

# **CHAPTER 13:**

# **PURCHASING &**

# **PUBLIC CONTRACTS**



## Table of Contents

|      |   |    |
|------|---|----|
| I.   | INTRODUCTION .....  | 4  |
| II.  | OVERVIEW .....  | 4  |
| A.   | Sources of Law .....  | 4  |
| B.   | What is a Public Contract? .....  | 5  |
| C.   | Who is Who .....  | 6  |
| D.   | General Provisions .....  | 7  |
| 1.   | Permissible Limitations on Competition.....   | 7  |
| 2.   | Contract Preferences.....   | 8  |
| 3.   | Non-Competitive and Alternative Procurement Methods.....  | 10 |
| 4.   | The Disposal of Surplus Property .....  | 13 |
| III. | THE PROCUREMENT OF GOODS AND SERVICES .....   | 14 |
| A.   | Pre-Solicitation Considerations .....   | 14 |
| 1.   | Consultation.....   | 14 |
| 2.   | Prequalification .....  | 15 |
| 3.   | Feasibility Determinations for Service Contracts over \$250,000 .....   | 15 |
| B.   | Solicitation Methods for the Procurement of Goods and Services .....  | 17 |
| 1.   | Direct Appointment .....  | 18 |
| 2.   | Intermediate Procurements – \$250,000 or Less .....   | 19 |
| 3.   | Special Procurements .....  | 20 |
| 4.   | Price Agreements .....  | 21 |
| C.   | Formal Solicitation Methods .....   | 21 |
| 1.   | Competitive Sealed Bid – ITB for Goods and Services .....   | 21 |
| 2.   | Competitive Sealed Proposal – RFP for Goods and Services .....  | 23 |
| D.   | Other Solicitation Considerations .....   | 25 |
| 1.   | Cancellation, Rejection, Delay.....   | 25 |
| 2.   | Debarment.....  | 26 |
| 3.   | Contract Amendments .....   | 26 |
| IV.  | Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, and Land Surveying Services ..... | 27 |
| A.   | Direct Appointment .....  | 27 |
| B.   | Informal Selection Procedure .....  | 28 |
| C.   | Formal Selection Procedure .....  | 29 |
| D.   | Selection for Local Public Improvements Procured Through a State Agency .....                                   | 30 |

|    |  |    |
|----|--|----|
| E. | Ties, Protests, and Cancellation .....   | 30 |
| V. | The Procurement of Public Improvements .....   | 31 |
| A. | Pre-Solicitation Considerations .....  | 31 |
| 1. | Prequalification .....   | 31 |
| 2. | Disqualification .....   | 32 |
| B. | Alternative Solicitation Methods for Procurement of Public Improvement Contracts.... | 33 |
| 1. | Public Improvements Constructed by the Contracting Agency .....                      | 33 |
| 2. | Direct Appointment .....   | 34 |
| 3. | Competitive Quotes .....   | 34 |
| 4. | Exempt Contracts .....   | 35 |
| 5. | Alternative Methods Provided in Model Rules .....                                    | 36 |
| 6. | Competitive Proposals as an Alternative to ITB .....                                 | 39 |
| C. | Formal Solicitation Method– ITB .....  | 39 |
| 1. | ITB Contents.....  | 39 |
| 2. | Advertisement.....   | 41 |
| 3. | Addenda, Clarification and Contract Specific Protests .....                          | 42 |
| 4. | Pre-Offer Conference .....   | 43 |
| 5. | First Tier Subcontractor Disclosure and Subcontractor Substitution .....             | 43 |
| 6. | Bid Evaluation.....  | 43 |
| 7. | Negotiations.....  | 44 |
| D. | Other Solicitation Considerations for Public Improvement Procurements .....          | 44 |
| 1. | Offer Requirements .....   | 44 |
| 2. | Mistakes – Waiver, Correction or Withdrawal of Offers After Opening.....             | 45 |
| 3. | Bid and Proposal Security .....  | 46 |
| 4. | Cancellation and Rejection of Offers .....   | 46 |
| 5. | Contract Award .....   | 47 |
| 6. | Contractor Eligibility.....  | 48 |
| 7. | Contractor Responsibility.....   | 48 |
| 8. | Procurement of Contract Oversight Services .....                                     | 50 |
| E. | Contract Specifications and Conditions Applicable to Public Improvement Contracts .  | 50 |
| 1. | Required Contract Conditions .....   | 50 |
| 2. | Brand Names.....   | 52 |
| 3. | Waiver of Damages for Delay.....   | 53 |

|      |   |     |
|------|---|-----|
| 4.   | Assignment or Transfer Restricted .....   | 53  |
| 5.   | Green Energy Technology.....  | 54  |
| F.   | Contract Amendments and Changes to Work .....                                   | 54  |
| G.   | Retainage .....   | 55  |
| H.   | Performance Security and Payment Security .....                                 | 56  |
| I.   | Final Inspection .....  | 57  |
| J.   | Contract Payments and Interest .....  | 57  |
| K.   | Contract Termination for Public Interest .....                                  | 57  |
| VI.  | Public Works.....   | 58  |
| A.   | Prevailing Wage Rates .....   | 60  |
| B.   | Contract Specifications .....   | 60  |
| C.   | Notice of Award and Fee .....   | 61  |
| VII. | Conclusion.....   | 61  |
|      | Appendix A: Standards of Responsibility .....                                   | 622 |
|      | Appendix B: FAQ on Emergency Procurement .....                                  | 63  |
|      | Appendix C: FAQ on Public Improvement Least Cost Contracting Requirements ..... | 66  |
|      | Appendix D: LOC Model Policy for Public Contracting and Purchasing.....         | 71  |

# Chapter 13:

## Purchasing and Public Contracts

### I. INTRODUCTION

In the private sector, organizations are generally free to contract however and with whomever they choose with the focus often on the organization's profit. In the public sector, public contracting is founded on the principle of fully advertised, open, and fair competition with the focus on transparency and fairness. Public contracts are generally the purchase, sale or lease of goods or services, or contracts for the construction of public improvements. The authority to enter into a public contract and the limits to that authority are governed primarily by state statute, state administrative rules, and to a lesser extent by the Oregon Constitution and local charters.

This chapter will provide a broad overview of Oregon's public contracting laws, identify the various types of public contracts subject to the laws, and describe how to legally procure a public contract.

Disclaimer: These materials are not intended to substitute for obtaining legal advice from a competent attorney. Rather, these materials are intended to provide general information regarding public contracting for public officials to allow the public official to have a working knowledge of the topic.

### II. OVERVIEW

The public contracting code refers to the entity procuring the contract as the "contracting agency." The contracting agency may be the city acting through its city council, or acting through a city manager, or a department head to whom the city council has delegated or permitted delegation of authority. The discussion below uses the term "contracting agency" to refer to either the city council or the person with delegated authority under the local code.

#### A. Sources of Law

Public contracting in Oregon is governed by the Oregon public contracting code codified in ORS chapters 279, 279A, 279B, and 279C. All city contracting agencies must comply with the requirements of the contracting code in their public contracting.

ORS chapter 279 exists as a shell of the former contracting code prior to its 2005 amendment. In its current state, the chapter primarily focuses on the state qualified rehabilitation facilities program which is discussed further below.

ORS chapter 279A sets out the general provisions for the entire public contracting code including many terms and their definitions, describes the types of contracts and entities subject to the code, and addresses local rulemaking authority and obligations under the code. This chapter

also addresses various policies embodied within the code, affirmative action, contract preferences, and cooperative procurement; and establishes substantive legal requirements applicable to all public contracting.

ORS chapter 279B addresses the procurement of goods and services (excluding professional services). The topics covered include permitted methods of procurement or “source selection” (including exceptions and exemptions), procurement document specifications, and legal remedies.

ORS chapter 279C addresses the procurement of public improvement contracts—generally covering public construction projects that are not emergencies, minor repairs or for maintenance. ORS chapter 279C also addresses the procurement of architectural, engineering and land surveying services from which a local contracting agency can opt out through rulemaking. Lastly, ORS chapter 279C contains provisions pertaining to public works contracts, covering the prevailing wage laws, hours of labor, etc.

To ensure transparency in public purchasing, the Oregon Legislative Assembly requires all contracting agencies to establish, implement, and follow standardized procurement rules. ORS 279A.065 gives cities three choices in their establishment of standardized procurement rules:

- Follow the model rules adopted by the Oregon Attorney General contained in Oregon Administrative Rules (OAR) chapter 137, divisions 46, 47, 48, and 49;
- Prescribe their own rules; or
- Prescribe their own rules which include portions of the model rules adopted by the Oregon Attorney General.

If a contracting agency decides to adopt its own local rules, those rules must still comply with the provisions of ORS chapters 279, 279A, 279B, and 279C. A local contracting code can be adopted by ordinance, resolution or charter. The most common and preferred method is by ordinance. In determining what the local code should look like, each city will need to evaluate its own form of government and needs. If a city chooses to adopt its own rules, it is required to do two things. First, it must specifically state that the model rules adopted by the Oregon attorney general are not applicable to the city. Second, each time the Oregon Attorney General’s office modifies its model rules, the city is required to review the modified rules to ensure its own locally created and adopted rules are still compliant with all applicable state regulations. For the ease of explanation, this chapter presumes that a city has not adopted its own local rules and is following the model rules adopted by the Oregon Attorney General. Where the model rules are referenced herein, a city may adopt its own local rules that differ from the referenced model rule so long as the local rules comply with the state statutes.

## **B. What is a Public Contract?**

Not every agreement is considered a public contract under the public contracting code. In technical terms, a public contract means “a sale or other disposal, or a purchase, lease, rental or

other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alternations, or ordinary repair or maintenance necessary to preserve a public improvement.”<sup>1</sup>

Thus, a public contract is the purchase of office supplies, equipment, construction services, paving, consultant services, software, cleaning services, to name a few. It is also important to note that that some contracts are excluded from the provisions of the public contracting code. Some of the more common or important exceptions to keep in mind are:

- Intergovernmental agreements under ORS Chapter 190;
- Grants;
- Contracts for purchase or sale of real property;
- Contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 to 279.855;
- Sole-source expenditures when the rates are set by law or ordinance;
- Contracts for professional or expert witnesses or consultants for existing or potential litigation; and
- Certain investment contracts and employee benefit plan contracts under ORS 279A.025(2)(q)&(r).

Contracts that are exclusively among or between governmental bodies, including governmental bodies of other states or countries, are not public contracts subject to the code, although if a private entity is a party to the agreement, then the exclusion for contracts between contracting agencies likely does not apply.

There are many more agreements excluded from the definition of a public contract under ORS 279A.025 which is always a good starting place to review to determine the applicability of the code.

### **C. Who is Who**

The contracting code uses a number of terms to reference the various entities involved in the public contracting process. The “contracting agency” is defined as “a public body authorized by law to conduct a procurement. ‘Contracting agency’ includes, but is not limited to...any person authorized by a contracting agency to conduct a procurement on the contracting agency's behalf.”<sup>2</sup>

---

<sup>1</sup> ORS 279A.010 (1)(z).

<sup>2</sup> ORS 279A.010(1)(b).

A city’s “local contract review board” is the city council, unless the city designates an alternative “[public] body, board or commission.”<sup>3</sup> The local contract review board may then delegate some, most, but not all of its authority through rulemaking.<sup>4</sup> Therefore, the city council may delegate some or all authority to a city manager or administrator or to department heads, and so on. How much delegation is appropriate will depend on the size of the city and the contracting limits adopted by the city council.

## **D. General Provisions**

As mentioned above, ORS chapter 279A is applicable to all chapters of the public contracting code. The model rules adopted under it in OAR chapter 137, division 46 are likewise applicable to all public contracts except where the contracting agency has opted out of the rules. Below are various provisions that apply to all solicitations for public contracts.

### **1. Permissible Limitations on Competition**

While the public contracting code is focused on the principle of competitive procurement, if a contracting agency has an established affirmative action goal, policy or program, it may limit competition for any public contract for goods or services, or any other public contract estimated to cost \$50,000 or less, to pursue that goal, policy or program.<sup>5</sup> An affirmative action goal, policy or program is one that is “designed to ensure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age or physical or mental disability or a policy to give a preference in awarding public contracts to disabled veterans.”<sup>6</sup>

A contracting agency may favor business enterprises certified as disadvantaged, minority, women or emerging small business enterprises under ORS 200.055 or business enterprises own or controlled by a disabled veteran in three ways:

- By requiring a contractor to subcontract with or obtain materials for use in performing the contract from, a certified disadvantaged, minority, women or emerging small business enterprise or business enterprise owned or controlled by a disabled veteran;
- By requiring a contractor to subcontract with or obtain materials for use in performing the contract from, a certified disadvantaged, minority, women or emerging small business enterprises that are located or draw their workforce from areas classified as economically distressed by the Oregon Economic and Community and Development Department; and

---

<sup>3</sup> ORS 279A.060.

<sup>4</sup> ORS 279A.075.

<sup>5</sup> ORS 279A.100(3)

<sup>6</sup> ORS 279A.100(1).

- By requiring that a contractor be a “responsible bidder” as defined in ORS 200.005 and have undertaken good faith efforts to comply with ORS 200.045.<sup>7</sup>

## **2. Contract Preferences**

There are a few preferences that a contracting agency must apply to its selection of a contractor.

### **a. Preferences for Oregon Goods and Services**

The public contracting code requires a contracting agency to give preference to goods and services manufactured and produced in Oregon if “price, fitness, availability and quality are otherwise equal.”<sup>8</sup> This means that a preference for Oregon goods and services may be given only when there is a tie low bid, or two identical proposals or offers. Except for construction contracts described in ORS 279C.320, cities are allowed to give a 10% price advantage to Oregon-produced goods and services. This preference is only available for contracts for goods and services procured under ORS chapter 279B.<sup>9,10</sup>

When evaluating bids under ORS chapters 279B and 279C, contracting agencies must give the preference by applying a percentage increase to the bids of out of state bidders equal to the percentage of the preference that would be given to the bidder in the state in which the bidder resides.<sup>11</sup> The National Association of Procurement Officials manages a list of states that give such preferences and the amount of the preference that the local contracting agency can refer to without liability.<sup>12</sup>

When evaluating offers other than bids, the identical offer that uses Oregon goods or services wins. If two or more offers use Oregon goods or services, lots are drawn between or among those offers. If none use Oregon goods or services, lots are drawn among all offers.<sup>13</sup>

### **b. Preferences for Local Goods and Services**

Apart from the statutory preference for Oregon goods and services, local preferences are not expressly permitted under the public contracting code. Local preferences likely cannot be approved as an exemption to competitive bidding under ORS 279C.335 because use of a local preference would result in favoritism or could substantially diminish competition, contrary to the findings required to approve the exemption. Even when a contract award is not required to be based on the lowest bid and factors other than cost can be considered, such as in a request for

---

<sup>7</sup> ORS 279A.105.

<sup>8</sup> ORS 279A.120.

<sup>9</sup> ORS 279A.128

<sup>10</sup> Contracts described in ORS 279C.320 are those for emergency work, minor alternations, ordinary repair or maintenance of public improvements, as well as any other construction contract that is not defined as a public improvement under ORS 279A.010, in accordance with the provision of ORS chapter 279B.

<sup>11</sup> ORS 279A.120(2).

<sup>12</sup> The NAPO state preference repository is available at <https://www.naspo.org/research-innovation/state-preference-repository/> (last accessed April 2026).

<sup>13</sup> OAR 137-046-0300.

proposals, it may be possible to favor local goods and services but such favoritism would not be consistent with the policies articulated in ORS 279A.015.<sup>14</sup>

When using a less formal contracting procedure, such as the intermediate procurement process under ORS chapter 279B and the competitive quote process under ORS chapter 279C, nothing in the public contracting code prevents the contracting agency from contracting only local contractors. Applications of local preferences have not been tested in the Oregon courts. There are many legal arguments to be made against doing so, such as preemption, and the U.S. Constitution’s Commerce Clause, to name a few. Therefore, if considering local preferences, the local contracting agency should consult with legal counsel and proceed with caution.

### c. Preferences for Recycled Goods

The public contracting code also includes a preference for recycled goods and requires local contracting agencies to give preference to the procurement of goods manufactured from recycled materials on any public contract for goods if: (1) the recycled good is available; (2) the recycled good meets applicable standards; (3) the recycled good can be substituted for a comparable nonrecycled good; and (4) the recycled good’s costs do not exceed the costs of the nonrecycled good by more than 5%, or a higher percentage if a written determination is made by the contracting agency.<sup>15</sup> Unless the findings in (1) to (4) cannot be made, the contracting agency must award a higher priced contract that includes recycled goods instead of a lower priced contract that does not.

#### Resource

For sample language for the adoption of preferences such as for recycled materials and supplies, see Appendix for LOC’s **Model Policy for Public Contracting and Purchasing**.

ORS 279B.025 requires contracting agencies to “establish procurement practices” for public contracts for goods and services that “ensure, to the maximum extent feasible, the procurement of goods that may be recycled or reused when discarded.” Therefore, a local contracting agency

---

<sup>14</sup> ORS 279A.015 provides: “It is the policy of the State of Oregon, in enacting the Public Contracting Code, that a sound and responsive public contracting system should:

- (1) Simplify, clarify and modernize procurement practices so that they reflect the marketplace 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 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 legislatively mandated socioeconomic programs that overlay public contracting and accompany the expenditure of public funds.
- (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.”

<sup>15</sup> ORS 279A.125.

should adopt rules under ORS 279B.025 to meet this obligation to give preference to recycled goods.

### 3. Non-Competitive and Alternative Procurement Methods

Prior to choosing a procurement method, the contracting agency may want to look to non-competitive or alternative procurement methods which do not have the same strict competitive requirements as “traditional” public contract procurement methods. The non-competitive procurement methods outlined below may save the contracting agency time, money and frustration.

#### a. Oregon Forward Program

Pursuant to state policy, a contracting agency must first look to whether an Oregon Forward Program (formerly known as the Qualified Rehabilitation Facility Program) provider is available for the products and services the contracting agency is seeking. The Oregon Department of Administrative Services maintains a list of Oregon Forward Program providers, products, and services.<sup>16</sup> Oregon Forward Program contract pricing is determined through the statewide coordinator. The contracting agency should evaluate if the available Oregon Forward Program product or service meets the agency’s needs of form, fit, and function.

#### b. Personal Services Procurements

A local contracting agency has authority to “designate certain service contracts or classes of service contracts as personal services contracts.”<sup>17</sup> Generally, these are contracts for services that require specialized skill, knowledge, and resources in the application of technical or scientific expertise or in the exercise of professional, artistic, or management discretion or judgment. In other words, a local contracting agency does not have to apply ORS chapter 279B or the model rules adopted under ORS chapter 279B to these types of personal services contracts if it has adopted its own personal services contracts rules. The local rules must designate the contracts or classes of contracts as personal services contracts and provide for the source selection method(s) to be used.

#### Personal Services

Examples of services a contracting agency may designate as “personal services” may include:

- Services of an accountant, attorney, auditor, information technology consultant.
- Services of expert witnesses or consultants.
- Services of a photographer, film maker, painter, sculptor.

Architectural, engineering and land-surveying services contracts are treated a little differently than other personal services and must generally be procured through the qualifications-based selection (QBS) process outlined in ORS 279C.110. See Section V below for further discussion on these types of service contracts.

<sup>16</sup> ORS 279.840 and 279.850; <https://www.oregon.gov/das/procurement/pages/oregonforward.aspx> (last accessed April 2026)..

<sup>17</sup> ORS 279A.055(2).

### c. Cooperative Purchasing

Contracting agencies are granted cooperating authority to conduct certain public contracting activities on behalf of other contracting agencies, participate in contracts and contracting activities conducted by other contracting agencies, or rely on membership in a cooperative procurement group as the basis for selection of contractors to provide certain goods or services.<sup>18</sup>

The public contracting code describes three types of cooperative or “piggy-back” procurements that are allowed and establishes the conditions under which a local contracting agency may participate in or administer each. The three types of cooperative procurements are: (1) joint cooperative procurement; and (2) permissive cooperative procurement, and (3) interstate cooperative procurement. The first two types of cooperative procurement may also be an interstate cooperative procurement. The conditions that must be met to participate in these contracts mostly address the procurement process of the original contract, notice requirements when choosing to participate in certain cooperative procurements, and protest procedures. In all cases, the cooperative procurement must have been procured using source selection methods that are substantially equivalent to the competitive sealed bid, proposal, or special procurement process in the public contracting code. Cooperative purchasing allows contracting agencies to avoid having to go through their own tedious procurement process and benefit from group discounts.

#### (1) Joint Cooperative Procurement – ORS 279A.210

Joint cooperative procurements are cooperative procurements in which the estimated contract volumes are set forth in the solicitation documents, and the contracting agencies or cooperative procurement groups are specifically identified in the solicitation documents and in the original contract or price agreement. A joint cooperative procurement can be used to establish contracts or price agreements for goods, services (including personal services) and contracts for public improvements. There can be no material change in terms, conditions, or price of the original contract. Use of a joint cooperative procurement requires the participants to enter into a formal agreement with the administrator executing the agreement on behalf of the cooperative procurement group. A joint cooperative procurement cannot be a permissive cooperative procurement because as outlined below, contracting agencies are not specifically identified in the solicitation documents or original contract. An example of a joint cooperative procurement is where two cities both are looking to procure the same services. The cities would first need to enter into a formal agreement establishing a solicitation administrator. The administering city will then issue a single solicitation wherein each city is identified and the contractor agrees to provide goods and services under the same terms and conditions to both cities.

**Resource**

**Oregon Cooperative Procurement Program**

<https://www.oregon.gov/das/Procurement/Pages/Orcpp.aspx>

Email: [info.orcpp@oregon.gov](mailto:info.orcpp@oregon.gov)

<sup>18</sup> ORS 279A.205.

Another example of a joint cooperative procurement are the various statewide price agreements to purchase goods and services under the Oregon Cooperative Procurement Program (OrCPP). The agreements available under this the OrCPP are administered by the Oregon Department of Administrative Services. Each negotiated contract requires that the contractor allow ORCPP members to establish contracts or price agreements under the same terms, conditions, and prices of the original contract.

### **(2) Permissive Cooperative Procurement – ORS 279A.215**

A permissive cooperative procurement is one in which the contract volumes and contracting agencies are not specifically identified in the solicitation documents or original contract, but which do permit other contracting agencies to establish contracts or price agreements under the terms, conditions, and prices of the original contract. A permissive cooperative procurement can be used to establish contracts for goods and services (including personal service services), but not public improvements. There can be no material change in the terms, conditions, or price of the original contract. If a contracting agency estimates that the permissive cooperative procurement contract will be more than \$250,000, then it must advertise its intent to enter into the contract, provide vendors the opportunity to submit comments, and respond to any comments it receives.

### **(3) Interstate Cooperative Procurement – ORS 279A.220**

An interstate cooperative procurement is a joint or permissive cooperative procurement in which one or more of the participating agencies are located outside of Oregon. An interstate cooperative procurement does not have to, but may specifically, identify contracting agencies permitted to participate. If contracting agencies are not identified, the procurement must permit other contracting agencies or cooperative purchasing groups to establish contracts or price agreements under the terms, conditions, and prices of the original contract. A contracting agency desiring to enter into a contract or price agreement under an interstate cooperative procurement must advertise its intent to do so, provide vendors the opportunity to submit comments, and respond to any comments it receives. An interstate cooperative procurement does not have to identify contract volumes. An interstate cooperative procurement can be used to establish contracts for goods and services (including personal services), but not public improvements. An example of an interstate cooperative procurement are those agreement available under the National Purchasing Partners (NPPGov). NPPGov is based in Washington, but partners with various government entities nationwide to provide government entities—including cities in Oregon—with access to a variety of contracts.

