

**CLACKAMAS COUNTY  
LOCAL CONTRACT REVIEW BOARD RULES<sup>1</sup>**

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**CLACKAMAS COUNTY  
LOCAL CONTRACT REVIEW BOARD RULES  
DIVISION C-046**

**GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTING**

**C-046-0100 Application; Federal Law Supremacy**

(1) These Rules set forth the rules of procedure for Public Contracting of Clackamas County, Clackamas County Development Agency, Clackamas County Service District No. 1, Surface Water Management Agency of Clackamas County, Tri-City Service District, North Clackamas Parks and Recreation District, Clackamas County Extension & 4-H Service District, and Library Service District of Clackamas County (hereinafter “Contracting Agencies”). These Rules consist of the following four divisions:

- (a) This division 46, which is applicable to all Public Contracting;
- (b) Division 47, which describes procedures for Public Contracting for Goods or Services, as defined in ORS 279B.005;
- (c) Division 49, which describes procedures for Public Contracting for Construction Services; and
- (d) Division 50, which identifies the persons other than the Board who have authority to sign Contracts and Contract amendments for the Contracting Agency.

(2) In the event of conflict between rules in this division 46 and rules in divisions 47 and 49, the rules in divisions 47 and 49 take precedence over the rules in this division 46.

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

(4) These division 46 rules become effective on March 1, 2005 and apply to Public Contracts first advertised, but if not advertised then entered into, on or after March 1, 2005.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order No. 2005-34, enacted 2/24/05; Amended by Order No. 2009-84, enacted 7/7/09]

**C-046-0110 Definitions for the Rules**

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

- (1) “**Addendum**” or “**Addenda**” means an addition or deletion to, a material change in, or general interest explanation of a Solicitation Document.
  - (2) “**Award**” means, as the context requires, either the act or occurrence of the Contracting Agency’s identification of the Person with whom the Contracting Agency will enter into a Contract following the resolution of any protest of the Contracting Agency’s selection of that Person, and the completion of all Contract negotiations.
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- (3) “**Bid**” means a response to an Invitation to Bid.
- (3.1) “**Board**” means the Board of Commissioners of Clackamas County, or the Board of Directors of another of the Contracting Agencies, which is the Local Contract Review Board pursuant to ORS 279A.060.
- (4) “**Closing**” means the date and time announced in a Solicitation Document as the deadline for submitting Offers.
- (5) “**Code**” means the Public Contracting Code, as defined in ORS 279A.010.
- (6) “**Competitive Range**” means the Proposers with whom the Contracting Agency will conduct discussions or negotiations if the Contracting Agency intends to conduct discussions or negotiations in accordance with offer award and negotiation procedures. The size of the Competitive Range must be stated in the Solicitation Document, but will be decreased if the number of Proposers that submit Proposals is less than the specified number, or may be increased by the Contracting Agency in accordance with offer award and evaluation procedures.
- (7) “**Contract**” means a “Public Contract,” as defined in ORS 279A.010.
- (8) “**Contract Price**” means, as the context requires, (i) the maximum payments that a Contracting Agency will make under a Contract, including bonuses, incentives and contingency amounts, if the Contractor fully performs under the Contract, (ii) the maximum not-to-exceed amount of payments specified in the Contract, or (iii) the unit prices for Goods or Services or Personal Services set forth in the Contract.
- (9) “**Contract Review Authority**” means the Local Contract Review Board determined as set forth in ORS 279A.060, and where specified by statute, the Director of the Oregon Department of Transportation.
- (9.1) “**Contracting Agency**” means Clackamas County, Clackamas County Development Agency, Clackamas County Service District No. 1, Surface Water Management Agency of Clackamas County, Tri-City Service District, North Clackamas Parks and Recreation District, Clackamas County Extension & 4-H Service District, or Library Service District of Clackamas County, as applicable.
- (10) “**Contractor**” means the Person with whom a Contracting Agency enters into a Contract.
- (10.1) “**Days**” means calendar days.
- (11) “**DBE Disqualification**” means a disqualification, suspension or debarment pursuant to ORS 200.065, 200.075 or 279A.110.
- (11.1) “**Department**” means Department of Administrative Services of the State of Oregon.
- (12) “**Descriptive Literature**” means the Offeror's materials submitted to provide information concerning the products or services available in response to a Solicitation Document.
- (12.1) “**Differing Site Conditions**” means subsurface or otherwise concealed physical conditions differing materially from those indicated in the contract, or unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract.
- (13) “**Electronic Advertisement**” means notice of a Contracting Agency’s request for Offers, request for quotes, request for information or other document inviting participation in the Contracting Agency’s Procurements available over the Internet via (a) the World Wide Web or some other Internet protocol; or (b) a Contracting Agency’s Electronic Procurement System. An Electronic Advertisement may include a Solicitation Document.
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- (14) “**Electronic Offer**” means a response to a Contracting Agency’s request for Offers or request for quotes submitted to a Contracting Agency via email or through the Contracting Agency’s Electronic Procurement System.
- (15) “**Electronic Procurement System**” means an information system that Persons may access through the Internet, using the World Wide Web or some other Internet protocol, or that Persons may otherwise remotely access using a computer, that enables a Contracting Agency to post Electronic Advertisements, receive Electronic Offers, and conduct other activities related to a Procurement.
- (15.1) “**Goods**” includes supplies, equipment, materials, personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, and combinations of any of the items identified in this paragraph.
- (16) “**Goods and Services**” or “Goods or Services” includes combinations of any of the items identified in the definitions of “goods” and “services.”
- (17) “**Invitation to Bid**” or “ITB” means the Solicitation Documents issued to invite Offers from prospective Contractors pursuant to either ORS 279B.055, or 279C.335.
- (18) “**Model Rules**” means the Attorney General’s model rules of procedure for Public Contracting, which are set forth in OAR Chapter 137, divisions 46, 47, 48 and 49.
- (19) “**Offer**” means a Written offer to provide Goods of Services in response to a Solicitation Document.
- (20) “**Offeror**” means a Person who submits an Offer.
- (21) “**Opening**” means the date, time and place announced in the Solicitation Document for the public opening of Written sealed Offers.
- (22) “**Person**” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation or any other legal or commercial entity.
- (22.1) “**Personal Property**” means everything subject to ownership which is not real property, mobile homes, or tax foreclosed property and has exchangeable value.
- (23) “**Personal Services**” means the services or type of services performed under a Personal Services Contract.
- (24) “**Personal Services Contract**” or “Contract for Personal Services” means a contract or member of a class of contracts that has been designated in Rule C-046-0500 as a Personal Services Contract pursuant to ORS 279A.055.
- (25) “**Product Sample**” means a representative specimen of the item offered by the Offeror in response to the Solicitation Document. Unless otherwise provided in the Solicitation Document, the Product Sample shall be the exact product or a representative portion of that product offered by the Offeror.
- (26) “**Proposal**” means a response to a Request for Proposals.
- (26.1) “**Public Contracting Officer**” means the County Administrator, or those persons delegated such authority by written delegation approved by the Board.
- (26.2) “**Public Improvement**” is defined by ORS 279A.010.
- (26.3) “**Public Work**” is defined by ORS 279C.800.
- (26.4) “**Purchasing Manager**” means the director of the Clackamas County Purchasing division or his designees, when the entity involved is Clackamas County or the Clackamas County Development Agency. When the entity involved is Clackamas County Service District No. 1, Surface Water Management Agency of Clackamas County, or Tri-City Service District, the Purchasing Manager shall be the Water Environment Services Department Director or his designees. When the entity involved is
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North Clackamas Parks and Recreation District, the Purchasing Manager shall be the Director of that agency, or his designees.

(27) “**Responsible Offeror**” (also, “**Responsible Bidder**” or “**Responsible Proposer**,” as applicable) means a Person that has submitted an Offer and meets the standards set forth in C-047-0640 or C-049-0390(2), and that has not been debarred or disqualified by the Contracting Agency under C-047-0575 or C-049-0370. When used alone, “Responsible” means meeting the aforementioned standards.

(28) “**Responsive Offer**” (also, “**Responsive Bid**” or “**Responsive Proposal**,” as applicable) means an Offer that substantially complies in all material respects with applicable solicitation requirements. When used alone, “Responsive” means having the characteristic of substantially complying in all material respects with applicable solicitation requirements.

(29) “**Request for Proposals**” or “**RFP**” means all documents used for soliciting Proposals in accordance with either ORS.279B.060, 279C.110 or C-049-0650.

(29.1) “**Rule**” or “**Rules**” means these Clackamas County Local Contract Review Board rules.

(29.2) “**Services**” means services other than personal services designated under ORS 279A.055.

(30) “**Signed**” or “**Signature**” means any mark, word or symbol attached to or logically associated with a document and executed or adopted by a Person with the intent to be bound.

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

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-046-0120 Policy**

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

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**C-046-0130 Application of the Code and Model Rules; Exceptions**

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

(2) **Opt-out.** The Contracting Agencies hereby specifically opt out of the Attorney General's Model Public Contracting Rules and adopt their own Rules for Public Contracting pursuant to 279A.065 in the exercise of their own contracting authority. The Contracting Agencies are not subject to the Attorney General's Model Rules.

(3) **Personal Services Contracts.** Contracts for Personal Services designated as such by the Board pursuant to ORS 279A.055 and C-046-0500, are not required to be awarded under the procedures of ORS 279B.050 to 279B.085 and C-047-0250 through C-047-0290, unless the Contracting Agency expressly provides in the contracting documents that some portion of those statutes or rules apply, or unless a state-funded contract for Architectural, Engineering, Land Surveying or Related Services is awarded under state law provisions pursuant to ORS 279C.110(2). Personal Service contracts will be awarded as set forth in C-046-0500.

(4) **Statutory Exceptions.** Neither the Code nor these Rules apply to the contracts or the classes of contracts described in ORS 279A.025(2).

(5) Neither the Code nor these Rules apply to the Public Contracting activities of the public bodies listed in ORS 279A.025(3).

(6) **Federal Programs.** Contracting Agencies otherwise subject to the Code and these Rules may enter into Public Contracts under a federal program described in ORS 279A.180 without following the procedures set forth in ORS 279B.050 through ORS 279B.085, provided that the Contracting Agency enters into the Public Contract pursuant to rules adopted by the Public Contracting Agency pursuant to ORS 279A.180.

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

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

**C-046-0140 Delegation of Authority**

The Local Contract Review Board hereby delegates to the County Hearings Officer the rights, power, and authority vested in the Local Contract Review Board to receive notices, conduct hearings, and make decisions regarding prequalifications and disqualifications pursuant to ORS 279A.110, ORS 279B.425, ORS 279C.450, ORS 200.065(5) and ORS 200.075(1). In the event the County Hearings Officer is not available to conduct a timely hearing, the County Land Use Hearings Officer may serve in the same capacity and is hereby delegated the same rights, powers and authority.

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

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

[Adopted by Order No. 2008-165, enacted 10/16/08]

## CONTRACT PREFERENCES

### **C-046-0300 Preference for Oregon Goods and Services; Nonresident Bidders**

(1) **Tiebreaker Preference and Award When Offers Are Identical.** Under ORS 279A.120, when a Contracting Agency receives Offers identical in price, fitness, availability and quality, and chooses to award a Contract, the Contracting Agency must award the Contract based on the following order of precedence:

- (a) The Agency must award the Contract to the Offeror among those submitting identical offers that is offering Goods or Services or Personal Services that are manufactured or produced in Oregon.
- (b) If two or more Offerors submit identical Offers, and they all offer Goods or Services, or both, or Personal Services, that are manufactured or produced in Oregon, the Contracting Agency must Award the Contract by drawing lots among the identical Offers. The Contracting Agency must provide the Offerors who submitted the identical Offers notice of the date, time and location of the drawing of lots and an opportunity for these Offerors to be present when the lots are drawn
- (c) If the Contracting Agency receives identical Offers, and none of the identical Offers offer Goods or Services or Personal Services that are manufactured or produced in Oregon, then the Contracting Agency must award the Contract by drawing lots among the identical Offers. The Offerors that submitted the identical Offers subject to the drawing of lots must be given notice and an opportunity to be present when the lots are drawn.

