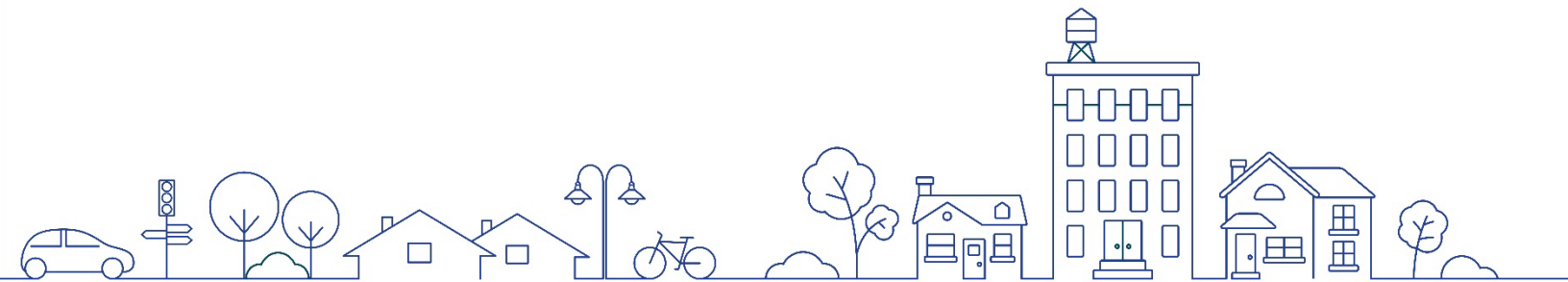


Oregon Municipal Handbook

CHAPTER 13: PURCHASING & PUBLIC CONTRACTS



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Table of Contents

I.	INTRODUCTION.....	5
II.	OVERVIEW.....	5
A.	Sources of Law.....	5
B.	What is a Public Contract?.....	7
C.	Who is Who.....	8
D.	General Provisions.....	8
1.	Permissible Limitations on Competition for Affirmative Action, Minorities, Women and Emerging Small Businesses; Disabled Veterans.....	8
2.	Contract Preferences.....	9
3.	Non-Competitive and Alternative Procurement Methods.....	11
4.	The Disposal of Surplus Property.....	15
III.	THE PROCUREMENT OF GOODS AND SERVICES.....	15
A.	Pre-Solicitation Considerations.....	16
1.	Consultation.....	16
2.	Prequalification.....	16
3.	Feasibility Determinations for Service Contracts over \$250,000.....	17
B.	Competitive Sealed Bid – ITB for Goods and Services.....	19
1.	ITB Contents.....	19
2.	Public Notice.....	20
3.	Disclosure of ITB Records.....	20
4.	Evaluation.....	20
5.	Negotiations.....	21
6.	Mistakes.....	21
C.	Competitive Sealed Proposal – RFP for Goods and Services.....	21
1.	RFP Contents.....	22
2.	Notice.....	22
3.	Disclosure of RFP Records.....	22

4.	Evaluation and Award.....	22
D.	Other Solicitation Considerations	23
1.	Cancellation, Rejection, Delay.....	23
2.	Debarment	24
3.	Contract Amendments.....	24
E.	Alternatives to ITB and RFP for the Procurement of Goods and Services.....	25
1.	Small Procurements.....	25
2.	Intermediate Procurements.....	25
3.	Sole Source Procurements.....	25
4.	Emergency Procurements.....	26
5.	Special Procurements	27
6.	Price Agreements	28
IV.	The Procurement of Public Improvements	28
A.	Pre-Solicitation Considerations.....	28
1.	Prequalification	29
2.	Disqualification	29
B.	Primary Solicitation Method for Public Improvement Contracts – ITB.....	30
1.	ITB Contents	30
2.	Advertisement	32
3.	Addenda, Clarification and Contract Specific Protests.....	32
4.	Pre-Offer Conference	33
5.	First Tier Subcontractor Disclosure and Subcontractor Substitution.....	34
6.	Bid Evaluation.....	34
7.	Negotiations	34
C.	Alternatives Solicitation Methods for the Procurement of Public Improvement Contracts.....	35
1.	Public Improvements Constructed by the Contracting Agency.....	35
2.	Competitive Proposals as an Alternative to ITB.....	36

3.	Intermediate Procurements – Competitive Quotes.....	36
4.	Alternative Methods Provided in Model Rules.....	37
5.	Exempt Contracts.....	40
D.	Other Solicitation Considerations for Public Improvement Procurements.....	41
1.	Offer Requirements.....	42
2.	Mistakes – Waiver, Correction or Withdrawal of Offers After Opening.....	42
3.	Bid and Proposal Security.....	43
4.	Cancellation and Rejection of Offers.....	43
5.	Contract Award.....	45
6.	Contractor Eligibility.....	45
7.	Contractor Responsibility.....	45
8.	Procurement of Contract Oversight Services.....	47
E.	Contract Specifications and Conditions Applicable to all Public Improvement Contracts 47	
1.	Required Contract Conditions.....	47
2.	Brand Names.....	49
3.	Waiver of Damages for Delay.....	50
4.	Assignment or Transfer Restricted.....	50
5.	Green Energy Technology.....	50
F.	Contract Amendments and Changes to Work.....	51
G.	Retainage.....	51
H.	Performance Security and Payment Security.....	53
I.	Final Inspection.....	53
J.	Contract Payments and Interest.....	54
K.	Contract Termination for Public Interest.....	54
V.	Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, and Land Surveying Services.....	55
A.	Formal Selection Procedure.....	55
B.	Informal Selection Procedure.....	56
C.	Direct Appointment.....	56
D.	Selection for Local Public Improvements Procured Through a State Agency.....	57
E.	Ties, Protests, and Cancellation.....	58

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: Checklist for ITB Document Goods & Services	62
	Appendix B: Standards of Responsibility	63
	Appendix C: Checklist for RFP Document	64
	Appendix D: Checklist for ITB Document Public Improvements	66

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 an 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. For ease of understanding, the chapter will be divided in to two primary categories of public procurements: 1) the procurement of goods and services; and 2) the procurement of public improvements and construction services.