**Resource**

**NPPGov**

<https://nppgov.com/>

Email:

[customerservice@nppgov.com](mailto:customerservice@nppgov.com)

#### (4) Cooperative Procurement Protests and Disputes – ORS 279A.225

Protests regarding the procurement process for a cooperative procurement or the award of an original cooperative contract can be directed only to the originating contracting agency. Likewise, protests regarding the use of a cooperative procurement can be directed only to the local contracting agency and are limited in scope to the local contracting agency’s authority to enter into the cooperative procurement. The protest procedure to be followed is the one used for public contracts for goods and services described in ORS chapter 279B. Any disputes regarding contract performance that arise after the contract is entered into can be resolved only between the local contracting agency and contractor—in other words, the originating administrating agency is not involved.

##### d. Federal Purchasing Programs

Local contracting agencies may enter into contracts through federal purchasing programs under the Electronic Government Act of 2002<sup>19</sup> for the purchase of automated data processing equipment (including firmware), software, supplies, support equipment, and related services. In order to do so, the local contracting agency must have adopted rules for that type of procurement.<sup>20</sup>

##### e. Contracts to Transfer Fire Protection Equipment

A local contracting agency may enter into a public contract to transfer fire protection equipment between fire departments without using a competitive procurement process if the procedures in ORS 279A.190(2) are followed, which includes a public hearing. There is no requirement to adopt local rules to use this process.

#### Disposal of Real Property

The disposal of real property is governed by two state statutes:

ORS 221.725  
*Sale of city real property; publication of notice; public hearing*

and

ORS 221.727  
*Alternative procedure for sale of city real property; public notice and hearing*

#### 4. The Disposal of Surplus Property<sup>21</sup>

The disposal of surplus property – except real property – is a public contract to which the policy of preserving competitive bidding as the standard contracting method applies.<sup>22</sup> The disposal of surplus property may be exempt from the competitive bidding requirements if the local contracting agency adopts its own rules.<sup>23</sup> Typically, local codes will designate the person or persons authorized to declare property “surplus,” if that authority is not retained by the local contract review board. The local code will then provide for various methods of disposal. The most common

<sup>19</sup> 10 USC 381.

<sup>20</sup> ORS 279A.180.

<sup>21</sup> LOC’s [FAQ on Surplus Property](#), available in the LOC’s online [Reference Library](#).

<sup>22</sup> Real versus personal property. Real property is considered land and anything growing on, attached to, or erected on land such as soil and buildings. Personal property is considered any movable or intangible thing that is subject to ownership and not classified as real property such as a firetruck or trademark.

<sup>23</sup> ORS 279A.185.

is a publicly advertised auction to the highest bidder but may also include a liquidation sale, fixed price sale, trade-in, donation or as a last resort, disposal as waste.

### **III. THE PROCUREMENT OF GOODS AND SERVICES**

Contracts for goods and services are governed by ORS chapter 279B and OAR chapter 137, division 47. The contract may be for goods, services, or both. Goods are supplies, equipment, materials, personal property, and includes any tangible, intangible and intellectual property, rights and licenses.<sup>24</sup> Services are all other services not designated as personal services under ORS 279A.055 or under local code.<sup>25</sup> Generally, these types of services are non-professional services such as a short-term consultant or services for office maintenance.

The public contracting code provides for two primary methods for procuring a contract for good and services: (1) the competitive sealed bid or invitation to bid (ITB); and (2) competitive sealed proposal or request for proposals (RFP). There are no statutory guidelines or preferences as to either method and the choice is the local contracting agency's to make.

An ITB typically defines the scope of work with detailed plans and specifications and will be awarded to the lowest and best bid. On the other hand, an RFP will more broadly define the scope of work, often by identifying a program or requesting a solution. An RFP will be awarded based on the level of technical ability shown as well as cost.

The public contracting code and model rules also provide for a variety of alternative contracting methods such as a multi-step bids or proposals. In addition, a local contract review board such as the city council may adopt its own contracting methods, as "special procurements" under ORS 279B.085, setting different dollar thresholds for the variety of different methods available.

#### **A. Pre-Solicitation Considerations**

Prior to deciding on the solicitation method to secure a contract for goods or services a contracting agency may want to consider a number of pre-solicitation items.

##### **1. Consultation**

Prior to proceeding with an ITB or RFP for goods and services, the contracting agency may choose to consult with outside experts, technical experts, suppliers, consultants and contractors to develop clear, precise and accurate specifications in its solicitation for public contracts.<sup>26</sup> Often times this is helpful for the contracting agency to determine how to best develop a solicitation to meet to needs of the contracting agency when the contracting agency is unclear about how to proceed. However, the contracting agency must take reasonable measures to ensure that no one who assists with the preparation of solicitation documents realizes a material

---

<sup>24</sup> ORS 279A.010(1)(i).

<sup>25</sup> ORS 279A.010(1)(kk).

<sup>26</sup> ORS 279B.210.

competitive advantage in a procurement that arises from the contracting agency's use of such experts and consultants.

## 2. Prequalification

A contracting agency may also choose to utilize the prequalification process to determine a prospective contractor's eligibility to submit an offer prior to the procurement process. A contracting agency may require prospective contractors to prequalify under ORS 279B.120 and ORS 279B.125. The prequalification process enables the contracting agency to apply criteria that reflect the standards of responsibility under which prospective contractors are measured in terms of their ability to perform the contracted work at the level of expertise and efficiency required to meet the contracting agency's needs. If prequalification is desired, the contracting agency will need to adopt prequalification rules setting out the procedure for submitting a prequalification application, the information required to determine prequalification, and the prequalification criteria. Although prequalification cannot be revoked once an ITB or RFP is issued under ORS 279B.120(3), the contracting agency may still make a determination of non-responsibility under ORS 279B.110 as discussed below in section C.1.d *Evaluation*.

### Resource

A sample feasibility determination form created by DAS is available on the [DAS website](#).

## 3. Feasibility Determinations for Service Contracts over \$250,000

Prior to beginning a procurement or entering into a service contract with an estimated price of more than \$250,000, the contracting agency must demonstrate that it would incur less cost in conducting the procurement versus performing the service with the agency's own personnel and resources, or that performing the services within the agency would not be feasible.<sup>27</sup> An example of a service contract is a contract between a city and trainer to provide continuing education to city staff.

This provision affects service contracts only, not professional services or those services to which ORS chapter 279B does not apply. In addition, the following public bodies do not have to comply with this provision:

- Cities with a population of 15,000 or less;
- Counties with a population of 30,000 or less;
- Community colleges that enroll 1,000 or less full-time equivalent students;
- Special districts, diking districts, and soil and water conservation districts;

---

<sup>27</sup> ORS 279B.030 to 279B.036.

- The Port of Portland; and
- Procurements for client services by state agencies.<sup>28</sup>

If a contracting agency wishes to procure the services of an independent contractor, the contracting agency must:

- Conduct a written cost comparison analysis showing that the contracting agency would incur less cost in contracting with an independent contractor; or
- Conduct a cost comparison analysis and make a written determination that using the contracting agency’s own personnel and resources to perform the services is not feasible under ORS 279B.036(1); or
- Make a written determination that using the contracting agency’s own personnel and resources to perform the services is not feasible under ORS 279B.036(1)(a) or (1)(b) (no cost comparison analysis required).<sup>29</sup>

Thus, under the second option above, even if the cost comparison analysis does not show that it will result in less cost to the contracting agency to contract with an independent contractor, the contracting agency may nevertheless make the feasibility determination to conclude that it would not be feasible to use the contracting agency’s own personnel and resources.

Under the third option above, a contracting agency may proceed without conducting a cost comparison analysis if it can make findings that agency personnel lack the “specialized capabilities, experience or technical or other expertise necessary to perform the services.”<sup>30</sup> Findings are required comparing the contracting agency’s capabilities, experience or expertise with a potential contractor’s capabilities, experience or expertise in the same or a similar field.<sup>31</sup>

The alternative findings permitted under the third option allow the contracting agency to rely on one or more of the “special circumstances” set forth in ORS 279B.036(1)(b) to make a determination that using the contracting agency’s own personnel and resources is not feasible. These circumstances include but are not limited to:

- Grant terms require outside procurement of independent contractor;
- State or federal law require outside procurement of independent contractor;
- Service and maintenance services incidental to a contract for purchasing or leasing real or personal property;

---

<sup>28</sup> ORS 279B.030.

<sup>29</sup> ORS 279B.036.

<sup>30</sup> ORS 279B.036(1)(a).

<sup>31</sup> *Id.*

- Emergency contracts under ORS 279B.080;
- Contracts that will be accomplished within six months after the date of contract execution;
- Policy goals, avoiding conflicts of interest, or ensuring unbiased findings; and
- Urgent or temporary need for services when delay would “frustrate purpose for obtaining services.

A contracting agency may enter into a contract with a contractor for the services only if the cost comparison analysis shows that it would cost the contracting agency more to use its own personnel and resources than it would incur in procuring the services from a contractor *and* the reason the costs are higher is not due solely to higher wage and benefit costs.<sup>32</sup> Thus, if the cost is higher due solely to higher wage and benefit costs, the contracting agency must nevertheless use its own personnel and resources. However, the statute gives the contracting agency one more out and will allow it to enter into a contract with a contractor for the services if the contracting agency determines that it lacks personnel and resources to perform the services, even if the cost is higher, regardless of the reason.<sup>33</sup> If the contracting agency chooses this latter course, ORS 279B.033(2)(b) sets forth some record keeping requirements that must be followed.

**Resource**

**Department of  
Administrative Services  
Procurement Manual**  
available at  
<https://www.oregon.gov/das/OPM/Pages/Index.aspx>

The cost comparison analysis and feasibility determinations along with the supporting records are public records subject to disclosure.<sup>34</sup> In addition, the decision under this process is exempt from the judicial review process of ORS chapter 279B and will be overturned only if it is “clearly erroneous, arbitrary, capricious or contrary to law.”<sup>35</sup> Review would be by writ of review to the circuit court under ORS chapter 34. The Oregon Department of Administrative Services (DAS) has prepared forms and other tools for state agency use under these provisions that can be easily adopted for local contracting agency use. Contact the department for additional tools.

## **B. Solicitation Methods for the Procurement of Goods and Services**

The general process to procure goods and services is by utilizing the Invitation to Bid (ITB) or Request for Proposals (RFP) process. However, this chapter will first discuss alternatives to the ITB and RFP processes. Generally, these are determined by the estimated contract cost.

---

<sup>32</sup> ORS 279B.033(2)(a).

<sup>33</sup> ORS 279B.033(2)(b).

<sup>34</sup> ORS 279B.033(3) and 279B.036(2).

<sup>35</sup> ORS 279B.145.

## 1. Direct Appointment

### a. Small Procurements - \$25,000 or Less

Small procurements for goods and services may be awarded “in any manner the contracting agency deems practical or convenient, including by direct selection or award.”<sup>36</sup> Contracts for goods or services are considered a small procurement if the procurement does not exceed \$25,000.<sup>37</sup> Contracts awarded under this method may amended to exceed \$25,000 so long as the contract does not exceed a total cost greater than \$31,250 or increase the original contract price by 25%, whichever is greater.<sup>38</sup> However, contracts for goods and services may not be artificially divided so as to constitute small procurements.<sup>39</sup>

### b. Sole Source Procurements

A public contract for goods and services can be awarded without any competition if a determination is made that “the goods or services, or class of goods or services, are available from only one source.”<sup>40</sup> The determination must be made by the local contract review board, or person delegated authority to do so under the local code. Neither the public contracting code nor the model rules contain a definition of “sole source,” but ORS 279B.075(1) requires a written determination that the goods or services “are available from *only one* source.”<sup>41</sup>

The written determination must include findings that address:

- That the efficient utilization of existing goods requires the acquisition of compatible goods or services;
- 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;
- That the goods or services are for use in a pilot or experimental project; or
- Other findings that support the conclusion that the goods or services are available from only one source.<sup>42</sup>

The findings should not try to justify or select the best source—that is done competitively. Rather, the findings must justify that there is only one source.

---

<sup>36</sup> ORS 279B.065.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; OAR 137-047-0265.

<sup>39</sup> ORS 279B.065(3).

<sup>40</sup> ORS 279B.075(1).

<sup>41</sup> *Id.* (emphasis added).

<sup>42</sup> ORS 279B.075(2).

### c. Emergency Procurements

A public contract for goods or services may be awarded without competition if an emergency exists.<sup>43</sup> An emergency contract for construction services must be awarded following “reasonable and appropriate competition” except in a case of “extreme necessity.”<sup>44</sup> The contracting agency or other person with authority under a local code must authorize the emergency procurement and must document the nature of the emergency and method of contractor selection.<sup>45</sup> Neither the public contracting code nor model rules specify when this written record must be created. Therefore, it can be created after the contract is entered into if the nature of the emergency warranted such swift action.

#### Resource

LOC’s **Emergency Procurement FAQ**, available below in the Appendix.

An emergency is defined in ORS 279A.010(1)(f) as circumstances that “(A) could not have reasonably been foreseen; (B) create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and (C) require prompt execution of a contract to remedy the condition.” Although the existence of an emergency will be self-evident in many situations as unforeseeable occurrences, this may not be so clear in less obvious emergency situations. Therefore, the contracting agency should take care to adequately document the circumstances that could not have reasonably been foreseen.

## 2. Intermediate Procurements – \$250,000 or Less

Competitive quote or proposal is an intermediate procurement method for goods or services for with an estimated contract of not more than \$250,000.<sup>46</sup> The process for intermediate procurements is set out in ORS 279B.070 and OAR 137-047-0270. All intermediate procurements may be procured by a written or verbal solicitation, but regardless of method, the contracting agency must keep a written record of the source of the quotes or proposals received. At least three competitive quotes or proposals are required, although if that is not possible, fewer will suffice if a written record of the effort to get more than three is kept.<sup>47</sup> Contracts awarded under the intermediate procurement may be amended up to \$312,500, or 125% of the original contract price, whichever is greater.<sup>48</sup> Just like small procurements, a contract cannot be artificially divided so as to constitute an intermediate procurement.<sup>49</sup> If the contract is awarded, it must be awarded to the offeror whose quote or proposal “will best serve the interests of the contracting agency, taking into account price as well as considerations including, but not limited

---

<sup>43</sup> ORS 279B.080.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> ORS 279.070.

<sup>47</sup> ORS 279B.070(4).

<sup>48</sup> *Id.*; OAR 137-047-0270.

<sup>49</sup> ORS 279B.070(3).

to, experience, expertise, product functionality, suitability for a particular purpose and contractor responsibility under ORS 279B.110.”<sup>50</sup>

### 3. Special Procurements

Special procurements are basically exemptions from the statutorily defined ITB, RFP, intermediate, and small procurement methods for goods and services discussed above.

A special procurement can be for a class of contracts—a “class special procurement,” or for a single contract—a “contract-specific special procurement.”<sup>51</sup> A class special procurement would permit a series of contracts for specified goods or services to be entered into without using the prescribed contracting process. For example, a city may wish to designate a class-special procurement for copyrighted material and creative works where the copyrighted materials or creative works that are only available from one source. Other examples of class-special procurements may include manufacturer direct supplies and employee benefit contracts. After approval of a class special procurement, the contracting agency may award contracts that fall within the class pursuant to the process adopted by the special procurement process without having to go back to the local contract review board for special procurement authority. The specified goods or services may be defined specifically as to type of goods or services, or as to dollar amounts of goods or services.

A contract-specific special procurement would permit a specific contract or a number of related contracts to be entered into without using the prescribed contracting process. For example, a city may wish to enter designate a contract-specific special procurement for time-sensitive yet non-emergency disaster cleanup services after its city hall suffered damage from a windstorm. The approval of a contract-specific special procurement is valid for that one contract or related contracts only.

Special procurements must be approved by the local contract review board, which must make the findings set forth in ORS 279B.085(4) justifying the special procurement. The findings must address the use of the special procurement:

- Is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competitions for public contracts; and
- Is reasonably expected to result in substantial cost savings to the contracting agency or to the public, or otherwise substantially promotes the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under the ITB, RFP, small or intermediate procurement source-selection methods or under any rules adopted thereunder. A special procurement can be adopted into the local code or adopted as needed under the local code by ordinance or resolution. The required findings should be attached to or within the body of the resolution or ordinance. The findings should be based on specific facts and address each of the four factors above. This is necessary not only to comply with the public contracting code but also to withstand

---

<sup>50</sup> ORS 279B.070(5).

<sup>51</sup> ORS 279B.085.

judicial review, which will be held on the record established by the local contract review board.<sup>52</sup>

Lastly, public notice of the approval of a special procurement is required. The notice must follow the requirements for an ITB notice under ORS 279B.055(4), which generally requires publication in a local newspaper at least once, as well as mailing and posting.<sup>53</sup>

#### **4. Price Agreements**

Price agreements are specifically authorized under ORS 279B.140 and defined in ORS 279A.010(1)(v). Price agreements are a type of contract under which the contractor agrees to provide goods and services at a set price with no minimum or maximum purchase amount, although an initial order may be included.

### **C. Formal Solicitation Methods**

#### **1. Competitive Sealed Bid – ITB for Goods and Services**

ORS 279B.055 and OAR 137-047-0255 provide a detailed checklist for developing the solicitations documents for an ITB. The model rule does not duplicate what is in statute, so a contracting agency who has not opted out of the model rules must follow both when drafting a solicitation document. A multi-stepped sealed bidding process is also permitted under ORS 279B.055(12)(13) in which necessary information or unpriced technical bids are solicited in the first phase, and the competitive sealed bids are solicited in the second phase from those who submitted eligible bids in the first phase. OAR 137-047-0257 provides the framework for this process.

##### **a. ITB Contents**

The ITB must include all requirements on which the bid award will be based. Many criteria are set out in ORS 279B.055(2), but additional criteria to determine minimum acceptability, such as inspection, testing, quality and suitability for intended use or purpose are permitted under ORS 279B.055(6)(a). OAR 137-047-0255 also requires the ITB to include all applicable contractual terms and conditions, including the form of contract and the consequences for failure to perform the work or meet established performance standards.

The solicitation documents must include a description of the goods or services to be secured under the procurement. The procurement description requirement in ORS 279B.055(2)(c) provides that “the contracting agency shall identify the scope of work included within the procurement, outline the contractor’s anticipated duties and set expectation for the contractor’s performance. Unless the contracting agency for good cause specifies otherwise, the scope of

---

<sup>52</sup> Review is to the circuit court by writ of review pursuant to ORS chapter 34.

<sup>53</sup> See also OAR 137-047-0300.

work shall require the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the appropriate goods or services.”

### **b. Public Notice**

Public notice of an ITB is required.<sup>54</sup> The notice must be published in a newspaper of general circulation in the area where the contract is to be performed (usually the local paper) or the local contract review board may, by rule, authorize notice of bids and proposals to be published electronically instead of in a newspaper if the electronic notice is likely to be cost-effective.<sup>55</sup> The contracting agency may use any other medium reasonable calculated to reach prospective bidders or proposers.<sup>56</sup>

### **c. Disclosure of ITB Records**

Until the notice of intent to award is issued, bids are not public records subject to disclosure, although the amount of a bid, bidder name, and other relevant information the contracting agency may determine by rule are subject to disclosure as a public record. After the notice of intent to award is issued, bids are public records subject to disclosure, although trade secrets and information submitted in confidence may be withheld from disclosure in accordance with ORS 192.345 and 192.355 of the Oregon Public Records Law.<sup>57, 58</sup>

### **d. Evaluation**

The contracting agency must evaluate all bids received before the closing date based on the requirements set forth in the ITB, but cannot consider any bids received after the closing date.<sup>59</sup> The contract must be awarded to the lowest “responsible” bidder whose bid “substantially complies” with the requirements and criteria of the ITB.<sup>60</sup> “Responsibility” is defined in ORS 279B.110 and OAR 137-047-0640(1)(c)(F). If the bidder is not responsible, the contracting agency must reject the bid and issue a written determination of non-responsibility.<sup>61</sup>

#### **Resource**

The Standards of Responsibility as provided in ORS 279B.110 are available in Appendix A.

---

<sup>54</sup> ORS 279B.055(4).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> ORS 279B.055(5)(b)(c).

<sup>58</sup> Under ORS Chapter 279C.365, bids for public improvements are public records subject to disclosure upon opening, as opposed to not until after notice of intent to award for bids submitted in the public contract for goods and services procurement process. Note that in order for information to be considered confidential and not subject to disclosure under the public records laws, it must have been submitted in confidence and the contracting agency must have committed itself to maintain confidentiality. A good place to do this would be in the solicitation documents.

<sup>59</sup> ORS 279B.055(6).

<sup>60</sup> ORS 279B.055(10).

<sup>61</sup> OAR 137-047-0500.

### **e. Negotiations**

Negotiations are not permitted, although a contracting agency may seek clarification of a bid.<sup>62</sup> Note that “clarification” does not supplement, change, correct, or otherwise alter what is already there.<sup>63</sup>

### **f. Mistakes**

Sometimes mistakes in a bid are discovered before the contract is awarded and sometimes a mistake may be waived or corrected, or the bid may be withdrawn. The contracting agency will need to consider the type of mistake before waiving the mistake, permitting correction, allowing withdrawal of the bid, or canceling the award of the contract. Under the model rules, errors in judgment cannot be corrected.<sup>64</sup> Decisions pertaining to mistakes must be given in writing.<sup>65</sup> After the contract is awarded, the bid becomes binding on the bidder and can be withdrawn or corrected only in accordance with the rules of contract law.<sup>66</sup>

## **2. Competitive Sealed Proposal – RFP for Goods and Services**

The public contracting code permits a much wider range of methods of contractor selection using RFPs rather than ITBs, including the opportunity to negotiate the scope of work or contract terms. These include, but are not limited to, serial negotiations, competitive simultaneous negotiations, competitive range, and multi-stepped proposals.<sup>67</sup> Competitive range is the designation of a proposer group with whom the contracting agency will conduct discussions or negotiations after it has evaluated and ranked all proposers. OAR 137-047-0262 sets forth the procedures for conducting competitive range, discussions, and negotiations, as well as a best and final offer process. The procedures for multistep proposals are contained in OAR 137-047-0263.

ORS 279B.060 and OAR 137-047-0260 provide a detailed checklist for developing the solicitation documents for an RFP. The model rule does not duplicate what is in the statute, so a contracting agency who has not adopted its own local rules must follow both when drafting a solicitation document.

### **a. RFP Contents**

The RFP must include all requirements on which a proposal will be evaluated, including the method of contractor selection. The RFP must also include all applicable contractual terms and

---

<sup>62</sup> ORS 279B.060(7); OAR 137-047-0600(2).

<sup>63</sup> See, *Matter of On-Line Gaming Services Contract*, 279 NJ Super 566 (1995).

<sup>64</sup> OAR 137-047-0470.

<sup>65</sup> ORS 279B.055(7).

<sup>66</sup> Note that a bid is irrevocable and binding for 30 days after closing, unless the solicitation documents specify otherwise or a longer period of time. OAR 137-047-0480.

