

**BEFORE THE BOARD OF COUNTY COMMISSIONERS  
FOR MULTNOMAH COUNTY, OREGON**

**RESOLUTION NO. 2015-123**

Adopting Revised Multnomah County Public Contract Review Board Rules Effective December 3, 2015.

**The Multnomah County Board of Commissioners Finds:**

- a. The most recent version of the Multnomah County Public Contract Review Board ("PCRB") Rules were adopted effective March 27, 2014. The PCRB Rules are based on the Attorney General Model Contract Rules ("AG Model Rules"). The AG Model Rules, in turn, are based on ORS Chapters 279A, 279B and 279C.
- b. Central Purchasing Policy Memorandum P104 requires a periodic review of the PCRB Rules to incorporate any required changes that have occurred and ensure the document reflects current and optimal business practice.
- c. The proposed rules will become effective on December 3, 2015.
- d. It is in the best interests of Multnomah County to adopt the proposed revision to the PCRB Rules in lieu of the AG Model Rules.
- e. ORS 279C.335(4)(c) requires compliance with the Oregon Attorney General's Model Rules for procuring CM/GC services. The Attorney General's model rule is adopted in its entirety for the 2015 PCRB revision.

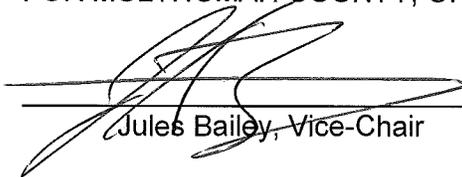
**The Multnomah County Board of Commissioners Resolves:**

The Board adopts the rules attached as Exhibit 1 as the Public Contract Review Board Rules for Multnomah County effective December 3, 2015. The Attorney General Model Rules provided in ORS 279A.065 do not apply to Multnomah County, unless required by law.

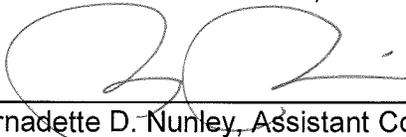
**ADOPTED this 3rd day of December, 2015.**



BOARD OF COUNTY COMMISSIONERS  
FOR MULTNOMAH COUNTY, OREGON

  
\_\_\_\_\_  
Jules Bailey, Vice-Chair

REVIEWED:  
JENNY M. MADKOUR, COUNTY ATTORNEY  
FOR MULTNOMAH COUNTY, OREGON

By   
\_\_\_\_\_  
Bernadette D. Nunley, Assistant County Attorney

SUBMITTED BY: Brian R. Smith, Purchasing Manager

**MULTNOMAH COUNTY**  
**PUBLIC CONTRACT REVIEW BOARD**  
**RULES**

**Effective December 3, 2015**  
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## **DIVISION 5 INTRODUCTION – SOURCE OF RULES – EFFECTIVE DATE**

These Rules comprise a comprehensive revision of the Multnomah County Public Contract Review Board Rules. The original rules were first adopted April 8, 1976 and were most recently revised and effective on December 3, 2015.

These Rules implement ORS Chapters 279 and Chapters 279A, 279B and 279C, the Public Contracting Code, referred to in this document as “the Code.”

- Division 10, Definitions, was compiled from definitions from Model Rules Divisions 46, 47, 48 and 49 with additions from the former county rules and from the Department of Administrative Services (“DAS”) Rules (“DAS Rules”).
- Divisions 15 and 20 apply to all Contracts including personal services.
- Division 46 implements ORS chapter 279A, General Provisions. Division 46 applies to all public contracting conducted under these Rules
- Division 47 implements chapter 279B, Public Procurements. Division 47 applies to Procurement of Goods and Trade Services.
- Divisions 48 and 49 implement ORS chapter 279C, Public Improvements and Related Contracts; Division 48 describes procedures for Procurement of architectural, engineering, land surveying and related services Contracts; Division 49 describes procedures for Procurement of construction services.
- Division 55 implements ORS Chapter 279 relating to purchases from Qualified Rehabilitation Facilities. Division 55 is based on DAS Rules and OAR 125-055-0005 et seq.
- Division 60 implements the County’s policy to provide opportunities for all segments of the business population and to prohibit discrimination. Division 60 applies to all Contracts including personal services Contracts.

The primary source documents for these Rules are the Code, the Oregon Attorney General’s Model Public Contract Rules (Divisions 46, 47, 48 and 49), the DAS Rules and the former Multnomah County Public Contract Review Board Rules dated March 27, 2015 (former county rules). The Model Rules and the DAS Rules were in some cases revised to meet the particular requirements of Multnomah County. ORS 279C.335(4)(c) requires compliance with the Attorney General’s Model Rules for procuring CM/GC services. The Attorney General’s rule is adopted in its entirety for the 2015 PCRBR revision.

These Rules focus on Competitive Procurement procedures intended to further the State of Oregon policy goals for a sound and responsive public contracting system that: 1) uses procurement practices that are a simple, clear and modern reflection of the market place and industry standards; 2) instills public confidence; 3) promotes efficient use of state and local government resources; 4) clearly identifies rules and policies that implement each of the legislatively mandated socioeconomic programs that overlay public contracting and accompany the expenditure of public funds; 5) allows impartial and open Competition; and 6) provides a public contracting structure that takes full advantage of evolving procurement methods as they emerge within various industries, while preserving Competitive Bidding as the standard for Public Improvement Contracts unless otherwise exempted.

## DIVISION 10 DEFINITIONS

### 10-0000 Definitions

**Addendum or Addenda.** A written or electronic addition or deletion to, a material change in, or general interest explanation of the Solicitation Document.

**Advantageous.** In the County's best interests, as assessed according to the judgment of the County.

**Award.** As the context requires, either the act or occurrence of the identification of the Person with whom the County will enter into a Contract following the resolution of any protest of the County's selection of that Person, and the completion of all Contract Negotiations.

**Affected Person or Affected Offeror.** A Person whose ability to participate in a Procurement is adversely affected by a decision of the County.

**Bid.** A response to an Invitation to Bid.

**Bidder.** A Person who submits a Bid in response to an Invitation to Bid.

**Board.** The Multnomah County Public Contract Review Board.

**Chair.** The Chair of the Board of County Commissioners for Multnomah County.

**Code.** The Public Contracting Code, ORS chapters 279A, 279B and 279C.

**Closing.** The date and time announced in the Solicitation Document as the deadline for submitting Offers.

**Competition.** Effort of two or more prospective suppliers of products or services to independently secure the business of the buyer by proposing the most attractive contract terms or by offering the highest quality service or product. (Competitive-adj.).

**Competitive Bidding.** A price-based selection process that involves an advertised public notice, issuance of a Written Solicitation Document inviting interested Persons to submit Written, Signed, and sealed Bids, that are received by the County and publicly opened at the designated time and place, and a Contract Awarded (if one is Awarded) to the lowest Responsive, Responsible Bidder.

**Competitive Range.** The Proposers with whom the Department will conduct Discussions or negotiate if the Department intends to conduct Discussions or Negotiations in accordance with Rule 47-0262 or Rule 49-0650. The Competitive Range shall be stated in the Solicitation Document, but will be decreased if the number of Proposers that submit Proposals is less than the specified number, or may be increased by the Department in accordance with Rule 47-0262 or Rule 49-0650.

**Conduct Disqualification.** A Disqualification pursuant to ORS 279C.440 and Rule 49-0370, or Debarment pursuant to Rule 47-0575.

**Contract.** A sale or other disposal, or a purchase, lease, rental or other acquisition of personal property, services other than Personal Services, public improvements, Public Works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. "Contract" does not include grants. This term is used interchangeably with the term "Public Contract."

**Contractor.** The Person with whom the County enters into a Contract.

**Contract Price.** As the context requires, (i) the maximum payments that the County will make under a Contract, including bonuses, incentives and contingency amounts, if the Contractor fully performs under the Contract, (ii) the maximum not-to-exceed amount of payments specified in the Contract, or (iii) the unit prices for Goods or Services set forth in the Contract.

**Cost Analysis.** Process used to develop or assess the reasonableness and validity of estimates and resource requirements by estimating the sub-elements of cost to produce an item or deliver a service (see 47-0250(4)(b)). Includes a statement or report of the assessment and related conclusions.

**Days.** Calendar Days unless otherwise specified by these Rules.

**Disadvantaged Business Enterprise or DBE.** A business concern described in ORS 200.005(1) and certified as such with the State of Oregon pursuant to ORS 200.055.

**Department.** A County Department or any unit within a Department, which has responsibility for the purchase of Goods or services for the County.

**Descriptive Literature.** The Offeror's materials submitted to provide information concerning the products available in response to the Solicitation Document.

**Disabled Individual.** A person who has a physical or mental impairment (a residual, limiting condition resulting from an injury, disease or congenital defect) that so limits the person's functional capabilities (such as mobility, communication, self-care, self-direction, work tolerance or work skills) that the individual is not able to engage in normal competitive employment over an extended period of time and, as a result, must rely on the provision of specialized employment opportunities by qualified nonprofit agencies for Disabled Individuals.

**Discussions.** To exchange information, compare views, take counsel, and communicate with another for the purposes of achieving clarification and mutual understanding of an Offer.

**Disqualification.** The preclusion of a Person from contracting with the County after notice and hearing pursuant to Rule 46-0210 or ORS 279C.440 and Rule 49-0370.

**Electronic Advertisement.** Notice of a request for Offers, request for Quotes, request for information or other document inviting participation in County Procurements available over the Internet via the World Wide Web or some other Internet protocol. An Electronic Advertisement may or may not include a Solicitation Document.

**Electronic Offer.** A response to a request for Quotes submitted via e-mail.

**Emergency.** Circumstances that could not have been reasonably foreseen which create a substantial risk of loss, damage, interruption of services or threat to the public health or safety and which require prompt execution of a Contract to remedy the condition.

**Emerging Small Business or ESB.** A business concern described in ORS 200.005(3) and 200.005(4) and certified as such with the State of Oregon pursuant to ORS 200.055.

**Exemption.** A process under Rules 49-0600 to 49-0690 that permits an Alternative Contracting Method to be used in lieu of Competitive Bidding. An Exemption may address a specific Contract, or a class or of Contracts.

**Facsimile.** A document that has been transmitted by and received by a facsimile machine.

**Feasibility Determination.** Examination of technical and cost data to determine the economic potential and practicality of project applications. Involves the use of metrics such as the time value of money so projects may be evaluated and compared on an equivalent basis. Interest rates, present value factors, capitalization costs, operating costs, and depreciation are all considered.

**Foreign Contractor.** A Contractor that is not domiciled in or registered to do business in the State of Oregon. See Rule 49-0490.

**Goods.** Supplies, equipment, or materials, and any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto.

**Good Cause.** When capitalized under these Rules, 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 County. The Department shall document in the Procurement file the basis for the determination of Good Cause for specifying otherwise. A Department will have Good Cause to specify otherwise when a Department determines:

- (1) 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;
- (2) 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;
- (3) 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;
- (4) That other circumstances exist in which the County's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs the County'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 Contract.

**Grant.** Grant has the meaning set forth in 279A.010(k)(A)

**Informal Quote.** A Quote made in response to a Solicitation under Rule 49-0160.

**Intermediate Procurement.** A sourcing method authorized by Rule 47-0270.

**Invitation to Bid or ITB.** The Solicitation document inviting competitive, Written, Signed and sealed Bids from prospective Contractors in which price is the predominate award criteria.

**Life Cycle Costing.** A Method of determining the cost of a product for its estimated useful life, including disposal.

**Living Wage.** A minimum wage required to be paid on janitorial, security and food services pursuant to Resolution 98-165.

**Minority Business Enterprise or MBE.** A minority business concern described in ORS 200.005(5) and certified as such with the State of Oregon pursuant to ORS 200.055.

**Minority Individual.** A person described in ORS 200.005(4).

**Negotiations.** To compare views, take counsel, and communicate with another so as to arrive at a voluntary, mutual agreement about a matter.

**Nonresident Bidder.** A Bidder described in ORS 279A.120(1)(a).

**Notice.** Any of the alternative forms of public announcement of Procurements, as described in 49-0210.

**Offer.** A Written Bid, Proposal or Quote offering to provide Goods or Services in response to a Solicitation.

**Offeror.** A Person submitting a Bid, Proposal or Quote as applicable; a Bidder or a Proposer.

**Opening.** The date, time and place announced in the Solicitation Document for the public Opening of Written sealed Offers.

**Person.** An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation or any other legal or commercial entity.

**Personal Services.** Services as defined in Rule 47-0000(2).

**Prevailing Wage Rate.** When used in these Rules means the “prevailing rate of wage” defined in ORS 279C.800(4).

**Price Agreement.** A Public Contract for the Procurement of Supplies and 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 Supplies and Services in which the County does not guarantee a minimum or maximum additional purchase.

**Procurement.** The act of purchasing, leasing, renting or otherwise acquiring Goods or services. As used in Division 49 it also means the act of contracting for a Public Improvement. “Procurement” includes each function and procedure undertaken or required to be undertaken to enter into a Public Contract, administer a Public Contract and obtain the performance of a Public Contract under the Code.

**Procurement File.** The file required to be maintained under Rule 46-0490.

**Product Sample.** A representative specimen of the item offered by the Offeror in response to the Solicitation Document. Unless otherwise provided in the Solicitation Document, the Product Sample shall be the exact product or a representative portion of that product offered by the Offeror.

**Proposal.** A response to a Request for Proposals.

**Proposer.** A Person who submits a Proposal in response to a Request for Proposals. In Division 48, the term “Proposer” means a Consultant who submits a Proposal to in response to a Request for Proposals.

**Public Contract Review Board.** The Board of County Commissioners acting as the local contract review board pursuant to ORS 279A.060; also referred to as “Board.”

**Public Contract.** A sale or other disposal, or a purchase, lease, rental or other acquisition of personal property, services other than Personal Services, public improvements, Public Works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. “Public Contract” does not include grants. This term is used interchangeably with the term “Contract.”

**Public Improvement.** A project for construction, reconstruction or major renovation on real property by or for the County. “Public Improvement” does not include projects for which no funds of the County are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or Emergency Work, minor alteration, ordinary repair or maintenance necessary to preserve a Public Improvement. See ORS 279A.010(1)(cc)

**Public Works.** Public Works includes but is not limited to roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by the County to serve the public interest but does not include the reconstruction or renovation of privately owned property that is leased by the County. See ORS 279C.800(5).

**PUR-1.** The County administrative procedure for use for Solicitation of Contracts for Personal Services.

**PURCHASING.** Purchasing section of DCM Finance Department.

**PURCHASING Manager.** The Purchasing Manager whose duties are described in Division 15 or that person's designee.

**PURCHASING COMMONS Site.** A site maintained by PURCHASING on the COMMONS (County intranet site) for use by County employees.

**PURCHASING Website.** The Internet World Wide Web site maintained by PURCHASING.

**QRF.** Qualified Rehabilitation Facility. A non-profit corporation, defined in ORS 279.835(4), to serve Disabled Individuals.

**Quote.** A response to an informally solicited request for a competitive price or competitive proposal pursuant to Rule 47-0270, Rule 49-0160 or to any other Solicitation where the Solicitation is not made by an Invitation to Bid or a Request for Proposals or Special Procurement.

**Request for Proposals or RFP.** A Solicitation Document calling for Proposals.

**Resident Bidder.** A Bidder described in ORS 279A.120(1)(b).

**Responsible Offeror (also, Responsible Bidder or Responsible Proposer, as applicable).** A Person that has submitted an Offer and meets the standards set forth in Rule 47-0640(1)(c)(F) and that has not been disqualified by the PURCHASING Manager under Rule 47-0575 or Rule 49-0370, respectively. When used alone, "Responsible" means meeting the aforementioned standards.

**Responsive Offer (also, Responsive Bid or Responsive Proposal, as applicable).** An Offer that substantially complies with applicable Solicitation procedures and requirements and the Solicitation Document.

**Retainage.** As used in these Rules, "Retainage" has the meaning given in ORS 279C.550 and means the difference between the amount earned by a Contractor on a Public Contract and the amount paid on the Contract.

**Rules.** These Public Contracting Rules unless otherwise indicated.

**Sign, Signed or Signature.** Any mark, word or symbol attached to or logically associated with a document and executed or adopted by a Person with the intent to be bound.

**Small Procurement.** A procurement pursuant to Rule 47-0265

**Sole-Source Procurement.** A sourcing method authorized by Rule 47-0275.

**Solicitation.** A request for the purpose of soliciting Offers. This request may take the form of an Invitation for Bid, a Request for Proposal, a Request for Qualifications or a similar document; the process of notifying prospective Offerors that the County requests such Offers; the Solicitation Document itself.

**Solicitation Document.** An Invitation to Bid, Request for Proposals, Request for Quotes or other similar document issued to invite offers from prospective Contractors. This term does not apply to Intermediate Procurements, Informal Quotes or Procurements under 47-0265, 47-0270, 48-0210 or 49-0160. The following are not Solicitation Documents if they do not invite Offers from prospective Contractors: a Request for Qualifications, a prequalification of Bidders, a Request for Information, or a Request for Product Prequalification.

**Special Procurement.** A sourcing method authorized by Rule 47-0285

**Specifications.** Any description of the physical or functional characteristics, or of the nature of a supply, service or construction item, including any requirement for inspecting, testing, or preparing a supply, service, or 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.

**Trade Services.** All remaining services that do not meet the definition for Personal Services.

**Unauthorized Purchase.** Any purchase of Goods or Services, including personal services made without following County Procurement requirements or without delegated authority (See PCRB 20-0030).

**Women.** As used in these Rules, this term has the meaning set forth in ORS 200.005(11).

**Women Business Enterprise or WBE.** A Women business concern described in ORS 200.005(5) and certified as such with the State of Oregon pursuant to ORS 200.055.

**Work.** 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.

**Written or Writing.** Conventional paper documents either manuscript or printed, in contrast to spoken words. It also includes electronic transmissions or Facsimile documents when required by applicable law or to the extent permitted by the Solicitation Document or Contract.

Source: The Code, Attorney General Model Rules, DAS Rules, Former County Rules

## **DIVISION 15 AUTHORITY OF THE PURCHASING MANAGER**

### **15-0000 Authority of the PURCHASING Manager**

- (1) The authority of the PURCHASING Manager is as follows:
  - (a) Solicit and Award all Contracts over the dollar thresholds stated in Rules 47-0270 (1), 48-0210 (1) and 49-0160 (1) on behalf of the County unless the Solicitation Document provides that the Contract shall be Awarded by the County Chair or the Board.
  - (b) Purchase or Contract for Goods and Services equal to or less than the thresholds stated in (1) (a) above
  - (c) Delegate authority to make purchases of Goods and Services equal to or less than \$150,000;
  - (d) Ensure compliance with all applicable federal and state laws, Multnomah County Rules, policies and procedures governing public and Personal Services Contracts.
  - (e) Establish and enforce Specifications to procure Goods and Services.
  - (f) Execute County Contracts on behalf of the Chair when authorized by the Chair, using the Signature of the Chair and the initials or the name of the PURCHASING Manager.
  - (g) Review and approve or deny, on behalf of the Chair, Contract amendments that exceed twenty percent of the original Contract authority amount for Contracts of \$150,000 or less.
  - (h) Review and approve or deny, on behalf of the Chair, Public Improvement Contract amendments that exceed twenty percent, or in the case of Contracts for renovation or remodel, thirty-three percent of the original Contract authority amount for Contracts of \$75,000 or less.
  - (i) Review and recommend to the Board approval or denial of Contract amendments that exceed the thresholds stated in (g) and (h) above.
  - (j) Recommend amendments to the Public Contract Review Board Rules to the Board and recommend amendments to County administrative procedures to the Chair;
  - (k) Develop procedures which comply with applicable statutes, rules, policies, resolutions and administrative procedures.
  - (l) Review and approve or deny Sole Source Procurements and Special Procurements for \$150,000 and less and exemption from Competitive Bidding for Public Improvement Contracts for \$75,000 and less
  - (m) Review and recommend to the Board action to be taken on Sole Source Procurement and Special Procurement in excess of \$150,000 and exemption from Competitive Bidding for Public Improvement Contracts in excess of \$75,000
  - (n) Manage and monitor county-wide Contracts required by county Departments for greater efficiency and economy.
  - (o) Adopt forms and procedures for all county purchases.
  - (p) Maintain a file of all original executed copies of Contracts.
  - (q) Maintain a county-wide Contracts information system.
  - (r) Manage the county Contract approval process.
  - (s) Delegate the PURCHASING Manager's authority to act under these Rules.

- (2) All authority to act under these Rules not specifically assigned to the Board, a Department or the PURCHASING Manager is delegated to the PURCHASING Manager.

Based on former County Rules 15.000, 15.003 and 15.006

## DIVISION 20 MISCELLANEOUS MATTERS

### 20-0005 Rules Applicable in Lieu of PCRB Rules

- (1) The Model Rules adopted by the Attorney General shall not apply to Multnomah County. These Rules shall apply in place of the Attorney General Model Rules.

### 20-0010 Conflicts of Interest

- (1) Definitions. The following definitions apply only to this section:
  - (a) **Actual conflict of interest.** Any action, decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated.
  - (b) **Business.** Any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain.
  - (c) **Business with which the person is associated.** Any business of which the person or the person's relative is a director, officer, owner or employee, or agent or any corporation in which the person or the person's relative owns or has stock worth \$1,000 or more at any time in the preceding calendar year.
  - (d) **Potential conflict of interest.** Any action or decision or recommendation by a person acting in a capacity as a Public Official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:
    - (A) An interest of membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.
    - (B) Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative is associated, is a member or is engaged. The Board of Commissioners may by resolution limit the minimum size of or otherwise establish criteria for or identify the smaller classes that qualify under this exception.
    - (C) Membership in a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.
  - (e) **Public official.** Any person who, when an alleged violation of this chapter occurs, is serving Multnomah County as an elected official, officer, employee, or appointee on any commission, committee or similar advisory body, irrespective of whether the person is compensated for such services.
  - (f) **Relative.** The spouse of the public official, any children of the public official or of the public official's spouse, and brothers, sisters or parents of the public official or of the public official's spouse.
  - (g) **Contract Official.** Any public official responsible for processing, Awarding, funding or monitoring a county Contract.
  - (h) **Appointing authority.** The elected official having administrative authority over the affected public official, or such elected official's designee.

**(2) Actual and Potential Conflicts of Interest.**

- (a) Prior to taking any action in connection with a County Contract, every Contract Official shall in Writing notify the Contract Official's appointing authority, the County Auditor and PURCHASING Manager of any actual conflict of interest or potential conflict of interest of such Contract Official with respect to such proposed Contract.
- (b) Upon receiving any information that a proposed Contract involves a potential conflict of interest or actual conflict of interest of any Contract Official, the County Auditor or designated representative shall review the Contract Award procedures for compliance with applicable laws and regulations.
- (c) No Contract shall be Awarded or executed on behalf of the County without review and approval by the County Auditor if the County Auditor determines that any Contract Official has a potential conflict of interest or actual conflict of interest in connection with the Contract.

**20-0025 Annual Reports**

- (1) The PURCHASING Manager shall file an annual report of purchasing activity by March 31 for the twelve-month period ending June 30 of the prior FY with the Chair and the Board. The report shall contain the following:
  - (a) An index of Contracts, Contract Price and Contractors.
  - (b) Information regarding Contracts with MBE, WBE and ESB enterprises as well as Qualified Rehabilitation Facilities.
  - (c) A summary of Contract totals by Department for the prior and current year.
  - (d) A listing of Contracts Awarded through the Solicitation process to Contractors who did not score the highest evaluation or have the lowest Responsive Bid.
  - (e) A listing of Contracts exceeding the dollar limit set forth in Rule 47-0270 (1), 48-0210 (1) and 49-0160 (1) as well as formal personal services Contracts governed by Administrative Procedure PUR-1 for which only one (1) Bid or Proposal was received.

**20-0030 Unauthorized Purchases**

- (1) The PURCHASING Manager may approve claims for payment arising from unauthorized purchases or may refer such claims to the Board for approval.
- (2) Prior to processing a request for approval of payment of an Unauthorized Purchase, the PURCHASING Manager shall require the following information:
  - (a) Description of the Goods or Services furnished as a result of the unauthorized Contract;
  - (b) A detailed statement of facts relating to the unauthorized purchase, including the name and position of the person who made the unauthorized purchase and an explanation of the reason County Procurement requirements were not followed;
  - (c) Documentation that the amount claimed by the Contractor is fair and reasonable;
  - (d) Copies of all invoices and other documents pertinent to the transaction;
  - (e) Verification that the Goods or services have been received and accepted by the County;
  - (f) The cost center, WBS element or order code for the purchase;
  - (g) A statement of the steps taken or planned to prevent recurrence of such Unauthorized Purchase.

## **20-0040 Ethics in Public Contracting**

- (1) These Rules supplement and do not replace Personnel Rules 3-30-010 to 3-30-055 or ORS 244.010 to ORS 244.400, for the purpose of applying the policy of ORS 244.010 to Oregon Public contracting under the Code and these Rules. Oregon Public contracting is a public trust. The Agencies and Contractors involved in public contracting must safeguard this public trust.

## **20-0050 Specifications**

- (1) Departments shall not develop Specifications that primarily benefit a Contractor, directly or indirectly, to the detriment of the County. When private sector specialists (consultants, architects, engineers, designers, draftsmen, etc.) develop specifications or material lists for the County, they must disclose any conflicts of interest. Such specialists may not participate in subsequent, related public solicitations, as either a primary Proposer/Bidder or subcontractor, except as allowed by the PURCHASING MANAGER.
- (2) Departments shall not develop Specifications that inhibit or tend to discourage public contracting with Qualified Rehabilitation Facilities under Division 55 of these Rules where those Specifications inhibit or tend to discourage the acquisition of QRF-produced Supplies and Services without reasonably promoting the satisfaction of bona fide, practical procurement needs of the County.
- (3) Departments shall not develop Specifications that inhibit or tend to discourage public contracting under other public procurement laws or policies of the County.

## **DIVISION 46 GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTING**

### **46-0100 Application; Federal Law Supremacy**

- (1) These PCRB Rules consist of the following four divisions:
  - (a) This division 46, which is applicable to all public contracting;
  - (b) Division 47, which describes procedures for public contracting for Goods or Services, as defined in ORS 279A.010.
  - (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) In the event of conflict between Rules in this division 46 and Rules in divisions 47, 48 and 49, the Rules in divisions 47, 48 and 49 take precedence over the Rules in this division 46.
- (3) Except as otherwise expressly provided in ORS 279C.800 to ORS 279C.870, and notwithstanding ORS chapters 279A, 279B, and ORS 279C.005 to 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, and ORS 279C.005 to 279C.670 or these PCRB Rules, or require additional conditions in Public Contracts not authorized by ORS chapters 279A, 279B, and ORS 279C.005 to 279C.670 or these PCRB Rules.

Stat. Auth.: ORS 279A.065

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

### **46-0120 Policy**

All County Departments shall conduct public contracting to further the following policies, and policies set forth in ORS Chapters 279, 279A, 279B and 279C and these PCRB Rules. A sound and responsive public contracting system should:

- (1) Simplify, clarify and modernize procurement practices so that they reflect the market place and industry standards.
- (2) Instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government.
- (3) Promote efficient use of federal, state and local government resources, maximizing the economic investment in public contracting within this state.
- (4) Clearly identify rules and policies that implement each of the socioeconomic programs that overlay public contracting and accompany the expenditure of public funds mandated by the legislature or the Board.
- (5) Allow impartial and open Competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement. In public procurement, as set out in ORS chapter 279B, meaningful Competition may be obtained by evaluation of performance factors and other aspects of service and product quality, as well as pricing, in arriving at best value.

- (6) Provide a public contracting structure that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving Competitive Bidding as the standard for Public Improvement Contracts unless otherwise exempted.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.015 & ORS 279A.065

#### **46-0130 Application of the Code and PCRB Rules; Exceptions**

- (1) Neither the Code nor these PCRB Rules apply to the following Contracts or the classes of Contracts:
  - (a) Contracts for purchases of law enforcement equipment suitable for counter-drug activities and computer equipment pursuant to the e-government Act of 2002 as described in ORS 279A.180, provided that the process described therein is followed;
  - (b) Grants as defined in ORS 279A.010;
  - (c) Acquisitions or disposals of real property or interest in real property;
  - (d) Transfer, sale or disposal of personal property. The Chair is delegated authority to transfer, sell or dispose of personal property in accordance with administrative procedures adopted by the Chair.
  - (e) Procurements by a Department from an Oregon Corrections Enterprises program;
  - (f) Contracts between the County and other government entities including the federal government.
  - (g) Contracts, agreements or other documents entered into, issued or established in connection with:
    - (A) The incurring of debt by a public body, including but not limited to the issuance of bonds, certificates of participation and other debt repayment obligations, and any associated Contracts, agreements or other documents, regardless of whether the obligations that the Contracts, agreements or other documents establish are general, special or limited;
    - (B) The making of program loans and similar extensions or advances of funds, aid or assistance by a public body to a public or private body for the purpose of carrying out, promoting or sustaining activities or programs authorized by law; or
    - (C) The investment of funds by a public body as authorized by law, and other financial transactions of a public body that by their character cannot practically be established under the competitive Contractor selection procedures of ORS 279B.050 to 279B.085;
  - (h) Contracts for Goods or Services with non-profit agencies providing employment opportunities for Disabled Individuals pursuant to ORS 279.835 to 279.855. However, Departments shall enter into such Contracts in accordance with Division 55 of these Rules.
  - (i) Contracts for employee benefit plans as provided in ORS 243.105(1), 243.125(4), 243.221, 243.275, 243.291, 243.303 and 243.565.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.050, ORS 279A.055, 279A.065 & 279A.180

**46-0210 Subcontracting to and Contracting with Emerging Small Businesses; Prohibition Against Discrimination.**

- (1) A Department may require a Contractor to subcontract some part of a Contract to, or to obtain materials to be used in performing the Contract from:
  - (a) A business enterprise that is certified under ORS 200.055 as an Emerging Small Business; or
  - (b) A business enterprise that is:
    - (A) Certified under ORS 200.055 as an Emerging Small Business; and
    - (B) Is located in or draws its workforce from economically distressed areas, as designated by the Oregon Economic and Community Development Department.
- (2) A subcontractor certified under ORS 200.055 as an Emerging Small Business is located in or draws its workforce from economically distressed areas if:
  - (a) Its principal place of business is located in an area designated as economically distressed by the Oregon Economic and Community Development Department pursuant to administrative rules adopted by the Oregon Economic and Community Development Department; or
  - (b) The Contractor certifies in Writing to the Department that a substantial number of the subcontractor's employees or subcontractors that will manufacture the Goods or complete the services under the Contract reside in an area designated as economically distressed by the Oregon Economic and Community Development Department pursuant to administrative rules adopted by the Oregon Economic and Community Development Department. For the purposes of making the foregoing determination, the Department shall determine in each particular instance what proportion of a Contractor's subcontractor's employees or subcontractors constitute a substantial number.
- (3) The PURCHASING Manager shall include in each Solicitation Document a requirement that Offerors certify in their Offers on a form prescribed by the PURCHASING Manager:
  - (a) That the Offeror has not and will not discriminate against a subcontractor in the Awarding of a subcontract because the subcontractor is a Minority, Women or Emerging Small Business enterprise certified under ORS 200.055 or against a business enterprise that is owned or controlled by or employs a disabled veteran as defined in ORS 408.225; and
  - (b) That the Offeror will not, in the performance of the Contract, discriminate based on race, religion, color, sex, marital status, familial status, national origin, age, mental or physical disability, sexual orientation, gender identity or source of income.
- (4) MBE, WBE, ESB and DBE Disqualification.
  - (a) The County may disqualify a Person from consideration of Award of County Contracts under ORS 200.065(5), or suspend a Person's right to bid on or participate in any Public Contract pursuant to ORS 200.075(1) after providing the Person with notice and a reasonable opportunity to be heard in accordance with sections (d) and (e) of this section.
  - (b) As provided in ORS 200.065 and 200.075 the County may disqualify or suspend a Person's right to submit an Offer or to participate in a Contract (e.g. act as a subcontractor) as follows:

- (A) The County may disqualify a Person upon finding that the Person engaged in any of the activities made unlawful by ORS 200.065(1) or (2), or if the Person has been disqualified by another public entity pursuant to ORS 200.065.
- (B) The County may suspend a Person upon finding that the Person engaged in any of the acts prohibited by ORS 200.075(a) through (c).
- (c) The County may disqualify or suspend a Person's right to submit Offers or participate in Public Contracts only for the length of time permitted by ORS 200.065 or ORS 200.075, as applicable.
- (d) The County shall notify the Person in Writing of a proposed Disqualification pursuant to this section, served personally or by registered or certified mail, return receipt requested. This notice shall:
  - (A) State that the County 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 County 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 that the hearing will be conducted pursuant to ORS 200.065 and 200.075;
  - (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.
- (e) The County shall schedule a hearing upon the County's receipt of the Person's timely request. The County 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 prior to the hearing.
- (f) The County will notify the Person in Writing of its Disqualification, served 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 200.065, ORS 200.075, ORS 279A.065, ORS 279A.105 & ORS 279A.110

## **DIVISION 46 CONTRACT PREFERENCES**

### **46-0300 Preference for Oregon Goods and Services; Nonresident Offerors**

- (1) Tiebreaker Preference and Award When Offers Identical. Under ORS 279A.120, when a Department receives Offers identical in price, fitness, availability and quality, and chooses to Award a Contract, the Department shall Award the Contract based on the following order of precedence:
  - (a) The Department shall Award the Contract to the Offeror among those submitting identical offers that is offering Goods or Services that are manufactured or produced in Oregon.
  - (b) If two or more Offerors submit identical Offers, and both offer Goods or Services manufactured or produced in Oregon, the Department shall Award the Contract by drawing lots among the identical Offers offering Goods or Services that have been manufactured or produced in Oregon. The Offerors that submitted the identical Offers subject to the drawing of lots shall be given notice and an opportunity to be present when the lots are drawn.
  - (c) If the Department receives identical Offers, and none of the identical Offers offer Goods or Services are manufactured or produced in Oregon, then the Department shall Award the Contract by drawing lots among the identical Offers.
- (2) Determining if Offers are Identical. A Department 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 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 pursuant to ORS 279B.085 are identical in price, fitness, availability and quality if, after completing the contracting procedure approved by the Contract Review Authority, the Department determines, in Writing, that two or more Offers are equally Advantageous to the Department.
- (3) Determining if Goods or Services are Manufactured or Produced in Oregon. In applying section 1 of this Rule, Departments may request, either in a Solicitation Document, following Closing, or at any other time determined appropriate by the Department, any information the Department determines is appropriate and necessary to allow the Department to determine if the Goods or Services are manufactured or produced in Oregon. A Department may use any reasonable criteria to determine if Goods or Services are manufactured or produced in Oregon, provided that the criteria reasonably relate to that determination, and provided that the Department applies those criteria equally to each Bidder or Proposer.
- (4) Procedure for Drawing Lots. In any instance when this Section calls for the drawing of lots, the Department shall draw lots by a procedure that affords each Offeror subject to the drawing a substantially equal probability of being selected, 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 Department 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 Department provides for a preference under this Section, and more than one Offeror qualifies for the preference, the Department may give a further preference to a qualifying Offeror that resides in or is headquartered in Oregon. A Department 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 Department's reasons and evidence for finding good cause to establish a higher percentage. A Department may not apply the preferences described in this Section in a Procurement for emergency work, minor alterations, ordinary repairs, or maintenance for public improvements, or construction work that is described in ORS 279C.320.
- (6) Nonresident Offerors. When a Public Contract is Awarded to a nonresident Offeror and the Contract Price exceeds \$10,000, the Bidder shall promptly report to the Department of Revenue (DOR) on forms provided by the DOR the total Contract Price, terms of payment, length of Contract and such other information as the DOR may require before the Offeror may receive final payment on the Public Contract. The County shall satisfy itself that this requirement is met before issuing final payment.