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.

Resource:

LOC's [Model Policy for Public Contracting and Purchasing](#), available in the LOC's online [Reference Library](#).

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.”¹

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.

¹ ORS 279A.010 (1)(z).

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.”²

A city’s “local contract review board” is the city council, unless the city designates an alternative “[public] body, board or commission.”³ The local contract review board may then delegate some, most, but not all of its authority through rulemaking.⁴ 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 for Affirmative Action, Minorities, Women and Emerging Small Businesses; Disabled Veterans.

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.⁵ 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.”⁶

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:

² ORS 279A.010(1)(b).

³ ORS 279A.060.

⁴ ORS 279A.075.

⁵ ORS 279A.100(3)

⁶ ORS 279A.100(1).

- 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
- By requiring that a contractor be a “responsible bidder” as defined in ORS 200.005(6) and have undertaken good faith efforts to comply with ORS 200.045(3).⁷

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.” 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.^{8,9}

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.¹⁰ 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.¹¹

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.¹²

⁷ ORS 279A.105.

⁸ ORS 279A.128

⁹ 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.

¹⁰ ORS 279A.120(2).

¹¹ The NAPO state preference repository is available at <https://www.naspo.org/research-innovation/state-preference-repository/>.

¹² OAR 137-046-0300.

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 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.015.¹³

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.

¹³ 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.”

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.¹⁴ 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 LOC's [Model Policy for Public Contracting and Purchasing](#), beginning on page 11.

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 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. Qualified Rehabilitation Facility

Pursuant to state policy, a contracting agency must first look to whether a qualified rehabilitation facility or “QRF” is available for the products and services the contracting agency is seeking. The Oregon Department of Administrative Services maintains a list of QRF providers, products, and services.¹⁵ This list is available at: <https://qrf.dasapp.oregon.gov/>. QRF contract pricing is determined through the QRF statewide coordinator. The contracting agency should evaluate if the available QRF product or service meets the agency's needs of form, fit, and function.

¹⁴ ORS 279A.125.

¹⁵ ORS 279.840 and 279.850.

b. Personal Services Procurements

A local contracting agency has authority to “designate certain service contracts or classes of service contracts as personal services contracts.”¹⁶ 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.

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. ORS 279A.205. These contracts may include contracts made by out of state agencies.

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; (2) permissive cooperative procurement; and (3) 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 a having to go through their own tedious procurement process and benefit from group discounts.

¹⁶ ORS 279A.055(2).

(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. 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.

(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. An example of a permissive 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.

Resource:

Oregon Cooperative Procurement Program

Website:

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

Email: info.orcpp@oregon.gov

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

An interstate cooperative procurement is a cooperative procurement in which one or more of the participating agencies are located outside of Oregon. An interstate cooperative procurement may be a joint procurement or permissive procurement. An interstate cooperative procurement does not have to but may specifically identify contracting agencies permitted to participate. If 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

Website: <https://nppgov.com/>

Email:

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 (10 U.S.C. 381) 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.¹⁷

¹⁷ ORS 279A.180.

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

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.¹⁸ The disposal of surplus property may be exempt from the competitive bidding requirements if the local contracting agency adopts its own rules.¹⁹ 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 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.²⁰ Services are all other services not designated as personal services under ORS 279A.055 or under local code.²¹ 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.

¹⁸ 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.

¹⁹ ORS 279A.185.

²⁰ ORS 279A.010(1)(i).

²¹ ORS 279A.010(1)(kk).

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.

Resource:

LOC's [FAQ on Disposing of Surplus Property](#), available in the LOC's online [Reference Library](#).

The public contracting code and model rules also provide for a variety of alternative contracting methods such as a multistep 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.²² 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 realized a material 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 many 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

Resource:

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

²² ORS279B.210.

be revoked once an ITB or RFP is issued under ORS 279B.120(3), the contracting agency may still make a determination of nonresponsibility under ORS 279B.110 as discussed below in section III.B.4 *Evaluation*.

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.²³ An example of a service contract is a contract between a city and a graphic design firm to update a the city's logo and website.

This provision effects 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;
- The Port of Portland; and
- Procurements for client services by state agencies.²⁴

If 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

²³ ORS 279B.030 to 279B.036.

²⁴ ORS 279B.030.

- 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).²⁵

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.”²⁶ 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.²⁷

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;
- 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.

Resource:
[Department of Administrative Services Procurement Manual](#)

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.²⁸ Thus, if the cost

²⁵ ORS 279B.036.
²⁶ ORS 279B.036(1)(a).
²⁷ *Id.*
²⁸ ORS 279B.033(2)(a).

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.²⁹ If the contracting agency chooses this latter course, ORS 279B.033(2)(b) sets forth some record keeping requirements that must be followed.

The cost comparison analysis and feasibility determinations along with the supporting records are public records subject to disclosure.³⁰ 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.”³¹ 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. 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.

1. 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

²⁹ ORS 279B.033(2)(b).

³⁰ ORS 279B.033(3) and 279B.036(2).

³¹ ORS 279B.145.

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.” Public Notice

Public notice of an ITB is required.³² 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).³³ The notice of an ITB must be published at least seven days before the solicitation closing date. Under the model rules, notice must also be sent to contractors who have “expressed an interest in the [c]ontracting [a]gency’s [p]rocurements,” if not posted on an electronic procurement system or the agency’s web site.³⁴ Notice must be published at least once in at least one newspaper of general circulation in the area where the contract is to be performed.³⁵ Lastly, the model rules require the notice must be posted at the “principal business office” of the contracting agency.³⁶

Resource:

A sample checklist for the development of an ITB for goods and services is available in Appendix A.