<sup>67</sup> ORS 279B.060(8)(b).

conditions (which can be done by including the form of a draft contract) and can identify any terms and conditions that could be negotiated.<sup>68</sup>

The RFP must include a description of the procurement and the contracting agency must “identify the scope of work included within the procurement, outline the contractor’s anticipated duties and set expectations for the contractor’s performance ... require the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the appropriate goods or services” and set clear consequences of a contractor’s failure to perform the work or meet established performance standards.<sup>69</sup>

#### **b. Notice**

Public notice of an RFP is required.<sup>70</sup> The notice is given in the same manner as the notice of an ITB and must be published at least seven days before the solicitation closing date, sent to contractors who have expressed an interest if not posted on an electronic procurement system or the agency’s web site, and posted at the contracting agency’s principal business office.<sup>71</sup>

A notice of intent to award a public contract procured through the RFP process must also be given at least seven days prior to award, although a shorter period is permitted if justified under the circumstances.

#### **c. Disclosure of RFP Records**

Until the notice of intent to award is issued, proposals are not public records subject to disclosure, although the name of the proposer is subject to disclosure as a public record after the proposals are opened. After the notice of intent to award is issued, proposals are public records subject to disclosure, subject to any applicable exemptions in the Oregon Public Records Law.<sup>72</sup>

#### **d. Evaluation and Award**

The contract must be awarded to the “responsible” proposer whose proposal is the “most advantageous to the contracting agency” based on: (1) the evaluation process and criteria in the RFP; (2) any applicable preferences required by ORS 279A.120 and ORS 279A.125; and (3) the outcome of negotiations, if any, authorized by the RFP.<sup>73</sup> As previously addressed above, “responsibility” is defined in ORS 279B.110 and OAR 137-047-0640(1)(c)(F). As with bidders, if the proposer is not responsible, the contracting agency must reject the proposal and issue a written determination of non-responsibility.<sup>74</sup> The contracting agency is required to obtain “the

---

<sup>68</sup> ORS 279B.060(2)(h).

<sup>69</sup> *Id.*

<sup>70</sup> ORS 279B.060(5).

<sup>71</sup> *Id.*; OAR 137-047-0300.

<sup>72</sup> ORS 279B.060(6). *Compare* ORS 279C.410 which does not contain a similar requirement to disclose the names of the proposers prior to notice of intent to award.

<sup>73</sup> ORS 279B.060(8).

<sup>74</sup> ORS 279B.110; OAR 137-047-0500.

proposer's agreement to perform the scope of work and meet the performance standards set forth in the final negotiated scope of work" before executing the contract.<sup>75</sup>

#### **D. Other Solicitation Considerations**

Once the solicitation is issued, there may be a number of additional items and steps for the contracting agency to consider such as cancellation, debarment, and amendments.

##### **1. Cancellation, Rejection, Delay**

Any solicitation may be cancelled, suspended or delayed, or all offers may be rejected when the contracting agency determines that it is "in the best interest of the contracting agency."<sup>76</sup> Additional criteria may include:

- The content of or an error in the solicitation document or the procurement process unnecessarily restricted competition for the contract.
- The price, quality or performance presented by the prospective contractors are too costly or of insufficient quality to justify acceptance of any offer.
- Misconduct, error, or ambiguous or misleading provisions in the solicitation document threaten the fairness and integrity of the competitive process.<sup>77</sup>

Any or all bids or proposals submitted in response to an ITB or RFP may be rejected in whole or in part for the same reasons. The reasons must be documented and placed in the solicitation file. The ability to cancel, reject or delay is a valuable tool for the contracting agency and can protect it from entering into an uneconomical contract (due to offers being higher than anticipated or budgeted), or from entering into a contract that will not meet the agency's needs (due to defects in the specifications, flaws in the award criteria, or misconduct by contractors). There is no liability to the contracting agency for cancelling, suspending, delaying a solicitation or rejecting any bid or proposal. The contracting agency, however, must give written notice of the cancellation. If the cancellation is made prior to opening, the contracting agency must simply give written notice to all potential contractors who submitted offers and the contracting agency should return all submitted offers.<sup>78</sup> If the solicitation is cancelled after opening, the contracting agency must keep all bids submitted in response to an ITB but may return proposals submitted in response to an RFP.<sup>79</sup> If all offers are rejected in response to an ITB or RFP, the contracting agency must keep all bids and proposals.<sup>80</sup>

---

<sup>75</sup> ORS 279B.060.

<sup>76</sup> ORS 279B.100(1).

<sup>77</sup> OAR 137-047-0650.

<sup>78</sup> OAR 137-047-0660(3); OAR 137-047-0670.

<sup>79</sup> ORS 279B.060(6)(c).

<sup>80</sup> OAR 137-047-0670(3).

## 2. Debarment

A contracting agency may debar prospective contractors from consideration for award of the contracting agency's contracts for reasons listed in ORS 279B.130(2). These reasons include:

- The prospective contractor has been convicted of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract or in the performance of a public or private contract or subcontract.
- The prospective contractor 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 contractor's responsibility as a contractor.
- The prospective contractor has been convicted under state or federal antitrust statutes.
- The prospective contractor has committed a violation of a contract provision that is regarded by the contracting agency or the Oregon Construction Contractors Board to be so serious as to justify disqualification.
- The prospective contractor does not carry workers' compensation or unemployment insurance as required by statute. The contracting agency must issue a written decision to debar a prospective contractor and the decision must state the reasons for the action taken and inform the debarred prospective contractor of their appeal rights under ORS 279B.425. A copy of the written decision must be mailed or otherwise immediately furnished to the debarred prospective contractor.<sup>81</sup>

## 3. Contract Amendments

If the contracting agency has not adopted its own local rules pertaining to contract amendments, the model rule provisions regarding contract amendments will apply. Under the model rules, a contracting agency may amend a contract to (1) add additional goods or services within the scope of the solicitation, contract or special procurement; or (2) renegotiate terms and conditions if it is advantageous to the contracting agency, subject to several limitations.<sup>82</sup> As discussed below, small and intermediate procurements may be amended so long as the amendments do not increase the total contract price of more than \$31,250, or 125% of the original contract price, whichever is greater for small procurements and \$312,500, or 125% of the original contract price, whichever is greater, for intermediate procurements.<sup>83</sup>

---

<sup>81</sup> ORS 279B.130(3) & (4).

<sup>82</sup> OAR 137-047-0800.

<sup>83</sup> ORS 279B.065 to 279B.070; OAR 137-047-0265 to 137-047-0270.

## IV. Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, and Land Surveying Services

The procurement of architectural, engineering, photogrammetric mapping, transportation planning, and land surveying services (A&E or related services) is governed by ORS chapter 279B, chapter 279C, and OAR chapter 137, division 48.

The procedures that a contracting agency creates to screen prospective consultants and make a selection are at the contracting agency's sole discretion. The contracting agency may adjust the procedures to accommodate the contracting agency's scope, schedule or objectives for a particular project if the estimated cost of the services does not exceed \$250,000.<sup>84</sup>

The model rules require a contracting agency to maintain a list of consultants who are interested in provided A&E or related services. OAR 137-048-0120 permits consultants to annually submit a statement describing their qualifications and related performance information for the list and requires the contracting agency to update the list every two years.

The default method for soliciting the procurement of these A&E or related services in the model rules is the "qualification based selection" (QBS) process.<sup>85</sup> However, note that a contracting agency may adopt its own provisions consistent with ORS 279C.100 to ORS 279C.124 and designate certain personal services contracts or classes or personal service contracts as contracts for A&E or related services.

### A. Direct Appointment

A contract for A&E or related services may be entered into directly without solicitation:

- In the case of an emergency;
- If the contract amount will not exceed \$100,000; or
- If the contract is for continuation of a project.<sup>86</sup>

If the contract is for continuation of a project where the estimated fee does not exceed \$250,000 the following must apply:

- The services "have been substantially described, planned or otherwise previously studied" in an earlier contract with the same consultant and are rendered for the same project; and

---

<sup>84</sup> ORS 279C.110.

<sup>85</sup> *Id.*

<sup>86</sup> OAR 137-048-0200.

- The contracting agency used a formal procurement process available to the contracting agency under OAR 137-048-0220 to select the consultant for the earlier contract.<sup>87</sup>

If the contract is for continuation of a project with an estimated fee that exceeds \$250,000, the following must apply:

- The services “have been substantially described, planned or otherwise previously studied” in an earlier contract with the same consultant and are rendered for the same project;
- The contracting agency used a formal procurement process available to the contracting agency under OAR 137-048-0220 to select the consultant for the earlier contract; and
- The contracting agency makes written findings that entering into a contract with the consultant, is an efficient use of public funds and resources and results in substantial cost savings for the contracting agency and protect the integrity of the public contracting process and competitive nature of procurement by not encouraging favoritism or substantially diminishing competition in the award of the contract.<sup>88</sup>

## **B. Informal Selection Procedure**

A contracting agency may enter into a contract for A&E or related services using the informal selection procedure in OAR 137-048-0210 if the contract amount will not exceed \$250,000.<sup>89</sup> The informal selection procedure may be conducted based on qualifications, price or a combination via a written RFP that must be provided to at least five prospective consultants.<sup>90</sup> If less than five prospective consultants are available, the contracting agency must provide the RFP to all available prospective consultants and maintain a written record of the contracting agency’s efforts to locate available prospective consultants for the RFP.<sup>91</sup> The model rule specifies the contents of the RFP and how to determine the consultants to whom the request will be given. After receipt of the proposals, negotiations must proceed serially with the three highest ranked proposers until the contracting agency reaches agreement with the proposer.<sup>92</sup> If agreement is not reached upon the conclusion of negotiations with the third highest ranked proposer, the contracting agency may then terminate the solicitation.<sup>93</sup>

If it becomes clear that the contract price will exceed \$250,000, the contracting agency must terminate the procurement and use the formal selection procedure described in OAR 137-048-0220.<sup>94</sup>

---

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> OAR 137-048-0210.

<sup>90</sup> OAR 137-048-0210(2)(3).

<sup>91</sup> *Id.*

<sup>92</sup> OAR 137-0480-0210(4)(5).

<sup>93</sup> *Id.*

<sup>94</sup> OAR 137-048-0210(8).

### C. Formal Selection Procedure

Under the formal selection procedure outlined in ORS 279C.110 and OAR 137-048-0220, the contracting agency may either obtain contracts through public advertisements of RFPs or requests for qualifications (RFQ) followed by RFPs.<sup>95</sup> The formal selection procedure requires advertising notice of the procurement in a manner similar to advertising public contracts for goods and services. Negotiation under the formal selection procedure must proceed serially with the highest ranked proposers based on qualifications.

There are two QBS processes available to cities. The traditional QBS process is a process under which a contractor is selected on the basis of qualifications alone; the consideration of price for those services cannot be considered. However, once the contractor is chosen, on the basis of qualifications, the contracting agency may discuss and negotiate price.<sup>96</sup>

The alternative QBS process provides contracting agencies with the ability to consider cost if certain requirements are met.<sup>97</sup> To consider cost, the contracting agency must state in the solicitation documents for the procurement:

- That the local contracting agency will screen and select prospective consultants as provided in ORS 279C.110(5);
- How the local contracting agency will rank proposals from prospective consultants, with a specific focus on factors the agency will consider in evaluating proposals and the relative weight the agency will give each factor;
- An estimate of the cost of professional services the local contracting agency requires for the procurement; and
- A scope of work that is sufficiently detailed to enable a prospective consultant to prepare a responsive proposal.<sup>98</sup>

The contracting agency must then evaluate each prospective consultant on the basis of the prospective consultant's qualifications to perform the professional services the local contracting agency requires for the procurement.<sup>99</sup> The contracting agency may use the criteria set forth in ORS 279C.110(3) to conduct the evaluation.<sup>100</sup>

After evaluation, the contracting agency must the evaluation scores and rank for each prospective consultant after completing the evaluation described above.<sup>101</sup>

---

<sup>95</sup> OAR 137-048-220(2).

<sup>96</sup> ORS 279C.110(1).

<sup>97</sup> ORS 279C.110(5).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

Under this alternative QBS process, a contracting agency must select up to three prospective consultants based on qualifications.<sup>102</sup> Pricing information could then be received from all three firms but could be weighed no more than 15% in the final evaluation and score.<sup>103</sup> A prospective consultant may withdraw from consideration if the consultant does not wish to provide a price proposal.<sup>104</sup>

However, if agreement is not reached upon the conclusion of negotiations with any proposer, the contracting agency may then terminate the solicitation.<sup>105</sup>

#### **D. Selection for Local Public Improvements Procured Through a State Agency**

When a public improvement is owned and maintained by a city or other local government and the Oregon Department of Transportation, Department of Administrative Services or another state contracting agency will serve as the lead state contracting agency and will execute personal services contracts for A&E or related services, a two-step solicitation process governed by the state agency's own rules will apply.<sup>106</sup> The state agency will be responsible for selecting no fewer than the three most qualified consultants and the city or local government is responsible for the final selection of the consultant from the state agency list provided.<sup>107</sup>

#### **E. Ties, Protests, and Cancellation**

If a tie occurs between proposers selected based on qualifications alone, the model rule allows that contracting agency to select the winning contractor through any process it believes will "result in the best value" for the contracting agency and that "instill[s] public confidence through ethical and fair dealing, honest and good faith" in the contracting agency.<sup>108</sup> If the tie occurs between proposers selected based on qualification and price, the contracting agency must follow the local preferences procedures in OAR 137-046-0300 to determine the winning contractor.<sup>109</sup>

Solicitation and award protests are governed by OAR 137-048-0240. OAR 137-048-0240 establishes a seven-day deadline for submission of solicitation document protests prior to closing. Contract award protests must be submitted within seven days after the date of the selection notice.<sup>110</sup> In either case, the contracting agency may provide for a longer period in the solicitation document. The contracting agency may cancel, delay, or suspend a solicitation at any time if it is in the public interest to do so, with no liability to the contracting agency for costs incurred by responding consultants.<sup>111</sup>

---

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> OAR 137-048-0220

<sup>106</sup> ORS 279C.125.

<sup>107</sup> *Id.*

<sup>108</sup> OAR 137-048-0230(1).

<sup>109</sup> OAR 137-048-0230(2).

<sup>110</sup> OAR 137-048-0240.

<sup>111</sup> OAR 137-048-0250.

## V. The Procurement of Public Improvements

The procurement of public improvement contracts is governed by ORS chapter 279C and OAR chapter 137, division 49. Public improvement contracts are generally known as construction contracts. These contracts are for the “construction, reconstruction or major renovation on real property by or for the contracting agency.”<sup>112</sup> Contracts for emergency work, minor alterations, or ordinary repair and maintenance are specifically excluded from the definition of a public improvement contract and as such, those contracts are subject to the provision of ORS chapter 279B and generally follow the rules governing contracts for goods and services.<sup>113</sup>

The underlying policy of the laws governing public improvement contracts is to construct public improvements at the least cost to the contracting agency.<sup>114</sup> Therefore, the primary method for procuring a public improvement contract is the ITB in which the contract is awarded to the bidder with the lowest price.<sup>115</sup> If a contracting agency does not want to follow the ITB process for a public improvement contract, an exception must apply or the contracting agency must adopt an exemption.

### A. Pre-Solicitation Considerations

As with the procurement of goods and services, a contracting agency should consider a number of items prior to beginning a solicitation for a public improvement contract such as prequalification and disqualification.

#### 1. Prequalification

A contracting agency may require prospective contractors to prequalify under ORS 279C.430. There are two types of prequalification—mandatory and permissive. Under mandatory prequalification, the contracting agency can limit distribution of a solicitation to those contractors who have prequalified.<sup>116</sup> Under permissive prequalification, the distribution cannot be so limited.<sup>117</sup>

If mandatory pre-qualification is desired, the contracting agency must adopt a process by ordinance, resolution or rule and prescribe the forms and manner for submitting pre-qualification applications.<sup>118</sup> Unless the contracting agency’s local contract review board has delegated this authority, an ordinance or resolution of the local review board will be required.<sup>119</sup> Permissive pre-qualification does not need to be adopted or authorized by the local contract review board and may be implemented for all or some public improvement contractors through the contracting agency’s policies and own applications forms. The standards for determining pre-qualification

---

<sup>112</sup> ORS 279A.010(1)(dd).

<sup>113</sup> *Id.*

<sup>114</sup> ORS 279C.305.

<sup>115</sup> ORS 279C.300.

<sup>116</sup> OAR 137-049-0220(1)(a).

<sup>117</sup> OAR 137-049-0220(1)(b).

<sup>118</sup> ORS 279C.430.

<sup>119</sup> *Id.*

are the same as determining responsibility as provided in ORS 279C.375(3)(b) and discussed below in section IV.D.7.<sup>120</sup>

## 2. Disqualification

A contracting agency may disqualify a contractor who has previously been prequalified under ORS 279C.430.<sup>121</sup> This is similar to the debarment process for contracts for goods and services. The grounds for disqualification are a little different than the groups for prequalification and criteria to determine responsibility. The groups for disqualification due to responsibility issues are limited to:

- The person has been convicted of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.
- The person 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 person's responsibility as a contractor.
- The person has been convicted under state or federal antitrust statutes.
- The person has committed a violation of a contract provision that is regarded by the contracting agency or the Oregon Construction Contractors Board to be so serious as to justify disqualification. 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 a basis for disqualification.
- The person does not carry workers' compensation or unemployment insurance as required by statute.<sup>122</sup>

In addition, it is possible to disqualify a contractor under ORS 200.065 and ORS 200.075 for engaging in any specified fraudulent or prohibited conduct related to obtaining certification as or subcontracting with a disadvantaged, minority, women or emerging small business enterprise. The same notice, hearing and appeal rights apply to disqualification under these provisions.

The disqualification cannot last more than three years and the contracting agency must provide written notice and opportunity for the contractor to have a hearing to respond to the disqualification.<sup>123</sup> The decision to disqualify must be in writing, personally served or sent by certified mail, state the reasons for the disqualification, and advise the contractor of their rights

---

<sup>120</sup> ORS 279C.430(2).

<sup>121</sup> ORS 279C.440.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

to appeal the decision under ORS279C.445 and 279C.450.<sup>124</sup> In lieu of going through the disqualification process itself, a contracting agency may also submit a request to the Oregon Construction Contractors Board to disqualify a contractor.<sup>125</sup>

## **B. Alternatives Solicitation Methods for the Procurement of Public Improvement Contracts**

The primary method for the solicitation of public improvement contracts is the Invitation to Bid process. However, a public contracting agency may want to consider alternative methods as outlined below prior to embarking on the ITB process.

### **1. Public Improvements Constructed by the Contracting Agency**

The public contracting code does not prohibit a contracting agency from constructing public improvements using its own personnel and equipment but there are a few restrictions. First before proceeding in house, the contracting agency must follow the state’s least cost policy.<sup>126</sup> The least cost policy generally requires a contracting agency to file certain reports with the Oregon Bureau of Labor and Industries (BOLI) before constructing a public improvement with the contracting agency’s own equipment and personnel.<sup>127</sup> These reports include an annual summary of planned public improvements and a least cost analysis.<sup>128</sup>

**Resource**

**LOC’s FAQ on Public Improvement Least Cost Contracting Requirements, available in below Appendix**

A contracting agency is exempt from filing an annual summary of planned public improvements if:

- No public improvement projects are planned for the upcoming budget period; or
- Planned public improvements projects only entail the placing of maintenance patching, chip seals or other seals as a maintenance treatment on highways, roads, streets or bridges.<sup>129</sup>

Additionally, a contracting agency does not have to list on its summary, any public improvement projects that are for resurfacing highways, roads or streets at a depth of two inches or less, or have an estimated cost of \$125,000 or less.<sup>130</sup>

---

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> ORS 279C.305.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

ORS 279C.305(5) identifies when certain public improvements are exempt from the least cost policy in its entirety:

- A public improvement for distributing or transmitting electric power.
- When the contracting agency did not receive a responsive bid or proposal for constructing the public improvement from a responsible bidder or proposer after soliciting bids or proposals and the solicitation occurred within one year before the date on which the construction began and allowed a commercially responsible reasonable time in which to perform the construction.

## **2. Direct Appointment**

A public improvement contract with a value of less than \$25,000 may be solicited by direct appointment.<sup>131</sup>

## **3. Competitive Quotes**

Another procurement method for public improvement contracts permitted by the public contracting code is the competitive quote process for “intermediate” procurements in ORS 279C.412 to 279C.414. An “intermediate” procurement is one that is estimated not to exceed \$100,000.<sup>132</sup> This process is less formal than the ITB process and allows evaluation based on price alone, or on price and other factors such as contractor experience, expertise, availability, project understanding, and contractor capacity.<sup>133</sup>

The offers may be solicited in writing or orally. However, for public improvement contracts that are considered public works under the prevailing wage laws, the quotes must be requested in writing unless written copies of the prevailing wage rates are not required by BOLI.<sup>134</sup> More than three quotes are not required, but if less than three are obtained, the contracting agency must keep a written record of why it could only obtain three quotes.<sup>135</sup>

When awarding a public improvement contract procured through the competitive quote process, the contracting agency must award the contract “to the prospective contractor whose quote will best serve the interests of the contracting agency,” taking into account price and responsibility as well as any other selection criteria announced by the contracting agency.<sup>136</sup> Note that if the award is not based on price alone, the contracting agency must make a written record of the basis for the award.<sup>137</sup>

---

<sup>131</sup> ORS 279C.335(1)(c).

<sup>132</sup> ORS 279C.412.

<sup>133</sup> ORS 279C.414.

<sup>134</sup> OAR 137-049-0160(3).

<sup>135</sup> OAR 137-049-0160(4).

<sup>136</sup> ORS 279C.414.

<sup>137</sup> OAR 137-049-0160(5).

Given the marked departure from the ITB process afforded by the competitive quote process, smaller jurisdictions may find the \$100,000 threshold too high for such an informal procurement process and can provide for a lower limit in its local rules. Also, because public improvement contracts valued at less than \$10,000 are not required to be procured using the ITB process, a contracting agency can nevertheless require a competitive quote or similar process for those contracts as well.

#### **4. Exempt Contracts**

ORS 279C.335 contains the few exceptions to the ITB process required for public improvement contracts. In addition to the intermediate procurements and ESPCs described above, additional exceptions include:

- Contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 to 279.855.
- A public improvement contract exempted by the contracting agency under ORS 279C.335.
- A public improvement contract with a contract price that does not exceed \$100,000 made under the procedures for competitive quotes in ORS 279C.412 and 279C.414.
- Contracts for repair, maintenance, improvement or protection of property obtained by the Department of Veterans' Affairs under ORS 407.135 and 407.145(1).
- A public improvement contract with an estimated contract price of \$250,000 or less that the contracting agency awards to an emergency small business certified under ORS 200.055 and funds with moneys from the Emergency Small Business Account established under ORS 200.180. Of note are contracts that are exempted under ORS 279C.335. A contract or class of contracts may be exempted from the competitive bidding process under ORS 279C.335 if an exception does not otherwise apply. Notice, a public hearing, and written findings are required.<sup>138</sup>

Similar to the findings required for special procurements of public contracts for goods and services, the findings for exemptions for public improvement contracts must affirmatively determine that:

- It is unlikely that the proposed exemption will encourage favoritism in the awarding of public improvement contracts; or substantially diminish competition for public improvement contracts;

---

<sup>138</sup> ORS 279C.335.

- The awarding of the public improvement contract(s) will likely result in substantial cost savings and other substantial benefits to the contracting agency.<sup>139</sup>

The model rules provide additional guidance when addressing cost savings, favoritism and competition.<sup>140</sup> In addition, the model rules suggest that the contracting agency provide a detailed description of the alternative contracting method that will be used in lieu of competitive bidding.<sup>141</sup>

If the exemption is for a class of contracts, the defining characteristics of the class must be clearly identified.<sup>142</sup> The characteristics must: (a) be reasonably related to the exemption criteria above; and (b) include “some combination of project descriptions or locations, time periods, contract values, methods of procurement or other factors that distinguish the limited and related class of public improvement contracts from the agency’s overall construction program.”<sup>143</sup> The class cannot be defined solely by funding source or method of procurement.

