required. As a result, while a Contracting Agency may make Proposals under 137-048-0200 (Direct Appointment Procedure) open for public inspection following the Contracting Agency's decision to begin Contract negotiations with the selected Consultant, 137-048-0200 Proposals are not required to be open for public inspection until after the Contracting Agency has executed a Contract with the selected Consultant.
- (c) In the limited circumstances permitted by ORS 279C.110, 279C.115 and 279C.120, where the Contracting Agency is conducting discussions or negotiations with Proposers who submit Proposals that the Contracting Agency has determined to be closely competitive or to have a reasonable chance of being selected for award, the Contracting Agency may open Proposals so as to avoid disclosure of Proposal contents to competing Proposers, consistent with the requirements of ORS 279C.107. Otherwise, Contracting Agencies may open Proposals in such a way as to avoid disclosure of the contents until after the Contracting Agency executes a Contract with the selected Consultant. If the Contracting Agency determines that it is in the best interest of the Contracting Agency to do so, the Contracting Agencies may make Proposals available for public inspection following the Contracting Agency's issuance of a notice of intent to award a Contract to a Consultant; and
- (d) Disclosure of Proposals and Proposal information is otherwise governed by ORS 279C.107.
- (8) As required by ORS 279C.307, pertaining to requirements to ensure the objectivity and independence of providers of certain Personal Services which are procured under ORS chapter 279C, Contracting Agencies may not:
- (a) Procure the Personal Services identified in ORS 279C.307 from a Contractor or an affiliate of a Contractor who is a party to the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the Personal Services; or
- (b) Procure the Personal Services identified in ORS 279C.307 through the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the Personal Services.
- (9) The requirements of ORS 279C.307 and section (8) of this rule apply in the following circumstances, except as provided in section (10) of this rule:
- (a) A Contracting Agency requires the Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Public Contract or performance under a Public Contract that is subject to ORS chapter 279C. A Public Contract that is "subject to ORS chapter 279C" includes a
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Public Contract for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, a Public Contract for Related Services or a Public Contract for construction services under ORS chapter 279C.

(b) The Procurements of Personal Services subject to the restrictions of ORS 279C.307 include, but are not limited to, the following:

(A) Procurements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, which involve overseeing or monitoring the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C;

(B) Procurements for commissioning services, which involve monitoring, inspecting, evaluating or otherwise overseeing the performance of a Contractor providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C;

(C) Procurements for project management services, which involve administration, management, monitoring, inspecting, evaluating compliance with or otherwise overseeing the performance of a Contractor providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, construction services subject to ORS chapter 279C, commissioning services or other Related Services for a Project;

(D) Procurements for special inspections and testing services, which involve inspecting, testing or otherwise overseeing the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C; and

(E) Procurements for other Related Services or Personal Services, which involve administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing the Public Contracts described in Section (9)(a) of this rule.

(10) The restrictions of ORS 279C.307 do not apply in the following circumstances, except as further specified below:

(a) To a Contracting Agency's Procurement of both design services and construction services through a single "Design-Build" Procurement, as that term is defined in OAR 137-049-0610. Such a Design-Build Procurement includes a Procurement under an Energy Savings Performance Contract, as defined in ORS 279A.010. Provided, however, the restrictions of ORS 279C.307 do apply to a Contracting Agency's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Design-Build Contract or performance under such a Contract resulting from a Design-Build Procurement; and

(b) To a Contracting Agency's Procurement of both pre-construction services and construction services through a single Procurement of Construction Manager/General Contractor Services, as that term is defined in ORS 279C.332(3). Provided, however, the restrictions of ORS 279C.307 do apply to a Contracting Agency's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Construction Manager/General Contractor Services Contract or performance under such a Contract resulting from a Procurement of Construction Manager/General Contractor Services.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458

Statutes/Other Implemented: ORS 279A.065, ORS 279C.100-279C.125, OL 2009, ch. 880, sec. 11, OL 2011 & ch 458

History:

[DOJ 15-2019, amend filed 12/23/2019, effective 01/01/2020](#) DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 8-2012, f. 7-2-12, cert. ef. 8-1-12

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0200

Direct Appointment Procedure

(1) Contracting Agencies may enter into a Contract directly with a Consultant without following the selection procedures set forth elsewhere in these rules if:

(a) Emergency. Contracting Agency finds that an Emergency exists; or

(b) Small Estimated Fee. The Estimated Fee to be paid under the Contract does not exceed \$100,000; or

(a)

- (c) Continuation of Project With Intermediate Estimated Fee. For Contracting Agencies where a Project is being continued, as more particularly described below, and where the Estimated Fee will not exceed \$250,000, the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be performed under the Contract must meet the following requirements:
- (A) The services consist of or are related to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that have been substantially described, planned or otherwise previously studied in an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services rendered under the earlier Contract;
- (B) The Estimated Fee to be made under the Contract does not exceed \$250,000; and
- (C) The Contracting Agency used either the formal selection procedure under OAR 137-048-0220 (Formal Selection Procedure) or the formal selection procedure applicable to selection of the Consultant at the time of original selection to select the Consultant for the earlier Contract; or
- (d) Continuation of Project With Extensive Estimated Fee. For Contracting Agencies where a Project is being continued, as more particularly described below, and where the Estimated Fee is expected to exceed \$250,000, the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be performed under the Contract must meet the following requirements:
- (A) The services consist of or are related to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that have been substantially described, planned or otherwise previously studied under an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services rendered under the earlier Contract;
- (B) The Contracting Agency used either the formal selection procedure under OAR 137-048-0220 (Formal Selection Procedure) or the formal selection procedure applicable to selection of the Consultant at the time of original selection to select the Consultant for the earlier Contract; and
- (C) The Contracting Agency makes written findings that entering into a Contract with the Consultant, whether in the form of an amendment to an existing Contract or a separate Contract for the additional scope of services, will:
- (i) Promote efficient use of public funds and resources and result in substantial cost savings to the Contracting Agency; and,
- (ii) Protect the integrity of the Public Contracting process and the competitive nature of the Procurement by not encouraging favoritism or substantially diminishing competition in the award of the Contract.
- (2) Contracting Agencies may select a Consultant for a Contract under this rule from the following sources:
- (a) The Contracting Agency's list of Consultants that is created under OAR 137-048-0120 (List of Interested Consultants; Performance Record);
- (b) Another Contracting Agency's list of Consultants that the Contracting Agency has created under OAR 137-048-0120 (List of Interested Consultants; Performance Record), with written consent of that Contracting Agency; or
- (c) All Consultants offering the required Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that the Contracting Agency reasonably can identify under the circumstances.
- (3) As part of the Contracting Agency's assessment of the qualifications of any Consultant being considered for award of a Contract under this rule, the Contracting Agency can, at any time before entering into a contract with the Consultant, consider information pertaining to whether the Consultant owes a liquidated and delinquent debt to the State of Oregon.
- (4) The Contracting Agency shall direct Contract negotiations with a Consultant selected under this rule toward discussing, refining and finalizing the following:
- (a) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be provided by the Consultant;
- (b) The Consultant's performance obligations and performance schedule;
- (c) Payment methodology, Consultant's rates and number of hours, and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the Contracting Agency, as determined
- (a)

solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and

(d) Any other conditions or provisions the Contracting Agency believes to be in the Contracting Agency's best interest to negotiate.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458 **Statutes/Other Implemented:** ORS 279C.110 & 279C.115, OL 2011 & ch 458 **History:**

[DOJ 15-2019, amend filed 12/23/2019, effective 01/01/2020](#) DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0210

Informal Selection Procedure

(1) Contracting Agencies may use the informal selection procedure described in this rule to obtain a Contract if the Estimated Fee is expected not to exceed \$250,000.

(2) Contracting Agencies using the informal selection procedure on the basis of qualifications alone or, for Related Services, on the basis of price and qualifications shall:

(a) Create a request for Proposals ("RFP") that includes at a minimum the following:

(A) A description of the Project for which a Consultant's Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services are needed and a description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that will be required under the resulting Contract;

(B) The anticipated Contract performance schedule;

(C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including construction services;

(D) The date and time Proposals are due and other directions for submitting Proposals;

(E) Criteria upon which the most qualified Consultant will be selected. Selection criteria may include, but are not limited to, the following:

(i) The amount and type of resources and number of experienced staff the Consultant has committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP within the applicable time limits, including the current and projected workloads of such staff and the proportion of time such staff would have available for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services;

(ii) Proposed management techniques for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;

(iii) A Consultant's capability, experience and past performance history and record in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, including but not limited to quality of work, ability to meet schedules, cost control methods and Contract administration practices;

(iv) A Consultant's approach to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP and design philosophy, if applicable;

(v) A Consultant's geographic proximity to and familiarity with the physical location of the Project;

(vi) Volume of work, if any, previously awarded to a Consultant, with the objective of effecting equitable distribution of Contracts among qualified Consultants, provided such distribution does not violate the principle of selecting the most qualified Consultant for the type of professional services required;

(vii) A Consultant's ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;

(viii) Whether the Consultant owes a liquidated and delinquent debt to the State of Oregon; and

(i)

- (ix) If the Contracting Agency is selecting a Consultant to provide Related Service, pricing policies and pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead.
- (F) A Statement that Proposers responding to the RFP do so solely at their expense, and Contracting Agency is not responsible for any Proposer expenses associated with the RFP;
- (G) A statement directing Proposers to the protest procedures set forth in these Division 48 rules; and
- (H) A sample form of the Contract.
- (b) Provide an RFP to a minimum of five (5) prospective Consultants. If fewer than five (5) prospective Consultants are available, Contracting Agencies shall provide the RFP to all available prospective Consultants and shall maintain a written record of the Contracting Agencies' efforts to locate available prospective Consultants for the RFP. Contracting Agencies shall draw prospective Consultants from:
- (A) The Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record);
- (B) Another Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record); or
- (C) All Consultants that the Contracting Agency reasonably can locate that offer the desired Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, or any combination of the foregoing.
- (c) Review and rank all Proposals received according to the criteria set forth in the RFP, and select the three highest ranked Proposers.
- (3) Contracting Agencies using the informal selection procedure for Related Services on the basis of price Proposals and other pricing information alone shall:
- (a) Create an RFP that includes at a minimum the following:
- (A) A description of the Project for which a Consultant's Related Services are needed and a description of the Related Services that will be required under the resulting Contract;
- (B) The anticipated Contract performance schedule;
- (C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including construction services;
- (D) The date and time Proposals are due and other directions for submitting Proposals;
- (E) Any minimum or pass-fail qualifications that the Proposers must meet, including but not limited to any such qualifications in the subject matter areas described in section (2)(a)(E)(i) through section (2)(a)(E)(viii) of this rule that are related to the Related Services described in the RFP;
- (F) Pricing criteria upon which the highest ranked Consultant will be selected. Pricing criteria may include, but are not limited to, the total price for the Related Services described in the RFP, Consultant pricing policies and other pricing information such as the Consultant's estimated number of staff hours needed to perform the Related Services described in the RFP, expenses, hourly rates and overhead;
- (G) A statement directing Proposers to the protest procedures set forth in these Division 48 rules; and
- (H) A sample form of the Contract.
- (b) Provide the RFP to a minimum of five (5) prospective Consultants. If fewer than five (5) prospective Consultants are available, Contracting Agencies shall provide the RFP to all available prospective Consultants and shall maintain a written record of the Contracting Agencies' efforts to locate available prospective Consultants for the RFP. Contracting Agencies shall draw prospective Consultants from:
- (A) The Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record);
- (B) Another Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record); or
- (C) All Consultants that the Contracting Agency reasonably can locate that offer the desired Related Services; and
- (c) Review and rank all responsive Proposals received, according to the total price for the Related Services described in the RFP, Consultant pricing policies and other pricing information requested in the RFP, including but not limited to the
- (a)

number of hours proposed for the Related Services required, expenses, hourly rates and overhead, and select the three highest-ranked Proposers.

(4) If the Contracting Agency does not cancel the RFP after it reviews the Proposals and ranks each Proposer, the Contracting Agency will begin negotiating a Contract with the highest ranked Proposer. The Contracting Agency shall direct Contract negotiations toward discussing, refining and finalizing the following:

(a) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be provided by the Consultant;

(b) The Consultant's performance obligations and performance schedule;

(c) Payment methodology, Consultant's rates and number of hours, and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the Contracting Agency as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and

(d) Any other conditions or provisions the Contracting Agency believes to be in the Contracting Agency's best interest to negotiate.

(5) The Contracting Agency shall, either orally or in writing, formally terminate negotiations with the highest ranked Proposer, if the Contracting Agency and the Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The Contracting Agency may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, in accordance with section (4) of this rule, until negotiations result in a Contract. If negotiations with any of the top three Proposers do not result in a Contract within a reasonable amount of time, the Contracting Agency may end the particular informal solicitation and thereafter may proceed with a new informal solicitation under this rule or proceed with a formal solicitation under OAR 137-048-0220 (Formal Selection Procedure).

(6) Local Contracting Agencies using the informal selection procedure for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, when the Local Contracting Agencies will be using pricing policies, proposals or other pricing information as part of the Local Contracting Agencies' screening and selection of prospective Consultants, pursuant to ORS 279C.110(5) [HB 2769 (Oregon Laws 2019, Chapter 55)], shall:

(a) Create an RFP that meets the requirements of ORS 279C.110(5)(a) In providing an estimate of the cost of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, the Local Contracting Agency may provide a specific estimate of that cost, or a range of estimated costs;

(b) Provide the RFP to a minimum of five (5) prospective Consultants. If fewer than five (5) prospective Consultants are available, the Local Contracting Agency shall provide the RFP to all available prospective Consultants and shall maintain a written record of the Local Contracting Agency's efforts to locate available prospective Consultants for the RFP. The Local Contracting Agency shall draw prospective Consultants from:

(A) The Local Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record);

(B) Another Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record); or

(C) All Consultants that the Local Contracting Agency reasonably can locate that offer the desired Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, or any combination of the foregoing.

(c) In the initial phase of the RFP, evaluate each prospective Consultant on the basis of each Consultant's qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, with those qualifications including the criteria set forth in subsections (2)(a)(E)(i) through (2)(a)(E)(viii) of this rule;

(d) At the end of the initial phase of the RFP, announce the evaluation scores of each Consultant and rank each Consultant according to the evaluation scores. The Local Contracting Agency shall identify up to three (3) of the highest ranked prospective Consultants as being qualified to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, and as being eligible to participate in the second phase of the RFP process;

(e) In the second phase of the RFP, request a pricing proposal from the highest ranked prospective Consultants identified in the initial phase of the RFP, with that pricing proposal to meet the requirements of ORS 279C.110(5)(c)(A) and (B);

(a)

- (f) Complete the evaluation of the highest ranked prospective Consultants that have decided to provide price proposals. In the Local Contracting Agency's final evaluation of the prospective Consultants who have provided price proposals, the Local Contracting Agency cannot assign more than fifteen (15) percent of the overall weight of the evaluation criteria in the second phase of the RFP to each Consultant's price proposal;
- (g) If the Local Contracting Agency does not cancel the RFP after it reviews the qualifications of all prospective Consultants and the price proposals received from the highest ranked Consultants and ranks the highest ranked Consultants from the second phase of the RFP, begin negotiating a Contract with the highest ranked prospective Consultant. The Local Contracting Agency shall direct Contract negotiations toward discussing, refining and finalizing the following:
- (A) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be provided by the Consultant;
- (B) The Consultant's performance obligations and performance schedule;
- (C) The Consultant's payment methodology, rates and number of hours, and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services required under the Contract that is fair and reasonable to the Local Contracting Agency as determined solely by the Local Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services; and
- (D) Any other conditions or provisions the Local Contracting Agency believes to be in the Local Contracting Agency's best interest to negotiate; and
- (h) The Local Contracting Agency shall, either orally or in writing, formally terminate negotiations with the highest ranked Consultant, if the Local Contracting Agency and the Consultant are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The Local Contracting Agency may thereafter negotiate with the second ranked Consultant, and if necessary, with the third ranked Consultant, in accordance with section (6)(g) of this rule, until negotiations result in a Contract. If negotiations with any of the top three prospective Consultants do not result in a Contract within a reasonable amount of time, the Local Contracting Agency may end the particular informal solicitation and thereafter may proceed with a new informal solicitation under this rule or proceed with a formal solicitation under OAR 137-048-0220 (Formal Selection Procedure).
- (7) When the Estimated Fee in an informal selection procedure under this rule is expected not to exceed \$150,000, the Contracting Agency is only required to provide the RFP under sections (2), (3) and (6) of this rule to three (3) prospective Consultants. If fewer than three (3) prospective Consultants are available, the Contracting Agency shall provide the RFP to all available prospective Consultants and shall maintain a written record of the Contracting Agency's efforts to locate available prospective Consultants for the RFP.
- (8) The Contracting Agency shall terminate the informal selection procedure and proceed with the formal selection procedure under OAR 137-048-0220 if the scope of the anticipated Contract is revised during negotiations so that the Estimated Fee will exceed \$250,000.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458 **Statutes/Other Implemented:** ORS 279C.110, OL 2011 & ch 458
History:

[DOJ 15-2019, amend filed 12/23/2019, effective 01/01/2020](#) DOJ 2-2015, f. & cert. ef. 2-3-15

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DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0220

Formal Selection Procedure

(1) Subject to OAR 137-048-0130 (Applicable Selection Procedures; Pricing Information; Disclosure of Proposals), Contracting Agencies shall use the formal selection procedure described in this rule to select a Consultant if the Consultant cannot be selected under either 137-048-0200 (Direct Appointment Procedure) or under 137-048-0210 (Informal Selection Procedure). The formal selection procedure described in this rule may otherwise be used at Contracting Agencies' discretion.

(1)

(2) Contracting Agencies using the formal selection procedure shall obtain Contracts through public advertisement of RFPs, or Requests for Qualifications followed by RFPs.

(a) Except as provided in subsection (b) of this section, a Contracting Agency shall advertise each RFP and RFQ at least once in at least one newspaper of general circulation in the area where the Project is located and in as many other issues and publications as may be necessary or desirable to achieve adequate competition. Other issues and publications may include, but are not limited to, local newspapers, trade journals, and publications targeted to reach disadvantaged business enterprise ("DBE"), service-disabled veteran business ("SDVB"), minority business enterprise ("MBE"), women business enterprise ("WBE") and emerging small business enterprise ("ESB") audiences.

(A) A Contracting Agency shall publish the advertisement within a reasonable time before the deadline for the Proposal submission or response to the RFQ or RFP, but in any event no fewer than fourteen (14) calendar days before the closing date set forth in the RFQ or RFP.

(B) A Contracting Agency shall include a brief description of the following items in the advertisement:

(i) The Project;

(ii) A description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services the Contracting Agency seeks;

(iii) How and where Consultants may obtain a copy of the RFQ or RFP; and

(iv) The deadline for submitting a Proposal or response to the RFQ or RFP.

(b) In the alternative to advertising in a newspaper as described in subsection (2)(a) of this rule, the Contracting Agency shall publish each RFP and RFQ by one or more of the electronic methods identified in OAR 137-046-0110(14). The Contracting Agency shall comply with subsections (2)(a)(A) and (2)(a)(B) of this rule when publishing advertisements by electronic methods.

(c) A Contracting Agency may send notice of the RFP or RFQ directly to all Consultants on the Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record).

(3) Request for Qualifications Procedure. Contracting Agencies may use the RFQ procedure to evaluate potential Consultants and establish a short list of qualified Consultants to whom the Contracting Agency may issue an RFP for some or all of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ.

(a) A Contracting Agency shall include the following, at a minimum, in each RFQ:

(A) A brief description of the Project for which the Contracting Agency is seeking a Consultant;

(B) A description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services the Contracting Agency seeks for the Project;

(C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including but not limited to construction services;

(D) The deadline for submitting a response to the RFQ;

(E) A description of required Consultant qualifications for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services the Contracting Agency seeks;

(F) The RFQ evaluation criteria, including weights, points or other classifications applicable to each criterion;

(G) A statement whether or not the Contracting Agency will hold a pre-qualification meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ and if a pre-qualification meeting will be held, the location of the meeting and whether or not attendance is mandatory; and

(H) A Statement that Consultants responding to the RFQ do so solely at their expense, and that the Contracting Agency is not responsible for any Consultant expenses associated with the RFQ.

(b) A Contracting Agency may include a request for any or all of the following in each RFQ:

(A) A statement describing Consultants' general qualifications and related performance information;

(B) A description of Consultants' specific qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ including Consultants' committed resources and recent, current and projected workloads;

(A)

- (C) A list of similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services and references concerning past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration;
- (D) A copy of all records, if any, of Consultants' performance under Contracts with any other Contracting Agency;
- (E) The number of Consultants' experienced staff committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ, including such personnel's specific qualifications and experience and an estimate of the proportion of time that such personnel would spend on those services;
- (F) Consultants' approaches to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ and design philosophy, if applicable;
- (G) Consultants' geographic proximity to and familiarity with the physical location of the Project;
- (H) Consultants' Ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;
- (I) If the Contracting Agency is selecting a Consultant to provide Related Services, Consultants' pricing policies and pricing Proposals or other pricing information, including the number of hours estimated for the services required, expenses, hourly rates and overhead;
- (J) Consultants' ability to assist a State Contracting Agency in complying with art acquisition requirements, pursuant to ORS 276.073 through 276.090;
- (K) Consultants' ability to assist a State Contracting Agency in complying with State of Oregon energy efficient design requirements, pursuant to ORS 276.900 through 276.915;
- (L) Consultants' ability to assist a Contracting Agency in complying with the energy technology requirements of ORS 279C.527 and 279C.528;
- (M) Whether the Consultant owes a liquidated and delinquent debt to the State of Oregon; and
- (N) Any other information the Contracting Agency deems reasonably necessary to evaluate Consultants' qualifications.
- (c) If a Local Contracting Agency will use a Request for Qualifications followed by an RFP to procure Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services under this rule and the Local Contracting Agency intends to use pricing policies, proposals or other pricing information as part of the Local Contracting Agency's screening and selection of prospective Consultants, pursuant to ORS 279C.110(5) [HB 2769 (Oregon Laws 2019, Chapter 55)], the Local Contracting Agency cannot request cost proposals or otherwise use pricing policies, proposals or other pricing information as part of the Request for Qualifications. The Local Contracting Agency may only request cost proposals or otherwise use pricing policies, proposals or other pricing information during the RFP process, following the establishment of a short list of qualified Consultants through the Request for Qualifications process.
- (d) RFQ Evaluation Committee. The Contracting Agency shall establish an RFQ evaluation committee of at least two (2) individuals to review, score and rank the responding Consultants according to the evaluation criteria. The Contracting Agency may appoint to the evaluation committee Contracting Agency employees or employees of other public agencies with experience in Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Related Services, construction services or Public Contracting. If the Contracting Agency procedure permits, the Contracting Agency may include on the evaluation committee private practitioners of architecture, engineering, photogrammetry, transportation planning, land surveying or related professions. The Contracting Agency shall designate one member of the evaluation committee as the evaluation committee chairperson.
- (e) A Contracting Agency may use any reasonable screening or evaluation method to establish a short list of qualified Consultants, including but not limited to, the following:
- (A) Requiring Consultants responding to an RFQ to achieve a threshold score before qualifying for placement on the short list;
- (B) Placing a pre-determined number of the highest scoring Consultants on a short list;
- (C) Placing on a short list only those Consultants with certain essential qualifications or experience, whose practice is limited to a particular subject area, or who practice in a particular geographic locale or region, provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFQ.
- (f) After the evaluation committee reviews, scores and ranks the responding Consultants, the Contracting Agency shall establish a short list of at least three qualified Consultants, if feasible; provided however, if four or fewer Consultants
- (a)

responded to the RFQ or if fewer than three Consultants fail to meet the Contracting Agency's minimum requirements, then:

- (A) The Contracting Agency may establish a short list of fewer than three qualified Consultants; or
 - (B) The Contracting Agency may cancel the RFQ and issue an RFP.
- (g) No Consultant will be eligible for placement on a Contracting Agency's short list established under subsection (3)(d) of this rule if Consultant or any of Consultant's principals, partners or associates are members of the Contracting Agency's RFQ evaluation committee.
- (h) Except when the RFQ is cancelled, a Contracting Agency shall provide a copy of the subsequent RFP to each Consultant on the short list.
- (4) Formal Selection of Consultants through Request for Proposals. Contracting Agencies shall use the procedure described in section (4) of this rule when issuing an RFP for a Contract described in section (1) of this rule.
- (a) RFP Required Contents. Except as otherwise provided in Sections (4)(b) and (4)(c) of this rule, Contracting Agencies using the formal selection procedure shall include at least the following in each RFP, whether or not the RFP is preceded by an RFQ:
- (A) General background information, including a description of the Project and the specific Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services sought for the Project, the estimated Project cost, the estimated time period during which the Project is to be completed, and the estimated time period in which the specific Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services sought will be performed;
 - (B) The RFP evaluation process and the criteria which will be used to select the most qualified Proposer, including the weights, points or other classifications applicable to each criterion. If the Contracting Agency does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value. Evaluation criteria may include, but are not limited to, the following:
 - (i) Proposers' availability and capability to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;
 - (ii) Experience of Proposers' key staff persons in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, or Related Services on comparable projects;
 - (iii) The amount and type of resources, and number of experienced staff persons Proposers have committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;
 - (iv) The recent, current and projected workloads of the staff and resources referenced in section (4)(a)(B)(iii), above;
 - (v) The proportion of time Proposers estimate that the staff referenced in section (4)(a)(B)(iii), above, would spend on the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;
 - (vi) Proposers' demonstrated ability to complete successfully similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services on time and within budget, including whether or not there is a record of satisfactory performance under OAR 137-048-0120 (List of Interested Consultants; Performance Record);
 - (vii) References and recommendations from past clients;
 - (viii) Proposers' performance history in meeting deadlines, submitting accurate estimates, producing high quality work, meeting financial obligations, price and cost data from previous projects, cost controls and contract administration;
 - (ix) Status and quality of any required license or certification;
 - (x) Proposers' knowledge and understanding of the Project and Architectural, Engineering and Land Surveying Services or Related Services described in the RFP as shown in Proposers' approaches to staffing and scheduling needs for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services and proposed solutions to any perceived design and constructability issues;
 - (xi) Results from interviews, if conducted;
 - (xii) Design philosophy, if applicable, and approach to the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;
 - (xiii) Whether the Consultant owes a liquidated and delinquent debt to the State of Oregon.
- (i)

- (xiv) If the Contracting Agency is selecting a Consultant to provide Related Services, pricing policies and pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead; and
- (xv) Any other criteria that the Contracting Agency deems relevant to the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP, including, where the nature and budget of the Project so warrant, a design competition between competing Proposers. Provided, however, these additional criteria cannot include pricing policies, pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, when the sole purpose or predominant purpose of the RFP is to obtain Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services.
- (C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including but not limited to construction services;
- (D) Whether interviews are possible and if so, the weight, points or other classifications applicable to the potential interview;
- (E) The date and time Proposals are due, and the delivery location for Proposals;
- (F) Reservation of the right to seek clarifications of each Proposal;
- (G) Reservation of the right to negotiate a final Contract that is in the best interest of the Contracting Agency;
- (H) Reservation of the right to reject any or all Proposals and reservation of the right to cancel the RFP at any time if doing either would be in the public interest as determined by the Contracting Agency;
- (I) A Statement that Proposers responding to the RFP do so solely at their expense, and Contracting Agency is not responsible for any Proposer expenses associated with the RFP;
- (J) A statement directing Proposers to the protest procedures set forth in these division 48 rules;
- (K) Special Contract requirements, including but not limited to DBE, MBE, WBE, ESB and SDVB participation goals or good faith efforts with respect to DBE, MBE, WBE, ESB and SDVB participation, and federal requirements when federal funds are involved;
- (L) A statement whether or not the Contracting Agency will hold a pre-Proposal meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP and if a pre-Proposal meeting will be held, the location of the meeting and whether or not attendance is mandatory;
- (M) A request for any information the Contracting Agency deems reasonably necessary to permit the Contracting Agency to evaluate, rank and select the most qualified Proposer to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP; and
- (N) A sample form of the Contract.
- (b) RFP Contents for Related Services Selections Based on Price Only. Contracting Agencies using the formal selection procedure shall include at least the following in each RFP, whether or not the RFP is preceded by an RFQ, when the formal selection procedure is for Related Services selected on the basis of price Proposals and other pricing information only:
- (A) General background information, including a description of the Project and the specific Related Services sought for the Project, the estimated Project cost, the estimated time period during which the Project is to be completed, and the estimated time period in which the specific Related Services sought will be performed;
- (B) The RFP evaluation process and the price criteria which will be used to select the highest ranked Proposer, including the weights, points or other classifications applicable to each criterion. If the Contracting Agency does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value. Evaluation price criteria may include, but are not limited to, the total price for the Related Services described in the RFP, Consultant pricing policies, and other pricing information such as the Consultant's estimated number of staff hours needed to perform the Related Services described in the RFP, expenses, hourly rates and overhead;
- (C) Any minimum or pass-fail qualifications that the Proposers must meet, including but not limited to any such qualifications in the subject matter areas described in section (4)(a)(B)(i) through section (4)(a)(B)(xii) of this rule; and
- (D) The information listed in section (4)(a)(C) through section (4)(a)(N) of this rule pertaining to the Related Services described in the RFP.
- (A)

(c) RFP Contents for Local Contracting Agencies' Selection of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services with Pricing Policies, Proposals or Other Pricing Information. Local Contracting Agencies that will be including pricing policies, proposals or other pricing information in the Local Contracting Agencies' formal selection procedure criteria for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services pursuant to ORS 279C.110(5) [HB 2769 (Oregon Laws 2019, Chapter 55)] shall meet the following minimum requirements for each RFP:

(A) If the Local Contracting Agency has used the Request for Qualifications procedure in Section (3) of this rule to evaluate potential Consultants and establish a short list of qualified Consultants pursuant to ORS 279C.110(5), the RFP must meet the requirements of ORS 279C.110(5) that address the second phase of the selection process applicable to the short list of no more than three of the highest ranked prospective consultants that were identified in the initial phase of the selection process described in ORS 279C.110(5)(a) and (b).