2. 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.^{37, 38}

3. 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.³⁹ The contract must be awarded to the lowest “responsible” bidder whose bid “substantially complies” with the requirements and criteria of the ITB.⁴⁰ “Responsibility” is defined in ORS 279B.110 and OAR 137-047-0640(1)(c)(F). If the bidder is not responsible, the contracting

Resource:

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

³² ORS 279B.055(4).

³³ *Id.*

³⁴ OAR 137-047-0300(1); see also ORS 279B.055.

³⁵ ORS 279B.055(4)(a).

³⁶ OAR 137-047-0300(4).

³⁷ ORS 279B.055(5)(b)&(c).

³⁸ Under ORS Chapter 279C.365, bids 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.

³⁹ ORS 279B.055(6).

⁴⁰ ORS 279B.055(10).

agency must reject the bid and issue a written determination of non-responsibility.⁴¹

4. Negotiations

Negotiations are not permitted, although a contracting agency may seek clarification of a bid.⁴² Note that “clarification” does not supplement, change, correct, or otherwise alter what is already there.⁴³

5. 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.⁴⁴ Decisions pertaining to mistakes must be given in writing.⁴⁵ 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.⁴⁶

C. 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.⁴⁷ 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.

Resource:

A sample checklist for the development of an RFP for goods and services is available in Appendix C.

⁴¹ OAR 137-047-0500.

⁴² ORS 279B.060(7); OAR 137-047-0600(2).

⁴³ See, *Matter of On-Line Gaming Services Contract*, 279 NJ Super 566 (1995).

⁴⁴ OAR 137-047-0470.

⁴⁵ ORS 279B.055(7).

⁴⁶ 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.

⁴⁷ ORS 279B.060(8)(b).

1. 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 conditions (which can be done by including the form of a draft contract) and can identify any terms and conditions that could be negotiated.⁴⁸

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.⁴⁹

2. Notice

Public notice of an RFP is required.⁵⁰ 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.⁵¹

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.

3. 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.⁵²

4. 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.⁵³ 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

⁴⁸ ORS 279B.060(2)(h).

⁴⁹ *Id.*

⁵⁰ ORS 279B.060(5).

⁵¹ *Id.*; OAR 137-047-0300.

⁵² 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.

⁵³ ORS 279B.060(8).

written determination of non-responsibility.⁵⁴ The contracting agency is required to obtain “the 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.⁵⁵

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.”⁵⁶ 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.⁵⁷

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.⁵⁸ 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.⁵⁹ If all offers are rejected in response to an ITB or RFP, the contracting agency must keep all bids and proposals.⁶⁰

⁵⁴ ORS 279B.110; OAR 137-047-0500.

⁵⁵ ORS 279B.060.

⁵⁶ ORS 279B.100(1).

⁵⁷ OAR 137-047-0650.

⁵⁸ OAR 137-047-0660(3); OAR 137-047-0670.

⁵⁹ ORS 279B.060(6)(c).

⁶⁰ 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.⁶¹

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.⁶² 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 \$12,500 for small procurements and \$150,000, or 25% of the original contract price, whichever is greater, for intermediate procurements.⁶³

⁶¹ ORS 279B.120(3) & (4).

⁶² OAR 137-047-0800.

⁶³ ORS 279B.065 to 279B.070; OAR 137-047-0265 to 137-047-0270. 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.

E. Alternatives to ITB and RFP for the Procurement of Goods and Services

Certain contracts for goods and services may be procured utilizing alternatives to the ITB or RFP processes. Generally, these are determined by the estimated contract cost.

1. Small Procurements

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.”⁶⁴ Contracts for goods or services are considered a small procurement if the procurement does not exceed \$10,000.⁶⁵ Contracts awarded under this method may be amended to exceed \$10,000 so long as the contract does not exceed a total cost greater than \$12,500.⁶⁶ However, contracts for goods and services may not be artificially divided so as to constitute small procurements.⁶⁷

2. Intermediate Procurements

An intermediate procurement is a contract for goods or services for more than \$10,000 but not more than \$150,000.⁶⁸ 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. Contracts awarded under the intermediate procurement may be amended up to \$150,000, or 125% of the original contract price, whichever is greater.⁶⁹ Just like small procurements, a contract cannot be artificially divided so as to constitute an intermediate procurement. 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 to, experience, expertise, product functionality, suitability for a particular purpose and contractor responsibility under ORS 279B.110.”⁷⁰

3. 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

⁶⁴ ORS 279B.065.

⁶⁵ Effective September 23, 2023, SB 1047 alters the thresholds for small procurements for goods and services from \$10,000 up to \$25,000.

⁶⁶ ORS 279B.065(b); OAR 137-047-0265. Effective September 23, 2023, SB 1047 alters the thresholds for small procurements for goods and services from \$10,000 up to \$25,000.

⁶⁷ ORS 279B.065(2).

⁶⁸ ORS 279.070. 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.

⁶⁹ *Id.*; OAR 137-047-0270. 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.

⁷⁰ ORS 279B.070(4).

from only one source.”⁷¹ 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.”⁷²

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.⁷³

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.

4. Emergency Procurements

A public contract for goods or services may be awarded without competition if an emergency exists.⁷⁴ An emergency contract for construction services must be awarded following “reasonable and appropriate competition” except in a case of “extreme necessity.”⁷⁵ 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.⁷⁶ 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.

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

Resource:

LOC’s [Emergency Procurement FAQ](#), available in the LOC’s online [Reference Library](#).