The public hearing required by ORS 279C.335 must be noticed by publication in at least one trade newspaper of general statewide circulation. This is typically the *Daily Journal of Commerce*.<sup>144</sup> The notice must be published at least 14 days before the hearing, state the purpose of the hearing, and state that the draft findings are available for review. Thus, the findings must be prepared and ready for review by the first date of publication.

In situations when the contracting agency “is required to act promptly due to circumstances beyond the agency’s control that do not constitute an emergency,” the contracting agency may publish notice of the public hearing simultaneously with the procurement notice, so long as the closing date is at least five days after the public hearing date.<sup>145</sup>

A challenge to an exemption under these provisions is made directly to circuit court via the writ of review process.<sup>146</sup>

## 5. Alternative Methods Provided in Model Rules

While not specifically mentioned in the public contracting code, the model rules discuss some of the more common types of alternative procurement methods used other than the RFP or competitive quote process. These include design-build, energy savings performance contracts (ESPC), and construction manager/general contractor (CM/GC) methods. With the exception of the ESPC method, which is statutorily exempted, these methods require the contracting agency to adopt a separate exemption prior to proceeding.

---

<sup>139</sup> *Id.*

<sup>140</sup> OAR 137-049-0630.

<sup>141</sup> OAR 137-049-0630(5).

<sup>142</sup> ORS 279C.335(3).

<sup>143</sup> *Id.*

<sup>144</sup> *Daily Journal of Commerce* website <https://djcoregon.com/> (last accessed April 2026).

<sup>145</sup> ORS 279C.335(5).

<sup>146</sup> ORS 279C.350(3).

### **a. Design Build**

A design-build contract is a contract under which the same contractor provides design services, participates on the project team with the contracting agency, provides construction services, and manages both design and construction.<sup>147</sup> The design-build form of contracting is available as an alternative to the traditional ITB method under the model rules.<sup>148</sup> The model rules warn that design-build contracts have technical complexities that are not readily apparent and should be used only with the assistance of knowledgeable staff or consultants.<sup>149</sup>

The benefits of using the design-build method are listed in the rule as follows:

- 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;
- 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;
- 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;
- 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
- 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.<sup>150</sup>

### **b. Energy Savings Performance Contracts (ESPC)**

An ESPC is a public improvement contract that provides for the identification, evaluation, recommendation, design and construction of energy conservation measures that guarantee energy savings or performance.<sup>151</sup> Similar to design-build contracts, the ESPC method is available as an alternative to the formal ITB process under the model rules.<sup>152</sup> The contract must be entered into between the contracting agency and a “Qualified Energy Services Company” or ESCO. ESCOs generally are experienced and financially secure entities with proven track records of providing and implementing energy conservation measures. The model rules define additional terms unique

---

<sup>147</sup> OAR 137-049-0610(6).

<sup>148</sup> ORS 279C.335; OAR 137-049-0670.

<sup>149</sup> OAR 137-049-0670(1).

<sup>150</sup> *Id.*

<sup>151</sup> OAR 137-049-0610(10).

<sup>152</sup> ORS 279C.335(1)(f); OAR 137-049-0620(2).

to ESPCs and provide a detailed procurement process for the use of ESPCs at OAR 137-049-0620 and 137-049-0680.

**c. Construction Manager/General Contractor (CM/GC)**

A construction manager at risk contract (CM/GC) is similar to a design-build contract, except that the contractor takes on much more responsibility and risk. CM/GC services are construction-related services that a contracting agency procured by means of an alternative contracting method under ORS 279C.335 that:

- Include a construction manager/general contractor's:
  - Functioning as a member of a project team that includes the contracting agency, the architect or engineer that designs the public improvement under a separate contract with the contracting agency and other contractors and consultants; and
  - Reviewing and analyzing a design for a public improvement in order to:
    - Suggest changes in the design that minimize potential errors, delays, unexpected costs and other problems during construction;
    - Recommend means by which the contracting agency may achieve the functions of the public improvement or a component of the public improvement safely, reliably, efficiently and at the lowest overall cost;
    - Improve the value and quality of the public improvement; and
    - Reduce the time necessary to complete the public improvement; and
- May include, depending on the specific terms of the public improvement contract and on whether the contracting agency decides to proceed with construction, a construction manager/general contractor's:
  - Devising a schedule for constructing the public improvement;
  - Estimating construction, materials, labor and other costs for the public improvement;
  - Establishing a fixed price, a guaranteed maximum price or other maximum price;
  - Constructing portions of the public improvement and subcontracting portions to other contractors;
  - Coordinating and overseeing the construction process; or

- Performing other services related to constructing a public improvement in accordance with the terms of the public improvement contract.<sup>153</sup>

Like its cousin, the design-build contract, the CM/GC contract method is technically complex and the model rules again advise proceeding with this method only with knowledgeable staff or consultants.<sup>154</sup> The skills needed to manage this type of contract extend from design and construction to cost control, accounting, legal, and project management. In addition, unlike the design-build contract, there is no single contractor in charge, or single contract. Contracting agencies may not adopt their own local rules for procuring CM/GC contractor services.<sup>155</sup>

## **6. Competitive Proposals as an Alternative to ITB**

The RFP process may be utilized in lieu of the ITB process only as provided in ORS 279C.400 to 279C.410. This means that unless there is a statutory exception in ORS 279C.400 to 279C.410 permitting the use of the RFP process for procuring a public improvement contract, an exemption must be obtained under ORS 279C.335. If the RFP process is used for a contract or class of contract with value of over \$100,000, the contracting agency must prepare a written report evaluating how well the RFP process worked, including ultimate costs and how the outcome compared to the findings providing for the exemption.<sup>156</sup> The report must be prepared within 30 days of the date the contracting agency accepts the work under the contract or, in the case of a class of contracts, accepts the work under the last contract in the class. The report is submitted to the contracting agency's local contract review board except in the case of certain transportation improvement contracts described in ORS 279A.050(3)(b), which are submitted to the state's director of transportation.

Unlike ITBs, negotiations are permitted with more than just the highest ranked proposer so long as the solicitation documents included provisions permitting negotiations. If the solicitation documents did not address negotiation, the contracting agency is limited to negotiating with only the highest ranked proposer.<sup>157</sup> Negotiations can also occur during the competitive range process and the model rules provide a process in OAR 137-049-0650(6).

### **C. Formal Solicitation Method– ITB**

The standard process for procuring public improvement contracts is by issuing an ITB because it is designed to result in a contract with the lowest responsible bidder.

#### **1. ITB Contents**

The required contents for ITBs are set out in ORS 279C.365 and OAR 137-049-0200. The required contents are:

---

<sup>153</sup> ORS 279C.332(3).

<sup>154</sup> OAR 137-049-0690(1).

<sup>155</sup> ORS 279A.065.

<sup>156</sup> ORS 279C.355.

<sup>157</sup> ORS 279C.410; OAR 137-049-0650(3)(a)(B).

- A designation for or description of the public improvement project;
- The office where the specifications for the project may be reviewed;
- The date that pre-qualification applications must be filed and the class or classes of work for which bidders must be prequalified if pre-qualification is a requirement;
- The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement, and may, in the sole discretion of the contracting agency, direct, or permit bidders to submit and the contracting agency to receive bids by electronic means;
- The name and the title of the person designated to receive bids;
- The date on which and the time and place at which the contracting agency will publicly open the bids;
- A statement that, if the contract is for a public works project subject to prevailing rates of wage, the contracting agency will not receive or consider a bid unless the bid contains a statement by the bidder that the bidder will comply with applicable state and federal prevailing rates of wage;
- A statement that each bid must identify whether the bidder is a resident bidder;
- A statement that the contracting agency may reject a bid that does not comply with prescribed public contracting procedures and requirements and that the contracting agency may reject for good cause all bids after finding that doing so is in the public interest;
- Information addressing whether a contractor or subcontractor must be licensed for asbestos abatement; and
- A statement that the contracting agency may not receive or consider a bid unless the bidder is licensed by the Oregon Construction Contractors Board or the Landscape Contractors Board.<sup>158</sup>

All submitted bids are required to be:

- In writing;
- Filed with the person designed by the contracting agency to receive bids; and

---

<sup>158</sup> ORS 279C.365; OAR 137-049-0200.

- Opened publicly by the contracting agency immediately after the deadline for submitting bids.<sup>159</sup>

If the public improvement project has a value, estimated by the contracting agency, of more than \$100,000, or \$50,000 for transportation projects, a bidder must submit or post a surety bond, irrevocable letter of credit issued by an insured institution, cashier's check or certified check for all bids as bid security unless the contracting agency has exempted the contract for which the bidder submits a bid from this requirement under ORS 279C.390.<sup>160</sup> The security may not exceed 10% of the amount bid for the contract.<sup>161</sup> After the contracting agency opens the bid, the contracting agency shall make the bids available for public inspection.

## 2. Advertisement

The procurement of all public improvement contracts must be advertised.<sup>162</sup> The advertising requirements require publication at least once in a local newspaper of general circulation in the area where the contract is to be performed<sup>163</sup> The contracting agency's local contract review board by rule or order may authorize advertisements for public improvement contracts to be published electronically instead of in a newspaper of general circulation if it determines that electronic advertisements are likely to be cost-effective.<sup>164</sup> If the estimated cost of the project exceeds \$125,000, the advertisement must also be published in at least one trade newspaper of general statewide circulation.<sup>165</sup>

The advertisement must state:

- The public improvement project;
- The office where the specifications for the project may be reviewed;
- The date that prequalification applications must be filed under ORS 279C.430 and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;
- The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement;
- The name and title of the person designated for receipt of bids;
- The date, time and place that the contracting agency will publicly open the bids; and

---

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> ORS 279C.360.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

- If the contract is for a public works subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act.<sup>166</sup>

### **3. Addenda, Clarification and Contract Specific Protests**

Changes to the ITB are made by written addenda. The model rules require changes to be in writing and be provided in accordance with OAR 137-049-0250. Addenda should be issued at least 72 hours prior to closing to give prospective offerors an opportunity to review the addenda and make any changes to an offer. Contracting agencies should have procedures pursuant to which prospective offerors provide written acknowledgement of receipt of addenda. Sometimes it may be necessary to extend closing to accommodate an addendum.

Prospective offerors have the opportunity under the model rules to submit requests for clarification or changes to the solicitation documents, including any addenda. Similarly, prospective offerors may submit protests to any specifications or contract terms. A specification or contract term protest must specify the legal and factual grounds, why the terms prejudice the offeror, and how the term could be changed.

OAR 137-049-0260 sets out the process for submitting and processing these requests and provides an administrative review process for protests that must be followed prior to seeking judicial review. Both a request for clarification and protest must be submitted at least 10 days prior to closing. If the contracting agency agrees with or approves a request or protest, it may issue an addendum and may extend the closing date if necessary.

If the contracting agency has opted out of the model rules, the local code or the contract documents will need to be consulted to determine the process for requests for clarification and protests.

If care has been taken in drafting the solicitation documents and following the appropriate procedures, there is little a contracting agency can do to otherwise avoid contract-specific protests. However, if a protest is received the following steps can help resolve the protest successfully.

First, the contracting agency should review the solicitation documents to determine if the objection is related to a clause or information inadvertently or mistakenly included in the solicitation documents. This easily happens when documents from a prior solicitation are used for the next. Next, if the clause or information is meant to be included, the contracting agency should determine whether it can be clarified instead of issuing an addendum. It is permissible to speak with the protester to understand the nature of the protest. Regardless of the outcome, the contracting agency should make sure to properly document the protest and response in the event of an appeal later, or award protest.

---

<sup>166</sup> *Id.*; 40 U.S.C. 3141 et seq.

#### 4. Pre-Offer Conference

Contracting agencies may hold mandatory or optional pre-offer conferences prior to closing the ITB.<sup>167</sup> Statements made at a pre-offer conference do not change the solicitation documents and are not binding on the contracting agency unless a confirming written addendum to the solicitation document is issued.<sup>168</sup>

#### 5. First Tier Subcontractor Disclosure and Subcontractor Substitution

First-tier subcontractor disclosure applies only to public improvement contracts that are procured through the ITB process and that are anticipated to cost more than \$100,000.<sup>169</sup> ORS 279C.370 specifies which subcontractors must be disclosed and the form of the disclosure. If first-tier subcontractor disclosure is required, then special rules apply regarding the closing and bid opening date and time.<sup>170</sup> The first-tier subcontractor disclosure is submitted with the bid or within two hours after closing.<sup>171</sup> A bid that does not include the required disclosure is considered nonresponsive and must be rejected.<sup>172</sup> The disclosures become public records after bid opening along with the remaining bid documents.

A contractor may substitute an undisclosed first-tier subcontractor for another subcontractor only in accordance with ORS 279C.585. The statute makes it clear that the contracting agency does not have any authority to review, approve or resolve disputes regarding substitutions. A complaint procedure is provided for subcontractors under ORS 279C.590.

#### 6. Bid Evaluation

The evaluation of submitted bids must be made in accordance with the evaluation process described in the ITB documents. As previously mentioned, bids are awarded to the lowest responsible bidder based on price. The price can be provided as a lump sum or as a unit price.<sup>173</sup> The total bid price can be altered if the contracting agency has elected to include “additive or deductive alternates.”<sup>174</sup> These are the elements of work that can be included, or not, at the discretion of the contracting agency, so long as the contracting agency has included provisions in the ITB documents providing as such. How to calculate the lump sum or unit price is described in OAR 137-049-0380.

The model rules describe the basic elements of the bid evaluation process that should be described in the ITB documents and permits the inclusion of various “special evaluation factors” that may be considered in determining actual cost.<sup>175</sup> A special evaluation factor is a “predictor of actual future costs” and must be an “objective, reasonable estimate based upon information

---

<sup>167</sup> OAR 137-049-0240.

<sup>168</sup> *Id.*

<sup>169</sup> ORS 279C.370(1).

<sup>170</sup> *See* ORS 279C.370; OAR 137-049-0360.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> OAR 137-049-0380.

<sup>174</sup> *Id.*

<sup>175</sup> OAR 137-049-0200.

the contracting agency has available concerning future use.”<sup>176</sup> Examples of special evaluation factors include conversion costs, transportation costs, cash discounts, and depreciation allowances.

## **7. Negotiations**

Negotiations are generally prohibited. However, ORS 279C.340 provides that negotiations with bidders may proceed if all of the responsive bids exceed the contracting agency’s cost estimate and budget. Negotiations are permitted with the lowest responsive and responsible bidder “in order to solicit value engineering and other options to attempt to bring the contract within the contracting agency’s cost estimate.”<sup>177</sup> However, in order to do so, the contracting agency must follow the model rules or its own rules prescribing a negotiation process.

The model rule setting out a negotiation process is at OAR 137-049-0430. It includes a number of definitions of terms unique to this process, such as “value engineering.” The negotiations cannot consider altering the scope of the project significantly or the resulting contract award would be in violation of this provision. Lastly, note that ORS 279C.340 only provides for authority to negotiate with the lowest responsive, responsible bidder. Thus, unlike with respect to the RFP process, if negotiations with the lowest responsive, responsible bidder are not successful, the contracting agency cannot negotiate with the next lowest.

## **D. Other Solicitation Considerations for Public Improvement Procurements**

In addition to the items discussed above, there may be additional items for the contracting agency to consider throughout the public improvement solicitation process such as offer requirements, mistakes, security, cancellation, contract award, contractor eligibility, contractor responsibility, and contract oversight services.

### **1. Offer Requirements**

OAR 137-049-0280 sets out the offerors’ responsibilities and content requirements for offers submitted in response to a solicitation for a public improvement contract whether in response to an ITB, RFP, or alternative process. As with public contracts for goods and services, an offer conditioned on the contracting agency agreeing to change any terms and conditions is not considered a responsive offer, unless the solicitation document authorizes the offer to do so. ORS 279C.365(3) sets out only three requirements for offers received under an exempt procurement process or under the competitive proposal process in ORS 279C.400. These three requirements are that the offer be written, filed with the person designated to receive the offers, and be opened publicly by the contracting agency immediately after the closing.<sup>178</sup> Unless the contracting agency has opted out of the model rules, the longer list in OAR 137-049-0280 will apply.

---

<sup>176</sup> OAR 137-049-0200(1)(b)(C)(i).

<sup>177</sup> ORS 279C.340.

<sup>178</sup> ORS 279C.365(3).

Except as discussed above for bids submitted pursuant to an ITB and in ORS 279C.410 for proposals submitted pursuant to an RFP, all other offers should be considered public records subject to disclosure following opening. The exceptions with respect to trade secrets and confidential information will, however, still apply.

All offers for contracts with an estimated value of over \$100,000 or, for highways, bridges or other transportation projects with an estimated value of more than \$50,000, must be submitted with bid security, unless the contracting agency has exempted the procurement from the bid security requirement under ORS 279C.390.<sup>179</sup> Otherwise, bid security is at the option of the contracting agency.<sup>180</sup>

## **2. Mistakes – Waiver, Correction or Withdrawal of Offers After Opening**

Sometimes, mistakes in offers are discovered after the offer is opened. When the mistake is considered a “minor informality,” the contracting agency may waive the mistake or allow the offeror to correct it. A “minor informality” is defined under the model rules as 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.<sup>181</sup> Example of minor informalities include an offeror’s failure to (1) return the correct number of signed offers or other documents as required by the solicitation documents; (2) sign in the correct place so long as a signature appears elsewhere indicating the offeror’s intent to be bound by the offer; or (3) acknowledge receipt of an addenda so long as it is clear in the offer that it was received and the offeror intended to be bound by it. A clerical error is another type of minor informality that the contracting agency can allow to be corrected.

Only offers containing one or more clerical errors that cannot be waived as minor informalities can be withdrawn after opening but before contract award. However, the offeror must get approval from the contracting agency and submit a written request showing that all of the criteria in OAR 137-049-0350(2)(c) are met. The same criteria used to then determine whether the offeror will forfeit bid or proposal security. The bid security would be used to compensate the contracting agency for the difference between the amount of the offer being withdrawn and the amount of the contract the contracting agency ends up awarding, whether by awarding it to the runner up, or by resorting to a new solicitation process.

When an offer contains an obvious mistake that cannot be corrected by looking at the remaining offer documents, the contracting agency must reject the offer.<sup>182</sup> Mistakes discovered after the contract is awarded cannot be corrected, or the contract rescinded, except by mutual agreement of the contractor and contracting agency, or as contracting law may otherwise provide.<sup>183</sup>

---

<sup>179</sup> ORS 279C.365(5)(6).

<sup>180</sup> ORS 279C.390(2).

<sup>181</sup> OAR 137-049-0350(2)(a).

<sup>182</sup> OAR 137-049-350.

<sup>183</sup> *Id.*

### 3. Bid and Proposal Security

A contracting agency must require bid security for public improvement contracts with an estimated value of more than \$100,000 or, in the case of contracts for highways, bridges and other transportation projects with a value of more than \$50,000, unless the contracting agency has exempted the contract under ORS 279C.390.<sup>184</sup> For all other public improvement contracts, the contracting agency, while not required, may require offer security.

If the contract is procured through the ITB or RFP process and bid or proposal security is required, the amount cannot be more than 10% or less than 5% of the bid or proposal. In addition, the contracting agency can accept only the following forms of security: (a) surety bond; (b) irrevocable letter of credit; or (c) cashier's or certified check.<sup>185</sup>

For all other contracts, the contracting agency may require bid security in an amount set by the contracting agency and determine the form of security. This should be done through the local code.

### 4. Cancellation and Rejection of Offers

As with public contracts for goods and services, a public improvement contract procurement may be cancelled at any time for any reason the contracting agency determines is in the public interest.<sup>186</sup> This is to protect the contracting agency from proceeding with a procurement that may have legal defects, or from entering into a contract that will ultimately not meet the contracting agency's needs.

If the procurement is cancelled prior to closing, notice is required to be provided in the same manner as the solicitation was noticed.<sup>187</sup> There is no parallel rule for rejection of all offers prior to closing, unless rejection is made on the ground in OAR 137-049-0270. If the procurement is cancelled prior to opening the opening of any offers, the offers are returned and if the cancellation is made after the offers are opened, the offers are retained in the file.<sup>188</sup>

Any or all offers may be rejected for a variety of reasons. ORS 279C.395 and OAR 137-049-0440 describe when an offer or all offers may be rejected. Any offer may be rejected if it "may impair the integrity of the [p]rocurement process" or if rejecting the offer is in the public interest.<sup>189</sup> Offers may also be rejected if they are late, do not substantially comply with the solicitation documents or procedures, are contingent on acceptance of alternate contract terms, take exception to contract terms or specifications, or describe work that does not meet the specifications.<sup>190</sup>

---

<sup>184</sup> ORS 279C.365(5) & (6).

<sup>185</sup> *Id.*; OAR 137-049-290(3).

<sup>186</sup> ORS 279C.395; OAR 137-049-0270.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> OAR 137-049-0440.

<sup>190</sup> *Id.*

With respect to compliance with documents or procedures, there is some leeway to accept the offer if the noncompliance is not substantial; however, with respect to compliance of the work offered with the specifications, the work must meet the specifications or the offer may be rejected. No written notice of rejection under these grounds is required and a contracting agency can simply include such offers with the remaining losing offers.

Offers must be rejected if the contractor has not met any prequalification and eligibility standards, has not met the responsibility standards, has not provided required bid or proposal security, is not eligible as a contractor on a public work if the contract is for a public work, or has not provided the certification of non-discrimination required by ORS 279A.110(4). If an offer is rejected for any of these reasons, the reason must be documented in writing.

All of the offers may be rejected if it is in the public interest to do so. The model rule requires written findings of good cause and provides the following examples of good cause:

- The content of or an error in the solicitation document, or the solicitation process unnecessarily restricted competition for the contract.
- The price, quality or performance presented by the offerors is too costly or of insufficient quality to justify acceptance of the offer.
- Misconduct, error, or ambiguous or misleading provisions in the solicitation document threaten the fairness and integrity of the competitive process.
- 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.
- The contracting agency cancels the solicitation in accordance with OAR 137-049-0270.
- Any other circumstance indicating that awarding the contract would not be in the public interest.<sup>191</sup>

## **5. Contract Award**

Written notice of intent to award a public improvement contract is required under the model rules, regardless of the procurement method used.<sup>192</sup> Because notice of intent to award is only for ITBs and RFPs in the public contracting code—as opposed to the model rules—a contracting agency can adopt local rules that limit this requirement.

Notice of intent to award must be posted electronically or provided in writing to each offeror at least seven days before the contract is to be awarded. The contracting agency can provide less

---

<sup>191</sup> OAR 137-049-0440(6).

<sup>192</sup> OAR 137-049-0450.

notice, but only if seven days is impractical and the contracting agency documents the decision and provides notice as soon as reasonably practical.

The model rules provide an administrative review procedure for protesting the contract award in OAR 137-049-0450. The protest process timeline starts when the contracting agency issues the notice of intent to award, after which an aggrieved offeror may file a protest within seven days.

As with offer protests, award protests can be avoided by carefully following the procurement process and sticking to the selection criteria. The first things to look at in evaluating a bid protest are responsibility and responsiveness. If the offer does not meet responsibility or responsiveness, the offer must be rejected.