(2) **Determining if Offers are Identical.** A Contracting Agency shall consider Offers identical in price, fitness, availability and quality as follows:

- (a) Bids received in response to an Invitation to Bid are identical in price, fitness, availability and quality if the Bids are Responsive, and offer the Goods or Services or Personal Services described in the Invitation to Bid at the same price.
- (b) Proposals received in response to a Request for Proposals are identical in price, fitness, availability and quality if they are Responsive and achieve equal scores when scored in accordance with the evaluation criteria set forth in the Request for Proposals.
- (c) Proposals received in response to a Special Procurement conducted under ORS 279B.085 are identical in price, fitness, availability and quality if, after completing the contracting procedure approved by the Contract Review Authority, the Contracting Agency determines, in writing, that two or more Proposals are equally advantageous to the Contracting Agency.

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

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criteria reasonably relate to that determination, and provided that the Contracting Agency applies those criteria equally to each Offeror.

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065, 279A.120 & 279A.128.

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2012-41, enacted 6/7/12]

#### **C-046-0310 Reciprocal Preferences**

(1) When evaluating Bids pursuant to C-047-0255, C-047-0257 or C-049-0390, Contracting Agencies shall add a percentage increase to the Bid of a Nonresident Bidder equal to the percentage, if any, of the preference that would be given to that Bidder in the state in which the Bidder resides. A Contracting Agency may rely on the list prepared and maintained by the Department pursuant to ORS 279A.120(4) to determine both (i) whether the Nonresident Bidder's state gives preference to in-state bidders, and (ii) the amount of such preference.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-046-0320 Preference for Recycled Materials**

(1) Notwithstanding provisions of law requiring a Contracting Agency to award a Contract to the lowest responsible bidder or best proposer or provider of a quotation, and in accordance with subsection (2) of this section, a Contracting Agency charged with the procurement of goods for any public use shall give preference to the procurement of goods manufactured from recycled materials.

(2) In comparing goods from two or more Bidders or Proposers, if at least one Bidder or Proposer offers goods manufactured from recycled materials, and at least one Bidder or Proposer does not, a Contracting Agency shall select the Bidder or Proposer offering

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goods manufactured from recycled materials if each of the following four conditions exists:

- (a) The recycled product is available;
  - (b) The recycled product meets applicable standards;
  - (c) The recycled product can be substituted for a comparable non-recycled product; and
  - (d) The recycled product's costs do not exceed the costs of non-recycled products by more than five percent, or a higher percentage if a written determination is made by the Contracting Agency and set forth in the Solicitation Document. For purposes of making the foregoing determination, the Contracting Agency shall consider the costs of the goods following any adjustments the Contracting Agency makes to the price of the goods for purposes of evaluation pursuant to C-046-0310.
- (3) For the purposes of this Section, a Contracting Agency shall determine if goods are manufactured from recycled materials in accordance with standards established by the Contracting Agency.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

## **COOPERATIVE PROCUREMENT**

### **C-046-0400 Authority for Cooperative Procurements**

(1) Agencies may participate in, sponsor, conduct or administer Cooperative Procurements as follows:

- (a) Contracting Agencies may participate in, sponsor, conduct or administer Joint Cooperative Procurements to establish Contracts or Price Agreements for Goods or Services or Personal Services, that use source selection methods substantially equivalent to those set forth in ORS 279B.055, 279B.060, or 279B.085 or to establish Contracts for Public Improvements that use a competitive bidding process substantially equivalent to that set forth in ORS 279C.005 through 279C.870.
  - (b) Contracting Agencies may participate in, sponsor, conduct or administer Permissive Cooperative Procurements to establish contracts or Price Agreements for the acquisition of Goods or Services or Personal Services that use source selection methods substantially equivalent to those set forth in ORS 279B.055 or 279B.060.
  - (c) Contracting Agencies may participate in, sponsor, conduct or administer Interstate Cooperative Procurements to establish contracts or Price Agreements for the acquisition of Goods or Services or Personal Services that use source selection methods substantially equivalent to those set forth in ORS 279B.055 or 279B.060.
- (2) A solicitation and award process uses source selection methods substantially equivalent to those identified in ORS 279B.055, ORS 279B.060 or ORS 279B.085 when it has the characteristics set forth in ORS 279A.200(2).

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**C-046-0420 Joint Cooperative Procurements**

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

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**C-046-0430 Permissive Cooperative Procurements**

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

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**C-046-0440 Advertisements of Intent to Establish Contracts or Price Agreements through a Permissive Cooperative Procurement**

(1) A Purchasing Contracting Agency that wishes to enter into a Contract or Price Agreement arising out of a Permissive Cooperative Procurement must publish notice of its intent to do so if the Purchasing Contracting Agency estimates that it will spend in excess of \$250,000 on Goods and Services or Personal Services acquired under the Contract or Price Agreement.

(2) For purposes of determining whether a Purchasing Contracting Agency must give the notice required by C-046-0440(1), a Purchasing Contracting Agency will spend in excess of \$250,000 for Goods and Services or Personal Services acquired under a Contract or Price Agreement arising out of a Permissive Cooperative Procurement if:

(a) The Purchasing Contracting Agency's Contract or Price Agreement arising out of the Permissive Cooperative Procurement expressly provides that the Purchasing Contracting Agency will make payments over the term of the Contract or Price Agreement that will, in aggregate, exceed \$250,000, whether or not the total amount or value of the payments is expressly stated;

(b) The Purchasing Contracting Agency's Contract or Price Agreement arising out of the Permissive Cooperative Procurement expressly provides for a guaranteed maximum price, or a maximum not to exceed amount in excess of \$250,000; or

(c) At the time the Purchasing Contracting Agency enters into the Contract or Price Agreement, the Purchasing Contracting Agency reasonably contemplates, based on historical or other data available to the Purchasing Contracting Agency, that the total payments it will make for Goods or Services or Personal Services under the Contract or Price Agreement will, in aggregate, exceed \$250,000 over the anticipated duration of the Contract or Price Agreement.

(3) The notice of intent required by C-046-0440(1) shall contain the information required by ORS 279A.215(2)(b), and Agency shall advertise the notice in the same manner as provided in ORS 279B.055(4)(b) and (c). The Purchasing Contracting Agency shall give the notice required by this Section no fewer than 7 days before the deadline for submitting comments regarding the Purchasing Contracting Agency's intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement.

(4) An Administering Contracting Agency that intends to establish a Contract or Price Agreement arising out of the Permissive Cooperative Procurement it administers may

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satisfy all the notice requirements set forth in C-046-0440(1) and (3) by including the information required by ORS 279A.215(2)(b) in the Solicitation Document related to the Permissive Cooperative Procurement, and including instructions in the Solicitation Document to potential Offerors describing how they may submit comments in response to the Administering Contracting Agency's intent to establish a Contract or Price Agreement through the Permissive Cooperative Procurement. The content and timing of such notice shall comply in all respects with ORS 279A.215(2), ORS 279A.215(3) and these Rules.

(5) The Purchasing Contracting Agency shall respond to any comments on its intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement as set forth in ORS 279A.215(3)(c).

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-046-0450 Interstate Cooperative Procurements**

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

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-046-0460 Advertisements of Interstate Cooperative Procurements**

A Purchasing Contracting Agency may only participate in an Interstate Cooperative Procurement if at least one of the following occurs:

(1) The Solicitation Document for the Interstate Cooperative Procurement lists the Purchasing Contracting Agency or the Cooperative Procurement Group of which the Purchasing Contracting Agency is a member as a party that may enter into Contracts or Price Agreements under the terms and conditions of the Original Contract, and the Solicitation Document is advertised in Oregon in compliance with ORS 279B.055(4) or ORS 279B.060(4) by either:

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

(2) If the Solicitation Document issued by the Administering Contracting Agency was not advertised in accordance with C-046-0460(1), the Purchasing Contracting Agency gives notice of its intent to enter into a Public Contract or Price Agreement based on the terms of the Interstate Cooperative Procurement. The notice of intent shall contain the information required by ORS 279A.220 (2)(b)(B), and the Purchasing Contracting Agency shall advertise the notice in the same manner as provided in ORS 279B.055(4)(b) and (c). The Purchasing Contracting Agency shall give the notice required by this Section no fewer than 7 days before the deadline for submitting comments regarding the

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Purchasing Contracting Agency's intent to establish a contract or price agreement through a Permissive Cooperative Procurement.

(3) The Purchasing Contracting Agency shall respond to any comments on its intent to establish a contract or price agreement through a Permissive Cooperative Procurement as set forth in ORS 279A.220(3)(c).

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-046-0470 Protests and Disputes**

(1) If a bidder or proposer wishes to protest the procurement process, the contents of a solicitation document related to a Cooperative Procurement, or the award or proposed award of an Original Contract, the bidder or proposer shall direct the protest to the Administering Contracting Agency, and the bidder or proposer shall make such protest in accordance with ORS 279B.400 through ORS 279B.425. If the Administering Contracting Agency is not subject to the Code, then bidders or proposers shall make such protests in accordance with the processes and procedures established by the Administering Contracting Agency.

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

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

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-046-0480 Contract Amendments**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

[Adopted by Order NO. 2005-34, enacted 2/24/05]

## **PERSONAL SERVICE CONTRACTS**

### **C-046-0500 Personal Service Contract Defined.**

(1) A contract for "Personal Services" is a contract that calls for specialized skills, knowledge and resources in the application of technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment. Qualifications and performance history, expertise, knowledge and creativity, and the ability to exercise



sound professional judgment are typically the primary considerations when selecting a Personal Services Contractor, with price being secondary. Personal Service Contracts include, but are not limited to:

- (a) Contracts for services performed as an independent contractor in a professional capacity, including but not limited to the services of an accountant; attorney; architectural or land use planning consultant; financial advisor; investment banker; physician or dentist; registered professional engineer; appraiser or surveyor; passenger aircraft pilot; aerial photographer; timber cruiser; data processing consultant; software developer; golf course manager, operator or consultant; or broadcaster.
  - (b) Contracts for services as an artist in the performing of fine arts, including but not limited to persons identified as photographer, film maker, painter, weaver, or sculptor.
  - (c) Contracts for services of a specialized, creative and research-oriented, noncommercial nature.
  - (d) Contracts for services as a consultant.
  - (e) Contracts for educational, training, or informational resource referral services.
  - (f) Contracts for human services in the areas of aging and senior services, mental health services, public health services, emergency medical services (including ambulance and paramedic services to be rendered to third parties), social services, child care services, and temporary shelter services.
- (2) The following are not personal service contracts.
- (a) Contracts, even though in a professional capacity, if substantially and predominately for a product, e.g. a contract with a landscape architect to design a garden is for personal services, but a contract to design a garden and supply all the shrubs and trees is predominately for a tangible product.
  - (b) A service contract to supply labor which is of a type that can generally be done by any competent worker, e.g., janitorial, security guard, crop spraying, laundry and landscape maintenance service contracts.
  - (c) Contracts for trade-related activities considered to be labor and materials contracts.
  - (d) Contracts for services of a trade-related activity, even though a specific license is required to engage in the activity. Examples are repair and/or maintenance of all types of equipment or structures.
- (3) **Procedures Not Required.** Contracting Agencies are not required to award contracts for personal services under the procedures of ORS 279B.050 to 279B.085, or C-047-0250 to C-047-0290.
- (4) **Procedure for Selection.**
- (a) If the Contracting Agency determines that a Personal Services contractor is needed, then at its discretion a competitive process similar to a Request for Proposal may be used for the selection of the contractor. The Contracting Agency shall provide such information and such detail as in its discretion is reasonably necessary to allow prospective candidates to prepare a proposal adequately;
  - (b) If part or all of the project is directly funded by the federal government, then the applicable federal statutes, regulations and procedures shall be followed and shall supersede these rules if funding specifically requires compliance with federal processes. If there are no applicable federal statutes, regulations or procedures, then these rules shall apply.
  - (c) If the estimated value of services is \$50,000 or less, the Contracting Agency shall document the screening and selection process.
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(d) If the estimated value of services is more than \$50,000, the Contracting Agency may prepare a Request for Proposals. The intent of this section is that the Contracting Agency will use a more formal approach to the solicitation as the estimated contract value increases.