⁷¹ ORS 279B.075(1).

⁷² *Id.* (emphasis added).

⁷³ ORS 279B.075(2).

⁷⁴ ORS 279B.080.

⁷⁵ *Id.*

⁷⁶ *Id.*

obvious emergency situations. Therefore, the contracting agency should take care to adequately document the circumstances that could not have reasonably been foreseen.

5. 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.”⁷⁷ 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 is 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 that 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

⁷⁷ ORS 279B.085.

judicial review, which will be held on the record established by the local contract review board.⁷⁸

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.⁷⁹

6. 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.

IV. 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.”⁸⁰ 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.⁸¹

The underlying policy of the laws governing public improvement contracts is to construct public improvements at the least cost to the contracting agency.⁸² 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.⁸³ 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.

⁷⁸ Review is to the circuit court by writ of review pursuant to ORS chapter 34.

⁷⁹ See also OAR 137-047-0300.

⁸⁰ ORS 279A.010(1)(dd).

⁸¹ *Id.* 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. Additionally, for public improvement small procurement threshold from \$10,000 to \$25,000.

⁸² ORS 279C.305.

⁸³ ORS 279C.300.

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.⁸⁴ Under permissive prequalification, the distribution cannot be so limited.⁸⁵

If mandatory prequalification is desired, the contracting agency must adopt a process by ordinance, resolution or rule and prescribe the forms and manner for submitting prequalification applications.⁸⁶ 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.⁸⁷ Permissive prequalification 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 prequalification are the same as determining responsibility as provided in ORS 279C.375(3)(b) and discussed below in section IV.D.7.⁸⁸

2. Disqualification

A contracting agency may disqualify a contractor who has previously been prequalified under ORS 279C.430.⁸⁹ 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

⁸⁴ OAR 137-049-0220(1)(a).

⁸⁵ OAR 137-049-0220(1)(b).

⁸⁶ ORS 279C.430.

⁸⁷ *Id.*

⁸⁸ ORS 279C.430(4).

⁸⁹ ORS 279C.440.

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.⁹⁰

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.⁹¹ 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 to appeal the decision under ORS 279C.445 and 279C.450.⁹² 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.⁹³

B. Primary Solicitation Method for Public Improvement Contracts – 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:

- A designation for or description of the public improvement project;
- The office where the specifications for the project may be reviewed;
- The date that prequalification applications must be filed and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;

Resource:

A sample checklist for the development of an ITB for a public improvement is available in Appendix D.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

- 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.⁹⁴

All submitted bids are required to be:

- In writing;
- Filed with the person designed by the contracting agency to receive bids; and
- Opened publicly by the contracting agency immediately after the deadline for submitting bids.⁹⁵

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

⁹⁴ ORS 279C.365; OAR 137-049-0200.

⁹⁵ *Id.*

bidder submits a bid from this requirement under ORS 279C.390.⁹⁶ The security may not exceed 10% of the amount bid for the contract.⁹⁷ 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.⁹⁸ The advertising requirements require publication at least once in a local newspaper of general circulation in the area where the contract is to be performed⁹⁹ 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.¹⁰⁰ 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.¹⁰¹

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
- If the contract is for a public works subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 et seq.).¹⁰²

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

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ ORS 279C.360.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

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.

4. Pre-Offer Conference

Contracting agencies may hold mandatory or optional pre-offer conferences prior to closing the ITB.¹⁰³ 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.¹⁰⁴

¹⁰³ OAR 137-049-0240.

¹⁰⁴ *Id.*

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. 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.¹⁰⁵ The first-tier subcontractor disclosure is submitted with the bid or within two hours after closing.¹⁰⁶ A bid that does not include the required disclosure is considered nonresponsive and must be rejected.¹⁰⁷ 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.¹⁰⁸ The total bid price can be altered if the contracting agency has elected to include “additive or deductive alternates.”¹⁰⁹ 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.¹¹⁰ A special evaluation factor is a “predictor[] of actual future costs” and must be an “objective, reasonable estimate[] based upon information the contracting agency has available concerning future use.”¹¹¹ 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 exceeded the contracting agency’s cost estimate and budget. Negotiations are permitted with the lowest responsive and responsible bidder “in

¹⁰⁵ See ORS 279C.370; OAR 137-049-0360.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ OAR 137-049-0380.

¹⁰⁹ *Id.*

¹¹⁰ OAR 137-049-0200.

¹¹¹ OAR 137-049-0200(1)(b)(C)(i).

order to solicit value engineering and other options to attempt to bring the contract within the contracting agency’s cost estimate.”¹¹² 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.

C. Alternatives Solicitation Methods for the Procurement of Public Improvement Contracts

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.¹¹³ 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.¹¹⁴ These reports include an annual summary of planned public improvements and a least cost analysis.¹¹⁵

Resource:

LOC’s [FAQ on Public Improvement Least Cost Contracting Requirements](#), available in the LOC’s online [Reference Library](#).

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.¹¹⁶

¹¹² ORS 279C.340.

¹¹³ ORS 279C.305.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

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.¹¹⁷

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. 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.¹¹⁸ 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 with respect to 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.¹¹⁹ Negotiations can also occur during the competitive range process and the model rules provide a process in OAR 137-049-0650(6).

3. Intermediate Procurements – 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

¹¹⁷ *Id.*

¹¹⁸ ORS 279C.355.

¹¹⁹ ORS 279C.410; OAR 137-049-0650(3)(a)(B).

\$100,000.¹²⁰ 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.¹²¹

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.¹²² 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.¹²³

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.¹²⁴ 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.¹²⁵

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 \$5,000 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. 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.