Stat. Auth.: ORS 279A.065, Or. Laws 2011, ch.237

Stats. Implemented: ORS 279A.065, 279A.120, and 279A.128; Or. Laws 2011, ch.237.

#### 46-0310 Reciprocal Preferences

When evaluating Bids pursuant to Rule 47-0255, Rule 47-0257 or Rule 49-0390, Departments shall add a percentage increase to the Bid of a Nonresident Bidder equal to the percentage, if any, of the preference that would be given to that Bidder in the state in which the Bidder resides. A Department may rely on the list prepared and maintained by the State of Oregon pursuant to ORS 279A.120(4) to determine both (i) whether the Nonresident Bidder's state gives preference to in-state Bidders, and (ii) the amount of such preference.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.120

#### 46-0320 Preference for Recycled Materials

##### (1) Preference for Recycled Materials

(a) **Definitions.** The following definitions apply only to this section:

- (A) **Post-consumer Waste.** A finished material which would normally be disposed of as solid waste, having completed its life cycle as a consumer item. "Post-consumer waste" does not include manufacturing waste
- (B) **Recycled Material.** Any material that would otherwise be a useless, unwanted or discarded material except for the fact that the material still has useful physical or chemical properties after serving a specific purpose and can, therefore, be reused or recycled.
- (C) **Recycled Paper.** A paper product with not less than thirty percent of its total weight consisting of post-consumer waste.
- (D) **Recycled Product.** All Goods, not less than 50 percent of the total weight of which consists of secondary and post-consumer waste, with not less than 10 percent of its total weight consisting of post-consumer waste. "Recycled product" also

includes any product that could have been disposed of as solid waste, having completed its life cycle as a consumer item, but otherwise is refurbished for reuse without substantial alteration of the product's form.

- (E) **Secondary Waste Material.** Fragments of products or finished products of a manufacturing process which has converted a virgin resource into a commodity of real economic value, and includes post consumer waste, but does not include excess virgin resources of the manufacturing process. For paper "secondary waste materials" does not include fibrous waste generated during the manufacturing process such as fibers recovered from waste water or trimmings of paper machine rolls, mill broke, wood slabs, chips, sawdust or other wood residue from a manufacturing process.
- (b) **Policy.** It is the policy of Multnomah County to purchase materials and products that are environmentally sound in their manufacture, use and disposal. The County shall give preference to the purchase of Goods from recycled materials if:
  - (A) The recycled product is available; and
  - (B) The recycled product meets applicable standards; and
  - (C) The recycled product can be substituted for a comparable non-recycled product; and
  - (D) The cost of the recycled product does not exceed the cost of the non-recycled product by more than five percent; or
  - (E) If the product is recycled paper, the cost does not exceed the cost of non-recycled paper by more than 15 percent.
- (c) **Development of Specifications.** Departments shall review and work with the PURCHASING Manager to develop Procurement Specifications that encourage the use of recycled products whenever quality of a recycled product is functionally equal to the same product manufactured from virgin resources. Except for Specifications that have been established to preserve the public health and safety, all Procurement and purchasing Specifications shall be established in a manner that encourages Procurement and purchase of recycled products.
- (d) **Discretion to Give Preference.** At its discretion, the County may give preference to the purchase of Goods manufactured from recycled materials, even if the cost differential exceeds the five percent preference set forth in subsection (b) (D) of this Rule, or the fifteen percent preference set forth in subsection (b) (E) of this Rule.
- (e) **Required Solicitation Language.** Any Written Solicitation under these Rules shall include the following language: "Contractors shall use recyclable products and products which contain recycled content to the maximum extent economically feasible in the performance of the Contract Work set forth in this document."
- (f) **Awards to Maximize Recycling.** In any Solicitation which the County has reserved the right to make multiple Awards, the recycled product or recycled paper preference shall be applied to the extent possible to maximize the dollar participation of firms offering recycled products or recycled paper in the Contract Award.
- (g) **Required Specifications.** The County shall require the Offeror to specify the minimum, if not the exact, percentage of recycled paper in the paper products or recycled product in products offered, and both the post-consumer waste and secondary waste material content. For paper products, the County also shall require that the

Offeror specify the fiber type. The Offeror may certify a zero percent recycled paper or product. All Contract provisions impeding the consideration of products with recycled paper or recycled products shall be deleted in favor of performance standards.

- (h) **Requirements for Oils.** The County shall require that purchases of lubricating oil and industrial oil be made from the seller whose oil products contain the greater percentage of recycled oil, unless a specific oil product containing recycled oil is:
  - (A) Not available within a reasonable period of time or in the quantities necessary to meet a Department's needs;
  - (B) Not able to meet the performance requirements or standards recommended by the equipment or vehicle manufacturer, including any warranty requirements; or
  - (C) Available only at a cost of the comparable virgin oil products or other percent preference established by the County.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.125

## **DIVISION 46 COOPERATIVE PROCUREMENT**

### **46-0400 Cooperative Procurement; Definitions, Policy, and Purpose**

- (1) As used in Rules 46-0400 to 46-0480:
  - (a) “Administering Contracting Agency” means a contracting agency that solicits and establishes the original Contract for Procurement of Goods, Services or Public Improvements in a Cooperative Procurement. The agency may be the County, a state agency, another local government or an out of state government entity.
  - (b) “Cooperative Procurement” means a Procurement conducted by, or on behalf of, one or more contracting agencies. “Cooperative Procurement” includes but is not limited to multiparty Contracts and Price Agreements.
  - (c) “Cooperative Procurement Group” means a group of contracting agencies joined through an intergovernmental agreement for the purposes of facilitating Cooperative Procurements.
  - (d) “Interstate Cooperative Procurement” means a Permissive Cooperative Procurement in which the Administering Contracting Agency is a governmental body, domestic or foreign, that is authorized under the governmental body’s laws, rules or regulations to enter into Public Contracts and in which one or more of the participating agencies are located outside this state.
  - (e) “Joint Cooperative Procurement” means a Cooperative Procurement in which the participating contracting agencies or the Cooperative Procurement Group and the agencies’ or group’s Contract requirements or estimated Contract requirements for Price Agreements are identified.
  - (f) “Original Contract” means the initial Contract or Price Agreement solicited and Awarded during a Cooperative Procurement by an Administering Contracting Agency.
  - (g) “Permissive Cooperative Procurement” means a Cooperative Procurement in which the purchasing contracting agencies are not identified.
  - (h) “Purchasing Contracting Agency” means either a Department or another contracting agency that procures Goods, services or Public Improvements from a Contractor based on the original Contract established by an Administering Contracting Agency.
- (2) The County may participate in, sponsor, conduct or administer Cooperative Procurements as follows:
  - (a) The County may participate in, sponsor, conduct or administer Joint Cooperative Procurements to establish Contracts or Price Agreements for Goods or Services, that use source selection methods substantially equivalent to those set forth in Rules 47-0255 to 47-0263 and 47-0285 or to establish Contracts for Public Improvements that use a Competitive Bidding process substantially equivalent to that set forth in Division 49.
  - (b) The County may participate in, sponsor, conduct or administer Permissive Cooperative Procurements to establish Contracts or Price Agreements for the acquisition of Goods or Services, but not Public Improvements that use source selection methods substantially equivalent to those set forth in Rule 47-0255 to 47-0263.
  - (c) The County may participate in, sponsor, conduct or administer Interstate Cooperative Procurements to establish Contracts or Price Agreements for the acquisition of Goods or Services, but not Public Improvements that use source selection methods substantially equivalent to those set forth in Rules 47-0255 to 47-0263.

- (3) A Solicitation and Award process uses source selection methods substantially equivalent to those identified in Rules 47-0255 to 47-0263 and 47-0285 when it:
  - (a) Calls for Award of a Contract on the basis of a lowest Responsible Bidder or a lowest and best Bidder determination in the case of Competitive Bids, or on the basis of a determination of the Proposer whose Proposal is most Advantageous based on evaluation factors set forth in the Request for Proposals in the case of Competitive Proposals;
  - (b) Does not permit the application of any geographic preference that is more favorable to Bidders or Proposers who reside in the jurisdiction or locality favored by the preference than the preferences provided in ORS 279A.120 (2); and
  - (c) Uses reasonably clear and precise Specifications that promote suitability for the purposes intended and that reasonably encourage Competition.
- (4) Before using a Cooperative Procurement the Department shall make a Written determination that the Solicitation and Award process for the original Contract arising out of the Cooperative Procurement is substantially equivalent to those identified in Rules 47-0255 to 47-0263 and 47-0285 as described in subsection (3) above. This Written determination shall be kept in the Procurement File.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.205

#### **46-0410 Responsibilities of Administering Contracting Agencies and Purchasing Contracting Agencies**

- (1) If the County is an Administering Contracting Agency of a Cooperative Procurement, the County may establish the conditions under which Persons may participate in the Cooperative Procurements administered by the County as the Administering Contract Agency. Such conditions may include, without limitation, whether each Person that participates in the Cooperative Procurement shall pay administrative fees to the County as the Administering Contract Agency, whether the participants shall enter into a Written agreement with the County as the Administering Contract Agency, or any other matters related to the administration of the Cooperative Procurement and the resulting original Contract. The County acting as an Administering Contract Agency may, but is not required to, include provisions in the Solicitation Document for a Cooperative Procurement or advertise the Solicitation Document in a manner to assist a Purchasing Contracting Agency' compliance with the Code or these PCRB Rules.
- (2) If the County, acting as a Purchasing Contracting Agency, enters into a Contract based on a Cooperative Procurement, the County shall comply with the Code and these PCRB Rules, including without limitation those sections of the Code and these PCRB Rules that govern:
  - (a) The extent to which the County may participate in the Cooperative Procurement,
  - (b) The advertisement of the Solicitation Document related to the Cooperative Procurement, and
  - (c) Public notice of the County's intent to establish Contracts based on a Cooperative Procurement.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.205

#### **46-0420 Joint Cooperative Procurements**

- (1) If the County chooses to participate in, sponsor, conduct or administer a Joint Cooperative Procurement it may do so if:
  - (a) The Administering Contracting Agency's Solicitation and Award process for the original Contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in Rules 47-0255 to 47-0263 and 47-0285 or uses a Competitive Bidding process substantially equivalent to the Competitive Bidding process in Division 49;
  - (b) The Administering Contracting Agency's Solicitation and the original Contract or Price Agreement identifies the Cooperative Procurement Group or each participating Purchasing Contracting Agency and specifies the estimated Contract requirements; and
  - (c) No material change is made in the terms, conditions or prices of the Contract between the Contractor and the Purchasing Contracting Agency from the terms, conditions and prices of the original Contract between the Contractor and the Administering Contracting Agency.
- (2) A Joint Cooperative Procurement may not be a Permissive Cooperative Procurement.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.210

#### **46-0430 Permissive Cooperative Procurements**

- (1) If the County chooses to participate in, sponsor, conduct or administer a Permissive Cooperative Procurement it may do so if:
  - (a) The Administering Contracting Agency's Solicitation and Award process for the original Contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in Rules 47-0255 to 47-0263;
  - (b) The Administering Contracting Agency's Solicitation and the original Contract allow other contracting agencies to establish Contracts or Price Agreements under the terms, conditions and prices of the original Contract;
  - (c) The Contractor agrees to extend the terms, conditions and prices of the original Contract to the Purchasing Contracting Agency; and
  - (d) No material change is made in the terms, conditions or prices of the Contract or Price Agreement between the Contractor and the Purchasing Contracting Agency from the terms, conditions and prices of the original Contract between the Contractor and the Administering Contracting Agency.
- (2) If a Department intends to act for the County as a Purchasing Contracting Agency, PURCHASING shall provide public notice of intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement if the estimated amount of the Procurement exceeds \$250,000. The notice of intent shall include:
  - (a) A description of the Procurement;
  - (b) An estimated amount of the Procurement;
  - (c) The name of the Administering Contracting Agency; and

- (d) A time, place and date by which comments shall be submitted to PURCHASING regarding the intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement.
- (3) Public notice of the intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement shall be given in the same manner as provided in Rule 47-0300.
- (4) PURCHASING shall give public notice at least seven (7) Days before the deadline for submission of comments regarding the intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement.
- (5) If a notice of intent is required to be given to establish a Contract or Price Agreement through a Permissive Cooperative Procurement under subsection (2) of this section:
  - (a) PURCHASING shall provide vendors who would otherwise be prospective Bidders or Proposers on the Contract or Price Agreement if the Procurement were competitively procured under Rules 47-0255 to 47-0263, an opportunity to comment on the intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement under Rule 46-0440.
  - (b) Vendors shall submit comments within seven (7) Days after the notice of intent is published.
  - (c) If PURCHASING receives comments on the intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement, before the Department may establish a Contract or Price Agreement through the Permissive Cooperative Procurement, the Department shall make a Written determination that establishing a Contract or Price Agreement through a Permissive Cooperative Procurement is in the best interest of the County. PURCHASING shall provide a copy of the Written determination to any vendor that submitted comments.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.215

**46-0440 Advertisements of Intent to Establish Contracts or Price Agreements through a Permissive Cooperative Procurement**

- (1) A Department that wishes to enter into a Contract or Price Agreement arising out of a Permissive Cooperative Procurement shall publish notice of its intent to do so if the Department estimates that it will spend in excess of \$250,000 on Goods and Services acquired under the Contract or Price Agreement.
- (2) For purposes of determining whether a Department shall give the notice required by this Rule, a Department will spend in excess of \$250,000 for Goods and Services acquired under a Contract or Price Agreement arising out of a Permissive Cooperative Procurement if:
  - (a) The Department's Contract or Price Agreement arising out of the Permissive Cooperative Procurement expressly provides that the Department will make payments over the term of the Contract or Price Agreement that will, in aggregate, exceed \$250,000, whether or not the total amount or value of the payments is expressly stated;
  - (b) The Department's Contract or Price Agreement arising out of the Permissive Cooperative Procurement expressly provides for a guaranteed maximum price, or a maximum not to exceed amount in excess of \$250,000; or
  - (c) At the time the Department enters into the Contract or Price Agreement, the Department reasonably contemplates, based on historical or other data available to the Department,

that the total payments it will make for Goods or Services under the Contract or Price Agreement will, in aggregate, exceed \$250,000 over the anticipated duration of the Contract or Price Agreement.

- (3) The notice of intent required by this Rule shall contain the information required by Rule 46-0430(2)(b), and PURCHASING shall advertise the notice in the same manner as provided in Rule 47-0300. PURCHASING shall give the notice required by this Section no fewer than seven (7) Days before the deadline for submitting comments regarding the Department's intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement.
- (4) A Department that intends to establish a Contract or Price Agreement arising out of a Permissive Cooperative Procurement it administers as an Administering Contract Agency may satisfy the notice requirements set forth in this Rule by including the information required by Rule 46-0430(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 Department's intent to establish a Contract or Price Agreement through the Permissive Cooperative Procurement. The content and timing of such notice shall comply in all respects with Rule 46-0430 and these Rules.
- (5) A Department acting as a Purchasing Contracting Agency shall respond to any comments on its intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement as set forth in Rule 46-0430(5)(c).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.215

#### **46-0450 Interstate Cooperative Procurements**

- (1) A Department may establish a Contract or Price Agreement through an Interstate Cooperative Procurement only if:
  - (a) The Solicitation and Award process for the original Contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in Rules 47-0255 to 47-0263
  - (b) The Administering Contracting Agency's Solicitation and the original Contract allows other governmental bodies to establish Contracts or Price Agreements under the terms, conditions and prices of the original Contract; and
  - (c) The Administering Contracting Agency permits the Contractor to extend the use of the terms, conditions and prices of the original Contract to the Purchasing Contracting Agency.
- (2) In addition to the requirements in subsection (1) of this section:
  - (a) The Department, or the Cooperative Procurement Group of which the Department is a member, shall be listed in the Solicitation of the Administering Contracting Agency as a party that may establish Contracts or Price Agreements under the terms, conditions and prices of the original Contract, and the Solicitation shall be advertised in Oregon; or
  - (b) The Department, or the Cooperative Procurement Group of which the Department is a member, shall advertise a notice of intent to establish a Contract or Price Agreement through an Interstate Cooperative Procurement.
    - (A) The notice of intent shall include:
      - (i) A description of the Procurement;

- (ii) An estimated amount of the Procurement;
  - (iii) The name of the Administering Contracting Agency; and
  - (iv) A time, place and date by which comments shall be submitted to PURCHASING regarding the intent to establish a Contract or Price Agreement through an Interstate Cooperative Procurement.
- (B) Public notice of the intent to establish a Contract or Price Agreement through an Interstate Cooperative Procurement shall be given in the same manner as provided in Rule 47-0300.
  - (C) The notice shall be given at least seven (7) Days before the deadline for submission of comments regarding the intent to establish a Contract or Price Agreement through an Interstate Cooperative Procurement.
- (3) If a Department is required to provide notice of intent to establish a Contract or Price Agreement through an Interstate Cooperative Procurement under subsection (2) of this section:
- (a) PURCHASING shall provide vendors who would otherwise be prospective Bidders or Proposers on the Contract or Price Agreement, if the Procurement were competitively procured under Rules 47-0255 to 47-0263, an opportunity to comment on the intent to establish a Contract or Price Agreement through an Interstate Cooperative Procurement.
  - (b) Vendors shall submit comments within seven (7) Days after the notice of intent is published
  - (c) If PURCHASING receives comments on the intent to establish a Contract or Price Agreement through an Interstate Cooperative Procurement, before the Department may establish a Contract or Price Agreement through the Interstate Cooperative Procurement, the Department shall make a Written determination that establishing a Contract or Price Agreement through an Interstate Cooperative Procurement is in the best interest of the County. PURCHASING shall provide a copy of the Written determination to any vendor that submitted comments.
- (4) For purposes of this section, an Administering Contracting Agency may be any governmental body, domestic or foreign, authorized under its laws, rules or regulations to enter into Contracts for the Procurement of Goods and Services for use by a governmental body.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.220

#### **46-0460 Advertisements of Interstate Cooperative Procurements**

A Department may participate in an Interstate Cooperative Procurement as a Purchasing Contracting Agency if at least one (1) of the following occurs:

- (1) The Solicitation Document for the Interstate Cooperative Procurement lists the Department or the Cooperative Procurement Group of which the Department is a member as a party that may enter into Contracts or Price Agreements under the terms and conditions of the original Contract, and the Solicitation Document is advertised in Oregon in compliance with Rule 47-0300 by either:
  - (a) The Department; or
  - (b) The Cooperative Procurement Group, or a member of the Cooperative Procurement Group, of which the Department is a member; or

- (c) Another Purchasing Contracting Agency that is subject to the Code, so long as such advertisement would, if given by the Department, comply with ORS Rule 47-0300; or
- (2) If the Solicitation Document issued by the Administering Contract Agency was not advertised in accordance with Rule 46-0460(a), the Department gives notice of its intent to enter into a Public Contract or Price Agreement based on the terms of the Interstate Cooperative Procurement. The notice of intent shall contain the information required by Rule 46-0450(2)(b)(B), and the notice shall be advertised in the same manner as provided in 47-0300. PURCHASING shall give the notice required by this Section no fewer than seven (7) Days before the deadline for submitting comments regarding the intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement.
- (3) The Purchasing Contracting Agency shall respond to any comments on its intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement as set forth in Rule 46-0430(5)(c).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.220

#### **46-0470 Protests and Disputes**

- (1) If a Bidder or Proposer wishes 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, the Bidder or Proposer shall make such protest in accordance with Rules 47-0700 through 47-0760. If the Administering Contract Agency is not subject to the Code, then Bidders or Proposers shall make such protests in accordance with the processes and procedures established by the Administering Contract Agency.
- (2) The failure of a Purchasing Contracting Agency to exercise any rights or remedies it has under a Contract or Price Agreement entered into through a Cooperative Procurement shall not affect the rights or remedies of any other agency that participates in the Cooperative Procurement, including the Administering Contract 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 or Price Agreement arising out of the Cooperative Procurement.
- (3) A protest regarding the use of a Cooperative Procurement by a Department as a Purchasing Contracting Agency after the execution of an original Contract shall be directed to PURCHASING. The protest shall be in accordance with the provisions of Rules 47-0700, 47-0730, 47-0740 and 47-0760 and is limited in scope to the County's authority to enter into a Cooperative Procurement Contract.
- (4) The decision of the County to use a Cooperative Procurement is reviewable in the circuit court of Multnomah County.
- (5) Disputes regarding Contract performance between another agency acting as a Purchasing Contracting Agency where the County is the Administering Contracting Agency shall be resolved solely by the Purchasing Contracting Agency and the Contractor.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.225

#### **46-0480 Contract Amendments**

A Purchasing Contracting Agency may amend a Contract entered into pursuant to a Cooperative Procurement as set forth in Rule 47-0800.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

## **DIVISION 46 PROCUREMENT FILES**

### **46-0490 Procurement Files**

- (1) This Rule applies to all purchases subject to these Rules in excess of the Small Purchases threshold established in FIN 16.
- (2) PURCHASING is responsible for initiating and maintaining the procurement file for procurement processes performed by PURCHASING for Countywide procurements and formal procurements processed on behalf of a Department.
- (3) A Department is responsible for initiating and maintaining the procurement file for intermediate, Small Purchases, emergency or any other procurements processed by the Department. Documents related to intermediate procurements, emergency and other procurements processed by the Department will be filed in the SAP Records Management module (RM) under the appropriate RFX number.
- (4) Procurement File(s) in RM shall contain:
  - (a) A copy of an executed Contract, if Awarded;
  - (b) The record of the actions used to develop the Contract;
  - (c) A copy of the Solicitation, if any;
  - (d) Any required findings or statement of justification for the selection of the Contractor and sourcing method used; and
- (5) Procurement File(s) shall also contain, if required by these Rules:
  - (a) A list of prospective Contractors notified of any Solicitation;
  - (b) The method used to advertise or notify prospective Contractors;
  - (c) A copy of each Offer that resulted in the Award of a Contract;
  - (d) The method of evaluating Offers, the results of the evaluation, and basis of selection;
  - (e) The record of any Negotiation of the Statement of Work and results;
  - (f) A record of all material Communications regarding the Solicitation by interested Contractors;
  - (g) Information describing how the Contractor was selected, including the basis for Awarding the Contract;
  - (h) A copy of the Request for Special Procurement, if any; and
  - (i) Documentation related to Cooperative Procurements.
- (6) PURCHASING and Departments shall maintain Procurement Files in RM, in accordance with the retention requirements of administrative procedure REC 1 and any other applicable County administrative procedures.

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

Stats. Implemented: ORS 279A.050; ORS 279A.065(5); ORS 279A.070; and ORS 279A.140

**DIVISION 47 PUBLIC PROCUREMENTS  
FOR GOODS OR SERVICES - GENERAL PROVISIONS**

**47-0000 Application**

- (1) These Division 47 Rules implement ORS chapter 279B, Public Procurements and apply to the Procurement of Goods or Services. These Rules do not apply to Procurement of Personal Services as defined in subsection (2) below. Procurement of Personal Services is governed by administrative procedure PUR-1.
- (2) Personal Services are services which require 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, information technology or other consultant, broadcaster or artist (including a photographer, filmmaker, painter, weaver or sculptor) and Contracts for human services. Personal Services do not include:
  - (a) The services of an Architect, Engineer, Land Surveyor or provider of Related Services. under Division 48.
  - (b) Products supplied through Contracts which, even though in a professional capacity, are primarily for a product. Services supplied through Contracts with a temporary service or personnel agency to supply labor, which is of a type that can generally be done by any competent worker; examples include data entry, keypunch, janitorial, unarmed security services, crop spraying, laundry, and landscape maintenance services;
  - (c) Services supplied through Contracts with a Contractor that primarily supplies labor that can generally be done by any competent or skilled worker including, but not limited to conference planning, collection, crowd management, first aid training, courier services and surveys to collect data;
  - (d) Services supplied through Contracts for trade-related activities to be paid on a labor and materials basis; and
  - (e) Contracts for trade-related services to accomplish routine, continuing functions, even though a specific license is required to engage in the activity. Examples include repair and maintenance of equipment, software or structures.
- (3) The PURCHASING Manager shall have discretion to determine whether a particular type of Contract or service falls within the foregoing definition.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279B.015  
Former PCRB Rule 340-1080

## DIVISION 47 SOURCE SELECTION

### 47-0250 Methods of Source Selection; Feasibility Determination; Cost Analysis

- (1) **Methods of Source Selection.** Except as otherwise permitted by these Rules, Awards of Public Contracts for Goods or Services shall be based on Offers received in response to either Competitive Bids pursuant to Rules 47-0255 and 47-0257 or Competitive Proposals pursuant to Rules 47-0260 to 47-0263. The source selection method to be used for Contracts that are at no cost to the County but generate revenue for the Contractor shall be determined by the potential dollar amount the Contractor is expected to receive (e.g. a concession contract). Contracts awarded under these source selection methods shall be effective for a period up to five years, unless the PURCHASING Manager has approved a longer period of time.
- (2) **Analysis Required Before Conducting Certain Procurements Over \$250,000.** Before conducting a procurement for services (except for a procurement for “client services” as that term is defined in OAR 125-246-0110) with an estimated Contract Price greater than \$250,000, a Department shall make a determination in Writing that using the County’s own personnel or resources to perform the services that the Department intends to procure is not feasible. If the Department determines that performing the services the Department intends to procure with County resources and personnel is feasible, before conducting a procurement for such services, the Department shall conduct a cost analysis and make a Written determination that the County would incur less cost in conducting the procurement than performing the services with the County’s own personnel and resources.
- (3) **Feasibility Determination.** Before determining that using County personnel and resources is not feasible because the County lacks the personnel and resources to perform the services the Department intends to procure the Department shall make a determination that the circumstances in subsection (a) or (b) exist at the time of the proposed procurement:
  - (a) The County lacks the specialized capabilities, experience or technical or other expertise necessary to perform the services. In making the finding, the Department shall compare the County’s capability, experience or expertise in the field most closely involved in performing the services with a potential Contractor’s capability, experience or expertise in the same or a similar field; or
  - (b) Special circumstances require the County to procure the services by Contract. Special circumstances may include, but are not limited to, circumstances in which:
    - (A) The terms under which the County receives a grant or other funds for use in a procurement require the County to obtain services through an independent Contractor;
    - (B) Other state or federal law requires the County to procure services through an independent Contractor;
    - (C) The procurement is for services that are incidental to a Contract for purchasing or leasing real or personal property, including service and maintenance agreements for equipment that is leased or rented;
    - (D) The Department cannot accomplish policy, administrative or legal goals, including but not limited to avoiding conflicts of interest or ensuring independent or unbiased findings in cases when using the County’s existing personnel or persons the County could hire through a regular or ordinary process would not be suitable;
    - (E) The procurement is for services which are being procured using an Emergency Procurement process authorized by these Rules;

- (F) The procurement is for services, the need for which is so urgent, temporary or occasional that attempting to perform the services with the County's own personnel or resources would cause a delay that would frustrate the purpose for obtaining the services;
  - (G) The services that the Department intends to procure will be completed within six months after the date on which the Contract for the services is executed; or
  - (H) Other circumstances, conditions or occurrences would make the Services, if performed by the County'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 County.
- (4) **Written Cost Analysis.** If a determination is made after completion of the analysis in subsection (3) above that it is feasible to perform the services the Department intends to procure with the County's own personnel or resources, before proceeding with the procurement, the Department shall conduct a Written cost analysis which shall include the following:
- (a) **Basic Comparison.** The Written cost analysis must compare an estimate of the County's cost of performing the Services with an estimate of the cost a potential Contractor would incur in performing the Services. However, the Department may proceed with the Procurement for Services only if it determines that the County would incur more cost in performing the Services with the County's own personnel or resources than it would incur in procuring the Services from a Contractor.
  - (b) **Costs of Using County's Own Personnel and Resources.** When estimating the County's cost of performing the Services, the Department shall consider cost factors that include:
    - (A) The salary or wage and benefit costs for the employees of the County who would be directly involved in performing 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 Department 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 County'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 County performed the Services.
    - (F) The costs in subsections (A) through (E) of this rule do not constitute an exclusive list of cost information. A Department may consider other reliable information that

bears on the cost to the County of performing the Services. For example, if the Department has accounted for its actual costs of performing the Services under consideration, or reasonably comparable Services, in a relatively recent Services project, the Department 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 Department 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 this rule over the expected duration of the Procurement.
  - (D) The costs described in subsections (A) through (C) of this subsection do not constitute an exclusive list of cost information. A Department may consider other reliable information that bears on the costs a potential Contractor would incur. For example, if the County, in the reasonably near past, received Bids or Proposals for the performance of the Services under consideration, or reasonably comparable Services, the Department may consider the pricing offered in those Bids or Proposals in making its estimate. Similarly, the Department may consider what the County actually paid out under a Contract for the same or similar Services.
- (5) **Decision Based on Cost Comparison.** After comparing the difference between the costs estimated for the County to perform the Services and the estimated costs a potential Contractor would incur in performing the Services, subject to the exceptions in subsections (6) and (7) below, a Department may proceed with the Procurement if the County would incur more cost in performing the Services with the County's own personnel and resources than it would incur in procuring the Services from a Contractor.
- (6) **Exception Based on Salaries or Wages and Benefits.** If the sole reason that the costs estimated for the County to perform the Services exceed the estimated costs a potential Contractor would incur in performing the Services is because the average or actual salary or wage and benefit costs for a Contractor's employees are lower than the salary or wage and benefit costs for employees of the County, then the Department may not proceed with the Procurement.
- (7) **Exception Based on Lack of County Personnel and Resources.** In cases in which the Department determines that it would incur less cost in providing the Services with its own personnel and resources, the Department nevertheless may proceed with the Procurement if, at the time the Department intends to conduct the Procurement, the County determines that it lacks personnel and resources to perform the Services within the time the Department requires them.

- (8) **Reporting.** When a Department conducts a procurement under this section, the Department shall maintain all records of the analyses described in this section in the project file and shall provide to the PURCHASING Manager copies of each Written determination that the County lacks personnel and resources to perform the Services within the time the Department requires them and each Written cost analysis. The PURCHASING Manager shall provide to the Board each calendar quarter, copies of each Written cost analysis and Written determination prepared under this section.

Stat. Auth.: ORS 279A.065 Or Laws 2009, c 880, §§ 3, 4  
Stats. Implemented: ORS 279B.050, 050, Or Laws 2009, c 880, § 2-4

#### **47-0255 Competitive Sealed Bidding**

- (1) **Generally.** The County may procure Goods or Services by Competitive Bidding as set forth in this Rule. The PURCHASING Manager may issue a request for information, a request for interest or other preliminary documents to obtain information useful in the preparation of an Invitation to Bid. An Invitation to Bid is used to initiate a Competitive Bidding Solicitation, awarded by low cost only, and shall contain the following information:
- (a) A time and date by which the Bids shall be received and a place at which the Bids shall be submitted, and may, in the sole discretion of the PURCHASING Manager, direct or permit the submission and receipt of Bids by electronic means;
  - (b) The name and title of the person designated for the receipt of Bids and the person designated by the PURCHASING Manager as the contact person for the Procurement, if different;
  - (c) A Procurement description;
  - (d) A time, date and place that prequalification applications, if any, shall be filed and the classes of Work, if any, for which Bidders shall be prequalified in accordance with Rule 47-0550;
  - (e) A statement that the County may cancel the Procurement or reject any or all Bids in accordance with Rule 47-0660;
  - (f) A statement that “Contractors shall use recyclable products and products which contain recycled content to the maximum extent economically feasible in the performance of the Contract Work set forth in this document.” (See, Rule 46-0320(1)(e))
  - (g) A statement that requires the Contractor or subcontractor to possess an asbestos abatement license, if required under ORS 468A.710;
  - (h) All contractual terms and conditions applicable to the Procurement;
  - (i) 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 County’s representatives at the conference are not binding upon the County unless confirmed by Written Addendum;

- (B) The form and instructions for submission of Bids and any other special information;
  - (C) The time, date and place of Opening;
  - (D) The office where the Solicitation Document may be reviewed;
  - (E) A statement that each Bidder shall identify whether the Bidder is a Resident Bidder;
  - (F) Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with Rule 46-0210;
  - (G) How the County will notify Bidders of Addenda and how the County will make Addenda available (See Rule 47-0430);
- (j) Department Need to Purchase. The character of the Goods or Services the Department is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. The Department's description of its need to purchase must:
- (A) Identify the scope of the work to be performed under the Contract, if the County Awards one;
  - (B) Outline the anticipated duties of the Contractor under the Contract;
  - (C) Establish the expectations for the Contractor's performance under the Contract; and
  - (D) Require in the scope of work, unless the Department for Good Cause specifies otherwise, that the Contractor meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the Department is purchasing.
- (k) Bidding and Evaluation Process.
- (A) The anticipated Solicitation schedule, deadlines, protest process, and evaluation process;
  - (B) The Solicitation Document shall set forth objective evaluation criteria in accordance with the requirements of Rule 47-0600. 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 Department has available concerning future use; and
  - (C) If the Department intends to Award Contracts to more than one Bidder pursuant to Rule 47-0600(4)(c), the Department shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award;
- (l) Applicable preferences pursuant to Rules 46-0310 (in state preference) and 46-0320 (recycled materials preference) and 47-0600(1)(b)(B) (in state printing preference);
- (m) All contractual terms and conditions in the form of Contract provisions the Department determines are applicable to the Procurement including terms and conditions specifying 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 County's right to reduce or withhold payment under the Contract;

- (B) The County'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 Contract; and
  - (C) The County's rights, which the County may assert individually or in combination, to declare a default of the Contract, to terminate the Contract, and to seek damages and other relief available under the resulting Contract or applicable law.
- (n) Where applicable, requirements for payment of a Living Wage.
- (2) A Department may require Bid security if the County determines that Bid security is reasonably necessary or prudent to protect the interests of the County. PURCHASING shall return the Bid security to all Bidders upon the execution of the Contract. PURCHASING shall retain the Bid security if a Bidder who is Awarded a Contract fails to promptly and properly execute the Contract. For purposes of this paragraph, prompt and proper execution of the Contract includes all action by a Bidder that is necessary to the formation of a Contract in accordance with the Invitation to Bid, including the posting of performance security and the submission of proof of insurance when required by the Invitation to Bid.
  - (3) Public notice of the Competitive Sealed Bidding Solicitation shall be given as set forth in Rule 47-0300.
  - (4) The PURCHASING Manager shall open Bids publicly at the time, date and place designated in the Invitation to Bid.
    - (a) The amount of a Bid, the name of the Bidder and other relevant information shall be recorded. The record shall be open to public inspection.
    - (b) Notwithstanding any requirement to make Bids open to public inspection after the issuance of notice of intent to Award a Contract, the County may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a Bid.
  - (5) The PURCHASING Manager shall evaluate all Bids that are received before the time and date indicated for Bid Closing in the Invitation to Bid. The PURCHASING Manager shall evaluate the Bids based on the requirements set forth in the Invitation to Bid. The requirements may include, in addition to the information described in subsection (1)(k)(B) of this Rule, criteria to determine minimum acceptability, such as inspection, testing, quality and suitability for intended use or purpose. Criteria that will affect the Bid price and will be considered in evaluation for Award including, but not limited to, discounts, transportation costs and Life Cycle Costing. The Invitation to Bid shall set forth the evaluation criteria to be used. No criteria may be used in a Bid evaluation that is not set forth in the Invitation to Bid or in a qualified products list maintained under Rule 47-0525. The PURCHASING Manager shall, for the purpose of evaluating Bids, apply any applicable preference described in Rules 46-0300, 46-0310 and 46-0320.
  - (6) The PURCHASING Manager may not consider for Award Bids received after the time and date indicated for Bid Closing in the Invitation to Bid.
  - (7) The PURCHASING Manager may retain Bids or copies of Bids received after the Bid Closing.
  - (8) Correction and withdrawal of Bids before and after Bid Closing and the cancellation of Awards or Contracts based on Bid mistakes shall be done in accordance with Rules 47-0460 and 47-0470.