(e) The Contracting Agency shall receive and evaluate the Proposals offered by the candidates under subsection (d) above. Such evaluation shall include the candidate's proposed method to accomplish the work required, including, where appropriate, demonstrated capability to use innovative methods to achieve desired performance. Cost may be considered, but should not be the sole criterion. The Contracting Agency may negotiate with one or more qualified candidate(s) as it deems appropriate.

(f) **Single Candidate.** Notwithstanding subsection (d) above, where:

(A) only a single candidate known to the Contracting Agency is qualified to perform the particular services required; or

(B) only a single candidate has reasonable access to factual, technical or statistical information necessary to perform the services required; or

(C) where a candidate has performed previous services related to the services now required so that it would be cost effective to contract with that candidate, then the Contracting Agency may engage solely in negotiations with that candidate. A contract complying with these Rules is still mandatory.

(g) **Architects, Engineers, on State-Funded Contracts.** Notwithstanding any other provision of these Rules, if the County is contracting for the services of architects, engineers, land surveyors, or related services, as defined in ORS 279C.100, on a state-funded project where the percentage of state funding and project value exceed the amounts set forth in ORS 279C.110(2), then the County shall follow the procurement process set forth in that statute and the provisions of Oregon Administrative Rules chapter 137, Division 48.

(h) No work shall be performed until the contract is approved unless there is an emergency because of time or other unforeseen events where, in the opinion of the Public Contracting Officer, the service must commence immediately. Notwithstanding the foregoing, the contract shall be executed as soon as reasonably practicable.

Stat. Auth.: ORS 279A.055

Stats. Implemented: ORS 279B.050

[Adopted by Order NO. 2005-34, enacted 2/24/05]

## **DISPOSITION OF PERSONAL PROPERTY**

### **C-046-0610 Auction Sales of Personal Property**

Personal Property may be sold at auction if the Contracting Agency determines that the auction contemplated will probably result in a higher net return than if the property were sold by competitive Bid or Proposal.

[Adopted by Order NO. 2005-34, enacted 2/24/05]

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**C-046-0620 Sales of Personal Property**

(1) When the current market value per item is deemed to be less than \$5,000, the Contracting Agency may sell Personal Property, including recyclable or reclaimed materials, without obtaining competitive Bids or Proposals if the following conditions are complied with:

- (a) determination has been made by the Purchasing Manager that the property is not needed for other Contracting Agency purposes; and
- (b) The director of the department and the Purchasing Manager have determined that a negotiated sale is likely to result in increased net revenue.

(2) When the current value per item is deemed to exceed \$5,000, the Personal Property must be offered for competitive Bids or Proposals and be publicly advertised, or be offered for sale at public auction in accordance with C-046-610. If no Bids or Proposals are received or if a determination is made that the market value of the property exceeds the offer of the highest responsible Bidder or the best Proposer, all Bids or Proposals may be rejected and the Contracting Agency may negotiate a sale subject to the following conditions:

- (a) An appraisal of the market value of the property is obtained and documented and the negotiated sale price equals at least 85% of appraised value; or
- (b) The sale amount exceeds the highest bid received through the bidding or auction process.

(3) The Contracting Agency shall maintain a record of all sales authorized by subsections (1) and (2).

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**C-046-0630 Liquidation Sales of Personal Property**

The Contracting Agency may sell Personal Property through a commercially recognized third party liquidator without obtaining competitive Bids or Proposals, if the Contracting Agency has determined that a liquidation sale will result in increased net revenue and the selection of the liquidator was conducted by a competitive selection process.

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**C-046-0640 Donations of Personal Property**

(1) The Contracting Agency may sell or donate Personal Property, including recyclable or reclaimed materials, without obtaining competitive Bids or Proposals, to the following activities:

- (a) Another public agency; or
- (b) Any sheltered workshop, work activity center or group care home which operates under contract or agreement with, or grant from, any Contracting Agency or state agency; or
- (c) Any recognized nonprofit activity.

(2) The Contracting Agency shall maintain a record of all transfers, donations or sales authorized by this rule.

[Adopted by Order NO. 2005-34, enacted 2/24/05]

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**REPEALED RULES****C-046-0700 Repealed Rules**

Clackamas County Local Contract Review Board Rules C-100-010 through C-160-020 are repealed effective March 1, 2005. The repealed rules will continue to apply to the solicitation of Public Contracts first advertised, but if not advertised then entered into, before March 1, 2005.

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**CLACKAMAS COUNTY  
LOCAL CONTRACT REVIEW BOARD RULES****DIVISION C-047****PUBLIC PROCUREMENTS FOR GOODS OR SERVICES  
GENERAL PROVISIONS****C-047-0000 Application**

These division 47 rules implement ORS chapter 279B, Public Procurements and apply to the Procurement of Goods and/or Services. These division 47 rules become effective on March 1, 2005 and apply to Contracts first advertised, but if not advertised then entered into, on or after March 1, 2005.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.015

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

**C-047-0100 Definitions**

- (1) “**Advantageous**” means in the Contracting Agency's best interests, as assessed according to the judgment of the Contracting Agency.
- (2) “**Affected Person**” or “**Affected Offeror**” means a Person whose ability to participate in a Procurement is adversely affected by a Contracting Agency decision. See ORS 279B.410.
- (3) “**Scope**” means the range and attributes of the Goods or Services described in the applicable Procurement document.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

**SOURCE SELECTION****C-047-0250 Methods of Source Selection; Feasibility Determinations; Cost Analysis**

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

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(2) **Written Cost Analysis for Contracts for Services.** Before conducting the Procurement of a Contract for Services that is subject to ORS 279B.030 to 279B.036, a Contracting Agency must, in the absence of a determination under section 34 of that enactment that performing the services with the Contracting Agency's own personnel and resources is not feasible, conduct a Written cost analysis.

(3) **Feasibility Determination for Contracts for Services.** A Contracting Agency may proceed with the procurement of a Contract for Services without conducting a cost analysis under ORS 279B.033, if the Contracting Agency makes Written findings that one or more of the special circumstances described in ORS 279B.036, make the Contracting Agency's use of its own personnel and resources to provide the Services not feasible.

(4) **Special Circumstances.** The special circumstances identified in 279B.036 that require a Contracting Agency to procure the Services by Contract include any circumstances, conditions or occurrences that would make the Services, if performed by the Contracting Agency's employees, incapable of being managed, utilized or dealt with successfully in terms of the quality, timeliness of completion, success in obtaining desired results, or other reasonable needs of the Contracting Agency.

(5) **Written Cost Analysis** under ORS 279B.033.

(a) **Basic Comparison.** The Written cost analysis must compare an estimate of the Contracting Agency's cost of performing the Services with an estimate of the cost a potential Contractor would incur in performing the Services. However, The Contracting Agency may proceed with the Procurement for Services only if it determines that the Contracting Agency would incur more cost in performing the Services with the Contracting Agency's own personnel than it would incur in procuring the Services from a Contractor. In making this determination, the cost the Contracting Agency would incur in procuring the Services from a Contractor includes the fair market value of any interest in equipment, materials or other assets the Contracting Agency will provide to the Contractor for the performance of the Services.

(b) **Costs of Using Contracting Agency's Own Personnel and Resources.** When estimating the Contracting Agency's cost of performing the Services, the Contracting Agency shall consider cost factors that include:

(A) The salary or wage and benefit costs for the employees of the Contracting Agency who would be directly involved in performing the Services, to the extent those costs reflect the proportion of the activity of those employees in the direct provision of the Services. These costs include those salary or wage and benefit costs of the employees who inspect, supervise or monitor the performance of the Services, to the extent those costs reflect the proportion of the activity of those employees in the direct inspection, supervision, or monitoring of the performance of the subject Services.

(B) The material costs necessary to the performance of the Services, including the costs for space, energy, transportation, storage, equipment and supplies used or consumed in the provision of the Services.

(C) The costs incurred in planning for, training for, starting up, implementing, transporting and delivering the Services.

(D) Any costs related to stopping and dismantling a project or operation because the Contracting Agency intends to procure a limited quantity of Services or to procure the Services within a defined or limited period of time.

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(E) The miscellaneous costs related to performing the Services. These costs exclude the Contracting Agency's indirect overhead costs for existing salaries or wages and benefits for administrators, and exclude costs for rent, equipment, utilities and materials, except to the extent the cost items identified in this sentence are attributed solely to performing the Services and would not be incurred unless the Contracting Agency performed the Services.

(F) ORS 279B.033(1)(a) provides that an estimate of the Contracting Agency's costs of performing the Services includes the costs described in subsections (5)(b)(A) through (E) of this rule. Therefore, those costs do not constitute an exclusive list of cost information. A Contracting Agency may consider other reliable information that bears on the cost to the Contracting Agency of performing the Services. For example, if the Contracting Agency has accounted for its actual costs of performing the Services under consideration, or reasonably comparable Services, in a relatively recent Services project, the Contracting Agency may consider those actual costs in making its estimate.

**(c) Costs a Potential Contractor Would Incur.** When estimating the costs a potential Contractor would incur in performing the Services, the Contracting Agency shall consider cost factors that include:

(A) The average or actual salary or wage and benefit costs for Contractors and Contractor employees:

(i) Who work in the business or industry most closely involved in performing the Services; and

(ii) Who would be necessary and directly involved in performing the Services or who would inspect, supervise or monitor the performance of the Services.

(B) The material costs necessary to the performance of the Services, including the costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies used or consumed in the provision of the Services.

(C) The miscellaneous costs related to performing the Services. These miscellaneous costs include reasonably foreseeable fluctuations in the costs listed in subsection (5)(c) (A) and (B) of this rule over the expected duration of the Procurement.

(D) ORS 279B.033(1)(b) provides that an estimate of the costs a potential Contractor would incur in performing the Services includes the costs described in subsections (5)(c)(A) through (C) of this rule. Therefore, those costs do not constitute an exclusive list of cost information. A Contracting Agency may consider other reliable information that bears on the costs a potential Contractor would incur. For example, if the Contracting Agency, in the reasonably near past, received Bids or Proposals for the performance of the Services under consideration, or reasonably comparable Services, the Contracting Agency may consider the pricing offered in those Bids or Proposals in making its estimate. Similarly, the Contracting Agency may consider what it actually paid out under a Contract for the same or similar Services. For the purposes of these examples, the reasonably near past is limited to Contracts, Bids or Proposals entered into or received within the five years preceding the date of the cost estimate. The Contracting Agency must take into account, when considering the pricing offered in previous Bids, Proposals or Contracts, adjustments to the pricing in light of measures of market price adjustments like the consumer price indexes that apply to the Services.