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. The design-build form of contracting is available as an alternative to the traditional ITB method under the model rules.¹²⁶ The model rules warn that

¹²⁰ Effective September 23, 2023, SB 1047 alters the threshold for intermediate procurements for goods and services from \$150,000 up to \$250,000 and a small procurement for small public improvements from \$10,000 to \$25,000.

¹²¹ ORS 279C.414.

¹²² OAR 137-049-0160(3).

¹²³ OAR 137-049-0160(4).

¹²⁴ ORS 279C.414.

¹²⁵ OAR 137-049-0160(5).

¹²⁶ ORS 279C.335; OAR 137-049-0670.

design-build contracts have technical complexities that are not readily apparent and should be used only with the assistance of knowledgeable staff or consultants.¹²⁷

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.¹²⁸

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.¹²⁹ Similar to design-build contracts, the ESPC method is available as an alternative to the formal ITB process under the model rules.¹³⁰ 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 to ESPCs and provide a detailed procurement process for the use of ESPCs at OAR 137-049-0610 and 137-049-0680.

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

A CM/GC (also known as a construction manager at risk contract) contract is similar to a design-build contract, except that the contractor takes on much more responsibility and risk. CM/GC

¹²⁷ OAR 137-049-0670(1).

¹²⁸ *Id.*

¹²⁹ OAR 137-049-0610(10).

¹³⁰ ORS 279C.335(1)(f); OAR 137-049-0620(2).

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.¹³¹

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.¹³² The skills needed to manage this type of contract extend from design and

¹³¹ ORS 279C.332(3).

¹³² OAR 137-049-0690(1).

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 its own local rules for procuring CM/GC contractor services.¹³³

5. 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 value of less than \$5,000.
- 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 279A.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).
- An energy savings performance contract that a contracting agency enters into in accordance with rules of procedure adopted under ORS 279A.065.

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.¹³⁴

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
- It is unlikely that the proposed exemption will substantially diminish competition for public improvement contracts; and

¹³³ ORS 279A.065.

¹³⁴ ORS 279C.335.

- The awarding of the public improvement contract(s) will likely result in substantial cost savings to the contracting agency.¹³⁵

The model rules provide additional guidance when addressing cost savings, favoritism and competition.¹³⁶ 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.¹³⁷

If the exemption is for a class of contracts, the defining characteristics of the class must be clearly identified.¹³⁸ 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.”¹³⁹ 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*. 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, 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.¹⁴⁰

A challenge to an exemption under these provisions is made directly to circuit court via the writ of review process.¹⁴¹

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.

¹³⁵ *Id.*

¹³⁶ OAR 137-049-0630.

¹³⁷ OAR 137-049-0630(5).

¹³⁸ ORS 279C.335(3).

¹³⁹ *Id.*

¹⁴⁰ ORS 279C.335(5).

¹⁴¹ ORS 279C.350(3).

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 in writing, filed with the person designated to receive the offers, and be opened publicly by the contracting agency immediately after the closing.¹⁴² Unless the contracting agency has opted out of the model rules, the longer list in OAR 137-049-0280 will apply.

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. ORS 279C.365(5)&(6). Otherwise, bid security is at the option of the contracting agency.¹⁴³

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.¹⁴⁴ 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

¹⁴² ORS 279C.365(3).

¹⁴³ ORS 279C.390(2).

¹⁴⁴ OAR 137-049-0350(2)(a).

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.¹⁴⁵ 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.¹⁴⁶

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.390.¹⁴⁷ 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.¹⁴⁸

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.¹⁴⁹ 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.¹⁵⁰ 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

¹⁴⁵ OAR 137-049-350.

¹⁴⁶ *Id.*

¹⁴⁷ ORS 279C.365(5) & (6).

¹⁴⁸ *Id.*; OAR 137-049-290(3).

¹⁴⁹ ORS 279C.395; OAR 137-049-0270.

¹⁵⁰ *Id.*

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.¹⁵¹

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.¹⁵² 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.¹⁵³

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.

¹⁵¹ *Id.*

¹⁵² OAR 137-049-0440.

¹⁵³ *Id.*

- Any other circumstance indicating that awarding the contract would not be in the public interest.¹⁵⁴

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.¹⁵⁵ 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 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.¹⁵⁶ Non-resident education service districts are ineligible to enter into public improvement contracts in Oregon.¹⁵⁷ 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

¹⁵⁴ OAR 137-049-0440(6).

¹⁵⁵ OAR 137-049-0450.

¹⁵⁶ See ORS 279C.365(1)(k).

¹⁵⁷ ORS 279C.325.

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.
- 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.
- 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.¹⁵⁸ In 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.¹⁵⁹ 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.¹⁶⁰ The service also cannot be procured through the public improvement contract itself.¹⁶¹ There are exceptions for construction manager/general contractor and design-build contracts as defined in the model rules.

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

¹⁵⁸ See ORS 279C.375(3)(c).

¹⁵⁹ See *Hanson v. Mosser*, 247 Or 1, 9-10 (1967), *overruled in part on other grounds*, *Smith v. Cooper*, 256 Or 485 (1970).

¹⁶⁰ ORS 279C.307.

¹⁶¹ *Id.*

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));
- 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);
- 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);

- 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; and
- 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.¹⁶²

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.
- 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.¹⁶³

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

- Operational, budget and financial data;
- Public benefits;
- Value engineering;

¹⁶² See OAR 137-049-0200(1)(c) and all statutes implemented within the rule.

¹⁶³ ORS 279C.345.

- Specialized expertise required;
- Public safety;
- Market conditions;
- Technical complexity; and
- Funding sources.¹⁶⁴

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.¹⁶⁵ 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 127-049-0200 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 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.¹⁶⁶ 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.¹⁶⁷ If

¹⁶⁴ ORS 279C.330.

¹⁶⁵ OAR 137-049-0870.