- (9) The cancellation of Invitations to Bid and the rejection of Bids shall be in accordance with Rules 47-0650 and 47-0660.
- (10) The PURCHASING Manager shall, in accordance with Rule 47-0610, issue to each Bidder or shall post, electronically or otherwise, a notice of intent to Award.
- (11) If a Contract is Awarded, the PURCHASING Manager shall Award the Contract:
  - (a) To the lowest Responsible Bidder whose Bid substantially complies with the requirements and criteria set forth in the Invitation to Bid and with all prescribed public Procurement procedures and requirements; or
  - (b) When the Invitation to Bid specifies or authorizes the Award of multiple Contracts, to the Responsible Bidders:
    - (A) Whose Bids substantially comply with the requirements and criteria set forth in the Invitation to Bid and with all prescribed public Procurement procedures and requirements; and
    - (B) Who qualify for the Award of a Public Contract under the terms of the Invitation to Bid.
- (12) The successful Bidder shall promptly execute a Contract. The successful Bidder's duty to promptly execute a Contract includes the duty to take all action that is necessary to the formation of a Contract in accordance with the Invitation to Bid, including the posting of performance security and the submission of proof of insurance when required by the Invitation to Bid.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.055

#### **47-0257 Multistep Sealed Bids**

- (1) **General.** When a Department considers it impractical to initially prepare a Procurement description to support an Award based on price, PURCHASING may issue a multistep Invitation to Bid requesting the submission of un-priced submittals, and then later issue an Invitation to Bid limited to the Bidders whom the PURCHASING Manager has determined to be eligible to submit a priced Bid under the criteria set forth in the initial Solicitation of un-priced submittals.
- (2) **Phased Process.** Multistep Bidding is a phased process that seeks necessary information or un-priced technical submittals in the initial phase and regular Competitive Bidding, inviting Bidders who submitted technically eligible submittals in the initial phase to submit Competitive price Bids in the final phase. The Contract shall be Awarded to the lowest Responsible Bidder. If time is a factor, the PURCHASING Manager may require Bidders to submit a separate sealed price Bid during the initial phase to be opened after the technical evaluation.
- (3) **Public Notice.** Whenever Multistep sealed Bids are used, public notice for the first phase shall be given in accordance with Rule 47-0300. Public notice is not required for the subsequent phases. However, the PURCHASING Manager shall give notice of subsequent phases to all Bidders and inform Bidders of the right to protest Addenda issued after initial Closing pursuant to Rule 47-0430 and inform Bidders excluded from the subsequent phases of the right, if any, to protest exclusion pursuant to Rule 47-0720.

- (4) **Procedures Generally.** In addition to the procedures set forth in Rules 47-0300 to 47-0490, the County shall employ the procedures set forth in this Rule for Multistep Bidding and in the Invitation to Bid:
- (a) Solicitation Protest. The Solicitation Document shall provide that prior to the Closing of phase one there shall be an opportunity to protest the Solicitation under Rule 47-0730.
  - (b) Addenda Protest. The Solicitation Document may provide an opportunity to protest any Addenda issued during phase two pursuant to Rule 47-0430(3)(b).
  - (c) Exclusion Protest. The Solicitation Document may, but is not required to provide an opportunity for a Bidder to protest exclusion from the second round of multistep sealed Bids as set forth in Rule 47-0720.
  - (d) Administrative Remedy. Proposers may submit a protest to any Addenda or to any action by the County that has the effect of excluding the Proposer from the second phase of Multistep Bidding to the extent such protests are provided for in the Solicitation Document or required by this section. Failure to so protest shall be considered the Bidder's failure to pursue an administrative remedy made available to the Bidder by the County.
  - (e) Award Protest. The County shall provide an opportunity to protest its intent to Award a Contract pursuant to Rule 47-0740. An Affected Person may protest, for any of the bases set forth in Rule 47-0720(2), its exclusion from the second phase of a Multistep Sealed Bid, or an Addendum issued following initial Closing, if the County did not previously provide Bidders the opportunity to protest such exclusion or Addendum.
- (5) Procedure for Phase One of Multistep Sealed Bidding.
- (a) Form. Multistep Bidding shall be initiated by the issuance of an Invitation to Bid in the form and manner required for Competitive Sealed Bidding except as hereinafter provided. In addition to the requirements set forth in Rule 47-0255(1), the Multistep Invitation to Bid shall state:
    - (A) That the solicitation is a multistep sealed Bid Procurement and describe the process the Department will use to conduct the Procurement;
    - (B) That the Department requests unpriced submittals and that the Department 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;
  - (b) Evaluation. The Department 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) Initiation. Upon the completion of phase one, if PURCHASING does not cancel the Solicitation, PURCHASING shall either:
    - (A) Open price Bids submitted in phase one (if price Bids were required to be submitted) from Bidders whose unpriced submittals were found to be eligible; or

- (B) If price Bids have not been submitted, technical Discussions have been held, or Addenda to the Invitation to Bid have been issued, invite each eligible Bidder to submit a price Bid.
- (b) Conduct. Phase Two shall be conducted as any other Competitive sealed Bidding 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.

Stat. Auth.: ORS 279A.065  
 Stats. Implemented: ORS 279B.055

#### **47-0260 Competitive Sealed Proposals**

- (1) The County may solicit and Award a Public Contract for Goods or Services, or may Award multiple Public Contracts for Goods or services when specified in the Request for Proposals, by requesting and evaluating Competitive sealed Proposals. The PURCHASING Manager may issue a request for information, a request for interest, a request for qualifications or other preliminary documents to obtain information useful in the preparation of a Request for Proposals.
- (2) The Request for Proposals shall include:
  - (a) A time and date by which sealed Proposals shall be received, and a place at which the Proposals shall be submitted, and may, in the sole discretion of the County, direct or permit the submission and receipt of Proposals by electronic means.
  - (b) The time, date and place of Opening;
  - (c) The office where the Solicitation Document may be reviewed;
  - (d) The name and title of the person designated for receipt of Proposals and the person designated by the PURCHASING Manager as the contact person for the Procurement, if different;
  - (e) Department Need to Purchase. The character of the Goods or Services the Department is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements The Department's description of its need to purchase must:
    - (A) Identify the scope of the work to be performed under the Contract, if the County Awards one;
    - (B) Outline the anticipated duties of the Contractor under the Contract;
    - (C) Establish the expectations for the Contractor's performance under the Contract; and
    - (D) Require in the scope of work, unless the Department for Good Cause specifies otherwise, or 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 ORS 279C.125, that the Contractor meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the Department is purchasing.

- (f) A time, date and place that prequalification applications, if any, shall be filed and the classes of Work, if any, for which Proposers shall be prequalified in accordance with Rule 47-0550;
- (g) Notice of any pre-Offer conference including the time, date and location of any pre-Offer conference and whether attendance at the conference will be mandatory or voluntary and a provision that provides that statements made by the Department's representatives at the conference are not binding upon the Department unless confirmed by Written Addendum;
- (h) The form and instructions for submission of Proposals and any other special information, e.g., whether Proposals may be submitted by electronic means;
- (i) Proposer's certification of nondiscrimination in obtaining required subcontractors in accordance with Rule 46-0210(3);
- (j) How the County will notify Proposers of Addenda and how the County will make Addenda available. (See, Rule 47-0430);
- (k) The anticipated Solicitation schedule, deadlines, protest process;
- (l) The evaluation process, including but not limited to the relative importance of price and any other evaluation factors used to rate the Proposals in the first tier of Competition, and if more than one tier of competitive evaluation may be used, a description of the process under which the Proposals will be evaluated in the subsequent tiers. Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates of actual future costs based on information available to the Department;
- (m) The selection criteria, which may include, but is not limited to, negotiation with the highest ranked Proposer, Competitive Negotiations, multiple-tiered Competition designed to identify a class of Proposers that fall within a Competitive Range or to otherwise eliminate from consideration a class of lower ranked Proposers, or any combination of methods, as authorized or prescribed by these Rules;
- (n) Whether the County intends to Award Contracts to more than one (1) Proposer pursuant to Rule 47-0600(4)(d), and, if so, the manner in which it will determine the number of Contracts it will Award.
- (o) A statement that the County may cancel the Procurement or reject any or all Proposals in accordance with Rule 47-0660;
- (p) A statement that "Contractors shall use recyclable products and products which contain recycled content to the maximum extent economically feasible in the performance of the Contract Work set forth in this document;" (See, Rule 46-0320(1)(e).
- (q) A statement that requires the Contractor or subcontractor to possess an asbestos abatement license, if required under ORS 468A.710;
- (r) All contractual terms and conditions in the form of Contract provisions the Department determines are applicable to the Procurement including terms and conditions specifying 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 County's right to reduce or withhold payment under the Contract;

- (B) The County'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 Contract; and
  - (C) The County's rights, which the County may assert individually or in combination, to declare a default of the Contract, to terminate the Contract, and to seek damages and other relief available under the resulting Contract or applicable law.
- (s) Where applicable, requirements for payment of a Living Wage.
- (3) The Request for Proposals may also, if applicable:
- (a) Identify contractual terms and conditions in the form of Contract provisions, or legal concepts to be included in the Contract;
  - (b) Specify that it will include or use a Proposer's terms and conditions that have been pre-negotiated under Rule 47-0550;
  - (c) Identify those contractual terms or conditions the Department reserves, in the Request for Proposals, for negotiation with Proposers;
  - (d) Request that Proposers propose contractual terms and conditions that relate to subject matter reasonably identified in the Request for Proposals;
  - (e) Contain or incorporate the form and content of the Contract that the County will accept, or suggested Contract terms and conditions that nevertheless may be the subject of Negotiations with Proposers;
- (4) The County may require Proposal security in any form deemed prudent by the County. Proposal security shall serve the same function with respect to requests for Proposals as Bid security serves with respect to Invitations to Bid under Rule 47-0255(2).
- (a) PURCHASING shall return the Proposal security to all Proposers upon the execution of the Contract.
  - (b) The County may retain the Proposal security if a Proposer who is Awarded a Contract fails to promptly and properly execute the Contract. For purposes of this paragraph, prompt and proper execution of the Contract includes all action by a Proposer that is necessary to the formation of a Contract in accordance with the Request for Proposals, including the posting of performance security and the submission of proof of insurance when required by the Request for Proposals. If Contract Negotiations or Competitive Negotiations are conducted, the failure, prior to Award, of the County and a Proposer to reach agreement does not constitute grounds for the retention of Proposal security.
- (5) Public notice of the Request for Proposals shall be given in the same manner as provided for public notice of Invitations to Bid in Rule 47-0300.
- (6) Notwithstanding ORS 192.410 to 192.505, Proposals may be opened in a manner to avoid disclosure of contents to competing Proposers during, when applicable, the process of negotiation, but the PURCHASING Manager shall record and make available the identity of all Proposers as part of the County's public records from and after the Opening of the Proposals. Notwithstanding ORS 192.410 to 192.505, Proposals are not required to be open for public inspection until after the notice of intent to Award a Contract is issued. The fact that Proposals are opened at a meeting, as defined in ORS 192.610, does not make their contents subject to disclosure, regardless of whether the public body opening the Proposals fails to give notice of or provide for an executive session for the purpose of opening Proposals.

- (a) Notwithstanding any requirement to make Proposals open to public inspection after the County's issuance of notice of intent to Award a Contract, the County may withhold from disclosure to the public materials included in a Proposal that are exempt or conditionally exempt from disclosure under ORS 192.501 or 192.502.
  - (b) If a Request for Proposals is canceled under ORS 279B.100 after Proposals are received, the County may return a Proposal to the Proposer that made the Proposal. The Department shall keep a list of returned Proposals in the file for the solicitation.
- (7) As provided in the Request for Proposals or in Written Addenda issued thereunder, the Department may conduct site tours, demonstrations, individual or group Discussions and other informational activities with Proposers before or after the opening of Proposals for the purpose of clarification to ensure full understanding of, and responsiveness to, the Solicitation requirements or to consider and respond to requests for modifications of the Proposal requirements. The Department shall use procedures designed to accord Proposers fair and equal treatment with respect to any opportunity for Discussion and revision of Proposals.
- (a) For purposes of evaluation, when provided for in the Request for Proposals, the Department may employ methods of Contractor selection that include, but are not limited to:
    - (A) An Award or Awards based solely on the ranking of Proposals;
    - (B) Discussions leading to best and final offers, in which the Department may not disclose private Discussions leading to best and final offers;
    - (C) Discussions leading to best and final offers, in which the Department may not disclose information derived from Proposals submitted by competing Proposers;
    - (D) Serial Negotiations, beginning with the highest ranked Proposer;
    - (E) Competitive simultaneous Negotiations;
    - (F) Multiple-tiered Competition designed to identify, at each level, a class of Proposers that fall within a Competitive Range or to otherwise eliminate from consideration a class of lower ranked Proposers;
    - (G) A multistep Request for Proposals requesting the submission of unpriced technical submittals, and then later issuing a Request for Proposals limited to the Proposers whose technical submittals the Department had determined to be qualified under the criteria set forth in the initial Request for Proposals; or
    - (H) Any combination of methods described in this paragraph,
  - (b) Revisions of Proposals may be permitted after the submission of Proposals and before Award for the purpose of obtaining best offers or best and final offers.
  - (c) After the opening of Proposals, the PURCHASING Manager may issue or electronically post an Addendum to the Request for Proposals that modifies the criteria, rating process and procedure for any tier of Competition before the start of the tier to which the Addendum applies. The PURCHASING Manager shall send an Addendum that is issued by a method other than electronic posting to all Proposers who are eligible to compete under the Addendum. The PURCHASING Manager shall issue or post the Addendum at least five (5) Days before the start of the subject tier of Competition or as otherwise determined by the Department to be adequate to allow eligible Proposers to prepare for the Competition in accordance with these Rules.

- (8) Any Solicitation or Procurement described in a Solicitation may be canceled, rejected, delayed or suspended as provided in Rule 47-0660.
- (9) The Solicitation shall describe the methods by which the agency will make the results of each tier of competitive evaluation available to the Proposers who competed in the tier. The Solicitation shall include a description of the manner in which the Proposers who are eliminated from further Competition may protest or otherwise object to the County's decision.
- (10) The PURCHASING Manager shall issue or electronically post the notice of intent to Award described in Rule 47-0300 to each Proposer who was evaluated in the final competitive tier.
- (11) If a Contract is Awarded, the Contract shall be Awarded to the Responsible Proposer whose Proposal the County determines in Writing to be the most Advantageous to the County based on the evaluation process and evaluation factors described in the Request for Proposals, any applicable preferences described in Rules 46-0310 and 46-0320 and, when applicable, the outcome of any Negotiations authorized by the Request for Proposals. Other factors may not be used in the evaluation. When the Request for Proposals specifies or authorizes the Award of multiple Public Contracts, the County shall Award Public Contracts to the Responsible Proposers who qualify for the Award of a Contract under the terms of the Request for Proposals.
- (12) No terms and conditions shall be included in the Contract that were expressly rejected in a solicitation protest.
- (13) For multiple Award Contracts, the County 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

#### **47-0261 Procedures for Competitive Range, Multi-tiered and Multistep Proposals**

- (1) **Generally.** A Department may procure Goods or Services employing any combination of the methods of Contractor selection as set forth in Rule 47-0260. In addition to the procedures set forth in Rules 47-0300 to 47-0490 for methods of Contractor selection a Contracting Agency may provide for a multi-tiered or multi-step 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. A Department may use one or more of the procedures set forth in this Rule for Competitive Range, multi-tiered and multistep Proposals.
- (2) A Department may use methods of Contractor selection that include, but are not limited to, multi-tiered or multistep processes that embrace:
  - (a) The evaluation of proposals only, including the evaluation of serial Proposals (a series of more than one Proposal from each Proposer that remains eligible in the competition at the particular tier of the competition);
  - (b) The use of Proposals in connection with discussions with Proposers that lead to Best and Final Offers;
  - (c) The use of Proposals in connection with serial negotiations with Proposers that lead to Best and Final Offers or to the award of a Contract;

- (d) The use of Proposals in connection with competitive negotiations with Proposers that lead to Best and Final Offers or to the award of a Contracts; and
  - (e) The use of Proposals in multi-tiered competition designed to identify, at each stage of the competition, a class of Proposers that fall within a Competitive Range of Proposers that have a reasonable chance of being determined the most Advantageous Proposer or, in multiple-award situations, a reasonable chance of being determined an awardee of a Public Contract. Multi-tiered and multistep competitions may use any combination or series of Proposals, discussions, negotiations, demonstrations, offers, or other means of soliciting information from Proposers that bear 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, as determined in the discretion of the Department.
- (3) When a Department's Request for Proposals prescribes a multi-tiered or multistep Contractor selection process, a Department 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 Department also may, at any time, cancel the Procurement when the cancellation or rejection is in the best interest of the Department, and as determined by the Department. The reasons for the cancellation or rejection must be made part of the solicitation file.
- (4) **Exclusion Protest.** The Solicitation Document may provide that, before the notice of intent to Award there shall be 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 47-0720.
- (5) **Award Protest.** The Solicitation Document shall provide an opportunity to protest the intent to Award a Contract pursuant to Rule 47-0740. An Affected Offeror may protest, for any of the bases set forth in Rule 47-0720, its exclusion from the Competitive Range or any phase of a multi-tiered or multistep sealed Proposal process, or may protest an Addendum issued following initial Closing, if the County 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 Department.
- (6) **Competitive Range.** When the Solicitation process conducted pursuant to Rule 47-0260 calls for the establishment of a Competitive Range at any stage in the Procurement process, it shall do so as follows:
- (a) **Determining Competitive Range.**
    - (A) The Department 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 Department may determine and rank the Proposers in the Competitive Range. Notwithstanding the foregoing, however, in instances in which the Department determines that a single Proposer has a reasonable chance of being determined the most Advantageous Proposer, the Department need not determine or rank Proposers in the Competitive Range. In addition, notwithstanding the foregoing, a Department may establish a Competitive Range of all Proposers to enter into discussions to correct deficiencies in Proposals.

- (B) The Department may establish the number of Proposers in the Competitive Range if the Department'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 indicating a number of Proposers are closely competitive, or have a reasonable chance of being determined the most Advantageous Proposer.
- (b) **Protesting Competitive Range.** PURCHASING shall provide written notice to all Proposers identifying Proposers in the Competitive Range. The Solicitation Document may provide an opportunity for Proposers excluded from the Competitive Range to protest the Department's evaluation and determination of the Competitive Range in accordance with Rule 47-0720.
- (7) **Discussions; Revised Proposals.** The Department may initiate oral or Written Discussions with all eligible Proposers regarding their Proposals on subject matter within the general scope of the provisions of the RFP. In conducting Discussions, the Department:
  - (a) Shall treat all eligible Proposers fairly and shall not favor any eligible proposer over another;
  - (b) May disclose other eligible Proposer's Proposals or Discussions only in accordance with 47-0260.
  - (c) May adjust the evaluation of a Proposal as a result of Discussions. The conditions, terms, or price of the Proposal may be altered or otherwise 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 Department 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.
    - (D) Upon conclusion of Discussions with the remaining eligible Proposers, PURCHASING shall provide notice requesting best and final Offers.
- (8) **Negotiations.** The Department may commence serial Negotiations with the highest-ranked eligible Proposers or commence simultaneous Negotiations with all eligible Proposers. The Department 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
  - (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 the Department 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 the Department conducts under this Rule, the Department may terminate Discussions or Negotiations with the highest-ranked Proposer, or the eligible Proposer with whom it is currently discussing or negotiating, if the Department 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 final Contract in a timely manner.
  - (c) Continuing Serial Negotiations. If the Department is conducting serial Negotiations and the Department terminates Negotiations with an eligible Proposer, the Department may then commence Negotiations with the next highest scoring eligible Proposer and continue the sequential process until the Department has either:
    - (A) Determined to recommend Award of the Contract to the eligible Proposer with whom it is currently discussing or negotiating; or
    - (B) Decided to cancel the procurement when the cancellation or rejection is in the best interest of the Department as determined by the Department. The reasons for the cancellation or rejection must be made part of the solicitation file.
  - (d) Competitive Simultaneous Negotiations. If the Department chooses to conduct Competitive Negotiations, the Department may negotiate simultaneously with competing eligible Proposers. The Department:
    - (A) Shall treat all eligible Proposers fairly and shall not favor any eligible Proposer over another;
    - (B) May disclose other eligible Proposer's Proposals or the substance of Negotiations with other eligible Proposers only if the PURCHASING Manager notifies all of the eligible Proposers with whom the Department will engage in Negotiations of the Department'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 by the Proposer.
- (10) Best and Final Offers.** If best and final Offers are required, PURCHASING shall establish a common date and time by which eligible Proposers shall submit best and final Offers. The Department may make a Written determination that it is in the Department's best interest to conduct additional Discussions, Negotiations or change the Department's requirements and require another submission of best and final Offers. Eligible Proposers shall also be informed if they do not submit notice of withdrawal or another best and final Offer, their immediately previous Offers will be construed as their best and final Offer. The Department shall evaluate Offers as modified by the best and final Offers. The Department shall conduct evaluations as described in Rule 47-0600. The Department 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 Department may procure Goods or Services by using Multistep Competitive sealed Proposals pursuant to Rule 47-0260. Multistep sealed Proposals is a phased Procurement process that seeks necessary information or un-priced technical Proposals in the initial phase and in the second phase invites Proposers who submitted technically qualified Proposals in the initial phase to submit Competitive sealed price Proposals in the final phase. The Department 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 final phase. If time is a factor, the Solicitation Document may require Proposers to submit a separate sealed price Proposal during the initial phase to be opened after the technical evaluation.
- (a) **Public Notice.** Whenever multistep sealed Proposals are used, public notice for the first phase shall be given in accordance with Rule 47-0300. Public notice is not required for

the subsequent phases. However, PURCHASING shall give notice of the subsequent phases to all Proposers and inform any Proposers excluded from the subsequent phases of the right, if any, to protest exclusion pursuant to Rule 47-0720.

- (b) Procedure for Phase One of Multistep Sealed Proposals. The Department must initiate Multistep sealed Proposals by issuing a Request for Proposal in the form and manner required for Competitive sealed Proposals except as provided in this Rule. In addition to the requirements set forth in Rule 47-0260, the multistep Request for Proposal must state:
  - (A) That un-priced technical Proposals are requested;
  - (B) Whether price Proposals are to be submitted at the same time as un-priced technical Proposals; that if they are, such price Proposals shall be submitted in a separate sealed envelope;
  - (C) That the Solicitation is a multistep sealed Proposal Procurement, and that priced Proposals will be accepted only in the subsequent phases from those Proposers whose un-priced technical Proposals are found qualified in the first phase;
  - (D) The criteria for the evaluation of un-priced technical Proposals;
  - (E) That the Goods or Services being procured will 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 Proposal.
- (c) **Addenda to the Request for Proposals.** After receipt of un-priced technical Proposals, Addenda to the Request for Proposal will be distributed only to Proposers who submitted un-priced technical Proposals.
- (d) **Receipt and Handling of Un-priced Technical Proposals.** Un-priced technical Proposals need not be opened publicly.
- (e) **Evaluation of Un-Priced Technical Proposals.** Un-priced technical Proposals will be evaluated solely in accordance with the criteria set forth in the Request for Proposals.
- (f) **Discussion of Un-priced Technical Proposals.** The Department 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 Department shall not disclose any information derived from one un-priced technical Proposal to any other Proposer.
- (g) **Methods of Contractor Selection for Phase One.** In conducting phase one, a Department 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 Subsequent Phases.** Upon the completion of phase one, PURCHASING shall either:
  - (A) Open price Proposals submitted in phase one (if price Proposals were required to be submitted) from Proposers whose un-priced technical Proposals were found to be qualified; or
  - (B) If price Proposals have not been submitted, technical Discussions have been held, or Addenda to the Request for Proposals have been issued, invite each qualified Proposer to submit price Proposals.

- (i) Phase two shall be conducted as any other Competitive sealed Proposal Solicitation except as specifically 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.

Stat. Auth.: ORS 279A.065, 279B.060

Stats. Implemented: ORS 279B.060

#### **47-0265 Small Procurements**

- (1) For Procurements of Goods or Services less than or equal to the Small Purchase threshold established in FIN 16, a Department may Award a Contract as a Small Procurement in accordance with this Rule. A Procurement may not be artificially divided or fragmented so as to constitute a small Procurement under this section.
- (2) If the Goods or services are available from a QRF, they shall be purchased as provided in Division 55 of these Rules and not as provided in this Rule.
- (3) Small Procurements are exempt from Competitive Solicitation; however, Departments shall where practicable, obtain Quotes as provided in Rule 47-0270.
- (4) A Department may amend a Public Contract Awarded as a small Procurement in accordance 47-0800 (3), but the cumulative amendments shall not increase the total Contract Price by more than \$1,000 in excess of the Small Purchases threshold. Any amendment that causes a Small Purchase to exceed the Small Purchase threshold by more than \$1,000 will be treated as an unauthorized purchase and shall be subject to the requirements of PCRB Rule 20-0030.

Stat. Auth.: ORS 279A.065 & ORS 279B.065

Stats. Implemented: ORS 279B.065

#### **47-0270 Intermediate Procurements**

- (1) **Generally.** For Procurements of Goods or Services greater than the Small Purchase threshold and less than or equal to \$150,000, a Department may Award a Contract as an Intermediate Procurement.
- (2) **QRFs.** If the Goods or services are available from a QRF, they shall be purchased as provided in Division 55 of these Rules and not as provided in this Rule.
- (3) **Fragmentation.** A Procurement may not be artificially divided or fragmented so as to constitute an Intermediate Procurement under this section.
- (4) **Negotiations.** A Department 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 County.
- (5) **Award.** If a Contract is Awarded, the Department shall Award the Contract to the responsive, Responsible Offeror who provides the lowest Quote, or if criteria other than price are to be considered, whose Proposal is the highest scoring Proposal. If the Department intends to consider criteria other than price, the Solicitation shall state the criteria that will be considered in making the Award. Criteria may include experience, expertise, product functionality, suitability for a particular purpose and Contractor responsibility under ORS 279B.110.

- (6) Amendments. A Department may amend a Public Contract Awarded as an Intermediate Procurement in accordance with 47-0800(3), but the cumulative amendments shall not increase the total Contract Price to a sum that is greater than \$150,000. Increases in excess of this limit shall be approved by the Board prior to authorization for the additional Goods or services.
- (7) Procedure for Solicitation of Intermediate Procurements. For Procurements for Goods or services greater than the Small Purchase threshold and less than or equal to \$150,000 Departments may seek informally solicited price Quotes or Competitive Proposal Quotes. Solicitations and Offers for Intermediate Procurements shall be in Writing and may be electronic, by Facsimile transmission or by mail, except that Solicitations and Offers for Goods or services may be oral where the Contract Award is based solely on price and is equal to or less than \$75,000. The requirements for an Intermediate Procurement are as follows:
- (a) A minimum of three (3) Quotes shall be solicited from vendors who can reasonably be expected to provide the required Goods or services. At least three (3) Quotes solicited shall be from an MBE, WBE or ESB Contractor, if available.
  - (b) The Department shall make a Written record of all vendors from whom Quotes were solicited and the amount of the Quotes received. If three (3) Quotes are not available, a lesser number will suffice provided a Written record is made of the effort to obtain three (3) Quotes.
- (8) Price Agreements. A Price Agreement solicited pursuant to subsection (7) or subsection (9) (b) may be used for Contracts up to five years duration and for a maximum total Contract amount of \$150,000 or if procured under subsection (9) (a) may be used for Contracts up to five years duration and for a maximum total Contract amount of \$75,000.
- (9) Solicitations for Contracts for Minor Alteration, Ordinary Repair or Maintenance Necessary to Preserve a Public Improvement.
- (a) Solicitations for Contracts for minor alteration, ordinary repair or maintenance necessary to preserve a Public Improvement between the Small Purchase threshold established in FIN 16 and \$75,000. Departments may Award Public Contracts between the Small Purchase threshold established in FIN 16 and \$75,000 for minor alteration, ordinary repair or maintenance necessary to preserve a Public Improvement as an Intermediate Procurement if the Contract is for a single project and is not a component of or related to any other project, and the requirements of this subsection are met. When the amount of the Contract is more than the Small Purchase threshold established in FIN 16 but equal to or less than \$75,000, Quotes shall be solicited in the following manner:
    - (A) A minimum of three (3) Quotes shall be solicited from vendors who can reasonably be expected to provide a Quote. If three (3) Quotes are not available, a lesser number will suffice provided a Written record is made of the effort to obtain the Quotes.
    - (B) At least three (3) Quotes solicited shall be from an MBE, WBE or ESB Contractor certified by the State of Oregon for the type of work required, if available.
    - (C) A Quote shall be “not available” if all Contractors certified by the State in that category and located within 75 miles from the place where the Contract is to be performed have been advised of the contracting opportunity, have been given a reasonable period of time under the circumstances to make the Quote, and have failed to provide a Quote within the time specified.

- (D) The Department shall make a written record of all vendors from whom Quotes were solicited and the amount of the Quotes received.
- (b) Solicitations for Contracts for minor alteration, ordinary repair or maintenance necessary to preserve a Public Improvement between \$75,000 and \$150,000. Solicitations for Contracts for minor alteration, ordinary repair or maintenance necessary to preserve a Public Improvement between \$75,000 and \$150,000 shall be done in accordance with subsections (1) to (6), (9) and (10) of this Rule.
- (10) Written Record.** The Department shall make a Written record in the Procurement File of all vendors from whom Quotes were solicited and the amount of the Quotes received.
- (11) BOLI Notification.** The Department shall provide notification of Award to BOLI as required by ORS 279C.835.
- (12) Contract Requirements.** When the Contract is for a minor alteration, ordinary repair or maintenance necessary to preserve a Public Improvement, the Department shall comply with:
  - (a) The prevailing wage provisions of ORS 279C.800 to 279C.870, including when applicable;
    - (A) If no federal funds are being used to fund the work, the wage rates established under ORS 279C.815(2)(a) shall be attached to the Contract.
    - (B) If federal funds are being used to fund the work, the wage rates established under ORS 279C.815(2)(b) shall be attached to the Contract.
  - (b) The performance bond, payment bond and BOLI Public Works bond requirements of ORS 279C.380 and 279C.836 (see Rules 49-0460 and 49-0815);
  - (c) The Contractor registration requirements of ORS 701; and
  - (d) Any other law applicable to such a Contract.
- (13) Annual Report.** The PURCHASING Manager shall prepare a report to the Board on an annual basis which provides an evaluation of the procedures for obtaining Quotes in subsection (8). The annual report shall include a recommendation whether the program should be continued. If the PURCHASING Manager recommends that the Program be continued, the recommendation shall include any proposed improvements to the Program.

Stat. Auth.: ORS 279A.065 & ORS 279B.070

Stats. Implemented: ORS 279B.070

#### **47-0275 Sole-Source Procurements**

- (1)** The County may Award a Contract for Goods or Services without Competition when it is determined that the Goods or Services, or class of Goods or Services, are available from only one source. Such determination shall be made by the PURCHASING Manager for Procurements under \$150,000. For all other Procurements the determination shall be made by the Board. The determination shall be made based on written findings by the Department that shall include, where applicable, findings:
  - (A) Based on a brief description of the Contract or Contracts to be covered including volume of contemplated future purchases; and
  - (B) Based on a description of the Goods or Services to be purchased; and
  - (C) That current market research supports the determination that the Goods or Services are available from only one seller or source;

- (D) That the efficient utilization of existing Goods or Services requires the acquisition of compatible Goods or Services;
  - (E) That the Goods or Services required for the exchange of software or data with other public or private agencies are available from only one source;
  - (F) That the required product is data processing equipment which will be used for research where there are requirements for exchange of software and data with other research establishments;
  - (G) That the Goods or Services are for use in a pilot or an experimental project; or
  - (H) Other findings that support the conclusion that the Goods or Services are available from only one source.
- (2) To the extent reasonably practical, the Department shall negotiate with the sole source to obtain Contract terms Advantageous to the County.
  - (3) Except for Contracts specifically exempted by these Rules, a Department shall give public notice on all Contracts in excess of \$75,000 of the County's determination that the Goods or Services or class of Goods or Services are available from only one source as set forth in Rule 47-0300(1). 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 notice shall be given at least seven (7) Days before the Award of the Contract to allow for protests pursuant to Rule 47-0710, unless the PURCHASING Manager gives prior Written approval to reduce the number of days based upon extraordinary circumstances that do not meet the criteria for an Emergency Procurement pursuant to Rule 47-0280.
  - (4) An Affected Person may protest, in accordance with Rule 47-0710, the determination that the Goods or Services or class of Goods or Services are available from only one source.
  - (5) Unless unusual circumstances warrant a longer exemption period, this type of exemption will not be approved for more than two (2) years.
  - (6) Departments shall not select a Sole-Source Procurement to avoid a Competitive Procurement.