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

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

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

- (a) Make and keep a Written determination that it lacks personnel and resources to perform the Services within the time the Contracting Agency requires them and of the basis for the Contracting Agency's decision to proceed with the Procurement.
- (b) Provide to its Local Contract Review Board, each calendar quarter, copies of each Written cost analysis and Written determination.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.050; 279B.030 to 279B.036

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-047-0255 Competitive Sealed Bidding**

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

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

(a) **General Information.**

(A) Notice of any pre-Offer conference as follows:

- (i) The time, date and location of any pre-Offer conference;
  - (ii) Whether attendance at the conference will be mandatory or voluntary; and
  - (iii) A provision that provides that statements made by the Contracting Agency's representatives at the conference are not binding upon the Contracting Agency unless confirmed by Written Addendum.
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- (B) The form and instructions for submission of Bids and any other special information, e.g., whether Bids may be submitted by electronic means (See C-047-0330 for required provisions of electronic Bids);
  - (C) The time, date and place of Opening;
  - (D) The office where the Solicitation Document may be reviewed;
  - (E) A statement that each Bidder must identify whether the Bidder is a “resident Bidder,” as defined in ORS 279A.120(1);
  - (F) Bidder’s certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4); and
  - (G) How the Contracting Agency will notify Bidders of Addenda and how the Contracting Agency will make Addenda available (See C-047-0430).
- (b) **Contracting Agency Need.** 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. The Contracting Agency's description of its need to purchase must:
- (A) Identify the scope of the work to be performed under the resulting Contract, if the Contracting Agency awards one;
  - (B) Outline the anticipated duties of the Contractor under any resulting Contract;
  - (C) Establish the expectations for the Contractor's performance of any resulting Contract; and
  - (D) Unless the Contracting Agency for good cause specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the Contracting Agency is purchasing.
- (c) **Bidding and Evaluation Process.**
- (A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;
  - (B) The Contracting Agency shall set forth objective evaluation criteria in the Solicitation Document in accordance with the requirements of ORS 279B.055(6)(a).; and
  - (C) If the Contracting Agency intends to Award Contracts to more than one Bidder pursuant to C-047-0600(4)(c), the Contracting Agency shall state in the Solicitation Document that it may award to more than one Bidder.
- (d) **Applicable preferences** pursuant to ORS 279B.055(6)(b).
- (e) [reserved]
- (f) **Contract terms and conditions** in the form of Contract provisions the Contracting Agency determines are applicable to the Procurement. As required by ORS 279B055, the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:
- (A) The Contracting Agency's reduction or withholding of payment under the Contract;
  - (B) The Contracting Agency's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the statement of work or to meet the performance standards established by the resulting Contract; and
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(C) The Contracting Agency's rights, which the Contracting Agency may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available under the resulting Contract or applicable law.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.055

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-047-0257 Multistep Sealed Bids**

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

(2) **Phased Process.** Multistep bidding is a phased process that seeks information or unpriced technical Bids in the first phase combined with regular competitive sealed bidding, inviting Bidders who submitted technically eligible Bids in the first phase to submit competitive sealed price Bids in the second phase. The Contract, if Awarded, must be Awarded to the lowest Responsible Bidder. If time is a factor, the Contracting Agency may require Bidders to submit a separate sealed price Bid during the initial phase to be opened after the technical evaluation.

(3) **Public Notice.** When a Contracting Agency uses multistep sealed bidding, the Contracting Agency must give public notice for the first phase in accordance with C-047-0300. Public notice is not required for the subsequent phases. However, a Contracting Agency must give notice of subsequent phases to all Bidders, inform Bidders of the right to protest Addenda issued after the initial Closing under C-047-430 and inform Bidders excluded from the subsequent phases of the right, if any, to protest their exclusion under C-047-0720.

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

(5) **Procedure for Phase One of Multistep Sealed Bids.**

(a) Form. Multistep sealed bidding must be initiated by the issuance of an Invitation to Bid in the form and manner required for competitive sealed Bids except as provided in this Rule. In addition to the requirements set forth in C-047-0255(2), the multistep Invitation to Bid must state:

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

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

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

(D) The criteria to be used in the evaluation of unpriced technical Bids.

(b) Evaluation. The Contracting Agency must evaluate unpriced technical Bids in accordance with the criteria set forth in the Invitation to Bid.

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**(6) Procedure for Phase Two of Multistep Sealed Bids.**

- (a) After the completion of phase one, if the Contracting Agency does not cancel the solicitation, the Contracting Agency shall invite each eligible Bidder to submit a price Bid.
- (b) A Contracting Agency shall conduct phase two as any other competitive sealed Bid Procurement except:
  - (A) As specifically set forth in this rule or the Invitation to Bid;
  - (B) No public notice need be given of the invitation to submit price Bids because such notice was previously given.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.055

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; Amended by Order No. 2012-41, enacted 6/7/12]

**C-047-0260 Competitive Sealed Proposals**

(1) **Generally.** A Contracting Agency may procure Goods or Services by competitive sealed Proposals as set forth in ORS 279B.060. A Contracting Agency must use a Request for Proposal to initiate a competitive sealed Proposal solicitation. The Request for Proposal must contain the information required by ORS 279B.060(2) and by section 2 of this rule. The Contracting Agency must provide public notice of the competitive sealed Proposal solicitation as set forth in C-047-0300.

(2) **Request for Proposal.** In addition to the provisions required by ORS 279B.060(2), the Request for Proposal must include the following:

(a) General Information.

(A) Notice of any pre-Offer conference as follows:

- (i) The time, date and location of any pre-Offer conference;
- (ii) Whether attendance at the conference will be mandatory or voluntary; and
- (iii) A provision that provides that statements made by the Contracting Agency's representatives at the conference are not binding upon the Contracting Agency unless confirmed by Written Addendum.

(B) The form and instructions for submission of Proposals and any other special information, e.g., whether Proposals may be submitted by electronic means (See C-047-0330 for required provisions of electronic Proposals);

(C) The time, date and place of Opening;

(D) The office where the Solicitation Document may be reviewed;

(E) Proposer's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4); and

(F) How the Contracting Agency will notify Proposers of Addenda and how the Contracting Agency will make Addenda available. (See C-047-0430).

(b) **Contracting Agency Need.** The character of the Goods or Services the Contracting Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.060(2)(c) the Contracting Agency's description of its need to purchase must:

- (A) Identify the scope of the work to be performed under the resulting Contract, if the Contracting Agency awards one;
  - (B) Outline the anticipated duties of the Contractor under any resulting Contract;
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(C) Establish the expectations for the Contractor's performance of any resulting Contract; and

(D) Unless the Contractor under any resulting Contract will provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services that are subject to ORS 279C.100 to 279C.125, or the Contracting Agency for good cause specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the Contracting Agency is purchasing.

(c) **Proposal and Evaluation Process.**

(A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;

(B) The Contracting Agency must 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 factors shall be reasonable estimates of actual future costs based on information available to the Contracting Agency;

(C) If the Contracting Agency's solicitation process calls for the Contracting Agency to establish a Competitive Range, the Contracting Agency must 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 C-047-0262(1)(a)(B).

(d) **Applicable Preferences** described in ORS 279A.120, 279A.125(2) and 282.210.

(e) [reserved]

(f) **Contract terms and conditions.** All contractual terms and conditions the Contracting Agency determines are applicable to the Procurement. The Contracting Agency's determination of contractual terms and conditions that are applicable to the Procurement may take into consideration, as authorized by ORS 279B.060(3), those contractual terms and conditions the Contracting Agency will not include in the Request for Proposal because the Contracting Agency either will reserve them for negotiation, or will request Proposers to offer or suggest those terms or conditions. *See* C-047-0260(3).

(g) As required by ORS 279B.060(2)(h), the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:

(A) The Contracting Agency's reduction or withholding of payment under the Contract;

(B) The Contracting Agency's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the scope of work or to meet the performance standards established by the resulting Contract; and

(C) The Contracting Agency's rights, which the Contracting Agency may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available under the resulting Contract or applicable law.

(3) The Contracting Agency may include the applicable contractual terms and conditions in the form of Contract provisions, or legal concepts to be included in the resulting

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Contract. Further, the Contracting Agency may specify that it will include or use Proposers' terms and conditions that have been pre-negotiated under C-047- 0551, but the Contracting Agency may only include or use a Proposer's pre-negotiated terms and conditions in the resulting Contract to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions.

(4) For multiple Award Contracts, the Contracting Agency may enter into Contracts with different terms and conditions with each Contractor to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions.

(5) Good Cause. For the purposes of this rule, "Good Cause" means a reasonable explanation for not requiring Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services under the Contract, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of the Contracting Agency. The Contracting Agency must document in the Procurement file the basis for the determination of Good Cause for specifying otherwise. A Contracting Agency will have Good Cause to specify otherwise when the Contracting Agency determines:

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

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

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10; amended by Order No. 2012-41, enacted 6/7/12.]

### **C-047-0261 Procedures for Competitive Range, Multi-tiered and Multistep Proposals**

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

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Contracting Agency may employ one or more, or any combination, of the procedures set forth in this rule for Competitive Range, multi-tiered and multistep Proposals.

(2) ORS 279B.060(3)(d), (e) and (8) authorize a Contracting Agency to employ methods of Contractor selection that include, but are not limited to, multi-tiered or multistep processes that embrace:

- (a) The evaluation of Proposals only, including the evaluations of serial Proposals (a series of more than one Proposal from each Proposer that remains eligible in the competition at the particular tier of the competition);
- (b) The use of Proposals in connection with discussions with Proposers that lead to best and final Offers;
- (c) The use of Proposals in connection with serial negotiations or simultaneous negotiations with Proposers that lead to best and final Offers or to the award of a Contract or multiple Contracts;
- (d) The use of Proposals in connection with competitive negotiations with Proposers that lead to best and final Offers or to the award of a Contract or multiple Contracts; and
- (e) The use of Proposals in multi-tiered or multistep competition designed to identify, at each stage of the competition, a class of Proposers that fall within a Competitive Range of Proposers that have a reasonable chance of being determined the most Advantageous Proposer or, in multiple-award situations, a reasonable chance of being determined an awardee of a Public Contract. Multi-tiered and multistep competitions may use any combination or series of Proposals, discussions, negotiations, demonstrations, offers, or other means of soliciting information from Proposers that bears on the selection of a Contractor or Contractors. In multi-tiered and multistep competitions, a Contracting Agency may use these means of soliciting information from prospective Proposers and Proposers in any sequence or order, as determined in the discretion of the Contracting Agency.

(3) When a Contracting Agency's Request for Proposals prescribes a multi-tiered or multistep Contractor selection process, a Contracting Agency nevertheless may, at the completion of any stage in the competition and on determining the Most Advantageous Proposer (or, in multiple-award situations, on determining the awardees of the Public Contracts), award a Contract or Contracts and conclude the Procurement without proceeding to subsequent stages. The Contracting Agency also may, at any time, cancel the Procurement under ORS 279B.100.

(4) **Exclusion Protest.** A Contracting Agency may provide before the notice of an intent to Award an opportunity for a Proposer to protest exclusion from the Competitive Range or from subsequent phases of multi-tiered or multistep sealed Proposals as set forth in C-047-0720.