¹⁶⁶ ORS 279C.527.

¹⁶⁷ ORS 279C.537(6).

the contract is subject to green energy technology, additional rules and specifications adopted by the Oregon Department of Energy will apply.¹⁶⁸

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.

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.¹⁶⁹ 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

¹⁶⁸ ORS 279C.528.

¹⁶⁹ OAR 137-049-0910(2).

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.¹⁷⁰

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.¹⁷¹ 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.¹⁷² 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.

A contracting agency may refuse to accept a bond or other instrument if it makes written findings that accepting the bonds in lieu of retaining funds “poses an extraordinary risk that is not typically associated with the bond or instrument.”¹⁷³

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.¹⁷⁴

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.¹⁷⁵ However, the contracting agency is not obligated to consider reducing or eliminating retainage unless requested by the contractor.¹⁷⁶ 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.

¹⁷⁰ ORS 701.440.

¹⁷¹ ORS 279C.555.

¹⁷² ORS 279C.845(7); OAR 137-049-0820(6).

¹⁷³ ORS 279C.560(1).

¹⁷⁴ ORS 279C.560(6).

¹⁷⁵ ORS 279C.570(7).

¹⁷⁶ *Id.*

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.¹⁷⁷

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.¹⁷⁸

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.¹⁷⁹ 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.

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.¹⁸⁰ 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.¹⁸¹

¹⁷⁷ ORS 279C.570(8).

¹⁷⁸ ORS 279C.560(3).

¹⁷⁹ ORS 279C.380(4).

¹⁸⁰ ORS 279C.570.

¹⁸¹ *Id.*

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.¹⁸² 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.¹⁸³

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%.¹⁸⁴

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.¹⁸⁵ 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.¹⁸⁶

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.¹⁸⁷

If the contracting agency terminates the contract, the contractor will not be entitled to any compensation unless the contract contains provisions providing for compensation in that event.¹⁸⁸

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

¹⁸² ORS 279C.570(2).

¹⁸³ ORS 279C.570(8)

¹⁸⁴ ORS 279C.570(9).

¹⁸⁵ ORS 279C.655 to 279C.670

¹⁸⁶ ORS 279C.655.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

arising out of termination.¹⁸⁹ The contracting agency shall also pay for all work completed, based on the contract price.¹⁹⁰

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.

V. 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 \$250,000.¹⁹¹

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 annual 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.¹⁹² 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. Formal Selection Procedure

Under the formal selection procedure outlined in OAR 137-048-0220, the contracting agency may either obtain contracts through public advertisements of RFPs or requests for qualifications (RFQ) followed by RFPs.¹⁹³ 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

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ ORS 279C.110.

¹⁹² *Id.*

¹⁹³ OAR 137-048-220(2).

those services cannot be considered. However, once the contractor is chosen, on the basis of qualifications, the contracting agency may discuss and negotiate price.

The alternative QBS process recently adopted by the Oregon Legislature in 2019 provides contracting agencies with the ability to consider cost. Under this alternative QBS process, a contracting agency must select up to three prospective consultants based on qualifications. Pricing information could then be received from all three firms but could be weighted no more than 15% in the final evaluation and score.

However, if agreement is not reached upon the conclusion of negotiations with any proposer, the contracting agency may then terminate the solicitation.¹⁹⁴ The model rule specifies the contents and process required of the RFQ and RFP process.¹⁹⁵

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 \$250,000.¹⁹⁶ The informal selection procedure requires a written RFP that must be provided to at least five prospective consultants.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ If agreement is not reached upon the conclusion of negotiations with the third highest ranked proposer, the contracting agency may then terminate the solicitation.²⁰⁰

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 137-048-0220.²⁰¹

C. 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

¹⁹⁴ OAR 137-048-0220

¹⁹⁵ *Id.*

¹⁹⁶ OAR 137-048-0210.

¹⁹⁷ OAR 137-048-0210(2).

¹⁹⁸ OAR 137-048-0210(3)

¹⁹⁹ OAR 137-048-0210(4).

²⁰⁰ OAR 137-048-0210(5).

²⁰¹ OAR 137-048-0210(8).

- If the contract is for continuation of a project.²⁰²

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
- 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.²⁰³

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 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.²⁰⁴

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.²⁰⁵ 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.²⁰⁶

²⁰² OAR 137-048-0200.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ ORS 279C.125.

²⁰⁶ *Id.*

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.²⁰⁷ If the tie occurs between proposers selected base on qualification and price, the contracting agency must follow the local preferences procedures in OAR 137-046-0300 to determine the winning contractor.²⁰⁸

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.²⁰⁹ 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.²¹⁰

VI. Public Works

A public works contract is a construction contract that is valued at over \$50,000 to which prevailing wages will apply.²¹¹ 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.²¹² 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.²¹³ 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.

²⁰⁷ OAR 137-048-0230(1).

²⁰⁸ OAR 137-048-0230(2).

²⁰⁹ OAR 137-048-0240

²¹⁰ OAR 137-048-0250.

²¹¹ ORS 279C.810(2)(a).

²¹² Effective September 23, 2023, SB 594 requires payment of prevailing wage rate for demolition or removal of hazardous waste from a road, highway, building, structure, or improvement in a public improvement contract that uses \$750,000 or more of public funds, or that occurs on property owned by a public agency, including demolition or removal of hazardous waste that occurs in connection with construction, reconstruction, renovation or painting of road, highway, building, structure or improvement. This clarifies hazardous waste removal is subject to prevailing wage rates.

²¹³ See OAR 839-025-0004(25).

“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;
- 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.²¹⁴

“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

²¹⁴ ORS 279C.800(6)(a).

- 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, 2007.²¹⁵

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 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 at: <https://www.oregon.gov/boli/employers/Pages/prevailing-wage-rates.aspx>.