Stat. Auth.: ORS 279A.065 & ORS 279B.075

Stats. Implemented: ORS 279B.075

#### **47-0280 Emergency Procurements/Contracts**

- (1) Pursuant to the requirements of this Rule, the County, may enter into a Public Contract for any amount without Competitive Solicitation if an Emergency exists. Emergency means circumstances that could not have been reasonably foreseen that create a substantial risk of loss, damage, interruption of services or threat to public health or safety that requires prompt execution of a Contract to remedy the condition.
- (2) A Department seeking authority to enter into an Emergency Contract shall:
  - (a) Make a Written declaration of Emergency in the Procurement File, signed by the Department Director, which includes findings describing the Emergency circumstances that require the prompt performance of the Contract, stating the anticipated harm from failure to establish the Contract on an expedited basis; and
  - (b) Seek Competition to the extent reasonable and appropriate under the circumstances and document the method used for selection of the particular Contractor. If conducting a

procurement for construction services that are not public improvements, PURCHASING shall set a solicitation time period that PURCHASING determines to be reasonable under the emergency circumstances, and PURCHASING may issue written and oral requests for offers; and

- (c) Record in the Procurement File the measures taken under subsection (2)(b) of this section to encourage Competition, the amounts of the Bids, Quotes or Proposals obtained, and the reason for selecting the Contractor; and
  - (d) Submit the information and documents described in subsections (2)(a), (2)(b) and (2)(c) above to the Chair with notice to the PURCHASING Manager and obtain authorization from the Chair to enter into the Contract.
- (3) The Chair is authorized to declare the existence of an Emergency and to authorize execution of Contracts in any amount required by Emergency circumstances, and may authorize direct appointments without Competition in cases of extreme necessity.
  - (4) Although no dollar limitation applies to Emergency Contracts the scope of the Contract shall be limited to only that Work that is essential to remedy the conditions causing the Emergency as described in the declaration.
  - (5) Any Contract Awarded under this Rule shall be Awarded within sixty (60) Days following declaration of the Emergency unless an extension is granted by the Chair.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.080

#### **47-0285 Special Procurements**

- (1) As used in this Rule and Rules 47-0700 and 47-0730:
  - (a) “Special Procurement” means, unless the context requires otherwise, a Class Special Procurement, a Contract-Specific Special Procurement or both. A Special Procurement allows the County to custom-design any contracting approach it determines will meet its procurement needs.
  - (b) “Class Special Procurement” means a contracting procedure that differs from the procedures described in these Rules and is for the purpose of entering into a series of Contracts over time for the acquisition of a specified class of Goods or services.
  - (c) “Contract-Specific Special Procurement” means a contracting procedure that differs from the procedures described in these Rules and is for the purpose of entering into a single Contract or a number of related Contracts for the acquisition of specified Goods or services on a one-time basis or for a single project.
- (2) To seek approval of a Special Procurement, a Department shall submit a Written request to the PURCHASING Manager, that describes the proposed contracting procedure, the Goods or services or the class of Goods or services to be acquired through the Special Procurement and the circumstances that justify the use of a Special Procurement under the standards set forth in subsection (3) of this Rule. The alternative process shall be clearly described and complete, and shall include a description of the Supplies and Services to be acquired, provisions for advertisement, a proposed Solicitation process, including the criteria for selection, and the proposed Contract document. The PURCHASING Manager has the authority to approve, deny or refer to the Board Special Procurement requests up to \$150,000. Special Procurement requests in excess of \$150,000 shall be approved by the Board. The PURCHASING Manager or the Board may require any additional information deemed necessary to evaluate the request for approval of the Special Procurement.

- (3) The PURCHASING Manager or the Board may approve a Special Procurement if the PURCHASING Manager or the Board finds that a Written request submitted under subsection (2) of this section demonstrates that the use of a Special Procurement as described in the request, or an alternative procedure prescribed by the PURCHASING Manager or the Board, will:
  - (a) Be unlikely to encourage favoritism in the Awarding of Public Contracts or to substantially diminish Competition for Public Contracts; and
  - (b) Result in substantial cost savings to the County or to the public; or
  - (c) Otherwise substantially promote the public interest in a manner that could not practicably be realized by complying with requirements of these Rules.
- (4) The PURCHASING Manager shall give public notice, and notice to any identified Affected Persons, of the approval of Special Procurements that are in excess of \$150,000 at least seven (7) Days prior to Award of the Contract. Notice shall be given in a manner similar to public notice of Competitive sealed Bids under Rule 47-0300. The public notice shall describe the Goods or Services or class of Goods or Services to be acquired through the Special Procurement.
- (5) If a Contract is Awarded through a Special Procurement, the County shall Award the Contract to the Offeror whose Offer the County determines in Writing to be the most Advantageous to the County.
- (6) When the PURCHASING Manager or the Board approves a Class Special Procurement under this section, the County may Award Contracts to acquire Goods or services within the class of Goods or services in accordance with the terms of the PURCHASING Manager's or the Board's approval without making a subsequent request for a Special Procurement.
- (7) **Protest.** An Affected Person may only protest the approval of Special Procurements in excess of \$150,000. Protests shall be in accordance with Rule 47-0700.
- (8) Purchases pursuant to the Class Special Procurements described in Rule 47-0288 are authorized. The procedures in this Rule shall not apply to the Class Special Procurements authorized in Rule 47-0288.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.085

#### **47-0288 Special Procurements Authorized by Rule**

Many of the following circumstances will specify the maximum length of the special procurement RFx before having to demonstrate the same circumstances exist in a new RFx. Users are reminded that if they issue a Purchase Order it will be limited to the fiscal year in which it was issued, and follow on purchase orders will have to be issued to obtain additional time. Contracts can be issued for up the time limit shown.

- (1) Brand Names or Products, "or Equal," and Single Seller
  - (a) **Authorization.** Departments are authorized to procure products in accordance with the following procedure:
  - (b) **Definitions.** "Procurement of Brand Name 'or Equal' Products" means the Procurement of a product after specifying the registered Brand name of the product or requiring the same Specifications of the Brand Name product.
  - (c) **Requirements.**

- (A) **Specifications.** Solicitation Specifications for Public Contracts shall not expressly or implicitly require any product of any particular manufacturer or seller except as expressly authorized in subsections (1)(c)(A)(i) and (ii) of this Rule.
- (i) **“Or Equal” Specification (No limit).** A Department may specify a particular brand name, make or product suffixed by “or equal”, “or approved equal”, “or equivalent”, “or approved equivalent”, or similar language if there is no other practical method of Specification.
  - (ii) **Specifying a Particular Make or Product (2 years).** A Department may specify a brand name, make, or product without an “or equal” or equivalent suffix if there is no other practical method of Specification, after documenting the Procurement File, with the following:
    - (I) A brief description of the Solicitation(s) to be covered including volume of contemplated future purchases;
    - (II) The brand name, mark, or product to be specified; and
    - (III) The reasons the Department is seeking this Procurement method, which shall include at least one of the following findings in the Procurement File:
      - (aa) It is unlikely that Specification of the brand name, mark or product will encourage favoritism in the Award of the Public Contracts or substantially diminish Competition; or
      - (bb) Specification of the brand name, mark or product would result in substantial cost savings to the Department; or
      - (cc) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies.
- (B) **Public Notice.** The County shall make a reasonable effort to notify all known suppliers of the specified product and invite such suppliers to submit Competitive Bids or Proposals; or shall document the Procurement File with findings of current market research to support the determination that the product is available from only one seller. For Contracts in excess of \$150,000 this requirement shall be satisfied by posting a notice on the PURCHASING Website for a reasonable time period.
- (C) **Single Manufacturer, Multiple Sellers (2 years).** The Department may specify a product or service available from only one (1) manufacturer, but available through multiple sellers, if the Department meets the Requirements of Subsection (c)(A) and (B) and the following:
- (i) If the total purchase is the small dollar threshold established in FIN 16 or more but does not exceed \$150,000, Competitive Quotes shall be obtained and retained in the Procurement File pursuant to the requirements for Intermediate Procurements in Rule 47-0270;
  - (ii) If the purchase exceeds \$150,000, Competitive Bids or Proposals shall be solicited in accordance with Rules 47-0255 to 47-0263.
- (D) **Single Manufacturer, Multiple Purchases (5 years).** If a Department intends to make several purchases of the product of a particular manufacturer or seller for a period not to exceed five (5) years, the Department shall so state in the Procurement File, the Solicitation Document, and the public notice described in Subsection (c)(B) of this Rule. Such documentation and public notice constitute sufficient notice

as to subsequent purchases. If the total purchase amount is estimated to exceed \$150,000, this shall be stated in the advertisement for Bids or Proposals.

- (E) **Competitive Solicitation.** If a Department competitively solicits, it shall comply with the Rules for that method of Solicitation pursuant to Rules 47-0255 to 47-0263, 47-0270 and 47-0285.

**(2) Advertising Contracts ( 5 years).**

- (a) **Authorization.** Departments are authorized to procure advertising from newspapers, magazines and other related print media and from radio and television stations and related media without Competitive Solicitation.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of this Rule which authorizes the Procurement. Departments shall use Competitive methods wherever possible to achieve best value and shall state in the Procurement File the reasons why a Competitive process was deemed to be impractical.

**(3) Equipment Maintenance, Repair and Overhaul (per repair).**

- (a) **Authorization.** A Department, may enter into a Contract for equipment maintenance, repair or overhaul without Competitive Solicitation, 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 (1) source; and
  - (C) Written documentation supporting the findings determination in subsections 3(a)(A) or (3)(a)(B) above is obtained and prepared and placed in the Procurement File.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of this Rule which authorizes the Procurement. Departments shall use Competitive methods wherever possible to achieve best value and shall state in the Procurement File the reasons why a Competitive process was deemed to be impractical.

**(4) Contracts for Price Regulated Items (5 years).**

- (a) **Authorization.** A Department may contract for the direct purchase of Goods or services where the rate or price for the Goods or services being purchased is established by federal, state, or local regulatory authority without Competitive Solicitation.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of this Rule which authorizes the Procurement. Departments shall use Competitive methods wherever possible to achieve best value and shall state in the Procurement File the reasons why a competitive process was deemed to be impractical.

**(5) Investment Contracts (per occurrence).**

- (a) **Authorization.** A Department may contract for the investment of public funds or the borrowing of funds by the County when such investment or borrowing is contracted pursuant to statute, ordinance, charter, or constitution without competitive Solicitation.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of this Rule which authorizes the Procurement. Departments shall use competitive

methods wherever possible to achieve best value and shall state in the Procurement File the reasons why a competitive process was deemed to be impractical.

**(6) Purchase of Used Personal Property (per occurrence).**

- (a) **Authorization.** A Department may purchase used personal property or equipment without Competitive Solicitation if it has determined and documented in the Procurement File that the purchase will (i) be unlikely to encourage favoritism or diminish competition; and (ii) result in substantial cost savings or promote the public interest. “Used personal property or equipment” is property or equipment which has been placed in its intended use by a previous owner or user for a period of time recognized in the relevant trade or industry as qualifying the personal property or equipment as “used,” at the time of the Department purchase. “Used personal property or equipment” generally does not include property or equipment if the Department was the previous user, whether under a lease, as part of a demonstration, trial or pilot project, or similar arrangement.
- (b) **Process and Criteria.**
  - (A) For purchases of used personal property or equipment not exceeding \$150,000, Departments shall, where feasible, obtain three (3) competitive Quotes, unless the Department has determined and documented that a purchase without obtaining competitive Quotes will result in cost savings to the Department and will not diminish competition or encourage favoritism.
  - (B) If the total purchase is estimated to exceed \$150,000, the Department shall submit a written request to the PURCHASING Manager for PURCHASING to solicit quotes and post on the PURCHASING website prior to making the purchase.
  - (C) PURCHASING shall keep a written record of the Quotes received by PURCHASING. If three (3) Quotes are not available, a written record shall be made of the attempt to obtain Quotes.
  - (D) Departments or PURCHASING shall cite in the Procurement File the subsection of this Rule which authorizes the Procurement.

**(7) Reverse Auctions (per occurrence).**

- (a) **Process.** A Reverse Auction means a process for the purchase of Supplies and Services by a buyer from the lowest Bidder. The Department as the buyer shall conduct Reverse Auctions by first publishing a Solicitation that describes its requirements, Contract terms and conditions. Then, the Department shall solicit online Bids from all interested Bidders through an Internet-based program. The Solicitation shall set forth a start and end time for Bids and specify the following type of information to be disclosed to Bidders during the Reverse Auction:
  - (A) The prices of the other Bidders or the price of the most Competitive Bidder;
  - (B) The rank of each Bidder (e.g., (i) “winning” or “not winning” or (ii) “1st, 2nd, or higher”);
  - (C) The scores of the Bidders if the Department chooses to use a scoring model that weighs non-price factors in addition to price; or
  - (D) Any combination of (A), (B) and (C) above.
- (b) Before the Reverse Auction commences, Bidders shall be required by the Department to consent to the Contract terms and conditions, either in Writing or by an Internet “click”

agreement. The Bidders then compete for the Award of a Contract by offering successively lower prices, informed by the price(s), ranks, and scores, separately or in any combination thereof, disclosed by the Department. The identity of the Bidders shall not be revealed during this process. Only the successively lower price(s), ranks, scores and related details, separately or in any combination thereof, will be revealed to the participants. The Department may cancel this Solicitation if it is in the County's best interest. At the end of this Bidding process, the Contract shall be Awarded to the lowest Responsible Bidder or in the case of multiple Awards, lowest Responsible Bidders. This process allows the Department to test and determine the suitability of the Goods and services before making the Award. The Department shall comply with the following procedures for this type of Solicitation:

- (A) **Public Notice.** The Department shall disclose the Reverse Auction process in the Solicitation Documents. The Department shall give notices of the price(s) offered, rank(s), score(s) and related details to the initial Bidders as described in the Solicitation Document. If the purchase exceeds \$150,000 the PURCHASING Manager shall issue a Notice of Intent to Award. The notice shall be issued at least seven (7) Days prior to making the Award.
- (B) **Prequalification.** For each Solicitation, on a case-by-case basis, the Department may determine whether prequalification of suppliers is needed. If prequalification is used, the Department shall prequalify suppliers and provide an appeal process in accordance with these Rules.
- (C) **Authorization.** The Department shall cite in the procurement file the subsection of this rule which authorizes the Procurement.

**(8) Hazardous Material Removal; Oil Cleanup (per occurrence)**

- (a) **Authorization.** A Department may enter into Public Contracts without competitive Solicitation when ordered to clean up oil or hazardous waste pursuant to the authority granted the Department of Environmental Quality (DEQ) under ORS Chapter 466, and such DEQ order necessitates the prompt establishment and performance of the Contract in order to comply with the statutes regarding spill or release of oil or hazardous material that have created an Emergency condition.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of this Rule which authorizes the Procurement. Departments shall use competitive methods wherever possible to achieve best value and shall state in the Procurement File the reasons why a competitive process was deemed to be impractical. Departments shall document in the Procurement File the circumstances requiring cleanup or a copy of the DEQ order ordering such cleanup. Departments shall not contract for such services pursuant to this Rule in the absence of an order from the Department of Environmental Quality to clean up a site with a time limitation that would not permit hiring a Contractor as otherwise required by these Rules.

**(9) Rating Agency Contracts (5 years).**

- (a) **Authorization.** The County may purchase the services of Moody's Investors Service, Standard and Poors or similar rating agencies without competitive solicitation.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of this Rule which authorizes the Procurement.

**(10) Library Databases, Interactive Computer Services and Circulation Materials (5 years)**

- (a) **Authorization.** Departments may purchase databases, interactive computer services and circulation materials such as books, videos, DVDs, tapes and CDs for Multnomah County Libraries without competitive solicitation.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of this Rule which authorizes the Procurement. Departments shall use competitive methods wherever possible to achieve best value and shall state in the Procurement File the reasons why a competitive process was deemed to be impractical.

**(11) Periodicals (5 years).**

- (a) **Authorization.** Departments may purchase subscriptions for periodicals, including journals, magazines and similar publications without competitive Solicitation.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of this Rule which authorizes the Procurement. Departments shall use competitive methods wherever possible to achieve best value and shall state in the Procurement File the reasons why a competitive process was deemed to be impractical.

**(12) Institutional Commissaries and Sheriff's Inmate and Juvenile Detainee Welfare Funds (2 years)**

- (a) **Authorization.** Institutional and residential commissaries and Sheriff's Inmate and Juvenile Detainee Welfare Funds may make purchases using these funds.
- (b) **Process and Criteria.** Purchases using these funds shall be made based upon Written policies and procedures approved by the PURCHASING Manager.

**(13) Gasoline, Diesel Fuel, Heating Oil, Lubricants and Asphalt (2 years)**

- (a) **Authorization.** Departments may purchase gasoline, diesel fuel, heating oil, lubricants and asphalt using the Intermediate Procurement process regardless of the dollar amount of the purchase.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of this Rule which authorizes the Procurement. Purchases shall be made subject to the following conditions:
  - (A) The Department follows the Intermediate Procurement process in accordance with Rule 47-0270;
  - (B) The Department makes its purchases from the least expensive source.

**(14) Ballots, Ballot Pages and Ballot Cards (2 years)**

- (a) **Authorization.** The County may contract for the printing of ballots without competitive Solicitation.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of this Rule which authorizes the Procurement.

**(15) Undercover Vehicles (5 years)**

- (a) **Authorization.** The Sheriff's Office may purchase vehicles for use for undercover operations without competitive Solicitation.
- (b) **Process and Criteria.** The Sheriff's Office shall state in the Procurement File the subsection of this Rule which authorizes the Procurement. The Sheriff's Office shall use competitive methods wherever possible to achieve best value and shall state in the Procurement File the reasons why a competitive process was deemed to be impractical.

**(16) Copyrighted Materials (3 years)**

- (a) **Authorization.** A Department may purchase copyrighted materials without competitive Solicitation if there is only one (1) supplier available for such Goods. Examples of copyrighted materials that may be subject to this subsection are textbooks, workbooks, curriculum kits, reference materials, audio and visual media, and software which is available only from the manufacturer or developer.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of this Rule which authorizes the Procurement.

**(17) Software and Hardware Maintenance and Upgrades (3 years)**

- (a) **Authorization.** A Department may enter into a Contract and may renew existing Contracts for proprietary information technology and telecommunications hardware or software maintenance and upgrades without Competitive Solicitation where these services are available from only one source.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of this Rule which authorizes the Procurement. Departments shall state in the Procurement File the facts upon which the Department determined that maintenance and upgrades were available from only one source.

**(18) Direct Purchase from Manufacturer (per purchase).**

- (a) **Authorization.** A Department may purchase Goods directly from the manufacturer without competitive solicitation if the price from the manufacturer is less than that offered by distributors.
- (b) **Process and Criteria.** The Department shall set forth in Writing the findings supporting the determination of lowest cost and cite the subsection of this rule which authorizes this procurement in the Procurement File.

**(19) Service Monopoly (per event).**

- (a) **Authorization.** The County may enter into Public Contracts without competitive solicitation when work is to be completed by a utility or other entity who has been granted a monopoly for services for a specific area or provision of a type of service and by agreement the utility or entity is either entitled to or required to perform the required work.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of the Rule which authorizes the Procurement. Departments shall identify in the Procurement File the provisions of the agreement with the utility or entity that entitle or require the entity to perform the required work.

**(20) Memberships and Professional Associations (1 year)**

- (a) **Authorization.** Departments and selected individuals within a Department may join professional associations and organizations when such membership will enhance professionalism, encourage networking with other professionals, or otherwise provide access to valuable and necessary information to accomplish their jobs or maintain their professional standing.
- (b) **Process and Criteria.** Departments shall state in the Procurement File the subsection of the Rule which authorizes the Procurement. Departments shall identify in the procurement file the specific business need and/or professional certification requirements that will be met through membership in the organization or association.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070  
Stats. Implemented: ORS 279B.085

## DIVISION 47 PROCUREMENT PROCESS

### 47-0300 Public Notice of Solicitation Documents

- (1) **Notice of Solicitation Documents.** Public notice of Solicitations by electronic means is likely to be cost-effective. Therefore, public notice of every Solicitation Document shall be given in accordance with subsection (2) of this Rule. The PURCHASING Manager may give additional notice using any method appropriate to foster and promote competition, including:
  - (a) Mailing or e-mailing notice of the availability of the Solicitation Document to Persons that have expressed an interest in County Procurements;
  - (b) Placing notice on the State of Oregon Electronic Procurement System (ORPIN); or
  - (c) Publication in a newspaper of general circulation in the County and in as many other publications as may be appropriate.
- (2) **Notice and Advertising.** Every notice and advertisement of a Solicitation Document shall be published on the PURCHASING Website.
- (3) **Content of Advertisement.** All notices and 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 or advertisement of the Solicitation Document given in accordance with subsection 2 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 PURCHASING Manager 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 or advertisement of the Solicitation Document given in accordance with subsection 2 above and Closing be less than seven (7) Days. The PURCHASING Manager shall document the specific reasons for the shorter interval in the Procurement File;
  - (d) The date that Persons shall file applications for prequalification if prequalification is a requirement and the class of Goods or Services is one for which Persons shall 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 County to receive Offers;
  - (g) The scheduled Closing; and
  - (h) Any other appropriate information.
- (4) **Posting Advertisement for Offers.** The PURCHASING Manager shall post notice of every Solicitation Document at the PURCHASING office and shall provide a copy of the Solicitation Document upon request.
- (5) **Fees.** The County may charge a fee or require a deposit for the Solicitation Document.
- (6) **Notice of Addenda.** Potential Offerors shall be provided notice of any Addenda to a Solicitation Document in accordance with Rule 47-0430.

Stat. Auth.: ORS 279A.065, ORS 279B.055 & ORS 279B.060  
Stats. Implemented: ORS 279B.055 & ORS 279B.060

#### 47-0310 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 acceptance for not less than 30 Days following Closing unless otherwise specified in the Solicitation Document. The County may elect to accept the Offer at any time during the specified period, and the 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", the County 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 Rule 47-0262, a Proposer shall not make its Offer contingent upon 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 Rule 47-0261, the Offeror's Offer includes any nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the County in Writing and the Offeror's agreement to perform the scope of work and meet the performance standards set forth in the final negotiated scope of work.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065, ORS 279B.055 & ORS 279B.060

#### 47-0320 Facsimile Bids and Proposals Department Authorization

- (1) The PURCHASING Manager may authorize Offerors to submit Facsimile Offers. If Bid or Proposal security is or will be required, Facsimile Offers shall not be authorized unless a method has been established for receipt of such security. Prior to authorizing the submission of Facsimile Offers, the PURCHASING Manager shall determine that equipment and personnel are available which are capable of receiving the size and volume of anticipated Offers within a short period of time. In addition, the PURCHASING Manager 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 Facsimile Offers for Bids or Proposals are authorized, the following provisions shall be included in the Solicitation Document (other than in a request for Small or Intermediate Procurements):

- (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 County 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 shall 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 County reserves the right to Award the Contract solely on the basis of the Facsimile Offer. However, upon the County’s request the apparent successful Offeror shall promptly submit its complete original Signed Offer.”;
- (e) The data and compatibility characteristics of the County’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 County 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.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.365

## DIVISION 47 BID AND PROPOSAL PREPARATION

### 47-0400 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 Closing 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 County with all documents and Descriptive Literature required by the Solicitation Document.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

### 47-0410 Offer Submission

- (1) **Product Samples and Descriptive Literature.** The County may require Product Samples or Descriptive Literature if the County determines either is necessary or desirable to evaluate the quality, features or characteristics of an Offer. The County 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 or in the envelope provided by PURCHASING, whichever is applicable.
  - (b) The County 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 PURCHASING receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

### 47-0420 Pre-Offer Conferences

- (1) **Purpose.** Pre-Offer conferences may be held with prospective Offerors prior to Closing, to explain the Procurement requirements, obtain information, or to conduct site inspections.
- (2) **Required Attendance.** The County may require attendance at the pre-Offer conference as a condition for making an Offer.
- (3) **Scheduled Time.** If pre-Offer conference is held, 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 County representative at the pre-Offer conference do not change the Solicitation Document unless such statements are confirmed in a Written Addendum to the Solicitation Document.
- (5) **Announcement.** Notice of any pre-Offer conference shall be given in the Solicitation Document and advertisement if applicable.

#### **47-0430 Addenda to Solicitation Document**

- (1) Issuance; Receipt.** A Solicitation Document may only be changed by Written Addenda. If required by the Solicitation Document or an Addendum the Offeror shall provide Written acknowledgment of receipt of all issued Addenda with its Offer.
- (2) Notice and Distribution.** The PURCHASING Manager 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 County will provide notice of Addenda and how the County will make the Addenda available before Closing, and at each subsequent step or tier of evaluation if the County will engage in a multi-step competitive sealed Bid process in accordance with Rule 47-0257, or a multi-tiered or multi-step competitive sealed Proposal process in accordance with Rule 47-0261. The following is an example of how Solicitation Document may specify notice of Addenda will be given: “The County will not mail notice of Addenda, but will publish notice of any Addenda on the PURCHASING Website. Addenda may be downloaded off the site. Offerors should frequently check the PURCHASING Website until Closing, including at least once weekly until the week of Closing and at least once daily the week of the Closing.”
- (3) Timelines; Extensions.**

  - (a) The PURCHASING Manager shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The PURCHASING Manager may extend the Closing if the PURCHASING Manager determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent justified by a countervailing public interest, the PURCHASING Manager shall not issue Addenda less than five (5) Days 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 shall be issued no fewer than five (5) Days before the beginning of that tier or step of competition, unless the PURCHASING Manager determines that a shorter period is sufficient to allow Offerors to prepare for that tier or step of competition. The PURCHASING Manager shall document the factors 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, and 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 Rule 47-0730, by the close of the next Business Day after issuance of the Addendum, or up to the last Day allowed to submit a request for change or protest under Rule 47-0730, 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 Rule 47-0730, then the PURCHASING Manager may consider an Offeror's request for change or protest to the Addendum only, and the PURCHASING Manager shall not consider a request for change or protest to matters not added or modified by the Addendum. Notwithstanding any provision of this subsection (4) of this Rule, a Department is not required to provide a protest period for Addenda issued after initial Closing during a multi-tier or multistep Procurement process.

Stat. Auth.: ORS 279A.065 & ORS 279B.060

Stats. Implemented: ORS 279B.060

#### **47-0440 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 County in accordance with Rule 47-0400 and Rule 47-0410, unless otherwise specified in the Solicitation Document. Any modification shall 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 PURCHASING Manager 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 PURCHASING Manager
  - (b) The PURCHASING Manager 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 PURCHASING Manager shall include all documents relating to the modification or withdrawal of Offers in the appropriate Procurement File.

Stat. Auth.: ORS 279A.065 & ORS 279B.055

Stats. Implemented: ORS 279B.055

#### **47-0450 Receipt, Opening, and Recording of Offers; Confidentiality of Offers.**

- (1) **Receipt.** The PURCHASING Manager shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The PURCHASING Manager shall not open the Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If the PURCHASING Manager for any reason opens an Offer or a modification prior to the Opening, the PURCHASING Manager shall return the Offer or modification to its secure and confidential state until Opening. The PURCHASING Manager shall document the resealing for the Procurement File (e.g. "County opened the Offer due to improper identification of the Offer.").
- (2) **Opening and Recording.** The PURCHASING Manager shall publicly open Offers including any modifications made to the Offer pursuant to 47-0440(1). In the case of Invitations to Bid, to the extent practicable, the PURCHASING Manager shall read aloud the name of each Bidder, and such other information as the PURCHASING Manager considers appropriate. However, the PURCHASING Manager may withhold from disclosure information in accordance with Rule 47-0255(4)(b) and Rule 47-0260(6). In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the PURCHASING Manager will not read Offers aloud.

Stat. Auth.: ORS 279A.065 & ORS 279B.055  
Stats. Implemented: ORS 279B.055

#### **47-0460 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. The PURCHASING Manager shall not consider late Offers, withdrawals or modifications.

Stat. Auth.: ORS 279A.065 & ORS 279B.055  
Stats. Implemented: ORS 279B.055

#### **47-0470 Mistakes**

- (1) **Generally.** To protect the integrity of the competitive Procurement process and to assure fair treatment of Offerors, the PURCHASING Manager shall carefully consider whether to permit waiver, correction or withdrawal of Offers for certain mistakes.
- (2) **Treatment of Mistakes.** The PURCHASING Manager shall not allow an Offeror to correct or withdraw an Offer for an error in judgment. If the PURCHASING Manager discovers certain mistakes in an Offer after Opening, but before Award of the Contract, the PURCHASING Manager may take the following action:
  - (a) The PURCHASING Manager 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) The PURCHASING Manager 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 PURCHASING Manager'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) Changes in Bids prejudicial to the interests of the public or fair competition are not permitted.
  - (d) The PURCHASING Manager 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 PURCHASING Manager does not grant the Offeror permission to withdraw the Offer;
    - (G) That the PURCHASING Manager's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on the County or the public it represents; and
    - (H) That the Offeror promptly gave notice of the claimed error to the PURCHASING Manager.
  - (e) The criteria in subsection (2)(d) of this Rule shall determine whether the PURCHASING Manager will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether the PURCHASING Manager 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 County based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually Awarded, 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 PURCHASING Manager 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.
- (5) **Written Determination.** All decisions to permit the correction or withdrawal of Bids, or to cancel an Award or a Contract based on Bid mistakes, shall be supported by a Written determination by the PURCHASING Manager that states the reasons for the action taken.

Stat. Auth.: ORS 279A.065 & ORS 279B.055  
Stats. Implemented: ORS 279B.055

#### **47-0480 Time for 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.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279A.065

#### **47-0490 Extension of Time for Acceptance of Offer**

The PURCHASING Manager may request, orally or in Writing, that Offerors extend, in Writing, the time during which the County 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.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279A.065

## DIVISION 47 QUALIFICATIONS AND DUTIES

### 47-0500 Responsibility of Bidders and Proposers

Before Awarding a Contract the PURCHASING Manager shall determine that the Bidder submitting the lowest Bid or Proposer submitting the most Advantageous Proposal is Responsible. The PURCHASING Manager shall use the standards set forth in Rule 47-0640(1)(c)(F) to determine if a Bidder or Proposer is Responsible. In the event the PURCHASING Manager determines a Bidder or Proposer is not responsible, the PURCHASING Manager shall prepare a written determination of non-Responsibility and shall reject the Offer.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.110

### 47-0525 Qualified Products Lists

- (1) **General.** A Department may develop and maintain a qualified products list in instances in which the testing or examination of Goods before initiating a Procurement is necessary or desirable in order to best satisfy the requirements of the County. For purposes of this section, "Goods" includes products that have associated or incidental service components, such as supplier warranty obligations or maintenance service programs.
- (2) **List Development.** In the initial development of any qualified products list, a Department shall give public notice, in accordance with Rule 47-0255, of the opportunity for potential Contractors, sellers or suppliers to submit Goods for testing and examination to determine their acceptability for inclusion on the list and may solicit in Writing representative groups of potential Contractors, sellers or suppliers to submit Goods for the testing and examination. Any potential Contractor, seller or supplier, even though not solicited, may offer its Goods for consideration.
- (3) **Tests or Examinations.** A Department's inclusion of Goods on a qualified products list shall be based on the results of tests or examinations. Notwithstanding any provision of ORS 192.410 to 192.505, a Department may make the test or examination results public in a manner that protects the identity of the potential Contractor, seller or supplier that offered the Goods for testing or examination, including by using only numerical designations. Notwithstanding any provision of ORS 192.410 to 192.505, a Department may keep confidential trade secrets, test data and similar information provided by a potential Contractor, seller or supplier if so requested in Writing by the potential Contractor, seller or supplier.
- (4) **Inclusion on List is not Prequalification.** The inclusion of Goods on a qualified products list does not constitute and may not be construed as a prequalification under Rule 47-0550 of any prospective Contractor, seller or supplier of Goods on the qualified products list.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.115

### 47-0550 Prequalification of Prospective Offerors; Pre-negotiation of Contract Terms and Conditions

- (1) **General.** The County may prequalify prospective Bidders or Proposers to submit Bids or Proposals for Public Contracts to provide particular types of Goods or services.

- (2) **Prequalification Application.** When a Department permits or requires prequalification of Bidders or Proposers, the Department shall prepare a prequalification application setting forth the criteria and qualifications for prequalification. Upon receipt of a prequalification application, the Department shall investigate the prospective Bidder or Proposer as necessary to determine whether the prospective Bidder or Proposer is qualified. The determination shall be made in less than thirty (30) Days, if practicable, if the prospective Bidder or Proposer requests an early decision to allow the prospective Bidder or Proposer as much time as possible to prepare a Bid or Proposal for a Contract that has been advertised. In making its determination, the Department shall consider only the applicable standards of responsibility listed in Rule 47-0640(1)(c)(F). The PURCHASING Manager shall promptly notify the prospective Bidder or Proposer whether the prospective Bidder or Proposer is qualified.
- (3) **Notice.** If the Department finds that a prospective Bidder or Proposer is qualified, the notice shall state the type, nature and dollar limit of Contracts that the prospective Bidder or Proposer is qualified to compete for and the period of time for which the prequalification is valid. If the Department finds that the prospective Bidder or Proposer is not qualified as to any Contracts the notice shall specify the reasons given for not pre-qualifying the prospective Bidder or Proposer and shall specify which of the standards of responsibility listed in Rule 47-0640(1)(c)(F) the prospective Bidder or Proposer failed to meet. Unless the reasons are specified, the prospective Bidder or Proposer shall be deemed to have been prequalified in accordance with the application. The notice shall inform the prospective Bidder or Proposer of the right to a hearing under Rule 47-0760 and the time within which an appeal shall be filed.
- (4) **Revocation or Revision for Substantial Change.** If a Department has reasonable cause to believe that there has been a substantial change in the conditions of a prequalified prospective Bidder or Proposer and that the prospective Bidder or Proposer is no longer qualified or is less qualified, the Department may revoke or may revise and reissue the prequalification after reasonable notice to the prequalified prospective Bidder or Proposer. The notice shall specify the reasons given for revocation or revision of the prequalification of the prospective Bidder or Proposer and inform the prospective Bidder or Proposer of the right to appeal and the right to a hearing under Rule 47-0760. To be entitled to a hearing under Rule 47-0760, a prospective Bidder or Proposer shall, within three (3) Days after receipt of the notice, notify the PURCHASING Manager that the prospective Bidder or Proposer requests a hearing under Rule 47-0760. A revocation or revision does not apply to any Contract for which an advertisement for Bids or Proposals was issued before the date the notice of revocation or revision was received by the prequalified prospective Bidder or Proposer however, the PURCHASING Manager may determine that a prequalified Offeror is not Responsible prior to Contract Award.
- (5) After consultation with a County Attorney, a Department 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 under this Rule 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 Department and a prospective Proposer to reach agreement on pre-negotiated Contract terms and conditions does not prohibit the prospective Proposer from responding to Procurements. A Department may agree to different pre-negotiated Contract terms and conditions with different prospective Proposers. When a Department 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.

