

FAQ

PROCUREMENT



# FAQ on Emergency Procurement

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## **FAQ – Emergency Procurements**

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

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

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

Oregon’s Public Contracting Code defines an “emergency” to mean “circumstances that: (A) Could not have been reasonably foreseen; (B) Create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and (C) Require prompt execution of a contract to remedy the condition.”<sup>1</sup> For some cities, the term may also be defined under local contracting rules.<sup>2</sup>

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

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

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

No. Under state law, local officials do not need to follow the normal competitive procurement process for emergency procurements. Oregon’s Public Contracting Code<sup>3</sup> and the Model Rules under Oregon Administrative Rules (OAR) Chapter 137, Divisions 46 through 49, provide for an emergency exception to the local procurement process. Note, however, that the scope of this exception is also subject to local contracting rules.<sup>4</sup>

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

<sup>2</sup> See, e.g., PORTLAND, OR. CODE § 5.33.130 (2020).

<sup>3</sup> ORS chapters 279A, 279B and 279C.

<sup>4</sup> See ORS 279A.065.

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

Yes. Under state law, these contracts must be limited to “*emergency* procurements of goods or services.”<sup>5</sup> As such, they cannot be used to purchase non-emergency goods or alleviate non-emergency needs.

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

When awarding an emergency procurement to a contractor, state law also requires that cities: **(A)** document the nature of the emergency and **(B)** describe the method used for selecting the contractor.<sup>6</sup>

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

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

Possibly. Oregon’s Public Contracting Code authorizes cities to develop their own contracting rules, and these rules can be more stringent than the state’s requirements.<sup>7</sup> If a city’s purchasing policy addresses emergency procurements, these additional rules must be followed. For this reason, local officials must review their city’s ordinances and policies before making an emergency procurement to ensure compliance.

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

Yes. Even in emergencies, the Model Rules under OAR Chapter 137 require local officials to procure city goods and services “with competition that is reasonable and appropriate under the circumstances.”<sup>8</sup> For anything other than construction projects, the state’s regulations do not specify a competitive process to ensure there is competition.<sup>9</sup> As noted in Question 5, however, a city may choose to adopt a competitive process for emergency procurements under its local contracting rules.

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<sup>5</sup> ORS 279B.080(1).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> OAR 137-047-0280.

<sup>9</sup> *Id.*

However, for emergency procurements of **construction services**, state law is more specific.<sup>10</sup> Generally, state law requires cities to “set a solicitation schedule” for a construction contract that is reasonable for the circumstances.<sup>11</sup> If the construction contract is a matter “of extreme necessity,” then the city may proceed with a written or oral request for quotes or may even “make direct appointments without competition.”<sup>12</sup>

Readers may note that the Public Contracting Code appears to authorize emergency procurements only for “construction services that are not public improvements.”<sup>13</sup> However, the Model Rules state that “Emergency contracts for construction services are not public improvement contracts and are regulated under ORS 279B.080.”<sup>14</sup> This seems to indicate that the rules for public improvement contracts do not apply for emergency procurements, even if the work would otherwise meet the definition of a public improvement project.

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

The head of the city, or a person delegated by the city as someone who can effectuate public procurements, is the person who may authorize an emergency procurement.<sup>15</sup> Often, city managers are authorized to approve emergency procurements.<sup>16</sup>

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<sup>10</sup> See OAR 137-049-0150.

<sup>11</sup> ORS 279B.080(2).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> OAR 137-049-0140(1).

<sup>15</sup> ORS 279B.080(1); see also ORS 279A.075.

<sup>16</sup> See, e.g., BEND, OR., CODE § 1.55.030 (2020).