(B) If the Local Contracting Agency has elected to not use the Request for Qualifications procedure in Section (3) of this rule, and will use only an RFP in the Local Contracting Agency's use of the formal selection procedure, the Local Contracting Agency shall include at least the following in the RFP:

(i) The information set forth in ORS 279C.110(5)(a). In providing an estimate of the cost of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, the Local Contracting Agency may provide a specific estimate of that cost, or a range of estimated costs;

(ii) In the initial phase of the RFP, provisions describing the Local Contracting Agency's evaluation of each prospective Consultant on the basis of each Consultant's qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, with those qualifications including the criteria set forth in subsections (4)(a)(B)(i) through (4)(a)(B)(xiii) and (4)(a)(B)(xv) of this rule;

(iii) At the end of the initial phase of the RFP, provisions describing the Local Contracting Agency's evaluation scores of each Consultant and rank of each Consultant according to the evaluation scores. The Local Contracting Agency shall identify up to three (3) of the highest ranked prospective Consultants as being qualified to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, and as being eligible to participate in the second phase of the RFP process;

(iv) In the second phase of the RFP, provisions describing the Local Contracting Agency's request of a pricing proposal from each of the highest ranked prospective Consultants identified in the initial phase of the RFP, pursuant to the requirements of ORS 279C.110(5)(c)(A) and (B);

(v) Provisions describing the Local Contracting Agency's evaluation of the highest ranked prospective Consultants that have decided to provide price proposals. In the Local Contracting Agency's final evaluation of the prospective Consultants who have provided price proposals, the Local Contracting Agency cannot assign more than fifteen (15) percent of the overall weight of the evaluation criteria in the second phase of the RFP to each Consultant's price proposal;

(d) RFP Evaluation Committee. The Contracting Agency shall establish a committee of at least three individuals to review, score and rank Proposals according to the evaluation criteria set forth in the RFP. If the RFP has followed an RFQ, the Contracting Agency may include the same members who served on the RFQ evaluation committee. The Contracting Agency may appoint to the evaluation committee Contracting Agency employees or employees of other public agencies with experience in Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying, Related Services, construction services or Public Contracting. At least one member of the evaluation committee must be a Contracting Agency employee. If the Contracting Agency procedure permits, the Contracting Agency may include on the evaluation committee private practitioners of architecture, engineering, land surveying or related professions. The Contracting Agency shall designate one of its employees who also is a member of the evaluation committee as the evaluation committee chairperson.

(A) No Proposer will be eligible for award of the Contract under the RFP if Proposer or any of Proposer's principals, partners or associates are members of the Contracting Agency's RFP evaluation committee for the Contract;

(B) If the RFP provides for the possibility of Proposer interviews, the evaluation committee may elect to interview Proposers if the evaluation committee considers it necessary or desirable. If the evaluation committee conducts interviews, it shall award weights, points or other classifications indicated in the RFP for the anticipated interview; and

(C) The evaluation committee shall provide to the Contracting Agency the results of the scoring and ranking for each Proposer.

(e) If the Contracting Agency does not cancel the RFP after it receives the results of the scoring and ranking for each Proposer, the Contracting Agency will begin negotiating a Contract with the highest ranked Proposer. The Contracting Agency shall direct Contract negotiations toward discussing, refining and finalizing the following:

(a)

- (A) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be provided by the Consultant;
- (B) The Consultant's performance obligations and performance schedule;
- (C) Payment methodology, Consultant's rates and number of hours, and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the Contracting Agency as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and
- (D) Any other conditions or provisions the Contracting Agency believes to be in the Contracting Agency's best interest to negotiate.
- (f) The Contracting Agency shall, either orally or in writing, formally terminate negotiations with the highest ranked Proposer if the Contracting Agency and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The Contracting Agency may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, and so on if applicable, in accordance with section (4)(e) of this rule, until negotiations result in a Contract. If negotiations with any Proposer do not result in a Contract within a reasonable amount of time, the Contracting Agency may end the particular formal solicitation. Nothing in this rule precludes a Contracting Agency from proceeding with a new formal solicitation for the same Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP that failed to result in a Contract.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.110, ORS 279C.527, OL 2015 & ch 565 (HB 3303)

History:

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DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

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DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0230

Ties Among Proposers

(1) If a Contracting Agency is selecting a Consultant on the basis of qualifications alone and determines after the ranking of Proposers that two or more Proposers are equally qualified, the Contracting Agency may select a candidate through any process that the Contracting Agency believes will result in the best value for the Contracting Agency taking into account the scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services. Provided, however, the tie breaking process established by the Contracting Agency under this section (1) cannot be based on the Consultant's pricing policies, pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead. The process must be designed to instill public confidence through ethical and fair dealing, honesty and good faith on the part of the Contracting Agency and Proposers and shall protect the integrity of the Public Contracting process. Once a tie is broken, the Contracting Agency and the selected Proposer shall proceed with negotiations under OAR 137-048-0210(3) or 137-048-0220(4)(c), as applicable.

(2) If a Contracting Agency is selecting a Consultant on the basis of price alone, or on the basis of price and qualifications, and determines after the ranking of Proposers that two or more Proposers are identical in terms of price or are identical in terms of price and qualifications, then the Contracting Agency shall follow the procedure set forth in OAR 137-046-0300, (Preferences for Oregon Goods and Services), to select the Consultant.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458 **Statutes/Other Implemented:** ORS 279C.110, OL 2011 & ch 458

History:

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0240**Protest Procedures**

(1) RFP Protest and Request for Change. Pursuant to ORS 279C.110(8) [HB 2769 (Oregon Laws 2019, Chapter 55)], Consultants may submit a written protest of anything contained in an RFP and may request a change to any provision, specification or Contract term contained in an RFP, no later than seven (7) calendar days prior to the date Proposals are due, unless a different deadline is indicated in the RFP. Each protest and request for change must include the reasons for the protest or request, and any proposed changes to the RFP provisions, specifications or Contract terms. The Contracting Agency may not consider any protest or request for change that is submitted after the submission deadline.

(2) Protest of Consultant Selection. Pursuant to ORS 279C.110(8) [HB 2769 (Oregon Laws 2019, Chapter 55)], Consultants may submit a written protest of the Contracting Agency's selection of a Consultant for award of a Contract as follows:

(a) Single Award. In the event of an award to a single Proposer, the Contracting Agency shall provide to all Proposers a copy of the selection notice that the Contracting Agency sent to the highest ranked Proposer. A Proposer who claims to have been adversely affected or aggrieved by the selection of the highest ranked Proposer may submit a written protest of the selection to the Contracting Agency no later than seven (7) calendar days after the date of the selection notice unless a different deadline is indicated in the RFP. A Proposer submitting a protest must claim that the protesting Proposer is the highest ranked Proposer because the Proposals of all higher ranked Proposers failed to meet the requirements of the RFP or because the higher ranked Proposers otherwise are not qualified to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP.

(b) Multiple Award. In the event of an award to more than one Proposer, the Contracting Agency shall provide to all Proposers copies of the selection notices that the Contracting Agency sent to the highest ranked Proposers. A Proposer who claims to have been adversely affected or aggrieved by the selection of the highest ranked Proposers may submit a written protest of the selection to the Contracting Agency no later than seven (7) calendar days after the date of the selection notices, unless a different deadline is indicated in the RFP. A Proposer submitting a protest must claim that the protesting Proposer is one of the highest ranked proposers because the Proposals of all higher ranked Proposers failed to meet the requirements of the RFP, or because a sufficient number of Proposals of higher ranked Proposers failed to meet the requirements of the RFP. In the alternative, a Proposer submitting a protest must claim that the Proposals of all higher ranked Proposers, or a sufficient number of higher ranked Proposers, are not qualified to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP.

(c) Effect of Protest Submission Deadline. A Contracting Agency may not consider any protest that is submitted after the submission deadline.

(3) Resolution of Protests. A duly authorized representative of the Contracting Agency shall resolve all timely submitted protests within a reasonable time following the Contracting Agency's receipt of the protest and once resolved, shall promptly issue a written decision on the protest to the Proposer who submitted the protest. If the protest results in a change to the RFP, the Contracting Agency shall revise the RFP accordingly and shall re-advertise the RFP in accordance with these rules.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458 **Statutes/Other Implemented:** ORS 279A.065 & 279C.110, OL 2011 & ch 458 **History:**

[DOJ 15-2019, amend filed 12/23/2019, effective 01/01/2020](#) DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0250**Solicitation Cancellation, Delay or Suspension; Rejection of All Proposals or Responses; Consultant Responsibility For Costs**

A Contracting Agency may cancel, delay or suspend a solicitation, RFQ or other preliminary Procurement document, whether related to a Direct Appointment Procedure (OAR 137-048-0200), the Informal Selection Procedure (OAR 137-048-0210), and the Formal Selection Procedure (OAR 137-048-0220), or reject all Proposals, responses to RFQs, responses to other preliminary Procurement documents, or any combination of the foregoing, if the Contracting Agency believes it is in the public interest to do so. In the event of any such cancellation, delay, suspension or rejection, the Contracting Agency is not liable to any Proposer for any loss or expense caused by or resulting from any such cancellation, delay, suspension or rejection. Consultants responding to either solicitations, RFQs or other preliminary

Procurement documents are responsible for all costs they may incur in connection with submitting Proposals, responses to RFQs or responses to other preliminary Procurement documents.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.065 & 279C.110 **History:**

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0260

Two-Tiered Selection Procedure for Local Contracting Agency Public Improvement Projects

(1) If a Local Contracting Agency requires an Architect, Engineer, Photogrammetrist, Transportation Planner or Land Surveyor to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services for a public improvement owned and maintained by that Local Contracting Agency, and a State Agency will serve as the lead Contracting Agency and will enter into Contracts with Architects, Photogrammetrists, Transportation Planners, Engineers or Land Surveyors for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services for that public improvement, the State Contracting Agency shall utilize the two-tiered selection process described below to obtain these Contracts with Architects, Engineers, Photogrammetrists, Transportation Planners, or Land Surveyors.

(2) Tier One. A State Contracting Agency shall, when feasible, identify no fewer than the three (3) most qualified Proposers responding to an RFP that was issued under the applicable selection procedures described in OAR 137-048-0210 (Informal Selection Procedure) and 137-048-0220 (Formal Selection Procedure), or from among Architects, Engineers, Photogrammetrists, Transportation Planners, or Land Surveyors identified under 137-048-0200 (Direct Appointment Procedure), and shall notify the Local Contracting Agency of the Architects, Engineers, Photogrammetrists, Transportation Planners, or Land Surveyors selected.

(3) Tier Two. In accordance with the qualifications based selection requirements of ORS 279C.110, the Local Contracting Agency shall either:

(a) Select an Architect, Engineer, Photogrammetrist, Transportation Planner or Land Surveyor from the State Contracting Agency's list of Proposers to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services for Local Contracting Agency's public improvement; or

(b) Select an Architect, Engineer, Photogrammetrist, Transportation Planner or Land Surveyor to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services for Local Contracting Agency's public improvement through an alternative process adopted by the Local Contracting Agency, consistent with the provisions of the applicable RFP, if any, and these division 48 rules. The Local Contracting Agency's alternative process must be described in the applicable RFP, may be structured to take into account the unique circumstances of the particular Local Contracting Agency and may include provisions to allow the Local Contracting Agency to perform its tier two responsibilities efficiently and economically, alone or in cooperation with other Local Contracting Agencies. The Local Contracting Agency's alternative process may include, but is not limited to, one or more of the following methods:

(A) A general written direction from the Local Contracting Agency to the State Contracting Agency, prior to the advertisement of a Procurement or series of Procurements or during the course of the Procurement or series of Procurements, that the Local Contracting Agency's tier two selection shall be the highest-ranked firm identified by the State Contracting Agency during the tier one process, and that no further coordination or consultation with the Local Contracting Agency is required. However, the Local Contracting Agency may provide written notice to the State Contracting Agency that the Local Contracting Agency's general written direction is not to be applied for a particular Procurement and describe the process that the Local Contracting Agency will utilize for the particular Procurement. In order for a written direction from the Local Contracting Agency consistent with this subsection to be effective for a particular Procurement, it must be received by the State Contracting Agency with adequate time for the State Contracting Agency to revise the RFP in order for Proposers to be notified of the tier two process to be utilized in the Procurement. In the event of a multiple award under the terms of the applicable Procurement, the written direction from the Local Contracting Agency may apply to the highest ranked firms that are selected under the terms of the Procurement document.

(B) An intergovernmental agreement between the Local Contracting Agency and the State Contracting Agency outlining the alternative process that the Local Contracting Agency has adopted for a Procurement or series of Procurements.

(A)

(C) Where multiple Local Government Agencies are involved in a two-tiered selection procedure, the Local Government Agencies may name one or more authorized representative(s) to act on behalf of all the Local Government Agencies, whether the Local Government Agencies are acting collectively or individually, to select the Architect, Engineer, Photogrammetrist, Transportation Planner or Land Surveyor to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under the tier two selection process. In the event of a multiple award under the terms of the applicable Procurement, the authorized representative(s) of the Local Contracting Agencies may act on behalf of the Local Contracting Agencies to select the highest ranked firms that are required under the terms of the Procurement document, as part of the tier two selection process.

(4) In the event the State Contracting Agency has made a multiple award of Price Agreements pursuant to OAR 137-048-0270, with that multiple award of Price Agreements meeting the tier-one requirements of ORS 279C.125 and this rule, the Local Contracting Agency shall make its tier-two selection of an Architect, Engineer, Photogrammetrist, Transportation Planner or Land Surveyor for a project-specific work order or task order from the Consultants who have executed Price Agreements with the State Contracting Agency, in accordance with the work order or task order assignment procedures established by the State Contracting Agency in the Price Agreements. If the Local Contracting Agency elects to select an Architect, Engineer, Photogrammetrist, Transportation Planner or Land Surveyor to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services for Local Contracting Agency's public improvement through an alternative process adopted by the Local Contracting Agency, the requirements of that alternative process must be specified in the RFP, if any, in the executed Price Agreements, or in the project-specific work order or task order assignment procedures provided to the Consultants who have executed Price Agreements, at the time the selection of a Consultant is made for the project-specific work order or task order.

(5) The State Contracting Agency shall thereafter begin Contract negotiations with the selected Architect, Engineer, Photogrammetrist, Transportation Planner or Land Surveyor in accordance with the negotiation provisions in OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure) or 137-048-0220 (Formal Selection Procedure) as applicable.

(6) Nothing in these division 48 rules should be construed to deny or limit a Local Contracting Agency's ability to enter into a Contract directly with Architects, Engineers, Photogrammetrists, Transportation Planners, or Land Surveyors pursuant to ORS 279C.125(4), through a selection process established by that Local Contracting Agency.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458 **Statutes/Other Implemented:** ORS 279C.110, 279C.125, OL 2011 & ch 458 **History:**

[DOJ 27-2018, amend filed 12/10/2018, effective 01/01/2019](#) DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0270

Price Agreements

(1) A Contracting Agency may establish Price Agreements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, when the Contracting Agency cannot determine the precise quantities of those Services which the Contracting Agency will require over a specified time period.

(2) When establishing Price Agreements under this rule, a Contracting Agency shall select no fewer than three Consultants, when feasible. The selection procedures for establishing Price Agreements shall be in accordance with OAR 137-048-0130(1) or 137-048-0130(2), as applicable. Contracting Agencies may select a single Consultant, when a Price Agreement is awarded to obtain services for a specific Project or a closely-related group of Projects.

(3) In addition to any other applicable solicitation requirements set forth in these division 48 rules, solicitation materials and the terms and conditions for a Price Agreement for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services must:

(a) Include a scope of services, menu of services, a specification for services or a similar description of the nature, general scope, complexity and purpose of the procurement that will reasonably enable a prospective bidder or Proposer to decide whether to submit a bid or proposal;

(b) Specify whether the Contracting Agency intends to award a Price Agreement to one Consultant or to multiple Consultants. If the Contracting Agency will award a Price Agreement to more than one Consultant, the solicitation document and Price Agreement shall describe the criteria and procedures the Contracting Agency will use to select a

(a)

Consultant for each individual work order or task order. Subject to the requirements of ORS 279C.110, the criteria and procedures to assign work orders or task orders that only involve or predominantly involve Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying services are at the Contracting Agency's sole discretion; provided, however, in circumstances where a direct contract is not permitted under OAR 137-048-0200 and a State Contracting Agency is conducting the solicitation, the selection criteria cannot be based on pricing policies, pricing proposals or other pricing information, including the number of hours proposed for the Services required, expenses, hourly rates and overhead. In accordance with OAR 137-048-0130(2) applicable to Related Services procurements, the selection criteria and procedures may be based solely on the qualifications of the Consultants, solely on pricing information, or a combination of both qualifications and pricing information. Pricing information for a Local Contracting Agency's solicitation of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying services, or any Contracting Agency's solicitation of Related Services, may include the number of hours proposed for the services required, expenses, hourly rates, the number of hours, overhead and other price factors. Work order or task order assignment procedures under Price Agreements may include direct appointments, subject to the requirements of OAR 137-048-0200; and

(c) Specify the maximum term for assigning Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under the Price Agreement.

(4) When the solicitation materials and terms and conditions for a Price Agreement involve a two-tiered selection process pursuant to ORS 279C.125 and OAR 137-048-0260(1), the solicitation materials and terms and conditions for a Price Agreement must meet the requirements of subsection (3) of this rule, except as provided in this subsection (4). In the event of a planned multiple award of Price Agreements under a Procurement, the solicitation materials and terms and conditions for the Price Agreements must include assignment procedures for project-specific work orders or task orders that will allow the Local Contracting Agency to select an Architect, Engineer, Photogrammetrist, Transportation Planner or Land Surveyor for a work order or task order from the Consultants who have executed Price Agreements with the State Contracting Agency. If the Local Contracting Agency decides to use an alternative process adopted by the Local Contracting Agency for its tier-two selection process, however, the Local Contracting Agency's alternative process must be described in the solicitation materials and terms and conditions supporting the initial award of Price Agreements, in the executed Price Agreements, or in the project-specific assignment procedures for a work order or task order that are provided to the firms who have executed Price Agreements, at the time of selection for the project-specific work order or task order. The Local Contracting Agency's alternative process may be structured to take into account the unique circumstances of the particular Local Contracting Agency and may include provisions to allow the Local Contracting Agency to perform its tier two responsibilities efficiently and economically, alone or in cooperation with other Local Contracting Agencies, including, but not limited to, the methods specified in OAR 137-048-0260(3)(b).

(5) All Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services assigned under a Price Agreement require a written work order or task order issued by the Contracting Agency. Any work orders or task orders assigned under a Price Agreement must include, at a minimum, the following:

(a) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be provided by the Consultant;

(b) The Consultant's performance obligations and performance schedule;

(c) The payment methodology, Consultant's rates and number of hours, and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the work order or task order that is fair and reasonable to the Contracting Agency, as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services;

(d) Language that incorporates all applicable terms and conditions of the Price Agreement into the work order or task order; and

(e) Any other conditions or provisions the Contracting Agency believes to be in the Contracting Agency's best interest.

Statutory/Other Authority: ORS 279A.065 & OL 2011 & ch 458

Statutes/Other Implemented: ORS 279A.065, ORS 279C.110, ORS 279C.120, ch 458 & OL 2011

History:

DOJ 15-2019, amend filed 12/23/2019, effective 01/01/2020 DOJ 27-2018, amend filed 12/10/2018, effective 01/01/2019
DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

137-048-0300

Prohibited Payment Methodology; Purchase Restrictions

(1) Except as otherwise allowed by law, a Contracting Agency shall not enter into any Contract which includes compensation provisions that expressly provide for payment of:

- (a) Consultant's costs under the Contract plus a percentage of those costs; or
- (b) A percentage of the Project construction costs or total Project costs.

(2) Except as otherwise allowed by law, a Contracting Agency shall not enter into any Contract in which:

(a) The compensation paid under the Contract is solely based on or limited to the Consultant's hourly rates for the Consultant's personnel working on the Project and reimbursable expenses incurred during the performance of work on the Project (sometimes referred to as a "time and materials" Contract); and

(b) The Contract does not include a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract.

(3) Except in cases of Emergency or in the particular instances noted in the subsections below, a Contracting Agency shall not purchase any building materials, supplies or equipment for any building, structure or facility constructed by or for the Contracting Agency from any Consultant under a Contract with Contracting Agency to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, for the building, structure or facility. This prohibition does not apply if either of the following circumstances exists:

(a) The Consultant is providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under a Contract with a Contracting Agency to perform Design-Build services or Energy Savings Performance Contract services (see OAR 137-049-0670 and 137-049-0680); or

(b) That portion of the Contract relating to the acquisition of building materials, supplies or equipment was awarded to the Consultant pursuant to applicable law governing the award of such a Contract.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458 **Statutes/Other Implemented:** ORS 279A.065, OL 2011 & ch 458
History:

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0310

Expired or Terminated Contracts; Reinstatement

(1) If a Contracting Agency enters into a Contract for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services and that Contract subsequently expires or is terminated, the Contracting Agency may proceed as follows, subject to the requirements of subsection (2) of this rule:

(a) **Expired Contracts.** If the Contract has expired as the result of Project delay caused by the Contracting Agency or caused by any other occurrence outside the reasonable control of the Contracting Agency or the Consultant, and if no more than one year has passed since the Contract expiration date, the Contracting Agency may amend the Contract to extend the Contract expiration date, revise the description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract to reflect any material alteration of the Project made as a result of the delay, and revise the applicable performance schedule. Beginning on the effective date of the amendment, the Contracting Agency and the Consultant shall continue performance under the Contract as amended; or

(b) **Terminated Contracts.** If the Contracting Agency or both parties to the Contract have terminated the Contract for any reason and if no more than one year has passed since the Contract termination date, then the Contracting Agency may enter into a new Contract with the same Consultant to perform the remaining Architectural, Engineering and Land Surveying Services, or Related Services not completed under the original Contract, or to perform any remaining Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services not completed under the Contract as adjusted to reflect a material alteration of the Project.

(2) The Contracting Agency may proceed under either subsection (1)(a) or subsection (1)(b) of this rule only after making written findings that amending the existing Contract or entering into a new Contract with the Consultant will:

- (a) Promote efficient use of public funds and resources and result in substantial cost savings to the Contracting Agency;
- (a)

- (b) Protect the integrity of the Public Contracting process and the competitive nature of the Procurement process by not encouraging favoritism or substantially diminishing competition in the award of Contracts; and
- (c) Result in a Contract that is still within the scope of the final form of the original Procurement document.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458 **Statutes/Other Implemented:** ORS 279A.065 & 279C.110, OL 2011 & ch 458 **History:**

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-048-0320

Contract Amendments

(1) A Contracting Agency may amend any Contract if the Contracting Agency, in its sole discretion, determines that the amendment is within the scope of the Solicitation Document and that the amendment would not materially impact the field of competition for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the final form of the original Procurement document. In making this determination, the Contracting Agency shall consider potential alternative methods of procuring the services contemplated under the proposed amendment. An amendment would not materially impact the field of competition for the services described in the Solicitation Document, if the Contracting Agency reasonably believes that the number of Proposers would not significantly increase if the Procurement document were re-issued to include the additional services.

(2) The Contracting Agency may amend any Contract if the additional services are required by reason of existing or new laws, rules, regulations or ordinances of federal, state or local agencies, which affect performance of the original Contract.

(3) All amendments to Contracts must be in writing, must be signed by an authorized representative of the Consultant and the Contracting Agency and must receive all required approvals before the amendments will be binding on the Contracting Agency.