#### **47-0575 Debarment of Prospective Offerors**

- (1) Authority.** The County may debar an Offeror after providing the Person with notice and a reasonable opportunity to be heard in accordance with these Rules.
- (2) Standards for Debarment.** The County may debar a Person for:
  - (a) The prospective Bidder or Proposer has been convicted of a criminal offense as an incident in obtaining or attempting to obtain a private or Public Contract or subcontract or in the performance of such Contract or subcontract.
  - (b) The prospective Bidder or Proposer has been convicted 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 prospective Bidder's or Proposer's responsibility as a Contractor.
  - (c) The prospective Bidder or Proposer has been convicted under state or federal antitrust statutes.
  - (d) The prospective Bidder or Proposer has committed a violation of a Contract provision and debarment for such a violation was listed in the Contract terms and conditions as a potential penalty. A violation may include but is not limited to a failure to perform the terms of a Contract or an unsatisfactory performance in accordance with the terms of the Contract. However, a failure to perform or an unsatisfactory performance caused by acts beyond the control of the Contractor may not be considered to be a basis for debarment.
  - (e) The prospective Bidder or Proposer does not carry workers' compensation or unemployment insurance as required by statute.
  - (f) Violation of ORS 279A.110(1), prohibiting discrimination in subcontracting.
- (3) Notice of Intent to Debar.** PURCHASING shall notify the Person in Writing of a proposed Debarment personally or by registered or certified mail, return receipt requested. This notice shall:
  - (a) State that the County intends to debar the Person;
  - (b) Set forth the reasons for the Debarment;
  - (c) Include a statement that the Person shall have a right to appeal the notice of intent to debar and have a hearing in accordance with Rule 47-0760 and a statement of the time within which an appeal shall be filed.
  - (d) Include a reference to the particular sections of the statutes and rules involved;
  - (e) State that the Person may be represented by legal counsel at the hearing.
- (4) Appeal and Hearing.** Appeal of the notice and hearing on the appeal shall be in accordance with the provisions of Rule 47-0760.

- (5) **Imputed Knowledge.** The County 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.
- (6) **Limited Participation.** The PURCHASING Manager 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 the County. The determination shall specify the factors on which it is based and define the extent of the limits imposed.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279B.130

## DIVISION 47 OFFER EVALUATION AND AWARD

### 47-0600 Offer Evaluation and Award

- (1) **Evaluation.** The County shall evaluate Offers only as set forth in the Solicitation Document, pursuant to Rule 47-0255(5) and Rule 47-0260(7)(a), and in accordance with applicable law. The County shall not evaluate Offers using any other requirement or criterion.
  - (a) **Preferences.**
    - (A) **Nonresident Bidders.** In determining the lowest Responsive Bid, the County shall apply the reciprocal preference set forth in Rule 46-0310 for Nonresident Bidders.
    - (B) **Public Printing.** The County 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 County determines that one (1) or more Bids are identical under Rule 46-0300, the County shall Award a Contract in accordance with the procedures set forth in Rule 46-0300.
  - (b) **Evaluation of Proposals.**
    - (A) **Award When Proposals are Identical.** If the County determines that one (1) or more Proposals are identical under Rule 46-0300, the County shall Award a Contract in accordance with the procedures set forth in Rule 46-0300.
    - (B) **Public Printing.** The County 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 County shall give preference for recycled materials as set forth in Rule 46-0320.
- (2) **Clarification of Bids or Proposals.** After Opening, the County 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 Department's sole discretion, needing clarification shall be accorded such an opportunity. PURCHASING shall document clarification of any Bidder's Bid in the Procurement File.
- (3) **Negotiations.**
  - (a) **Bids.** The County shall not negotiate with any Bidder. After Award of the Contract, the Department and Contractor may only modify the Contract in accordance with Rule 47-0800.
  - (b) **Requests for Proposals.** The County may conduct Discussions or negotiate with Proposers only in accordance with Rules 47-0260 and 47-0262. After Award of the Contract, the Department and Contractor may only modify the Contract in accordance with Rule 47-0800.
- (4) **Award.**
  - (a) **General.** If Awarded, PURCHASING shall Award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the most Advantageous, Responsive Proposal. PURCHASING 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 Department’s expected purchases, or grand total of all items.

(c) **Multiple Awards - Bids.**

- (A) Notwithstanding subsection 4(a) of this Rule, PURCHASING 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 Department’s needs, including but not limited to adequate availability, delivery, service, or product compatibility and skills. 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. 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 PURCHASING from Awarding a single Contract for such Invitation to Bid.
- (B) If an Invitation to Bid permits the Award of multiple Contracts, the County 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, PURCHASING 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 Department’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 PURCHASING from Awarding a single Contract for such Request for Proposals.
- (B) If a Request for Proposals permits the Award of multiple Contracts, the County 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 Proposers.

(e) **Partial Awards.** If after evaluation of Offers, the Department determines that an acceptable Offer has been received for only parts of the requirements of the Solicitation Document:

- (A) PURCHASING may Award a Contract for the parts of the Solicitation Document for which acceptable Offers have been received; or
- (B) PURCHASING may reject all Offers and may issue a new Solicitation Document on the same or revised terms, conditions and Specifications.

(f) **All or none Offers.** PURCHASING 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.

Stat. Auth.: ORS 279A.065 & ORS 279B.060  
Stats. Implemented: ORS 279B.055 & ORS 279B.060

#### **47-0610 Notice of Intent to Award**

- (1) **Notice of Intent to Award.** PURCHASING shall provide Written notice of intent to Award to all Bidders and Proposers at least seven (7) Days before the Award of a Contract, unless the PURCHASING Manager determines that circumstances justify prompt execution of the Contract, in which case the PURCHASING Manager may provide a shorter notice period. The PURCHASING Manager shall document the specific reasons for the shorter notice period in the Procurement File. This section does not apply to a Contract Awarded as a small Procurement, an Intermediate Procurement, a Sole-Source Procurement, an Emergency Procurement or a Special Procurement authorized by rule under Rule 47-0288.
- (2) **Finality.** The Award shall not be final until the later of the following:
  - (a) The expiration of the protest period provided pursuant to Rule 47-0740(3); or
  - (b) PURCHASING provides written responses to all timely-filed protests denying the protests and affirming the Award.

Stat. Auth.: ORS 279A.065 & ORS 279B.135  
Stats. Implemented: ORS 279B.135

#### **47-0620 Documentation of Award**

- (1) **Basis of Award.** After Award, the PURCHASING Manager shall make a record showing the basis for determining the successful Offeror part of the Procurement File.
- (2) **Contents of Award Record.** The 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 County engaged in any of the methods of Contractor selection described in Rule 47-0260 and Rule 47-0261, Written documentation of the content of any Discussions, Negotiations, best and final Offers, or any other procedures the County used to select a Proposer to which the PURCHASING Manager Awarded a Contract.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: 279A.065

#### **47-0630 Availability of Award Decisions**

- (1) **Contract Documents.** To the extent required by the Solicitation Document, the Department 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 established by the PURCHASING Manager, in person or by submitting to the PURCHASING Manager 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 County may make available tabulations of Bids and Proposals through the County's website.
- (3) **Availability of Procurement Files.** After notice of intent to Award, the PURCHASING Manager shall make Procurement Files available in accordance with applicable law.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.055 & ORS 279B.060

#### **47-0640 Rejection of an Offer**

(1) **Rejection of an Offer.**

- (a) The PURCHASING Manager may reject any Offer when the PURCHASING Manager determines that rejection is in the best interest of the County. The reasons for the rejection shall be made part of the Procurement File. The County shall not be liable to any Bidder or Proposer for any loss or expense caused by or resulting from the rejection of a Bid or Proposal.
- (b) The PURCHASING Manager shall reject an Offer upon finding that the Offer:
- (A) Is contingent upon the acceptance of terms and conditions (including Specifications) that differ materially 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, unless the Offeror agrees after Opening to withdraw any conditions in the Bid prohibiting disclosure;
  - (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 PURCHASING Manager shall reject an Offer upon finding that the Offeror:
- (A) Has not been prequalified under Rule 47-0550 and the required mandatory prequalification if required by the Solicitation Document;
  - (B) Has been Debarred under Rule 47-0575;
  - (C) Has not met the requirements of Rule 46-0210, 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 46-0210(3); or

- (F) Is non-Responsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the PURCHASING Manager shall determine 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. The PURCHASING Manager 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 PURCHASING Manager 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 PURCHASING Manager may review the Offeror's performance on both private and Public Contracts in determining the Offeror's record of Contract performance. The PURCHASING Manager shall make its basis for determining an Offeror non-Responsible under this subparagraph part of the Procurement File;
  - (iii) Has a satisfactory record of integrity. An Offeror may lack integrity if the PURCHASING Manager determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to a Contracting Agency. The PURCHASING Manager 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 Rule 47-0575 may be used to determine an Offeror's integrity. An Offeror may be found to be nonresponsible 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 PURCHASING Manager shall make the basis for determining that an Offeror is non-Responsible under this subparagraph part of the Procurement File;
  - (iv) Is legally qualified to Contract with the County; and
  - (v) Has supplied all necessary information in connection with the inquiry concerning Responsibility. If the Offeror fails to promptly supply information requested by the PURCHASING Manager concerning Responsibility, the PURCHASING Manager shall base the determination of Responsibility upon any available information, or may find the Offeror non-Responsible.

- (2) **Form of Business Entity.** For purposes of this Rule, the PURCHASING Manager 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 Rule 47-0575.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100 & 279B.110

#### **47-0650 Rejection of All Offers**

- (1) **Rejection.** The PURCHASING Manager may reject all Offers when the PURCHASING Manager determines that rejection is in the best interest of the County. The reasons for the rejection shall be made part of the Procurement File. The County shall not be liable to any Bidder or Proposer for any loss or expense caused by or resulting from the rejection of all Bids, or Proposals.
- (2) **Criteria.** The PURCHASING Manager may reject all Offers based upon the following criteria:
- (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 PURCHASING Manager cancels the Procurement or Solicitation in accordance with Rule 47-0660; or
  - (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

#### **47-0660 Cancellation, Rejection, Delay or Suspension of a Procurement or Solicitation**

- (1) **Cancellation, Rejection, Delay or Suspension of a Procurement or Solicitation.** Any Solicitation or Procurement described in a Solicitation may be canceled, or any or all Bids or Proposals may be rejected in whole or in part, when the cancellation or rejection is in the best interest of the County. The reasons for the cancellation or rejection shall be made part of the Procurement File. The County shall not be liable to any Bidder or Proposer for any loss or expense caused by or resulting from the cancellation or rejection of a solicitation, Bid, Proposal or Award. Any Solicitation or Procurement described in a Solicitation may be delayed or suspended when the delay or suspension is in the best interest of the County. The County shall make the reasons for the delay or suspension part of the Procurement File. The County shall not be liable to any Bidder or Proposer for any loss or expense caused by or resulting from the delay or suspension of a solicitation, Bid, Proposal or Award.

- (2) **Notice of Cancellation Before Opening.** If the PURCHASING Manager cancels a Procurement or Solicitation prior to Opening, the PURCHASING Manager shall provide Written notice of cancellation 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 re-solicitation.
- (3) **Notice of Cancellation After Opening.** If the PURCHASING Manager cancels a Procurement or Solicitation after Opening, the PURCHASING Manager shall provide Written notice of cancellation to all Offerors who submitted Offers.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

#### **47-0670 Disposition of Offers if Procurement or Solicitation Canceled**

- (1) **Prior to Opening.** If the PURCHASING Manager cancels a Procurement or Solicitation prior to Opening, the PURCHASING Manager 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 PURCHASING Manager shall open the Offer to determine the source and then return it to the Offeror. For Electronic Offers, if any, the PURCHASING Manager shall delete the Offers from the Electronic Procurement System or information technology system.
- (2) **After Opening.** If the PURCHASING Manager cancels a Procurement or Solicitation after Opening, the PURCHASING Manager:
- (a) May return Proposals in accordance with Rule 47-0260(6)(b);
  - (b) Shall keep Bids in the Procurement File.
- (3) **Rejection of All Offers.** If the PURCHASING Manager rejects all Offers, the PURCHASING Manager shall keep all Proposals and Bids in the Procurement File.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

## DIVISION 47 LEGAL REMEDIES

### 47-0700 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 shall file a Written protest with the PURCHASING Manager and exhaust all administrative remedies.
- (2) **Delivery.** Protest of Approval of a Special Procurement. Notwithstanding the requirements for filing a writ of review under ORS chapter 34 pursuant to ORS 279B.400(4)(a), an Affected Person shall deliver a Written protest to the PURCHASING Manager within seven (7) Days after the first date of public notice of the approval of a Special Procurement by the PURCHASING Manager or the Board, 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 shall 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) **Response to Protest.** Protest of Approval of a Special Procurement: The PURCHASING Manager or the Board 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 PURCHASING Manager or the Board shall issue a Written disposition of the protest in a timely manner. If the PURCHASING Manager or the Board upholds the protest, in whole or in part, they may in their sole discretion implement the sustained protest in the approval of the Special Procurement, or revoke the approval of the Special Procurement. A Department may, in lieu of having the protest presented to the PURCHASING Manager or the Board, notify the PURCHASING Manager that it will not pursue the procurement as a Special Procurement. Written notice of the Department's decision shall be given to the Affected Person.
- (5) **Judicial Review.** An Affected Person may seek judicial review of the PURCHASING Manager's or the Board's decision under subsection (4) above denying a protest of the approval of a Special Procurement. Judicial review shall be in accordance with ORS 279B.400.

Stat. Auth.: ORS 279A.065 & ORS 279B.400

Stats. Implemented: ORS 279B.400

### 47-0710 Protests and Judicial Review of Sole-Source Procurements

- (1) **Purpose.** For Sole-Source Procurements requiring public notice, an Affected Person may protest the determination of the PURCHASING Manager or the Board under Rule 47-0275 that the Goods or Services or class of Goods or Services are available from only one (1) source. Before seeking judicial review, an Affected Person shall file a Written protest with the PURCHASING Manager and exhaust all administrative remedies.
- (2) **Delivery.** Unless otherwise specified in the public notice of the Sole-Source Procurement, an Affected Person shall deliver a Written protest to the PURCHASING Manager 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 shall 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) **Response to Protest.** No protest shall be considered under this section if it is 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 PURCHASING Manager or the Board shall issue a Written disposition of the protest in a timely manner. If the protest is upheld in whole or in part, the County shall not enter into a sole-source Contract.
- (5) **Judicial Review.** Judicial review of the decision in subsection (4) above shall be in accordance with ORS 279B.420.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.075

#### 47-0720 Protests and Judicial Review of Multi-Tiered and Multistep Solicitations

- (1) **Purpose.** An Affected Person 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, before seeking judicial review, an Affected Person shall file a Written protest with the PURCHASING Manager and exhaust all administrative remedies.
- (2) **Basis for Protest.** An Affected Person 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 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 shall 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 County 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 Person shall deliver a Written protest to the PURCHASING Manager 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 Person's protest shall be in Writing and shall specify the grounds upon which the protest is based.
- (5) **Response to Protest.** The PURCHASING Manager shall not consider an Affected Person'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 PURCHASING Manager shall issue a Written disposition of the protest in a timely manner. If the PURCHASING Manager upholds the protest, in whole or in part, the PURCHASING Manager may in his or her sole discretion either issue an Addendum under Rule 47-0430 reflecting the disposition of the protest or cancel the Procurement or Solicitation under Rule 47-0660.

- (6) **Judicial Review.** Judicial review of the decision relating to a multi-tiered or multistep Solicitation protest shall be in accordance with ORS 279B.420.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

#### 47-0730 Protests and Judicial Review of Solicitations

(1) **Purpose.**

(a) A prospective Offeror may protest the Procurement process or the Solicitation Document for a Contract solicited under Rules 47-0255, 47-0260 and 47-0285. Before seeking judicial review, a prospective Offeror shall file a Written protest with the PURCHASING Manager and exhaust all administrative remedies.

(b) Contract-Specific Special Procurements. Notwithstanding subsection 1(a) of this Rule, a Person may not protest, challenge, or review a Contract-Specific Special Procurement except upon the occurrence of the conditions set forth in ORS 279B.405(2)(b).

(2) **Delivery.** Unless otherwise specified in the Solicitation Document, a prospective Offeror shall deliver a Written protest to the PURCHASING Manager 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 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) **Response to Protest.** The PURCHASING Manager 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 PURCHASING Manager shall consider the protest if it is timely filed and meets the conditions set forth in ORS 279B.405(4). The PURCHASING Manager shall issue a Written disposition of the protest in accordance with the timeline set forth in ORS 279B.405(6). If the PURCHASING Manager upholds the protest, in whole or in part, the PURCHASING Manager may in his or her sole discretion either issue an Addendum reflecting its disposition under Rule 47-0430 or cancel the Procurement or Solicitation under Rule 47-0660.

(5) **Extension of Closing.** If the PURCHASING Manager receives a protest from a prospective Offeror in accordance with this Rule, the PURCHASING Manager may extend Closing if the PURCHASING Manager 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 clarification of any provision of the Solicitation Document. Any such request shall be in Writing and any response shall also be in Writing and shall be included in an Addendum to the Solicitation Document.

(7) **Judicial Review.** Judicial review of the decision relating to a Solicitation protest shall be in accordance with ORS 279B.405.

Stat. Auth.: ORS 279A.065 & ORS 279B.405

Stats. Implemented: ORS 279B.405

#### 47-0740 Protests and Judicial Review of Contract Award

(1) **Purpose.** An Offeror may protest the Award of a Contract, or the intent to Award a Contract, whichever occurs first, if :

- (a) The Bidder or Proposer is adversely affected because the Bidder or Proposer would be eligible to be Awarded the Public Contract in the event that the protest were successful; and
- (b) The reason for the protest is that:
  - (A) All lower Bids or higher ranked Proposals are nonresponsive;
  - (B) The County has failed to conduct the evaluation of Proposals in accordance with the criteria or processes described in the Solicitation materials;
  - (C) The County has abused its discretion in rejecting the protestor's Bid or Proposal as nonresponsive; or
  - (D) The County's evaluation of Bids or Proposals or the County's subsequent determination of Award is otherwise in violation of these Rules.
- (2) **Exhaustion of Remedies.** An Offeror shall file a Written protest with the PURCHASING Manager and exhaust all administrative remedies before seeking judicial review of the Contract Award decision.
- (3) **Delivery.** Unless otherwise specified in the Solicitation Document, an Offeror shall deliver a written protest to the PURCHASING Manager within seven (7) Days after the Award of the Contract or issuance of the notice of intent to Award the Contract, whichever occurs first.
- (4) **Content of Protest.** An Offeror's Written protest shall specify the grounds for the protest to be considered by the PURCHASING Manager.
- (5) **Response to Protest.** The PURCHASING Manager 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 may be provided in the Solicitation Document. The PURCHASING Manager shall issue a Written disposition of the protest in a timely manner as set forth in ORS 279B.410(4). If the PURCHASING Manager upholds the protest, in whole or in part, the PURCHASING Manager may in his or her sole discretion either Award the Contract to the successful protestor or cancel the Procurement or solicitation.
- (6) **Judicial Review.** Judicial review of the decision relating to a Contract Award protest shall be in accordance with ORS 279B.415.

Stat. Auth.: ORS 279A.065 & ORS 279B.410  
 Stats. Implemented: ORS 279B.410 & ORS 279B.415

#### **47-0745 Protests and Judicial Review of Qualified Products List Decisions**

- (1) **Purpose.** A prospective Offeror may protest the decision to exclude the prospective Offeror's Goods from the County's qualified products list under Rule 47-0525. A prospective Offeror shall file a written protest and exhaust all administrative remedies before seeking judicial review of the Department's qualified products list decision.
- (2) **Delivery.** Unless otherwise stated in the Department's notice to prospective Offerors of the opportunity to submit Goods for inclusion on the qualified products list, a prospective Offeror shall deliver a written protest to the PURCHASING Manager within seven (7) Days after issuance of the decision to exclude the prospective Offeror's Goods from the qualified products list.
- (3) **Content of Protest.** The prospective Offeror's protest shall be in Writing and shall specify the grounds upon which the protest is based.

- (4) **Response to Protest.** The PURCHASING Manager 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 notice to prospective Offerors of the opportunity to submit Goods for inclusion on the qualified products list. The PURCHASING Manager shall issue a written disposition of the protest in a timely manner. If the PURCHASING Manager upholds the protest, it shall include the successful protestor's Goods on the qualified products list.
- (5) **Judicial Review.** Judicial review of the decision relating to a qualified products list protest shall be in accordance with ORS 279B.425.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.115

#### **47-0750 Judicial Review of Other Violations**

Any violation of these Rules or ORS chapter 279A or 279B by the County for which no judicial remedy is otherwise provided in the Code is subject to judicial review as set forth in ORS 279B.420.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.420

#### **47-0760 Review of Prequalification and Debarment Decisions**

Review of the County's prequalification and Debarment decisions shall be as set forth in ORS 279B.425.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.425

## DIVISION 47 CONTRACT AMENDMENTS

### 47-0800 Amendments to Contracts and Price Agreements

- (1) An amendment for additional Goods or services which is reasonably related to the scope of Work under the original Contract, including change orders, extra Work, field orders, or other change in the original Specifications that increases the original Contract Price, may be made with the Contractor without Competitive Solicitation subject to the following conditions:
  - (a) The original Contract was issued by Competitive Solicitation or alternative Procurement process including Special Procurements or Sole Source Procurements that were publicly noticed and unit prices or additive alternates were provided that established the cost basis for the additional Goods or services and a binding obligation exists on the parties covering the terms and conditions of the additional Work; or
  - (b) The original Contract was issued pursuant to a declaration of Emergency, in accordance with Rule 47-0280; or
  - (c) The additional Goods or services are required by reason of existing or new laws, rules, regulations or ordinances of federal, state or local agencies, that affect performance of the original Contract; or
  - (d) When subsections (a), (b) or (c) above do not apply a Department shall have authority to authorize increases resulting from amendments to a Contract provided that the total of all such increases shall not exceed 20 percent of the original Contract Price. For Contracts of \$150,000 or less increases in excess of this 20 percent (20%) limit shall be submitted to the PURCHASING Manager for approval prior to authorization for the additional Goods or services. For Contracts in excess of \$150,000, increases in excess of the 20 percent limit shall be submitted to the PURCHASING Manager to obtain approval by the Board prior to authorization for the additional Goods or services. Escalation clauses showing cost of living increases over the life of the Contract are excluded from the 20 percent limitation if the escalation was part of the original solicitation and Contract.
  - (e) Every Contract for Goods, Services and Public Works that are not Public Improvements, including emergency Contracts, shall comply with the requirements of this Rule.
- (2) **Renegotiated Contract.** A Department may renegotiate the terms and conditions, including the Contract Price, of a Contract without additional competition and amend a Contract if it is Advantageous to the Department subject to the following conditions:
  - (a) The amended Contract is within the Scope of the Solicitation Document, or if no Solicitation Document, the Contract, or in the instance of a Special Procurement the approval of Special Procurement;
  - (b) A Department shall determine that, with all things considered, the renegotiated Contract is at least as favorable to the Department as the original Contract; and
  - (c) The renegotiated Contract will not have a total term greater than allowed in the original Solicitation Document, Contract or approval of a Special Procurement 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 unless the original procurement allowed for a longer Contract period. Also, if multiple Contracts with a single Contractor are restated as a single Contract, the term of the single Contract may not have a total term greater than the longest term of any of the prior Contracts.

- (d) If a Contractor offers a lower price in exchange for a change in term or condition that was expressly rejected in the original solicitation, the amended Contract may be structured with this changed term as an optional, but not as a mandatory Contract term.
  - (e) If the Contract is the result of a Cooperative Procurement, the amended Contract may not materially change the terms, conditions, and prices of the original Contract.
- (3) **Small or Intermediate Contract.** The County may amend a Contract Awarded as small or Intermediate Procurement pursuant to subsections (1) or (2) of this Rule, provided also the total Contract Price does not exceed the limits set forth in Rule 47-0265(4) for small Procurements and Rule 47-0270(6) for Intermediate Procurements.
- (4) **Emergency Contract.** A Department may amend a Contract Awarded as an Emergency Procurement if the Emergency justification for entering into the Contract still exists, and the amendment is necessary to address the continuing Emergency.
- (5) **Price Agreements.** A Department may amend or terminate a Price Agreement as follows:
- (a) As permitted by the Price Agreement;
  - (b) As permitted by this Rule;
  - (c) The County fails to receive funding, appropriations, limitations, allotments or other expenditure authority, including the continuation of program operating authority sufficient, as determined in the discretion of the County, to sustain purchases at the levels contemplated at the time of contracting;
  - (d) Any change in law or program termination that makes purchases under the price agreement no longer authorized or appropriate for the County's use; or
  - (e) As otherwise permitted by applicable law.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279A.065

## **DIVISION 48 CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING, LAND SURVEYING AND RELATED SERVICES CONTRACTS**

### **48-0100 Application**

The Rules in this Division 48 implement ORS Chapter 279C and 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 procedures through which Departments select Consultants to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying or Related Services.

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

Stats. Implemented: ORS 279A.065

### **48-0110 Definitions**

The definitions for this Division 48 are found in Division 46, except the following definitions apply only to this Division 48:

- (1) **Architect.** A person who is registered and holds a valid certificate in the practice of architecture in the State of Oregon, as provided under ORS 671.010 to 671.220, and includes without limitation the terms “architect,” “licensed architect” and “registered architect.
- (2) **Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services.** Professional services that are required to be performed by an architect, engineer, photogrammetrist, transportation planner, or land surveyor.
- (3) **Agreement-To-Agree.** A Written document of understanding negotiated between a Department and the Consultant for the provision of services on a single Project, or on more than one (1) project, which contains Contract clauses that will apply to future Contracts during its term to be established through Work orders and which will incorporate the required and applicable clauses of the Agreement-To-Agree. Agreement-To-Agree documents are also referred to as Price Agreements.
- (4) **Consultant.** 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.
- (5) **Design-Build.** An alternative contracting method for the construction of Public Improvements where construction and design services are combined in a single Contract.
- (6) **Direct Appointment or Direct Appointment Procedure.** The Consultant selection method provided for under Rule 48-0200.
- (7) **Engineer.** A person who is registered and holds a valid certificate in the practice of engineering in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002 (2)
- (8) **Estimated Fee.** A Department’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.
- (9) **Formal Selection Procedure.** The Consultant selection method provided for under Rule 48-0220.

- (10) **Informal Selection Procedure.** The Consultant selection method provided for under Rule 48-0210.
- (11) **Land surveyor.** A person who is registered and holds a valid certificate in the practice of land surveying in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002 (4).
- (12) **Mixed Contract.** A Contract that requires the Consultant to perform certain Architectural, Engineering, Land Surveying or Related Services and also to provide the Department with other kinds of Supplies and Services; the classification of a Mixed Contract as a Contract for Architectural, Engineering, Land Surveying or Related Services is determined by the Mixed Contract's predominate purpose. For a Mixed Contract to be considered a Contract for Architectural, Engineering, Land Surveying or Related Services, the majority of the payments made or received under the Mixed Contract shall be for Architectural, Engineering, Land Surveying or Related Services.
- (13) **Price Agreement.** Price Agreement, for the purposes of this section, is limited to mean an agreement related to the procurement of Architectural, Engineering, Photogrammetric Mapping, Transportation Planned 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 Department does not guarantee a minimum or maximum additional purchase.
- (14) **Project.** All components of a Department's planned undertaking that gives rise to the need for a Consultant's Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services under a Contract.
- (15) **Proposer.** A Consultant who submits a Proposal to a Department in response to a Request for Proposals.
- (16) **Related services.** Personal services, other than architectural, engineering and land surveying services, that are related to the planning, design, engineering or oversight of public improvement projects or components thereof, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, environmental impact studies, hazardous substances or hazardous waste or toxic substances testing services, wetland delineation studies, wetland mitigation studies, Native American studies, historical research services, endangered species studies, rare plant studies, biological services, archaeological services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner's representative services or land-use planning services.
- (17) **Request for Qualifications or RFQ.** A Written document issued by a Department to which Consultants respond with a description of their experience with and qualifications for the Architectural, Engineering, Land Surveying or Related Services described in the RFQ and from which the Department creates a list of Consultants who are qualified to perform those services, but which is not intended to result in a Contract between a Consultant and a Department.

- (18) Transportation Planning Services.** Transportation Planning Services include only Project-specific transportation planning involved in the preparation of categorical exclusions, environmental assessments, environmental assessments, environmental impact statements and other documents required for compliance with the National Environmental Policy Act, 42 U.S.C. 4321 et.seq. Transportation Planning Services do not include transportation planning for corridor plans, transportation system plans not directly associated with an individual Project that will require compliance with the National Environmental Policy Act, 42 U.S.C. 4321 et.seq. Transportation Planning Services also do not include transportation planning for Projects not subject to the National Environmental Policy Act, 42 U.S.C. 4321 et. seq.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070; and Or. Laws 2011, chapter 458  
Stats. Implemented: ORS 279A.065 and Or. Laws 2011, chapter 458

#### **48-0120 List of Interested Consultants; Performance Record**

- (1) Consultants who are interested in providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services may annually submit a statement describing their qualifications and related performance information to Departments' office addresses. Departments shall use this information to create a list of prospective Consultants and shall update the list at least once every five years.
- (2) Departments may compile and maintain a record of each Consultant's performance under Contracts with the particular Department, including information obtained from Consultants during an exit interview. Upon request and in accordance with the Oregon Public Records Law (ORS 192.410 to ORS 192.505) Departments may make available copies of the records.
- (3) Departments shall keep a record of all Contracts and shall make these records available to the public consistent with the requirements of the Oregon Public Records Law (ORS 192.410 to 192.505). Departments shall include the following information in the record:
  - (a) Consultant's principal office address and all office addresses in the State of Oregon;
  - (b) Consultant's direct expenses on each Contract whether or not those direct expenses are reimbursed. "Direct expenses" include all amounts that are directly attributable to Consultant's 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
  - (c) The total number of Contracts Awarded to each Consultant over the immediately preceding 10-year period from the date of the record.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070; and Or. Laws 2011, chapter 458  
Stats. Implemented: ORS 279A.065; ORS 279C.110; and Or. Laws 2011, chapter 458

#### **48-0130 Disclosure of Proposals; Conflicts of Interest**

- (1) Notwithstanding the public records law, ORS 192.410 to 192.505, if a Department solicits a Contract for architectural, engineering or land surveying services or related services using any of the methods provided for in Rules 48-0200, 48-0210, 48-0220, and 48-0270 Proposals may be opened so as to avoid disclosure of contents to competing proposers during, when applicable, the process of negotiation. Proposals are not required to be open for public inspection until after the notice of intent to Award a Contract is issued or, in the case of selection under Rule 48-0200, until after the Department has executed a Contract with the selected consultant.

- (2) Notwithstanding any requirement to make proposals open to public inspection after the issuance of notice of intent to Award a Contract (or, in the case of selection under Rule 48-0200, until after the Department has executed a Contract with the selected consultant) PURCHASING may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a proposal. If a request for proposals is canceled after proposals are received, PURCHASING may return a proposal to the proposer that made the proposal. PURCHASING shall keep a list of returned proposals in the file for the solicitation.
- (3) Except as provided in subsections (4) and (5) below, a Department that procures Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Public Contract that is subject to these Rules may not:
  - (a) Procure the Personal Services 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 through the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the personal services.
- (4) Subsection (3) of this section does not apply to a Procurement of both design services and construction services through a single “Design-Build” Procurement as defined in Rule 49-0610 including a Procurement of an Energy Savings Performance Contract, provided, however, the restrictions in subsection (3) do apply to a 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.
- (5) Subsection (3) of this section does not apply to a Procurement of both pre-construction services and construction services through a single “Construction Manager/General Contractor” Procurement, as defined in Rule 49-610. Provided, however, the restrictions of subsection (3) do apply to a Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a CM/GC Contract or performance under such a Contract resulting from a CM/GC Procurement.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A. 065, 279C.100-279C.125 and Oregon Laws 2009, chapter 880, section 11.

#### **48-0200 Direct Appointment Procedure**

(1) Departments may enter into a Contract directly with a Consultant without following the selection procedures set forth elsewhere in these Rules if:

- (a) The work is for general consulting assistance or for consulting within a specific Public Work project; and
- (b) The Estimated Fee to be paid under the Contract does not exceed \$100,000; or
- (c) An emergency, as declared by the Chair per 48-0280 exists; or
- (d) The Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services to be performed under the Contract:

- (A) Consist of, or are related to, Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying 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 or Related Services rendered under the earlier Contract; and
  - (B) The Department used either the Formal Selection Procedure under Rule 48-0220 or the Informal Selection Procedure applicable to selection of the Consultant at the time of original selection to select the Consultant for the earlier Contract.
- (2) The Departments may select Consultants for Contracts under this Rule from the following sources:
- (a) The County’s current list of Consultants;
  - (b) A list of Consultants from another public jurisdiction; or
  - (c) Consultants offering the required Architectural, Engineering, Land Surveying or Related Services that Departments reasonably can identify under the circumstances.
- (3) If the County estimates that the fee for the Work will not exceed \$10,000, then, except for Work described in subsection (1)(b) or (c) of this section, the Direct Appointment shall be made to an MBE, WBE or ESB Consultant certified by the State of Oregon for the type or Work required unless such Consultant is not available. A Consultant shall be considered “not available” if Consultants certified by the State for the type of Work required who are located within 75 miles from the place where the Contract is to be performed, have been advised of the opportunity, have been given a reasonable period of time under the circumstances to respond and have failed or declined to respond. In such event, a Direct Appointment then may be made to any other qualified Consultant.
- (4) Selection of a Contractor for Direct Appointment under this Rule shall be competitive to the extent practicable and may be based on criteria which include but are not limited to the Consultant’s availability, capabilities, staffing, experience, and compensation requirements and the location of the project.
- (5) The Department shall direct Negotiations with Consultants selected under this Rule toward obtaining written agreement on:
- (a) Consultant’s performance obligations and performance schedule;
  - (b) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services required under the Contract that is fair and reasonable to the Department as determined solely by the Department, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services; and
  - (c) Any other provisions the Department believes to be in the Department’s best interest to negotiate.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070 and Or. Laws 2011, chapter 458  
 Stats. Implemented: ORS 279C110 and ORS 279C.115 and Or. Laws 2011, chapter 458

#### 48-0210 Informal Selection Procedure

- (1) Departments may use the Informal Selection Procedure described in this Rule to obtain a Contract if the Estimated Fee is expected to not exceed \$150,000.
- (2) For Contracts between \$10,000 and \$75,000 for a specific project, the following consultant solicitation procedure applies:
  - (a) Proposals shall be solicited from a minimum of three (3) Consultants.
  - (b) Of the three Proposals sought, one shall be obtained from an MBE, one from a WBE, and one from an ESB.
  - (c) If a Proposal is not available in a particular category from an MBE, WBE, or ESB Consultant certified by the State of Oregon for the type of work required, an additional Proposal shall be obtained from one of the other categories. If three Proposals are not available from all of the categories combined, the remaining Proposal(s) may be obtained from any other Consultant.
  - (d) A Proposal shall be “not available” in a specific category if all Consultants in that category (MBE, WBE, or ESB) certified by the State in that category and located within 75 miles from the place where the Contract is to be performed, have been advised of the contracting opportunity, have been given a reasonable period of time under the circumstances to submit a Proposal, and have failed or declined to provide a Proposal within the time specified.
- (3) For Contracts for a specific project in excess of \$75,000 but not exceeding \$150,000 a minimum of three (3) informal proposals shall be solicited from consultants who can reasonably be expected to provide the required services. One (1) of the three consultants contacted shall be a MBE, WBE or ESB consultant if available (see (2) (d) above).
- (4) Departments using the Informal Selection Procedure shall:
  - (a) Create a Request for Proposals that includes at a minimum the following:
    - (A) A description of the Project for which Consultant’s Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services are needed and a description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services that will be required under the resulting Contract;
    - (B) 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) Date and time Proposals are due and other directions for submitting Proposals;
    - (E) A statement that Proposers responding to the RFP do so solely at their expense, and the Department is not responsible for any Proposer expenses associated with the RFP;
    - (F) A statement directing Proposers to the protest procedures set forth in these rules.
    - (G) Criteria upon which most qualified Consultant will be selected. Selection Criteria may include:
      - (i) Amount and type of resources and number of experienced staff Consultant has committed to perform the Architectural, Engineering, Photogrammetric

Mapping, Transportation Planning or Land Surveying or Related Services described in the Request for Proposals 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 or Related Services described in the Request for Proposals;
- (iii) Consultant's capability, experience and past performance history and record in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying 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 or Related Services described in the Request for Proposals and design philosophy, if applicable;
- (v) Consultant's geographic proximity to and familiarity with the physical location of the Project;
- (vi) Volume of Work, if any, previously Awarded to 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; and
- (viii) If the Department 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

(b) Review and rank all Proposals received according to the criteria set forth in the Request for Proposals.