(5) **Award Protest.** A Contracting Agency shall provide an opportunity to protest its intent to Award a Contract pursuant to ORS 279B.410 and C-047-0740. An Affected Proposer may protest, for any of the bases set forth in C-047-0720(2), its exclusion from the Competitive Range or any phase of a multi-tiered or multistep sealed Proposal process, or may protest an Addendum issued following initial Closing, if the Contracting Agency did not previously provide Proposers the opportunity to protest the exclusion or Addendum. The failure to protest shall be considered the Proposer's failure to pursue an administrative remedy made available to the Proposer by the Contracting Agency.

(6) **Competitive Range.** When a Contracting Agency's solicitation process conducted under ORS 279B.060(8) calls for the Contracting Agency to establish a Competitive

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Range at any stage in the Procurement process, the Contracting Agency may do so as follows:

(a) Determining Competitive Range.

(A) The Contracting Agency may establish a Competitive Range after evaluating all Responsive Proposals in accordance with the evaluation criteria in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria in the Request for Proposals, the Contracting Agency may determine and rank the Proposers in the Competitive Range. Notwithstanding the foregoing, however, in instances in which the Contracting Agency determines that only a single Proposer has a reasonable chance of being determined the most Advantageous Proposer, the Contracting Agency need not determine or rank Proposers in the Competitive Range. In addition, notwithstanding the foregoing, a Contracting Agency may establish a Competitive Range of all Proposers to enter into discussions to correct deficiencies in Proposals.

(B) The Contracting Agency may establish the number of Proposers in the Competitive Range in light of whether the Contracting Agency's evaluation of Proposals identifies a number of Proposers who have a reasonable chance of being determined the most Advantageous Proposer, or whether the evaluation establishes a natural break in the scores of Proposers that indicates that a particular number of Proposers are closely competitive or have a reasonable chance of being determined the most Advantageous Proposer.

(b) Protesting Competitive Range. The Contracting Agency must provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Contracting Agency may provide an opportunity for Proposers excluded from the Competitive Range to protest the Contracting Agency's evaluation and determination of the Competitive Range in accordance with C-047-0720.

(7) Discussions. The Contracting Agency may initiate oral or written discussions with all "eligible Proposers" on subject matter within the general scope of the Request for Proposals. In conducting discussions, the Contracting Agency:

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

(b) May disclose other eligible Proposers' Proposals or discussions only in accordance with ORS 279B.060(8)(b) or (c);

(c) May adjust the evaluation of a Proposal as a result of discussions. The conditions, terms, or price of the Proposal may be changed during the course of the discussions provided the changes are within the scope of the Request for Proposals.

d) At any time during the time allowed for discussions, the Contracting Agency may:

(A) Continue discussions with a particular eligible Proposer;

(B) Terminate discussions with a particular eligible Proposer and continue discussions with other eligible Proposers; or

(C) Conclude discussions with all remaining eligible Proposers and provide, to the then-eligible Proposers, notice requesting best and final Offers.

(8) Negotiations. A Contracting Agency may commence serial negotiations with the highest-ranked eligible Proposer or commence simultaneous negotiations with all eligible Proposers. A Contracting Agency may negotiate:

(a) The statement of work;

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(b) The Contract Price as it is affected by negotiating the statement of work and other terms and conditions authorized for negotiation in the Request for Proposals or Addenda thereto; and

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

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

(a) The eligible Proposer is not discussing or negotiating in good faith; or

(b) Further discussions or negotiations with the eligible Proposer will not result in the parties agreeing to the terms and conditions of a Contract in a timely manner.

(c) Continuing Serial Negotiations. If the Contracting Agency is conducting serial negotiations and the Contracting Agency terminates negotiations with an eligible Proposer the Contracting Agency may then commence negotiations with the next highest scoring eligible Proposer, and continue the sequential process until the Contracting Agency has either:

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

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

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

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

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

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

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

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not modify evaluation factors or their relative importance after the date and time that best and final Offers are due.

(11) Multistep Sealed Proposals. A Contracting Agency may procure Goods or Services by using multistep competitive sealed Proposals under ORS 279B.060(8)(b)(g).

Multistep sealed Proposals is a phased Procurement process that seeks necessary information or unpriced technical Proposals in the first phase and, in the second phase, invites Proposers who submitted technically qualified Proposals to submit competitive sealed price Proposals on the technical Proposals. The Contracting Agency must award the Contract to the Responsible Proposer submitting the most Advantageous Proposal in accordance with the terms of the Solicitation Document applicable to the second phase.

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

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

(A) That unpriced technical Proposals are requested;

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

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

(D) That the Goods or Services being procured shall be furnished generally in accordance with the Proposer's technical Proposal as found to be finally qualified and shall meet the requirements of the Request for Proposals.

(c) Addenda to the Request for Proposals. After receipt of unpriced technical Proposals, Addenda to the Request for Proposals shall be distributed only to qualified Proposers who submitted unpriced technical Proposals.

(d) Receipt and Handling of Unpriced Technical Proposals. Unpriced technical Proposals need not be opened publicly.

(e) Evaluation of Unpriced Technical Proposals. Unpriced technical Proposals shall be evaluated solely in accordance with the criteria set forth in the Request for Proposals.

(f) Discussion of Unpriced Technical Proposals. The Contracting Agency may seek clarification of a technical Proposal of any Proposer who submits a qualified, or potentially qualified technical Proposal. During the course of such discussions, the Contracting Agency shall not disclose any information derived from one unpriced technical Proposal to any other Proposer.

(g) Methods of Contractor Selection for Phase One. In conducting phase one, a Contracting Agency may employ any combination of the methods of Contractor selection that call for the establishment of a Competitive Range or include discussions, negotiations, or best and final Offers as set forth in this rule.

(h) Procedure for Phase Two. On the completion of phase one, the Contracting Agency shall invite each qualified Proposer to submit price Proposals. A Contracting

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Agency shall conduct phase two as any other competitive sealed Proposal Procurement except as set forth in this rule.

(j) No public notice need be given of the request to submit price Proposals because such notice was previously given.

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

Stats. Implemented: ORS 279B.060

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10; amended by Order No. 2012-41, enacted 6/7/12.]

#### **C-047-0265 Small Procurements**

(1) **Generally.** For Procurements of Goods or Services less than or equal to \$5,000 a Contracting Agency may Award a Contract as a small Procurement pursuant to ORS 279B.065 and in accordance with policies and procedures promulgated by the Contracting Agency pursuant to ORS 279A.070.

(2) **Amendments.** A Contracting Agency may amend a Public Contract Awarded as a small Procurement in accordance C-047-0800, but the cumulative amendments shall not increase the total Contract Price to greater than \$6,000.

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

Stats. Implemented: ORS 279B.065

[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-047-0270 Intermediate Procurements**

(1) **Generally.** For Procurements of Goods or Services greater than \$5000 and less than or equal to \$150,000, a Contracting Agency may Award a Contract as an intermediate Procurement pursuant to ORS 279B.070.

(2) **Written Solicitations.** For intermediate Procurements equal to or exceeding \$75,000, a Contracting Agency shall use a Written solicitation to obtain quotes, Bids or Proposals.

(3) **Negotiations.** A Contracting Agency may negotiate with a prospective Contractor who offers to provide Goods or Services in response to an intermediate Procurement to clarify its quote or Offer, or to effect modifications that will make the quote or Offer more Advantageous to the Contracting Agency.

(4) **Amendments.** A Contracting Agency may amend a Public Contract Awarded as an intermediate Procurement in accordance with C-047-0800 “Contract Amendments.”

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

Stats. Implemented: ORS 279B.070

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; amended by Order No. 2010-21, enacted 3/18/10.]

#### **C-047-0275 Sole-source Procurements**

(1) **Generally.** A Contracting Agency may Award a Public Contract without competition as a sole-source Procurement pursuant to the requirements of ORS 279B.075.

(2) **Public Notice.** If, but for the Contracting Agency’s determination that it may enter into a Contract as a sole-source, a Contracting Agency would be required to select a Contractor using source selection methods set forth in either ORS 279B.055 or ORS 279B.060, a Contracting Agency shall give public notice of the Contract Review Authority’s determination that the Goods or Services or class of Goods or Services are

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available from only one source in a manner similar to public notice of competitive sealed Bids under ORS 279B.055(4) and C-047-0300. The public notice shall describe the Goods or Services to be acquired by a sole-source Procurement, identify the prospective Contractor and include the date, time and place that protests are due. The Contracting Agency shall give such public notice at least seven (7) Days before Award of the Contract.

(3) **Protest.** An Affected Person may protest the Contract Review Authority's determination that the Goods or Services or class of Goods or Services are available from only one source in accordance with C-047-0710.

Stat. Auth.: ORS 279A.065 & ORS 279B.075  
Stats. Implemented: ORS 279B.075  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-047-0280 Emergency Procurements**

A Contracting Agency may Award a Public Contract as an Emergency Procurement pursuant to the requirements of ORS 279B.080. When an Emergency Procurement is authorized, the Procurement shall be made with competition that is reasonable and appropriate under the circumstances. However, for emergency procurement of construction services that are not public improvements, see ORS 279B.080(2). A contract awarded as an Emergency Procurement may be amended as set forth in C-047-0800.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279B.080  
[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

### **C-047-0285 Contract-Specific Special Procurements**

(1) **Generally.** A Contracting Agency may Award a Public Contract as a contract-specific Special Procurement pursuant to the requirements of ORS 279B.085.

(2) **Public Notice.** A Contracting Agency shall give public notice of its request for approval of a contract-specific Special Procurement in a manner similar to public notice of competitive sealed Bids under ORS 279B.055(4) and C-047-0300. The public notice shall describe the Goods or Services to be acquired through the Special Procurement. The Contracting Agency shall give such public notice of its request for approval of a contract-specific Special Procurement at least seven (7) Days prior to the approval of the Special Procurement by the Contract Review Authority.

(3) **Protest.** An Affected Person may protest the approval of or request for approval of a contract-specific Special Procurement in accordance with ORS 279B.400 and C-047-0700.

(4) **Approval Procedure.** To seek approval of a contract-specific special procurement, a Contracting Agency shall submit a written request to the Board that describes the proposed contracting procedure, the goods or services to be acquired, and the circumstances that justify the use of a special procurement under the standards set forth in subsection (5) of this section.

(5) **Approval Standard.** The Board may approve a contract-specific special procurement if it finds that the written request submitted under subsection (4) of this section demonstrates that the use of a special procurement as described in the request, or an alternative procedure prescribed by the Board will:

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- (a) Be unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts; and
- (b)(A) Result in substantial cost savings to the contracting agency or to the public; or  
(B) Otherwise substantially promote the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under ORS 279B.055, 279B.060, 279B.065 or 279B.070 or under any rules adopted thereunder.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.085

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-047-0286 Class Special Procurements; Definitions**

Contracting Agencies may award Class Special Procurements in classes approved by the Board, pursuant to ORS 279B.085. Class Special Procurements allow Contracting Agencies to enter into a series of contracts over time without following the requirement of competitive sealed bidding, competitive proposals, or intermediate procurements, provided that the contract is within a class described in C-047-0288.

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-047-0288 Class Special Procurements; by Rule**

The Board declares the following as class special procurements:

#### **(1) Equipment Repair and Overhaul.**

Contracts for equipment repair or overhaul may be let without obtaining competitive Bids or Proposals, subject to the following conditions:

- (a) Service and/or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing; or
- (b) Service and/or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source.
- (c) If the contract exceeds \$50,000, the Contracting Agency shall document in its procurement file the reasons why competitive Bids or Proposals were deemed to be impractical.

#### **(2) Laboratory and Medical Supplies.**

The Contracting Agency may, regardless of dollar value and without obtaining competitive Bids or Proposals, contract for the direct purchase of laboratory and medical supplies.