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458 **Statutes/Other Implemented:** ORS 279A.065, 279C.110, OL 2011 & ch 458 **History:**

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

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Chapter 137

Division 49

MODEL RULES GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTS FOR CONSTRUCTION SERVICES

137-049-0100

Application

(1) These division 49 rules apply to Public Improvement Contracts as well as Public Contracts for ordinary construction Services that are not Public Improvements. Model Rules that apply specifically to Public Improvement Contracts are so identified. These division 49 rules apply to Contracts for Construction Manager/General Contractor Services, whether the initial Contract between the parties includes both pre-construction services and construction services, or only contains pre-construction services, since the underlying procurement for Construction Manager/General Contractor Services authorizes Contracting Agencies to enter into Contracts for both pre-construction and construction services.

(2) These division 49 rules address matters covered in ORS Chapter 279C (with the exception of Architectural, Engineering, Land Surveying and Related Services, all of which are addressed in division 48 of the Model Rules).

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.065**History:**

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0110

Policies

In addition to the general Code policies set forth in ORS 279A.015, the 279C.300 policy on competition and the 279C.305 policy on least-cost for Public Improvements apply to these division 49 rules.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other**

Implemented: ORS 279C.300 & 279C.305**History:**

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0120

Definitions

(1) "Certified Firm" means a business concern that possesses one or more current, valid certification(s) as a Disadvantaged Business Enterprise, Minority-Owned Business, Woman-Owned Business, Business That Service-Disabled Veterans Own or Emerging Small Business by the Oregon Certification Office for Business Inclusion and Diversity, pursuant to ORS 200.055.

(2) "Conduct Disqualification" means a Disqualification under ORS 279C.440.

(3) "Disqualification" means the preclusion of a Person from contracting with a Contracting Agency for a period of time in accordance with OAR 137-049-0370.

(1)

- (4) "Emergency" means, only for purposes of the Diesel Engine Requirements rule OAR 137-049-0805, circumstances that could not have been reasonably foreseen, and that create a substantial risk of loss, damage, interruption of services, or threat to public health or safety with regard to a Public Improvement Contract.
- (5) "Foreign Contractor" means a Contractor that is not domiciled in or registered to do business in the State of Oregon. See OAR 137-049-0480.
- (6) "Nonroad Diesel Equipment" means equipment used in the course of performing a State Contracting Agency? Public Improvement Contract, powered by a compression ignition diesel engine of 25 horsepower or more that is not designed primarily to propel a motor vehicle on public highways.
- (7) "Notice" means any of the alternative forms of public announcement of Procurements, as described in OAR 137-049-0210.
- (8) "Project Site" means, only for purposes of the Diesel Engine Requirements rule OAR 137-049-0805, the geographic dimensions of the surface area of the real property on which the Work for a State Contracting Agency? Public Improvement Contract is to be performed, including designated contiguous staging areas.
- (9) "Specified Projects" means the following projects and Project Sites formally described and established by the Oregon Department of Transportation: The Interstate 5 Rose Quarter Project, the Interstate 205 Abernathy Bridge Project, the Interstate 205 Freeway Widening Project, the State Highway 217 Northbound Project and the State Highway 217 Southbound Project.
- (10) "Tier 4 Exhaust Emission Standards" means the Tier 4 compression ignition diesel engine emission standards established by the United States Environmental Protection Agency in 40 CFR 89.112 for Non-Road Diesel Equipment.
- (11) "Verified Diesel Oxidation Catalyst" means a diesel oxidation catalyst verified by the United States Environmental Protection Agency for use on Non-Road Diesel Equipment.
- (12) "Verified Diesel Particulate Filter" means a diesel particulate filter verified by the United States Environmental Protection Agency for use on Non-Road Diesel Equipment.
- (13) "Work" means the furnishing of all services, materials, equipment, labor and incidentals necessary to successfully complete any individual item or the entire Contract and the carrying out and completion of all duties and obligations imposed by the Contract.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.065, OL 2015, ch 565 (HB 3303), ORS 279C.537 & ORS 200.005 - 200.055

History:

[DOJ 2-2022, temporary amend filed 01/03/2022, effective 01/03/2022 through 07/01/2022](#) DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0130

Competitive Bidding Requirement

A Contracting Agency shall solicit Bids for Public Improvement Contracts by Invitation to Bid ("ITB"), except as otherwise allowed or required pursuant to ORS 279C.335 on competitive bidding exceptions and exemptions, 279A.030 on federal law overrides or 279A.100 on affirmative action. Also see OAR 137-049-0600 to 137-049-0690 regarding the use of Alternative Contracting Methods, use of Alternative Contracting Methods for projects which are excepted or exempt from the competitive bidding process, use of Alternative Contracting Methods within the competitive bidding process and the process for obtaining an exemption from competitive bidding requirements.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.335 **History:**

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0140**Contracts for Construction Other Than Public Improvements**

(1) Procurement Under ORS Chapter 279B. Pursuant to ORS 279C.320, Public Contracts for construction Services that are not Public Improvement Contracts may be procured and amended as general trade Services under the provisions of ORS Chapter 279B rather than under the provisions of ORS Chapter 279C and these division 49 rules. Emergency Contracts for construction Services are not Public Improvement Contracts and are regulated under ORS 279B.080.

(2) Application of ORS Chapter 279C. Non-procurement provisions of ORS Chapter 279C and these division 49 rules may still be applicable to the resulting Contracts. See, for example, particular statutes on Disqualification (279C.440, 445, 450); Legal Actions (279C.460 and 465); Required Contract Conditions (279C.505, 515, 520, 530); Hours of Labor (279C.540, 545); Retainage (279C.550, 555, 560, 565 and 570); Subcontracts (279C.580); Action on Payment Bonds (279C.600, 605, 610, 615, 620, 625); Termination (279C.650, 660, 670); and all of the Prevailing Wage Rates requirements (279C.800 through 870) for Public Works Contracts.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.320 **History:**

[DOJ 12-2019, minor correction filed 11/04/2019, effective 11/04/2019](#) DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0150**Emergency Contracts; Bidding and Bonding Exemptions**

(1) Emergency Declaration. A Contracting Agency may declare that Emergency circumstances exist that require prompt execution of a Public Contract for Emergency construction or repair Work. The declaration shall be made at an administrative level consistent with the Contracting Agency's internal policies, by a Written declaration that describes the circumstances creating the Emergency and the anticipated harm from failure to enter into an Emergency Contract. The Emergency declaration shall be kept on file as a public record.

(2) Competition for Emergency Contracts. Pursuant to ORS 279C.320(1), Emergency Contracts are regulated under ORS 279B.080, which provides that, for an emergency procurement of construction services, the Contracting Agency shall ensure competition that is reasonable and appropriate under the Emergency circumstances, and may include Written requests for Offers, oral requests for Offers or direct appointments without competition in cases of extreme necessity, in whatever solicitation time periods the Contracting Agency considers reasonable in responding to the Emergency.

(3) Emergency Contract Scope. Although no dollar limitation applies to Emergency Contracts, the scope of the Contract must be limited to Work that is necessary and appropriate to remedy the conditions creating the Emergency as described in the declaration.

(4) Emergency Contract Modification. Emergency Contracts may be modified by change order or amendment to address the conditions described in the original declaration or an amended declaration that further describes additional Work necessary and appropriate for related Emergency circumstances.

(5) Excusing Bonds. Pursuant to ORS 279C.380(4) and this rule, the Emergency declaration may also state that the Contracting Agency waives the requirement of furnishing a performance bond and payment bond for the Emergency Contract. After making such an Emergency declaration those bonding requirements are excused for the procurement, but this Emergency declaration does not affect the separate Public Works bond requirement for the benefit of the Bureau of Labor and Industries (BOLI) in enforcing prevailing wage rate and overtime payment requirements. See OAR 137-049-0815 and BOLI rules at OAR 839-025-0015.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279B.080, 279C.320 & 279C.380

History:

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0160**Intermediate Procurements; Competitive Quotes and Amendments**

- (1) General. Public Improvement Contracts estimated by the Contracting Agency not to exceed \$100,000 may be Awarded in accordance with intermediate level procurement procedures for competitive quotes established by this rule.
- (2) Selection Criteria. The selection criteria may be limited to price or some combination of price, experience, specific expertise, availability, project understanding, contractor capacity, responsibility and similar factors.
- (3) Request for Quotes. Contracting Agencies shall utilize Written requests for quotes whenever reasonably practicable. Written Request for Quotes shall include the selection criteria to be utilized in selecting a Contractor and, if the criteria are not of equal value, their relative value or ranking. When requesting quotations orally, prior to requesting the price quote the Contracting Agency shall state any additional selection criteria and, if the criteria are not of equal value, their relative value. For Public Works Contracts, oral quotations may be utilized only in the event that Written copies of the prevailing wage rates are not required by the Bureau of Labor and Industries.
- (4) Number of Quotes; Record Required. Contracting Agencies shall seek at least three competitive quotes, and keep a Written record of the sources and amounts of the quotes received. If three quotes are not reasonably available the Contracting Agency shall make a Written record of the effort made to obtain those quotes.
- (5) Award. If Awarded, the Contracting Agency shall Award the Contract to the prospective contractor whose quote will best serve the interests of the Contracting Agency, taking into account the announced selection criteria. If Award is not made to the Offeror offering the lowest price, the Contracting Agency shall make a Written record of the basis for Award.
- (6) Price Increases. Intermediate level Public Improvement Contracts obtained by competitive quotes may be increased above the original amount of Award by Contracting Agency issuance of a Change to the Work or Amendment, pursuant to OAR 137-049-0910, within the following limitations:
 - (a) Up to an aggregate Contract Price increase of 25% over the original Contract amount when a Contracting Agency's contracting officer determines that a price increase is warranted for additional reasonably related Work, and;
 - (b) Up to an aggregate Contract Price increase of 50% over the original Contract amount, when a Contracting Agency's contracting officer determines that a price increase is warranted for additional reasonably related Work and a Contracting Agency official, board or governing body with administrative or review authority over the contracting officer approves the increase.
- (7) Amendments. Amendments of intermediate level Public Improvement Contracts that exceed the thresholds stated in section (1) are specifically authorized by the Code, when made in accordance with this rule. Accordingly, such amendments are not considered new procurements and do not require an exemption from competitive bidding.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: Temporary provisions relating to competitive quotes were not codified but compiled as Legislative Co & unsel notes following ORS 279C.410.

History:

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0200

Solicitation Documents; Required Provisions; Assignment or Transfer

- (1) Solicitation Document. Pursuant to ORS 279C.365 and this rule, the Solicitation Document shall include the following:
 - (a) General Information:
 - (A) Identification of the Public Improvement project, including the character of the Work, and applicable plans, Specifications and other Contract documents;
 - (B) Notice of any pre-Offer conference as follows:
 - (i) The time, date and location of any pre-Offer conference;
 - (ii) Whether attendance at the conference will be mandatory or voluntary; and
 - (iii) That statements made by the Contracting Agency's representatives at the conference are not binding upon the Contracting Agency unless confirmed by Written Addendum.
 - (C) The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be prequalified if prequalification is a requirement;
 - (A)

- (D) The name and title of the authorized Contracting Agency Person designated for receipt of Offers and contact Person (if different);
- (E) Instructions and information concerning the form and submission of Offers, including the address of the office to which Offers must be delivered, any Bid or Proposal security requirements, and any other required information or special information, e.g., whether Offers may be submitted by facsimile or electronic means (See OAR 137-049-0300 regarding facsimile Bids or Proposals and OAR 137-049-0310 regarding electronic Procurement);
- (F) The time, date and place of Opening;
- (G) The time and date of Closing after which a Contracting Agency will not accept Offers, which time shall be not less than five Days after the date of the last publication of the advertisement. Although a minimum of five Days is prescribed, Contracting Agencies are encouraged to use at least a 14 Day solicitation period when feasible. If the Contracting Agency is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, the Contracting Agency shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and OAR 137-049-0360. For timing issues relating to Addenda, see OAR 137-049-0250;
- (H) The office where the Specifications for the Work may be reviewed;
- (I) A statement that each Bidder to an ITB must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120;
- (J) If the Contract resulting from a solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148), a statement that no Offer will be received or considered by the Contracting Agency unless the Offer contains a statement by the Offeror as a part of its Offer that "Contractor agrees to be bound by and will comply with the provisions of 279C.838, 279C.840 or 40 U.S.C. 3141 to 3148."
- (K) A statement that the Contracting Agency will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as specified in OAR 137-049-0230;
- (L) Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;
- (M) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-049-0440(3));
- (N) How the Contracting Agency will notify Offerors of Addenda and how the Contracting Agency will make Addenda available (See OAR 137-049-0250); and
- (O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in OAR 137-049-0360.
- (b) Evaluation Process:
- (A) A statement that the Contracting Agency may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, including the requirement to demonstrate the Bidder's responsibility under ORS 279C.375(3)(b), and may reject for good cause all Offers after finding that doing so is in the public interest;
- (B) The anticipated solicitation schedule, deadlines, protest process and evaluation process, if any;
- (C) Evaluation criteria, including the relative value applicable to each criterion, that the Contracting Agency will use to determine the Responsible Bidder with the lowest Responsive Bid (where Award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of competitive Proposals is authorized under ORS 279C.335 and OAR 137-049-0620), along with the process the Contracting Agency will use to determine acceptability of the Work;
- (i) If the Solicitation Document is an Invitation to Bid, the Contracting Agency shall set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, and ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors shall be objective, reasonable estimates based upon information the Contracting Agency has available concerning future use;
- (ii) If the Solicitation Document is a Request for Proposals, the Contracting Agency shall refer to the additional requirements of OAR 137-049-0650; and
- (c) Contract Provisions. The Contracting Agency shall include all Contract terms and conditions, including warranties, insurance and bonding requirements, that the Contracting Agency considers appropriate for the Public Improvement
- (a)

project. The Contracting Agency must also include all applicable Contract provisions required by Oregon law as follows:

- (A) Prompt payment to all Persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279C.505(1));
- (B) Demonstrate that an employee drug testing program is in place (ORS 279C.505(2));
- (C) If the Contract calls for demolition Work described in ORS 279C.510(1), a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;
- (D) If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective (ORS 279C.510(2));
- (E) Payment of claims by public officers (ORS 279C.515(1));
- (F) Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515(2), including the rate of interest;
- (G) Person's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279C.515(3));
- (H) Hours of labor in compliance with ORS 279C.520;
- (I) Environmental and natural resources regulations (ORS 279C.525);
- (J) Payment for medical care and attention to employees (ORS 279C.530(1));
- (K) A Contract provision substantially as follows: "All employers, including Contractor, that employ subject workers who work under this Contract in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530(2));
- (L) Maximum hours, holidays and overtime (ORS 279C.540);
- (M) Time limitation on claims for overtime (ORS 279C.545);
- (N) Prevailing wage rates (ORS 279C.800 to 279C.870);
- (O) BOLI Public Works bond (ORS 279C.830(2));
- (P) Retainage (ORS 279C.550 to 279C.570);
- (Q) Prompt payment policy, progress payments, rate of interest (ORS 279C.570);
- (R) Contractor's relations with subcontractors (ORS 279C.580);
- (S) Notice of claim (ORS 279C.605);
- (T) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385; and
- (U) Contractor's certification that all subcontractors performing Work described in ORS 701.005(2) (i.e., construction Work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence Work under the Contract.
- (V) If the Contract resulting from a solicitation will be a Public Improvement Contract, and if the Public Improvement that is the subject of the solicitation will have a value of \$20,000,000 or more and will be located within Multnomah County, Clackamas County or Washington County, State Contracting Agencies must include provisions in the Public Improvement Contract that meet the requirements of HB 2007 (2019 Oregon Laws, Chapter 645) for diesel engines and non-road diesel engines.

(2) Assignment or Transfer Restricted. Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, or transfer rights, or delegate duties under the Contract, either in whole or in part, without the Contracting Agency's prior Written consent. Unless otherwise agreed by the Contracting Agency in Writing, such consent shall not relieve the Contractor of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If the Contracting Agency consents in Writing to an assignment, sale, disposal or transfer of the Contractor's rights or delegation of Contractor's duties, the Contractor and its surety, if any, shall remain liable to the Contracting Agency for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the Contracting Agency otherwise agrees in Writing.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.110, ORS 279A.120, ORS 279C.365, ORS 279C.370, ORS 279C.390, ORS

279C.505 - 580, ORS 279C.605, ORS 305.385, ORS 468A.720, ORS 701.005 & ORS 701.055

History:

DOJ 15-2019, amend filed 12/23/2019, effective 01/01/2020 DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0210

Notice and Advertising Requirements; Posting

(1) Notice and Distribution Fee. A Contracting Agency shall furnish "Notice" as set forth below in subsections (a) through (c), to a number of Persons sufficient for the purpose of fostering and promoting competition. The Notice shall indicate where, when, how and for how long the Solicitation Document may be obtained and generally describe the Public Improvement project or Work. The Notice may contain any other appropriate information. The Contracting Agency may charge a fee or require a deposit for the Solicitation Document. The Contracting Agency may furnish Notice using any method determined to foster and promote competition, including:

(a) Mailing Notice of the availability of Solicitation Documents to Persons that have expressed an interest in the Contracting Agency's Procurements;

(b) Placing Notice on the Contracting Agency's Electronic Procurement System; or

(c) Placing Notice on the Contracting Agency's Internet Web site.

(2) Advertising. Pursuant to ORS 279C.360 and this rule, a Contracting Agency shall advertise every solicitation for competitive Bids or competitive Proposals for a Public Improvement Contract, unless the Contract Review Authority for that Contracting Agency has exempted the solicitation from the advertisement requirement as part of a competitive bidding exemption under ORS 279C.335.

(a) Unless the Contracting Agency publishes by Electronic Advertisement as permitted under subsection 2(b), the Contracting Agency shall publish the advertisement for Offers at least once in at least one newspaper of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as the Contracting Agency may determine to be necessary or desirable to foster and promote competition.

(b) A Contracting Agency may publish by Electronic Advertisement if the Contract Review Authority for the Contracting Agency determines Electronic Advertisement is likely to be cost effective and, by rule or order, authorizes Electronic Advertisement.

(c) In addition to the Contracting Agency's publication required under subsection 2(a) or 2(b), the Contracting Agency shall also publish an advertisement for Offers in at least one trade newspaper of general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000.

(d) All advertisements for Offers shall set forth:

(A) The Public Improvement project;

(B) The office where Contract terms, conditions and Specifications may be reviewed;

(C) The date that Persons must file applications for prequalification under ORS 279C.340, if prequalification is a requirement, and the class or classes of Work for which Persons must be prequalified;

(D) The scheduled Closing, which shall not be less than five Days after the date of the last publication of the advertisement;

(E) The name, title and address of the Contracting Agency Person authorized to receive Offers;

(F) The scheduled Opening; and

(G) If applicable, that the Contract is for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148).

(3) Minority, Women Emerging Small Business. State Contracting Agencies shall provide timely notice of all solicitations to the Advocate for Minority, Women and Emerging Small Business if the estimated Contract Price exceeds \$5,000. See ORS 200.035.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.360 & 200.035 **History:**

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
 DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08
 DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
 DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0220

Prequalification of Offerors

- (1) Prequalification. Pursuant to ORS 279C.430 and this rule, two types of prequalification are authorized:
- (a) Mandatory Prequalification. A Contracting Agency may, by rule, resolution, ordinance or other law or regulation, require mandatory prequalification of Offerors on forms prescribed by the Contracting Agency's Contract Review Authority. A Contracting Agency must indicate in the Solicitation Document if it will require mandatory prequalification. Mandatory prequalification is when a Contracting Agency conditions a Person's submission of an Offer upon the Person's prequalification. The Contracting Agency shall not consider an Offer from a Person that is not prequalified if the Contracting Agency required prequalification.
- (b) Permissive Prequalification. A Contracting Agency may prequalify a Person for the Contracting Agency's solicitation list on forms prescribed by the Contracting Agency's Contract Review Authority, but in permissive prequalification the Contracting Agency shall not limit distribution of a solicitation to that list.
- (2) Prequalification Presumed. If an Offeror is currently prequalified by either the Oregon Department of Transportation or the Oregon Department of Administrative Services to perform Contracts, the Offeror shall be rebuttably presumed qualified to perform similar Work for other Contracting Agencies.
- (3) Standards for Prequalification. A Person may prequalify by demonstrating to the Contracting Agency's satisfaction:
- (a) That the Person's financial, material, equipment, facility and personnel resources and expertise, or ability to obtain such resources and expertise, indicate that the Person is capable of meeting all contractual responsibilities;
- (b) The Person's record of performance;
- (c) The Person's record of integrity;
- (d) The Person is qualified to contract with the Contracting Agency. (See, OAR 137-049-0390(2) regarding standards of responsibility.)
- (4) Notice of Denial. If a Person fails to prequalify for a mandatory prequalification, the Contracting Agency shall notify the Person, specify the reasons under section (3) of this rule and inform the Person of the Person's right to a hearing under ORS 279C.445 and 279C.450.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.430 & 279C.435 **History:**

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
 DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
 DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0230

Eligibility to Bid or Propose; Registration or License

- (1) Construction Contracts. A Contracting Agency shall not consider a Person's Offer to do Work as a contractor, as defined in ORS 701.005(2), unless the Person has a current, valid certificate of registration issued by the Construction Contractors Board at the time the Offer is made.
- (2) Landscape Contracts. A Contracting Agency shall not consider a Person's Offer to do Work as a landscape contractor as defined in ORS 671.520(2), unless the Person has a current, valid landscape contractors license issued pursuant to 671.560 by the State Landscape Contractors Board at the time the offer is made.
- (3) Noncomplying Entities. The Contracting Agency shall deem an Offer received from a Person that fails to comply with this rule nonresponsive and shall reject the Offer as stated in ORS 279C.365(1)(k), unless contrary to federal law or subject to different timing requirements set by federal funding agencies.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.365, 671.530 & 701.055

History:

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0240**Pre-Offer Conferences**

- (1) Purpose. A Contracting Agency may hold pre-Offer conferences with prospective Offerors prior to Closing, to explain the Procurement requirements, obtain information or to conduct site inspections.
- (2) Required attendance. The Contracting Agency may require attendance at the pre-Offer conference as a condition for making an Offer. Unless otherwise specified in the Solicitation Document, a mandatory attendance requirement is considered to have been met if, at any time during the mandatory meeting, a representative of an offering firm is present.
- (3) Scheduled time. If a Contracting Agency holds a pre-Offer conference, it shall be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference.
- (4) Statements Not Binding. Statements made by a Contracting Agency's representative at the pre-Offer conference do not change the Solicitation Document unless the Contracting Agency confirms such statements with a Written Addendum to the Solicitation Document.
- (5) Contracting Agency Announcement. The Contracting Agency must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with OAR 137-049-0200(1)(a)(B).

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.365 & 279C.370 **History:** DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0250**Addenda to Solicitation Documents**

- (1) Issuance; Receipt. The Contracting Agency may change a Solicitation Document only by Written Addenda. An Offeror shall provide Written acknowledgement of receipt of all issued Addenda with its Offer, unless the Contracting Agency otherwise specifies in the Addenda or in the Solicitation Document.
- (2) Notice and Distribution. The Contracting Agency shall notify prospective Offerors of Addenda consistent with the standards of Notice set forth in OAR 137-049-0210(1). The Solicitation Document shall specify how the Contracting Agency will provide notice of Addenda and how the Contracting Agency will make the Addenda available (see, 137-049-0200(1)(a)(N)).

For example, "Contracting Agency will not mail notice of Addenda, but will publish notice of any Addenda on Contracting Agency's Web site. Addenda may be downloaded off the Contracting Agency's Web site. Offerors should frequently check the Contracting Agency's Web site until closing, i.e., at least once weekly until the week of Closing and at least once daily the week of the Closing."

- (3) Timelines; Extensions. The Contracting Agency shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The Contracting Agency may extend the Closing if the Contracting Agency determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by public interest, the Contracting Agency shall not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.
- (4) Request for Change or Protest. Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in OAR 137-049-0260, by the close of the Contracting Agency's next business day after issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under 137-049-0260, whichever date is later. The Contracting Agency shall consider only an Offeror's request for change or protest to the Addendum; the Contracting Agency shall not consider a request for change or protest to matters not added or modified by the Addendum, unless the Offeror submits the request for change or protest before the deadline for the Contracting Agency's receipt of request for change or protests as set forth in 137-049-0260(2) and (3).