## **6. Contractor Eligibility**

Oregon law requires contractors to have a valid certification of registration issued by the Oregon Construction Contractors Board to work as a contractor. Landscape contractors must also be licensed with the State Landscape Contractors Board to work as a landscape contractor. Thus, a contractor who is not registered or licensed, as applicable, is not eligible to submit an offer on a public improvement contract (or on public contract for emergency work, maintenance or repair of a public improvement) or, if an offer is submitted, the offer must be considered nonresponsive and rejected.<sup>193</sup> Non-resident education service districts are ineligible to enter into public improvement contracts in Oregon.<sup>194</sup> If the contract is federally funded, different rules may apply and ineligibility in Oregon may not mean ineligibility under federal law.

## **7. Contractor Responsibility**

ORS 279C.375 provides that a public improvement contract must be awarded to the lowest “responsible” bidder. By its terms, this provision will apply only if the contracting agency is procuring the contract through the ITB process. However, the model rules apply this provision to procurement through both the ITB and RFP process. A contracting agency can adopt its own rules regarding responsibility and extend the responsibility determination to all public improvement contract procurements.

The responsibility determination is made during the bid or proposal review process. The bidder or proposer should have submitted sufficient information for the contracting agency to determine whether the contractor meets the standards of responsibility. The standards are set out in ORS 279C.375(3)(b).

To meet the standards of responsibility, a contractor must show that it:

- Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities.

---

<sup>193</sup> See ORS 279C.365(1)(k).

<sup>194</sup> ORS 279C.325.

- Holds current licenses that businesses or service professionals operating in this state must hold in order to undertake or perform the work specified in the contract.
- Is covered by liability insurance and other insurance in amounts the contracting agency requires in the solicitation documents.
- Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407 or has elected coverage under ORS 656.128.
- Has made the disclosure required under ORS 279C.370.
- Completed previous contracts of a similar nature with a satisfactory record of performance. For purposes of this subparagraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the bidder's control, the bidder stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. The contracting agency shall document the bidder's record of performance if the contracting agency finds under this subparagraph that the bidder is not responsible.
- Has a satisfactory record of integrity. The contracting agency in evaluating the bidder's record of integrity may consider, among other things, whether the bidder has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the bidder's performance of a contract or subcontract. The contracting agency shall document the bidder's record of integrity if the contracting agency finds under this subparagraph that the bidder is not responsible.
- Is legally qualified to contract with the contracting agency.
- Has agreed in the bid or proposal to be bound by the terms and conditions of a community benefit contract, if the public improvement contract is a community benefit contract.
- Supplied all necessary information in connection with the inquiry concerning responsibility.

If a bidder fails to promptly supply information concerning responsibility that the contracting agency requests, the contracting agency shall determine the bidder's responsibility based on available information or may find that the bidder is not responsible.

Contracting agencies must document their compliance with ORS 279C.375 by using the form, or substantially the same form, as set out in ORS 279C.375(3)(c). Note that to comply with this requirement and complete the form in full, cities will need to check the Construction Contractors Board list of contractors who are qualified to enter into public improvement contracts.<sup>195</sup> In

---

<sup>195</sup> See ORS 279C.375(3)(c).

addition, the form must be submitted to the Construction Contractors Board within 30 days after the date the contract is awarded.

Generally, contracting agencies have broad, although not unlimited, discretion to determine responsibility.<sup>196</sup> Thus, a court will not overturn a responsibility determination unless the contracting agency acted fraudulently or grossly abused its discretion.

## **8. Procurement of Contract Oversight Services**

A contracting agency is prohibited from entering into a personal services contract for the oversight of public improvement contracts with a contractor who is the contractor or affiliate of the contractor under the public improvement contract to be overseen.<sup>197</sup> The service also cannot be procured through the public improvement contract itself.<sup>198</sup> There are exceptions for construction manager/general contractor and design-build contracts, as well as a method for requesting an exception.<sup>199</sup>

## **E. Contract Specifications and Conditions Applicable to all Public Improvement Contracts**

The following list of contract specifications and conditions are drawn from ORS chapter 279C. Refer to ORS chapter 279A for additional specifications that may be included, such as with respect to recyclable and used goods, minority, women, or emergency small businesses.

### **1. Required Contract Conditions**

The following contract conditions, where applicable, must be included in all public improvement solicitation documents:

- Prompt payment to all persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279C.505(1));
- Demonstrate that an employee drug testing program is in place (ORS 279C.505(2));
- If the contract calls for demolition work described in ORS 279C.510(1)), it must require the contractor to salvage or recycle construction and demolition debris, if feasible and cost effective;
- 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));

---

<sup>196</sup> See *Hanson v. Mosser*, 247 Or 1, 9-10 (1967), *overruled in part on other grounds*, *Smith v. Cooper*, 256 Or 485 (1970).

<sup>197</sup> ORS 279C.307.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

- Payment of claims by public officers (ORS 279C.515(1));
- Contractor and first-tier subcontractor liability for late payment on public improvement contracts pursuant to ORS 279C.515 (2), including the rate of interest;
- 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));
- Hours of labor in compliance with ORS 279C.520;
- Environmental and natural resources regulations (ORS 279C.525);
- Payment for medical care and attention to employees (ORS 279C.530 (1));
- 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 (Employer required to pay compensation and perform other duties) and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126 (Coverage while temporarily in or out of state). Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530 (2));
- Maximum hours, holidays and overtime (ORS 279C.540);
- Time limitation on claims for overtime (ORS 279C.545);
- Prevailing wage rates (ORS 279C.800 to ORS 279C.870);<sup>200</sup>
- BOLI public works bond (ORS 279C.830 (2));
- Retainage (ORS 279C.550 to ORS 279C.570);
- Prompt payment policy, progress payments, rate of interest (ORS 279C.570);
- Contractor's relations with subcontractors (ORS 279C.580);
- Notice of claim (ORS 279C.605);

---

<sup>200</sup> For additional information, see Oregon Bureau of Labor and Industries Prevailing Wage Rates for Public Works Contracts (Effective January 5, 2026), available at: <https://www.oregon.gov/odot/Business/Wages/BOLI-2026-January.pdf> (last accessed April 2026). See also Oregon Bureau of Labor and Industries Prevailing Wage for Employers webpage, available at: <https://www.oregon.gov/boli/employers/Pages/prevailing-wage.aspx> (last accessed April 2026).

- Contractor’s certification of compliance with the Oregon tax laws in accordance with ORS 305.385);
- Contractor’s certification that all subcontractors performing work described in ORS 701.005(2) 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;
- If the contract resulting from a solicitation will be a public improvement contract, and if the public improvement that is the subject of the solicitation will have a value of \$20,000,000 or more and will be located within Multnomah County, Clackamas County or Washington County, State Contracting Agencies must include provisions in the Public Improvement Contract that meet the requirements of HB 2007 (2019 Oregon Laws, Chapter 645) for diesel engines and non-road diesel engines;
- If the contract resulting from a solicitation will be a public improvement contract with a “Qualifying Agency,” as defined in ORS 279C.533, and if the public improvement that is subject of the solicitation will have a value that exceeds \$3,000,000, Qualifying Agencies must include provisions that meet the requirements of ORS 279C.533 for apprenticeship employment; and
- If the contract resulting from a solicitation will be a public improvement contract with a “Qualifying Agency,” as defined in ORS 279C.533, the Qualifying Agency shall require, as a material provision of the public improvement contract, that the contractor establish and implement a plan for outreach to and recruitment and retention of women, minority individuals and veterans to perform the work under the public improvement contract, in compliance with ORS 279C.533.<sup>201</sup>

## 2. Brand Names

A public improvement contract cannot expressly or implicitly include any brand name or manufacturer specification, unless the contracting agency obtains an exemption. The contracting agency’s local contract review board may exempt certain projects or classes or products from the prohibition against brand name or manufacturer specification upon any of the following findings:

- It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts.
- The specification of a product by brand name or mark, or the product of a particular manufacturer or seller, would result in a substantial cost savings to the contracting agency.

---

<sup>201</sup> See OAR 137-049-0200(1)(c) and all statutes implemented within the rule.

- There is only one manufacturer or seller of the product of the quality required.
- Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies.<sup>202</sup>

The contracting agency must justify any findings by relying on information regarding:

- Operational, budget and financial data;
- Public benefits;
- Value engineering;
- Specialized expertise required;
- Public safety;
- Market conditions;
- Technical complexity; and
- Funding sources.<sup>203</sup>

Under the model rules, it is permissible, however, to identify products by brand names so long as “approved equal” or “equivalent” is included in the solicitation documents.<sup>204</sup> A contracting agency could also adopt a local rule stating that when a brand name is inadvertently or impliedly used, the work “or approved equal” are implied.

### **3. Waiver of Damages for Delay**

A public improvement contract cannot contain a clause that causes a contractor to waive its rights to monetary damages for an unreasonable delay caused by the contracting agency. If the contract includes such a clause, ORS 279C.315 provides that the contract is void and unenforceable. This provision does not limit any clause setting a reasonable amount of damages that might be paid in such circumstances such as liquidated damages.

### **4. Assignment or Transfer Restricted**

OAR 137-049-0200(2) provides that unless the contract specifies otherwise, the contractor cannot assign, sell, delegate or otherwise transfer its rights under the contract without the contracting agency’s prior written consent and even if the contracting agency provides its

---

<sup>202</sup> ORS 279C.345.

<sup>203</sup> ORS 279C.330.

<sup>204</sup> OAR 137-049-0870.

consent, the contractor will not be relieved of its obligations under the contract. This provision automatically applies unless the contracting agency has opted out of this specific rule.

## **5. Green Energy Technology**

Public improvement contracts with a total contract price of \$5 million or more for constructing a public building and certain renovation or reconstruction contracts for public buildings the cost of which exceeds 50% of the value of the building must include an amount equal to at least 1.5% of the total contract price for the inclusion of green energy technology.<sup>205</sup> The contracting agency must make a determination prior to entering into the contract as to whether the inclusion of green energy technology in the project is “appropriate” under ORS 279C.527(5). If the contracting agency determines that it is not appropriate to include green energy technology in the project, obligations will follow with respect to subsequent public building improvement projects.<sup>206</sup> If the contract is subject to green energy technology, additional rules and specifications adopted by the Oregon Department of Energy will apply.<sup>207</sup>

## **F. Contract Amendments and Changes to Work**

It is important to be aware of the difference between a contract amendment and changes to work because different rules apply to each. Amendments modify the terms and conditions of the contract, although they must still be within the original scope of work of the contract. Any amendments that change the scope of work are not permitted and would require a new procurement, or an exemption from a new procurement process.

OAR 137-049-0910(4) provides that contract amendments may be made only when:

- They are within the general scope of the original procurement;
- 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;
- In the case of a contract obtained under an [exemption], any additional work was specified or reasonably implied within the findings supporting the competitive bidding exemption; and
- The amendment is made consistent with [OAR 137-049-0910] and other applicable legal requirements.

---

<sup>205</sup> ORS 279C.527.

<sup>206</sup> ORS 279C.537(6).

<sup>207</sup> ORS 279C.528.

Generally, an amendment will require a more formal process. The contract will usually require that for any amendment to be enforceable, it must be in writing and signed by both the authorized representative of the contracting agency and the contractor.

On the other hand, changes to work (known variously as change of work orders, change orders, or construction change directives) are less formal and are changes that are typically anticipated in the construction process. Public improvement contracts must contain provisions addressing how change orders will be handled and who is authorized to approve them.<sup>208</sup> Local rules can limit who in the contracting agency is authorized to approve change orders and setting any dollar limits.

## **G. Retainage**

Retainage is a percentage of the contract price for work completed that the contracting agency withholds or retains until certain conditions are met. Retainage in the public improvement contract context is defined in ORS 279C.550 and is governed by ORS 279C.555 to ORS 279C.570, ORS 701.420, ORS 701.430, and OAR 137-049-0820. The state retainage statutes and rules do not apply when federal funds are used.<sup>209</sup>

The amount that may be withheld as retainage is set by ORS 701.420 and cannot exceed 5% of the contract price of the completed work. This maximum amount cannot be exceeded unless the city's charter requires otherwise.<sup>210</sup> However, for public works contracts, the contracting agency *must* withhold 25% of the contract price of completed work when the contractor has failed to file certified payroll statements with the contracting agency if the contractor is required to do so under the prevailing wage laws.<sup>211</sup> The retainage is released within 14 days after the contractor files the certified statements.

The forms of retainage a contracting agency must accept are:

- Bonds, securities or other instruments specified in ORS 279C.560; and
- A surety bond.<sup>212</sup>

Both ORS 279C.560 and OAR 137-049-0820 contain specifications for the form the bonds or other instruments must take and the deposit requirements. If instruments are bonds or securities, they may now also be in the form of general obligation bonds issued by the State of Oregon or any of its political subdivisions, or an irrevocable letter of credit issued by a bank or trust company insured by the FDIC.<sup>213</sup>

---

<sup>208</sup> OAR 137-049-0910(2).

<sup>209</sup> ORS 701.440.

<sup>210</sup> ORS 279C.555.

<sup>211</sup> ORS 279C.845(7); OAR 137-049-0820(6).

<sup>212</sup> ORS 279C.560(1).

<sup>213</sup> ORS 279C.560(6).

As the work progresses, the contracting agency may reduce the amount of retainage on any remaining payments after 50% of the work is completed, or sooner if the contracting agency chooses.<sup>214</sup> However, the contracting agency is not obligated to consider reducing or eliminating retainage unless requested by the contractor.<sup>215</sup> The request must be in writing and signed by the contractor's surety. Once the contract work is 97.5% complete, the contracting agency may reduce the retainage to 100% of the value of the remaining work, whether or not the contractor requests that it do so. If the contractor submits a written request for a reduction in retainage at any time, the contracting agency must respond in writing in a reasonable time.

The remainder of the retainage is released (or paid) after final inspection and acceptance of all of the work. The retainage is released (or paid) with interest if not paid within 30 days of acceptance of all of the work.<sup>216</sup>

Regardless of the form of retainage, the contracting agency is entitled to reduce the final payment by the costs incurred by the contracting agency in handling the retainage in accordance with the public contracting code and model rules.<sup>217</sup>

## **H. Performance Security and Payment Security**

ORS 279C.380 requires the contractor to provide performance and payment security on all public improvement contracts with an estimated value of more than \$100,000, or in the case of transportation projects with an estimated value of more than \$50,000. However, the contracting agency may waive both security requirements in the event of an emergency order.<sup>218</sup> A contracting agency may require performance and payment security for all other public improvement contracts, but these requirements should be clearly identified in the solicitation documents.

Performance security is security that is usually required to be provided in the full amount of the contract price that guarantees the complete and faithful performance of the contract in accordance with the terms and conditions and plans and specifications of the contract.

Payment security is also required to be provided in the full amount of the contract price to guarantee payment of materials and labor suppliers, including subcontractors under the contract. In the event the contracting agency fails to require a contractor to provide a payment security bond as required by law, the contracting agency and those officers who authorized the contract are jointly liable for payment for the labor and materials used in performing the contract and for workers compensation claims, unemployment claims, and tax claims.

---

<sup>214</sup> ORS 279C.570(7).

<sup>215</sup> *Id.*

<sup>216</sup> ORS 279C.570(8).

<sup>217</sup> ORS 279C.560(3).

<sup>218</sup> ORS 279C.380(4).

## **I. Final Inspection**

At the completion of the work, the contractor must notify the contracting agency that the work is complete so that the contracting agency can undertake a final inspection.<sup>219</sup> Notification must be submitted in writing. Within 15 days of receiving the notice the contracting agency must inspect the work and the records and either accept the work or notify the contractor of any defects or remaining work to be done. Final acceptance is provided in writing once the contracting agency determines that all of the work has been done satisfactorily.<sup>220</sup>

## **J. Contract Payments and Interest**

ORS 279C.570 contains a statewide policy applicable to all contracting agencies requiring prompt payment of all payments due on public improvement contracts. Along with that, contracting agencies must make progress payments based upon estimates of the completed work.<sup>221</sup> However, progress payments do not constitute an acceptance of the work.

Interest must be included with the payment if the payment is made 30 days after receipt of the invoice, or within 15 days after approval of the payment, whichever is *earlier*. The final payment must be paid within 30 days of acceptance of the work with an interest rate of 1.5% until paid.<sup>222</sup>

Lastly, interest is also provided by statute on payments due under a settlement or judgment of a dispute regarding compensation due the contractor. The interest accrues as of the date the payment was due or the contractor submitted a claim for the amount due, whichever is later. equal to two times the discount rate on 90-day commercial paper in effect on the date the payment is due but not to exceed 30%.<sup>223</sup>

## **K. Contract Termination for Public Interest**

A contracting agency may terminate or suspend a contract for any reason considered by the contracting agency to be in the public interest.<sup>224</sup> Termination for public interest is also known as termination for convenience. The public interest does not include a labor dispute or a third-party judicial proceeding relating to the work.<sup>225</sup>

If the contracting agency suspends the contract, the contractor is entitled to a reasonable extension of time and to reasonable compensation on account of the delay, including overhead.<sup>226</sup> If the contracting agency terminates the contract, the contractor will not be entitled

---

<sup>219</sup> ORS 279C.570.

<sup>220</sup> *Id.*

<sup>221</sup> ORS 279C.570(2).

<sup>222</sup> ORS 279C.570(8)

<sup>223</sup> ORS 279C.570(9).

<sup>224</sup> ORS 279C.655 to 279C.670

<sup>225</sup> ORS 279C.655.

<sup>226</sup> *Id.*

to any compensation unless the contract contains provisions providing for compensation in that event.<sup>227</sup>

If the parties mutually agree to terminate the contract for any reasons considered to be in the public interest, other than a labor dispute or any judicial proceeding related to resolve a labor dispute, and circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the work, the contractor will be entitled to a reasonable amount of compensation for preparatory work completed, and for costs and expenses arising out of termination.<sup>228</sup> The contracting agency shall also pay for all work completed, based on the contract price.<sup>229</sup>

Care must be taken, however, when terminating for public interest to make sure the procedures are carefully followed so that the contracting agency does not then find itself in default of the contract.

## VI. Public Works

A public works contract is a construction contract that is valued at over \$50,000 to which prevailing wages will apply.<sup>230</sup> Note that a public works contract is a type of construction contract that is not always a public improvement contract governed by ORS chapter 279C. A contract for maintenance, repair, or emergency work on a public improvement that falls under the provisions of ORS chapter 279B may also be a public works contract.<sup>231</sup> This \$50,000 threshold applies to the original contract plus any change orders or amendments. Thus, a contract that was originally below the limit could exceed the limit could become subject to prevailing wage, in which case BOLI will require application of the prevailing wage rate to all of the contract work, not just the work that caused the contract to exceed the \$50,000 limit. A contract less than \$50,000 could also exceed the limit due to site of work provisions wherein off-site work causes the price to go up. Artificially splitting a project into \$50,000 or less component contracts is not permissible and neither can the components of a single project be divided so that the exemption applies to some of the contract.

“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 any public agency to serve the public interest;
- A project that uses \$750,000 or more of funds of a public agency for constructing, reconstructing, painting or performing a major renovation on a road, highway, building, structure or improvement of any type;

---

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> ORS 279C.810.

<sup>231</sup> *See* OAR 839-025-0004(25).

- A project that uses funds of a private entity for constructing a privately owned road, highway, building, structure or improvement of any type in which a public agency will use or occupy 25% or more of the square footage of the completed project;
- Notwithstanding the provisions of ORS 279C.810 (2)(a), (b) and (c), a device, structure or mechanism, or a combination of devices, structures or mechanisms, that:
  - Uses solar radiation as a source for generating heat, cooling or electrical energy; and
  - Is constructed or installed, with or without using funds of a public agency, on land, premises, structures or buildings that a public body, as defined in ORS 174.109, owns; or
- Notwithstanding paragraph ORS 279C.800(b)(A) and ORS 279C.810 (2)(b) and (c), construction, reconstruction, painting or major renovation of a road, highway, building, structure or improvement of any type that occurs, with or without using funds of a public agency, on real property that a public university listed in ORS 352.002 owns.<sup>232</sup>

“Public works” does not include:

- Reconstructing or renovating privately owned property that a public agency leases; or
- A private nonprofit entity's renovation of publicly owned real property that is more than 75 years old if:
  - The real property is leased to the private nonprofit entity for more than 25 years;
  - Funds of a public agency used in the renovation do not exceed 15% of the total cost of the renovation; and
  - Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 13, 2007.<sup>233</sup>

Note, the exclusion above for reconstruction and renovation. There is a fine line distinction between reconstruction and renovation on the one hand and construction or new construction on the other. BOLI’s rules define these terms and they should be consulted when considering this type of project and determining whether it is a public works project. When in doubt, consult with legal counsel or obtain a determination from BOLI.

There is one additional important definition for purposes of determining whether the contract is a public works and this is “funds of a public agency.” ORS 279C.810(1) defines this term as to what it does not include. What “funds of a public agency” are is well worth being familiar with

---

<sup>232</sup> ORS 279C.800(6)(a).

<sup>233</sup> ORS 279C.800(6)(b).

in the event the funding for a public improvement public works contract is not coming from the contracting agency. Examples of funds that are not funds of a public agency include funds provided in the form of a government grant to a nonprofit organization (which is also defined in ORS 279C.810) unless the grant is for the purpose of construction, reconstruction, major renovation, or painting; building or development permit fees waived by the contracting agency; and certain staff resources.

### **A. Prevailing Wage Rates**

Prevailing wage rates are minimum hourly rates a contractor must pay its employees under public works contracts. There are federal and state prevailing wage rates. These rates vary by occupation and region. Current prevailing wage rates are available on BOLI's website.<sup>234</sup> During the 2025 Legislative Session, the prevailing wage rate definition was amended to include certain bespoke offsite fabrication, assembly, preconstruction or construction work when performed for a particular public work.<sup>235</sup> Although the Bill became effective September 26, 2025, the amendments to prevailing wage rate law apply to procurements that a contracting agency solicits (or if the contracting agency does not solicit the procurement) to public contracts that a contracting agency enters into, on or after July 1, 2026.

### **B. Contract Specifications**

The contracting agency must provide information regarding the payment of prevailing wages with the contract specifications.<sup>236</sup> When federal funds are involved in a public works contract, the contracting agency must provide information that also identifies which rates are higher.<sup>237</sup>

Inclusion of the following information will meet this obligation:

- The prevailing state rate of wage, as required by ORS 279C.830(1)(a):
  - Physically contained within or attached to hard copies of procurement specifications;
  - Included by a statement incorporating the applicable wage rate publication 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.

---

<sup>234</sup> <https://www.oregon.gov/boli/employers/Pages/prevailing-wage-rates.aspx> (last accessed April 2026).

<sup>235</sup> Amending ORS 279C.800, see <https://olis.oregonlegislature.gov/liz/2025R1/Measures/Overview/HB2688> (last accessed April 2026); see also BOLI Rulemaking webpage at: <https://www.oregon.gov/boli/employers/pages/pwr-hb-2688-information.aspx> (last accessed April 2026).

<sup>236</sup> ORS 279C.830(1).

<sup>237</sup> *Id.*

- If applicable, the federal prevailing rate of wage and information concerning whether the state or federal rate is higher in each trade or occupation in each locality, as determined by BOLI in a separate publication. The same options for inclusion of wage rate information stated in OAR 137-049-08603(a) of this rule apply.<sup>238</sup>

The applicable prevailing wage rates are those that are in effect at the time the contracting agency first advertises the solicitation for the contract.

The contracting agency or contractor may request a determination from BOLI regarding the extent to which prevailing wage rate requirements will apply to a public improvement contract under ORS 279C.817. This is particularly useful if the project involves funding from mixed private and public sources.

### **C. Notice of Award and Fee**

The contracting agency is required under ORS 279C.835 to notify BOLI when it has awarded a public works contract. The notice must be submitted on the appropriate BOLI form no later than 30 days after the date of the award and must include a copy of the first-tier subcontractor disclosure form.