(5) After it reviews and ranks each Proposer, the Department will begin negotiating a Contract with the highest ranked Proposer. The Department shall direct Negotiations toward obtaining Written agreement on:

- (a) Consultant's performance obligations and performance schedule;
- (b) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services required under the Contract that is fair and reasonable to the Department as determined solely by the Department, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services; and

- (c) Any other provisions the Department believes to be in the Department's best interest to negotiate.
- (6) The Department shall, either orally or in Writing, formally terminate Negotiations with the highest ranked Proposer if the Department and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The Department may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, until Negotiations result in a Contract. If Negotiations with any of the top three (3) Proposers do not result in a Contract within a reasonable amount of time, the Department 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 Rule 48-0220 (Formal Selection Procedure).
- (7) The Department shall terminate the Informal Selection Procedure and proceed with the Formal Selection Procedure under Rule 48-0220 if the scope of the anticipated Contract is revised during Negotiations so that the Estimated Fee will exceed \$150,000.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070 and Or. Laws 2011, chapter 458  
 Stats. Implemented: ORS 279C.110 and Or. Laws 2011, chapter 458

#### **48-0220 Formal Selection Procedure**

- (1) **General.** Departments shall use the Formal Selection Procedure described in this Rule to select Consultants if the Consultants cannot be selected under either Rule 48-0200 (Direct Appointment Procedure) or under Rule 48-0210 (Informal Selection Procedure). The Formal Selection Procedure may otherwise be used at Departments' discretion. For architectural, engineering, photogrammetric mapping, transportation planning or land surveying services Contracts that are subject to the provisions of ORS 279C.110(2) because the County is receiving funds from the State of Oregon that will be used to pay for all or a portion of the design and construction of the project and those funds exceed 10 percent of the value of the project and the project exceeds \$900,000 the Department shall follow the selection process set forth in ORS 279C.110.
- (2) **Advertisement.** Departments using the Formal Selection Procedure shall obtain Contracts through public advertisement of a Request for Proposals or a Request for Qualifications followed by a Request for Proposals.
  - (a) Advertisement of each RFP and RFQ shall be in accordance with the requirements of Rule 47-0300.
    - (A) PURCHASING shall publish the advertisement within a reasonable time before the deadline for the Proposal submission or response to the RFP or RFQ but in any event no fewer than fourteen (14) Days before the Closing date set forth in the RFP or RFQ.
    - (B) PURCHASING 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 or Related Services the Department seeks;
      - (iii) How and where Consultants may obtain a copy of the RFP or RFQ; and
      - (iv) The deadline for submitting a Proposal or response to the RFP or RFQ.

- (3) Request for Qualifications Procedure. Departments may use the RFQ procedure to evaluate potential Consultants and establish a short list of qualified Consultants to whom the Department may issue an RFP for some or all of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services described in the RFQ.
- (a) The Department shall include the following, at a minimum, in each RFQ:
    - (A) A brief description of the Project for which the Department is seeking Consultants;
    - (B) A description of the Architectural, Engineering, Land Surveying or Related Services the Department seeks for the Project;
    - (C) The deadline for submitting a response to the RFQ;
    - (D) A description of required Consultant qualifications for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services the Department seeks;
    - (E) The RFQ evaluation criteria, including weights or points applicable to each criterion;
    - (F) A statement whether or not the Department 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 or Related Services described in the RFQ and if a pre-qualification meeting will be held, the date, time and location of the meeting and whether or not attendance is mandatory; and
    - (G) A Statement that Consultants responding to the RFQ do so solely at their expense, and the Department is not responsible for any Consultant expenses associated with the RFQ.
  - (b) The Department may include a request for any or all of the following in each RFQ:
    - (A) A statement describing Consultant's general qualifications and related performance information;
    - (B) A description of Consultant's specific qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services described in the RFQ including Consultant's available resources and recent, current and projected workloads;
    - (C) A list of similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services and references concerning past performance, and a copy of all records, if any, of Consultant's performance under Contracts with any other contracting agency, including but not limited to price and cost data for previous projects, quality of work, ability to meet schedules, cost control and contract administration;
    - (D) The number of Consultant's experienced staff available to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services described in the RFQ, including such personnel's specific qualifications and experience and an estimate of the proportion of their time that such personnel would spend on those services;

- (E) Consultant's approach to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services described in the RFQ and design philosophy, if applicable;
  - (F) Consultant's geographic proximity to and familiarity with the physical location of the Project;
  - (G) Consultant's ownership status and employment practices regarding Women, minorities and Emerging Small Businesses or historically underutilized businesses;
  - (H) If the Department is selecting a Consultant to provide Related Services, the Consultant's pricing policies, Proposals and other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead;
  - (I) Consultant's ability to assist a Department in complying with energy technology requirements of ORS 279C.527 and ORS 279C.528; and
  - (J) Any other information the Department deems reasonable and necessary to evaluate Consultants' qualifications.
- (c) RFQ Evaluation Committee. The Department shall establish an RFQ evaluation committee of at least three (3) individuals to review, score, and rank the responding Consultants according to the Solicitation criteria. The Department may appoint to the evaluation committee, Department employees, or employees of other public entities, with experience in Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, construction services or public contracting. The Department may include on the evaluation committee private practitioners of architecture, engineering, photogrammetry, transportation planning, land surveying or related professions. The Department shall designate one (1) member of the evaluation committee from the County as the evaluation committee chairperson.
- (d) The Department may use any reasonable screening or evaluation method to establish a short list of qualified Consultants, including but not limited to:
- (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 shortlist 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.
- (e) After the evaluation committee reviews, scores and ranks the responding Consultants, the Department shall establish a short list of at least three (3) qualified Consultants, provided however, that if four or fewer Consultants responded to the RFQ, or if fewer than three Consultants fail to meet the Department's minimum requirements, then:
- (A) The Department may establish a short list of fewer than three (3) qualified Consultants; or
  - (B) PURCHASING may cancel the RFQ and issue an RFP.

- (f) No Consultant will be eligible for placement on the Department's short list established under Section (3) of this Rule if the Consultant or any of Consultant's principals, partners or associates is a member of the Department's RFQ evaluation committee.
  - (g) Except when the RFQ is cancelled, PURCHASING shall provide a copy of the subsequent RFP to each Consultant on the short list.
- (4) Formal Selection of Consultants through Request for Proposals. Departments shall use the following procedure when issuing an RFP for a Contract described in Section (1) of this Rule.
- (a) RFP Required Contents. Departments using the Formal Selection Procedure shall include at least the following in each Request for Proposals, 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 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 or Related Services sought will be performed.
    - (B) The RFP evaluation process and criteria which will be used to select the most qualified Proposer, including the number of points applicable to each criterion. If the RFP does not indicate the applicable number of points, then each criterion is worth the same number of points. Evaluation criteria may include, but are not limited to, the following:
      - (i) Proposer's availability and capability to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services described in the RFP;
      - (ii) Experience of Proposer's key staff persons in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services on comparable Projects;
      - (iii) The amount and type of resources, and number of experienced staff persons Proposer has available to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services described in the RFP;
      - (iv) The recent, current and projected workloads of the staff and resources referenced in this Section;
      - (v) The proportion of time Proposer estimates that the staff referenced in this Section, would spend on the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services described in the RFP;
      - (vi) Proposer's demonstrated ability to successfully complete similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services on time and within budget, including whether or not there is a record of satisfactory performance under Rule 48-0120 (List of Interested Consultants; Performance Record);
      - (vii) References and recommendations from past clients;

- (viii) Proposer's performance history in meeting deadlines, submitting accurate estimates, producing high quality Work, and 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) Proposer's knowledge and understanding of the Project and Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services described in the RFP as shown in Proposer's approach to staffing and scheduling needs for the Architectural, Engineering, Land Surveying 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 or Related Services described in the RFP. If the Department 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 service required, expenses, hourly rates and overhead, and;
  - (xiii) Any other criteria relevant to the Project and Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying 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;
  - (xiv) 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; and
  - (xv) If interviews are possible, the weight or points applicable to the potential interview;
- (C) The RFP shall include at a minimum the following provisions:
- (i) The date and time Proposals are due, and the delivery location for Proposals;
  - (ii) Reservation of the right to seek clarifications of each Proposal;
  - (iii) Reservation of the right to negotiate a final Contract that is in the best interest of the County;
  - (iv) Reservation of the right to reject any or all Proposals and reservation of the right to cancel the RFP at anytime if doing either would be in the public interest;

- (v) A Statement that Proposers responding to the RFP do so solely at their expense, and the County is not responsible for any Proposer expenses associated with the RFP;
  - (vi) A statement directing Proposers to the protest procedures set forth in these Rules;
  - (vii) Any other special Contract requirements;
  - (viii) A statement whether or not a pre-Proposal meeting will be held for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying 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;
  - (ix) A request for any other information reasonably necessary to permit the County to evaluate, rank and select the most qualified Proposer to perform the Architectural, Engineering, Land Surveying or Related Services described in the RFP;
  - (x) A sample form of the Contract; and
  - (xi) Pricing policies, pricing proposals and other pricing information.
- (5) **RFP Evaluation Committee.** The Department shall establish a committee of at least three (3) 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 Department may include the same members who served on the RFQ evaluation committee. The Department may appoint to the evaluation committee, Department employees, or employees of other public agencies, with experience in architecture, engineering, photogrammetric mapping, transportation planning or land surveying, related services, construction services or public contracting.
- (6) No Proposer will be eligible for Award of the Contract under the RFP if the Proposer or any of Proposer's principals, partners or associates is a member of the RFP evaluation committee for the Contract.
- (7) 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 up to the number of points indicated in the RFP for the anticipated interview.
- (8) The evaluation committee shall provide to the PURCHASING Manager the results of the scoring and ranking for each Proposer.
- (9) **Initial Negotiations.** The Department will begin negotiating a Contract with the highest ranked Proposer. The Department shall direct Negotiations toward obtaining Written agreement on:
- (a) Consultant's performance obligations and performance schedule;
  - (b) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services required under the Contract that is fair and reasonable to the Department as determined solely by the Department, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services; and

- (c) Any other provisions the Department believes to be in the Department's best interest to negotiate.

**(10) Subsequent Negotiations.** The Department shall, either orally or in Writing, formally terminate Negotiations with the highest ranked Proposer if the Department and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The Department may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, and so on, in accordance with subsection (9) 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 Department may determine to end the particular formal Solicitation. In such event, PURCHASING shall issue an appropriate notice of the Department's decision. Nothing in this Rule precludes the County from proceeding with a new formal Solicitation for the same Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services described in the RFP that failed to result in a Contract.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070; and Or. Laws 2011, chapter 458  
Stats. Implemented: ORS 279C.110; and Or. Laws 2011, chapter 458

#### **48-0230 Ties Among Proposers**

- (1) If the County 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 County may select a candidate through any process that the County believes will result in the best value for the County, taking into account the scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services. Provided, however, the tie breaking process established by the Department 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 shall instill public confidence through ethical and fair dealing, honesty and good faith on the part of the Department and Proposers and shall protect the integrity of the public contracting process. Once a tie is broken, the County and the selected Proposer shall proceed with Negotiations under Rules 48-0210(3) or 48-0220(9), as applicable.
- (2) If the County is selecting a Consultant on the basis of price alone, or on the basis of price and qualifications, and determines after the ranking, following all allowable methods of proposal evaluation including oral evaluations or interviews that two or more Proposers are equal in terms of price or are equal in terms of price and qualifications, then the County shall follow the procedure set forth in Rule 46-0300.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070  
Stats. Implemented: ORS 279C.110

#### **48-0240 Protest Procedures**

- (1) **RFP Protest and Request for Change.** 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 ten (10) Days prior to the date Proposals are due unless a different deadline is indicated in the RFP. Each protest and request for change shall include the reasons for the protest or request, and any proposed changes to the RFP provisions, Specifications or Contract terms. The PURCHASING Manager will not consider any protest or request for change that is submitted after the submission deadline.

- (2) **Protest of Consultant Selection.** The PURCHASING Manager shall provide notice to all Proposers of intent to Award the Contract 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 PURCHASING Manager no later than seven (7) Days after the date of the selection notice unless a different deadline is indicated in the RFP. A Proposer submitting a protest shall 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 or Related Services described in the RFP. The PURCHASING Manager will not consider any protest that is submitted after the submission deadline.
- (3) **Decision.** The PURCHASING Manager shall resolve all timely submitted protests within a reasonable time following receipt of the protest and once resolved, shall promptly issue a Written decision on the protest to the Proposer who submitted the protest.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070; and Or. Laws 2011, chapter 458  
Stats. Implemented: ORS 279A.065, ORS 279C.110; and Or. Laws, chapter 458

#### **48-0250 Solicitation Cancellation; Delay or Suspension; Rejection of All Proposals or Responses; Consultant Responsibility for Costs**

The PURCHASING Manager may cancel, delay or suspend a Solicitation, RFQ, or other preliminary Procurement document, whether related to a direct appointment procedure, informal selection procedure or formal selection procedure, or reject all Proposals, responses to RFPs or RFQs, responses to other preliminary Procurement documents, or any combination of the foregoing, if PURCHASING believes it is in the public interest to do so. In the event of any such cancellation, delay, suspension or rejection, the County 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 solicitations, RFQs, or other preliminary Procurement documents are responsible for all costs they may incur in connection with submitting Proposals, responses to RFPs or RFQs, or responses to other preliminary Procurement documents.

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

#### **48-0270 Price Agreements**

- (1) A Department may establish Price Agreements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, when the Department cannot determine the precise quantities of those Services which the Department will require over a specified time period.
- (2) When establishing Price Agreements under this rule, a Department shall select no fewer than three Consultants, when feasible. The selection procedures for establishing Price Agreements shall be in accordance with 48-0200, 48-0210, and 48-0220, as applicable. Departments 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 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 Department intends to award a Price Agreement to one Consultant or to multiple Consultants. If the Department will award a Price Agreement to more than one Consultant, the solicitation document and Price Agreement shall describe the criteria and procedures the Department will use to select 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 Department's sole discretion; provided, however, in circumstances where a direct contract is not permitted under 48-0200, 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 48-0200, 48-0210, and 48-0220 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 may include the number of hours proposed for the Related Services required, expenses, hourly rates, overhead and other price factors. Work order or task order assignment procedures under Price Agreements may include direct appointments, subject to the requirements of 48-0200; 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)** 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 Department. Any work orders or task orders assigned under a Price Agreement must include, at a minimum, the following:

**(a)** The Consultant's performance obligations and performance schedule;

**(b)** The payment methodology 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 Department, as determined solely by the Department, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services;

**(c)** Language that incorporates all applicable terms and conditions of the Price Agreement into the work order or task order; and

**(d)** Any other provisions the Department believes to be in the Department's best interest.

#### **48-0310 Contract Reinstatements; Effect of Material Alteration or Delay of Project**

- (1) **Compensation.** When a Contract expires and is reinstated pursuant to this Rule, the County may compensate the Consultant for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services performed in the interim between the expiration of the original Contract and the reinstatement.
- (2) **Agreement-to-Agree Reinstatement.** When an Agreement-To-Agree expires and is reinstated pursuant to this Rule, the County may compensate the Consultant for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying and Related Services performed under a Contract resulting from a Work order issued under the Agreement-To-Agree, during the time period between the expiration of the Agreement-To-Agree and the reinstatement.
- (3) **Reasons.** Contracts or Agreements-To-Agree may be reinstated for any of the following reasons:
  - (a) When an administrative error or oversight is discovered, the Department may submit, for approval by the PURCHASING Manager, an Amendment to reinstate the Contract; or
  - (b) If the project for which the Consultant has been selected and Awarded becomes inactive, or is terminated, whether due to project phasing, or insufficient appropriations, separately or combined, the Department may, if the project is reactivated, retain the same Consultant to complete the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Related Services required under the Contract if the Department Director makes Written findings that retaining the Consultant:
    - (A) Is not likely to encourage favoritism or substantially diminish competition in the Awarding of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services Contracts;
    - (B) Will result in substantial cost savings to the County; and
    - (C) Is in the best interest of the County.
- (4) **Effect of Material Alteration or Delay of Project.** If the Department delays or delays and then materially alters a Project for which the County has entered into a Contract, and the Contract has expired or been terminated, the County may enter into a Contract with the same Consultant to perform either the same Architectural, Engineering, Land Surveying or Related Services described in the Contract or Architectural, Engineering, Land Surveying or Related Services as amended to reflect the Department's material alteration of the Project if no more than one year has passed since expiration or termination of the Contract and the Department makes Written findings that entering a Contract with Consultant:
  - (a) Will promote efficient use of public funds and resources and result in substantial cost savings;
  - (b) Will not encourage favoritism in the contracting process; and
  - (c) Will not substantially diminish competition for future Contracts with Consultants.

Stats. Implemented: ORS 279A.065, ORS 279A.070, ORS 279C.110, and ORS 279A.140, and Or. Laws 2011, chapter 458

#### **48-0315 Special Contract Processes**

- (1) Consultants for Agreements-To-Agree shall be selected, and the Department shall obtain Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services by selecting a Consultant or Consultants in the following manner:
  - (a) The Department selects one (1) or more Consultants under the applicable provisions of Rules 48-0200, 48-0210, or 48-0220.
  - (b) The Department develops documents that include a specific Statement of Work for each anticipated Contract under the Agreement-To-Agree document.
  - (c) When the Department selects more than one (1) Consultant under the Agreement-To-Agree Solicitation process, the Department shall identify a standard in the Solicitation Document and the Agreement-to-Agree to be used in assigning particular Architectural, Engineering, Land Surveying or Related Services under the Agreements-To-Agree.
- (2) Design-Build Contracts involve the provision of both design and construction services for Public Improvements under one (1) Contract. Under most circumstances, Design-Build Contracts are Mixed Contracts with the predominate purpose of the Contract involving construction of the Public Improvement. If the predominate purpose of the Contract is to obtain Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying or Related Services, selection may proceed under these Division 48 Rules. Otherwise, the selection process will require an Exemption from Competitive Bidding under Division 49, unless the Design-Build Contract is to be Awarded to the Responsible Bidder submitting the lowest Responsive Bid.

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

Stats. Implemented: ORS 279C.110 and ORS 279C.115

#### **48-0320 Contract Amendments**

- (1) The County may amend any Contract if the County, in its sole discretion, determines that the amendment is within the scope of services contemplated under the Solicitation and that the amendment would not materially impact the field of competition for the services described in the Solicitation. In making this determination, the Department 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 if the Department reasonably believes that the number of Proposers would not significantly increase if the Solicitation were re-issued to include the additional services.
- (2) Amendments are required to document price and schedule changes agreed upon between the parties. The program may include several changes under a single amendment.
- (3) The County 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.
- (4) All amendments to Contracts shall be in Writing, shall be Signed by an authorized representative of the Consultant and the Department.

- (5) A Department shall have authority to authorize increases resulting from amendments to a Contract provided that the total of all such increases shall not exceed 33 percent of the original Contract Price. For Contracts of \$150,000 or less including the proposed changes, increases in excess of the 33 percent limit shall be submitted to the PURCHASING Manager for approval prior to authorization of performance of the Work. For Contracts in excess of \$150,000, increases in excess of the 33 percent limit shall be submitted to the PURCHASING Manager to obtain approval by the Board prior to authorization of performance of the Work.
- (6) Every Contract for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying and Related Services shall comply with the requirements of this Rule including Contracts advertised, or if not advertised, entered into prior to March 1, 2005.

Stat. Auth.: ORS 279A.065 and Or. Laws 2011, chapter 458

Stats. Implemented: ORS 279A.065, 279C.110 and Or. Laws 2011, chapter 458

## **DIVISION 49 GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTS FOR CONSTRUCTION SERVICES**

### **49-0100 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 as identified.
- (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.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279A.065

### **49-0110 Policies**

In addition to the general Code policies set forth in ORS 279A.015, the ORS 279C.300 policy on competition and the ORS 279C.305 policy on least-cost for Public Improvements apply to these Division 49 Rules.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.300 & ORS 279C.305

### **49-0130 Competitive Bidding Requirements**

A Department shall solicit Bids for Public Improvement Contracts by Invitation to Bid, 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 Rule 49-0600 to 49-0690 regarding the use of Alternative Contracting Methods and the Exemption process.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.335

### **49-0140 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 Division 47 rather than under the provisions of these Division 49 Rules. This includes, but is not limited to, Contracts for minor alteration, ordinary repair or maintenance necessary to preserve a Public Improvement. Emergency Contracts for construction services are not Public Improvement Contracts and are regulated under Rule 47-0280.
- (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 (ORS 279C.440, 445 and 450); Legal Actions (ORS 279C.460 and 465); Required Contract Conditions (ORS 279C.505, 515, 520 and 530); Hours of Labor (ORS 279C.540 and 545); Retainage (ORS 279C.550, 560 and 565); Subcontracts (ORS 279C.580); Action on Payment Bonds (ORS 279C.600, 605, 610, 615, 620 and 625); Termination (ORS 279C.650, 650, 660 and 670); and all of the Prevailing Wage Rates requirements (ORS 279C.800 to 870) for Public Works Contracts.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.320

#### **49-0150 Emergency Contract Procedure; Waiver of Bond Requirements**

- (1) **Emergency Procedure.** In the event of an Emergency that requires prompt execution of a Public Contract for Emergency construction or repair Work the procedures in Rules 47-0280 and 47-0800(4) shall be followed.
- (2) **Waiver of Bond Requirements.** The Emergency declaration may also state that the County waives the requirement of furnishing a performance bond, payment bond and BOLI Public Works bond for the Emergency Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335 and 279C.380

#### **49-0160 Informal Solicitations and Amendments**

- (1) **General.** Public Improvement Contracts estimated by the Department not to exceed \$75,000 may be Awarded in accordance with Informal procedures for Quotes established by this Rule. A Procurement may not be artificially divided or fragmented so as to constitute an Informal Quote under this Rule or to circumvent Competitive Bidding requirements.
- (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.** Departments shall utilize Written requests for Quotes for all projects estimated by the Department to exceed \$75,000 or if criteria other than cost will be used to Award the Contract regardless of Contract amount. Written request for Quotes shall include:
  - (a) The selection criteria to be utilized in selecting a Contractor and, if the criteria are not of equal value, their relative value or ranking;
  - (b) A complete description of the proposed Work;
  - (c) Location and deadline for submittal of Quotes;
  - (d) The prevailing wage provisions of ORS 279C.800 to 279C.870, when applicable;
    - (A) If no federal funds are being used to fund the work, the wage rates established under ORS 279C.815(2)(a) shall be attached to the Contract.
    - (B) If federal funds are being used to fund the work, the wage rates established under ORS 279C.815(2)(b) shall be attached to the Contract.
  - (e) The performance bond, payment bond and BOLI Public Works bond requirements of ORS 279C.380 and 279C.830, when applicable;
  - (f) The Contractor registration requirements of ORS 701;.and
  - (g) Any other law applicable to such a Contract.

- (4) **Number of Quotes; Record Required.** Departments may let Public Improvement Contracts between the small dollar threshold established in FIN 16 and the limits set forth in subsection (1) of this Rule without formal Competitive Bidding if the Contract is for a single project and is not a component of or related to any other project and the requirements of this subsection are met. When the amount of the Contract does not exceed the small dollar threshold established in FIN 16 and the Contract otherwise meets the requirements of this section, Departments are exempt from Competitive Solicitation; however, Departments shall where practicable, obtain Informal Quotes. When the amount of the Contract is more than the small dollar threshold as established in FIN 16 but equal to or less than the limits set forth in subsection (1) of this Rule, Informal Quotes shall be solicited in the following manner:
- (a) A minimum of three (3) Quotes shall be solicited from vendors who can reasonably be expected to provide a Quote. If three (3) Quotes are not available, a lesser number will suffice provided a Written record is made of the effort to obtain the Quotes.
  - (b) At least three (3) Quotes solicited shall be from an MBE, WBE or ESB Contractor certified by the State of Oregon for the type of work required, if available.
  - (c) A Quote shall be “not available” if all Contractors certified by the State in that category and located within 75 miles from the place where the Contract is to be performed have been advised of the contracting opportunity, have been given a reasonable period of time under the circumstances to make the Quote, and have failed to provide a Quote within the time specified.
  - (d) The Department shall make a written record of all vendors from whom Quotes were solicited and the amount of the Quotes received.
- (5) **Award.** If Awarded, the Department shall Award the Contract to the prospective Contractor whose Quote will best serve the interests of the Department. If Award is not made to the Offeror offering the lowest price, the Department shall make a written record of the basis for Award and place the record in the Procurement File.
- (6) **BOLI Notification.** The Department shall provide notification of Award to BOLI as required by ORS 279C.835.
- (7) **Price Increases.** Public Improvement Contracts obtained by competitive Quotes may be increased above the initial amount of Award by Department issuance of a Change to the Work or Amendment, pursuant to Rule 49-0910, within the following limitations:
- (a) A Department shall have authority to authorize increases resulting from all amendments to a Contract up to 20 percent of the original Contract Price, except for Contracts for the renovation or remodeling of a building in which case the aggregate increase resulting from all amendments shall not exceed 33 percent of the initial Contract Price. The PURCHASING Manager shall have authority to approve increases in excess of these limits so long as the total Contract amount does not exceed \$75,000 for Public Improvement Contracts. Increases in excess of these limits shall be submitted to the PURCHASING Manager to obtain approval by the Board prior to authorization of performance of the Work.
- (8) The limitations in the previous section shall not apply where unit prices or additive alternates are provided for in the Contract which establishes the cost basis for the additional Work or product and the Contract includes the terms and conditions for provision of the additional Work.

- (9) Exemption from Requirement to Solicit Informal Quotes. A Department may submit a Written request to the PURCHASING Manager seeking an Exemption from the requirement to solicit Informal Quotes. The request shall include description of the proposed selection procedure, a description of the Public Improvement and the circumstances that justify exemption from the requirement to solicit quotes. The PURCHASING Manager may require any additional information deemed necessary to evaluate the request for approval of the Exemption.

Stat. Auth.: ORS 279A.065

Stats. Implemented: Sections 132, 133 and 332a, Ch. 794 Oregon Laws 2003. Temporary provisions relating to competitive Quotes were not codified but compiled as Legislative Counsel notes following ORS 279C.410.

## **DIVISION 49 FORMAL PROCUREMENT RULES**

### **49-0200 Solicitation Documents for Invitations to Bid and Requests for Proposals**

- (1) **Solicitation Document.** 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 County’s representatives at the conference are not binding upon the County unless confirmed by Written Addendum.
    - (C) The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors shall be prequalified if prequalification is a requirement;
    - (D) The name and title of the Procurement Analyst as the person designated for receipt of Offers and PURCHASING contact Person (if different);
    - (E) Instructions and information concerning the form and submission of Offers, including the PURCHASING address to which Offers shall 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 (See Rule 49-0300 regarding Facsimile Bids or Proposals and Rule 49-0310 regarding Facsimile Bids and Proposals);
    - (F) The time and date of Closing after which the County will not accept Offers, which time shall be not less than five (5) Days after the date of the last publication of the advertisement. Although a minimum of five (5) Days is prescribed, Departments are encouraged to use at least a fourteen (14) Day Solicitation period when feasible. If the Department is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, PURCHASING shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and Rule 49-0360. For timing issues relating to Addenda, see Rule 49-0250;
    - (G) The time, date and place of Opening;
    - (H) The office where the Specifications for the Work may be reviewed;
    - (I) A statement that each Bidder to an ITB shall 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 County 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 ORS 279C.838, ORS 279C.840 or 40 U.S.C. 3141 to 3148.”;
    - (K) A statement that the County 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 Rule 49-0230;

- (L) Whether a Contractor or a subcontractor under the Contract shall 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);
  - (N) How the County will notify Offerors of Addenda and how the County will make Addenda available (See Rule 49-0250); and
  - (O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in Rule 49-0360.
- (b) Evaluation Process:
- (A) A statement that the County 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 Rule 49-0390(2), 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;
  - (C) Evaluation criteria, including the relative value applicable to each criterion, that the Department 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 Rule 49-0620), along with the process the Department will use to determine acceptability of the Work;
    - (i) If the Solicitation Document is an Invitation to Bid, any special price evaluation factors shall be set forth 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, 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 Department has available concerning future use;
    - (ii) If the Solicitation Document is a Request for Proposals, the Department shall refer to the additional requirements of Rule 49-0650; and
- (c) **Contract Provisions.** The Solicitation Document shall include all Contract terms and conditions, including warranties, insurance and bonding requirements, that the Department considers appropriate for the Public Improvement project. The Solicitation Document shall 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) Conditions concerning payment of claims by the County (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) Requirement to pay prevailing wage rates (ORS 279C.800 to 279C.870);
  - (i) If no federal funds are being used to fund the work, the wage rates established under ORS 279C.815(2)(a) shall be attached to the Contract.
  - (ii) If federal funds are being used to fund the work, the wage rates established under ORS 279C.815(2)(b) shall be attached to the Contract.
- (O) BOLI Public Works bond (ORS279C.830 (3))
- (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 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.

(2) **Assignment or Transfer Restricted.** The Solicitation and the Contract shall also provide that:

- (a) The Contractor shall not assign, sell, dispose of, or transfer rights, nor delegate duties under the Contract, either in whole or in part, without the prior Written consent of the County.
- (b) Unless otherwise agreed by the County in Writing, such consent shall not relieve the Contractor of any obligations under the Contract and any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the Contract.
- (c) If the County 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 County for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the County otherwise agrees in Writing.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.110, ORS 279A.120, ORS 279C.365, ORS 279C.370, ORS 279C.375 ORS 279C.390, ORS 279C.505 to 580, ORS 279C.605, 279C.830, ORS 305.385, ORS 468A.720, ORS 701.005 & ORS 701.055

#### **49-0210 Notice and Advertising Requirements; Posting**

- (1) **Notice and Distribution Fee.** Notice shall be given 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. PURCHASING may charge a fee or require a deposit for the Solicitation Document. PURCHASING 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 County Procurements;
  - (b) Placing Notice on the PURCHASING web site; or
  - (c) Placing Notice on ORPIN.
- (2) Advertising. Pursuant to ORS 279C.360 and this Rule, PURCHASING shall advertise every Solicitation for competitive Bids or competitive Proposals for a Public Improvement Contract.
  - (a) PURCHASING may publish by Electronic Advertisement. In addition PURCHASING may publish the advertisement for Offers in a newspaper of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as PURCHASING may determine to be necessary or desirable to foster and promote competition.
  - (b) In addition to the publication required under subsection 2(a), PURCHASING shall publish an advertisement for Offers in at least one (1) trade newspaper of general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000.
  - (c) 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 shall file applications for prequalification, if prequalification is a requirement, and the class or classes of Work for which Persons shall be prequalified;
- (D) The scheduled Closing date, which shall not be less than five (5) Days after the date of the last publication of the advertisement;
- (E) The name and address of the PURCHASING Manager;
- (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).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.360 & ORS 200.035

#### **49-0220 Prequalification of Offerors**

- (1) **Mandatory Prequalification.** A Department may require mandatory prequalification of Offerors for Contracts to construct Public Improvements or to perform Public Works on forms prescribed by PURCHASING. Applications for Prequalification shall be postmarked not less than ten (10) Days prior to the Solicitation Closing date unless otherwise provided in the Solicitation Document. A Department shall indicate in the Solicitation Document if it will require mandatory prequalification. Mandatory prequalification is when a Solicitation Document conditions a Person's submission of an Offer upon the Person's prequalification. The PURCHASING Manager shall not consider an Offer from a Person that is not prequalified if the Department required prequalification.
- (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 the County. However the County may require, at its discretion, its own prequalification process.
- (3) **Standards for Prequalification.** A Person may prequalify by demonstrating to the Department's satisfaction that the Person meets the standards of responsibility under Rule 49-0390(2).
- (4) **Notice of Denial.** If a Person fails to prequalify, PURCHASING shall notify the Person, specifying the reasons under subsection (3) of this Rule for denial of prequalification and informing the Person of the right to appeal and the right to a hearing under ORS 279C.445 and 279C.450.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.430 & ORS 279C.435

#### **49-0230 Eligibility to Bid or Propose; Registration or License**

- (1) **Construction Contracts.** The PURCHASING Manager 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.** The PURCHASING Manager 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 ORS 671.560 by the State Landscape Contractors Board at the time the Offer is made.