B. Contract Specifications

The contracting agency must provide information regarding the payment of prevailing wages with the contract specifications.²¹⁶ When federal funds are involved in a public works contract, the contracting agency must provide information that also identifies which rates are higher.²¹⁷

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,

²¹⁵ ORS 279C.800(6)(b).

²¹⁶ ORS 279C.830(1).

²¹⁷ *Id.*

- 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.
- 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.²¹⁸

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 \$250.²¹⁹ The fee is payable when the contracting agency provides notice to BOLI that it has awarded a public works contract under ORS 279C.835.²²⁰ 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.²²¹

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 279, 279A, 279B, and 279C.

²¹⁸ OAR 137-049-0860.

²¹⁹ ORS 279C.825.

²²⁰ *Id.*

²²¹ OAR 839-025-0210.

APPENDIX A: CHECKLIST FOR ITB DOCUMENT GOODS & SERVICES

Use this checklist to ensure you comply with ORS 279B.055 & OAR 137-047-0255 in developing an ITB.

MUST INCLUDE:

- Notice of any pre-offer conference which includes:
 - The time, date and location of any pre-Offer conference;
 - Whether attendance at the conference will be mandatory or voluntary; and
 - (A provision that provides that statements made by the Contracting Agency's representatives at the conference are not binding upon the Contracting Agency unless confirmed by Written Addendum.
- The form and instructions for submission of Bids and any other special information, e.g., whether Bids may be submitted by electronic means (See OAR 137-047-0330 for required provisions of electronic Bids).
- Specify a time and date by which the bids must be received and a place at which the bids must be submitted.
- Specify the name and title of the person designated to receive bids and the person the contracting agency designates as the contact person for the procurement, if different.
- Describe the procurement.
 - Identify the scope of work included within the procurement,
 - Outline the contractor's anticipated duties and set expectations for the contractor's performance.
 - Unless the contracting agency for good cause specifies otherwise, the scope of 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.
- Specify a time, date and place for prequalification applications, if any, to be filed and the classes of work, if any, for which bidders must be prequalified in accordance with ORS 279B.120.
- State that the contracting agency may cancel the procurement or reject any or all bids in accordance with ORS 279B.100.
- All applicable preferences pursuant to ORS 279B.055(6)(b)
- State that "Contractors shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document." if a state contracting agency issues the invitation to bid.
- Require the contractor or subcontractor to possess an asbestos abatement license, if required under ORS 468A.710.
- A statement that each Bidder must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120(1).
- Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-046-0210(2)).
- Contractor's certification of compliance with Oregon tax laws in accordance with ORS 305.385.
- Contracting Agency Need to Purchase. The character of the Goods or Services the Contracting Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements.
- Include all contractual terms and conditions applicable to the procurement. The contract terms and conditions shall specify clear consequences for a contractor's failure to perform the scope of work identified in the invitation to bid or the contractor's failure to meet established performance standards. The consequences may include, but are not limited to:
 - Reducing or withholding payment; Requiring the contractor to perform, at the contractor's expense, additional work necessary to perform the identified scope of work or meet the established performance standards; or
 - Declaring a default, terminating the public contract and seeking damages and other relief available under the terms of the public contract or other applicable law.
- The time, date and place of Opening.
- The office where the Solicitation Document may be reviewed.
- How the Contracting Agency will notify Bidders of Addenda and how the Contracting Agency will make Addenda available (See OAR 137-047-0430).



APPENDIX B: 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.

See ORS 279B.110.

APPENDIX C: CHECKLIST FOR RFP DOCUMENT

Use this checklist to ensure you comply with ORS 279B.055 & OAR 137-047-0260 in developing an RFP.

MUST INCLUDE:

- Notice of any pre-Offer conference as follows:
 - The time, date and location of any pre-Offer conference;
 - Whether attendance at the conference will be mandatory or voluntary; and
 - A provision that provides that statements made by the Contracting Agency's representatives at the conference are not binding on the Contracting Agency unless confirmed by Written Addendum.
- The form and instructions for submission of Proposals and any other special information, e.g., whether Proposals may be submitted by electronic means. (See OAR 137-047-0330 for required provisions of electronic Proposals).
- Specify a time and date by which the bids must be received and a place at which the bids must be submitted. The contracting agency, in the contracting agency's sole discretion, may receive bids by electronic means or direct or permit a bidder to submit bids by electronic means.
- Specify the name and title of the person designated to receive bids and the person the contracting agency designates as the contact person for the procurement, if different.
- Describe the procurement. In the description, the contracting agency shall identify the scope of work included within the procurement, outline the contractor's anticipated duties and set expectations for the contractor's performance. Unless the contracting agency for good cause specifies otherwise, the scope of 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.
- Specify a time, date and place for prequalification applications, if any, to be filed and the classes of work, if any, for which bidders must be prequalified in accordance with [ORS 279B.120](#).
- State that the contracting agency may cancel the procurement or reject any or all bids in accordance with [ORS 279B.100](#).
- Require the contractor or subcontractor to possess an asbestos abatement license, if required under [ORS 468A.710](#).
- The time, date and place of Opening.
- The office where the Solicitation Document may be reviewed.
- Proposer's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-046-0210(2)).
- How the Contracting Agency will notify Proposers of Addenda and how the Contracting Agency will make Addenda available. (See OAR 137-047-0430).
- Contracting Agency Need to Purchase. The character of the Goods or Services the Contracting Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.060(2)(c), the Contracting Agency's description of its need to purchase must:
 - Identify the scope of the work to be performed under the resulting Contract, if the Contracting Agency awards one;
 - Outline the anticipated duties of the Contractor under any resulting Contract;
 - Establish the expectations for the Contractor's performance of any resulting Contract; and
 - Unless the Contractor under any resulting Contract will provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services that are subject to ORS 279C.100 to 279C.125, or the Contracting Agency for Good Cause specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the Contracting Agency is purchasing.
- The anticipated solicitation schedule, deadlines, protest process, and evaluation process.
- The Contracting Agency shall set forth selection criteria in the Solicitation Document in accordance with the requirements of ORS 279B.060(3)(e). Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, the criteria shall:
 - Afford the Contracting Agency the ability to compare the Proposals and Proposers, applying the same standards of comparison to all Proposers;