#### **(3) Gasoline, Diesel Fuel, Heating Oil, Lubricants, Asphalt, and Rock.**

The Contracting Agency is exempt from competitive Bid or Proposal requirements for the purchase of gasoline, diesel fuel, heating oil, lubricants, asphalts and rock if the Contracting Agency seeks competitive quotes, makes its purchase from the least expensive source, and retains written justification for the purchase made.

#### **(4) Copyrighted Materials.**

The Contracting Agency may purchase copyrighted materials without obtaining competitive Bids or Proposals, and regardless of dollar value, if there is only one known supplier available for such goods. Examples of copyrighted materials covered by this exemption may include, but are not limited to, new books, periodicals, curriculum materials, reference materials, audio and visual media, and non-mass-marketed software from a particular publisher or its designated distributor.

**(5) Purchases of Used Personal Property.**

The Contracting Agency may purchase used personal property without obtaining competitive Bids or Proposals. For purchases of used personal property over \$50,000, three competitive quotes shall be obtained. If three quotes are not available, a written record must be made of the attempt to obtain quotes.

**(6) Advertising Contracts.**

The Contracting Agency may purchase advertising, regardless of dollar value, without obtaining competitive Bids or Proposals.

**(7) Temporary Housing Services.**

Contracts for temporary housing are exempt from competitive Bids or Proposals under the following conditions:

- (a) When the prompt execution of a contract is required to provide temporary short term shelter.
- (b) The term of the contract is not to exceed one year.
- (c) The Contracting Agency should, where feasible, obtain competitive quotes.

**(8) Food Service Contracts.**

(a) For purposes of this rule, food service means a contract in which the contractor agrees to perform for the Contracting Agency all of the following functions: the purchase, preparation, and service of meals and related services.

(b) Contracts for food services may be let without competitive Bids or Proposals subject to the following conditions:

- (A) Prior to the selection of a contractor, the Contracting Agency has made reasonable efforts to inform known companies providing food services of the subject matter of the contract and solicit proposals including public advertisements in at least one newspaper of general circulation in the area where the contract is to be performed.
- (B) The contractor is selected on the basis of the most competitive offer considering cost, quality of the product and the service to be rendered.

**(9) Food Items.**

Contracts for food items are exempt from competitive Bids or Proposals. The Contracting Agency should, where feasible, obtain competitive quotes.

**(10) Insurance Contracts.**

Contracts for insurance, including employee benefit insurance, may be awarded directly to an insurer after the Contracting Agency obtains proposals from an insurance consultant or agent of record. The consultant or agent of record shall be selected according to the procedure for personal services contracts. Among the services to be provided by the consultant is the securing of competitive proposals from insurance carriers for all coverages for which the insurance consultant is given responsibility, and advice to the Contracting Agency about the costs and benefits of the various proposals. The Contracting Agency may then negotiate or enter into the insurance contract that appears the most advantageous to the Contracting Agency without advertisement or issuance of its own Request for Proposals.

**(11) Contract Amendments.**

Contract amendments that increase the original contract price may be made without obtaining competitive Bids or Proposals pursuant to C-047-0800, provided however that contract amendments relating to construction services are made pursuant to C-049-0910.

**(12) Ballots, Ballot Pages, and Ballot Cards.**

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The Contracting Agency is exempt from competitive Bid or Proposal requirements for the printing of ballots, including ballot pages and labeling of ballot cards.

**(13) Concession Agreements.**

(a) Concession agreements may be let without competitive Bids or Proposals subject to the following conditions:

(A) Prior to the selection of a contractor, the Contracting Agency had made reasonable efforts to inform known companies providing such services of the subject matter of the contract and solicit proposals including public advertisements in at least one newspaper of general circulation in the area where the contract is to be performed.

(B) The contractor is selected on the basis of the most competitive offer considering cost, quality of the product and the service to be rendered.

(b) For purposes of this rule, “concession agreement” means a contract that authorizes and requires a private entity or individual to promote or sell, for its own business purposes, specified types of goods or services from a site within a building or upon lands owned by the Contracting Agency and under which the concessionaire makes payments to the Contracting Agency based, at least in part, on the concessionaire’s revenue from sales. The term “concession agreement” does not include an agreement which is merely a flat-fee or per-foot rental, lease, license, permit or other arrangement for the use of public property.

**(14) Telecommunications Services.**

(a) The intent of this rule is for the Contracting Agency to secure the most competitive, cost-effective telecommunications services, while meeting service performance requirements and reducing unnecessary administrative processing.

(b) “Telecommunications Services” means the purchase, lease or rental of the use of voice and data transmission facilities or services.

(c) In determining the appropriate procurement method for telecommunications services, the Contracting Agency will determine whether competition exists. In determining competition, the Contracting Agency may consider the following factors:

(A) The extent to which alternative providers exist in the relevant geographic and service market.

(B) The extent to which alternative services offered are comparable or substitutable in technology service provided and performance. For example, if the Contracting Agency's requirement is for digital services, analog services are not comparable or substitutable.

(C) The extent to which alternative providers can respond to the Contracting Agency’s interests in consistency and continuity of services throughout its service area, volume discounts, and centralized management. The Contracting Agency must document for the record its findings on these factors or any other factors used in determining whether competition exists. In developing its findings, the Contracting Agency may solicit the information either through informal telephone or written contacts, or through a formal request for information.

(d) Upon determination that competition does not exist for the relevant service and geographical area, the Contracting Agency may proceed to secure the service on a sole source basis, as described in these Rules, and following all applicable rules and procedures.

**(15) Efficient Utilization of Existing Equipment or Supplies.**

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(a) If the efficient utilization of the existing equipment or supplies requires compatible products or services of a particular manufacturer or seller, the Contracting Agency may purchase such particular product or service without obtaining competitive Bids or Proposals, subject to the following conditions:

(A) The product or service is selected on the basis of the most competitive offer considering quality and cost. The term “cost” includes not only the product price but also other items of expense such as costs related to quality or conversion.

(B) Prior to awarding the contract, the Contracting Agency has made reasonable effort to notify all known vendors of competing or comparable products or services of the intended specifications and invited such vendors to submit competing proposals. If the purchase does not exceed \$50,000, such notice and invitation may be informal. If the amount of the purchase exceeds \$50,000, such notice shall include advertisement in at least one newspaper of general circulation in the area where the contract is to be performed and shall be timely to allow competing vendors a reasonable opportunity to make proposals.

**(16) Purchases through Federal Programs.**

Notwithstanding any other provisions of these Rules, a procurement may be made without competitive bidding, competitive proposals, or other competition provided that:

- (a) the procurement is made pursuant to a federal program described in ORS 279A.180,
- (b) the Contracting Agency has federal authorization to purchase through the federal program, and
- (c) notice of intent is published as provided in C-046-0440 for a Permissive Cooperative Procurement if it is estimated that the Contracting Agency will spend more than \$250,000.

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**C-047-0289 Availability of Exemptions**

(1) A contract which is exempt from competitive bidding under the statutes of the State of Oregon retains that exemption regardless of any provisions of these Local Contract Review Board rules.

(2) A contract which is exempt from competitive bidding under one of these Local Contract Review Board rules is not subject to requirements contained in another of these Local Contract Review Board rules.

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**C-047-0290 Cooperative Procurements**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.205

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**PROCUREMENT PROCESS**

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

- (1) **Notice of Solicitation Documents; Fee.** A Contracting Agency shall provide public notice of every Solicitation Document in accordance with section (2) of this rule. The Contracting Agency may give additional notice using any method it determines appropriate to foster and promote competition, including:
- (a) Mailing notice of the availability of the Solicitation Document to Persons that have expressed an interest in the Contracting Agency's Procurements;
  - (b) Placing notice on the Contracting Agency's Electronic Procurement System; or
  - (c) Placing notice on the Contracting Agency's Internet World Wide Web site.
- (2) **Advertising.** A Contracting Agency shall advertise every notice of a Solicitation Document as follows:
- (a) The Contracting Agency shall publish the advertisement for Offers in accordance with the requirements of ORS 279B.055(4) and 279B.060(4); or
  - (b) A Contracting Agency may publish the advertisement for Offers on the Contracting Agency's Electronic Procurement System instead of publishing notice in a newspaper of general circulation as required by ORS 279B.055(4)(b) if, by rule or order, the Contracting Agency's Contract Review Authority has authorized the Contracting Agency to publish notice of Solicitation Documents on the Contracting Agency's Electronic Procurement System.
- (3) **Content of Advertisement.** All advertisements for Offers shall set forth:
- (a) Where, when, how, and for how long the Solicitation Document may be obtained;
  - (b) A general description of the Goods or Services to be acquired;
  - (c) The interval between the first date of notice of the Solicitation Document given in accordance with subsection 2(a) or (b) above and Closing, which shall not be less than fourteen (14) Days for an Invitation to Bid and thirty (30) Days for a Request for Proposals, unless the Contracting Agency determines that a shorter interval is in the public's interest, and that a shorter interval will not substantially affect competition. However, in no event shall the interval between the first date of notice of the Solicitation Document given in accordance with subsection 2(a) or (b) above and Closing be less than seven (7) Days as set forth in ORS 279B.055(4)(f). The Contracting Agency shall document the specific reasons for the shorter public notice period in the Procurement file;
  - (d) The date that Persons must file applications for prequalification if prequalification is a requirement and the class of Goods or Services is one for which Persons must be prequalified;
  - (e) The office where Contract terms, conditions and Specifications may be reviewed;
  - (f) The name, title and address of the individual authorized by the Contracting Agency to receive Offers;
  - (g) The scheduled Opening; and
  - (h) Any other information the Contracting Agency deems appropriate.
- (4) **Obtaining Advertisement for Offers.** An Offeror may obtain a copy of the advertisement for Offers upon request.
- (5) **Fees.** The Contracting Agency may charge a fee or require a deposit for the Solicitation Document.
- (6) **Notice of Addenda.** The Contracting Agency shall provide potential Offerors notice of any Addenda to a Solicitation Document in accordance with C-047-0430.

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[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-047-0310 Bids or Proposals are Offers**

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

(a) In competitive bidding and competitive Proposals, the Offer is always a "Firm Offer," i.e., the Offer shall be held open by the Offeror for the Contracting Agency's acceptance for the period specified in C-047-0480 or C-049-0410. The Contracting Agency may elect to accept the Offer at any time during the specified period, and the Contracting Agency's Award of the Contract constitutes acceptance of the Offer and binds the Offeror to the Contract.

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

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

(3) **Offeror's Acknowledgment.** By Signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits Proposers to propose alternative terms or conditions under C-047-0262, the Offeror's Offer includes any nonnegotiable terms and conditions, any proposed terms and conditions offered for negotiation upon and to the extent accepted by the Contracting Agency in Writing, and Offeror's agreement to perform the scope of work and meet the performance standards set forth in the final negotiated scope of work.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065, ORS 279B.055 & ORS 279B.60

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-047-0320 Facsimile Bids and Proposals**

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-047-0330 Electronic Procurement**

#### **(1) Electronic Procurement Authorized.**

- (a) A Contracting Agency may conduct all phases of a Procurement, including without limitation the posting of Electronic Advertisements and the receipt of Electronic Offers, by electronic methods if and to the extent the Contracting Agency specifies in a Solicitation Document, a request for quotes, or any other Written instructions on how to participate in the Procurement.
  - (b) The Contracting Agency shall open an Electronic Offer in accordance with electronic security measures in effect at the Contracting Agency at the time of its receipt of the Electronic Offer. Unless the Contracting Agency provides procedures for the secure receipt of Electronic Offers, the Person submitting the Electronic Offer assumes the risk of premature disclosure due to submission in unsealed form.
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(c) The Contracting Agency's use of electronic Signatures shall be consistent with applicable statutes and rules. A Contracting Agency may limit the use of electronic methods of conducting a Procurement as Advantageous to the Contracting Agency.