- (3) **Non-complying Entities.** The PURCHASING Manager 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, ORS 671.530 & ORS 701.055

#### **49-0240 Pre-Offer Conferences**

- (1) **Purpose.** The County 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 County 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 the County 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 County representative at the pre-Offer conference do not change the Solicitation Document unless the County confirms such statements with a Written Addendum to the Solicitation Document.
- (5) **Department Announcement.** The County shall set forth notice of any pre-Offer conference in the Solicitation Document in accordance with Rule 49-0200(1)(a)(B).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365 and 279C.370

#### **49-0250 Addenda to Solicitation Documents**

- (1) **Issuance; Receipt.** The PURCHASING Manager 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 PURCHASING Manager otherwise specifies in the Addenda or in the Solicitation Document.
- (2) **Notice and Distribution.** The PURCHASING Manager shall notify prospective Offerors of Addenda consistent with the standards of Notice set forth in Rule 49-0210(1). The Solicitation Document shall specify how the PURCHASING Manager will provide notice of Addenda and how the PURCHASING Manager will make the Addenda available (see, Rule 49-0200(1)(a)(N). For example, “The PURCHASING Manager will not mail notice of Addenda, but will publish notice of any Addenda on PURCHASING Website. Addenda may be downloaded off the PURCHASING Website. Offerors should frequently check the PURCHASING Website 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 PURCHASING Manager shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The PURCHASING Manager may extend the Closing date if the PURCHASING Manager determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by public interest, the Department shall not issue Addenda less than five (5) Days 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 Rule 49-0260, by the close of the next Business Day after issuance of the Addendum, or up to the last Day allowed to submit a request for change or protest under Rule 49-0260, whichever date is later. The PURCHASING Manager shall consider only an Offeror's request for change or protest to the Addendum; the PURCHASING Manager 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 receipt of request for change or protests as set forth in Rule 49-0260(2) and (3).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.395 & ORS 279A.065

#### **49-0260 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 PURCHASING Manager clarify any provision of the Solicitation Document. The PURCHASING Manager's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on the County unless the PURCHASING Manager 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 shall deliver the Written request for change to the PURCHASING Manager not less than ten (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 shall deliver a Written protest on those matters to the PURCHASING Manager not less than ten (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) County Response.** The PURCHASING Manager is not required to consider an Offeror's request for change or protest after the deadline established for submitting such request or protest. The PURCHASING Manager shall provide notice to the applicable Person if it entirely rejects a protest. If the PURCHASING Manager agrees with the Person's request or protest, in whole or in part, the PURCHASING Manager shall either issue an Addendum reflecting its determination under Rule 49-0260 or cancel the Solicitation under Rule 49-0270.
- (5) Extension of Closing.** If the PURCHASING Manager receives a Written request for change or protest from an Offeror in accordance with this Rule, the PURCHASING Manager may extend Closing if the PURCHASING Manager determines an extension is necessary to consider the request or protest and issue an Addendum, if any, to the Solicitation Document.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.345 & ORS 279C365

#### **49-0270 Cancellation of Solicitation Document**

- (1) Cancellation in the Public Interest.** The PURCHASING Manager may cancel a Solicitation for good cause if the PURCHASING Manager finds that cancellation is in the public interest. The reasons for cancellation shall be made part of the Procurement File.
- (2) Notice of Cancellation.** If the PURCHASING Manager cancels a Solicitation prior to Opening, the PURCHASING Manager shall provide Notice of cancellation in the same manner as provided in Rule 49-0210(1). Such notice of cancellation shall:
  - (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 PURCHASING Manager cancels a Solicitation prior to Offer Opening, the PURCHASING Manager 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 PURCHASING Manager shall open the Offer to determine the source and then return it to the Offeror.
  - (b) After Offer Opening. If the PURCHASING Manager cancels a Solicitation after Offer Opening, the PURCHASING Manager shall retain all such Offers as part of the Procurement File.

#### 49-0280 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 acceptance for the period specified in Rule 49-0410. The County may elect to accept the Offer at any time during the specified period, and the 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 Rule 49-0410, the County may elect to discuss or negotiate certain contractual provisions, as identified in these rules or in the Solicitation Document, with the Proposer. See Rule 49-0650 on Requests for Proposals and Rule 49-0290 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.** The County 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 Rule 49-0650, an Offeror shall not make an Offer contingent upon the 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 Rule 49-0650, 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 County 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 Closing 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 County with all documents and Descriptive Literature required under the Solicitation Document.
- (8) **Facsimile Submissions.** If the County permits Facsimile Offers in the Solicitation Document, the Offeror may submit Facsimile Offers in accordance with the Solicitation Document. The PURCHASING Manager shall not consider Facsimile Offers unless authorized by the Solicitation Document.

- (9) **Product Samples and Descriptive Literature.** A Department 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 Department 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 County, whichever is applicable.
  - (b) The County 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 PURCHASING receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365 & ORS 279C.375

#### 49-0290 Bid or Proposal Security

- (1) **Security Amount.** If the Department requires Bid or Proposal security, it shall be not more than ten percent or less than five percent of the Offeror's Bid or Proposal, consisting of the base Bid or Proposal together with all additive alternates. A Department shall not use Bid or Proposal security to discourage competition. The Solicitation Document shall clearly state any Bid or Proposal security requirements. 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, BOLI Public Works bond and, any required proof of insurance. See ORS 279C.365(4), ORS 279C.385 and ORS 279C.830 .
- (2) **Requirement for Bid Security (Optional for Proposals).** Except for Solicitations exempted under Rule 49-0460 (5), the Solicitation Document shall require Bid security for Solicitation of Bids for Public Improvements. The Solicitation Document may require Bid security even if the Board has exempted a class of Solicitations from Bid security. The County may require Proposal security in RFPs. See ORS 279C.400(5).
- (3) **Form of Bid or Proposal Security.** Only the following forms of Bid or Proposal security may be accepted:
- (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.** The PURCHASING Manager shall return or release the Bid or Proposal security of the successful Offeror and 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 PURCHASING Manager 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 (3) lowest Bids, or the Proposers with the three (3) highest scoring Proposals, is retained pending execution of a Contract.

Stat. Auth.: ORS 279A.065

#### 49-0300 Facsimile Bids and Proposals

- (1) **Authorization.** The PURCHASING Manager may authorize Offerors to submit Facsimile Offers. If Bid or Proposal security is or will be required, Facsimile Offers shall not be authorized unless a method has been established for receipt of such security. Prior to authorizing the submission of Facsimile Offers, the PURCHASING Manager shall determine that equipment and personnel are available which are capable of receiving the size and volume of anticipated Offers within a short period of time. In addition, the PURCHASING Manager 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 Facsimile Offer for Bids or Proposals are authorized, the following provisions shall be included in the Solicitation Document:
  - (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 County 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 shall 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 County reserves the right to Award the Contract solely on the basis of the Facsimile Offer. However, upon the County’s request the apparent successful Offeror shall promptly submit its complete original Signed Offer”;
  - (e) The data and compatibility characteristics of the County’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 County 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365

#### **49-0320 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 in accordance with Rule 49-0280, unless otherwise specified in the Solicitation Document. Any modification shall 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 PURCHASING Manager 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 PURCHASING Manager 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 PURCHASING Manager shall include all documents relating to the modification or withdrawal of Offers in the appropriate Procurement File.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.360, ORS 279C.365, ORS 279C.375 & ORS 279C.395

#### **49-0330 Receipt, Opening and Recording of Offers; Confidentiality of Offers**

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

- (2) **Opening and Recording.** PURCHASING shall publicly open Offers including any modifications made to the Offer pursuant to Rule 49-0320. In the case of Invitations to Bid, to the extent practicable, PURCHASING shall read aloud the name of each Bidder, the Bid price(s), and such other information as PURCHASING considers appropriate. In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, PURCHASING will not read Offers aloud.
- (3) **Availability.** After Opening, PURCHASING shall make Bids available for public inspection, but Proposals shall not be required to be available for public inspection until after notice of intent to Award is issued. In any event PURCHASING 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 192.501(2); ORS 646.461 to 646.475. To the extent such designation is not in accordance with applicable law, those portions shall be made available for public inspection. The Offeror shall separate information designated as confidential from other non-confidential 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, ORS 279C.375 & ORS 279C.395

#### **49-0340 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. PURCHASING shall not consider late Offers, withdrawals or modifications except as permitted in Rule 49-0350.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, ORS 279C.375 & ORS 279C.395

#### **49-0350 Mistakes**

- (1) **Generally.** To protect the integrity of the competitive Procurement process and to assure fair treatment of Offerors, PURCHASING should carefully consider whether to permit waiver, correction or withdrawal of Offers for certain mistakes.
- (2) **Treatment of Mistakes.** PURCHASING shall not allow an Offeror to correct or withdraw an Offer for an error in judgment. If PURCHASING discovers certain mistakes in an Offer after Opening, but before Award of the Contract, PURCHASING may take the following action:
  - (a) 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) 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 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) Permit an Offeror to withdraw an Offer based on one (1) 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 permission to withdraw the Offer is not granted;
  - (G) That the County's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on the County or the public; and
  - (H) That the Offeror promptly gave notice of the claimed error to the County.
- (d) The criteria in subsection (2)(c ) of this Rule shall determine whether the County will permit an Offeror to withdraw its Offer after Closing. These criterion also shall apply to the question of whether the County 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 County based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually Awarded by the County, whether by Award to the next lowest Responsive and Responsible Bidder or the next best Responsive and Responsible Proposer, or by resort to a new solicitation.
- (3) **Rejection for Mistakes.** PURCHASING 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375 & ORS 279C.395

#### 49-0360 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 Department to exceed \$100,000, all Bidders shall submit to the Department 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 PURCHASING Manager shall:
  - (a) Set the Bid Closing on a Tuesday, Wednesday or Thursday, and at a time between 2 p.m. and 5 p.m., 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 in the Solicitation Document.
- (3) **Bidder Instructions and Disclosure Form.** For the purposes of this Rule, the Solicitation shall:
  - (a) Prescribe the disclosure form that shall 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”

Bidders are required to disclose information about certain first-tier subcontractors when the Contract value for a Public Improvement is greater than \$100,000 (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) five percent of the project Bid, but at least \$15,000, or (ii) \$350,000 regardless of the percentage, the Bidder shall disclose the following information about that subcontract either in its Bid submission, or within two hours after Bid Closing:

    1. The subcontractor’s name,
    2. The category of Work that the subcontractor would be performing, and
    3. The dollar value of the subcontract.
  - (c) 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 disclosure form.

THE COUNTY SHALL REJECT A BID AS NONRESPONSIVE IF THE BIDDER FAILS TO SUBMIT THE DISCLOSURE FORM WITH THIS INFORMATION BY THE STATED DEADLINE (see PCRB Rule 49-0360).
- (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 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) **PURCHASING Role.** PURCHASING shall obtain, and make available for public inspection, the disclosure forms required by this Rule. The Department shall provide copies of disclosure forms to the Bureau of Labor and Industries. Neither the PURCHASING Manager nor the Department is 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, the Solicitation Document and the Contract. Departments shall accept written submissions filed under that statute as public records. Aside from issues involving inadvertent clerical error under ORS 279C.585 and provisions of the Solicitation Document and Contract, the County does 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.370, ORS 279C.585, ORS 279C.590 & ORS 279C.835

#### 49-0370 Disqualification of Persons

- (1) **Authority.** The PURCHASING Manager may disqualify a Person from consideration of Award of the County's Contracts after providing the Person with notice and a reasonable opportunity to be heard in accordance with these Rules.
- (2) **Standards for Disqualification.** The PURCHASING Manager may disqualify a Person for:
  - (a) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a private or Public 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 County to be so serious as to justify Conduct Disqualification. A violation under this subsection (2)(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.
  - (e) The Person does not carry workers' compensation or unemployment insurance as required by statute.
  - (f) Violation of ORS 279A.110 Discrimination in subcontracting prohibited; remedies.
- (3) **Notice of Intent to Disqualify.** The PURCHASING Manager 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 County intends to disqualify the Person;

- (b) Set forth the reasons for the Disqualification;
  - (c) Include a statement that the Person shall have a right to appeal the notice of intent to disqualify and have a hearing in accordance with Rule 49-0455 and a statement of the time within which an appeal shall be filed.
  - (d) Include a reference to the particular sections of the statutes and rules involved;
  - (e) State the proposed Disqualification period; and
  - (f) State that the Person may be represented by legal counsel at the hearing.
- (4) **Hearing.** The PURCHASING Manager shall schedule a hearing upon receipt of the Person's timely request. The PURCHASING Manager 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 prior to hearing.
- (5) **Notice of Disqualification.** The PURCHASING Manager 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, the Disqualified Person shall notify the PURCHASING Manager in Writing within three (3) Days after receipt of the notice of Disqualification if the Person intends to appeal the decision.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 200.065, ORS 200.075, ORS 279C.440, ORS 279C.445, ORS 279C.450 & ORS 279A.110

#### 49-0380 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 Rule 49-0390 and Rules 49-0600 to 49-0690.
- (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 County 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 shall be calculated by adding to or deducting from the base Bid those alternates selected by the Department, 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 Department, for the purpose of comparing Bids. The estimated quantity of the Procurement to be used for determination of the low Bidder shall be specified in the Solicitation Document. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price governs. See Rule 49-0350(2)(b).

- (3) **Proposal Evaluation Criteria.** If the Board has exempted the Procurement of a Public Improvement from the Competitive Bidding requirements of ORS 279C.335(1), and has directed that an Alternative Contracting Method under ORS 279C.335(3) be used, the evaluation criteria shall be set forth in the Solicitation Documents. See, Rule 49-0640, ORS 279C.335 and 279C.405.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335

#### **49-0390 Offer Evaluation and Award; Determination of Responsibility**

- (1) **General.** If Awarded, the PURCHASING Manager 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 or is ineligible for Award as a nonresident education service district (ORS 279C.325). The PURCHASING Manager 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, multiple Contract Awards may be made 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 PURCHASING Manager shall have information that indicates that the Offeror meets the standards of responsibility. To be a Responsible Offeror, the PURCHASING Manager shall 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 and otherwise performed the Contract in a satisfactory manner. An Offeror's record of Contract performance should be carefully scrutinized if the Offeror is or recently has been materially deficient in Contract performance. In reviewing the Offeror's performance, the PURCHASING Manager should determine whether the Offeror's deficient performance was expressly excused under the terms of Contract, or whether the Offeror took appropriate corrective action. The PURCHASING Manager may review the Offeror's performance on both private and Public Contracts in determining the Offeror's record of Contract performance. The PURCHASING Manager shall make its basis for determining an Offeror not Responsible under this paragraph part of the Procurement File;
  - (c) Has a satisfactory record of integrity. An Offeror may lack integrity if the PURCHASING Manager determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to a Department. The PURCHASING Manager 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 Rule 49-0370 may be used

to determine an Offeror's integrity. An Offeror may be found to be nonresponsible 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 PURCHASING Manager shall make the basis for determining that an Offeror is not Responsible under this paragraph part of the Procurement File;

- (d) Is legally qualified to Contract with the County; and
  - (e) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by the County concerning responsibility, the PURCHASING Manager shall base the determination of responsibility upon any available information, or may find the Offeror not Responsible.
- (3) **Documenting Determination of Responsibility.** PURCHASING shall document compliance with ORS 279C.375 (3) and the above sections of this rule on a Responsibility Determination Form substantially as set forth in ORS 279.375(3)(c), and file that form with the Construction Contractors Board within thirty (30) days after Contract Award.
- (4) **Evaluation.** The Department shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. The Department shall not evaluate an Offer using any other requirement or criterion.
- (5) Offeror Submissions.
- (a) The Department 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 Department shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. The PURCHASING Manager shall reject an Offer providing any product that does not meet the Solicitation Document requirements. Rejection of an Offer because it offers nonconforming Work or materials is not Disqualification and is not appealable under ORS 279C.445.
- (6) **Evaluation of Bids.** The Department shall use only objective criteria to evaluate Bids as set forth in the ITB. The Department shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid.
- (a) **Nonresident Bidders.** In determining the lowest Responsive Bid, the PURCHASING Manager shall, in accordance with Rule 46-0310, 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 Department 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 shall submit Written and Signed clarifications and such clarifications shall become part of the Bidder's Bid.

- (7) **Evaluation of Proposals.** See Rule 49-0650 regarding Rules applicable to Requests for Proposals.

Stat. Auth.: ORS 279A.065, Oregon Laws 2005, chapter 413

Stats. Implemented: ORS 279C.325, ORS 279C.335, ORS 279C.365, ORS 279C.375 & ORS 279C.395

#### **49-0395 Notice of Intent to Award**

- (1) **Notice.** At least seven (7) Days before the Award of a Public Improvement Contract, PURCHASING shall issue to each Offeror or post electronically or otherwise a notice of the County's intent to Award the Contract. This requirement does not apply to informal competitive quotes or emergency Public Improvement Contracts.
- (2) **Finalizing Award.** The Award shall not be final until the later of the following: Seven (7) Days after the date of the notice, unless the Solicitation Document provided a different period for protest; or after providing a Written response to all timely-filed protests that denies the protest and affirms the Award.
- (3) **Prior Notice Impractical.** Posting of notice of intent to Award shall not be required when the PURCHASING Manager determines that it is impractical due to unusual time constraints in making prompt Award for the immediate procurement needs, documents the Procurement File as to the reasons for that determination, and posts notice of that action as soon as reasonably practical.

Stat. Auth.: ORS 279A.065

Stat. Implemented: ORS 279C.375

#### **49-0400 Documentation of Award; Availability of Award Decisions**

- (1) **Basis of Award.** After Award, the PURCHASING Manager shall make a record showing the basis for determining the successful Offeror part of the Procurement File.
- (2) **Contents of Award Record for Bids.** The 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 Rule 49-0650, the 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
  - (d) If the Solicitation Document permitted Negotiations in accordance with
  - (e) Rule 49-0650, the Department's completed evaluation of the initial Proposals and the Department's completed evaluation of final Proposals.
- (4) **Contract Document.** The Department 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 PURCHASING shall provide Bid tabulations or evaluation summaries of Proposals for a nominal charge to be determined by the PURCHASING Manager. Requests shall contain the Solicitation Document number and, if requested, be accompanied by a self-addressed, stamped envelope. PURCHASING may also provide tabulations of Bids and Proposals Awarded on the PURCHASING Website.
- (6) **Availability of Procurement Files.** PURCHASING shall make completed Procurement Files available for public review at the PURCHASING office.
- (7) **Copies from Procurement Files.** Any Person may obtain copies of material from Procurement Files upon payment of a reasonable charge.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365 & ORS 279C.375

#### 49-0410 Time for Department Acceptance; Extension

- (1) **Time for Offer Acceptance.** An Offeror's Bid, or Proposal submitted as a Firm Offer, is irrevocable, valid and binding on the Offeror for not less than thirty (30) Days from Closing unless otherwise specified in the Solicitation Document.
- (2) **Extension of Acceptance Time.** PURCHASING may request, orally or in writing, that Offerors extend, in writing, the time during which the County 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375

#### 49-0420 Negotiation With Bidders Prohibited

- (1) **Bids.** Except as permitted by Rule 49-0430, a Department shall not negotiate with any Bidder prior to Contract Award. After Award of the Contract, the Department and Contractor may modify the resulting Contract only by change order or amendment to the Contract in accordance with Rule 49-0910.
- (2) **Requests for Proposals.** A Department may conduct Discussions or Negotiations with Proposers only in accordance with the requirements of Rule 49-0650.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.340 & ORS 279C.375

#### 49-0430 Negotiation When Bids Exceed Cost Estimate

- (1) **Generally.** If all Responsive Bids from Responsible Bidders on a competitively Bid Project exceed the Department's Cost Estimate, prior to Contract Award the Department 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 Department's Cost Estimate. The subcontractor disclosure and substitution requirements of Rule 49-0360 do not apply to Negotiations under this Rule.
- (2) **Definitions.** The following definitions apply to this Rule:
  - (a) **Cost Estimate.** The Department'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 Worksheets, where available, and otherwise consisting of formal planning or budgetary documents.

- (b) **Other Options.** Those items generally considered appropriate for negotiation in the RFP process, relating to the details of Contract performance as specified in Rule 49-0650, but excluding any material requirements previously announced in the Solicitation process that would likely affect the field of competition.
  - (c) **Project.** A Public Improvement.
  - (d) **Value Engineering.** 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 County, shall be excluded from consideration.
  - (4) **Scope of Negotiations.** The PURCHASING Manager 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 Department 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 Department may discontinue Negotiations at any time, and shall do so if it appears to the Department that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to re-Bid 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.
  - (7) **Public Records.** To the extent that a Bidder's records used in Contract Negotiations 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 192.410 to 192.505.

Stat. Auth.: ORS 279C.340 & ORS 279A.065

Stats. Implemented: ORS 279C.340

#### 49-0440 Rejection of Offers

- (1) Rejection of an Offer.
  - (a) The PURCHASING Manager shall 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 PURCHASING Manager shall reject an Offer upon a finding that the Offer:

- (A) Is contingent upon 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 PURCHASING Manager shall reject an Offer upon a finding that the Offeror:
- (A) Has not been prequalified and the Solicitation Document 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 subsection (3) of this Rule;
  - (H) Is not responsible. See Rule 49-0390(2) regarding determination that the Offeror has met statutory standards of responsibility.
- (2) **Form of Business.** For purposes of this Rule, PURCHASING 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 Rule 49-0370.
- (3) **Certification of Non-Discrimination.** An Offeror shall certify and deliver to the PURCHASING Manager Written certification, as part of the Offer that the Offeror has not discriminated and will not discriminate against minority, women or emerging business enterprises in obtaining any required subcontracts. Failure to do so shall be grounds for Disqualification.
- (4) **Rejection of all Offers.** The PURCHASING Manager may reject all Offers for good cause upon a written finding it is in the public interest to do so. If PURCHASING determines it is in the public interest to reject all offers written notice shall be given to all Offerors.
- (5) **Criteria for Rejection of All Offers.** The PURCHASING Manager 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) PURCHASING cancels the Solicitation in accordance with Rule 49-0270; or
- (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375, ORS 279C.380, ORS 279C.395, ORS 279A.105 & ORS 279A.110

#### **49-0450 Protest of Contractor Selection, Contract Award**

- (1) **Purpose.** An adversely affected or aggrieved Offeror shall exhaust all avenues of administrative review and relief before seeking judicial review of the 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 Rule 49-0650, the PURCHASING Manager shall provide Written notice to all Proposers of the determination of the Proposers included in the Competitive Range. The notice of the Proposers included in the Competitive Range shall not be final until the later of the following:
  - (a) Ten (10) Days after the date of the notice, unless otherwise provided therein; or
  - (b) Until the PURCHASING Manager 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 PURCHASING Manager shall provide Written notice to all Offerors of the intent to Award the Contract as provided in Rule 49-0395.
- (4) **Right to Protest Award.**
  - (a) An adversely affected or aggrieved Offeror may submit to the PURCHASING Manager a Written protest of the intent to Award within seven (7) 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 Affected Person's protest shall be in Writing and shall specify the grounds upon which the protest is based.
  - (c) An Affected Person is adversely affected or aggrieved only if the Affected Person 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 shall claim that all lower Bidders or higher-scored Proposers are ineligible for Award:
    - (A) Because their Offers were nonresponsive; or

- (B) In making the Award, there was 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 PURCHASING Manager 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 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 PURCHASING Manager a Written protest of the decision to exclude the Proposer from the Competitive Range within seven (7) 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 Rule 49-0650.)
  - (b) The Proposer's protest shall be in Writing and shall 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 shall 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) In excluding the Proposer from the Competitive Range, there was a substantial violation of a provision of the RFP, the Code or these Rules, and would have, but for such substantial violation, been included in the Competitive Range.
  - (d) The PURCHASING Manager 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 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 PURCHASING Manager may settle or resolve a written protest submitted in accordance with the requirements of this Rule.
- (7) Decision.** If a protest is not settled or resolved, the PURCHASING Manager shall promptly issue a written decision on the protest.
- (8) Award.** The successful Offeror shall promptly execute the Contract after the Award is final. The County shall execute the Contract only after all required documents and approvals have been obtained.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375, ORS 279C.380, ORS 279C.385 & ORS 279C.460

#### **49-0460 Performance and Payment Security; Waiver**

- (1) **Public Improvement Contracts.** Unless the required performance bond and payment bond are waived under subsection (5) of this rule, excused in cases of Emergency under Rule 49-0150 (2), or unless the Board exempts a Contract or classes of Contracts from the required performance bond and payment bond pursuant to ORS 279C.390, the Contractor shall execute and deliver to the Department a performance bond and a payment bond each in a sum equal to the Contract Price for all Public Improvement Contracts. The requirement for the BOLI Public Works payment bond under ORS 279C.830 may only be waived as provided in ORS 279C.836 (4), (7) and (8).
- (2) **Other Construction Contracts.** A Department 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.** If a performance bond is required, the Department shall accept only a performance bond furnished by a surety company authorized to do business in Oregon. The Department may accept a cashier's check or certified check in lieu of all or a portion of the required performance bond if specified in the Solicitation Document. The payment bond shall 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 shall promptly furnish the required performance and payment security upon the Department's request. If the Offeror fails to furnish the all security bonds as requested, the County 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 County's discretion, the Offeror shall forfeit its Bid or Proposal security.
- (5) **Public Improvement Contracts \$75,000 or Less.** Departments may waive Bid or Proposal security and performance bond and payment bond requirements if the amount of the Contract for the Public Improvement is \$75,000 or less or in the case of highways, bridges or other transportation projects, \$50,000 or less.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375, ORS 279C.380 & ORS 279C.390

#### **49-0470 Substitute Contractor**

If the Contractor provided a performance bond, the Department 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 provisions 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, ORS 279C.370, ORS 279C.375, ORS 279C.380 & 279C.390

**49-0490 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 County. The Department shall satisfy itself that the above requirements have been complied with before it authorizes issuance of final payment on the Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.120

## **DIVISION 49 ALTERNATIVE CONTRACTING METHODS**

### **49-0600 Purpose**

Rules 49-0600 to 49-0690 are intended to provide guidance regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as may be directed by the Board under ORS 279C.335. Those methods include, but are not limited to, Design-Build, Energy Savings Performance Contract (ESPC) and Construction Manager/General Contractor (CM/GC) forms of contracting. As to ESPC contracting, Rules 49-0600 to 49-0690 implement the requirements of ORS 279C.335 pertaining to the adoption of Rules governing the procedures for entering into ESPCs. As to contracting for Construction Manager/General Contractor services requiring an exemption from competitive bidding under ORS 279C.335(2), 49-0600 to 49-0690 include mandatory and optional provisions pertaining to the procurement of CM/GC services, pursuant to the requirements of ORS 279C.337.

Stat. Auth.: ORS 279C.335, 279A.065 & 351.086

Stats. Implemented: ORS 279C.335, 279A.065 & 351.086

### **49-0610 Definitions for Alternative Contracting Methods**

The following definitions shall apply to Rules 49-0600 to 49-0690, unless the context requires otherwise:

- (1) Affiliate means a person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with another person.
- (2) Alternative Contracting Methods means innovative Procurement techniques for procuring or performing Public Improvement Contracts, utilizing processes other than the traditional method of Design-Bid-Build (with Award 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 lowest Responsive, Responsible Bidder, 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 Rules 49-0600 to 49-0690, as well as other developing techniques such as general “performance contracting” and “cost plus time” contracting, for which procedural requirements are identified under Rules 49-0600 to 49-0690.
- (3) Construction Manager/General Contractor (or “CM/GC”) means a form of Procurement that results in a Public Improvement Contract for a Construction Manager/General Contractor to undertake project team involvement with design development; constructability reviews; value engineering, scheduling, estimating and subcontracting services; establish a Guaranteed Maximum Price to complete the Contract Work; act as General Contractor; hold all subcontracts, self-perform portions of the Work as may be allowed by the County under the CM/GC Contract; coordinate and manage the building process; provide general Contractor expertise; and act as a member of the project team along with the Department, architects, engineers and other consultants. CM/GC also refers to a Contractor under this form of Contract, sometimes known as the “Construction Manager at Risk.”
- (4) 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 Department, and manages both design and construction. In this form of Contract, a single Person provides the Department with all of the services necessary to both design and construct the project.

- (5) 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.
- (6) Energy Conservation Measures (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 Rules 49-0600 to 49-0690, 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 Rules 49-0600 to 49-0690.
- (7) Energy Savings Guarantee means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the County 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 County 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 County after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.
- (8) Energy Savings Performance Contract (ESPC) means a Public Improvement Contract between the County 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.
- (9) General Conditions 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.
- (10) Guaranteed Maximum Price (GMP) means the total maximum price provided to the County by the Contractor, and accepted by the County, that includes all reimbursable costs of and fees for completion of the Contract Work, as defined by the Public Improvement Contract, except for material changes in the scope of Work. It may also include particularly identified contingency amounts.
- (11) Measurement and Verification (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.

- (12) 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.
- (13) Qualified Energy Service Company (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 Department; 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.
- (14) Savings, for Alternative Contracting Methods, 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. Savings, pertaining to CM/GC Services procurements, means a positive difference between a fixed price, a guaranteed maximum price or other maximum price set forth in a public improvement contract and the actual cost of the work, including costs for which a contracting agency reimburses a CM/GC and fees or profits the CM/GC earns.
- (15) 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 Department 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335 & ORS 279A.065

#### **49-0620 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 or an individual Contract has been exempted in accordance with ORS 279C.335 and any applicable PCRB Rules. Use of Alternative Contracting Methods may be directed by the Board as an exception to the prescribed public contracting practices in Oregon, and their use shall be justified in accordance with the Code and Rules 49-0600 to 49-0690. See Rule 49-0630 regarding required findings and restrictions on class Exemptions.

- (2) **Energy Savings Performance Contracts.** Unlike other Alternative Contracting Methods covered by Rules 49-0600 to 49-0690, ESPCs are exempt from the Competitive Bidding process for Public Improvement Contracts pursuant to ORS 279C.335(1)(f), upon compliance with the procedures set forth in Rule 49-0600 to 49-0690 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 exemption requirements in Rules 49-0620 (1) and 49-0630.
- (3) **Post-Project Evaluation.** ORS 279C.355 requires that the County prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 for which the Competitive Bidding process was not used. The purpose of this evaluation is to determine whether it was actually in the County’s best interest to use an Alternative Contracting Method. For each such project, the Department shall prepare and deliver the evaluation required by ORS 279C.335 to the Board within thirty (30) Days of the date the Department “accepts” the Public Improvement project, as 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 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.

Stat. Auth.: ORS 279C.335 & 279A.065

Stats. Implemented: ORS 279C.335, ORS 279A.065, ORS 279C.355 & ORS 351.086

#### **49-0630 Findings, Notice and Hearing**

- (1) **Cost Savings Factors.** When findings are required under ORS 279C.335 to exempt a Contract or class of Contracts from Competitive Bidding requirements, the “substantial cost savings” criterion at ORS 279C.335(2)(b) requires consideration of the type, cost, amount of the Contract, number of Entities available to Bid, and “such other factors as may be deemed appropriate”, and, if the Public Improvement relates to the operation, maintenance or construction of highways, bridges and other transportation facilities, that the exemption will result in substantial cost savings to the County or to the public.
- (2) **Required Information.** The statutory definition of “findings” at ORS 279C.330 means the justification for a Board conclusion that includes, “but is not limited to,” information regarding eight identified areas: Operational, budget and financial data, public benefits, value engineering, specialized expertise required, public safety, market conditions, technical complexity, and funding sources.
- (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” requirement may be addressed by a combination of:
  - (a) Specified findings that address the factors and other information specifically identified by statute, including an analysis or reasonable forecast of future cost savings as well as present cost savings; and

- (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” requirement where an Alternative Contracting Method has not been previously used, the County may make a Finding that identifies the project as a “pilot project” under ORS 279C.335(2)(c).
- (4) **Favoritism and Competition.** The criteria at ORS 279C.335(2)(a) that it is “unlikely” that the Exemption will “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 the Award.
- (5) **Description.** Findings supporting a Competitive Bidding exemption shall describe with specificity the Alternative contracting Method to be used in lieu of Competitive Bidding, including, but not limited to, whether a one step (Request for Proposals) or two step (beginning with Requests for Qualifications) solicitation process will be utilized. The Findings may also describe anticipated characteristics or features of the resulting Public Improvement Contract. However, such description in the findings shall not be binding upon the County. The parameters of the Public Improvement Contract shall be those set forth in the Solicitation Document.
- (6) **Class Exemptions.** In making the findings supporting a class Exemption the Department shall clearly identify defining characteristics of the class. Those characteristics shall include some combination of Project descriptions or locations, time periods, Contract values or method of Procurement or other factors that distinguish the limited and related class of Projects from the Department’s overall construction program. Classes shall not be defined solely by funding sources, such as a particular bond fund, or by method of Procurement, but shall be defined by characteristics that reasonably relate to the Exemption criteria set forth in ORS 279C.335(2).
- (7) **Public Hearing.** Before final adoption of findings exempting a Public Improvement Contract or class of Contracts from the requirement of Competitive Bidding, notice shall be given and a public hearing held by the Board as follows:
- (a) Notification of the public hearing shall be published in at least one trade newspaper of general statewide circulation a minimum of fourteen (14) Days before the hearing.
  - (b) The notice shall state that the public hearing is for the purpose of taking comments on the County’s draft findings for an Exemption from the Competitive Bidding requirement. The notice shall state that at the hearing, after an opportunity for receipt of comments, the Board will consider adoption of the draft findings and approval of the proposed alternative contracting method. At the time of the notice, copies of the draft findings shall be made available to the public.
  - (c) At the public hearing, the Board shall offer an opportunity for any interested party to appear and present comment before considering and adopting the findings.
  - (d) If the County is required to act promptly due to circumstances beyond the County’s control that do not constitute an Emergency, notification of the public hearing may be published simultaneously with the County’s Solicitation of contractors for the

alternative public contracting method, as long as responses to the Solicitation are due at least five (5) Days after the hearing and approval of the findings.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335 & ORS 279A.065

#### **49-0640 Competitive Proposals; Procedure**

Departments may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract Negotiation, only in accordance with PCRB Rules 49-0600 to 49-0690, unless other applicable statutes control the use of competitive Proposals for Public Improvement Contracts. Also see the subdivision of Rules in this division entitled Formal Procurement Rules, Rules 49-0200 to 49-0480, and RFP related Rules under the Alternative Contracting Methods subdivision at Rules 49-0640 to 49-0660. For ESPCs, the following RFP process shall be utilized if a Department 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 Rules 49-0600 to 49-0690 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. For ESPC Proposal evaluations, the RFP may provide that qualifications-based evaluation factors will outweigh 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. 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 Department;
  - (b) Treat all Proposals equitably; and
  - (c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the County. See ORS 279C.305.
- (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 affect cost or quality.
  - (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, coordination of multiple disciplines, the time required to commence and complete the improvement, and related matters that affect cost or quality.
  - (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 affect cost or quality.
  - (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 County and the ESCO, the ESCO's 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 Rules 49-0600 to 49-0690, 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 Rule 49-0650. 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 affect cost or quality. 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 services 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 Rule 49-0680 below.

Stat. Auth.: ORS 279C.335 & ORS 279A.065

Stats. Implemented: ORS 279C.335, ORS 279A.065 & ORS 351.086

#### **49-0645 Requests for Qualifications (RFQ)**

**Generally.** The County 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 qualified under the RFQ process. The County shall first advertise and provide notice of the RFQ in the same manner as required in Rule 49-0210. The RFQ shall provide that RFPs will be distributed only to the firms selected in the RFQ process. The RFQ shall also provide for a protest provision substantially the same as that described in Rule 49-0450 (5) regarding protest of the competitive range. After the RFQ process is completed the County may distribute the RFP to the selected firms without further advertisement of the solicitation.