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.395 & 279A.065 **History:** DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0260**Request for Clarification or Change; Solicitation Protests**

- (1) Clarification. Prior to the deadline for submitting a Written request for change or protest, an Offeror may request that the Contracting Agency clarify any provision of the Solicitation Document. The Contracting Agency's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on the Contracting Agency unless the Contracting Agency amends the Solicitation Document by Addendum.
- (2) Request for Change.
- (a) Delivery. An Offeror may request in Writing a change to the Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver the Written request for change to the Contracting Agency not less than 10 Days prior to Closing;
- (b) Content of Request for Change.
- (A) An Offeror's Written request for change shall include a statement of the requested change(s) to the Contract terms and conditions, including any Specifications, together with the reason for the requested change.
- (B) An Offeror shall mark its request for change as follows:
- (i) "Contract Provision Request for Change"; and
- (ii) Solicitation Document number (or other identification as specified in the Solicitation Document).
- (3) Protest.
- (a) Delivery. An Offeror may protest Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest on those matters to the Contracting Agency not less than 10 Days prior to Closing;
- (b) Content of Protest.
- (A) An Offeror's Written protest shall include:
- (i) A detailed statement of the legal and factual grounds for the protest;
- (ii) A description of the resulting prejudice to the Offeror; and
- (iii) A statement of the desired changes to the Contract terms and conditions, including any Specifications.
- (B) An Offeror shall mark its protest as follows:
- (i) "Contract Provision Protest"; and
- (ii) Solicitation Document number (or other identification as specified in the Solicitation Document).
- (4) Contracting Agency Response. The Contracting Agency is not required to consider an Offeror's request for change or protest after the deadline established for submitting such request or protest. The Contracting Agency shall provide notice to the applicable Person if it entirely rejects a protest. If the Contracting Agency agrees with the Person's requestor protest, in whole or in part, the Contracting Agency shall either issue an Addendum reflecting its determination under OAR 137-049-0260 or cancel the solicitation under OAR 137-049-0270.
- (5) Extension of Closing. If a Contracting Agency receives a Written request for change or protest from an Offeror in accordance with this rule, the Contracting Agency may extend Closing if the Contracting Agency determines an extension is necessary to consider the request or protest and issue an Addendum, if any, to the Solicitation Document.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.345 & 279C.365 **History:**
 DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
 DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
 DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0270

Cancellation of Solicitation Document

- (1) Cancellation in the Public Interest. A Contracting Agency may cancel a solicitation for good cause if the Contracting Agency finds that cancellation is in the public interest. The Contracting Agency's reasons for cancellation shall be made part of the solicitation file.
- (2) Notice of Cancellation. If the Contracting Agency cancels a solicitation prior to Opening, the Contracting Agency shall provide Notice of cancellation in accordance with OAR 137-049-0210(1). Such notice of cancellation shall:
- (1)

- (a) Identify the solicitation;
 - (b) Briefly explain the reason for cancellation; and
 - (c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.
- (3) Disposition of Offers.
- (a) Prior to Offer Opening. If the Contracting Agency cancels a solicitation prior to Offer Opening, the Contracting Agency shall return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the Contracting Agency shall open the Offer to determine the source and then return it to the Offeror.
 - (b) After Offer Opening. If the Contracting Agency rejects all Offers, the Contracting Agency shall retain all such Offers as part of the Contracting Agency's solicitation file.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.395 **History:**

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0280

Offer Submissions

- (1) Offer and Acceptance. The Bid or Proposal is the Bidder's or Proposer's offer to enter into a Contract.
 - (a) In competitive bidding and competitive Proposals, the Offer is always a "Firm Offer," i.e., the Offer shall be held open by the Offeror for the Contracting Agency's acceptance for the period specified in OAR 137-049-0410. The Contracting Agency may elect to accept the Offer at any time during the specified period, and the Contracting Agency's Award of the Contract to a Bidder constitutes acceptance of the Offer and binds the Offeror to the Contract.
 - (b) Notwithstanding the fact that a competitive Proposal is a "Firm Offer" for the period specified in OAR 137-049-0410, the Contracting Agency may elect to discuss or negotiate certain contractual provisions, as identified in these rules or in the Solicitation Document, with the Proposer. See 137-049-0650 on Requests for Proposals and 137-049-0290 on Bid or Proposal Security. Where negotiation is permitted by the rules or the Solicitation Document, Proposers are bound to an obligation to negotiate in good faith and only on those terms that the rules or the Solicitation Document has reserved for negotiation.
 - (2) Responsive Offer. A Contracting Agency may Award a Contract only to a Responsible Offeror with a Responsive Offer.
 - (3) Contingent Offers. Except to the extent that an Offeror is authorized to propose certain terms and conditions pursuant to OAR 137-049-0650, an Offeror shall not make an Offer contingent upon the Contracting Agency's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.
 - (4) Offeror's Acknowledgement. By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits Proposal of alternative terms under OAR 137-049-0650, the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the Contracting Agency in Writing.
 - (5) Instructions. An Offeror shall submit and Sign its Offer in accordance with the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document.
 - (6) Forms. An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.
 - (7) Documents. An Offeror shall provide the Contracting Agency with all documents and Descriptive Literature required under the Solicitation Document.
 - (8) Facsimile or Electronic Submissions. If the Contracting Agency permits facsimile or electronic Offers in the Solicitation Document, the Offeror may submit facsimile or electronic Offers in accordance with the Solicitation Document. The Contracting Agency shall not consider facsimile or electronic Offers unless authorized by the Solicitation Document.
- (1)

(9) Product Samples and Descriptive Literature. A Contracting Agency may require Product Samples or Descriptive Literature if it is necessary or desirable to evaluate the quality, features or characteristics of the offered items. The Contracting Agency will dispose of Product Samples, or return or make available for return Product Samples to the Offeror in accordance with the Solicitation Document.

(10) Identification of Offers.

(a) To ensure proper identification and handling, Offers shall be submitted in a sealed envelope appropriately marked or in the envelope provided by the Contracting Agency, whichever is applicable.

(b) The Contracting Agency is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.

(11) Receipt of Offers. The Offeror is responsible for ensuring that the Contracting Agency receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.365 & 279C.375 **History:**

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0290

Bid or Proposal Security

(1) Security Amount. If a Contracting Agency requires Bid or Proposal security, it shall be not more than 10% or less than 5% of the Offeror's Bid or Proposal, consisting of the base Bid or Proposal together with all additive alternates. A Contracting Agency shall not use Bid or Proposal security to discourage competition. The Contracting Agency shall clearly state any Bid or Proposal security requirements in its Solicitation Document. The Offeror shall forfeit Bid or Proposal security after Award if the Offeror fails to execute the Contract and promptly return it with any required performance bond, payment bond and any required proof of insurance. See ORS 279C.365(5) and 279C.385.

(2) Requirement for Bid Security (Optional for Proposals). Unless a Contracting Agency has otherwise exempted a solicitation or class of solicitations from Bid security pursuant to ORS 279C.390, the Contracting Agency shall require Bid security for its solicitation of Bids for Public Improvements. This requirement applies only to Public Improvement Contracts with a value, estimated by the Contracting Agency, of more than \$100,000 or, in the case of Contracts for highways, bridges and other transportation projects, more than \$50,000. See ORS 279C.365(6). The Contracting Agency may require Bid security even if it has exempted a class of solicitations from Bid security. Contracting Agencies may also require Proposal security in RFPs. See ORS 279C.400(5).

(3) Form of Bid or Proposal Security. A Contracting Agency may accept only the following forms of Bid or Proposal security:

- (a) A surety bond from a surety company authorized to do business in the State of Oregon;
- (b) An irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or
- (c) A cashier's check or Offeror's certified check.

(4) Return of Security. A Contracting Agency shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been fully executed and all required bonds and insurance have been provided, or after all Offers have been rejected. The Contracting Agency may return the Bid or Proposal security of unsuccessful Offerors prior to Award if the return does not prejudice Contract Award and the security of at least the Bidders with the three lowest Bids, or the Proposers with the three highest scoring Proposals, is retained pending execution of a Contract.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.365, 279C.385 & 279C.390

History:

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0300

Facsimile Bids and Proposals

(1) Contracting Agency Authorization. A Contracting Agency may authorize Offerors to submit facsimile Offers. If the Contracting Agency determines that Bid or Proposal security is or will be required, the Contracting Agency shall not authorize facsimile Offers unless the Contracting Agency has established a method for receipt of such security. Prior to authorizing the submission of facsimile Offers, the Contracting Agency shall determine that the Contracting Agency's equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time. In addition, the Contracting Agency shall establish administrative procedures and controls:

- (a) To receive, identify, record and safeguard facsimile Offers;
- (b) To ensure timely delivery of Offers to the location of Opening; and
- (c) To preserve the Offers as sealed.

(2) Provisions To Be Included in Solicitation Document. In addition to all other requirements, if the Contracting Agency authorizes a facsimile Offer for Bids or Proposals, the Contracting Agency shall include in the Solicitation Document (other than in a Request for Quotes) the following:

- (a) A provision substantially in the form of the following: "A 'facsimile Offer,' as used in this Solicitation Document, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by the Contracting Agency via a facsimile machine";
- (b) A provision substantially in the form of the following: "Offerors may submit facsimile Offers in response to this Solicitation Document. The entire response must arrive at the place and by the time specified in this Solicitation Document.";
- (c) A provision that requires Offerors to Sign their facsimile Offers;
- (d) A provision substantially in the form of the following: "The Contracting Agency reserves the right to Award the Contract solely on the basis of the facsimile Offer. However, upon the Contracting Agency's request the apparent successful Offeror shall promptly submit its complete original Signed Offer.";
- (e) The data and compatibility characteristics of the Contracting Agency's receiving facsimile machine as follows:
 - (A) Telephone number; and
 - (B) Compatibility characteristics, e.g., make and model number, receiving speed, communications protocol; and
- (f) A provision that the Contracting Agency is not responsible for any failure attributable to the transmission or receipt of the facsimile Offer including, but not limited to the following:
 - (A) Receipt of garbled or incomplete documents;
 - (B) Availability or condition of the receiving facsimile machine;
 - (C) Incompatibility between the sending and receiving facsimile machine;
 - (D) Delay in transmission or receipt of documents;
 - (E) Failure of the Offeror to properly identify the Offer documents;
 - (F) Illegibility of Offer documents; and
 - (G) Security and confidentiality of data.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.365 **History:**
DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0310

Electronic Procurement

(1) General. Contracting Agencies may utilize Electronic Advertisement of Public Improvement Contracts in accordance with ORS 279C.360(1), provided that advertisement of such Contracts with an estimated Contract Price in excess of \$125,000 must also be published in a trade newspaper of general statewide circulation, and may post notices of intent to Award electronically as provided by ORS 279C.410(7).

(2) Alternative Procedures. In the event that a Contracting Agency desires to direct or permit the submission and receipt of Offers for a Public Improvement Contract by electronic means, as allowed under ORS 279C.365(1)(d), it shall first promulgate supporting procedures substantially in conformance with OAR 137-047-0330 (Electronic Procurement

(1)

under ORS Chapter 279B), taking into account ORS Chapter 279C requirements for Written bids, opening bids publicly, bid security, first-tier subcontractor disclosure and inclusion of prevailing wage rates.

(3) Interpretation. Nothing in this rule shall be construed as prohibiting Contracting Agencies from making procurement documents for Public Improvement Contracts available in electronic format as well as in hard copy when Bids are to be submitted only in hard copy. See ORS 279C.365(2).

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.365 **History:**

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0320

Pre-Closing Modification or Withdrawal of Offers

(1) Modifications. An Offeror may modify its Offer in Writing prior to the Closing. An Offeror shall prepare and submit any modification to its Offer to the Contracting Agency in accordance with OAR 137-049-0280, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:

- (a) Bid (or Proposal) Modification; and
- (b) Solicitation Number (or Other Identification as specified in the Solicitation Document).

(2) Withdrawals.

(a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, Signed by an authorized representative of the Offeror, delivered to the location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by the Contracting Agency prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in Person prior to the Closing, upon presentation of appropriate identification and satisfactory evidence of authority.

(b) The Contracting Agency may release an unopened Offer withdrawn under subsection 2(a) to the Offeror or its authorized representative, after voiding any date and time stamp mark.

(c) The Offeror shall mark the Written request to withdraw an Offer as follows:

- (A) Bid (or Proposal) Withdrawal; and
- (B) Solicitation Number (or Other Identification as specified in the Solicitation Document).

(3) Documentation. The Contracting Agency shall include all documents relating to the modification or withdrawal of Offers in the appropriate solicitation file.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.360, 279C.365, 279C.375 & 279C.395

History:

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0330

Receipt, Opening and Recording of Offers; Confidentiality of Offers

(1) Receipt. A Contracting Agency shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The Contracting Agency shall not open the Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If the Contracting Agency inadvertently opens an Offer or a modification prior to the Opening, the Contracting Agency shall return the Offer or modification to its secure and confidential state until Opening. The Contracting Agency shall document the resealing for the Procurement file (e.g. "Contracting Agency inadvertently opened the Offer due to improper identification of the Offer").

(2) Opening and Recording. A Contracting Agency shall publicly open Offers including any modifications made to the Offer pursuant to OAR 137-049-0320. In the case of Invitations to Bid, to the extent practicable, the Contracting Agency shall read aloud the name of each Bidder, the Bid price(s), and such other information as the Contracting Agency considers appropriate. In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the Contracting Agency will not read Offers aloud.

(1)

(3) Availability. After Opening, the Contracting Agency shall make Bids available for public inspection, but pursuant to ORS 279C.410 Proposals are not required to be available for public inspection until after notice of intent to award is issued. In any event Contracting Agencies may withhold from disclosure those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.345(2); 646.461 to 646.475. To the extent the Contracting Agency determines such designation is not in accordance with applicable law, the Contracting Agency shall make those portions available for public inspection. The Offeror shall separate information designated as confidential from other nonconfidential information at the time of submitting its Offer. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and shall be publicly available regardless of an Offeror's designation to the contrary.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.365, ORS 279C.375 & ORS 279C.395

History:

[DOJ 13-2019, minor correction filed 11/04/2019, effective 11/04/2019](#) DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0340

Late Bids, Late Withdrawals and Late Modifications

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. A Contracting Agency shall not consider late Offers, withdrawals or modifications except as permitted in OAR 137-049-0350 or 137-049-0390.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.365, 279C.375 & 279C.395

History:

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0350

Mistakes

(1) Generally. To protect the integrity of the competitive Procurement process and to assure fair treatment of Offerors, a Contracting Agency should carefully consider whether to permit waiver, correction or withdrawal of Offers for certain mistakes.

(2) Contracting Agency Treatment of Mistakes. A Contracting Agency shall not allow an Offeror to correct or withdraw an Offer for an error in judgment. If the Contracting Agency discovers certain mistakes in an Offer after Opening, but before Award of the Contract, the Contracting Agency may take the following action:

(a) A Contracting Agency may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:

(A) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;

(B) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and

(C) Acknowledge receipt of an Addendum to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addendum and intended to be bound by its terms; or the Addendum involved did not affect price, quality or delivery.

(b) A Contracting Agency may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms the Contracting Agency's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Unit prices shall prevail over extended prices in the event of a discrepancy between extended prices and unit prices.

(c) A Contracting Agency may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:

(A) The nature of the error;

(B) That the error is not a minor informality under this subsection or an error in judgment;

(C) That the error cannot be corrected or waived under subsection (b) of this section;

(A)

- (D) That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;
- (E) That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;
- (F) That the Offeror will suffer substantial detriment if the Contracting Agency does not grant the Offeror permission to withdraw the Offer;
- (G) That the Contracting Agency's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on the Contracting Agency or the public it represents; and
- (H) That the Offeror promptly gave notice of the claimed error to the Contracting Agency.
- (d) The criteria in subsection (2)(c) of this rule shall determine whether a Contracting Agency will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether a Contracting Agency will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to the Contracting Agency based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by the Contracting Agency, whether by Award to the next lowest Responsive and Responsible Bidder or the best Responsive and Responsible Proposer, or by resort to a new solicitation.
- (3) Rejection for Mistakes. The Contracting Agency shall reject any Offer in which a mistake is evident on the face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents submitted with the Offer.
- (4) Identification of Mistakes after Award. The procedures and criteria set forth above are Offeror's only opportunity to correct mistakes or withdraw Offers because of a mistake. Following Award, an Offeror is bound by its Offer, and may withdraw its Offer or rescind a Contract entered into pursuant to this division 49 only to the extent permitted by applicable law.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.375 & 279C.395 **History:**
 DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
 DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0360

First-Tier Subcontractors; Disclosure and Substitution

- (1) Required Disclosure. Within two working hours after the Bid Closing on an ITB for a Public Improvement having a Contract Price anticipated by the Contracting Agency to exceed \$100,000, all Bidders shall submit to the Contracting Agency a disclosure form as described by ORS 279C.370(2), identifying any first-tier subcontractors (those Entities that would be contracting directly with the prime contractor) that will be furnishing labor or labor and materials on the Contract, if Awarded, whose subcontract value would be equal to or greater than:
- (a) Five percent of the total Contract Price, but at least \$15,000; or
- (b) \$350,000, regardless of the percentage of the total Contract Price.
- (2) Bid Closing, Disclosure Deadline and Bid Opening. For each ITB to which this rule applies, the Contracting Agency shall:
- (a) Set the Bid Closing on a Tuesday, Wednesday or Thursday, and at a time between 2 p.m. and 5 p.m., except that these Bid Closing restrictions do not apply to an ITB for maintenance or construction of highways, bridges or other transportation facilities, and provided that the two-hour disclosure deadline described by this rule would not then fall on a legal holiday;
- (b) Open Bids publicly immediately after the Bid Closing; and
- (c) Consider for Contract Award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed by the Contracting Agency.
- (3) Bidder Instructions and Disclosure Form. For the purposes of this rule, a Contracting Agency in its solicitation shall:
- (a) Prescribe the disclosure form that must be utilized, substantially in the form set forth in ORS 279C.370(2); and
- (b) Provide instructions in a notice substantially similar to the following: "Instructions for First-Tier Subcontractor Disclosure"
- (a)

Bidders are required to disclose information about certain first-tier subcontractors (see ORS 279C.370). Specifically, when the contract amount of a first-tier subcontractor furnishing labor or labor and materials would be greater than or equal to: (i) 5% of the project Bid, but at least \$15,000; or (ii) \$350,000 regardless of the percentage, the Bidder must disclose the following information about that subcontract either in its Bid submission, or within two hours after Bid Closing:

- (A) The subcontractor's name;
- (B) The category of Work that the subcontractor would be performing, and
- (C) The dollar value of the subcontract. If the Bidder will not be using any subcontractors that are subject to the above disclosure requirements, the Bidder is required to indicate "NONE" on the accompanying form.

THE CONTRACTING AGENCY MUST REJECT A BID IF THE BIDDER FAILS TO SUBMIT THE DISCLOSURE FORM WITH THIS INFORMATION BY THE STATED DEADLINE (see OAR 137-049-0360)."

- (4) Submission. A Bidder shall submit the disclosure form required by this rule either in its Bid submission, or within two working hours after Bid Closing in the manner specified by the ITB.
- (5) Responsiveness. Compliance with the disclosure and submittal requirements of ORS 279C.370 and this rule is a matter of Responsiveness. Bids that are submitted by Bid Closing, but for which the disclosure submittal has not been made by the specified deadline, are not Responsive and shall not be considered for Contract Award.
- (6) Contracting Agency Role. Contracting Agencies shall obtain, and make available for public inspection, the disclosure forms required by ORS 279C.370 and this rule. Contracting Agencies shall also provide copies of disclosure forms to the Bureau of Labor and Industries as required by ORS 279C.835. Contracting Agencies are not required to determine the accuracy or completeness of the information provided on disclosure forms.
- (7) Substitution. Substitution of affected first-tier subcontractors shall be made only in accordance with ORS 279C.585. Contracting Agencies shall accept Written submissions filed under that statute as public records. Aside from issues involving inadvertent clerical error under ORS 279C.585, Contracting Agencies do not have a statutory role or duty to review, approve or resolve disputes concerning such substitutions. See ORS 279C.590 regarding complaints to the Construction Contractors Board on improper substitution.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.370, 279C.585, 279C.590 & 279C.835

History:

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0370

Disqualification of Persons

- (1) Authority. A Contracting Agency may disqualify a Person from consideration of Award of the Contracting Agency's Contracts after providing the Person with notice and a reasonable opportunity to be heard in accordance with sections (2) and (4) of this rule.
- (a) Standards for Conduct Disqualification. As provided in ORS 279C.440, a Contracting Agency may disqualify a Person for:
 - (A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.
 - (B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the Person's responsibility as a contractor.
 - (C) Conviction under state or federal antitrust statutes.
 - (D) Violation of a contract provision that is regarded by the Contracting Agency to be so serious as to justify Conduct Disqualification. A violation under this subsection (1)(a)(D) may include but is not limited to material failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a Person's failure to perform or unsatisfactory performance caused by acts beyond the Person's control is not a basis for Disqualification.
- (b) Standards for Disqualification. As provided in ORS 200.065, 200.075 or 279A.110, a Contracting Agency may disqualify a Person's right to submit an Offer or to participate in a Contract (e.g. subcontractors) as follows:
 - (a)

- (A) For a Disqualification under ORS 200.065, the Contracting Agency may disqualify a Person upon finding that:
- (i) The Person fraudulently obtained or retained or attempted to obtain or retain or aided another Person to fraudulently obtain or retain or attempt to obtain or retain certification as a disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business, or a business that a service-disabled veteran owns; or
 - (ii) The Person knowingly made a false claim that any Person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit; or
 - (iii) The Person has been disqualified by another Contracting Agency under ORS 200.065.
- (B) For a Disqualification under ORS 200.075, the Contracting Agency may disqualify a Person upon finding that:
- (i) The Person has entered into an agreement representing that a disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business, or a business that a service-disabled veteran owns, certified under ORS 200.055 ("Certified Enterprise"), will perform or supply materials under a Public Improvement Contract without the knowledge and consent of the Certified Enterprise; or
 - (ii) The Person exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any Certified Enterprise; or
 - (iii) The Person uses a Certified Enterprise to perform Work under a Public Improvement Contract to meet an established Certified Enterprise goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the contract.
 - (iv) If a Person is Disqualified for a Disqualification under ORS 200.075, the affected Contracting Agency shall not permit that Person to participate in that Contracting Agency's Contracts.
- (C) For a Disqualification under ORS 279A.110, a Contracting Agency may disqualify a Person if the Contracting Agency finds that the Person discriminated against a disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business, or a business that a service-disabled veteran owns in awarding a subcontract under a Contract with that Contracting Agency.
- (2) Notice of Intent to Disqualify. The Contracting Agency shall notify the Person in Writing of a proposed Disqualification personally or by registered or certified mail, return receipt requested. This notice shall:
- (a) State that the Contracting Agency intends to disqualify the Person;
 - (b) Set forth the reasons for the Disqualification;
 - (c) Include a statement of the Person's right to a hearing if requested in Writing within the time stated in the notice and that if the Contracting Agency does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived its right to a hearing;
 - (d) Include a statement of the authority under which the hearing will be held;
 - (e) Include a reference to the particular sections of the statutes and rules involved;
 - (f) State the proposed Disqualification period; and
 - (g) State that the Person may be represented by legal counsel.
- (3) Hearing. The Contracting Agency shall schedule a hearing upon the Contracting Agency's receipt of the Person's timely hearing request. Within a reasonable time prior to the hearing, the Contracting Agency shall notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing.
- (4) Notice of Disqualification. The Contracting Agency will notify the Person in Writing of its Disqualification, personally or by registered or certified mail, return receipt requested. The notice shall contain:
- (a) The effective date and period of Disqualification;
 - (b) The grounds for Disqualification; and
 - (c) A statement of the Person's appeal rights and applicable appeal deadlines. For a Conduct Disqualification or a Disqualification under ORS 279A.110, the disqualified person must notify the Contracting Agency in Writing within three business Days after receipt of the Contracting Agency's notice of Disqualification if the Person intends to appeal the Contracting Agency's decision.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 200.065, 200.075, 279A.110, 279C.440, 279C.445, 279C.450, OL 2015 & ch 565

(HB 3303)

History:

DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0380**Bid or Proposal Evaluation Criteria**

(1) General. A Public Improvement Contract, if Awarded, must be Awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. (See OAR 137-049-0390, and Rules for Alternative Contracting Methods at 137-049-0600 to 137-049-0690.)

(2) Bid Evaluation Criteria. Invitations to Bid may solicit lump-sum Offers, unit-price Offers or a combination of the two.

(a) Lump Sum. If the ITB requires a lump-sum Bid, without additive or deductive alternates, or if the Contracting Agency elects not to award additive or deductive alternates, Bids must be compared on the basis of lump-sum prices, or lump-sum base Bid prices, as applicable. If the ITB calls for a lump-sum base Bid, plus additive or deductive alternates, the total Bid price must be calculated by adding to or deducting from the base Bid those alternates selected by the Contracting Agency, for the purpose of comparing Bids.

(b) Unit Price. If the Bid includes unit pricing for estimated quantities, the total Bid price must be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by the Contracting Agency, for the purpose of comparing Bids. Contracting Agencies shall specify within the Solicitation Document the estimated quantity of the procurement to be used for determination of the low Bidder. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price governs. (See OAR 137-049-0350(2)(b).)

(3) Proposal Evaluation Criteria. If the Contracting Agency's Contract Review Authority has exempted the Procurement of a Public Improvement from the competitive bidding requirements of ORS 279C.335(1), and has directed the Contracting Agency to use an Alternative Contracting Method under 279C.335(4), the Contracting Agency shall set forth the evaluation criteria in the Solicitation Documents. (See OAR 137-049-0640, 137-049-0650, 137-049-0670, 137-049-0690, ORS 279C.335 and 279C.405.)

Statutory/Other Authority: ORS 279A.065, OL 2011 & ch 458 **Statutes/Other Implemented:** ORS 279C.335, OL 2011 & ch 458 **History:**

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0390**Offer Evaluation and Award; Determination of Responsibility**

(1) General. If Awarded, the Contracting Agency shall Award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer or Proposers submitting the best, Responsive Proposal or Proposals, provided that such Person is not listed by the Construction Contractors Board as disqualified to hold a Public Improvement Contract (ORS 279C.375(3)(a)) or is ineligible for Award as a nonresident education service district (ORS 279C.325). The Contracting Agency may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in the public interest. Where Award is based on competitive Bids, ORS 279C.375(5) permits multiple Contract awards when specified in the ITB.

(2) Determination of Responsibility. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the Contracting Agency must have information that indicates that the Offeror meets the standards of responsibility set forth in ORS 279C.375(3)(b). To be a Responsible Offeror, the Contracting Agency must determine that the Offeror:

(a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to meet all contractual responsibilities;

(b) Has completed previous contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that, to the extent the costs associated with and time available to perform a previous contract were within the Offeror's control, the Offeror stayed within the time and budget allotted for the procurement

(a)

and otherwise performed the contract in a satisfactory manner. A Contracting Agency should carefully scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in contract performance. In reviewing the Offeror's performance, the Contracting Agency should determine whether the Offeror's deficient performance was expressly excused under the terms of the contract, or whether the Offeror took appropriate corrective action. The Contracting Agency may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. The Contracting Agency shall make its basis for determining an Offeror not Responsible under this paragraph part of the Solicitation file;

(c) Has a satisfactory record of integrity. An Offeror may lack integrity if a Contracting Agency determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to a Contracting Agency. A Contracting Agency may find an Offeror not Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Conduct Disqualification under OAR 137-049-0370 may be used to determine an Offeror's integrity. A Contracting Agency may find an Offeror non-responsible based on previous convictions of offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the Offeror's performance of a contract or subcontract. The Contracting Agency shall make its basis for determining that an Offeror is not Responsible under this paragraph part of the Solicitation file;

(d) Is legally qualified to contract with the Contracting Agency;

(e) In State Contracting Agency procurements, possesses an unexpired certificate, issued by the Oregon Department of Administrative Services under 2015 Oregon Laws, chapter 454, section 2, if the Offeror employs 50 or more full-time workers at the time of the Bid or Proposal Closing and the estimated Contract Price exceeds \$500,000; and

(f) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by the Contracting Agency concerning responsibility, the Contracting Agency shall base the determination of responsibility on any available information, or may find the Offeror not Responsible.

(3) In addition to making the responsibility determination under ORS 279C.375(3)(b) and section (2) of this rule, the Contracting Agency may consider, as authorized by House Bill 2094 (2019 Oregon Laws, chapter 124), as part of the Contracting Agency's evaluation of an Offer, whether the Offeror owes a liquidated and delinquent debt to the State of Oregon.

(4) Documenting Agency Determinations. Contracting Agencies shall document their compliance with ORS 279C.375(3) and the above sections of this rule on a Responsibility Determination Form substantially as set forth in 279.375(3)(c), and file that form with the Construction Contractors Board within 30 days after Contract Award.

(5) Contracting Agency Evaluation. The Contracting Agency shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. The Contracting Agency shall not evaluate an Offer using any other requirement or criterion.