- Rationally reflect Proposers' abilities to perform the resulting Contract in compliance with the Contract's requirements; and
- Permit the Contracting Agency to determine the relative pricing offered by the Proposers, and to reasonably estimate the costs to the Contracting Agency of entering into a Contract based on each Proposal, considering information available to the Contracting Agency and subject to the understanding that the actual Contract costs may vary as a result of the Statement of Work ultimately negotiated or the quantity of Goods or Services for which the Contracting Agency contracts.
- If the Contracting Agency's solicitation process calls for the Contracting Agency to establish a Competitive Range, the Contracting Agency shall generally describe, in the Solicitation Document, the criteria or parameters the Contracting Agency will apply to determine the Competitive Range. The Contracting Agency, however, subsequently may determine or adjust the number of Proposers in the Competitive Range in accordance with OAR 137-047-0261(6).
- Applicable Preferences, including those described in ORS 279A.120, 279A.125(2) and 282.210.
- For Contracting Agencies subject to ORS 305.385, the Proposers' certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
- All contractual terms and conditions the Contracting Agency determines are applicable to the Procurement.
- As required by ORS 279B.060(2)(h), the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract.



APPENDIX D: CHECKLIST FOR ITB DOCUMENT PUBLIC IMPROVEMENTS

Use this checklist to ensure you comply with ORS 279C.365 & OAR 137-049-0200 in developing an ITB.

MUST INCLUDE:

- General Information:
 - Identification of the Public Improvement project, including, a designation or description of the project, the character of the Work, and applicable plans, Specifications and other Contract documents;
 - Notice of any pre-Offer conference as follows:
 - The time, date and location of any pre-Offer conference;
 - Whether attendance at the conference will be mandatory or voluntary; and
 - That statements made by the Contracting Agency's representatives at the conference are not binding upon the Contracting Agency unless confirmed by Written Addendum.
 - The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be prequalified if prequalification is a requirement;
 - The name and title of the authorized Contracting Agency Person designated for receipt of Offers and contact Person (if different);
 - Instructions and information concerning the form and submission of Offers, including the address of the office to which Offers must be delivered, any Bid security requirements, and any other required information or special information, e.g., whether Offers may be submitted by facsimile or electronic means (See OAR 137-049-0300 regarding facsimile Bids and OAR 137-049-0310 regarding electronic Procurement);
 - The time, date and place of Opening;
 - The time and date of Closing after which a Contracting Agency will not accept Offers, which time shall be not less than five Days after the date of the last publication of the advertisement. Although a minimum of five Days is prescribed, Contracting Agencies are encouraged to use at least a 14 Day solicitation period when feasible. If the Contracting Agency is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, the Contracting Agency shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and OAR 137-049-0360. For timing issues relating to Addenda, see OAR 137-049-0250;
 - The office where the Specifications for the Work may be reviewed;
 - A statement that each Bidder to an ITB must identify whether the Bidder is a “resident Bidder,” as defined in ORS 279A.120;
 - If the Contract resulting from a solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148), a statement that no Offer will be received or considered by the Contracting Agency unless the Offer contains a statement by the Offeror as a part of its Offer that “Contractor agrees to be bound by and will comply with the provisions of 279C.838, 279C.840 or 40 U.S.C. 3141 to 3148.”
 - A statement that the Contracting Agency will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as specified in OAR 137-049-0230;
 - Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;
 - Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-049-0440(3));
 - How the Contracting Agency will notify Offerors of Addenda and how the Contracting Agency will make Addenda available (See OAR 137-049-0250); and
 - When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in OAR 137-049-0360.
 - The date on which and the time and place at which the contracting agency will publicly open the bids.



- Evaluation Process:
 - A statement that the Contracting Agency may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, including the requirement to demonstrate the Bidder's responsibility under ORS 279C.375(3)(b), and may reject for good cause all Offers after finding that doing so is in the public interest;
 - The anticipated solicitation schedule, deadlines, protest process and evaluation process, if any;
 - Evaluation criteria, including the relative value applicable to each criterion, that the Contracting Agency will use to determine the Responsible Bidder with the lowest Responsive Bid (where Award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of competitive Proposals is authorized under ORS 279C.335 and OAR 137-049-0620), along with the process the Contracting Agency will use to determine acceptability of the Work;
 - The Contracting Agency shall set forth any special price evaluation factors in the Solicitation Document.
- Contract Provisions. The Contracting Agency shall include all Contract terms and conditions, including warranties, insurance and bonding requirements, that the Contracting Agency considers appropriate for the Public Improvement project. The Contracting Agency must also include all applicable Contract provisions required by Oregon law as follows:
 - 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), a condition requiring 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));
 - 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 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530(2));
 - Maximum hours, holidays and overtime (ORS 279C.540);
 - Time limitation on claims for overtime (ORS 279C.545);
 - Prevailing wage rates (ORS 279C.800 to 279C.870);
 - BOLI Public Works bond (ORS 279C.830(2));
 - Retainage (ORS 279C.550 to 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);
 - Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385; and
 - Contractor's certification that all subcontractors performing Work described in ORS 701.005(2) (i.e., construction Work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence Work under the Contract.
 - 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.