#### **49-0650 Requests for Proposals (RFP)**

- (1) Generally. When authorized or required by an Exemption granted under Rules 49-0620 and 49-0630, the County may Award a Public Improvement Contract by competitive Proposals. A Contract Awarded under this section may be amended only in accordance with Rule 49-0910. PURCHASING may issue a request for information, a request for interest, a request for qualifications or other preliminary documents to obtain information useful in the preparation or distribution of a Request for Proposals.
- (2) Competitive Proposals shall be subject to the following requirements of Competitive Bidding:
  - (a) Advertisement under Rule 49-0210;
  - (b) Requirements for Solicitation Documents under Rule 49-0200;
  - (c) Disqualification due to a Construction Contractors Board listing under Rule 49-0370;
  - (d) Contract execution and bonding requirements under Rules 49-0390 and 49-0460;
  - (e) Determination of responsibility under Rule 49-0390;
  - (f) Rejection of Bids under Rule 49-0440; and
  - (g) Disqualification and prequalification under Rules 49-0370 and 49-0220.
- (3) For the purposes of applying the requirements listed in subsection (2) of this section to competitive Proposals, when used in the sections listed in subsection (2) of this section, “Bids” includes Proposals, and “Bid documents” and “Invitation to Bid” include Requests for Proposals.
- (4) Competitive Proposals are not subject to the following requirements of Competitive Bidding:
  - (a) First-tier subcontractor disclosure under Rule 49-0360; and
  - (b) Reciprocal preference under Rule 46-0310.
- (5) When Award of a Public Improvement Contract advertised by the issuance of a Request for Proposals may be made without negotiation, the Department may require Proposal security that serves the same function with respect to Proposals as Bid security serves with respect to Bids as follows:
  - (a) Proposal security may be required in a form and amount as may be determined to be reasonably necessary or prudent to protect the interests of the County.
  - (b) Proposal security shall be retained if a Proposer who is Awarded a Contract fails to promptly and properly execute the Contract and provide any required bonds or insurance.
  - (c) Proposal security shall be returned to all Proposers upon the execution of the Contract, or earlier in the selection process.
- (6) **Receipt of Proposals; evaluation and Award.** Notwithstanding the public records law, ORS 192.410 to 192.505:
  - (a) Proposals may be opened so as to avoid disclosure of contents to competing Proposers during, when applicable, the process of negotiation.
  - (b) Proposals are not required to be open for public inspection until after the notice of intent to Award a Contract is issued.
- (7) For each Request for Proposals, the Department shall prepare a list of Proposals submitted.

- (8) Notwithstanding any requirement to make Proposals open to public inspection after issuance of the notice of intent to Award a Contract, the County may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a Proposal. If a Request for Proposals is canceled after Proposals are received, the County may return a Proposal to the Proposer that made the Proposal. PURCHASING shall keep a list of returned Proposals in the file for the solicitation.
- (9) The cancellation of requests for Proposals and the rejection of Proposals shall be in accordance with Rule 49-0440.
- (10) At least seven (7) Days before the Award of the Contract, unless there is a determination is made that seven (7) Days is impractical, PURCHASING shall issue to each Proposer or post, electronically or otherwise, a notice of intent to Award.
- (11) If a Public Contract is Awarded, PURCHASING shall Award a Public Contract to the Responsible Proposer whose Proposal is determined in Writing to be the most Advantageous to the County based on the evaluation factors set forth in the Request for Proposals and, when applicable, the outcome of any Negotiations authorized by the Request for Proposals. Other factors may not be used in the evaluation.
- (12) **Solicitation Documents.** In addition to the Solicitation Document requirements of Rule 49-0200, this Rule applies to the requirements for Requests for Proposals. RFP Solicitation Documents shall conform to the following standards:
  - (a) Selection criteria shall be set forth 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 Rule 49-0640. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates based on information available to the Department. 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 Department is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following Discussions, the Department 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 Department has identified as authorized for negotiation. The Department shall describe the evaluation and Discussion or negotiation process, including how the Department will establish the Competitive Range;
  - (c) When the Department intends to Award Contracts to more than one (1) Proposer, the Department shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. The Department shall also include the criteria it will use to determine how the Department will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular Contractor to provide Goods or services from those Contractors Awarded Contracts.

**(13) Evaluation of Proposals.**

- (a) **Evaluation.** Proposals shall be evaluated only in accordance with criteria set forth in the RFP and applicable law to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.
  - (A) Clarifications. In evaluating Proposals, information may be requested 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 Department did not permit negotiation in its Request for Proposals, the Department 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.
    - (iii) The process for Discussions or Negotiations that is outlined and explained in this Rule does not apply to this limited negotiation.
- (b) **Discussions; Negotiations.** If the Department permitted Discussions or Negotiations in the Request for Proposals, the Department shall 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 Department's discretion, the Department may forego Discussions and Negotiations and evaluate all Proposals in accordance with this Rule.
  - (B) If the Department proceeds with Discussions or Negotiations, the Department shall establish a negotiation team tailored for the acquisition. The Department's team may include legal, technical and negotiating personnel.
- (c) **Cancellation.** Nothing in this Rule shall restrict or prohibit the County from canceling the Solicitation at any time.

**(14) Competitive Range; Protest; Award.**

- (a) **Determining Competitive Range.**
  - (A) After the Opening the Proposals shall be evaluated in accordance with the evaluation criteria set forth in the Request for Proposals. After evaluation of the Proposals, the Department will determine and rank the Proposers in the Competitive Range.
  - (B) The Department may increase the number of Proposers in the Competitive Range if the 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 evaluation of revised Proposals submitted in accordance with the process described in this Rule.
- (b) **Protesting Competitive Range.** PURCHASING 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 evaluation and determination of the Competitive Range in accordance with Rule 49-0450.
- (c) **Intent to Award; Discuss or Negotiate.** After the protest period provided in these Rules expires, or after a final response to any protest has been provided, whichever date is later, PURCHASING may either:

- (A) Provide Written notice to all Proposers in the Competitive Range of the County's intent to Award the Contract to the highest-ranked Proposer in the Competitive Range.
    - (i) An unsuccessful Proposer may protest the notice of intent to Award in accordance with Rule 49-0450.
    - (ii) After the protest period provided in accordance with Rule 49-0450 expires, or after a final response to any protest has been provided, whichever date is later, the Department 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.
- (15) **Discussions; Revised Proposals.** If the Department chooses to enter into Discussions with and receive revised Proposals from the Proposers in the Competitive Range, the Department shall proceed as follows:
- (a) **Initiating Discussions.** The Department 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 Department identified in the RFP as the subject of Discussions. The Department 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 Department would like additional information; and
    - (C) Otherwise allowing Proposers to develop revised Proposals that will allow the Department to obtain the best Proposal based on the requirements and evaluation criteria set forth in the Request for Proposals.
  - (b) **Conducting Discussions.** The Department 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 Department may terminate Discussions with any Proposer in the Competitive Range at any time. However, the Department shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with Department before the Department notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.
    - (A) In conducting Discussions, the Department:
      - (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 Department 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.** At the conclusion of the Department's Discussions with all remaining Proposers in the Competitive Range, the Department shall give all remaining Proposers in the Competitive Range notice of the date, place and time by which they shall submit revised Proposals. This notice shall constitute the Department's termination of Discussions, and Proposers shall submit revised Proposals by the date and time set forth in the Department's notice without further Discussions with the Department.
  - (A) Upon receipt of the revised Proposals, the revised Proposals shall be evaluated based upon the evaluation criteria set forth in the Request for Proposals, and ranked based on the scoring.
  - (B) The Department may conduct Discussions with and accept only one (1) revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the Request for Proposals.
- (d) **Intent to Award; Protest.** PURCHASING shall provide Written notice to all Proposers in the Competitive Range of the intent to Award the Contract. An unsuccessful Proposer may protest the intent to Award in accordance with Rule 49-0450. After the protest period provided in accordance with that rule expires, or after the final response to any protest has been provided, whichever date is later, the Department shall commence final Contract Negotiations.

**(16) Negotiations.**

- (a) **Initiating Negotiations.** The Department 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.**
  - (A) Scope. The Department may negotiate:
    - (i) The statement of Work;
    - (ii) The Contract Price as it is affected by negotiating the statement of Work; and
    - (iii) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the Request for Proposals. Accordingly, Proposers shall not submit, and Department shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the Request for Proposals.
- (c) **Terminating Negotiations.** At any time during Discussions or Negotiations that the Department conducts in accordance with this Rule, the Department may terminate Discussions or Negotiations with the highest-ranked Proposer, or the Proposer with

whom it is currently discussing or negotiating, if the Department 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.
- (d) **Continuing Negotiations.** If the Department terminates Discussions or Negotiations with a Proposer, the Department may then commence Negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this Rule until the Department has either:
- (A) Determined to Award the Contract to the Proposer with whom it is currently discussing or negotiating; or
  - (B) Completed one (1) round of Discussions or Negotiations with all Proposers in the Competitive Range, unless the Department provided for more than one (1) round of Discussions or Negotiations in the Request for Proposals.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.400 to 279C.410

#### **49-0660 RFP Pricing Mechanisms**

- (1) A Request for Proposals may result in a lump sum Contract Price, as in the case of Competitive Bidding. Alternatively, a cost reimbursement Contract may be negotiated.
- (2) Economic incentives or disincentives may be included to reflect stated Department purposes related to time of completion, safety or other Contracting objectives, including total least cost mechanisms such as life cycle costing.
- (3) A Guaranteed Maximum Price (GMP) is used as the pricing mechanism for CM/GC where a total Contract Price is provided in the design phase in order to assist the Department in determining whether the project scope is within the Department's budget, and allowing for design changes during preliminary design rather than after final design Work has been completed.
  - (a) If this collaborative process is successful, the Contractor shall propose a final GMP, which may be accepted by the Department and included within the Contract.
  - (b) If this collaborative process is not successful, and no mutually agreeable resolution on GMP can be achieved with the Contractor, then the Department shall terminate the Contract. The Department 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 Department shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335

## 49-0670 Design-Build Contracts

- (1) **General.** The Design-Build form of contracting, as defined at Rule 49-0610(3), has technical complexities that are not readily apparent. Departments 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 Department shall 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.** Departments shall utilize the Design-Build form of contracting only in accordance with the requirements of these Rules 49-0600 to 49-0690. See particularly Rule 49-0620 on “Use of Alternative Contracting Methods” and Rule 49-0680 pertaining to ESPCs.
- (3) **Selection.** Design-Build selection criteria may include those factors set forth above in Rule 49-0640(2)(a), (b) and (c).
- (4) **Licensing.** If a Design-Build Contractor is not an Oregon licensed design professional, the Department 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 671.030(2) (g) (A) regarding the Offer of architectural services, and ORS 672.060(11) regarding the Offer of engineering services that are related to construction Work.
- (5) **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.
- (6) **Contract Requirements.** Departments shall conform their Design-Build contracting practices to the following requirements:
  - (a) **Design Services.** The level or type of design services required shall 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 shall be identified.

- (b) **Professional Liability.** The Contract shall clearly identify the liability of design professionals with respect to the Design-Build Contractor and the County, as well as requirements for professional liability insurance.
- (c) **Risk Allocation.** The Contract shall clearly identify the extent to which the County 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 County 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 Department is benefited from such deliverables.

Stat. Auth.: ORS 279C.335 & ORS 279A.065

Stats. Implemented: ORS 279C.335, ORS 279A.065, ORS 279C.110 & ORS 351.086

#### **49-0680 Energy Savings Performance Contracts (ESPC)**

- (1) **Generally.** These Rules 49-0600 to 49-0690 include a limited, efficient method for Departments 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 Department chooses not to utilize the ESPC Procurement method provided for by these Rules 49-0600 to 49-0690, the Department 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 of these Rules.
- (2) **SPC Contracting Method.** The ESPC form of contracting, as defined at Rule 49-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the Department, as well as the additional technical complexities associated with a Design-Build Contract. Departments 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 Department shall be able to reasonably anticipate one (1) 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;

- (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 services 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.** Departments 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 Rules 49-0600 to 49-0690.
- (4) **No Findings Required.** No findings are required for an ESPC to be exempt from the Competitive Bidding process for Public Improvement Contracts unless the Department chooses not to comply with the ESPC contracting procedures set forth in Rules 49-0600 to 49-0690.
- (5) **Selection.** ESPC selection criteria may include those factors set forth above in Rule 49-0640(2)(a), (b), (c) and (d). Since the Energy Savings Guarantee is such a fundamental component in the ESPC contracting process, Proposers shall 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) **Licensing.** If the ESCO is not an Oregon licensed design professional, the Department 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 ORS 672.060(11) regarding the Offer of engineering services that are appurtenant to construction services.

- (7) **Performance Security.** At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the ESCO shall provide a performance bond and a payment bond, each for one hundred percent (100%) of the full Contract Price, including the construction and design and related professional services specified in the ESPC Design-Build Contract, pursuant to ORS 279C.380(1)(a). For ESPC Design-Build Contracts, these “design and related professional services” include conventional design services, commissioning services, training services for the Department’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 ORS 279C.380(1)(a) “design and related professional services.” Nevertheless, a Department 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 Department so provides in the RFP.
- (8) **Contracting Requirements.** Departments 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.
    - (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 County, 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 Department shall conform its Design-Build contracting practices to the Design-Build contracting requirements set forth in Rule 49-0670(6) above.
  - (c) **Pricing Alternatives.** The Department may utilize one (1) 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 services 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 County, the ESCO's M & V services may be terminated prior to the completion of the M & V/Energy Savings Guarantee period and the County'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 Rules 49-0600 to 49-0690 does not include maintenance services for the project facility.

Stat. Auth.: ORS 279C.335; ORS 279A.065

Stats. Implemented: ORS 279C.335, ORS 279A.065, ORS 279C.110 & ORS 351.086

#### **49-0690 Construction Manager/General Contractor (CM/GC)**

**(1) General.** The CM/GC Method is a technically complex project delivery system. Departments 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 County and design professional. In order to utilize the CM/GC Method, the County 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 Department may consider operational and financial data that show significant savings or 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 Department may consider value engineering, building systems analysis, life cycle costing analysis and construction planning that lead to cost savings. The Department 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 Department, design professionals, any Department 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 Department 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.** Departments shall use the CM/GC form of contracting only in accordance with the requirements of these rules and their authorizing statutes, when a competitive bidding exemption is approved. See particularly 49-0600 on “Purpose” and 49-0620 on “Use of Alternative Contracting Methods.”
- (3) **Selection.** CM/GC selection criteria may include those factors set forth in 49-0640(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 49-0610 and Pricing Mechanisms at 49-0660.
- (5) **Contract Requirements.** Departments 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 County 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 Department 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.

(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 conventional additions to the project scope, as well as corrections to the Contract terms and conditions, additions to insurance coverage required by the Department 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 County'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 County.

(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 GC Work 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 Department 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 shall clearly describe the methods by which the CM/GC shall publicly receive, open, and record Bids or price quotations, and competitively select subcontractors to perform the Contract Work based upon price, as well as the mechanisms by which the CM/GC may waive those requirements, as described in ORS 279C.337(3) and in any other Department requirements. The documents shall also describe completely the methods by which the CM/GC and its affiliated or subsidiary entities may compete to perform the Work, including, at a minimum, advance notice to the public of the CM/GC's intent to compete and a public opening of Bids or quotations by the County or an independent party, as described in ORS 279C.337(3)(c). Within this scope, 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 Department 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 Department, 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 Department, 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 Department 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;

(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 Department;

(iv) The CM/GC must fully respond to any questions or comments submitted to the CM/GC by the Department; and

(v) The Department 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 subcontractor 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 Department must approve subcontract awards, and to what extent, if any, the Department 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 subcontractor 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 Department must retain the right to monitor the subcontracting process in order to protect the County’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.** 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 Department, 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.** A subcontractor who was not selected by the CM/GC to perform a particular element of the construction Work may 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 Department 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 preconstruction 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. 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 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 Department 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 Department 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. However, the CM/GC may proceed with 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; 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335, 279C.337 & 279C.380(2)

#### **49-0695 Post Project Evaluation**

- (1) Upon completion of and final payment for any Public Improvement Contract, or class of Public Improvement Contracts in excess of \$100,000 for which the County did not use the Competitive Bidding process, the Department shall prepare and deliver to the Board an evaluation of the Public Improvement Contract or the class of Public Improvement Contracts.
- (2) The evaluation shall include but is not limited to the following matters:
  - (a) The actual project cost as compared with original project estimates;
  - (b) The amount of any guaranteed maximum price;
  - (c) The number of project change orders issued;
  - (d) A narrative description of successes and failures during the design, engineering and construction of the project;
  - (e) An objective assessment of the use of the alternative contracting process as compared to the findings prepared to support the use of the alternative contracting process;
- (3) The evaluation required by this section:
  - (a) Shall be made available for public inspection; and
  - (b) Shall be completed within thirty (30) Days of the date the County accepts:
    - (A) The Public Improvement project; or
    - (B) The last Public Improvement project if the project falls within a class of Public Improvement projects.

## DIVISION 49 CONTRACT PROVISIONS

### 49-0800 Required Contract Clauses

Departments shall include in all formal Solicitation Documents for Public Improvement Contracts all of the ORS Chapter 279C required Contract clauses, as set forth in the checklist contained in Rule 49-0200(1)(c) regarding Solicitation Documents. The following series of rules provide further guidance regarding particular Public Contract provisions.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 297C.505 to ORS 279C.545 & ORS 279C.800 to 279C.870

### 49-0810 Waiver of Delay Damages Against Public Policy

No provision shall be placed in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from the County'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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.315

### 49-0815 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 shall 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.

Stat. Auth: ORS 279A.065

Stats. Implemented: ORS 279C.830

### 49-0820 Retainage

- (1) **Withholding of Retainage.** A Department shall not retain an amount in excess of five percent (5%) of the Contract Price for Work completed. If the Contractor has performed at least 50 percent (50%) of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of written application containing the surety's written approval, the Department may, in its discretion, reduce or eliminate Retainage on any remaining progress payments. The Department shall respond in Writing to all such applications within a reasonable time. When the Contract Work is ninety-seven and one-half percent (97-1/2%) completed, the Department may, at its discretion and without application by the Contractor, reduce the retained amount to one hundred percent (100%) of the value of the remaining unperformed Contract Work. A Department may at any time reinstate Retainage. Retainage shall be included in the final payment of the Contract Price.
- (2) **Form of Retainage.** Unless the County reserves an amount as Retainage and finds in writing that accepting a bond or instrument described in part (a) or (b) of this section poses an extraordinary risk that is not typically associated with the bond or instrument, the County, 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 (4)(a) of this rule; or
  - (b) A surety bond deposited as provided in subsection (4)(b) of this rule.

- (3) **Deposit in interest-bearing accounts.** Upon request of the Contractor, the County shall deposit cash Retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the County. Earnings on such account shall accrue to the Contractor.
- (4) **Alternatives to cash Retainage.** In lieu of cash Retainage to be held by the County, the Contractor may substitute one (1) of the following:
- (a) Deposit of bonds, securities or other instruments:
    - (A) The Contractor may deposit bonds , securities or other instruments with the County or in any bank or trust company to be held for the benefit of the County. If the County accepts the deposit, the County 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 County Chief Financial Officer and 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.
      - (vi) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.
    - (C) Upon a determination by the Department that all requirements for the protection of the County’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.** The County, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the Department 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.
- (5) **Recovery of costs.** The County may recover from the Contractor all costs incurred in the proper handling of Retainage, by reduction of the final payment.
- (6) **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 County shall retain 25 percent (25%) of any amount earned by the Contractor on a Public Works Contract until the Contractor has filed such statements with the County. The County shall pay the Contractor the amount retained under this provision within fourteen (14) Days after the Contractor files the certified statements regardless of whether a subcontractor has filed such statements.

Stat. Auth.: ORS 279A.065 & ORS 279.845

Stats. Implemented: ORS 279C.560, ORS 279C.570 & ORS 701.420

#### 49-0830 Contractor Progress Payments

- (1) Request for Progress Payments. Each month the Contractor shall submit to the Department its written request for a progress payment based upon an estimated percentage of Contract completion. At the Department'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 Department 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 Department for any cause;
  - (d) Less the appropriate amount of Retainage.
- (2) Progress Payments/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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.570

#### 49-0840 Interest

- (1) **Prompt payment policy.** A Department 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 thirty (30) Days after receipt of invoice or fifteen (15) Days after Department approval of payment (the "Progress Payment Due Date"). The interest rate shall equal three (3) 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 thirty percent (30%).
- (3) **Interest on final payment.** Final payment on the Contract Price, including Retainage, shall be due and owing no later than thirty (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 (1/2%) 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 (30) Days after the Contractor submitted a claim for payment to the Department in Writing or otherwise in accordance with the Contract requirements.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.570

#### 49-0850 Final Inspection

- (1) **Notification of Completion; Inspection.** The Contractor shall notify the Department in Writing when the Contractor considers the Contract Work completed. Within fifteen (15) Days of receiving Contractor's notice, the Department 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 Department finds that all Work required under the Contract has been completed satisfactorily, the Department shall acknowledge acceptance of the Work in Writing.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.570

#### 49-0860 Public Works Contracts

- (1) **Generally.** ORS 279C.800 to 279C.870 regulate Public Works Contracts, as defined in ORS 279C.800(5), 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) **BOLI Notification.** The Department shall provide notification of Award to BOLI as required by ORS 279C.835.
- (3) **Required Contract Conditions.** As detailed in the above statutes and rules, every Public Works Contract shall contain the following provisions:
  - (a) County 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) Requirement for payment of prevailing rate of wage, as set forth in ORS 279C.830.
    - (A) If no federal funds are being used to fund the work, the wage rates established under ORS 279C.815(2)(a) shall be paid.
    - (B) If federal funds are being used to fund the work, the wage rates established under ORS 279C.815(2)(b) shall be paid. 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.
    - (C) The rates may be incorporated into the Specifications by reference, in compliance with OAR 839-025-0020; or, 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 and 0035.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.800 to ORS 279C.870

#### **49-0870 Specifications; Brand Name Products**

- (1) **Generally.** The 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 Department may identify products by brand names so long as the following language: “approved equal”; “or equal”; “approved equivalent” or “equivalent,” or similar language is included in the Solicitation Document. The Department shall determine, in its sole discretion, whether an Offeror’s alternate product is “equal” or “equivalent.”

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.345

#### **49-0880 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 their performance and 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 Department at reasonable times and places, whether or not litigation has been filed as to such claims.
- (2) **Inspection and Audit.** A Department 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 shall 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 County, and its authorized representatives, shall be entitled to inspect, examine, copy, and audit any Contractor’s or subcontractor’s Records, as provided in subsection 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.030, ORS 279C.375, ORS 279C.380 & ORS 279C.440

#### **49-0890 Department Payment for Unpaid Labor or Supplies**

- (1) **Contract incomplete.** If the Contract is still in force, the County 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 the County chooses to make such a payment as provided in ORS 279C.515(1), the Contractor and the Contractor’s surety shall not be relieved from liability for unpaid claims.

- (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 County shall not make payments to subcontractors or suppliers for Work already paid for by the County.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.515

#### **49-0900 Contract Suspension; Termination Procedures**

- (1) **Suspension of Work.** In the event the County suspends performance of Work for any reason considered by the Department 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 (as defined in the Contract), including a reasonable allowance for related overhead (as defined in the Contract), 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 County 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 subsection (2), the County shall pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination (all as defined in the Contract). The Department 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 (as may be further defined in the Contract). No claim for loss of anticipated profits will be allowed.
  - (c) **Public interest termination by Department.** A Department 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 Department unilaterally terminates the Contract for any reason considered by the Department to be in the public interest.
  - (d) **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.
  - (e) **Remedies cumulative.** The Department 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.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.650, ORS 279C.655, ORS 279C.660, ORS 279C.665 & ORS 279C.670

#### **49-0910 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 Department 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 County 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, or both, for the changed Work.
  - (c) “Changes Provisions” Changes to the Work are anticipated in construction and, accordingly, Departments shall include changes provisions in all Public Improvement Contracts that detail the scope of the changes clause, provide pricing mechanisms, authorize the County 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.
- (2) **Contract Amendments.** Contract Amendments to Public Improvement Contracts are not considered to be new Procurements and an Exemption from Competitive Solicitation is not required to add work when:
- (a) The work added is within the general scope of the original Contract, or if the work is outside the scope of the original Contract, it can be performed by the Contractor at a cost below what the Department estimates it would cost if a Contract for that work were Awarded through Competitive Bidding, Competitive Quotations, or Competitive Proposals. Additional work is “within the general scope of the original Contract for the purposes of this subsection if the additional work is logically related to the Contract work; prudent Contract management, engineering or construction practices dictate that the additional work ought to be performed in conjunction with the original Contract work; the additional work is located at the same site as the Contract work; and the Contract objectively establishes the prices, or the method of arriving at the price, for the additional work;
  - (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 any other applicable legal requirements.

- (3) **Limits on Contract Increases.** The aggregate increase resulting from all amendments to a Contract shall not exceed 20 percent (20%) of the original Contract Price, except that amendments to Contracts for the renovation or remodeling of a building may be increased up to 33 percent (33%) of the original Contract Price. For Contracts of \$75,000 or less increases in excess of these limits shall be approved by the PURCHASING Manager prior to authorization of performance of the Work. For Contracts in excess of \$75,000 increases in excess of these limits shall be submitted to the PURCHASING Manager to obtain approval by the Board prior to authorization of performance of the Work.
- (4) **Applicability of Rule.** Every Public Improvement Contract shall comply with the requirements of this Rule including Contracts advertised, or if not advertised entered into prior to March 1, 2005.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279C.400(1)

## **DIVISION 55 CONTRACTS WITH QUALIFIED REHABILITATION FACILITIES**

### **55-0005 Definitions**

- (1) As used in Rules 55-0005 to 55-00305:
  - (a) “Price” means the cost to the County of the products and services under Contracts procured under the program created by ORS 279.835 to 279.855 as determined by these Division 55 Rules.
  - (b) “Procurement List” means a listing of those nonprofit agencies for Disabled Individuals that currently are qualified to participate in the program created by ORS 279.835 to 279.850 and includes a list of the products and services offered by Qualified Rehabilitation Facilities and determined by the State Procurement Office to be suitable for purchase by agencies.
  - (c) “Qualified Rehabilitation Facility” (QRF) means an activity center or rehabilitation facility, certified as a community rehabilitation program or as a vocational service provider through the Oregon Department of Human Services, that the State Procurement Office has determined to be qualified to participate in the program created by ORS 279.835 to 279.850.
  - (d) “QRF Contract” means a Contract entered into under the program created by ORS 279.835 to 279.850

Stat. Auth.: ORS 279.845(1), ORS 184.340

Stats. Implemented: ORS 279.015(1)(b), ORS 279.835 to ORS 279.855

### **55-0010 Policy**

It is the policy of Multnomah County to encourage and assist Disabled Individuals to achieve maximum personal independence through useful and productive gainful employment by assuring an expanded and constant market for sheltered workshop and activity center products and services, thereby enhancing their dignity and capacity for self-support and minimizing their dependence on welfare and need for costly institutionalization. An essential element of this policy is to support sheltered employment to the fullest extent provided by law by contracting for needed Goods and services available from QRFs. The County shall identify contracting opportunities within the organization and Award appropriate Contracts to QRFs in accordance with ORS 279.850 and this Division 55. This policy shall be equally applicable to all County Departments and shall be administered by the PURCHASING Manager.

### **55-0015 Procurements from QRFs**

- (1) When the County intends to procure a product or service that is listed on the Procurement List, it shall procure that product or service, at the Price determined by the State Procurement Office, from a Qualified Rehabilitation Facility if the product or service is of Specifications appropriate to the County’s Procurement needs and is available within the time required by the County.
- (2) The County shall enter into and renew QRF Contracts only for the specific products or services that are on the Procurement List.
- (3) If a QRF is removed from the Procurement List, the County shall not Award or renew a QRF Contract, and the removal from the Procurement List shall constitute sufficient grounds for the County to terminate any outstanding QRF Contract.

- (4) No placement of a product or service on the Procurement List shall act to displace a Contractor under an existing Contract with the County for the same product or service prior to the expiration or other termination of the Contractor's Contract with the County. However, where a product or service is on the Procurement List, no existing Contract shall be renewed for such a product or service.
- (5) If a QRF submits a Competitive Bid, Proposal, Quote or other Offer in a Competitive Procurement for a Public Contract, then regardless of whether the Offer was accepted, that QRF may not, at any time during the initial term of the Contract for which the QRF submitted a Bid, Proposal or Offer, make any claim to the County that the product or service that was the subject of the Offer is on the Procurement List. If, during the Solicitation process, a QRF claims the product or service that is the subject of the Procurement is on the Procurement List, then, if the product or service is determined to have been on the Procurement List at the time the Solicitation Document was issued, the Solicitation process shall be terminated so long as a Contract has not been fully executed at the time the claim is made.

Stat. Auth.: ORS 279.845(1), ORS 184.340

Stats. Implemented: ORS 279.015(1)(b), ORS 279.835 to ORS 279.855

### 55-0030 Determination of Price/Changes to QRF Contracts

- (1) When a product or service on the Procurement List is offered by more than one QRF, a Department may purchase the required product or service from any QRF without competition between QRFs.
- (2) Departments may use the formal selection procedure described in Rule 47-0260 to select a QRF to provide a service on the Procurement list, provided that:
  - (a) The Solicitation shall not request any information concerning price and price shall not be a consideration in making the Award.
  - (b) The Solicitation shall not be advertised
  - (c) Notice of the Solicitation shall only be given to those QRFs offering the service on the Procurement List.
  - (d) After selection of a QRF the price will be determined in accordance with subsection (3)(b) below
- (3) **Price.**
  - (a) **Price for products or services where the Price is listed.** For products or services on the Procurement List where the Price is listed, the Contract shall provide that the County will pay the Price that is listed.
  - (b) **Price for services where the Price is not listed.** For services for which no price is listed on Procurement List, the Department shall proceed as follows:
    - (A) The Department shall request that the QRF submit its proposed Price to the County based on the volume or scope of the Work and Specifications provided by the County as prescribed in the proposed Contract between the QRF and the County. For janitorial, security and food services where a Living Wage is required to be paid, the Specifications shall state the minimum wage required to be paid.
    - (B) In submitting its proposed Price to the County the County shall require the QRF to make full disclosure of known costs. The disclosure shall include documentation, on a form prescribed by the State Procurement Office, that the costs proposed will result in a Price that will permit the QRF to recover the amounts prescribed in ORS

279.845(1)(a) The Department shall require that an authorized officer of the QRF certify that the costs claimed are, to the best of the officer's knowledge, reasonable and adequate, and that the proposed Price will permit the QRF to recover the amounts prescribed in ORS 279.845(1)(a).

- (C) If the QRF and the County agree on the terms and conditions of a proposed Contract and the price for the services to be provided under the proposed Contract, the Department shall present the proposed Contract (including the agreed Price) to the State Procurement Office for review and approval of the Price. If the QRF and the County cannot agree on the price, the parties shall present the issue of price to the State Procurement Office for determination.
- (D) The County shall not execute or implement any Contract under the program created by ORS 279.835 to 279.855 until the State Procurement Office has transmitted notice of the Price approved determined by the State Procurement Office to the County and the QRF.
- (c) Re-determinations of Price. The Price established by the State Procurement Office shall apply for the initial term or period of the Contract unless otherwise approved by the State Procurement Office. The State Procurement Office may re-determine a Price at the request of a QRF or County, or at the discretion of the State Procurement Office. Until the State Procurement Office approves a new Price, the QRF shall continue to provide, at the established Price, the service or product in accordance with the scope of Work that was the basis for establishing the existing Price.
- (d) The County shall not pay or agree to pay a QRF any amount other than the Price approved by the State Procurement Office. Any Price established by the State Procurement Office for a product or service shall remain in effect until the State Procurement Office approves a new Price.
- (e) Departments shall not make material changes (changes that affect the cost of providing the products or services in more than a negligible manner) to the Specifications of a QRF Contract unless the changes are in Writing and have been submitted to the State Procurement Office for a re-determination of Price. If the Department wishes to make a material change to the Specifications from the most recent Solicitation for the product or service, the Department shall notify the QRF in Writing of the specific changes in the scope of Work or other conditions which will be required during the new Contract period. No agreement making a material change in the Specifications shall be executed until State Procurement Office re-determines the Price.

Stat. Auth.: ORS 279.845(1), ORS 184.340

Stats. Implemented: ORS 279.015(1)(b), ORS 279.835 to ORS 279.855

## **DIVISION 60 EQUAL OPPORTUNITY IN PUBLIC CONTRACTING**

### **60-0010 Purpose**

- (1) The purpose of this Division is to establish procedures to assure that Multnomah County provides adequate opportunities for Minority Individuals, Women, and MBE, WBE and ESB Contractors and subcontractors to participate and compete for business and employment opportunities provided through Contracts with Multnomah County.

### **60-0020 Policy**

- (1) It is the intent of Multnomah County to provide opportunities for all segments of the business population to participate in Multnomah County contracting opportunities.
- (2) Multnomah County has a compelling governmental interest in prohibiting discrimination in programs, activities, services, benefits and employment whether carried out by the County itself or through a Contractor with whom the County arranges to carry out its programs and activities.

### **60-0030 Contract Clauses Required**

- (1) In order to assure opportunity, every County Contract shall include a provision barring discrimination against MBEs, WBEs and ESBs by Contractor and all subcontractors.
- (2) Every County Contract shall contain a provision prohibiting discrimination by Contractor and all subcontractors based on race, religion, color, sex, marital status, familial status, national origin, age, mental or physical disability, sexual orientation, gender identity or source of income.

### **60-0031 Good Faith Effort Program**

- (1) The activities described in ORS 200.045 are standards for Good Faith Efforts to provide equitable opportunities for MBEs, WBEs, and ESBs to participate in subcontract opportunities created through Multnomah County Contracts.
- (2) The PURCHASING Manager shall implement a Good Faith Effort program utilizing the standards described in ORS 200.045 that are determined to be effective to achieve the purpose of this section together with such other standards as are appropriate to such a program. Bid or Proposal Specifications for Contracts requiring Good Faith Effort shall state the requirements necessary to show that a Good Faith Effort has been made and shall require documentation of such effort. The PURCHASING Manager shall cooperate with other municipal and state agencies to design, to the maximum extent possible, a program that is uniform between agencies.
- (3) The PURCHASING Manager shall determine if the Offer complies with requirements for Good Faith Effort in the Solicitation Document.
- (4) If the Good Faith Effort documentation submitted by the Offeror fails to substantially comply with the requirements of the Solicitation Document, the Offer shall be deemed non-responsive and shall be rejected by the PURCHASING Manager.

### **60-0040 Requirement for Certification as Equal Employment Opportunity Employer**

- (1) No Department shall enter into a contract for an amount in excess of \$75,000 unless the Contractor agrees to meet the full requirements of Title VII of the Civil Rights Act of 1964 as described in ORS 659A.001 et al. with regard to Unlawful Discrimination in Employment.

- (2) Contractors without employees at the time of Contracting who later add employees during the period of performance of any County Contract must meet the full requirements of Title VII of the Civil Rights Act of 1964 as described in ORS 659A.001 et al.
- (3) County may terminate all existing contracts with Contractors who fail to meet the requirements above.

**60-0050 Workforce Requirements in Construction Contracts**

- (1) For all Contracts designated by the PURCHASING Manager as being appropriate for such a program, the PURCHASING Manager shall establish Specifications to be included in the Solicitation Document which require for such Contracts that Contractors make reasonable efforts to increase apprenticeship training and work opportunities for Women and Minority Individuals, and, to ensure that their workforce reflects the diversity of Multnomah County and is reasonably consistent with the availability of qualified Women and Minority Individuals. The Specifications shall state the requirements necessary to show that a reasonable effort has been made, shall require documentation of such effort, and shall provide for remedies to the County for failure to comply with any of the specified requirements.