(d) If the Contracting Agency determines that Bid or Proposal security is or will be required, the Contracting Agency should not authorize Electronic Offers unless the Contracting Agency has another method for receipt of such security.

(2) **Rules Governing Electronic Procurements.** The Contracting Agency shall conduct all portions of an electronic Procurement in accordance with these division C-047 rules, unless otherwise set forth in this rule.

(3) **Preliminary Matters.** As a condition of participation in an electronic Procurement the Contracting Agency may require potential Contractors to register with the Contracting Agency before the date and time on which the Contracting Agency will first accept Offers, to agree to the terms, conditions, or other requirements of a Solicitation Document, or to agree to terms and conditions governing the Procurement, such as procedures that the Contracting Agency may use to attribute, authenticate or verify the accuracy of an Electronic Offer, or the actions that constitute an electronic Signature.

(4) **Offer Process.** A Contracting Agency may specify that Persons must submit an Electronic Offer by a particular date and time, or that Persons may submit multiple Electronic Offers during a period of time established in the Electronic Advertisement. When the Contracting Agency specifies that Persons may submit multiple Electronic Offers during a specified period of time, the Contracting Agency must designate a time and date on which Persons may begin to submit Electronic Offers, and a time and date after which Persons may no longer submit Electronic Offers. The date and time after which Persons may no longer submit Electronic Offers need not be specified by a particular date and time, but may be specified by a description of the conditions that, when they occur, will establish the date and time after which Persons may no longer submit Electronic Offers. When the Contracting Agency will accept Electronic Offers for a period of time, then at the designated date and time that the Contracting Agency will first receive Electronic Offers, the Contracting Agency must begin to accept real time Electronic Offers on the Contracting Agency's Electronic Procurement System, and shall continue to accept Electronic Offers in accordance with subsection 5(b) of this rule until the date and time specified by the Contracting Agency, after which the Contracting Agency will no longer accept Electronic Offers.

(5) **Receipt of Electronic Offers.**

(a) When a Contracting Agency conducts an electronic Procurement that provides that all Electronic Offers must be submitted by a particular date and time, the Contracting Agency shall receive the Electronic Offers in accordance with these division C-047 rules.

(b) When the Contracting Agency specifies that Persons may submit multiple Electronic Offers during a period of time, the Contracting Agency shall accept Electronic Offers, and Persons may submit Electronic Offers, in accordance with the following:

(A) Following receipt of the first Electronic Offer after the day and time the Contracting Agency first receives Electronic Offers the Contracting Agency shall post on the Contracting Agency's Electronic Procurement System, and updated on a real time basis, the lowest Electronic Offer price or the highest ranking Electronic Offer. At any time before the date and time after which the Contracting Agency will no longer receive Electronic Offers, a Person may revise its Electronic Offer,

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except that a Person may not lower its price unless that price is below the then lowest Electronic Offer.

(B) A Person may not increase the price set forth in an Electronic Offer after the day and time that the Contracting Agency first accepts Electronic Offers.

(C) A Person may withdraw an Electronic Offer only in compliance with these division C-047 rules. If a Person withdraws an Electronic Offer, it may not later submit an Electronic Offer at a price higher than that set forth in the withdrawn Electronic Offer.

**(6) Failure of the E-Procurement System.** In the event of a failure of the Contracting Agency's Electronic Procurement System that interferes with the ability of Persons to submit Electronic Offers, protest or to otherwise participate in the Procurement, the Contracting Agency may cancel the Procurement in accordance with C-047-0660, or may extend the date and time for receipt of Electronic Offers by providing notice of the extension immediately after the Electronic Procurement System becomes available.

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

Stats. Implemented: ORS 279A.065

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

## **BID AND PROPOSAL PREPARATION**

### **C-047-0400 Offer Preparation**

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

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

### **C-047-0410 Offer Submission**

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

(2) **Identification of Offers.**

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

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(if received prior to the Closing) a facsimile modification of an Offer or facsimile withdrawal of an Offer.

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

### **C-047-0420 Pre-Offer Conferences**

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

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

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

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-047-0430 Addenda to Solicitation Document**

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

(2) **Notice and Distribution.** The Contracting Agency shall notify prospective Offerors of Addenda in a manner intended to foster competition and to make prospective Offerors aware of the Addenda. The Solicitation Document shall specify how the Contracting Agency will provide notice of Addenda and how the Contracting Agency will make the Addenda available before Closing, and at each subsequent step or tier of evaluation if the Contracting Agency will engage in a multistep competitive sealed Bid process in accordance with C-047-0257, or a multi-tiered or multistep competitive sealed Proposal process in accordance with C-047-0261 through C-047-0263. The following is an example of how a Contracting Agency may specify how it will provide notice of Addenda: "Contracting Agency will not mail notice of Addenda, but will publish notice of any Addenda on Contracting Agency's web site. Addenda may be downloaded off the

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Contracting Agency's web site. Offerors should frequently check the Contracting Agency's web site until Closing, i.e., at least once weekly until the week of Closing and at least once daily the week of the Closing.”

**(3) Timelines; Extensions.**

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

(b) Notwithstanding subsection 3(a) of this rule, an Addendum that modifies the evaluation criteria, selection process or procedure for any tier of competition under a multistep sealed Bid or a multi-tiered or multistep sealed Proposal issued in accordance with ORS 279B.060(6)(d) and C-047-0261 through C-047-0263 must be issued no fewer than five (5) Days before the beginning of that tier or step of competition, unless the Contracting Agency determines that a shorter period is sufficient to allow Offerors to prepare for that tier or step of competition. The Contracting Agency shall document the factors it considered in making that determination, which may include, without limitation, the scope of the changes to the Solicitation Document, the location of the remaining eligible Proposers, or whether shortening the period between issuing an Addendum and the beginning of the next tier or step of competition favors or disfavors any particular Proposer or Proposers.

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

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

Stats. Implemented: ORS 279B.060

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

**C-047-0440 Pre-Closing Modification or Withdrawal of Offers**

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

(a) Bid (or Proposal) Modification; and

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(b) Solicitation Document Number (or other identification as specified in the Solicitation Document).

(2) **Withdrawals.**

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

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

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

(A) Bid (or Proposal) Withdrawal; and

(B) Solicitation Document Number (or Other Identification as specified in the Solicitation Document).

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

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

Stats. Implemented: ORS 279B.055

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**C-047-0450 Receipt, Opening, and Recording of Offers; Confidentiality of Offers.**

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

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

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

Stats. Implemented: ORS 279B.055

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**C-047-0460 Late Offers, Late Withdrawals and Late Modifications**

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. An Agency shall not consider late Offers, withdrawals or modifications except as permitted in C-047-0470 or C-047-0262.

Stat. Auth.: ORS 279A.065 & ORS 279B.055  
Stats. Implemented: ORS 279B.055  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-047-0470 Mistakes**

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

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

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

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

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

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

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

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

(A) The nature of the error;

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

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

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

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

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

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

(d) The criteria in subsection (2)(c) of this rule shall determine whether a Contracting Agency will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether a Contracting Agency will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to the Contracting Agency based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by the Contracting Agency, whether by Award to the next lowest Responsive and Responsible Bidder or the most Advantageous Responsive and Responsible Proposer, or by resort to a new solicitation.

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

(4) **Identification of Mistakes after Award.** The procedures and criteria set forth above are Offeror's only opportunity to correct mistakes or withdraw Offers because of a mistake. Following Award, an Offeror is bound by its Offer, and may withdraw its Offer or rescind a Contract entered into pursuant to this division C-047 only to the extent permitted by applicable law.

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

Stats. Implemented: ORS 279B.055

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

#### **C-047-0480 Time for Agency Acceptance**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-047-0490 Extension of Time for Acceptance of Offer**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-047-0495 Specifications; Brand Name Products**

(1) **Generally.** The Contracting Agency's Solicitation Document shall not expressly or implicitly require any product by brand name or mark, nor shall it require the product of

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any particular manufacturer or seller, except pursuant to a special procurement authorized under ORS 279B.075 to 279B.085 or these Rules.

(2) **Equivalents.** A Contracting Agency may identify products by brand names so long as the following language: "approved equal"; "or equal"; "approved equivalent" or "equivalent," or similar language is included in the Solicitation Document. The Contracting Agency shall determine, in its sole discretion, whether an Offeror's alternate product is "equal" or "equivalent."

Stat. Auth.: ORS 279A.065

[Adopted by Order NO. 2005-34, enacted 2/24/05]

## QUALIFICATIONS AND DUTIES

### **C-047-0500 Responsibility of Bidders and Proposers**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.110

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-047-0525 Qualified Products Lists**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.115

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-047-0550 Prequalification of Prospective Offerors**

(1) A Contracting Agency may prequalify prospective Offerors pursuant to ORS 279B.120 and 279B.125.

(2) Notwithstanding the prohibition against revocation of prequalification in ORS 279B.120(3), a Contracting Agency may determine that a prequalified Offeror is not Responsible prior to Contract Award.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.120

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-047-0551 Pre-Negotiation of Contract Terms and Conditions**

A Contracting Agency may pre-negotiate some or all Contract terms and conditions including prospective Proposer Contract forms such as license agreements, maintenance and support agreements or similar documents for use in future Procurements. Such prenegotiation of Contract terms and conditions (including prospective Proposer forms)

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may be part of the prequalification process of a Proposer or the pre-negotiation may be a separate process and not part of a prequalification process. Unless required as part of the prequalification process, the failure of the Contracting Agency and the prospective Proposer to reach agreement on pre-negotiated Contract terms and conditions does not prohibit the prospective Proposer from responding to Procurements. A Contracting Agency may agree to different pre-negotiated Contract terms and conditions with different prospective Proposers. When a Contracting Agency has pre-negotiated different terms and conditions with Proposers or when permitted, Proposers offer different terms and conditions, a Contracting Agency may consider the terms and conditions in the Proposal evaluation process.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.015 and 279B.120

[Adopted by Order NO. 2010-21, enacted 3/18/10]

### **C-047-0575 Debarment of Prospective Offerors**

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

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

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.130

[Adopted by Order NO. 2005-34, enacted 2/24/05]

## **OFFER EVALUATION AND AWARD**

### **C-047-0600 Offer Evaluation and Award**

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

(a) Evaluation of Bids.