(6) Offeror Submissions.

(a) The Contracting Agency may require an Offeror to submit Product Samples, Descriptive Literature, technical data, or other material and may also require any of the following prior to Award:

(A) Demonstration, inspection or testing of a product prior to Award for characteristics such as compatibility, quality or workmanship;

(B) Examination of such elements as appearance or finish; or

(C) Other examinations to determine whether the product conforms to Specifications.

(b) The Contracting Agency shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. The Contracting Agency shall reject an Offer providing any product that does not meet the Solicitation Document requirements. A Contracting Agency's rejection of an Offer because it offers nonconforming Work or materials is not Disqualification and is not appealable under ORS 279C.445.

(7) Evaluation of Bids. The Contracting Agency shall use only objective criteria to evaluate Bids as set forth in the ITB. The Contracting Agency shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid.

(a) Nonresident Bidders. In determining the lowest Responsive Bid, the Contracting Agency shall, in accordance with OAR 137-046-0310, add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.

(b) Clarifications. In evaluating Bids, a Contracting Agency may seek information from a Bidder only to clarify the Bidder's Bid. Such clarification shall not vary, contradict or supplement the Bid. A Bidder must submit Written and Signed clarifications and such clarifications shall become part of the Bidder's Bid.

(a)

(c) Negotiation Prohibited. The Contracting Agency shall not negotiate scope of Work or other terms or conditions under an Invitation to Bid process prior to Award.

(8) Evaluation of Proposals. See OAR 137-049-0650 regarding rules applicable to Requests for Proposals.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.335, ORS 279C.365, ORS 279C.375, ORS 279C.395, OL 2015 & ch 454 (SB 491)

History:

[DOJ 15-2019, amend filed 12/23/2019, effective 01/01/2020](#) DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0395

Notice of Intent to Award

(1) Notice. At least seven days before the Award of a Public Improvement Contract, the Contracting Agency shall issue to each Bidder (pursuant to ORS 279C.375(2)) and each Proposer (pursuant to 279C.410(7)), or post electronically or otherwise, a notice of the Contracting Agency's intent to Award the Contract. This requirement does not apply to Award of a small (under \$5,000) or intermediate (informal competitive quotes) Public Improvement Contract awarded under 279C.335(1)(c) or (d).

(2) Form and Manner of Posting. The form and manner of posting notice shall conform to customary practices within the Contracting Agency's procurement system, and may be made electronically.

(3) Finalizing Award. The Contracting Agency's Award shall not be final until the later of the following:

(a) Seven Days after the date of the notice, unless the Solicitation Document provided a different period for protest; or

(b) The Contracting Agency provides a Written response to all timely-filed protests that denies the protest and affirms the Award.

(4) Prior Notice Impractical. Posting of notice of intent to award shall not be required when the Contracting Agency determines that it is impractical due to unusual time constraints in making prompt Award for its immediate procurement needs, documents the Contract file as to the reasons for that determination, and posts notice of that action as soon as reasonably practical.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.375 **History:**

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

137-049-0400

Documentation of Award; Availability of Award Decisions

(1) Basis of Award. After Award, the Contracting Agency shall make a record showing the basis for determining the successful Offeror part of the Contracting Agency's solicitation file.

(2) Contents of Award Record for Bids. The Contracting Agency's record shall include:

(a) All submitted Bids;

(b) Completed Bid tabulation sheet; and

(c) Written justification for any rejection of lower Bids.

(3) Contents of Award Record for Proposals. Where the use of Requests for Proposals is authorized as set forth in OAR 137-049-0650, the Contracting Agency's record shall include:

(a) All submitted Proposals.

(b) The completed evaluation of the Proposals;

(c) Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and

(a)

(d) If the Contracting Agency permitted negotiations in accordance with OAR 137-049-0650, the Contracting Agency's completed evaluation of the initial Proposals and the Contracting Agency's completed evaluation of final Proposals.

(4) Contract Document. The Contracting Agency shall deliver a fully executed copy of the final Contract to the successful Offeror.

(5) Bid Tabulations and Award Summaries. Upon request of any Person the Contracting Agency shall provide tabulations of Awarded Bids or evaluation summaries of Proposals for a nominal charge which may be payable in advance. Requests must contain the Solicitation Document number and, if requested, be accompanied by a self-addressed, stamped envelope. Contracting Agencies may also provide tabulations of Bids and Proposals Awarded on designated Web sites or on the Contracting Agency's Electronic Procurement System.

(6) Availability of Solicitation Files. The Contracting Agency shall make completed solicitation files available for public review at the Contracting Agency.

(7) Copies from Solicitation Files. Any Person may obtain copies of material from solicitation files upon payment of a reasonable copying charge.

(8) Minority, Women Emerging Small Business. State Contracting Agencies shall provide timely notice of Contract Award to the Advocate for Minority, Women and Emerging Small Business if the estimated Contract Price exceeds \$5,000. See ORS 200.035.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.365 & 279C.375 **History:**

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0410

Time for Contracting Agency Acceptance; Extension

(1) Time for Offer Acceptance. An Offeror's Bid, or Proposal submitted as a Firm Offer (see OAR 137-049-0280), is irrevocable, valid and binding on the Offeror for not less than 30 Days from Closing unless otherwise specified in the Solicitation Document.

(2) Extension of Acceptance Time. A Contracting Agency may request, orally or in Writing, that Offerors extend, in Writing, the time during which the Contracting Agency may consider and accept their Offer(s). If an Offeror agrees to such extension, the Offer shall continue as a Firm Offer, irrevocable, valid and binding on the Offeror for the agreed- upon extension period.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.375 **History:**

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0420

Negotiation With Bidders Prohibited

(1) Bids. Except as permitted by ORS 279C.340 and OAR 137-049-0430 when all bids exceed the cost estimate, a Contracting Agency shall not negotiate with any Bidder prior to Contract Award. After Award of the Contract, the Contracting Agency and Contractor may modify the resulting Contract only by change order or amendment to the Contract in accordance with 137-049-0910.

(2) Requests for Proposals. A Contracting Agency may conduct discussions or negotiations with Proposers only in accordance with the requirements of OAR 137-049-0650.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.340 & 279C.375 **History:**

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0430

Negotiation When Bids Exceed Cost Estimate

(1) Generally. In accordance with ORS 279C.340, if all Responsive Bids from Responsible Bidders on a competitively Bid Project exceed the Contracting Agency's Cost Estimate, prior to Contract Award the Contracting Agency may negotiate Value Engineering and Other Options with the Responsible Bidder submitting the lowest, Responsive Bid in an attempt to bring the Project within the Contracting Agency's Cost Estimate. The subcontractor disclosure and substitution requirements of OAR 137-049-0360 do not apply to negotiations under this rule.

(2) Definitions. The following definitions apply to this administrative rule:

(a) "Cost Estimate" means the Contracting Agency's most recent pre-Bid, good faith assessment of anticipated Contract costs, consisting either of an estimate of an architect, engineer or other qualified professional, or confidential cost calculation work sheets, where available, and otherwise consisting of formal planning or budgetary documents.

(b) "Other Options" means those items generally considered appropriate for negotiation in the RFP process, relating to the details of Contract performance as specified in OAR 137-049-0650, but excluding any material requirements previously announced in the solicitation process that would likely affect the field of competition.

(c) "Project" means a Public Improvement.

(d) "Value Engineering" means the identification of alternative methods, materials or systems which provide for comparable function at reduced initial or life-time cost. It includes proposed changes to the plans, Specifications, or other Contract requirements which may be made, consistent with industry practice, under the original Contract by mutual agreement in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the Public Improvement. Cost savings include those resulting from life cycle costing, which may either increase or decrease absolute costs over varying time periods.

(3) Rejection of Bids. In determining whether all Responsive Bids from Responsible Bidders exceed the Cost Estimate, only those Bids that have been formally rejected, or Bids from Bidders who have been formally disqualified by the Contracting Agency, shall be excluded from consideration.

(4) Scope of Negotiations. Contracting Agencies shall not proceed with Contract Award if the scope of the Project is significantly changed from the original Bid. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other Bidders would have been expected by the Contracting Agency to participate in the Bidding process had the change been made during the solicitation process rather than during negotiation. This rule shall not be construed to prohibit resolicitation of trade subcontracts.

(5) Discontinuing Negotiations. The Contracting Agency may discontinue negotiations at any time, and shall do so if it appears to the Contracting Agency that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to rebid any portion of the project, or to obtain subcontractor pricing information upon request, shall be considered a lack of good faith.

(6) Limitation. Negotiations may be undertaken only with the lowest Responsive, Responsible Bidder pursuant to ORS 279C.340. That statute does not provide any additional authority to further negotiate with Bidders next in line for Contract Award.

(7) Public Records. To the extent that a Bidder's records used in Contract negotiations under ORS 279C.340 are public records, they are exempt from disclosure until after the negotiated Contract has been awarded or the negotiation process has been terminated, at which time they are subject to disclosure pursuant to the provisions of the Oregon Public Records Law, ORS 192.311 through 192.478.

Statutory/Other Authority: ORS 279C.340 & ORS 279A.065

Statutes/Other Implemented: ORS 279C.340

History:

[DOJ 14-2019, minor correction filed 11/04/2019, effective 11/04/2019](#) DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0440

Rejection of Offers

(1) Rejection of an Offer.

(a) A Contracting Agency may reject any Offer upon finding that to accept the Offer may impair the integrity of the Procurement process or that rejecting the Offer is in the public interest.

(b) The Contracting Agency shall reject an Offer upon the Contracting Agency's finding that the Offer:

(a)

- (A) Is contingent on the Contracting Agency's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;
 - (B) Takes exception to terms and conditions (including Specifications);
 - (C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of Solicitation Document or in contravention of applicable law;
 - (D) Offers Work that fails to meet the Specifications of the Solicitation Document;
 - (E) Is late;
 - (F) Is not in substantial compliance with the Solicitation Documents;
 - (G) Is not in substantial compliance with all prescribed public solicitation procedures.
- (c) The Contracting Agency shall reject an Offer upon the Contracting Agency's finding that the Offeror:
- (A) Has not been prequalified under ORS 279C.430 and the Contracting Agency required mandatory prequalification;
 - (B) Has been Disqualified;
 - (C) Has been declared ineligible under ORS 279C.860 by the Commissioner of Bureau of Labor and Industries and the Contract is for a Public Work;
 - (D) Is listed as not qualified by the Construction Contractors Board, if the Contract is for a Public Improvement;
 - (E) Has not met the requirements of ORS 279A.105 if required by the Solicitation Document;
 - (F) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;
 - (G) Has failed to provide the certification required under section 3 of this rule;
 - (H) Is not Responsible. See OAR 137-049-0390(2) regarding Contracting Agency determination that the Offeror has met statutory standards of responsibility.
- (2) Form of Business. For purposes of this rule, the Contracting Agency may investigate any Person submitting an Offer. The investigation may include that Person's officers, Directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this rule or to apply the Disqualification provisions of ORS 279C.440 to 279C.450 and OAR 137-049-0370.
- (3) Certification of Non-Discrimination. The Offeror shall certify and deliver to the Contracting Agency Written certification, as part of the Offer, that the Offeror has not discriminated and will not discriminate against any disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business, or business that a service-disabled veteran owns, in obtaining any required subcontracts. Failure to do so shall be grounds for disqualification.
- (4) Contract and Subcontract Conditions. If a Contracting Agency awards a Contract to an Offeror that has been determined to be responsible under ORS 200.005(8) and ORS 200.045(3), or awards a Contract under ORS 279A.100:
- (a) The Contracting Agency must provide, as a material condition of the Contract:
 - (A) That the Contractor must maintain its certification under ORS 200.055 throughout the term of the Contract and any extensions (if the Contracting Agency used the certification as a factor in or as a basis for the award of the Contract);
 - (B) That the Contractor must promptly pay each subcontractor that is certified under ORS 200.055 in accordance with ORS 279B.220, or 279C.570 and ORS 279C.580, whichever apply to the Contract;
 - (C) That the Contractor must include, in any subcontract the Contractor establishes in connection with the Contract, a provision that requires the subcontractor to maintain the subcontractor's certification under ORS 200.055 throughout the term of the subcontract and any extensions (if the Contractor used the certification as a factor in or as a basis for the award of the subcontract);
 - (D) That the Contracting Agency may require the Contractor to terminate a subcontract with a subcontractor that fails to maintain its certification under ORS 200.055 throughout the term of the subcontract and any extensions.
 - (b) In the administration of Contracts that are subject to section (4) of this rule, the Contracting Agency must verify the Contractor's and any subcontractor's compliance with subsection (4)(a) of this rule.
 - (c) Subparagraph (4)(a)(A) of this section does not apply to an emerging small business that ceases to qualify as a tier one firm or a tier two firm (as ORS 200.005 defines those terms) due to the growth in the business's number of full-time equivalent employees or in average annual gross receipts during the term of the Contract. This section (4) does not
 - (a)

apply to an emerging small business for which a certification under ORS 200.055 expires during the term of the Contract or any extensions.

(5) Rejection of all Offers. A Contracting Agency may reject all Offers for good cause upon the Contracting Agency's Written finding it is in the public interest to do so. The Contracting Agency shall notify all Offerors of the rejection of all Offers, along with the good cause justification and finding.

(6) Criteria for Rejection of All Offers. The Contracting Agency may reject all Offers upon a Written finding that:

(a) The content of or an error in the Solicitation Document, or the solicitation process unnecessarily restricted competition for the Contract;

(b) The price, quality or performance presented by the Offerors is too costly or of insufficient quality to justify acceptance of the Offer;

(c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;

(d) Causes other than legitimate market forces threaten the integrity of the competitive Procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct and inadvertent or intentional errors in the Solicitation Document;

(e) The Contracting Agency cancels the solicitation in accordance with OAR 137-049-0270; or

(f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.105, 279A.110, 279C.375, 279C.380, 279C.395, OL 2015, ch 325 (HB 2716), OL 2015 & ch 565 (HB 3303)

History:

DOJ 18-2015, f. 12-31-15, cert. ef. 1-1-16

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0450

Protest of Contractor Selection, Contract Award

(1) Purpose. An adversely affected or aggrieved Offeror must exhaust all avenues of administrative review and relief before seeking judicial review of the Contracting Agency's Contractor selection or Contract Award decision.

(2) Notice of Competitive Range. Unless otherwise provided in the RFP, when the competitive Proposal process is authorized under OAR 137-049-0650, the Contracting Agency shall provide Written notice to all Proposers of the Contracting Agency's determination of the Proposers included in the Competitive Range. The Contracting Agency's notice of the Proposers included in the Competitive Range shall not be final until the later of the following:

(a) 10 Days after the date of the notice, unless otherwise provided therein; or

(b) Until the Contracting Agency provides a Written response to all timely-filed protests that denies the protest and affirms the notice of the Proposers included in the Competitive Range.

(3) Notice of Intent to Award. The Contracting Agency shall provide Written notice to all Offerors of the Contracting Agency's intent to Award the Contract, as provided by OAR 137-049-0395.

(4) Right to Protest Award.

(a) An adversely affected or aggrieved Offeror may submit to the Contracting Agency a Written protest of the Contracting Agency's intent to Award within seven Days after issuance of the notice of intent to Award the Contract, unless a different protest period is provided under the Solicitation Document.

(b) The Offeror's protest must be in Writing and must specify the grounds upon which the protest is based.

(c) An Offeror is adversely affected or aggrieved only if the Offeror is eligible for Award of the Contract as the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer submitting the best Responsive Proposal and is next in line for Award, i.e., the protesting Offeror must claim that all lower Bidders or higher-scored Proposers are ineligible for Award:

(A) Because their Offers were nonresponsive; or

(A)

(B) The Contracting Agency committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been the Responsible Bidder offering the lowest Bid or the Responsible Proposer offering the highest-ranked Proposal.

(d) The Contracting Agency shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest a Contracting Agency's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.

(5) Right to Protest Competitive Range.

(a) An adversely affected or aggrieved Proposer may submit to the Contracting Agency a Written protest of the Contracting Agency's decision to exclude the Proposer from the Competitive Range within seven Days after issuance of the notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document. (See procedural requirements for the use of RFPs at OAR 137-049-0650.)

(b) The Proposer's protest shall be in Writing and must specify the grounds upon which the protest is based.

(c) A Proposer is adversely affected only if the Proposer is responsible and submitted a Responsive Proposal and is eligible for inclusion in the Competitive Range, i.e., the protesting Proposer must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Proposers are removed from consideration, and that those ineligible Proposers are ineligible for inclusion in the Competitive Range because:

(A) Their Proposals were not responsive; or

(B) The Contracting Agency committed a substantial violation of a provision in the RFP or of an applicable Procurement statute or administrative rule, and the protesting Proposer was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.

(d) The Contracting Agency shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest a Contracting Agency's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.

(6) Authority to Resolve Protests. The head of the Contracting Agency, or such Person's designee, may settle or resolve a Written protest submitted in accordance with the requirements of this rule.

(7) Decision. If a protest is not settled, the head of the Contracting Agency, or such Person's designee, shall promptly issue a Written decision on the protest. Judicial review of this decision will be available if provided by statute.

(8) Award. The successful Offeror shall promptly execute the Contract after the Award is final. The Contracting Agency shall execute the Contract only after it has obtained all applicable required documents and approvals.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.375, 279C.380, 279C.385 & 279C.460

History:

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0460

Performance and Payment Security; Waiver

(1) Public Improvement Contracts. Unless the required performance bond is waived under ORS 279C.380(1)(a), excused in cases of emergency under 279C.380(4), or unless the Contracting Agency's Contract Review Authority exempts a Contract or classes of contracts from the required performance bond and payment bond pursuant to 279C.390, the Contractor shall execute and deliver to the Contracting Agency a performance bond and a payment bond each in a sum equal to the Contract Price for all Public Improvement Contracts. This requirement applies only to Public Improvement Contracts with a value, estimated by the Contracting Agency, of more than \$100,000 or, in the case of Contracts for highways, bridges and other transportation projects, more than \$50,000. See 279C.380(5). Under 279C.390(3)(b) the Director of the Oregon Department of Transportation may reduce the performance bond amount for contracts financed from the proceeds of bonds issued under 367.620(3)(a). Also see OAR 137-049-0815 and BOLI rules at 839-025-0015 regarding the separate requirement for a Public Works bond.

(2) Other Construction Contracts. A Contracting Agency may require performance security for other construction Contracts that are not Public Improvement Contracts. Such requirements shall be expressly set forth in the Solicitation Document.

(3) Requirement for Surety Bond. The Contracting Agency shall accept only a performance bond furnished by a surety company authorized to do business in Oregon unless otherwise specified in the Solicitation Document (i.e., the

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Contracting Agency may accept a cashier's check or certified check in lieu or all or a portion of the required performance bond if specified in the Solicitation Document). The payment bond must be furnished by a surety company authorized to do business in Oregon, and in an amount equal to the full Contract Price.

(4) Time for Submission. The apparent successful Offeror must promptly furnish the required performance security upon the Contracting Agency's request. If the Offeror fails to furnish the performance security as requested, the Contracting Agency may reject the Offer and Award the Contract to the Responsible Bidder with the next lowest Responsive Bid or the Responsible Proposer with the next highest-scoring Responsive Proposal, and, at the Contracting Agency's discretion, the Offeror shall forfeit its Bid or Proposal security.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.375, 279C.380 & 279C.390

History:

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0470

Substitute Contractor

If the Contractor provided a performance bond, the Contracting Agency may afford the Contractor's surety the opportunity to provide a substitute contractor to complete performance of the Contract. A substitute contractor shall perform all remaining Contract Work and comply with all terms and conditions of the Contract, including the provision of the performance bond and the payment bond. Such substitute performance does not involve the Award of a new Contract and shall not be subject to the competitive Procurement provisions of ORS Chapter 279C.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.365, 279C.370, 279C.375, 279C.380 & 279C.390

History:

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0490

Foreign Contractor

If the Contract Price exceeds \$10,000 and the Contractor is a Foreign Contractor, the Contractor shall promptly report to the Oregon Department of Revenue on forms provided by the Department of Revenue, the Contract Price, terms of payment, Contract duration and such other information as the Department of Revenue may require before final payment can be made on the Contract. A copy of the report shall be forwarded to the Contracting Agency. The Contracting Agency Awarding the Contract shall satisfy itself that the above requirements have been complied with before it issues final payment on the Contract.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279A.120

History: DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0600

Purpose

OAR 137-049-0600 to 137-049-0690 are intended to provide guidance to Contracting Agencies regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as may be directed by a Contracting Agency's Contract Review Authority under ORS 279C.335. These Alternative Contracting Methods include, but are not limited to, the following forms of contracting: Design-Build, Energy Savings Performance Contract and the Construction Manager/General Contractor Method. To the extent any such Alternative Contracting Methods are utilized within the competitive bidding process set forth in 279C.335(1), these OAR 137-049-0600 to 137-049-0690 rules are advisory only and may be used or referred to by a Contracting Agency in whole, in part or not at all, within the discretion of the Contracting Agency. As to ESPC contracting, these 137-049-0600 to 137-049-0690 rules implement the requirements of ORS 279C.335 pertaining to the adoption of Model Rules appropriate for use by all Contracting Agencies to govern the procedures for entering into ESPCs. As to contracting for Construction Manager/General Contractor Services requiring an exemption from competitive bidding under 279C.335(2), OAR 137-049-0600 to 137-049-0690 include mandatory and optional provisions pertaining to the procurement of Construction Manager/General Contractor Services, pursuant to the requirements of ORS 279C.337.

Statutory/Other Authority: ORS 279C.335, 279A.065 & 351.086 **Statutes/Other Implemented:** ORS 279C.335, 279C.337, 279A.065 & 351.086

History:

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0610

Definitions for Alternative Contracting Methods

The following definitions shall apply to these OAR 137-049-0600 to 137-049-0690 rules, unless the context requires otherwise:

- (1) Affiliate has the meaning set forth in ORS 279C.332(1).
 - (2) Alternative Contracting Methods means innovative techniques for procuring or performing Public Improvement Contracts, utilizing processes other than the traditional methods involved in the design-bid-build construction contracting method (with Award of a Public Improvement Contract based solely on price, in which a final design is issued with formal Bid documents, construction Work is obtained by sealed Bid Awarded to the Responsible Bidder submitting the lowest Responsive Bid, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design-Build contracting, CM/GC forms of contracting and ESPCs, which are specifically addressed in these OAR 137-049-0600 to 137-049-0690 rules. These methods also include other developing techniques, which include but are not limited to general "performance contracting," "cost plus time" contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(I)) and "qualifications plus project approach" contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(II)). Procedural requirements for these methods are identified in these OAR 137-049-0600 to 137-049-0690 rules, when a Contracting Agency uses an Alternative Contracting Method in a procurement that requires an exemption from competitive bidding under ORS 279C.335(2) or in an ESPC procurement that is excepted from competitive bidding under ORS 279.335(1).
 - (3) Construction Manager/General Contractor (or "CM/GC") has the meaning set forth in ORS 279C.332(2).
 - (4) Construction Manager/General Contractor Method (or "CM/GC Method") means the Alternative Contracting Method which involves a Contracting Agency's selection of a CM/GC to perform CM/GC Services for a project or projects.
 - (5) Construction Manager/General Contractor Services (or "CM/GC Services") has the meaning set forth in ORS 279C.332(3).
 - (6) Design-Build means a form of Procurement that results in a Public Improvement Contract in which the construction Contractor also provides or obtains specified design services, participates on the project team with the Contracting Agency, and manages both design and construction. In this form of Contract, a single Person provides the Contracting Agency with all of the Personal Services and construction Work necessary to both design and construct the project.
 - (7) Early Work means construction services, construction materials and other Work authorized by the parties to be performed under the CM/GC Contract in advance of the establishment of the GMP, fixed price or other maximum, not-to-exceed price for the project. Permissible Early Work shall be limited to early procurement of materials and supplies, early release of bid or proposal packages for site development and related activities, and any other advance Work related to important components of the project for which performance prior to establishment of the GMP will materially and positively affect the development or completion of the project.
 - (8) Energy Conservation Measures (or "ECMs") (also known as "energy efficiency measures") means, as used in ESPC Procurement, any equipment, fixture or furnishing to be added to or used in an existing building or structure, and any repair, alteration or improvement to an existing building or structure that is designed to reduce energy consumption and related costs, including those costs related to electrical energy, thermal energy, water consumption, waste disposal, and future contract-labor costs and materials costs associated with maintenance of the building or structure. For purposes of these OAR 137-049-0600 to 137-049-0690 rules, use of either or both of the terms "building" or "structure" shall be deemed to include existing energy, water and waste disposal systems connected or related to or otherwise used for the building or structure when such system(s) are included in the project, either as part of the project together with the building or structure, or when such system(s) are the focus of the project. Maintenance services are not Energy Conservation Measures, for purposes of these 137-049-0600 to 137-049-0690 rules.
 - (9) Energy Savings Guarantee means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the Contracting Agency that certain energy savings and performance will be achieved for the project covered by the RFP, through the installation and implementation of the agreed-upon ECMs for the project. The Energy Savings Guarantee shall include, but shall not be limited to, the specific energy savings and performance levels and amounts that will be guaranteed, provisions related to the financial remedies available to the Contracting Agency in the event the guaranteed savings and performance are not achieved, the specific conditions under which the ESCO will guarantee energy savings and performance (including the specific responsibilities of the
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Contracting Agency after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.

(10) Energy Savings Performance Contract (or "ESPC") means a Public Improvement Contract between a Contracting Agency and a Qualified Energy Service Company for the identification, evaluation, recommendation, design and construction of Energy Conservation Measures, including a Design-Build Contract, that guarantee energy savings or performance.

(11) General Conditions Work (or "GC Work") means a general grouping of project Work required to support construction operations on the project that is not included within the Contractor's overhead or fee.

(12) Guaranteed Maximum Price (or "GMP") has the meaning set forth in ORS 279C.332(4), pertaining to procurements for CM/GC Services. For Alternative Contracting Methods other than the CM/GC Method, "Guaranteed Maximum Price" or "GMP" means the total maximum price provided to the Contracting Agency by the Contractor and accepted by the Contracting Agency that includes all reimbursable costs and fees for completion of the Contract Work and any particularly identified contingency amounts, as defined by the Public Improvement Contract.

(13) Measurement and Verification (or "M & V") means, as used in ESPC Procurement, the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy-using systems pre-installation and post-installation.

(14) Project Development Plan means a secondary phase of Personal Services and Work performed by an ESCO in an ESPC Procurement when the ESCO performs more extensive design of the agreed-upon ECMs for the project, provides the detailed provisions of the ESCO's Energy Savings Guarantee that the fully installed and commissioned ECMs will achieve a particular energy savings level for the building or structure, and prepares an overall report or plan summarizing the ESCO's Work during this secondary phase of the Work and otherwise explaining how the agreed-upon ECMs will be implemented during the design and construction phase of the Work; The term "Project Development Plan" can also refer to the report or plan provided by the ESCO at the conclusion of this phase of the Work.