The contracting agency is required to pay a per-project fee to BOLI under ORS 279C.825. The fee is used to cover certain BOLI administrative expenses. The fee is 0.1% of the contract price, but cannot exceed \$7,500 or be less than \$250.<sup>239</sup> The fee is payable when the contracting agency provides notice to BOLI that it has awarded a public works contract under ORS 279C.835.<sup>240</sup> Lastly, the contracting agency must determine the final contract price, recalculate the fee, and send in any balance due or request a credit within 30 days of making the final payment to the contractor.<sup>241</sup>

## **VII. Conclusion**

Public contracting and the related laws and rules can appear complicated. Taking the time to review each procurement document to ensure compliance with the public contracting code and model rules, if applicable, will ensure a streamlined process and reduce the likelihood of complications later on in the project. Where feasible, cities should adopt their own local rules to address and meet their unique needs so long as those local rules do not contradict the provisions of ORS chapters 279, 279A, 279B, and 279C.

---

<sup>238</sup> OAR 137-049-0860.

<sup>239</sup> ORS 279C.825.

<sup>240</sup> *Id.*

<sup>241</sup> OAR 839-025-0210.

# Appendix A: Standards of Responsibility

Under the standards of responsibility, a prospective contractor must demonstrate to the contracting agency that the prospective contractor:

- Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain them, to meet all contractual responsibilities.
- Has completed previous contracts of a similar nature with a satisfactory record of performance.
- Has a satisfactory record of integrity. The contracting agency in evaluating the contractor's record of integrity may consider, among other things, whether the contractor has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the contractor's performance of a contract or subcontract.
- Is legally qualified to contract with the contracting agency.
- Has complied with the tax laws of the state or a political subdivision of the state, including ORS 305.620 and ORS chapters 316, 317 and 318 and demonstrate compliance by attesting to the bidder's or proposer's compliance in any way the contracting agency deems credible and convenient.
- Possess an unexpired certificate that the Oregon Department of Administrative Services issued under ORS 279A.167 if the bidder or proposer employs 50 or more full-time workers and submitted a bid or proposal for a procurement with an estimated contract price that exceeds \$500,000 in response to an advertisement or solicitation from a state contracting agency.
- Has supplied all necessary information requested by the contracting agency to make the responsibility determination.
- Has not been debarred under ORS 279B.130.

# Appendix B: FAQ on Emergency Procurement

## **Introduction**<sup>242</sup>

Oregon’s public contracting code is lengthy and can be challenging for the average public official to navigate and understand. And while the code may be cumbersome at times, it serves a valuable public purpose — ensuring that public dollars are spent wisely and justly by requiring that public contracts be awarded through a fair, open and competitive process. While an open and competitive process serves a valuable public policy purpose, and is typically required in Oregon, what about those emergency situations when public officials must act quickly and do not have the time to follow the normal public procurement process?

This Emergency Procurement Frequently Asked Questions (FAQ) publication provides answers to the questions most often posed to the LOC about public procurements during emergency situations. It is not intended to provide an exhaustive legal analysis on the topic, nor is it intended to be a substitute for legal advice. This FAQ is meant to serve as a baseline for understanding emergency public procurements in Oregon. Each city in Oregon is subject to its own individual charter, municipal code and rules of procedures — any person reading this FAQ is strongly encouraged to conduct a thorough review of applicable charter provisions, municipal code sections, and their city’s rules of procedures to ensure that those provisions do not provide additional requirements to be followed when purchasing goods or services during an emergency.

### **1. What is an Emergency?**

Oregon’s Public Contracting Code defines an “emergency” to mean “circumstances that: (A) Could not have been reasonably foreseen; (B) Create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and (C) Require prompt execution of a contract to remedy the condition.”<sup>243</sup> For some cities, the term may also be defined under local contracting rules.<sup>244</sup>

### **2. What is an Emergency Procurement?**

An emergency procurement is any contract that a city enters into in response to an emergency in the hopes of remedying the effects of the emergency.

### **3. Do Emergency Procurements Follow the Normal Competitive Procurement Process Required by the Oregon Revised Statutes?**

No. Under state law, local officials do not need to follow the normal competitive procurement process for emergency procurements. Oregon’s Public Contracting Code<sup>245</sup> and the Model Rules under Oregon Administrative Rules (OAR) Chapter 137, Divisions 46 through 49, provide

---

<sup>242</sup> Last updated May 2023.

<sup>243</sup> ORS 279A.010(1)(f).

<sup>244</sup> See, e.g., PORTLAND, OR. CODE § 5.33.130 (2020).

<sup>245</sup> ORS chapters 279A, 279B and 279C.

for an emergency exception to the local procurement process. Note, however, that the scope of this exception is also subject to local contracting rules.<sup>246</sup>

#### 4. Are there Any Limits under State Law on an Emergency Procurement?

Yes. Under state law, these contracts must be limited to “*emergency* procurements of goods or services.”<sup>247</sup> As such, they cannot be used to purchase non-emergency goods or alleviate non-emergency needs.

In general, emergency procurements should not cover goods or services that are not immediately necessary in an emergency. For example, if an earthquake causes such severe structural damage to a city-owned building that it is in imminent danger of collapsing and causing harm to the public, an emergency procurement can be utilized to immediately stabilize the building to keep it from collapsing. Once stabilized, if there is time to allow the normal public procurement process to be utilized for other repairs or replacements, the normal process should be used.

When awarding an emergency procurement to a contractor, state law also requires that cities: **(A)** document the nature of the emergency and **(B)** describe the method used for selecting the contractor.<sup>248</sup>

Finally, state law also requires cities to foster competition, especially in the context of construction projects — see Question 6.

#### 5. Are there Any Limits Under Local Law on an Emergency Procurement?

Possibly. Oregon’s Public Contracting Code authorizes cities to develop their own contracting rules, and these rules can be more stringent than the state’s requirements.<sup>249</sup> If a city’s purchasing policy addresses emergency procurements, these additional rules must be followed. For this reason, local officials must review their city’s ordinances and policies before making an emergency procurement to ensure compliance.

#### 6. Are Local Officials Still Required to Foster Competition when Awarding Emergency Procurements?

Yes. Even in emergencies, the Model Rules under OAR Chapter 137 require local officials to procure city goods and services “with competition that is reasonable and appropriate under the circumstances.”<sup>250</sup> For anything other than construction projects, the state’s regulations do not specify a competitive process to ensure there is competition.<sup>251</sup> As noted in Question 5, however, a city may choose to adopt a competitive process for emergency procurements under its local contracting rules.

However, for emergency procurements of **construction services**, state law is more specific.<sup>252</sup> Generally, state law requires cities to “set a solicitation schedule” for a construction contract that

---

<sup>246</sup> See ORS 279A.065.

<sup>247</sup> ORS 279B.080(1).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> OAR 137-047-0280.

<sup>251</sup> *Id.*

<sup>252</sup> See OAR 137-049-0150.

is reasonable for the circumstances.<sup>253</sup> If the construction contract is a matter “of extreme necessity,” then the city may proceed with a written or oral request for quotes or may even “make direct appointments without competition.”<sup>254</sup>

Readers may note that the Public Contracting Code appears to authorize emergency procurements only for “construction services that are not public improvements.”<sup>255</sup> However, the Model Rules state that “Emergency contracts for construction services are not public improvement contracts and are regulated under ORS 279B.080.”<sup>256</sup> This seems to indicate that the rules for public improvement contracts do not apply for emergency procurements, even if the work would otherwise meet the definition of a public improvement project.

## **7. Who Can Authorize an Emergency Procurement?**

The head of the city, or a person delegated by the city as someone who can effectuate public procurements, is the person who may authorize an emergency procurement.<sup>257</sup> Often, city managers are authorized to approve emergency procurements.<sup>258</sup>

---

<sup>253</sup> ORS 279B.080(2).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> OAR 137-049-0140(1).

<sup>257</sup> ORS 279B.080(1); *see also* ORS 279A.075.

<sup>258</sup> *See, e.g.*, BEND, OR., CODE § 1.55.030 (2020).

# Appendix C: FAQ on Public Improvement Least Cost Contracting Requirements

## Introduction<sup>259</sup>

State policy requires public contracting agencies to make every effort to construct public improvements at the least cost to the contracting agency.<sup>260</sup> Under this policy, contracting agencies—which include cities—must comply with certain analysis and reporting requirements.

The following list of *frequently asked questions* (FAQs) provides answers to questions the League has received from numerous cities on least cost public contracting requirements. The answers are not meant as a substitute for legal advice. League members are encouraged to speak with their city attorneys for specific advice about least cost contracting requirements. All information in this FAQ is current as of February 15, 2019.<sup>261</sup>

### 1. Does the State’s Least Cost Policy Apply to All Public Contracts?

No. The state’s least cost policy applies only to contracts for the construction of public improvements such as buildings and roads.<sup>262</sup>

While all cities should have internal policies and procedures to ensure needed goods and services are procured at the least cost to the agency and its taxpayers, the formal policy discussed here applies only to the construction of public improvements and not to the purchase of other goods or services.

### 2. What Does the State’s Least Cost Policy Require?

The policy generally requires a city to file certain reports with the Oregon Bureau of Labor and Industries (BOLI) before constructing a public improvement with the city’s own equipment and personnel.

If the required reports are not filed, BOLI can take administrative enforcement action against the city.

### 3. What are the Mandated Reporting Requirements?

There are two reports a city may need to file with BOLI:

---

<sup>259</sup> Publication prepared in cooperation with Beaverton City Attorney’s Office and Bill Kirby. Last updated May 2023.

<sup>260</sup> ORS 279C.305(1).

<sup>261</sup> Last updated by LOC attorneys in May 2023.

<sup>262</sup> The term “public improvement” is defined under the Public Contracting Code as “a project for construction, reconstruction or major renovation on real property by or for a contracting agency.” The definition of “public improvement” does not include “[p]rojects for which no funds of a contracting agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or [e]mergency work, minor alteration, ordinary repair or maintenance necessary to preserve a public improvement.” ORS 279A.010(1)(cc).

- A summary of planned public improvements; and
- A least cost analysis.

#### **4. What is a Summary of Planned Public Improvements?**

A summary of planned improvements lists every public improvement project a city expects to undertake during its upcoming budget period. The projects are listed by name, type, location and estimated total on-site construction costs. The list must also state whether the city expects to perform the construction through a private contractor.<sup>263</sup>

A city can use BOLI Form WH-118 (available via BOLI's Prevailing Wage Rate forms directory) to make the report.

#### **5. Are there Any Exceptions to the Requirement of Filing a Summary of Planned Public Improvements?**

Yes, there are exceptions. The most common ones are these:

- A city does not have to file a summary if no public improvement project is planned for the upcoming budget period, or if the projects that are planned only entail the placing of maintenance patching, chip seals or other seals as a maintenance treatment on highways, roads, streets or bridges.
- Additionally, a city does not have to list on its summary any public improvement projects that are for resurfacing highways, roads or streets at a depth of two inches or less; or at an estimated cost of \$125,000 or less.

#### **6. What is a Least Cost Analysis?**

A least cost analysis is a report that documents that a city's decision to use its own equipment or personnel to perform construction work on a public improvement project conforms to the state's least cost policy.

A least cost analysis is only required if a city intends to use its own equipment or personnel to perform construction work on a public improvement and certain cost thresholds (discussed below) are met. A city can use BOLI Form WH-119 (available via BOLI's Prevailing Wage Rate forms directory) to make the report.

#### **7. When Must a City Submit its Summary of Planned Improvements?**

A city's summary of planned improvements is due at least thirty days before adoption of its budget, or – in the alternative – thirty days before the start of construction on a public improvement.

A best practice is to prepare and submit the summary of planned projects in connection with your city's budget process. If plans change during the budget period, and a new project is identified for construction, prepare and submit the summary for that project as soon as practical, and in all cases at least thirty days before starting to construct the project.

---

<sup>263</sup> ORS 279C.305(2)(a).

## **8. When Must a City Submit its Least Cost Analysis?**

The least cost analysis must be submitted at least 180 days before construction begins on the public improvement.

A best practice is to submit the least cost analysis to BOLI as soon as possible; preferably at the same time the city submits its summary of planned improvements.

## **9. Is a Least Cost Analysis Required Every Time a City Intends to Use Its Own Equipment or Personnel to Perform Construction Work on a Public Improvement?**

No. There are exemptions and thresholds that allow a city to undertake some public improvement projects with its own equipment or personnel without having to prepare and submit a least cost analysis to BOLI.

Even if an exemption applies or a minimum threshold has not been met, a best practice is nevertheless for a city to perform an internal least cost analysis to ensure it is constructing a public improvement at the least cost to the city and its taxpayers.

## **10. What are the Thresholds Below Which a Formal Least Cost Analysis is Not Required to be Prepared or Submitted to BOLI?**

There are two thresholds below which a formal least cost analysis is not required to be prepared or submitted to BOLI: one for paving-related projects and the other for all other public improvement projects.

- For paving projects (including the resurfacing of highways, roads or streets), if the estimated cost of the project is less than \$125,000, then the project is not subject to the least cost analysis requirement.<sup>264</sup>
- For all other public improvement projects, if the estimated value of construction is \$200,000 or less, then the project is not subject to the least cost analysis requirement.<sup>265</sup>

## **11. What Public Improvement Projects are Excluded from the Least Cost Analysis Requirement?**

Cities are not required to conduct a least cost analysis if:

- The public improvement is for distributing or transmitting electric power.
- The public improvement is for placing maintenance patching, chip seals or other seals as a maintenance treatment on highways, roads, streets or bridges.
- The city did not receive a responsive bid or proposal for constructing the public improvement from a responsible bidder or proposer after soliciting bids or proposals, provided the solicitation (i) occurred within one year before the date which construction began; and (ii) allowed a commercially reasonable time in which to perform the construction.<sup>266</sup>

---

<sup>264</sup> ORS 279C.305(6).

<sup>265</sup> A lower cost threshold exists for road resurfacing work at a depth two or more inches. A city must conduct and submit a least-cost analysis if the estimated cost for resurfacing is greater than \$125,000.

<sup>266</sup> ORS 279C.305(5),(6).

## 12. How is a Least-Cost Analysis Conducted?

A least cost analysis simply compares the estimated cost of contracting with a private contractor to construct a public improvement to the cost of the city constructing a public improvement using its own equipment and personnel. To conduct the analysis, a city must:

- Estimate the cost of contracting with a private contractor to construct the public improvement, including all necessary and related costs that a private contractor would incur; (such as performance and maintenance bonds);
- Estimate the costs the city would incur in constructing the public improvement using the city's own equipment or personnel; and
- Compare the cost of the work if performed by a private contractor with the cost of the work if the city uses its own equipment and personnel.<sup>267</sup>

## 13. What Must a City's Cost Estimate Include?

ORS 279C.305(3) provides a list of costs a city is to include in its cost estimate. Many of these costs are equally applicable to the cost estimate the city will prepare for contracting out the work to a private contractor.

The city's cost estimate to use its own equipment or personnel must include:

- The cost of labor, including all benefits the city pays to or on behalf of employees who will work on the contract, workers' compensation insurance premiums and the cost of traveling to and from the site of the improvement;
- The cost of equipment, including costs associated with leasing, renting or acquiring and owning the equipment, costs from transporting the equipment to and from the improvement site, costs for depreciation and costs for insuring, operating, storing, repairing and maintaining the equipment;
- The costs of administration and overhead the city will incur, including insurance, show and office costs that are allocable to the public improvement;
- The cost of tools and materials;
- The costs associated with any contracts into which the city must enter;
- The commercially reasonable value of quality control testing if the city would require quality control testing for the work that a private contractor performed on the public improvement; and
- Any other necessary and related costs that the city will incur to construct the public improvement with the city's own equipment or personnel.

---

<sup>267</sup> ORS 279C.305(3).

#### **14. What Else Must a City’s Cost Estimate Include?**

If the estimated cost of the public improvement project exceeds \$200,000, the cost estimate must also include plans, specifications and estimates of the unit cost of each classification of construction work that are sufficient to control the performance of the construction work and ensure satisfactory construction quality.

#### **15. How will the Information Reported to BOLI be Used?**

BOLI will conduct a review of the costs reported in the least-cost analyses to determine whether cities and other contracting agencies must adjust the methodology of calculating the costs. BOLI will review the costs to determine whether the threshold amount and other aspects of the reporting requirements should be adjusted. The review will be conducted every four years beginning in 2021.<sup>268</sup>

#### **16. Is a City Required to Track the Actual Cost of Constructing a Public Improvement Using Its Own Equipment and Personnel?**

Yes. The new policy requires a city using its own equipment and personnel to construct a public improvement to “prepare and preserve a full, true and accurate account of the actual costs of performing the work.” This includes all the categories of costs that go into the cost analysis submitted to BOLI.

#### **17. What Happens if I Make a Mistake?**

A contractor or trade association may file a complaint with BOLI. The complaint must be filed within one year of when the alleged mistake was discovered or should have been discovered by the contractor or trade association. The complaint must be accompanied by a \$250 filing fee.

#### **18. How Does BOLI Respond to Complaints?**

If BOLI reasonably concludes that the facts alleged do not constitute a violation or that the complaint is frivolous, or was filed to harass the contracting agency, or for purposes other than to enforce the requirements of the new law, then BOLI must dismiss the complaint.

If the complaint isn’t dismissed, BOLI has 60 days to conclude an investigation and must either find substantial evidence of a violation or end the investigation and dismiss the complaint.

The penalties for violations are progressive. For a first violation, BOLI would issue a warning letter. If another violation occurs within five years, BOLI would require the city to negotiate a compliance agreement with the contractor or trade association that filed the complaint. If the city breaches the compliance agreement or BOLI finds a third violation has occurred within five years of the first violation, BOLI can pursue more substantial remedies, including the issuance of cease and desist orders and the imposition of civil penalties not to exceed \$20,000.

---

<sup>268</sup> ORS 279C.305(7).

# Appendix D: Model Policy for Public Contracting and Purchasing

## Table of Contents

|   |                                     |    |
|---|-------------------------------------|----|
| Preface   | <b>Error! Bookmark not defined.</b> |    |
| Disclaimer.....   |                                     | 73 |
| I. Introduction.....  |                                     | 74 |
| A. Purpose of Purchasing Policy.....                            |                                     | 74 |
| B. Interpretation of Purchasing Policy.....                     |                                     | 74 |
| C. Specific Provisions’ Precedence over General Provisions..... |                                     | 74 |
| D. Conflict with Federal Statutes and Regulations.....          |                                     | 74 |
| II. Definitions.....  |                                     | 74 |
| A. Administering agency.....                                    |                                     | 74 |
| B. Affected person/offenor.....                                 |                                     | 74 |
| C. Architectural, engineering and land surveying services.....  |                                     | 74 |
| D. Award.....   |                                     | 75 |
| E. Bid.....   |                                     | 75 |
| F. Bidder.....  |                                     | 75 |
| G. Business with which a city employee is associated.....       |                                     | 75 |
| H. City.....  |                                     | 75 |
| I. City manager.....  |                                     | 75 |
| J. Closing.....   |                                     | 75 |
| K. Contract.....  |                                     | 75 |
| L. Contractor.....  |                                     | 75 |
| M. Contract price.....  |                                     | 75 |
| N. Contracting agency.....                                      |                                     | 75 |
| O. Cooperative procurement.....                                 |                                     | 75 |
| P. Days.....  |                                     | 75 |
| Q. Emergency.....   |                                     | 75 |
| R. Findings.....  |                                     | 75 |
| S. Goods and/or services.....                                   |                                     | 76 |
| T. Grant.....   |                                     | 76 |
| U. Immediate family member.....                                 |                                     | 76 |
| V. Offer.....   |                                     | 76 |
| W. Offeror.....   |                                     | 76 |
| X. Opening.....   |                                     | 76 |
| Y. Original contract.....                                       |                                     | 76 |
| Z. Purchasing agency.....                                       |                                     | 76 |
| AA. Person.....   |                                     | 76 |
| BB. Personal services.....                                      |                                     | 77 |
| CC. Price agreement.....  |                                     | 77 |
| DD. Procurement.....  |                                     | 77 |
| EE. Professional services.....                                  |                                     | 77 |
| FF. Proposal.....   |                                     | 77 |
| GG. Proposer.....   |                                     | 77 |
| HH. Provider.....   |                                     | 77 |

|       |  |     |
|-------|--|-----|
| II.   | Public contract.....   | 77  |
| JJ.   | Public contracting.....  | 78  |
| KK.   | Public improvement.....  | 78  |
| LL.   | Public improvement contract.....   | 78  |
| MM.   | Recycled product.....  | 78  |
| NN.   | Related services.....  | 78  |
| OO.   | Request for proposals.....   | 79  |
| PP.   | Request for qualifications.....  | 79  |
| QQ.   | Revenue generating agreements.....   | 79  |
| RR.   | Scope.....   | 79  |
| SS.   | Signed or signature.....   | 79  |
| TT.   | Solicitation.....  | 79  |
| UU.   | Work.....  | 79  |
| VV.   | Written or in writing.....   | 79  |
| III.  | Authority.....   | 79  |
| A.    | City Council as Local Contract Review Board.....   | 79  |
| B.    | Application of Attorney General’s Model Rules of Procedure.....                                      | 79  |
| C.    | Inapplicability of {Code}.....   | 79  |
| D.    | Authority of City Manager.....   | 80  |
| E.    | Favorable Terms.....   | 81  |
| F.    | Unauthorized Contracts or Purchases.....   | 81  |
| G.    | Purchasing from City Employees or Employees’ Immediate Family Prohibited<br>.....                    | 82  |
| IV.   | Preferences.....   | 82  |
| A.    | Discretionary Local Preference.....  | 82  |
| B.    | Mandatory Tie Breaker Preference.....  | 82  |
| C.    | Reciprocal Preference.....   | 82  |
| D.    | Preference for Recycled Materials and Supplies.....  | 82  |
| V.    | General Provisions.....  | 82  |
| A.    | Public Notice.....   | 82  |
| B.    | Procedure for Competitive Verbal Quotes and Proposals.....   | 82  |
| C.    | Procedure for Informal Written Solicitation.....   | 83  |
| D.    | Procurement Methods for Professional Services and Public Improvements<br>.....                       | 83  |
| E.    | Retroactive Approval.....  | 83  |
| VI.   | Source Selection Methods for Goods or Services, Other Than Personal or Professional<br>Services..... | 84  |
| A.    | Small Procurements.....  | 84  |
| B.    | Intermediate Procurements.....   | 84  |
| C.    | Large Procurements.....  | 85  |
| VII.  | Personal Services Contracts.....   | 85  |
| A.    | Classification of Services as Personal Services.....   | 856 |
| B.    | Requests for Qualifications.....   | 85  |
| C.    | Direct Negotiations.....   | 86  |
| D.    | Informal Written Solicitations.....  | 86  |
| E.    | Requests for Proposals.....  | 87  |
| VIII. | Alternative Source Selection Methods for Goods or Services & Personal Services.<br>.....             | 89  |

|     |    |   |    |
|-----|----|---|----|
|     | A. | Sole-Source Procurements.....                                       | 89 |
|     | B. | Special Procurements.....   | 89 |
|     | C. | Contracts.....  | 90 |
|     | D. | Emergency Procurements.....   | 91 |
|     | E. | Cooperative Procurement Contracts.....                              | 91 |
| IX. |    | Surplus Property.....   | 92 |
|     | A. | General Methods.....  | 92 |
|     | B. | Disposal of Property with Minimal Value.....                        | 92 |
|     | C. | Personal-Use Items.....   | 92 |
|     | D. | Restriction on Sale to City Employees.....                          | 92 |
|     | E. | Conveyance to Purchaser.....  | 92 |
| X.  |    | Protest and Appeal Procedures.....                                  | 92 |
|     | A. | Appeal of Debarment or Prequalification Decision.....               | 92 |
|     | B. | Protests and Judicial Review of Special Procurements.....           | 93 |
|     | C. | Protests and Judicial Review of Sole-Source Procurements.....       | 94 |
|     | D. | Protests and Judicial Review of Personal Services Procurements..... | 95 |
|     | E. | Protests of Cooperative Procurements.....                           | 96 |

**Preface**

Local governments in Oregon spend millions of dollars each calendar year to provide goods and services to their communities. Because the money being spent is taxpayer money, the highest standards of professionalism must apply. Professionalism requires that the money be spent openly and in accordance with well-vetted and established procedures, and that the purchase is at an equitable and reasonable price.