(15) Qualified Energy Service Company (or "ESCO") means, as used in ESPC Procurement, a company, firm or other legal Person with the following characteristics: demonstrated technical, operational, financial and managerial capabilities to design, install, construct, commission, manage, measure and verify, and otherwise implement Energy Conservation Measures and other Work on building systems or building components that are directly related to the ECMs in existing buildings and structures; a prior record of successfully performing ESPCs on projects involving existing buildings and structures that are comparable to the project under consideration by the Contracting Agency; and the financial strength to effectively guarantee energy savings and performance under the ESPC for the project in question, or the ability to secure necessary financial measures to effectively guarantee energy savings under an ESPC for that project.

(16) Savings has the meaning set forth in ORS 279C.337(4), pertaining to CM/GC Services procurements. For other Alternative Contracting Methods, "Savings" means a positive difference between a Guaranteed Maximum Price or other maximum not-to-exceed price set forth in a Public Improvement Contract and the actual cost of the Contractor's performance of the Contract Work payable by the Contracting Agency under the terms of the Contract, including costs for which a Contracting Agency reimburses a Contractor and fees, profits or other payments the Contractor earns.

(17) Technical Energy Audit means, as used in ESPC Procurement, the initial phase of Personal Services to be performed by an ESCO that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the Contracting Agency of the ESCO's Findings during this initial phase of the Work; the term "Technical Energy Audit" can also refer to the report provided by the ESCO at the conclusion of this phase of the Work.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.332, 279C.335 & 279A.065

History:

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0620

Use of Alternative Contracting Methods

(1) Competitive Bidding Exemptions. ORS Chapter 279C requires a competitive bidding process for Public Improvement Contracts, unless a statutory exception applies, a class of Contracts has been exempted from the competitive bidding process, or an individual Contract has been exempted from the competitive bidding process, in accordance with 279C.335 and any applicable Contracting Agency administrative rules. Use of Alternative Contracting Methods may be directed by the Contracting Agency if that use is within the competitive bidding process, if feasible, or through an

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available statutory exception to the competitive bidding process. Use of Alternative Contracting Methods must be directed through a Contracting Agency's Contract Review Authority, however, when use of the Alternative Contracting Method requires an exemption to the prescribed competitive bidding requirement of 279C.335. In any of these circumstances, use of Alternative Contracting Methods must be justified in accordance with any applicable Code and Contracting Agency requirements and, if required, these OAR 137-049-0600 to 137-049-0690 rules. See 137-049-0630 regarding required Findings and restrictions on exemptions from the competitive bidding requirement under ORS 279C.335.

(2) Energy Savings Performance Contracts. ESPCs are excepted from the competitive bidding requirements for Public Improvement Contracts pursuant to ORS 279C.335(1)(f), if the Contracting Agency complies with the procedures set forth in OAR 137-049-0600 to 137-049-0690 or parallel administrative rules meeting the requirements of ORS 279A.065 related to the solicitation, negotiation and contracting for ESPC Work. If those procedures are not followed, an ESPC procurement may still be exempted from competitive bidding requirements by following the general exemption procedures within 279C.335.

(3) Post-Project Evaluation. ORS 279C.355 requires that the Contracting Agency prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 when the Contracting Agency does not use the competitive bidding process required by 279C.335. The purpose of this evaluation is to determine whether it was actually in the Contracting Agency's best interest to use an Alternative Contracting Method outside the competitive bidding process. The evaluation must be delivered to the Contracting Agency's Contract Review Authority within 30 Days of the date the Contracting Agency "accepts" the Public Improvement project, which event is typically defined in the Contract. In the absence of such definition, acceptance of the Project occurs on the later of the date of final payment or the date of final completion of the Contract Work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:

- (a) Financial information, consisting of cost estimates, any Guaranteed Maximum Price, changes and actual costs;
- (b) A narrative description of successes and failures during design, engineering and construction; and
- (c) An objective assessment of the use of the Alternative Contracting Method as compared to the exemption Findings.

Statutory/Other Authority: ORS 279C.335 & 279A.065

Statutes/Other Implemented: ORS 279C.335, 279A.065, 279C.355 & 351.086

History:

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0630

Findings, Notice and Hearing

(1) Cost Savings and Other Substantial Benefits Factors. When Findings are required under ORS 279C.335 to exempt a Contract or class of Contracts from the competitive bidding requirements, the "substantial cost savings and other substantial benefits" criteria at 279C.335(2)(b) require consideration of the type, cost and amount of the Contract and, to the extent applicable, the other factors set forth in 279C.335(2)(b). If a particular factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board does not need to consider that factor, and the Contracting Agency is not required to address the factor, other than to explain why the factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts..

(2) Required Information. The statutory definition of "Findings" at ORS 279C.330(2), which applies to exemptions from competitive bidding under ORS 279C.335, means the justification for a Contracting Agency or State Agency conclusion regarding the factors listed in both ORS 279C.335(2)(a) and 279C.335(2)(b) or, in the alternative, both 279C.335(2)(a) and 279C.335(2)(c). For an exemption granted by the Director of the Oregon Department of Administrative Services or the Director of Transportation under ORS 279C.350 by order, however, the order must also include the findings listed in ORS 279C.330(1).

(3) Addressing Cost Savings. Accordingly, when the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the "substantial cost savings and other substantial benefits" requirement may be addressed by a combination of:

- (a) Specified Findings that address the factors and other information specifically identified by statute, including, but not limited to, an analysis or reasonable forecast of present and future cost savings and other substantial benefits; and

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- (b) Additional Findings that address industry practices, surveys, trends, past experiences, evaluations of completed projects required by ORS 279C.355 and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable, such Findings shall relate back to the specific characteristics of the project or projects at issue in the exemption request.
- (c) As an alternative to the "substantial cost savings and other substantial benefits" requirement in ORS 279C.335(2)(b), if an Alternative Contracting Method has not been previously used, the Contracting Agency or State Agency may make a Finding that identifies the project as a "pilot project" under ORS 279C.335(2)(c). Nevertheless, the Contracting Agency or State Agency must still make the findings required in ORS 279C.335(2)(a).
- (4) Favoritism and Competition. The criteria at ORS 279C.335(2)(a) that the exemption "is unlikely to encourage favoritism" or "substantially diminish competition" may be addressed in contemplating the use of Alternative Contracting Methods by specifying the manner in which an RFP process will be utilized, that the Procurement will be formally advertised with public notice and disclosure of the planned Alternative Contracting Method, competition will be encouraged, Award made based upon identified selection criteria and an opportunity to protest that Award.
- (5) Descriptions. Findings supporting a competitive bidding exemption must describe with specificity any Alternative Contracting Method to be used in lieu of competitive bidding, including, but not limited to, whether a one-step (request for Proposals), two-step (beginning with a Request for Qualifications, followed by a request for Proposals) or other solicitation process will be utilized. The Findings may also describe anticipated characteristics or features of the resulting Public Improvement Contract. However, the purpose of an exemption from competitive bidding is limited to a determination of the Procurement method. Any unnecessary or incidental descriptions of the specific details of the anticipated Contract within the supporting Findings are not binding upon the Contracting Agency. The parameters of the Public Improvement Contract are those characteristics or specifics that are announced in the Solicitation Document.
- (6) Class Exemptions. In making the findings supporting a class exemption the Contracting Agency shall clearly identify the "class" with respect to its defining characteristics, pursuant to the requirements of ORS 279C.335(3). The class must meet the following requirements:
- (a) The class cannot be based on a single characteristic or factor, so that an Agency directly or indirectly creates a class whereby the Agency uses, for example, the CM/GC Method for all Agency construction projects or all Agency construction projects over a particular dollar amount, unidentified future Agency construction projects of a particular work category, or all Agency construction projects from a particular funding source such as the sale of bonds; and
- (b) The class must include a combination of factors, be defined by the Agency through characteristics that reasonably relate to the exemption criteria set forth in ORS 279C.335(2) and must reflect a detailed evaluation of those characteristics so that the class is defined in a limited way that effectively meets the Agency's objectives while allowing for impartial and open competition, and protecting the integrity of the exemption process. An example of a class that might be permitted under the statute is a series of projects, such as a specific group of building renovation projects, that
- (A) Involve renovations for a common purpose;
- (B) Require completion on a related schedule in order to avoid unnecessary disruption of Contracting Agency operations;
- (C) Share common characteristics, such as historic building considerations, the presence of asbestos or other hazardous substances, or the presence of agency staff during construction;
- (D) Otherwise possess characteristics that meet the requirements of ORS 279C.335(2); and
- (E) Otherwise meet the requirements of the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board, as applicable.
- (7) Public Hearing. Before final adoption of Findings exempting a Public Improvement Contract or class of Contracts from the requirement of competitive bidding, a Contracting Agency or State Agency shall give notice and hold a public hearing as required by ORS 279C.335(5). The hearing shall be for the purpose of receiving public comment on the Contracting Agency's or State Agency's draft Findings.
- (8) Prior Review of Draft Findings. State Contracting Agencies shall submit draft Findings to their Contract Review Authority for review and concurrence prior to advertising the public hearing required by ORS 279C.335(5). State Contracting Agencies shall also submit draft Findings to the Department of Justice for review and comment prior to advertising the public hearing.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.335 & 279A.065 **History:**
 DOJ 2-2015, f. & cert. ef. 2-3-15
 Reverted to DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0640**Competitive Proposals; Procedure**

Contracting Agencies may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS 279C.330 to 279C.337, 279C.400 to 279C.410 and OAR 137-049-0600 to 137-049-0690, unless other applicable statutes control a Contracting Agency's use of competitive Proposals for Public Improvement Contracts. Also see the subdivision of rules in this division 49 entitled "Formal Procurement Rules," 137-049-0200 to 137-049-0480, and RFP related rules under the Alternative Contracting Methods subdivision at 137-049-0640 to 137-049-0660. For ESPCs, the following RFP process as further specified in 137-049-0645, 137-049-0650, 137-049-0660 and 137-049-0680 shall be utilized, if a Contracting Agency desires the Procurement process to be exempt from the competitive bidding requirements of ORS 279C.335. The RFP process for the Alternative Contracting Methods identified in OAR 137-049-0600 to 137-049-0690 includes the following steps:

(1) Proposal Evaluation. Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. Proposal evaluation shall be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall:

(a) Be reasonable estimates based on information available to the Contracting Agency;

(b) Treat all Proposals equitably; and

(c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the Contracting Agency. See ORS 279C.305. For ESPC Proposal evaluations, the Contracting Agency may provide in the RFP that qualifications-based evaluation factors will outweigh the Contracting Agency's consideration of price-related factors, due to the fact that prices for the major components of the Work to be performed during the ESPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation. For CM/GC Services Proposal evaluations, the Contracting Agency must comply with ORS 279C.337.

(2) Evaluation Factors.

(a) In basic negotiated construction contracting, where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that could affect the cost or quality of the Work.

(b) In CM/GC contracting, in addition to (a) above, those factors may also include the ability to respond to the technical complexity or unique character of the project, analyze and propose solutions or approaches to complex project problems, analyze and propose value engineering options, analyze and propose energy efficiency measures or alternative energy options, coordinate multiple disciplines on the project, effectively utilize the time available to commence and complete the improvement, and related matters that could affect the cost or quality of the Work.

(c) In Design-Build contracting, in addition to (a) and (b) above, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience and related matters that could affect the cost or quality of the Work.

(d) In ESPC contracting, in addition to the factors set forth in subsections (a), (b) and (c) above, those factors may also include sample Technical Energy Audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP, financial statements and related information of joint venturers comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting energy guarantee Contract levels, the specific Person that will provide the Energy Savings Guarantee to be offered by the ESCO, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the Work under the ESPC, the ESCO's team members and consultants to be assigned to the project, the ESCO's experience in the Energy Savings Performance Contracting field, the ESCO's experience acting as the prime contractor on previous ESPC projects (as opposed to a sub-contractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular project between the Contracting Agency and the ESCO, the ESCO's

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equipment performance guarantee policies and procedures, the ESCO's energy savings and cost savings guarantee policies and procedures, the ESCO's project cost guarantee policies and procedures, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the Work and the ESCO's fee structure for all phases of the ESPC.

(3) Contract Negotiations. Contract terms may be negotiated to the extent allowed by the RFP and OAR 137-049-0600 to 137-049-0690, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See 137-049-0650. Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that could affect the cost or quality of the Work. For the CM/GC Method, terms that may be negotiated also include the specific scope of pre-construction services, the GC Work, any Early Work and other construction Work to be performed by the CM/GC, and any other terms that the Contracting Agency has identified as being subject to negotiation, consistent with the requirements of OAR 137-049-0690. In ESPC contracting, terms that may be negotiated also include the scope of preliminary design of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the scope of Personal Services and Work to be performed by the ESCO during the Project Development Plan phase of the Work, the detailed provisions of the Energy Savings Guarantee to be provided by the ESCO and scope of Work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the Work, consistent with the requirements of OAR 137- 049-0680.

Statutory/Other Authority: ORS 279C.335 & 279A.065 **Statutes/Other Implemented:** ORS 279C.335, 279A.065 & 351.086 **History:**

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0645

Requests for Qualifications (RFQ)

As provided by ORS 279C.405(1), Contracting Agencies may utilize Requests for Qualifications (RFQs) to obtain information useful in the preparation or distribution of a Request for Proposals (RFPs). When using RFQs as the first step in a two step solicitation process, in which distribution of the RFPs will be limited to the firms identified as most qualified through their submitted statements of qualification, Contracting Agencies shall first advertise and provide notice of the RFQ in the same manner in which RFPs are advertised, specifically stating that RFPs will be distributed only to the firms selected in the RFQ process. In such cases the Contracting Agencies shall also provide within the RFQ a protest provision substantially in the form of OAR 137-049-0450(5) regarding protests of the Competitive Range. Thereafter, contracting agencies may distribute RFPs to the selected firms without further advertisement of the solicitation.

Statutory/Other Authority: ORS 279C.405 & 279A.065

Statutes/Other Implemented: ORS 279C.405

History:

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

137-049-0650

Requests for Proposals ("RFP")

(1) Generally. The use of competitive Proposals must be specially authorized for a Public Improvement Contract under the competitive bidding exception and exemption requirements of ORS 279C.335, OAR 137-049-0130 and 137-049-0600 to 137-049-0690. Also see ORS 279C.337 and 279C.400 to 279C.410 for statutory requirements regarding competitive Proposals and OAR 137-049-0640 regarding competitive Proposal procedures.

(2) Solicitation Documents. In addition to the Solicitation Document requirements of OAR 137-049-0200, this rule applies to the requirements for RFPs. RFP Solicitation Documents shall conform to the following standards:

(a) The Contracting Agency shall set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references and warranty provisions. See OAR 137-049-0640 regarding Proposal evaluation and evaluation factors. Evaluation factors need not be precise

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predictors of actual future costs and performance, but to the extent possible, such factors must be reasonable estimates based on information available to the Contracting Agency. Subject to ORS 279C.410(4), the Solicitation Document may provide for discussions with Proposers to be conducted for the purpose of Proposal evaluation prior to award or prior to establishing any Competitive Range;

(b) When the Contracting Agency is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, the Contracting Agency shall identify the specific terms and conditions in or provisions of the Solicitation Document that are subject to negotiation or discussion and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions the Contracting Agency has identified as authorized for negotiation. The Contracting Agency shall describe the evaluation, discussion and negotiation processes, including how the Contracting Agency will establish the Competitive Range, if any;

(c) The anticipated size of any Competitive Range must be stated in the Solicitation Document, but may be decreased if the number of Proposers that submit responsive Proposals is less than the specified number, or may be increased as provided in OAR 137-049-0650(4)(a)(B);

(d) When the Contracting Agency intends to Award Contracts to more than one Proposer, the Contracting Agency shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. The Contracting Agency shall also include the criteria it will use to determine how the Contracting Agency will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular Contractor to provide Personal Services or Work from those Contractors Awarded Contracts.

(3) Evaluation of Proposals.

(a) Evaluation. The Contracting Agency shall evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. The Contracting Agency shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.

(A) Clarifications. In evaluating Proposals, a Contracting Agency may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer shall submit Written and Signed clarifications and such clarifications shall become part of the Proposer's Proposal.

(B) Limited Negotiation. If the Contracting Agency did not permit negotiation in its RFP, the Contracting Agency may, nonetheless, negotiate with the highest-ranked Proposer, but may then only negotiate the:

(i) Statement of Work; and

(ii) Contract Price as it is affected by negotiating the statement of Work. The process for discussions or negotiations that is outlined and explained in subsections (5)(b) and (6) of this rule does not apply to this limited negotiation.

(b) Discussions; Negotiations. If the Contracting Agency permitted discussions or negotiations in the RFP, the Contracting Agency shall evaluate Proposals and establish the Competitive Range, and may then conduct discussions and negotiations in accordance with this rule.

(A) If the Solicitation Document provided that discussions or negotiations may occur at Contracting Agency's discretion, the Contracting Agency may forego discussions and negotiations and evaluate all Proposals in accordance with this rule.

(B) If the Contracting Agency proceeds with discussions or negotiations, the Contracting Agency shall establish a negotiation team tailored for the acquisition. The Contracting Agency's team may include legal, technical, auditing and negotiating personnel.

(c) Cancellation. Nothing in this rule shall restrict or prohibit the Contracting Agency from canceling the solicitation at any time.

(4) Competitive Range; Protest; Award.

(a) Determining Competitive Range.

(A) If the Contracting Agency does not cancel the solicitation, after the Opening the Contracting Agency will evaluate all Proposals in accordance with the evaluation criteria set forth in the RFP. After evaluation of all Proposals in accordance with the criteria set forth in the RFP, the Contracting Agency will rank the Proposers based on the Contracting Agency's scoring and determine the Competitive Range.

(B) The Contracting Agency may increase the number of Proposers in the Competitive Range if the Contracting Agency's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the best Proposer after the Contracting Agency's evaluation of revised Proposals submitted in accordance with the process described in this rule.

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(b) **Protesting Competitive Range.** The Contracting Agency shall provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest the Contracting Agency's evaluation and determination of the Competitive Range in accordance with OAR 137-049-0450.

(c) **Intent to Award; Discuss or Negotiate.** After the protest period provided in accordance with these rules expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency may either:

(A) Provide Written notice to all Proposers in the Competitive Range of its intent to Award the Contract to the highest-ranked Proposer in the Competitive Range.

(i) An unsuccessful Proposer may protest the Contracting Agency's intent to Award in accordance with OAR 137-049-0450.

(ii) After the protest period provided in accordance with OAR 137-049-0450 expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency shall commence final Contract negotiations with the highest-ranked Proposer in the Competitive Range; or

(B) Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them, and, following such discussions and receipt and evaluation of revised Proposals, conduct negotiations with the Proposers in the Competitive Range.

(5) **Discussions; Revised Proposals.** If the Contracting Agency chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, the Contracting Agency shall proceed as follows:

(a) **Initiating Discussions.** The Contracting Agency shall initiate oral or Written discussions with all of the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP that the Contracting Agency identified in the RFP as the subject of discussions. The Contracting Agency may conduct discussions for the following purposes:

(A) Informing Proposers of deficiencies in their initial Proposals;

(B) Notifying Proposers of parts of their Proposals for which the Contracting Agency would like additional information; and

(C) Otherwise allowing Proposers to develop revised Proposals that will allow the Contracting Agency to obtain the best Proposal based on the requirements and evaluation criteria set forth in the RFP.

(b) **Conducting Discussions.** The Contracting Agency may conduct discussions with each Proposer in the Competitive Range necessary to fulfill the purposes of this section, but need not conduct the same amount of discussions with each Proposer. The Contracting Agency may terminate discussions with any Proposer in the Competitive Range at any time. However, the Contracting Agency shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with Contracting Agency before the Contracting Agency notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.

(A) In conducting discussions, the Contracting Agency:

(i) Shall treat all Proposers fairly and shall not favor any Proposer over another;

(ii) Shall not discuss other Proposers' Proposals;

(iii) Shall not suggest specific revisions that a Proposer should make to its Proposal, and shall not otherwise direct the Proposer to make any specific revisions to its Proposal.

(B) At any time during the time allowed for discussions, the Contracting Agency may:

(i) Continue discussions with a particular Proposer;

(ii) Terminate discussions with a particular Proposer and continue discussions with other Proposers in the Competitive Range; or

(iii) Conclude discussions with all remaining Proposers in the Competitive Range and provide notice to the Proposers in the Competitive Range to submit revised Proposals.

(c) **Revised Proposals.** If the Contracting Agency does not cancel the solicitation at the conclusion of the Contracting Agency's discussions with all remaining Proposers in the Competitive Range, the Contracting Agency shall give all remaining Proposers in the Competitive Range notice of the date and time by which they must submit revised Proposals. This notice constitutes the Contracting Agency's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in the Contracting Agency's notice.

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- (A) Upon receipt of the revised Proposals, the Contracting Agency shall evaluate the revised Proposals based upon the evaluation criteria set forth in the RFP, and rank the revised Proposals based on the Contracting Agency's scoring.
- (B) The Contracting Agency may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the RFP.
- (d) Intent to Award; Protest. The Contracting Agency shall provide Written notice to all Proposers in the Competitive Range of the Contracting Agency's intent to Award the Contract. An unsuccessful Proposer may protest the Contracting Agency's intent to Award in accordance with OAR 137-049-0450. After the protest period provided in accordance with that rule expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency shall commence final Contract negotiations.
- (6) Negotiations.
- (a) Initiating Negotiations. The Contracting Agency may determine to commence negotiations with the highest-ranked Proposer in the Competitive Range following the:
- (A) Initial determination of the Competitive Range; or
- (B) Conclusion of discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.
- (b) Conducting Negotiations. Scope. The Contracting Agency may negotiate:
- (A) The statement of Work;
- (B) The Contract Price as it is affected by negotiating the statement of Work; and
- (C) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the RFP. Accordingly, Proposers shall not submit, and Contracting Agency shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the RFP.
- (c) Continuing Negotiations. If the Contracting Agency terminates negotiations with a Proposer, the Contracting Agency may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this rule until the Contracting Agency has:
- (A) Determined to Award the Contract to the Proposer with whom it is currently negotiating; or
- (B) Completed one round of negotiations with all Proposers in the Competitive Range, unless the Contracting Agency provided for more than one round of discussions or negotiations in the RFP, in which case the Contracting Agency may proceed with any authorized further rounds of discussions or negotiations.
- (7) Terminating Discussions or Negotiations. At any time during discussions or negotiations conducted in accordance with this rule, the Contracting Agency may terminate discussions or negotiations with the Proposer with whom it is currently conducting discussions or negotiations if the Contracting Agency reasonably believes that:
- (a) The Proposer is not discussing or negotiating in good faith; or
- (b) Further discussions or negotiations with the Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.400 - 279C.410 **History:**

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 10-

2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0660

RFP Pricing Mechanisms

(1) An RFP may result in a Contract with a lump-sum Contract Price or a fixed Contract Price, as in the case of competitive bidding. Alternatively, an RFP may result in a cost reimbursement Contract with a GMP or some other maximum price specified in the Contract.

(2) Economic incentives or disincentives may be included to reflect stated Contracting Agency purposes related to time of completion, safety or other Public Contracting objectives, including but not limited to total least cost mechanisms

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such as life cycle costing.

(3) A Guaranteed Maximum Price may be used as the pricing mechanism for CM/GC Services Contracts where a total Contract Price is provided in the design phase in order to assist the Contracting Agency in determining whether the project scope is within the Contracting Agency's budget, and allowing for design changes during preliminary design rather than after final design services have been completed.

(a) If the collaborative process described above in this section (3) is successful, the Contractor shall propose a final GMP, which may be accepted by the Contracting Agency and included within the Contract.

(b) If the collaborative process described above in this section (3) is not successful, and no mutually agreeable resolution on the GMP for the project construction Work can be achieved with the Contractor, then the Contracting Agency shall terminate the Contract. The public Contracting Agency may then proceed to negotiate a new Contract (and GMP) with the firm that was next ranked in the original selection process, or employ other means for continuing the project under ORS Chapter 279C.

(4) When cost reimbursement Contracts are utilized, regardless of whether a GMP is included, the Contracting Agency shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.335**History:**

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0670

Design-Build Contracts

(1) General. The Design-Build form of contracting, as defined at OAR 137-049-0610(3), has technical complexities that are not readily apparent. Contracting Agencies shall use this contracting method only with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to use the Design-Build process, the Contracting Agency must be able to reasonably anticipate the following types of benefits:

(a) Obtaining, through a Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;

(b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;

(c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims;

(d) Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance Work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased projects); or

(e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.

(2) Authority. Contracting Agencies shall utilize the Design-Build form of contracting only in accordance with the requirements of these OARs 137-049-0600 to 137-049-0690 rules. See particularly 137-049-0620 on "Use of Alternative Contracting Methods" and 137-049-0680 pertaining to ESPCs.

(3) Selection. Design-Build selection criteria may include those factors set forth above in OAR 137-049-0640(2)(a), (b) and (c).

(4) QBS Inapplicable. Because the value of construction Work predominates the Design-Build form of contracting, the qualifications based selection (QBS) process mandated by ORS 279C.110 for State Contracting Agencies in obtaining certain consultant Personal Services is not applicable.

(5) Licensing. If a Design-Build Contractor is not an Oregon licensed design professional, the Contracting Agency shall require that the Design-Build Contractor disclose in its Written Offer that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS

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671.030(2)(g) regarding the offer of architectural services, and 672.060(11) regarding the offer of engineering services that are appurtenant to construction Work.

(6) Performance Security. ORS 279C.380(1)(a) provides that for Design-Build Contracts the surety's obligation on performance bonds, or the Bidder's obligation on cashier's or certified checks accepted in lieu thereof, includes the preparation and completion of design and related Personal Services specified in the Contract. This additional obligation, beyond performance of construction Work, extends only to the provision of Personal Services and related design revisions, corrective Work and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage.

(7) Contract Requirements. Contracting Agencies shall conform their Design-Build contracting practices to the following requirements:

(a) Design Services. The level or type of design services required must be clearly defined within the Procurement documents and Contract, along with a description of the level or type of design services previously performed for the project. The Personal Services and Work to be performed shall be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.

(b) Professional Liability. The Contract shall clearly identify the liability of design professionals with respect to the Design-Build Contractor and the Contracting Agency, as well as requirements for professional liability insurance.

(c) Risk Allocation. The Contract shall clearly identify the extent to which the Contracting Agency requires an express indemnification from the Design-Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.

(d) Warranties. The Contract shall clearly identify any express warranties made to the Contracting Agency regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.