To ensure transparency in public purchasing, the Oregon Legislative Assembly requires all cities to establish, implement and follow standardized procurement rules. ORS 279A.065 gives cities three choices in their establishment of standardized procurement rules: (1) follow the Model Rules adopted by the Oregon attorney general; (2) prescribe their own rules; or (3) prescribe their own rules which include portions of the Model Rules adopted by the Oregon attorney general.

If a city chooses to adopt its own rules, it is required to do two things. First, it must specifically state that the model rules adopted by the Oregon attorney general are not applicable to the city. Second, each time the Oregon attorney general’s office modifies its Model Rules, the city is required to review the modified rules to ensure its own locally created and adopted rules are still compliant with all applicable state regulations.

This Model Policy for Public Contracting and Purchasing was prepared by the League’s Legal Services Department. The model was developed by using the League’s own Public Contracting Policy as a starting point as well as public purchasing policies adopted by cities across Oregon.

**Disclaimer**

This Model Policy for Public Contracting and Purchasing is not a substitute for legal advice. To ensure compliance with federal, state and any applicable local charters or ordinances, city officials drafting a public purchasing policy are advised to seek the advice of their city attorney.

## Public Purchasing Code

### I. Introduction.

- A. Purpose of Purchasing Policy.** This {Code} is adopted by the city council as the governing body of the city to establish the rules and procedures for contracts entered into and purchases made by the city. It is the policy of the city in adopting this {Code} to utilize public contracting and purchasing practices and methods that maximize the efficient use of city resources and the purchasing power of city funds by:
1. Promoting impartial and open competition;
  2. Using solicitation materials that are complete and contain a clear statement of contract specifications and requirements; and
  3. Taking full advantage of evolving procurement methods that suit the purchasing needs of the city as they emerge within various industries.
- B. Interpretation of Purchasing Policy.** Except as specifically provided in this {Code}, public contracts and purchases shall be awarded, administered and governed according to ORS Chapters 279A, 279B and 279C (the “Public Contracting Code”) and the Attorney General’s Model Public Contract Rules (“Model Rules”), as they now exist.
1. In furtherance of the purposes of the objective set forth above in subsection A, it is the city’s intent that this {Code} be interpreted to authorize the full use of all contracting and purchasing powers described in ORS Chapters 279A, 279B and 279C.
  2. The Model Rules adopted under ORS 279A.065 shall apply to the contracts and purchases of the city to the extent they do not conflict with this {Code} and the rules and regulations adopted by the city.
  3. In the event of a conflict between any provisions of this {Code} and the Model Rules, the provisions of this {Code} shall prevail.
- C. Specific Provisions’ Precedence over General Provisions.** In the event of a conflict between the provisions of this {Code}, the more specific provision shall take precedence over the more general provision.
- D. Conflict with Federal Statutes and Regulations.** Except as otherwise expressly provided in ORS Chapters 279A, 279B and/or 279C, applicable federal statutes and regulations govern when federal funds are involved.

**II. Definitions.** Unless a different definition is specifically provided herein, or context clearly requires otherwise, the following terms have the meanings set forth herein. Additionally, any term defined in the singular includes the meaning of the plural, and vice versa.

- A. Administering agency.** The contracting agency that solicited and established the original contract in a cooperative procurement for goods, services, personal services, professional services, or public improvements.
- B. Affected person/offeror.** A person whose ability to participate in a procurement is adversely impaired by a city decision.
- C. Architectural, engineering, and land surveying services.** Professional services performed by an architect, engineer, or land surveyor and includes architectural,

engineering or land surveying services, separately or any combination thereof, as appropriate within the context of a section of this Model.

- D. Award.** The decision to enter into a contract or purchase order with a specific offeror.
- E. Bid.** A response to an invitation to bid.
- F. Bidder.** A person who submits a bid in response to an invitation to bid.
- G. Business with which a city employee is associated.** Any business in which a city employee is a director, officer, owner or employee, or any corporation in which a city employee owns or has owned ten percent (10%) or more of any class of stock at any point in the preceding calendar year.
- H. City.** The city of {insert city's name}, a municipal corporation, and a contracting and purchasing agency.
- I. City manager.** The person appointed by the city council to the position of city manager.
- J. Closing.** The date and time announced in a solicitation document as the deadline for submitting bids or offers.
- K. Contract.** See Public Contract.
- L. Contractor.** The person who enters into a contract with the city.
- M. Contract price.** As the context requires:
  - 1. The maximum payment that the city will make under a contract if the contractor fully performs under the contract, including bonuses, incentives and contingency amounts;
  - 2. The maximum not-to-exceed payment specified in the contract; or
  - 3. The unit prices set forth in the contract.
- N. Contracting agency.** A public body authorized by law to conduct a procurement.
- O. Cooperative procurement.** A procurement conducted by, or on behalf of, one or more contracting agencies.
- P. Days.** Calendar days.
- Q. Emergency.** Involves circumstances that:
  - 1. Could not have been reasonably foreseen;
  - 2. Create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and
  - 3. Require prompt execution of a contract or amendment in order to remedy the condition.
- R. Findings.** The justification for a conclusion. If the justification relates to a public improvement contract, findings may be based on information that includes, but is not limited to:
  - 1. Operational, budget and financial data;
  - 2. Public benefits;
  - 3. Value engineering;

4. Specialized expertise;
  5. Market conditions;
  6. Technical complexity; and
  7. Funding sources.
- S. Goods and/or services.** Supplies, equipment, materials and services, other than personal services, and any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto. The term includes combinations of any of the items identified in the definition.
- T. Grant.** An agreement under which:
1. The city receives moneys, property or other assistance, including but not limited to, federal assistance that is characterized as a grant by federal law or regulation, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets;
    - a. The assistance received by the city is from a grantor for the purpose of supporting or stimulating a program or activity of the city; and
    - b. No substantial involvement by the grantor is anticipated in the program or activity other than involvement associated with monitoring compliance with grant conditions; or
  2. The city provides moneys, property or other assistance, including but not limited to, federal assistance that is characterized as a grant by federal law or regulation, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets;
    - a. The assistance is given to the recipient for the purpose of supporting or stimulating a program or activity of the recipient; and
    - b. No substantial involvement by the city is anticipated in the program or activity other than involvement associated with monitoring compliance with grant conditions.
- U. Immediate family member.** An employee's: spouse, and parents thereof; children, and spouses thereof; parents, and spouses thereof; siblings, and spouses thereof; grandparents and grandchildren, and spouses thereof; and domestic partner, and parents thereof.
- V. Offer.** A bid, proposal, quote or other response to a solicitation document.
- W. Offeror.** A person who submits an offer.
- X. Opening.** The date, time and place announced in the solicitation document for the public opening of written sealed offers.
- Y. Original contract.** The initial contract or price agreement solicited and awarded during a cooperative procurement by an administering agency.
- Z. Purchasing agency.** An agency that procures goods or services, personal services, or public improvements from a contractor based on the original contract established by an administering agency in a cooperative procurement.
- AA. Person.** An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public body, public corporation or other legal or commercial entity, and any other person or entity with legal capacity to contract.

- BB. Personal services.** Services, other than professional services, that require specialized skill, knowledge and resources in the application of technical or scientific expertise or in the exercise of professional, artistic or management discretion or judgment.
1. Qualifications and performance history, expertise and creativity, and the ability to exercise sound professional judgment are typically the primary considerations when selecting a personal services contractor, with price being secondary.
  2. Personal services contracts include, but are not limited to, the following classes of contracts:
    - a. Contracts for services performed in a professional capacity, including but not limited to, services of an accountant, attorney, auditor, court reporter, information technology consultant, physician or broadcaster;
    - b. Contracts for professional or expert witnesses or consultants to provide services or testimony relating to existing or potential litigation or legal matters in which the city is or may become interested;
    - c. Contracts for services as an artist in the performing or fine arts, including any person identified as a photographer, film maker, actor, director, painter, weaver or sculptor;
    - d. Contracts for services that are specialized, creative or research-oriented; and/or
    - e. Contracts for services as a consultant.
- CC. Price agreement.** A contract for the procurement of goods or services at a set price which has:
1. No guarantee of a minimum or maximum purchase; or
  2. An initial order or minimum purchase combined with a continuing contractor obligation to provide goods or services with no guarantee of any minimum or maximum additional purchase.
- DD. Procurement.** The act of purchasing, leasing, renting or otherwise acquiring goods or services, personal services or professional services. It includes each function and procedure undertaken or required to be undertaken to enter into a contract, administer a contract and obtain the performance of a contract for goods or services, personal services or professional services.
- EE. Professional services.** Architectural, engineering, land surveying, photogrammetric, transportation planning or related services, or any combination of these services, provided by a consultant.
- FF. Proposal.** A response to a request for proposals.
- GG. Proposer.** A person that submits a proposal in response to a request for proposals.
- HH. Provider.** As the context requires, a supplier of goods or services, personal services, or professional services.
- II. Public contract.** A sale or other disposal, or a purchase, lease, rental or other acquisition, by the city of personal property, goods or services, including personal services, professional services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. It does not include grants.

- JJ. Public contracting.** Procurement activities relating to obtaining, modifying or administering contracts or price agreements.
- KK. Public improvement.** A project for construction, reconstruction or major renovation on real property, by or for the city. It does not include projects for which no funds of the city are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or emergency work, minor alteration, or ordinary repair or maintenance necessary to preserve a public improvement.
- LL. Public improvement contract.** A contract for a public improvement. This does not include a contract for emergency work, minor alterations, or ordinary repair, or maintenance necessary to maintain a public improvement.
- MM. Recycled product.** All materials, goods and supplies, not less than fifty percent (50%) of the total weight of which consists of secondary and post-consumer waste with not less than ten percent (10%) of its total weight consisting of post-consumer waste. It 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.
- NN. Related services.** Personal services, other than architectural, engineering and land survey services, that are related to the planning, design, engineering or oversight of public improvement projects or components thereof, including but not limited to:
1. Landscape architectural services;
  2. Facilities planning services;
  3. Energy planning services;
  4. Space planning services;
  5. Environmental impact studies;
  6. Hazardous substances or hazardous waste or toxic substances testing services;
  7. Wetland delineation studies;
  8. Wetland mitigation services;
  9. Native American studies;
  10. Historical research services;
  11. Endangered species studies;
  12. Rare plant studies;
  13. Biological services;
  14. Archaeological services;
  15. Cost estimating services;
  16. Appraising services;
  17. Material testing services;
  18. Mechanical system balancing services;
  19. Commissioning services;

20. Project management services;

21. Construction management services and owner's representatives service; and/or

22. Land use planning services.

**OO. Request for proposals.** A solicitation document used for soliciting proposals.

**PP. Request for qualifications.** A written document issued by the city describing particular services to which potential contractors respond with a description of their experience and qualifications that results in a list of potential contractors who are qualified to perform those services, but which is not intended to create a contract between a potential contractor on the list and the city.

**QQ. Revenue generating agreements.** Contracts or agreements for services that generate revenue and that are typically awarded to the offeror proposing the most advantageous or highest monetary return.

**RR. Scope.** The range and attributes of the goods or services described in a procurement document.

**SS. 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 authority and intent to be bound.

**TT. Solicitation.** As the context requires:

1. A request for the purpose of soliciting offers, including an invitation for bid, a request for proposal, a request for quotation, a request for qualifications, or other similar documents;
2. The process of notifying prospective offerors of a request for offers; and/or
3. The solicitation document.

**UU. Work.** The furnishing of all materials, equipment, labor, and incidentals necessary to successfully complete any individual item in a contract and successful completion of all duties and obligations imposed by the contract.

**VV. Written or in writing.** Conventional paper documents, whether handwritten, typewritten or printed, in contrast to spoken words, including electronic transmissions or facsimile documents when required by applicable law or permitted by a solicitation document or contract.

### **III. Authority.**

**A. City Council as Local Contract Review Board.** The city council is designated as the local contract review board of the city and has all the rights, powers, and authority necessary to carry out the provisions of this {Code}, the Public Contracting Code, and/or the Model Rules.

**B. Application of Attorney General's Model Rules of Procedure.** Pursuant to ORS 279A.065(6), the city has elected to establish its own policy for public contracting and purchasing. Except as provided herein, the Model Rules do not apply to the city.

**C. Inapplicability of {Code}.** This {Code} does not apply to the following:

1. Contracts or agreement to which the Public Contracting Code does not apply;

2. Contracts, intergovernmental and interstate agreements entered into pursuant to ORS Chapter 190;
3. Grants;
4. Acquisitions or disposals of real property or interests in real property;
5. Procurements from an Oregon Corrections Enterprise program;
6. Contracts, agreements or other documents entered into, issued or established in connection with:
  - a. The incurring of debt, including 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 advance of funds, aid or assistance by the city to a public or private person for the purpose of carrying out, promoting or sustaining activities or programs authorized by law other than for the construction of public works or public improvements;
  - c. The investment of funds by the city as authorized by law; or
  - d. Banking, money management or other predominantly financial transactions that, by their character, cannot practically be established under the competitive contractor selection procedures, based upon the findings of the city manager.
7. Contracts for employee benefit plans;
8. Contracts with newspapers and other publications for the placement of advertisements or public notices;
9. Contracts for items where the price is regulated and available from a single source or limited number of sources;
10. Insurance contracts;
11. Revenue-generating agreements;
12. Federal agreements where applicable federal statutes and regulations govern when federal funds are involved and the federal statutes or regulations conflict with any provision of the Oregon Public Contracting Code or this {Code}, or require additional conditions in public contracts not authorized by the Oregon Public Contracting Code or this {Code}.

**D. Authority of City Manager.** For contracts and purchases covered by this {Code}, the city manager is authorized to:

1. Award contracts and amendments without specific authorization by the city council whenever the contract amount is \$100,000 or less and the proposed expenditure is included in the current fiscal year budget.
2. Execute contracts and amendments with specific authorization by the city council whenever the contract or amendment amount is greater than \$100,000 and the proposed expenditure is included in the current fiscal year budget.
3. As the purchasing agent for the city, the city manager is authorized to:
  - a. Advertise for bids or proposals without specific authorization from the city council, when the proposed purchase is included within the current fiscal year budget.

- b. Advertise for bids or proposals when the proposed purchase is not included within the current fiscal year budget after the city council approves the proposed budget transfer.
  - c. Purchase goods, services and/or property without specific authorization by the city council whenever the amount is \$100,000 or less and the proposed expenditures are included in the current fiscal year budget.
  - d. Purchase goods, services and/or property with specific authorization by the city council whenever the amount is greater than \$100,000 and the proposed expenditure is included in the current fiscal year budget.
  - e. Purchases of any goods or services in excess of \$7,500 from city employees require authorization of the city manager.
  - f. Departments shall communicate purchase requirements to the city manager and plan sufficiently in advance so that orders can be placed in economical quantities.
4. Delegate, in writing, the signature authority described in the above subsection (2) and the purchasing powers described in the above subsection (3). In the absence of a written delegation to the contrary, and in the absence of the city manager, the signature authority described in the above subsection (2) and the purchasing powers described in the above subsection (3) are delegated in order as follows:
- a. Auditor;
  - b. Finance director; and
  - c. Mayor.
5. Adopt forms, procedures, computer software, and administrative rules for all city purchases regardless of the amount.
- a. When adopting the forms, procedures, computer software, and/or administrative rules, the city manager shall establish practices and policies that:
    - i. Do not encourage favoritism or substantially diminish competition; and
    - ii. Allow the city to take advantage of the cost-saving benefits of alternative contracting methods and practices;
  - b. The city shall use these forms, procedures, computer software and administrative rules unless they conflict with the {Code}.
- E. Favorable Terms.** Contracts and purchases shall be negotiated on the most favorable terms in accordance with this {Code}, other adopted ordinances, state and federal laws, policies and procedures.
- F. Unauthorized Contracts or Purchases.** Public contracts entered into or purchases made as authorized herein shall be voidable at the sole discretion of the city.
- 1. The city may take appropriate action in response to execution of contracts or purchases made contrary to this provision.
  - 2. Such actions include, but are not limited to, providing educational guidance, imposing disciplinary measures, and/or holding individuals personally liable for such contracts or purchases.

- G. Purchasing from City Employees or Employees' Immediate Family Prohibited.** No contract shall be entered into with or purchase made from any city employee or employee's immediate family member, or any business with which the employee is associated, unless:
1. The contract or purchase is expressly authorized and approved by the city council; or
  2. The need for the contract or purchase occurs during a state of emergency, and the city manager finds, in writing, that the acquisition from the employee, employee's immediate family member or business with which the employee is associated is the most expeditious means to eliminate the threat to public health, safety and welfare.

#### **IV. Preferences.**

- A. Discretionary Local Preference.** If the solicitation is in writing, the city manager may provide a specified percentage preference of not more than ten percent (10%) for goods fabricated or processed entirely in Oregon or services performed entirely in Oregon.
1. When a preference is provided under this subsection, and more than one offeror qualifies for the preference, the city manager may give further preference to a qualifying offeror that resides in or is headquartered in Oregon.
  2. The city manager may establish a preference percentage of ten percent (10%) or higher if the city manager makes a written determination that good cause exists to establish the higher percentage, explains the reasons, and provides evidence of good cause.
  3. The preference described in this subsection cannot be applied to a contract for emergency work, minor alterations, and ordinary repairs or maintenance of public improvements.
- B. Mandatory Tie Breaker Preference.** If offers are identical in price, fitness, availability, and the quality is identical, and the city desires to award the contract, the preferences provided in ORS 279A.120 shall be applied prior to the contract award.
- C. Reciprocal Preference.** Reciprocal preferences must be given when evaluating bids, if applicable under ORS 279A.120.
- D. Preference for Recycled Materials and Supplies.** Preferences for recycled goods shall be given when comparing goods, if applicable under ORS 279A.125. The city manager shall adopt standards to determine if goods are manufactured from recycled materials.

#### **V. General Provisions.**

- A. Public Notice.** Unless otherwise specifically provided by this {Code}, any notice required to be published by this {Code} may be published using any method the city manager deems appropriate, including but not limited to, mailing notice to persons that have requested notice in writing, placing notice on the city's website, or publishing in statewide trade or local publications.
- B. Procedure for Competitive Verbal Quotes and Proposals.** Where allowed by this {Code}, solicitations by competitive verbal quotes and proposals shall be based on a description of the quantity of goods or services to be provided, and may be solicited and received by phone, or facsimile or email if authorized by the city manager.
1. A good faith effort shall be made to contact at least three (3) potential providers.

2. If three (3) potential providers are not reasonably available, fewer will suffice, provided the reasons three potential providers are not reasonably available is documented as part of the procurement file.

**C. Procedure for Informal Written Solicitation.** Where allowed by this {Code}, informal written solicitations shall be made by a solicitation document sent to not less than three (3) prospective providers.

1. The solicitation document shall request competitive price quotes or competitive proposals, and include:
  - a. The date, time and place that price quotes or proposals are due;
  - b. A description or quantity of the good or service required;
  - c. Any statement of period for which price quotes or proposals must remain firm, irrevocable, valid and binding on the offeror. If no time is stated in the solicitation document, the period shall be thirty (30) days;
  - d. Any required contract terms or conditions; and
  - e. Any required bid form or proposed format.
2. Price quotes or proposals shall be received by the city manager at the date, time and place established in the solicitation document.
  - a. The city manager shall keep a written record of the sources of the quotes or proposals.
  - b. If three (3) quotes or proposals are not reasonably available, fewer shall suffice, but the city manager shall make a written record of the effort made to obtain quotes or proposals as part of the procurement file.

**D. Procurement Methods for Professional Services and Public Improvements.** The city shall apply the Public Contracting Code and the Model Rules when procuring professional services and public improvements and processing protests thereof.

**E. Retroactive Approval.** Retroactive approval of a contract means the award or execution of a contract where work was commenced without final award or execution. The city manager may make a retroactive approval of a contract only if the responsible employee submits a copy of the proposed contract to the city manager, along with a written request for contract retroactive approval, that contains:

1. An explanation of the reason work was commenced before the contract was finally awarded or executed;
2. A description of steps being taken to prevent similar occurrences in the future;
3. Evidence that, but for the failure to finally award or execute the contract, the employee complied with all other steps required to properly select a contractor and negotiate the contract; and
4. A proposed form of contract.

## VI. Source Selection Methods for Goods or Services, Other Than Personal or Professional Services.

**A. Small Procurements.** Contracts for or purchases of goods or services with a contract price of \$10,000<sup>269</sup> or less are small procurements.

1. Purchases less than \$7,500. The city manager may use any procurement method the city manager deems practical or convenient, including direct negotiation or award, for small procurements of goods or services with a contract price of less than \$7,500.
2. Purchases between \$7,500 and \$10,000.<sup>270</sup> The city manager may use competitive verbal quotes or proposals and informal written solicitations for small procurements of goods or services with a contract price between \$7,500 and \$10,000.
3. Negotiations. The city manager may negotiate with an offeror to clarify competitive verbal quotes or proposals or informal written proposals, or to make modifications that will make the quote or proposal acceptable or more advantageous to the city.
4. Award. If a contract is awarded, the award shall be made to the offeror whose verbal quote or proposal the city manager determines will best serve the interests of the city, taking into account price as well as any other relevant considerations, including but not limited to, experience, expertise, product functionality, suitability for a particular purpose, delivery, and contractor responsibility.
5. Amendments. Small procurement contracts may be amended if the cumulative amendments do not increase the total contract price to more than twenty-five percent (25%) of the original contract price.
6. Public notice. No public notice of small procurements is required.

**B. Intermediate Procurements.** Contracts for goods or services with a contract price greater than \$10,000 and less than or equal to \$150,000 are intermediate procurements.<sup>271</sup>

1. Intermediate procurements shall be by informal written solicitation.
2. Negotiations. The city manager may negotiate with an offeror to clarify an informal written solicitation, or to make modifications that will make the quote, proposal, or solicitation acceptable or more advantageous to the city.
3. Award. If a contract is awarded, the award shall be made to the offeror whose competitive verbal quote or proposal or informal written solicitation the city manager determines will best serve the interests of the city, taking into account price or any other relevant considerations, including but not limited to, experience, expertise, product functionality, suitability for a particular purpose, delivery and contractor responsibility.
4. Amendments. Intermediate procurement contracts may be amended if the cumulative amendments do not increase the total contract price by more than twenty-five percent (25%) of the original contract price.

---

<sup>269</sup> Effective September 23, 2023, SB 1047 alters the thresholds for small procurements for goods and services from \$10,000 up to \$25,000 and intermediate procurements for goods and services from \$150,000 up to \$250,000.

<sup>270</sup> *Id.* Consider whether the amount should remain at the lower level or increase with the statutory threshold increase.

<sup>271</sup> *Id.*

5. Public notice. Public notice is required for intermediate procurements with a contract price equal to or exceeding \$50,000.

**C. Large Procurements.** Contracts for goods or services with a contract price greater than \$150,000 are large procurements.<sup>272</sup>

1. The city manager may use competitive sealed bidding as set forth in ORS 279B.055, or competitive sealed proposals as set forth in ORS 279B.060.
2. When using either competitive sealed bidding or competitive sealed proposals, the city manager shall follow the applicable procedures set out in the Model Rules.
3. The city shall apply the applicable procedure set out in the Model Rules for processing protests of large procurements.

## **VII. Personal Services Contracts.**

**A. Classification of Services as Personal Services.** In addition to the classes of personal services contracts identified in the definition of personal services contracts, the city manager may classify additional specific types of services as personal services. In determining whether a service is a personal service, the city manager shall consider:

1. Whether the work requires specialized skills, knowledge and resources in the application of technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment;
2. Whether the city intends to rely on the contractor's specialized skills, knowledge and expertise to accomplish the work; and
3. Whether selecting a contractor primarily on the basis of qualifications, rather than price, would most likely meet the city's needs and result in obtaining satisfactory contract performance and optimal value.
4. A service shall not be classified as personal services for the purposes of this {Code} if:
  - a. The work has traditionally been performed by contractors selected primarily on the basis of price; or
  - b. The services do not require specialized skills, knowledge and resources in the application of highly technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment.

**B. Requests for Qualifications.** At the city manager's discretion, a request for qualifications may be used to determine whether competition exists to perform the needed personal services or to establish a non-binding list of qualified contractors for individual negotiation, informal written solicitations or requests for proposals.

1. A request for qualifications shall describe the particular type of personal services that will be sought, the qualifications the contractor must have to be considered, and the evaluation factors and their relative importance.
2. A request for qualifications may require information including, but not limited to:

---

<sup>272</sup> Effective September 23, 2023, SB 1047 alters the thresholds for small procurements for goods and services from \$10,000 up to \$25,000 and intermediate procurements for goods and services from \$150,000 up to \$250,000. The amount will adjust to "greater than \$250,000."

- a. The contractor's particular capability to perform the required personal services;
  - b. The number of experienced personnel available to perform the required personal services;
  - c. The specific qualifications and experience of personnel;
  - d. A list of similar personal services the contractor has completed;
  - e. References concerning past performance; and
  - f. Any other information necessary to evaluate the contractor's qualifications.
3. A voluntary or mandatory qualifications pre-submission meeting may be held for all interested contractors to discuss the proposed personal services. The request for qualifications shall include the date, time and location of the meeting.
  4. Unless the responses to a request for qualifications establish that competition does not exist, the request for qualifications is canceled, or all responses to the request for qualifications are rejected, and all respondents who meet the qualifications set forth in the request for qualifications shall receive notice of any required personal services and have an opportunity to submit a proposal in response to request for proposals.
- C. Direct Negotiations.** Personal services may be procured through direct negotiations if:
1. The contract price does not exceed \$75,000 and the work is within a budgetary appropriation or approved by the city council; or
  2. The confidential personal services, including special counsel, or professional or expert witnesses or consultants, are necessary to assist with pending or threatened litigation or other legal matters in which the city may have an interest; or
  3. The nature of the personal service is not project-driven but requires an ongoing, long-term relationship of knowledge and trust.
  4. Amendments. Personal services contracts procured by direct negotiation pursuant to this section may be amended, provided the amendment is within the scope of the original contract and the cumulative amount of the amendments does not increase the total contract price by more than twenty-five percent (25%) over the original contract price; or the amendment is necessary to complete the work being performed and it would be unreasonable or impracticable to seek another provider within the time frames needed to complete the work.
  5. Public Notice. No public notice of personal services contracts procured by direct negotiations is required.
- D. Informal Written Solicitations.** An informal written solicitation process may be used for personal services when the contract price is less than \$125,000.
1. An informal written solicitation shall solicit proposals from at least three (3) qualified providers. If the city manager determines three (3) qualified providers are not reasonably available, fewer shall suffice if the reasons three (3) providers are not reasonably available are documented in the procurement file.
  2. The solicitation document shall include:
    - a. The date, time and place that proposals are due;
    - b. A description of personal services sought, or the project to be undertaken;

- c. Any statement of the time period for which proposals must remain firm, irrevocable, valid and binding on the offeror. If no time is stated in the solicitation document, the period shall be thirty (30) days;
  - d. Any required contract terms or conditions; and
  - e. Any required bid form or proposal format.
3. Selection and ranking of proposals may be based on the following criteria:
- a. Particular capability to perform the personal services required;
  - b. Experienced staff available to perform the personal services required, including the proposer's recent, current and projected workloads;
  - c. Performance history;
  - d. Approach and philosophy used in providing personal services;
  - e. Fees or costs;
  - f. Geographic proximity to the project or the area where the services are to be performed; and
  - g. Such other factors deemed appropriate, including a desire to ensure an equitable distribution of work among highly qualified contractors.
4. The city manager shall maintain written documentation of the solicitation, including solicitation attempts, responses, and provider names and addresses in the procurement file.
5. Amendments. Personal services contracts procured by informal written solicitations pursuant to this section may be amended, provided the amendment is within the scope of the original contract and the cumulative amount of the amendments does not increase the total contract price by more than twenty-five percent (25%) over the original contract price; or the amendment is necessary to complete the work being performed and it would be unreasonable or impracticable to seek another provider within the time frames needed to complete the work.
6. Public Notice. No public notice of personal services contracts procured by informal written solicitations pursuant to this section is required.

**E. Requests for Proposals.** A request for proposals shall be used to procure personal services when the contract price is \$125,000 or more or the complexity of the project requires the use of a formal competitive process to determine whether a particular proposal is most advantageous to the city.

1. Request for Proposal. The request for proposal shall include:
- a. Notice of any pre-offer conference, including:
    - i. The time, date and location;
    - ii. Whether attendance at the pre-offer conference is mandatory or voluntary; and
    - iii. A provision that statements made by representatives of the city at the pre-offer conference are not binding unless confirmed by written addendum.

- b. The form and instructions for submission of proposals, including the location where proposals must be submitted, the date and time by which proposals must be received and any other special information, e.g., whether proposals may be submitted by electronic means;
  - c. The name and title of the person designated for the receipt of proposals and the person designated as the contact person for the procurement, if different;
  - d. A date, time and place that pre-qualification applications, if any, must be filed and the classes of work, if any, for which proposers must be pre-qualified;
  - e. A statement that the city may cancel the procurement or reject any or all proposals;
  
  - f. The date, time and place of opening;
  - g. The office where the request for proposals may be reviewed;
  - h. A description of the personal services to be procured;
  - i. The evaluation criteria;
  - j. The anticipated schedule, deadlines, evaluation process and protest process;
  - k. The form and amount of any proposal security deemed reasonable and prudent by the city manager to protect the city's interests;
  - l. A description of the manner in which proposals will be evaluated, including the relative importance of price and other evaluation factors used to rate the proposals;
  - m. If more than one tier of competitive evaluation will be used, a description of the process under which the proposals will be evaluated in the subsequent tiers;
  - n. If contracts will be awarded to more than one personal services contractor, an identification of the manner in which the city will determine the number of contracts to be awarded, or that the manner will be left to the city's discretion at time of award;
  - o. If contracts will be awarded to more than one personal services contractor, the criteria to be used to choose from the multiple contracts when acquiring personal services shall be identified;
  - p. All required contract terms and conditions, including the statutorily required provisions in ORS 279B.220, 279B.230 and 279B.235; and
  - q. Any terms and conditions authorized for negotiation.
2. Public Notice. The city manager shall provide public notice of a request for proposals for personal services.
- a. Public notice shall be given not less than twenty-one (21) days prior to closing for the request for proposals, unless the city manager determines that a shorter interval is in the public's interest, or a shorter interval will not substantially affect competition.
  - b. The city manager shall document the specific reasons for the shorter public notice period in the procurement file.

3. Amendments. Personal services contracts procured by requests for proposals pursuant to this section may be amended, provided the amendment is within the scope of the original contract and the cumulative amount of the amendments does not increase the total contract price by more than twenty-five percent (25%) over the original contract price; or the amendment is necessary to complete the work being performed and it would be unreasonable or impracticable to seek another provider within the time frames needed to complete the work.

## VIII. Alternative Source Selection Methods for Goods or Services & Personal Services.

### A. **Sole-Source Procurements.** A contract may be awarded as a sole-source procurement without competition pursuant to this section.

1. Determination of Sole Source. Before a sole-source contract may be awarded, the city manager shall make written findings that the goods or services, personal services or professional services are available from only one source, based on one or more of the following criteria:
  - a. The efficient use of existing goods or services, personal services or professional services requires the acquisition of compatible goods or services, personal services or professional services that are available from only one source;
  - b. The goods or services, personal services or professional services are available from only one source and required for the exchange of software or data with other public or private agencies;
  - c. The goods or services, personal services or professional services are available from only one source, and are needed for use in a pilot or an experimental project; or
  - d. Other facts or circumstances exist that support the conclusion that the goods or services, personal services or professional services are available from only one source.
2. Negotiations. To the extent reasonably practical, contract terms advantageous to the city shall be negotiated with the sole source provider.
3. Notice. The city manager shall post notice of any determination that the sole source selection method will be used on the city's website not less than ten (10) days prior to the date a sole source contract will be awarded. The notice shall describe the goods or services, personal services or professional services to be procured, identify the prospective contractor and include the date and time when, and place where, protests of the use of a sole source selection method must be filed.

### B. **Special Procurements.** In its capacity as contract review board for the city, the city council, upon its own initiative or upon request of the city manager, may create special selection, evaluation and award procedures for, or may exempt from competition, the award of a specific contract or class of contracts as provided in this section.

1. Basis for Approval. The approval of a special solicitation method or exemption from competition must be based upon a record before the city council that contains the following:
  - a. The nature of the contract or class of contracts for which the special solicitation or exemption is requested;
  - b. The estimated contract price or cost of the project, if relevant;

- c. Findings to support the substantial cost savings, enhancement in quality or performance, or other public benefit anticipated by the proposed selection method or exemption from competitive solicitation;
  - d. Findings to support the reason that approval of the request would be unlikely to encourage favoritism or diminish competition for the public contract or class of public contracts, or would otherwise substantially promote the public interest in a manner that could not practicably be realized by complying with the solicitation requirements that would otherwise be applicable under these regulations;
  - e. A description of the proposed alternative contracting methods to be employed; and
  - f. The estimated date by which it would be necessary to let the contract(s).
2. In making a determination regarding a special selection method, the city council may consider the type, cost, amount of the contract or class of contracts, number of persons available to make offers, and such other factors as it may deem appropriate.
  3. Hearing. The city shall approve the special solicitation or exemption after a public hearing before the city council.
    - a. At the public hearing, the city shall offer an opportunity for any interested party to appear and present comment.
    - b. The city council shall consider the findings and may approve the exemption as proposed or as modified by the city council after providing an opportunity for public comment.
- C. Contracts.** Subject to award at the city manager's discretion. The following classes of contracts may be awarded in any manner that the city manager deems appropriate to the city's needs, including by direct appointment or purchase. Except where otherwise provided, the city manager shall make a record of the method of award.
1. Amendments. Contract amendments shall not be considered to be separate contracts if made in accordance with the {Code}.
  2. Copyrighted Materials; Library Materials. Contracts for the acquisition of materials entitled to copyright, including but not limited to, works of art and design, literature and music, or materials even if not entitled to copyright, purchased for use as library lending materials.
  3. Equipment Repair. Contracts for equipment repair or overhauling, provided the service or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing.
  4. Government-Regulated Items. Contracts for the purchase of items for which prices or selection of suppliers are regulated by a governmental authority.
  5. Non-Owned Property. Contracts or arrangements for the sale or other disposal of abandoned property or other personal property not owned by the city.
  6. Specialty Goods for Resale. Contracts for the purchase of specialty goods by the city for resale to consumers.
  7. Sponsorship Agreements. Sponsorship agreements, under which the city receives a gift or donation in exchange for recognition of the donor.
  8. Structures. Contracts for the disposal of structures located on city-owned property.

9. Renewals. Contracts that are being renewed in accordance with their terms are not considered to be newly issued contracts and are not subject to competitive procurement procedures.
10. Temporary Extensions or Renewals. Contracts for a single period of one (1) year or less, for the temporary extension or renewal of an expiring and non-renewable, or recently expired, contract, other than a contract for public improvements.
11. Temporary Use of City-Owned Property. The city may negotiate and enter into a license, permit or other contract for the temporary use of city-owned property without using a competitive selection process if:
  - a. The contract results from an unsolicited proposal to the city based on the unique attributes of the property or the unique needs of the proposer;
  - b. The proposed use of the property is consistent with the city's use of the property and the public interest; and
  - c. The city reserves the right to terminate the contract without penalty, in the event that the city determines that the contract is no longer consistent with the city's present or planned use of the property or the public interest.
12. Used Property. The city manager may contract for the purchase of used property by negotiation if such property is suitable for the city's needs and can be purchased for a lower cost than substantially similar new property.
  - a. For this purpose, the cost of used property shall be based upon the life-cycle cost of the property over the period for which the property will be used by the city.
  - b. The city manager shall record the findings that support the purchase.
13. Utilities. Contracts for the purchase of steam, power, heat, water, telecommunications services, and other utilities.
14. Conference/Meeting Room Contracts. Contracts entered into for meeting room rental, hotel rooms, food and beverage, and incidental costs related to conferences and city-sponsored workshops and trainings.

- D. Emergency Procurements.** When the city manager determines that immediate execution of a contract within the city manager's authority is necessary to prevent substantial damage or injury to persons or property, the city manager may execute the contract without competitive selection and award or city council approval, but, where time permits, competitive quotes should be sought from at least three (3) providers.
1. When the city manager enters into an emergency contract, the city manager shall, as soon as possible in light of the emergency circumstances, document the nature of the emergency, the method used for selection of the particular contractor, and the reason why the selection method was deemed in the best interest of the city and the public.
  2. The city manager shall also notify the city council of the facts and circumstances surrounding the emergency execution of the contract.

- E. Cooperative Procurement Contracts.** Cooperative procurements may be made without competitive solicitation as provided in the Public Contracting Code.

## **IX. Surplus Property.**

- A. General Methods.** Surplus property may be disposed of by any of the following methods upon a determination by the city manager that the method of disposal is in the best interest of the city. Factors that may be considered by the city manager include costs of sale, administrative costs, and public benefits to the city.
1. Governments. Without competition, by transfer or sale to another government department or public agency.
  2. Auction. By publicly advertised auction to the highest bidder.
  3. Bids. By publicly advertised invitation to bid.
  4. Liquidation Sale. By liquidation sale using a commercially recognized third-party liquidator selected in accordance with this {Code} for the award of personal services contracts.
  5. Fixed Price Sale. The city manager may establish a selling price based upon an independent appraisal or published schedule of values generally accepted by the insurance industry, schedule and advertise a sale date, and sell to the first buyer meeting the sales terms.
  6. Trade-In. By trade-in, in conjunction with acquisition of other price-based items under a competitive solicitation. The solicitation shall require the offer to state the total value assigned to the surplus property to be traded.
  7. Donation. By donation to any organization operating within or providing a service to residents of the state of Oregon, which is recognized by the Internal Revenue Service as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986, as amended.
- B. Disposal of Property with Minimal Value.** Surplus property which has a value of less than \$500, or for which the costs of sale are likely to exceed sale proceeds, may be disposed of by any means determined to be cost-effective, including by disposal as waste. The employee making the disposal shall make a record of the value of the item and the manner of disposal.
- C. Personal-Use Items.** An item (or indivisible set) of specialized and personal use with a current value of less than \$100 may be sold to the employee or retired or terminated employee for whose use it was purchased. These items may be sold for fair market value without bid and by a process deemed most efficient by the city manager.
- D. Restriction on Sale to City Employees.** City employees shall not compete, as members of the public, for the purchase of publicly sold surplus property.
- E. Conveyance to Purchaser.** Upon the consummation of a sale of surplus personal property, the city shall make, execute and deliver a bill of sale or similar instrument signed on behalf of the city, conveying the property in question to the purchaser and delivering possession, or the right to take possession, of the property to the purchaser.

## **X. Protest and Appeal Procedures.**

- A. Appeal of Debarment or Prequalification Decision.**
1. Right to Hearing. Any person who has been debarred from competing for the city's contracts or for whom prequalification has been denied, revoked or revised may appeal the city's decision to the city council as provided in this section.

2. Filing of Appeal. The person shall file a written notice of appeal with the city manager within five (5) business days after the prospective contractor's receipt of notice of the determination of debarment or denial of prequalification.
3. Notification of City Council. Immediately upon receipt of such notice of appeal, the city manager shall notify the city council of the appeal.
4. Hearing. The procedure for appeal from a debarment or denial, revocation or revision of prequalification shall be as follows:
  - a. Promptly upon receipt of notice of appeal, the city shall notify the appellant of the date, time and place of the hearing;
  - b. The city council shall conduct the hearing and decide the appeal within thirty (30) days after receiving notice of the appeal from the city manager; and
  - c. At the hearing, the city council shall reconsider, without regard to the underlying decision giving rise to the appeal, the notice of debarment, or the notice of denial, revocation or revision of prequalification, the standards of responsibility upon which the decision on prequalification was based, or the reasons listed for debarment, and any evidence provided by the parties.
5. Decision. The city council shall set forth in writing the reasons for the decision.
6. Costs. The city council may allocate its costs for the hearing between the appellant and the city.
  - a. The allocation shall be based upon facts found by the city council and stated in the city council's decision that, in the city council's opinion, warrant such allocation of costs.
  - b. If the city council does not allocate costs, the costs shall be paid by the appellant if the decision is upheld, or by the city if the decision is overturned.
  - c. Judicial Review. The decision of the city council may be reviewed only upon a petition in the circuit court of {County} filed within fifteen (15) days after the date of the city council's decision. The appeal must be filed in accordance with all applicable state laws and trial court procedures.

**B. Protests and Judicial Review of Special Procurements.** An affected person may protest the request for approval of a special procurement as provided in this section.

1. Delivery; Late Protests. An affected person shall deliver a written protest to the city manager within seven (7) days after the first date of public notice of a proposed special procurement, unless a different period is provided in the public notice.
  - a. The written protest shall include a fee in an amount established in a schedule adopted by the city manager to cover the costs of processing the protest.
  - b. A protest submitted after the timeframe established under this subsection is untimely and shall not be considered.
2. Content of Protest. The written protest shall include:
  - a. Identification of the requested special procurement;
  - b. A detailed statement of the legal and factual grounds for the protest;
  - c. Evidence or documentation supporting the grounds on which the protest is based;
  - d. A description of the resulting harm to the affected person; and

- e. The relief requested.
- 3. Additional Information. The city manager may allow any person to respond to the protest in any manner the city manager deems appropriate, by giving such persons written notice of the time and manner whereby any response shall be delivered.
- 4. City Response. The city manager shall issue a written disposition of the protest in a timely manner.
  - a. If the city manager upholds the protest, in whole or in part, the city manager may, in the city manager's sole discretion, implement the protest in the approval of the special procurement, deny the request for approval of the special procurement, or revoke any approval of the special procurement.
  - b. If the city manager upholds the protest, in whole or in part, the city shall refund the fee required to be delivered with the protest.
- 5. Judicial Review. An affected person may not seek judicial review of a denial of a request for a special procurement.
  - a. Before seeking judicial review of the approval of a special procurement, an affected person shall exhaust all administrative remedies.
  - b. Judicial review shall be in accordance with ORS 279B.400.

**C. Protests and Judicial Review of Sole-Source Procurements.** An affected person may protest the determination that goods or services or a class of goods or services are available from only one source as provided in this section.

- 1. Delivery; Late Protests. An affected person shall deliver a written protest to the city manager within seven (7) days after the first date of public notice of a proposed sole source procurement is placed on the city's website, unless a different period is provided in the public notice.
  - a. The written protest shall include a fee in an amount established in a schedule adopted by the city manager to cover the costs of processing the protest.
  - b. A protest submitted after the timeframe established under this subsection is untimely and shall not be considered.
- 2. Content of Protest. The written protest shall include:
  - a. A detailed statement of the legal and factual grounds for the protest;
  - b. Evidence or documentation supporting the grounds on which the protest is based;
  - c. A description of the resulting harm to the affected person; and
  - d. The relief requested.
- 3. Additional Information. The city manager may allow any person to respond to the protest in any manner the city manager deems appropriate by giving such person written notice of the time and manner whereby any response shall be delivered.
- 4. City Manager Response. The city manager shall issue a written disposition of the protest in a timely manner.
  - a. If the city manager upholds the protest, in whole or in part, the proposed sole-source contract shall not be awarded.

- b. If the city manager upholds the protest, in whole or in part, the city shall refund the fee required to be delivered with the protest.
- 5. Judicial Review. An affected person may not seek judicial review of an election not to make a sole-source procurement.
  - a. Before seeking judicial review of the approval of a sole-source procurement, an affected person shall exhaust all administrative remedies.
  - b. Judicial review shall be in accordance with ORS 279B.400.

**D. Protests and Judicial Review of Personal Services Procurements.** An affected person may protest the procurement of a personal services contract as provided in this section.

- 1. Delivery. Unless otherwise specified in the solicitation document, the protest shall be in writing and delivered to the city manager.
  - a. The written protest shall include a fee in an amount established in a schedule adopted by the city manager to cover the costs of processing the protest.
  - b. Protests of the procurement of a specific contract as a personal services contract shall be made prior to closing.
  - c. Protests to the award or an intent to award a personal services contract shall be made within seven (7) days after issuance of the intent to award, or if no notice of intent to award is given, within forty-eight (48) hours after award.
  - d. Protests submitted after the timeframe established under this subsection are untimely and shall not be considered.
- 2. Contents of Protest. The written protest shall:
  - a. Specify all legal or factual grounds for the protest as follows:
    - i. A person may protest the solicitation on the grounds that the contract is not a personal services contract or was otherwise in violation of this {Code} or applicable law. The protest shall identify the specific provision of this {Code} or applicable law that was violated.
    - ii. A person may protest award or intent to award for the reason that:
      - All proposals ranked higher than the affected persons are nonresponsive;
      - The city failed to conduct the evaluation of proposals in accordance with the criteria or processes described in the solicitation document;
      - The city abused its discretion in rejecting the affected person's proposal as nonresponsive; or
      - The evaluation of proposals or the subsequent determination of award is otherwise in violation of this {Code} or applicable law.
    - iii. The protest shall identify the specific provision of this {Code} or applicable law that was violated by the city's evaluation or award;
  - b. Include evidence or supporting documentation that supports the grounds on which the protest is based;
  - c. A description of the resulting harm to the affected person; and
  - d. The relief requested.

3. Additional Information. The city manager may allow any person to respond to the protest in any manner the city manager deems appropriate by giving such person written notice of the time and manner whereby any response shall be delivered.
4. City Manager Response. The city manager shall issue a written disposition of the protest in a timely manner.
  - a. If the city manager upholds the protest, in whole or in part, the proposed personal services contract procurement shall be cancelled, or the contract shall not be awarded, as the case may be.
  - b. If the city manager upholds the protest, in whole or in part, the city shall refund the fee required to be delivered with the protest.
5. Judicial Review. Before seeking judicial review, an affected person shall exhaust all administrative remedies. Judicial review shall be in accordance with ORS 279B.420.

**E. Protests of Cooperative Procurements.** Protests of the cooperative procurement process, contents of a solicitation document, or award may be filed with the city only if the city is the administering agency and under the applicable procedure described herein.