(e) Incentives. The Contract shall clearly identify any economic incentives and disincentives, the specific criteria that apply and their relationship to other financial elements of the Contract.

(f) Honoraria. If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the solicitation process on the basis that the Contracting Agency is benefited from such deliverables.

Statutory/Other Authority: ORS 279C.335 & 279A.065

Statutes/Other Implemented: ORS 279C.335, 279A.065, 279C.110 & 351.086

History:

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0680

Energy Savings Performance Contracts (ESPC)

(1) Generally. These OAR 137-049-0600 to 137-049-0690 rules include a limited, efficient method for Contracting Agencies to enter into ESPCs outside the competitive bidding requirements of ORS 279C.335 for existing buildings or structures, but not for new construction. See ORS 279C.335(1)(f). If a Contracting Agency chooses not to utilize the ESPC Procurement method provided for by these OAR 137-049-0600 to 137-049-0690 rules, the Contracting Agency may still enter into an ESPC by complying with the competitive bidding exemption process set forth in ORS 279C.335, or by otherwise complying with the Procurement requirements applicable to any Contracting Agency not subject to all the requirements of 279C.335.

(2) ESPC Contracting Method. The ESPC form of contracting, as defined at OAR 137-049-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the Contracting Agency, as well as the additional technical complexities associated with a Design-Build Contract. Contracting Agencies shall only utilize the ESPC contracting method with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the ESPC contracting process, the Contracting Agency must be able to reasonably anticipate one or more of the following types of benefits:

(a) Obtaining, through an ESCO, the following types of integrated Personal Services and Work: facility profiling, energy baseline studies, ECMs, Technical Energy Audits, project development planning, engineering design, plan preparation, cost estimating, life cycle costing, construction administration, project management, construction, quality control, operations and maintenance staff training, commissioning services, M & V services and required documentation as a fully integrated function with a single point of responsibility;

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- (b) Obtaining, through an ESCO, an Energy Savings Guarantee;
 - (c) Integrating the Technical Energy Audit phase and the Project Development Plan phase into the design and construction phase of Work on the project;
 - (d) Reducing the risk of design flaws, misunderstandings and conflicts inherent in the construction process, through the integration of ESPC Personal Services and Work;
 - (e) Obtaining innovative design solutions through the collaboration of the members of the ESCO integrated ESPC team;
 - (f) Integrating cost-effective ECMs into an existing building or structure, so that the ECMs pay for themselves through savings realized over the useful life of the ECMs;
 - (g) Preliminary design, development, implementation and an Energy Savings Guarantee of ECMs into an existing building or structure through an ESPC, as a distinct part of a major remodel of that building or structure that is being performed under a separate remodeling Contract; and
 - (h) Satisfying local energy efficiency design criteria or requirements.
- (3) Authority. Contracting Agencies desiring to pursue an exemption from the competitive bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086), shall utilize the ESPC form of contracting only in accordance with the requirements of these OAR 137-049-0600 to 137-049-0690 rules.
- (4) No Findings Required. A Contracting Agency is only required to comply with the ESPC contracting procedures set forth in these OAR 137-049-0600 to 137-049-0690 rules in order for the ESPC to be exempt from the competitive bidding processes of ORS 279C.335. No Findings are required for an ESPC to be exempt from the competitive bidding process for Public Improvement Contracts pursuant to 279C.335, unless the Contracting Agency is subject to the requirements of 279C.335 and chooses not to comply with the ESPC contracting procedures set forth in OAR 137-049-0600 to 137-049-0690.
- (5) Selection. ESPC selection criteria may include those factors set forth above in OAR 137-049-0640(2)(a), (b), (c) and (d). Since the Energy Savings Guarantee is such a fundamental component in the ESPC contracting process, Proposers must disclose in their Proposals the identity of any Person providing (directly or indirectly) any Energy Savings Guarantee that may be offered by the successful ESCO during the course of the performance of the ESPC, along with any financial statements and related information pertaining to any such Person.
- (6) QBS Inapplicable. Because the value of construction Work predominates in the ESPC method of contracting, the qualifications based selection (QBS) process mandated by ORS 279C.110 for State Contracting Agencies in obtaining certain consultant services is not applicable.
- (7) Licensing. If the ESCO is not an Oregon licensed design professional, the Contracting Agency shall require that the ESCO disclose in the ESPC that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and 672.060(11) regarding the offer of engineering services that are appurtenant to construction Work.
- (8) Performance Security. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the ESCO must provide a performance bond and a payment bond, each for 100% of the full Contract Price, including the construction Work and design and related Personal Services specified in the ESPC Design-Build Contract, pursuant to ORS 279C.380(1)(a). For ESPC Design-Build Contracts, these "design and related services" include conventional design services, commissioning services, training services for the Contracting Agency's operations and maintenance staff, and any similar Personal Services provided by the ESCO under the ESPC Design-Build Contract prior to final completion of construction. M & V services, and any Personal Services or Work associated with the ESCO's Energy Savings Guarantee are not included in these 279C.380(1)(a) "design and related services." Nevertheless, a Contracting Agency may require that the ESCO provide performance security for M & V services and any Personal Services or Work associated with the ESCO's Energy Savings Guarantee, if the Contracting Agency so provides in the RFP.
- (9) Contracting Requirements. Contracting Agencies shall conform their ESPC contracting practices to the following requirements:
- (a) General ESPC Contracting Practices. An ESPC involves a multi-phase project, which includes the following contractual elements:
 - (A) A contractual structure which includes general Contract terms describing the relationship of the parties, the various phases of the Work, the contractual terms governing the Technical Energy Audit for the project, the contractual terms governing the Project Development Plan for the project, the contractual terms governing the final design and construction of the project, the contractual terms governing the performance of the M & V services for the project, and the detailed provisions of the ESCO's Energy Savings Guarantee for the project.

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- (B) The various phases of the ESCO's Work will include the following:
- (i) The Technical Energy Audit phase of the Work;
 - (ii) The Project Development Plan phase of the Work;
 - (iii) A third phase of the Work that constitutes a Design-Build Contract, during which the ESCO completes any plans and Specifications required to implement the ECMs that have been agreed to by the parties to the ESPC, and the ESCO performs all construction, commissioning, construction administration and related Personal Services or Work to actually construct the project; and
 - (iv) A final phase of the Work, whereby the ESCO, independently or in cooperation with an independent consultant hired by the Contracting Agency, performs M & V services to ensure that the Energy Savings Guarantee identified by the ESCO in the earlier phases of the Work and agreed to by the parties has actually been achieved.
- (b) Design-Build Contracting Requirements in ESPCs. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the Contracting Agency shall conform its Design-Build contracting practices to the Design-Build contracting requirements set forth in OAR 137-040-0560(7) above.
- (c) Pricing Alternatives. The Contracting Agency may utilize one of the following pricing alternatives in an ESPC:
- (A) A fixed price for each phase of the Personal Services and Work to be provided by the ESCO;
 - (B) A cost reimbursement pricing mechanism, with a maximum not-to-exceed price or a GMP; or
 - (C) A combination of a fixed fee for certain components of the Personal Services to be performed, a cost reimbursement pricing mechanism for the construction Work to be performed with a GMP, a single or annual fixed fee for M & V services to be performed for an identified time period after final completion of the construction Work, and a single or annual Energy Savings Guarantee fixed fee payable for an identified time period after final completion of the construction Work that is conditioned on certain energy savings being achieved at the facility by the ECMs that have been implemented by the ESCO during the project (in the event an annual M & V services fee and annual Energy Savings Guarantee fee is utilized by the parties, the parties may provide in the Design-Build Contract that, at the sole option of the Contracting Agency, the ESCO's M & V services may be terminated prior to the completion of the M & V/ Energy Savings Guarantee period and the Contracting Agency's future obligation to pay the M & V services fee and Energy Savings Guarantee fee will likewise be terminated, under terms agreed to by the parties).
 - (d) Permitted ESPC Scope of Work. The scope of Work under the ESPC is restricted to implementation and installation of ECMs, as well as other Work on building systems or building components that are directly related to the ECMs, and that, as an integrated unit, will pay for themselves over the useful life of the ECMs installed. The permitted scope of Work for ESPCs resulting from a solicitation under these 137-049-0600 to 137-049-0690 rules does not include maintenance services for the project facility.

Statutory/Other Authority: ORS 279C.335 & 279A.065

Statutes/Other Implemented: ORS 279C.335, 279A.065, 279C.110 & 351.086

History:

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0690

Construction Manager/General Contractor Services ("CM/GC Services")

(1) General. The CM/GC Method is a technically complex project delivery system. Contracting Agencies shall use this contracting method only with the assistance of legal counsel with substantial experience and necessary expertise in using the CM/GC Method, as well as knowledgeable staff, consultants or both staff and consultants who have a demonstrated capability of managing the CM/GC process in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, Public Contracting and project management. Unlike the Design-Build form of contracting, the CM/GC Method does not contemplate a "single point of responsibility" under which the CM/GC is responsible for successful completion of all Work related to a performance Specification. The CM/GC has defined contract obligations, including responsibilities as part of the project team along with the Contracting Agency and design professional, although with the CM/GC Method there is a separate contract between the Contracting Agency and design professional. In order to utilize the CM/GC Method, the Contracting Agency must be able to reasonably anticipate the following types of benefits:

(a) Time Savings. With the CM/GC Method, the Public Improvement has significant schedule ramifications, such that concurrent design and construction are necessary in order to meet critical deadlines and shorten the overall duration of construction. The Contracting Agency may consider operational and financial data that show significant savings or

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increased opportunities for generating revenue as a result of early completion, as well as less disruption to public facilities as a result of shortened construction periods;

(b) **Cost Savings.** With the CM/GC Method, early CM/GC input during the design process is expected to contribute to significant cost savings. The Contracting Agency may consider value engineering, building systems analysis, life cycle costing analysis and construction planning that lead to cost savings. The Contracting Agency shall specify any special factors influencing this analysis, including high rates of inflation, market uncertainty due to material and labor fluctuations or scarcities, and the need for specialized construction expertise due to technical challenges; or

(c) **Technical Complexity.** With the CM/GC Method, the Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between the Contracting Agency, design professionals, any Contracting Agency project management or technical consultants and the CM/GC, in which the CM/GC will assist in addressing specific project challenges through pre-construction Personal Services. The Contracting Agency may consider the need for CM/GC input on issues such as operations of the facility during construction, tenant occupancy, public safety, delivery of an early budget or GMP, financing, historic preservation, difficult remodeling projects and projects requiring complex phasing or highly coordinated scheduling.

(2) **Authority.** Contracting Agencies shall use the CM/GC form of contracting only in accordance with the requirements of these division 49 Model Rules and ORS 279C.337, when a competitive bidding exemption is approved. See particularly OAR 137-049-0600 on "Purpose" and 137-049-0620 on "Use of Alternative Contracting Methods".

(3) **Selection.** CM/GC selection criteria may include those factors set forth above in OAR 137-049-0640(2)(b).

(4) **Basis for Payment.** The CM/GC process adds specified construction manager Personal Services to traditional design-bid-build general contractor Work, requiring full Contract performance within a negotiated GMP, fixed Contract Price or other maximum Contract Price. For a GMP pricing method, the basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for construction Work and Personal Services rendered, which together shall not exceed the GMP. See GMP definition at OAR 137-049-0610 and Pricing Mechanisms at 137-049-0660.

(5) **Contract Requirements.** Contracting Agencies shall conform their CM/GC contracting practices to the following requirements:

(a) **Nature of the Initial CM/GC Services Contract Document.** A solicitation for CM/GC Services is a Procurement for a Public Improvement, since the scope of the Procurement includes not only pre-construction Personal Services to be performed by the CM/GC, but also construction Work that is expected to result in a completed Public Improvement. In the traditional CM/GC Services contracting approach, the text of the resulting CM/GC Services Contract will include comprehensive contract provisions that will not only fully govern the relationship between the Contracting Agency and the CM/GC for the pre-construction Personal Services, but will also include the general contract provisions that will control the CM/GC's providing of the construction Work necessary to complete the project (with any remaining necessary construction-related contract provisions being added through Early Work amendments to the Contract, the GMP amendment to the Contract or, if necessary, a conventional amendment to the Contract). The traditional CM/GC Services contracting approach, however, also contemplates that the Contracting Agency will only authorize the CM/GC to perform the pre-construction Personal Services when the Contract is first executed unless construction Work is specifically included in the initial CM/GC Contract. Under this approach, the construction phase or phases of the CM/GC Services project are not yet authorized and the Contract only becomes a Public Improvement Contract once the parties amend the Contract, through an Early Work or a GMP amendment, to authorize the construction of a portion of the project or the entire project. See also OAR 839-025-0020, regarding the Bureau of Labor and Industries' determination of when a Contract for CM/GC Services becomes a "public works" Contract for purposes of paying prevailing wage rates for construction Work under the CM/GC Contract.

(b) **Setting the GMP, Fixed Contract Price or Other Maximum Contract Price.** The GMP, fixed Contract Price or other maximum Contract Price shall be set at an identified time consistent with industry practice and project conditions and after supporting information reasonably considered necessary to its use has been developed, which will normally take place by the end of the design development phase of the project. The supporting information for the GMP must define with particularity both what Personal Services and construction Work are included and excluded from the GMP, fixed Contract Price or other maximum Contract Price. A set of project drawings and Specifications shall be produced establishing the scope of construction Work contemplated by the GMP, fixed Contract Price or other maximum Contract Price.

(c) **Adjustments to the GMP, Fixed Contract Price or Other Maximum Contract Price.** The Contract shall clearly identify the standards or factors under which changes or additional construction Work will be considered outside of the Work scope that warrants an increase in the GMP, fixed Contract Price or other maximum Contract Price, as well as criteria for decreasing the GMP, fixed Contract Price or other maximum Contract Price. The GMP, fixed Contract Price or other maximum Contract Price shall not be increased without a concomitant increase to the scope of the Work defined at the establishment of the GMP, fixed Contract Price or other maximum Contract Price or most recent amendment to the GMP, fixed Contract Price or other maximum Contract Price. An increase to the scope of the Work may take the form of

(a)

conventional additions to the project scope, as well as corrections to the Contract terms and conditions, additions to insurance coverage required by the Contracting Agency and other changes to the Work.

(d) Cost Savings. The Contract shall clearly identify the disposition of any Cost Savings resulting from completion of the Work below the GMP, fixed Contract Price or other maximum Contract Price; that is, under what circumstances, if any, the CM/GC might share in those Cost Savings, or whether the Cost Savings accrue only to the Contracting Agency's benefit. Unless there is a clearly articulated reason for sharing the Cost Savings set forth in the Contract, the Cost Savings must accrue to the Contracting Agency.

(e) Cost Reimbursement. The Contract shall clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, fixed Contract Price or other maximum Contract Price, including any category of GCWork costs, and may also incorporate a mutually-agreeable cost-reimbursement standard.

(f) Audit. Cost reimbursements shall be made subject to final audit adjustment, and the Contract shall establish an audit process to ensure that Contract costs are allowable, properly allocated and reasonable.

(g) Fee. Compensation for the CM/GC's Personal Services and construction Work, where the Contract uses a GMP, shall include a fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee shall be expressly defined in the Contract terms and conditions at the time the Contracting Agency selects the CM/GC. The fee, which may be expressed as either a fixed dollar amount or as a proposed percentage of all reimbursable costs, shall be identified during and become an element of the selection process. It shall subsequently be expressed as a fixed amount for particular construction Work authorized to be performed, when Early Work is added to the Contract through an amendment and when the GMP is established. The CM/GC fee does not include any fee paid to the CM/GC for performing pre-construction services during a separate pre-construction phase.

(h) Incentives. The Contract shall clearly identify any economic incentives, the specific criteria that apply and their relationship to other financial elements of the Contract (including the GMP, fixed Contract Price or other maximum Contract Price).

(i) Controlled Insurance Programs. For projects where an owner-controlled or contractor-controlled insurance program is permitted under ORS 737.602, the Contract shall clearly identify whether an owner-controlled or contractor-controlled insurance program is anticipated or allowable. If so, the Contract shall clearly identify (1) anticipated cost savings from reduced premiums, claims reductions and other factors, (2) the allocation of cost savings, and (3) safety responsibilities, incentives or both safety responsibilities and incentives.

(j) Early Work. The RFP shall clearly identify, whenever feasible, the circumstances under which any Early Work may be authorized and undertaken for compensation prior to establishing the GMP, fixed Contract Price or other maximum Contract Price.

(k) Subcontractor Selection. Subcontracts under the Contract are not Public Contracts within the meaning of the Code. However, the Contract must include provisions that clearly meet the requirements of ORS 279C.337(3) and other Contracting Agency requirements. Within the scope of 279C.337(3), the CM/GC's subcontractor selection process must meet the following parameters:

(A) Absent a written justification prepared by the CM/GC and approved by the Contracting Agency as more particularly provided for in this section, the CM/GC's Subcontractor selection process must be "competitive", meaning that the process should include publicly-advertised subcontractor solicitations and be based on a low-bid competitive method, a low-quote competitive method for contracts in a specified dollar range agreeable to the Contracting Agency, or a method whereby both price and qualifications of the subcontractors are evaluated in a competitive environment, consistent with the RFP and Contract requirements;

(B) When the Subcontractor selection process for a particular Work package will not be "competitive" as provided for in this section, the process must meet the following requirements:

(i) The CM/GC must prepare and submit a written justification to the Contracting Agency, explaining the project circumstances that support a non-competitive Subcontractor selection process for a particular Work package, including, but not limited to, Emergency circumstances, the CM/GC's need to utilize a key Subcontractor member of the CM/GC's project team consistent with the CM/GC's project Proposal, the need to meet other specified Contract requirements, the continuation or expansion of an existing Subcontractor agreement that was awarded through a "competitive process" along with facts supporting the continuation or expansion of the Subcontractor agreement, or a "sole source" justification;

(ii) For a "sole source" selection of a subcontractor to proceed, the Contracting Agency must evaluate the written justification provided by the CM/GC and must find that critical project efficiencies require utilization of labor, services or materials from one subcontractor; that technical compatibility issues on the project require labor, services or materials from one subcontractor; that particular labor, services or materials are needed as part of an experimental or pilot project or as part of an experimental or pilot aspect of the project; or that other project circumstances exist to support the conclusion that the labor, services or materials are available from only one subcontractor;

(i)

- (iii) The CM/GC must provide an independent cost estimate for the Work package that will be subject to the non-competitive process, if required by the Contracting Agency;
- (iv) The CM/GC must fully respond to any questions or comments submitted to the CM/GC by the Contracting Agency; and
- (v) The Contracting Agency must approve the CM/GC's use of the non-competitive Subcontractor selection process prior to the CM/GC's pursuit of the non-competitive process.
- (C) A competitive selection process may be preceded by a publicly advertised sub-contractor pre-qualification process, with only those subcontractors meeting the pre-qualification requirements being invited to participate in the later competitive process through which the CM/GC will select the subcontractor to perform the construction Work described in the selection process;
- (D) If the CM/GC or an Affiliate or subsidiary of the CM/GC will be included in the subcontractor selection process to perform particular construction Work on the project, the CM/GC must disclose that fact in the selection process documents and announcements. The Contract must also identify the conditions, processes and procedures the CM/GC will utilize in that competitive process in order to make the process impartial, competitive and fair, including but not limited to objective, independent review and opening of bids or proposals for the elements of Work involved, by a representative of the Contracting Agency or another independent third party.
- (I) Subcontractor Approvals and Protests. The Contract shall clearly establish whether the Contracting Agency must approve subcontract awards, and to what extent, if any, the Contracting Agency will resolve or be involved in the resolution of protests of the CM/GC's selection of subcontractors and suppliers. The procedures and reporting mechanisms related to the resolution of sub-contractor and supplier protests shall be established in the Contract with certainty, including the CM/GC's roles and responsibilities in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the Contracting Agency must retain the right to monitor the subcontracting process in order to protect the Contracting Agency's interests and to confirm the CM/GC's compliance with the Contract and with applicable statutes, administrative rules and other legal requirements.
- (m) CM/GC Self-Performance or Performance by CM/GC Affiliates or Subsidiaries Without Competition. Consistent with the requirements of ORS 279C.337(3)(c), the Contract must establish the conditions under which the CM/GC or an Affiliate or subsidiary of the CM/GC may perform elements of the construction Work without competition from subcontractors, including, for example, job-site GC Work. Other than for GC Work, in order for the CM/GC or an Affiliate or subsidiary of the CM/GC to perform elements of the construction Work without competition from subcontractors, the CM/GC must provide, or must have included in the CM/GC's RFP Proposal to perform CM/GC Services for the project, a detailed proposal for performance of the Work by the CM/GC or an Affiliate or subsidiary of the CM/GC. If required by the Contracting Agency, the CM/GC's proposal to perform the construction Work must be supported by at least one independent cost estimate prior to the Work being included in the Contract.
- (n) Unsuccessful Subcontractor Briefing. ORS 279C.337(3)(e) is designed to allow a subcontractor who was not selected by the CM/GC to perform a particular element of the construction Work to obtain specific information from the CM/GC, and meet with the CM/GC to discuss the subcontractor qualification and selection process involved and the CM/GC's subcontractor selection decisions, in order to better understand why the subcontractor was not successful in being selected to perform the particular element of the Work and to improve the subcontractor's substantive qualifications or the subcontractor's methods in competing for elements of the Work for the particular project involved, or for future projects. The briefing meetings may be held with individual subcontractors or, if the subcontractors agree, in groups of subcontractors, with those groups established by bid package or other designation agreed to by the contracting agency and the CM/GC. Nevertheless, the CM/GC is not obligated to provide this briefing opportunity unless the CM/GC receives a written request from a subcontractor to discuss the subcontractor qualification and selection process involved. Unless the Contracting Agency and the CM/GC agree on a different schedule, the CM/GC Contract should include provisions:
- (A) Allowing a subcontractor 60 days from the CM/GC's notice of award of a subcontract for a particular Work package to request, in writing, a post-selection meeting with the CM/GC under this section; and
- (B) Requiring the CM/GC to set a meeting with the subcontractor under this section within 45 days of the subcontractor's written request.
- (o) Performance and Payment Bonds. Provided no construction Work is included with the pre-construction services to be performed under the initial form of the CM/GC Contract, no performance bond or payment bond is required to be provided by the CM/GC at the time of Contract signing, consistent with ORS 279C.380. Once construction Work is included in the Contract and authorized by the Contracting Agency to be performed by the CM/GC, however, the CM/GC must provide a performance bond and payment bond each in the full amount of any Early Work to be performed by the CM/GC, or the full amount of the GMP, fixed Contract Price or other maximum Contract Price, as applicable. Furthermore, in the event additional Early Work is added to the CM/GC Contract after the initial Early Work or in the event an amendment to the CM/GC Contract is made so that the GMP, fixed Contract Price or other maximum Contract
- (a)

Price must be increased, the performance bond and the payment bond must each be increased in an amount equal to the additional Early Work or the increased GMP, fixed Contract Price or other maximum Contract Price.

(p) Independent Review of CM/GC Performance; Conflicts of Interest. If a Contracting Agency requires independent review, monitoring, inspection or other oversight of a CM/GC's performance of pre-construction Personal Services, construction Work or both pre-construction Personal Services and construction Work, the Contracting Agency must obtain those independent review services from a Contractor independent of the CM/GC, the CM/GC's Affiliates and the CM/GC's Subcontractors, pursuant to the requirements of ORS 279C.307. However, ORS 279C.307 does not prohibit the following:

(A) The CM/GC's performance of both pre-construction Personal Services and construction Work that are included within the definition of CM/GC Services, consistent with ORS 279C.307(2); or

(B) The CM/GC's performance of internal quality control services, quality assurance services or other internal peer review of CM/GC work product that is intended to confirm the CM/GC's performance of the CM/GC Contract according to its terms.

(q) Socio-Economic Programs. The Contract shall clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and Contracting Agency.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.335, 279C.337 & 279C.380(2)

History:

DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06 DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 20-

2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0800

Required Contract Clauses

Except as provided by OAR 137-0490-0150 and 137-049-0160, Contracting Agencies shall include in all Solicitation Documents for Public Improvement Contracts all of the ORS Chapter 279C required Contract clauses, as set forth in the checklist contained in OAR 137-049-0200(1)(c) regarding Solicitation Documents. The following series of rules provides further guidance regarding particular Public Contract provisions.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 297C.505 - 279C.545 & 279C.800 - 279C.870

History:

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0805

Diesel Engine Requirements

(1) Nonroad Diesel Equipment – General Engine Requirements. For a State Contracting Agency Public Improvement Contract where the majority of the Project Site is located within Clackamas County, Multnomah County, or Washington County, the Public Improvement Contract is subject to the following requirements:

(a) For a State Contracting Agency Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2022 but before January 1, 2025, when the Public Improvement Contract will have an awarded Contract Amount of \$20 million or more, 60 percent of the total Nonroad Diesel Equipment used on the Project Site during the performance of the Public Improvement Contract must meet or exceed United States Environmental Protection Agency Tier 4 Exhaust Emission Standards for nonroad compression ignition diesel engines or, if not equipped with a Tier 4 compression ignition diesel engine, must be retrofitted with a Verified Diesel Oxidation Catalyst or Verified Diesel Particulate Filter;

(b) For a State Contracting Agency Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2025 but before January 1, 2029, when the Public Improvement Contract will have an awarded Contract Amount of \$15 million or more, 70 percent of the total Nonroad Diesel Equipment used on the Project Site during the performance of the Public Improvement Contract must meet or exceed United States Environmental Protection Agency Tier 4 Exhaust Emission Standards for non-road compression ignition diesel engines or, if not

(a)

equipped with a Tier 4 compression ignition diesel engine, must be retrofitted with a Verified Diesel Oxidation Catalyst or Verified Diesel Particulate Filter;

(c) For a State Contracting Agency Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2029, when the Public Improvement Contract will have an awarded Contract Amount of \$10 million or more, 80 percent of the total Non-Road Diesel Equipment used on the Project Site during the performance of the Public Improvement Contract must meet or exceed United States Environmental Protection Agency Tier 4 Exhaust Emission Standards for non-road compression ignition diesel engines or, if not equipped with a Tier 4 compression ignition diesel engine, must be retrofitted with a Verified Diesel Oxidation Catalyst or Verified Diesel Particulate Filter.

(2) Non-Road Diesel Equipment – Engine Requirements for Specified Projects. Notwithstanding the requirements of section (1) of this rule, 80 percent of the total Non-Road Diesel Equipment used on the Project Site during the performance of the State Contracting Agency Public Improvement Contract must meet or exceed United States Environmental Protection Agency Tier 4 Exhaust Emission Standards for non-road compression ignition diesel engines or, if not equipped with a Tier 4 compression ignition diesel engine, be retrofitted with a Verified Diesel Oxidation Catalyst or Verified Diesel Particulate Filter, for the Specified Projects.

(3) Non-Road Diesel Equipment – Exemptions. The following categories of Non-Road Diesel Equipment are exempt from sections (1) and (2) of this rule:

(a) Non-Road Diesel Equipment required for an Emergency, as determined by the State Contracting Agency responsible for administering the Public Improvement Contract; or

(b) For a State Contracting Agency Public Improvement Contract with a Solicitation Document advertisement date before January 1, 2029, Non-Road Diesel Equipment owned and operated by a Certified Firm. For a Public Improvement Contract with an advertisement date before January 1, 2029, Non-Road Diesel Equipment that is owned and operated by a Certified Firm and is otherwise compliant with the requirements of sections (1) and (2) of this rule, may be counted as compliant equipment for purposes of the calculation under section (5)(a) of this rule.

(4) Non-Road Diesel Equipment – Data and Records. To verify compliance with sections (1) and (2) of this rule, the Contractor must submit all required or necessary data and records associated with Non-Road Diesel Equipment to the State Contracting Agency, according to the specifications of the Public Improvement Contract.

(5) Non-Road Diesel Equipment – Sample Calculation. Contractor compliance with sections (1) and (2) of this rule will be determined by the following calculation:

(a) Total pieces of Non-Road Diesel Equipment used on the Project Site = _____

(b) Multiply the answer to (5)(a) by the required percentage under sections (1) or (2) of this rule (round to the nearest whole number)..... = _____

(c) Total pieces of Non-Road Diesel Equipment that qualify for an exemption under sections (3)(a) and (3)(b) of this rule..... = _____

(d) Subtract the number under section (5)(c) from the number under (5)(b) = _____

(e) Total number of Non-Road Diesel Equipment items used on the Project Site that must meet or exceed United States Environmental Protection Agency Tier 4 Exhaust Emission Standards for non-road compression ignition diesel engines or, if not equipped with a Tier 4 compression ignition diesel engine, be retrofitted with a Verified Diesel Oxidation Catalyst or Verified Diesel Particulate Filter [equal to 5(a) and (d)]...... = _____

(6) On-Road Concrete Mixer Trucks and On-Road Dump Trucks – General Engine Requirements. For a State Contracting Agency Public Improvement Contract where the majority of the Project Site is located within Clackamas County, Multnomah County, or Washington County, the Public Improvement Contract is subject to the following requirements:

(a) For a State Contracting Agency Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2022 but before January 1, 2025, when the Public Improvement Contract will have an awarded Contract Amount of \$20 million or more, and for the Specified Projects, 50 percent of the total on-road concrete mixer trucks and on-road dump trucks with compression ignition diesel engines used on the Project Site during the performance of the Public Improvement Contract must be powered by a model year 2010 or newer engine;

(b) For a State Contracting Agency Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2025 but before January 1, 2029, when the Public Improvement Contract will have an awarded Contract Amount of \$15 million or more, 75 percent of the total on-road concrete mixer trucks and on-road dump trucks with compression ignition diesel engines used on the Project Site during the performance of the Public Improvement Contract must be powered by a model year 2010 or newer engine;

(a)

(c) For a State Contracting Agency Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2029, when the Public Improvement Contract will have an awarded Contract Amount of \$10 million or more, 100 percent of the total on-road concrete mixer trucks and dump trucks with compression ignition diesel engines used on the Project Site during the performance of the Public Improvement Contract must be powered by a model year 2010 or newer engine.

(7) On-Road Concrete Mixer Trucks and On-Road Dump Trucks – Scope of Engine Requirements. The requirements of section (6) of this rule apply to on-road concrete mixer trucks and on-road dump trucks with compression ignition diesel engines that are owned or operated by Contractors, subcontractors, and those operated under trucking services agreements.

(8) On-Road Concrete Mixer Trucks and On-Road Dump Trucks – Exemptions. The requirements of section (6) of this rule do not apply to the following:

(a) Concrete mixer trucks or dump trucks that are required for an Emergency, as determined by the State Contracting Agency responsible for administering the Public Improvement Contract;

(b) Concrete mixer trucks or dump trucks with compression ignition diesel engines that are owned and operated by a Certified Firm under a State Contracting Agency Public Improvement Contract with a Solicitation Document advertisement date before January 1, 2029; or

(c) Concrete mixer trucks or dump trucks with compression ignition diesel engines that are owned and operated by suppliers or vendors delivering materials to a Project Site, that are not operated by Contractors or subcontractors or operated under a trucking services agreement.

(9) Timing of Engine Requirements. For purposes of this rule, a Contract does not become a Public Improvement Contract until construction work is described, specified, authorized and agreed upon by the parties to the Contract. A Contract that has not yet become a Public Improvement Contract includes, but is not limited to, a Contract for Construction Manager/General Contractor Services which only includes preconstruction services to be provided by the Contractor, or a progressive design-build Contract that only includes preliminary design services to be provided by the Contractor.

(10) Idling Requirements. Where the majority of the Project Site is located within Clackamas, Multnomah, or Washington County, all Non-Road Diesel Equipment used on a Project Site during the performance of the State Contracting Agency Public Improvement Contracts listed in section (11) of this rule, must meet the following engine idling requirements, in order to reduce unnecessary diesel exhaust emissions:

(a) All Non-Road Diesel Equipment must shut down after five (5) minutes of inactivity;

(b) All Non-Road Diesel Equipment must have signs or decals on the Non-Road Diesel Equipment visible to the operators to remind them to shut down the Non-Road Diesel Equipment after five (5) minutes of inactivity;

(c) Contractors must post "Five Minute Limit" signs in high foot-traffic areas of the Project Site that are visible to workers stating that Non-Road Diesel Equipment must be shut down after five (5) minutes of inactivity;

(d) Contractors must otherwise instruct all Non-Road Diesel Equipment operators in writing of the requirement that all Non-Road Diesel Equipment must be shut down after five (5) minutes of inactivity.

(11) Idling Requirements – Contracts Affected. The idling requirements for Non-Road Diesel Equipment in section (10) of this rule apply only to the following State Contracting Agency Public Improvement Contracts:

(a) For a State Contracting Agency Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2022 but before January 1, 2025, when the Public Improvement Contract will have an awarded Contract Amount of \$20 million or more, and for the Specified Projects;

(b) For a State Contracting Agency Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2025 but before January 1, 2029, when the Public Improvement Contract will have an awarded Contract Amount of \$15 million or more; and,

(c) For a State Contracting Agency Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2029, when the Public Improvement Contract will have an awarded Contract Amount of \$10 million or more.

(12) Idling Requirements – Exemptions. Each State Contracting Agency Public Improvement Contract subject to the idling requirements for Non-Road Diesel Equipment in sections (10) and (11) of this rule shall include provisions exempting Contractors from these idling requirements in the following circumstances:

(a) When the Non-Road Diesel Equipment is required for an Emergency, as determined by the State Contracting Agency responsible for administering the Public Improvement Contract;

(a)

- (b) When the safety of Contractors, subcontractors and their employees may be compromised if Non-Road Diesel Equipment is turned off, which may include, but not be limited to, circumstances when employees are working in atrench;
- (c) When the Non-Road Diesel Equipment involved meets the most stringent EPA emissions standards or has been retrofitted with a Verified Diesel Oxidation Catalyst or Verified Diesel Particulate Filter;
- (d) When frequent shutdowns may be detrimental to the exhaust control system of the Non-Road Diesel Equipment, thereby reducing the effectiveness of that exhaust control system by lowering the exhaust temperature; or
- (e) When the Non-Road Diesel Equipment requires testing, servicing, inspection, or repairs.

Statutory/Other Authority: ORS 279A.065 & ORS 279C.537

Statutes/Other Implemented: ORS 279C.537

History:

[DOJ 1-2022, temporary adopt filed 01/03/2022, effective 01/03/2022 through 07/01/2022](#)

137-049-0810

Waiver of Delay Damages Against Public Policy

Contracting Agencies shall not place any provision in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from a Contracting Agency's unreasonable delay in performing the Contract. However, Contract provisions requiring notice of delay, providing for alternative dispute resolution such as arbitration (where allowable) or mediation, providing other procedures for settling contract disputes, or providing for reasonable liquidated damages, are permissible.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.315**History:**

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0815

BOLI Public Works Bond

Pursuant to ORS 279C.830(2), the specifications for every Public Works Contract shall contain a provision stating that the Contractor and every subcontractor must have a Public Works bond filed with the Construction Contractors Board before starting Work on the project, unless otherwise exempt. This bond is in addition to performance bond and payment bond requirements. See BOLI rule at OAR 839-025-0015.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.830**History:**

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

137-049-0820

Retainage

(1) Withholding of Retainage. A Contracting Agency shall not retain an amount in excess of five percent of the Contract Price for Work completed. If the Contractor has performed at least 50 percent of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written approval, the Contracting Agency may, in its discretion, reduce or eliminate retainage on any remaining progress payments. The Contracting Agency shall respond in Writing to all such applications within a reasonable time. When the Contract Work is 97-1/2 percent completed, the Contracting Agency may, at its discretion and without application by the Contractor, reduce the retained amount to 100 percent of the value of the remaining unperformed Contract Work. A Contracting Agency may at any time reinstate retainage. Retainage shall be included in the final payment of the Contract Price.

(2) Cash Retainage - Contract Price \$500,000 or Less. When the Contract Price for a Public Improvement Contract is \$500,000 or less, a Contracting Agency may reserve as retainage from any progress payment an amount not to exceed five percent, pursuant to ORS 279C.570(7). The Contracting Agency shall hold all retained moneys in a Contracting Agency fund or account, and interest is not required to accrue on the retained moneys.

(3) Cash Retainage - Contract Price in Excess of \$500,000. When the Contract Price for a Public Improvement Contract exceeds \$500,000, the Contracting Agency shall, in the ordinary course, deposit cash retainage in an amount not to exceed five percent from any progress payment due under the Public Improvement Contract into an interest-bearing escrow account, pursuant to ORS 279C.570(2) [House Bill 2415 (2019 Oregon Laws, Chapter 486)]. The Contractor

(1)

under the Public Improvement Contract is entitled to receive interest on the retained moneys from the date the Contractor's related payment request is fully approved by the Contracting Agency until the date the retained moneys are paid by the Contracting Agency to the Contractor. For purposes of this section, a payment of retainage is deemed to be "paid" by a Contracting Agency when the payment is transmitted to the Contractor, or otherwise applied against an obligation of the Contractor under the Public Improvement Contract.

(4) Alternatives In Lieu of Cash Retainage. Unless a Contracting Agency that reserves an amount as retainage finds in writing that accepting bonds, securities or other instruments described in part (a) of this section or a surety bond described in part (b) of this section poses an extraordinary risk that is not typically associated with the bonds, securities, other instruments or surety bond, as applicable, the Contracting Agency, in lieu of withholding moneys from payment, shall accept from the Contractor:

(a) Bonds, securities or other instruments that are deposited and accepted as provided in subsection (6)(a) of this rule; or

(b) A surety bond deposited as provided in subsection (6)(b) of this rule.

(5) Deposit in interest-bearing accounts. Upon election of the Contractor and when the Contract Price in the Public Improvement Contract is \$500,000 or less, a Contracting Agency shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the Contracting Agency. Earnings on such an account shall accrue on the cash retainage from the date the Contractor's related payment request is fully approved by the Contracting Agency until the date the retained moneys are paid by the Contracting Agency to the Contractor. For purposes of this section, a payment of retainage is deemed to be "paid" by a Contracting Agency when the payment is transmitted to the Contractor, or otherwise applied against an obligation of the Contractor under the Public Improvement Contract. State Contracting Agencies shall establish the interest-bearing account through the State Treasurer. When the contractor makes an election for deposit of retainage into an interest-bearing account and the Contract Price in the Public Improvement Contract exceeds \$500,000, the Contractor's election shall be satisfied by the Contracting Agency's establishment of an interest-bearing escrow account, pursuant to ORS 279C.570(2) [House Bill 2415 (2019 Oregon Laws, Chapter 486)].

(6) Alternatives In Lieu of Cash Retainage - Requirements. In lieu of cash retainage to be held by a Contracting Agency, the Contractor may substitute one of the following:

(a) Deposit of bonds, securities or other instruments:

(A) The Contractor may deposit bonds, securities or other instruments with the Contracting Agency or in any bank or trust company to be held for the benefit of the Contracting Agency. If the Contracting Agency accepts the deposit, the Contracting Agency shall reduce the cash retainage by an amount equal to the value of the bonds and securities, and reimburse the excess to the Contractor.

(B) Bonds, securities or other instruments deposited or acquired in lieu of cash retainage must be of a character approved by the Oregon Department of Administrative Services, which may include, without limitation:

(i) Bills, certificates, notes or bonds of the United States.

(ii) Other obligations of the United States or agencies of the United States.

(iii) Obligations of a corporation wholly owned by the Federal Government.

(iv) Indebtedness of the Federal National Mortgage Association.

(v) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.

(vii) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

(C) Upon the Contracting Agency's determination that all requirements for the protection of the Contracting Agency's interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu of retainage.

(b) Deposit of surety bond. A Contracting Agency, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the Contracting Agency in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond shall accept surety bonds from its subcontractors and suppliers in lieu of retainage. In such cases, retainage shall be reduced by an amount equal to the value of the bond, and the excess shall be reimbursed.

(7) Recovery of Additional Costs. Pursuant to ORS 279A.560(3), a Contracting Agency may recover from the Contractor all additional costs incurred in the proper handling of retainage alternatives requested by the Contractor, whether a request for the deposit of bonds, securities or other instruments in lieu of cash retainage, a request for a surety bond in lieu of cash retainage or an election for an interest-bearing account. If a Contracting Agency incurs costs associated with establishing a fund or account under section (2) of this rule or establishing an interest-bearing escrow account under section (3) of this rule, the Contracting Agency is not permitted to recover such costs from the Contractor.

(1)

(8) Additional Retainage When Certified Payroll Statements Not Filed. Pursuant to ORS 279C.845(7), if a Contractor is required to file certified payroll statements and fails to do so, the Contracting Agency shall retain 25 percent of any amount earned by the Contractor on a Public Works Contract until the Contractor has filed such statements with the Contracting Agency. The Contracting Agency shall pay the Contractor the amount retained under this provision within 14 days after the Contractor files the certified statements, regardless of whether a subcontractor has filed such statements (but see 279C.845(1) regarding the requirement for both contractors and subcontractors to file certified statements with the Contracting Agency). See BOLI rule at OAR 839-025-0010.

Statutory/Other Authority: ORS 279A.065 & ORS 279C.845

Statutes/Other Implemented: ORS 279C.560, ORS 279C.570 & ORS 701.420

History:

DOJ 15-2019, amend filed 12/23/2019, effective 01/01/2020 DOJ 2-2015, f. & cert. ef. 2-3-15

Reverted to DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14 DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0830

Contractor Progress Payments

(1) Request for progress payments. Each month the Contractor shall submit to the Contracting Agency its Written request for a progress payment based upon an estimated percentage of Contract completion. At the Contracting Agency's discretion, this request may also include the value of material to be incorporated in the completed Work that has been delivered to the premises and appropriately stored. The sum of these estimates is referred to as the "value of completed Work." With these estimates as a base, the Contracting Agency will make a progress payment to the Contractor, which shall be equal to:

- (a) The value of completed Work;
- (b) Less those amounts that have been previously paid;
- (c) Less other amounts that may be deductible or owing and due to the Contracting Agency for any cause; and
- (d) Less the appropriate amount of retainage.

(2) Progress payments do not mean acceptance of Work. Progress payments shall not be construed as an acceptance or approval of any part of the Work, and shall not relieve the Contractor of responsibility for defective workmanship or material.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.570 **History:**

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0840

Interest

(1) Prompt payment policy. A Contracting Agency shall pay promptly all payments due and owing to the Contractor on Contracts for Public Improvements.

(2) Interest on progress payments. Late payment interest shall begin to accrue on payments due and owing on the earlier of 30 Days after receipt of invoice or 15 Days after Contracting Agency approval of payment (the "Progress Payment Due Date"). The interest rate shall equal three times the discount rate on 90-day commercial paper in effect on the Progress Payment Due Date at the Federal Reserve Bank in the Federal Reserve district that includes Oregon, up to a maximum rate of 30 percent.

(3) Interest on final payment. Final payment on the Contract Price, including retainage, shall be due and owing no later than 30 Days after Contract completion and acceptance of the Work. Late-payment interest on such final payment shall thereafter accrue at the rate of one and one-half percent per month until paid.

(4) Settlement or judgment interest. In the event of a dispute as to compensation due a Contractor for Work performed, upon settlement or judgment in favor of the Contractor, interest on the amount of the settlement or judgment shall be added to, and not made part of, the settlement or judgment. Such interest, at the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District that includes Oregon, shall accrue from the

later of the Progress Payment Due Date, or thirty Days after the Contractor submitted a claim for payment to the Contracting Agency in Writing or otherwise in accordance with the Contract requirements.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.570**History:** DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0850

Final Inspection

(1) Notification of Completion; inspection. The Contractor shall notify the Contracting Agency in Writing when the Contractor considers the Contract Work completed. Within 15 Days of receiving Contractor's notice, the Contracting Agency will inspect the project and project records, and will either accept the Work or notify the Contractor of remaining Work to be performed.

(2) Acknowledgment of acceptance. When the Contracting Agency finds that all Work required under the Contract has been completed satisfactorily, the Contracting Agency shall acknowledge acceptance of the Work in Writing.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.570**History:** DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0860

Public Works Contracts

(1) Generally. ORS 279C.800 to 279C.870 regulates Public Works Contracts, as defined in 279C.800(6), and requirements for payment of prevailing wage rates. Also see administrative rules of the Bureau of Labor and Industries (BOLI) at OAR chapter 839.

(2) Required Contract Conditions. As detailed in the above statutes and rules, every Public Works Contract must contain the following provisions:

(a) Contracting Agency authority to pay certain unpaid claims and charge such amounts to Contractors, as set forth in ORS 279C.515(1).

(b) Maximum hours of labor and overtime, as set forth in ORS 279C.520(1).

(c) Employer notice to employees of hours and days that employees may be required to work, as set forth in ORS 279C.520(2).

(d) Contractor required payments for certain services related to sickness or injury, as set forth in ORS 279C.530.

(e) A requirement for payment of prevailing rate of wage, as set forth in ORS 279C.830(1). If both state and federal prevailing rates of wage apply, the contract and every subcontract must provide that all workers must be paid the higher of the applicable state or federal prevailing rate of wage.

(f) A requirement for filing a public works bond by contractor and every subcontractor, as set forth in ORS 279C.830(2).

(3) Requirements for Specifications. The Specifications for every Public Works Contract, consisting of the procurement package (such as the project manual, Bid or Proposal booklets, request for quotes or similar procurement Specifications), must contain the following provisions:

(a) The state prevailing rate of wage, and, if applicable, the federal prevailing rate of wage, as required by ORS 279C.830(1)(a):

(A) Physically contained within or attached to hard copies of procurement Specifications;

(B) Included by a statement incorporating the applicable wage rate publication into the Specifications by reference, in compliance with OAR 839-025-0020; or, (iii) when the rates are available electronically or by Internet access, the rates may be incorporated into the Specifications by referring to the rates and providing adequate information on how to access them in compliance with OAR 839-025-0020.

(b) If both state and federal prevailing rates of wage apply, a requirement that the contractor shall pay the higher of the applicable state or federal prevailing rate of wage to all workers. See BOLI rules at OAR 839-025-0020 and 0035.

(c) A requirement for filing a public works bond by contractor and every subcontractor, as set forth in ORS 279C.830(2).

(a)

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.800 - 279C.870, OL 2011 & ch 458

History:

DOJ 10-2011, f. 11-29-11, cert. ef. 1-1-12

DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10

DOJ 19-2007, f. 12-28-07, cert. ef. 1-1-08

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0870

Specifications; Brand Name Products

(1) Generally. The Contracting Agency's Solicitation Document shall not expressly or implicitly require any product by brand name or mark, nor shall it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279C.345(2).

(2) Equivalents. A Contracting Agency may identify products by brand names as long as the following language: "approved equal"; "or equal"; "approved equivalent" or "equivalent," or similar language is included in the Solicitation Document. The Contracting Agency shall determine, in its sole discretion, whether an Offeror's alternate product is "equal" or "equivalent."

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.345

History:

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0880

Records Maintenance; Right to Audit Records

(1) Records Maintenance; Access. Contractors and subcontractors shall maintain all fiscal records relating to Contracts in accordance with generally accepted accounting principles ("GAAP"). In addition, Contractors and subcontractors shall maintain all other records necessary to clearly document: (i) their performance; and (ii) any claims arising from or relating to their performance under a Public Contract. Contractors and subcontractors shall make all records pertaining to their performance and any claims under a Contract (the books, fiscal records and all other records, hereafter referred to as "Records") accessible to the Contracting Agency at reasonable times and places, whether or not litigation has been filed as to such claims.

(2) Inspection and Audit. A Contracting Agency may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the Records of any Person that has submitted cost or pricing data according to the terms of a Contract to the extent that the Records relate to such cost or pricing data. If the Person must provide cost or pricing data under a Contract, the Person shall maintain such Records that relate to the cost or pricing data for 3 years from the date of final payment under the Contract, unless a shorter period is otherwise authorized in Writing.

(3) Records Inspection; Contract Audit. The Contracting Agency, and its authorized representatives, shall be entitled to inspect, examine, copy, and audit any Contractor's or subcontractor's Records, as provided in section 1 of this rule. The Contractor and subcontractor shall maintain the Records and keep the Records accessible and available at reasonable times and places for a minimum period of 3 years from the date of final payment under the Contract or subcontract, as applicable, or until the conclusion of any audit, controversy or litigation arising out of or related to the Contract, whichever date is later, unless a shorter period is otherwise authorized in Writing.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.030, 279C.375, 279C.380 & 279C.440

History:

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0890

Contracting Agency Payment for Unpaid Labor or Supplies

(1) Contract incomplete. If the Contract is still in force, the Contracting Agency may, in accordance with ORS 279C.515(1), pay a valid claim to the Person furnishing the labor or services, and charge the amount against payments due or to become due to the Contractor under the Contract. If a Contracting Agency chooses to make such a payment as provided in 279C.515(1), the Contractor and the Contractor's surety shall not be relieved from liability for unpaid claims.

(1)

(2) Contract completed. If the Contract has been completed and all funds disbursed to the prime Contractor, all claims shall be referred to the Contractor's surety for resolution. The Contracting Agency shall not make payments to subcontractors or suppliers for Work already paid for by the Contracting Agency.

Statutory/Other Authority: ORS 279A.065 **Statutes/Other Implemented:** ORS 279C.515 **History:**
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0900

Contract Suspension; Termination Procedures

- (1) Suspension of Work. In the event a Contracting Agency suspends performance of Work for any reason considered by the Contracting Agency to be in the public interest other than a labor dispute, the Contractor shall be entitled to a reasonable extension of Contract time, and to reasonable compensation for all costs, including a reasonable allowance for related overhead, incurred by the Contractor as a result of the suspension.
- (2) Termination of Contract by mutual agreement for reasons other than default.
 - (a) Reasons for termination. The parties may agree to terminate the Contract or a divisible portion thereof if:
 - (A) The Contracting Agency suspends Work under the Contract for any reason considered to be in the public interest (other than a labor dispute, or any judicial proceeding relating to the Work filed to resolve a labor dispute); and
 - (B) Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the Work.
 - (b) Payment. When a Contract, or any divisible portion thereof, is terminated pursuant to this section (2), the Contracting Agency shall pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. The Contracting Agency shall also pay for all Work completed, based on the Contract Price. Unless the Work completed is subject to unit or itemized pricing under the Contract, payment shall be calculated based on percent of Contract completed. No claim for loss of anticipated profits will be allowed.
- (3) Public interest termination by Contracting Agency. A Contracting Agency may include in its Contracts terms detailing the circumstances under which the Contractor shall be entitled to compensation as a matter of right in the event the Contracting Agency unilaterally terminates the Contract for any reason considered by the Contracting Agency to be in the public interest.
- (4) Responsibility for completed Work. Termination of the Contract or a divisible portion thereof pursuant to this rule shall not relieve either the Contractor or its surety of liability for claims arising out of the Work performed.
- (5) Remedies cumulative. The Contracting Agency may, at its discretion, avail itself of any or all rights or remedies set forth in these rules, in the Contract, or available at law or in equity.

Statutory/Other Authority: ORS 279A.065
Statutes/Other Implemented: ORS 279C.650, 279C.655, 279C.660, 279C.665 & 279C.670
History:
DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

137-049-0910

Changes to the Work and Contract Amendments

- (1) Definitions for Rule. As used in this rule:
 - (a) "Amendment" means a Written modification to the terms and conditions of a Public Improvement Contract, other than by Changes to the Work, within the general scope of the original Procurement that requires mutual agreement between the Contracting Agency and the Contractor.
 - (b) "Changes to the Work" means a mutually agreed upon change order, or a construction change directive or other Written order issued by the Contracting Agency or its authorized representatives to the Contractor requiring a change in the Work within the general scope of a Public Improvement Contract and issued under its changes provisions in administering the Contract and, if applicable, adjusting the Contract Price or contract time for the changed Work.
- (2) Changes Provisions. Changes to the Work are anticipated in construction and, accordingly, Contracting Agencies shall include changes provisions in all Public Improvement Contracts that detail the scope of the changes clause, provide pricing mechanisms, authorize the Contracting Agency or its authorized representatives to issue Changes to the Work

and provide a procedure for addressing Contractor claims for additional time or compensation. When Changes to the Work are agreed to or issued consistent with the Contract's changes provisions they are not considered to be new Procurements and an exemption from competitive bidding is not required for their issuance by Contracting Agencies.

(3) Change Order Authority. Contracting Agencies may establish internal limitations and delegations for authorizing Changes to the Work, including dollar limitations. Dollar limitations on Changes to the Work are not set by these Model Rules, but such changes are limited by the above definition of that term.

(4) Contract Amendments. Contract Amendments within the general scope of the original Procurement are not considered to be new Procurements and an exemption from competitive bidding is not required in order to add components or phases of Work specified in or reasonably implied from the Solicitation Document. Amendments to a Public Improvement Contract may be made only when:

- (a) They are within the general scope of the original Procurement;
- (b) The field of competition and Contractor selection would not likely have been affected by the Contract modification. Factors to be considered in making that determination include similarities in Work, project site, relative dollar values, differences in risk allocation and whether the original Procurement was accomplished through competitive bidding, competitive Proposals, competitive quotes, sole source or Emergency contract;
- (c) In the case of a Contract obtained under an Alternative Contracting Method, any additional Work was specified or reasonably implied within the findings supporting the competitive bidding exemption; and
- (d) The Amendment is made consistent with this rule and other applicable legal requirements.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.065, 279C.335 & 279C.400

History:

DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06

DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

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