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

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

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- (C) Award When Bids are Identical. If the Contracting Agency determines that one or more Bids are identical under C-046-0300, the Contracting Agency shall Award a Contract in accordance with the procedures set forth in C-046-0300.
- (b) Evaluation of Proposals.
- (A) Award When Proposals are Identical. If the Contracting Agency determines that one or more Proposals are identical under C-046-0300, the Contracting Agency shall Award a Contract in accordance with the procedures set forth in C-046-0300.
- (B) Public Printing. The Contracting Agency shall for the purpose of evaluating Proposals apply the public printing preference set forth in ORS 282.210.
- (c) Recycled Materials. When procuring Goods, the Contracting Agency shall give preference for recycled materials as set forth in ORS 279A.125 and C-046-0320.
- (2) **Clarification of Bids or Proposals.** After Opening, a Contracting Agency may conduct discussions with apparent Responsive Offerors for the purpose of clarification to assure full understanding of the Bids or Proposals. All Bids or Proposals, in the Contracting Agency's sole discretion, needing clarification must be accorded such an opportunity. The Contracting Agency shall document clarification of any Bidder's Bid in the Procurement file.
- (3) **Negotiations.**
- (a) Bids. After Award of the Contract, the Contracting Agency and Contractor may only modify the Contract in accordance with C-047-0800.
- (b) Requests for Proposals. A Contracting Agency may conduct discussions or negotiate with Proposers only in accordance with ORS 279B.060(6)(b) and C-047-0262 After Award of the Contract, the Contracting Agency and Contractor may only modify the Contract in accordance with C-047-0800.
- (4) **Award.**
- (a) General. If Awarded, the Contracting Agency shall Award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the most Advantageous, Responsive Proposal. The Contracting Agency may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in the public interest.
- (b) Multiple Items. An Invitation to Bid or Request for Proposals may call for pricing of multiple items of similar or related type with Award based on individual line item, group total of certain items, a "market basket" of items representative of the Contracting Agency's expected purchases, or grand total of all items.
- (c) Multiple Awards - Bids.
- (A) Notwithstanding subsection 4(a) of this rule, a Contracting Agency may Award multiple Contracts under an Invitation to Bid in accordance with the criteria set forth in the Invitation to Bid. Multiple Awards shall not be made if a single Award will meet the Contracting Agency's needs, including but not limited to adequate availability, delivery, service, or product compatibility. A multiple Award may be made if Award to two or more Bidders of similar Goods or Services is necessary for adequate availability, delivery, service or product compatibility and skills. Multiple Awards may not be made for the purpose of dividing the Procurement into multiple solicitations, or to allow for user preference unrelated to utility or economy. A notice to prospective Bidders that multiple Contracts may be Awarded for any Invitation to Bid shall not preclude the Contracting Agency from Awarding a single Contract for such Invitation to Bid.
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- (B) If an Invitation to Bid permits the Award of multiple Contracts, the Contracting Agency shall specify in the Invitation to Bid the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services.
- (d) Multiple Awards – Proposals.  
 (A) Notwithstanding subsection 4(a) of this rule, a Contracting Agency may Award multiple Contracts under a Request for Proposals in accordance with the criteria set forth in the Request for Proposals. Multiple Awards shall not be made if a single Award will meet the Contracting Agency’s needs, including but not limited to adequate availability, delivery, service or product compatibility. A multiple Award may be made if Award to two or more Proposers of similar Goods or Services is necessary for adequate availability, delivery, service or product compatibility. Multiple Awards may not be made for the purpose of dividing the Procurement into multiple solicitations, or to allow for user preference unrelated to obtaining the most Advantageous Contract. A notice to prospective Proposers that multiple Contracts may be Awarded for any Request for Proposals shall not preclude the Contracting Agency from Awarding a single Contract for such Request for Proposals.  
 (B) If a Request for Proposals permits the Award of multiple Contracts, the Contracting Agency shall specify in the Request for Proposals the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services, which may include consideration and evaluation of the Contract terms and conditions agreed to by the Contractors.
- (e) Partial Awards. If after evaluation of Offers, the Contracting Agency determines that an acceptable Offer has been received for only parts of the requirements of the Solicitation Document:  
 (A) The Contracting Agency may Award a Contract for the parts of the Solicitation Document for which acceptable Offers have been received; or  
 (B) The Contracting Agency may reject all Offers and may issue a new Solicitation Document on the same or revised terms, conditions and Specifications.
- (f) All or none Offers. A Contracting Agency may Award all or none Offers if the evaluation shows an all or none Award to be the lowest cost for Bids or the most Advantageous for Proposals of those submitted.

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

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-047-0610 Notice of Intent to Award**

- (1) **Notice of Intent to Award.** The Contracting Agency shall provide Written notice of its intent to Award to all Bidders and Proposers pursuant to ORS 279B.135 at least seven (7) Days before the Award of a Contract, unless the Contracting Agency determines that circumstances require prompt execution of the Contract, in which case the Contracting Agency may provide a shorter notice period. The Contracting Agency shall document the specific reasons for the shorter notice period in the Procurement file.
- (2) **Finality.** The Contracting Agency’s Award shall not be final until the later of the following:  
 (a) The expiration of the protest period provided pursuant to C-047-0740; or  
 (b) The Contracting Agency provides Written responses to all timely-filed protests denying the protests and affirming the Award.

Stat. Auth.: ORS 279A.065 & ORS 279B.135  
Stats. Implemented: ORS 279B.135  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-047-0620 Documentation of Award**

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

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

(a) For Bids:

(A) Bids;

(B) Completed Bid tabulation sheet; and

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

(b) For Proposals:

(A) Proposals;

(B) The completed evaluation of the Proposals;

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

(D) If the Contracting Agency engaged in any of the methods of Contractor selection described in ORS 279B.060(6)(b) and C-047-0261 through C-047-0263, Written documentation of the content of any discussions, negotiations, best and final Offers, or any other procedures the Contracting Agency used to select a Proposer to which the Contracting Agency Awarded a Contract.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: 279A.065  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-047-0630 Availability of Award Decisions**

(1) **Contract Documents.** To the extent required by the Solicitation Document, the Contracting Agency shall deliver to the successful Offeror a Contract, Signed purchase order, Price Agreement, or other Contract documents as applicable.

(2) **Availability of Award Decisions.** A Person may obtain tabulations of Awarded Bids or evaluation summaries of Proposals , in person or by submitting to the Contracting Agency a Written request. The requesting Person shall provide the name of the Solicitation and enclose a self-addressed, stamped envelope if requesting a mailed copy. In addition, the Contracting Agency may make available tabulations of Bids and Proposals through the Electronic Procurement System of the Contracting Agency or the Contracting Agency's website.

(3) **Availability of Procurement Files.** The Contracting Agency shall make Procurement files available in accordance with applicable law, after notice of intent to Award or as otherwise provided in the Solicitation Document.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279B.055 & ORS 279B.060  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-047-0640 Rejection of an Offer**

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

(a) A Contracting Agency may reject any Offer as set forth in ORS 279B.100.

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(b) The Contracting Agency shall reject an Offer upon the Contracting Agency's finding that the Offer:

- (A) Is contingent upon the Contracting Agency's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;
- (B) Takes exception to terms and conditions (including Specifications) set forth in the Solicitation Document;
- (C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of the Solicitation Document or in contravention of applicable law;
- (D) Offers Goods or Services that fail to meet the Specifications of the Solicitation Document;
- (E) Is late;
- (F) Is not in substantial compliance with the Solicitation Document; or
- (G) Is not in substantial compliance with all prescribed public Procurement procedures.

(c) The Contracting Agency shall reject an Offer upon the Contracting Agency's finding that the Offeror:

- (A) Has not been prequalified under ORS 279B.120 and the Contracting Agency required mandatory prequalification;
  - (B) Has been Debarred as set forth in ORS 279B.130 or has been disqualified pursuant to ORS 200.065 or 200.075 (DBE Disqualification);
  - (C) Has not met the requirements of ORS 279A.105, if required by the Solicitation Document;
  - (D) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;
  - (E) Has failed to provide the certification of non-discrimination required under ORS 279A.110(4); or
  - (F) Is non-Responsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the Contracting Agency must have information that indicates that the Offeror meets the applicable standards of Responsibility. To be a Responsible Offeror, the Contracting Agency must determine pursuant to ORS 279B.110 that the Offeror:
    - (i) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to meet all contractual responsibilities;
    - (ii) Has completed previous contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that to the extent the costs associated with and time available to perform a previous contract were within the Offeror's control, the Offeror stayed within the time and budget allotted for the Procurement and otherwise performed the contract in a satisfactory manner. A Contracting Agency should carefully scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in contract performance. In reviewing the Offeror's performance, the Contracting Agency should determine whether the Offeror's deficient performance was expressly excused under the terms of the contract, or whether the Offeror took appropriate corrective action. The Contracting Agency may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. The Contracting
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Agency shall make its basis for determining an Offeror non-Responsible under this subparagraph part of the Procurement file pursuant to ORS 279B.110(2)(b);

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

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

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

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

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-047-0650 Rejection of All Offers**

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

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

- (a) The content of or an error in the Solicitation Document, or the Procurement process unnecessarily restricted competition for the Contract;
  - (b) The price, quality or performance presented by the Offerors are too costly or of insufficient quality to justify acceptance of any Offer;
  - (c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;
  - (d) Causes other than legitimate market forces threaten the integrity of the competitive process. These causes may include, without limitation, those that tend to limit competition, such as restrictions on competition, collusion, corruption, unlawful anti-
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competitive conduct, and inadvertent or intentional errors in the Solicitation Document;

- (e) The Contracting Agency cancels the Procurement or solicitation in accordance with C-047-0660; or
- (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279B.100  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-047-0660 Cancellation of Procurement or Solicitation**

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

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279B.100  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-047-0670 Disposition of Offers if Procurement or Solicitation Canceled**

- (1) **Prior to Opening.** If the Contracting Agency cancels a Procurement or solicitation prior to Opening, the Contracting Agency shall return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the Contracting Agency shall open the Offer to determine the source and then return it to the Offeror. For Electronic Offers, the Contracting Agency shall delete the Offers from the Contracting Agency's Electronic Procurement System or information technology system.
- (2) **After Opening.** If the Contracting Agency cancels a Procurement or solicitation after Opening, the Contracting Agency:
  - (a) May return Proposals in accordance with ORS 279B.060(5)(c); and
  - (b) Shall keep Bids in the Procurement file.
- (3) **Rejection of All Offers.** If the Contracting Agency rejects all Offers, the Contracting Agency may keep all Proposals and Bids in the Procurement file, or may return them to Offerors.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279B.100  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

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## LEGAL REMEDIES

### **C-047-0700 Protests and Judicial Review of Special Procurements**

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

(2) **Delivery.**

(a) Protest of Request for Approval of a Special Procurement. An Affected Person must deliver a Written protest to the Contract Review Authority for the Contracting Agency within fourteen (14) Days after the first date of public notice of a proposed Special Procurement, unless a different protest period is provided in the public notice of the proposed Special Procurement.

(b) Protest of Approval of a Special Procurement. Notwithstanding the requirements for filing a writ of review under ORS chapter 34 pursuant to ORS 279B.400(4)(a), an Affected Person must deliver a Written protest to the Contract Review Authority for the Contracting Agency within fourteen (14) Days after the first date of public notice of the approval of a Special Procurement by the Contract Review Authority for the Contracting Agency, unless a different protest period is provided in the public notice of the approval of a Special Procurement.

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

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

(4) **Contract Review Authority Response.**

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

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

(5) **Judicial Review.** An Affected Person may not seek judicial review of the Contract Review Authority's denial of a protest of a request for approval of a Special Procurement. An Affected Person may seek judicial review of the Contract Review

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Authority's decision relating to a protest of the approval of a Special Procurement in accordance with ORS 279B.400.

Stat. Auth.: ORS 279A.065 & ORS 279B.400  
Stats. Implemented: ORS 279B.400  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

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

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

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

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

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

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

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

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279B.075  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-047-0720 Protests and Judicial Review of Multi-Tiered and Multistep Solicitations**

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

(2) **Basis for Protest.** An Affected Offeror may protest its exclusion from a tier or step of competition only if the Offeror is Responsible and submitted a Responsive Offer and but for the Contracting Agency's mistake in evaluating the Offeror's or other Offerors' Offers, the protesting Offeror would have been eligible to participate in the next tier or

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step of competition. (For example, the protesting Offeror must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Offerors are removed from consideration, and that those ineligible Offerors are ineligible for inclusion in the Competitive Range because: their Proposals were not Responsive, or the Contracting Agency committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.)

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

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

(5) **Contracting Agency Response.** The Contracting Agency shall not consider an Affected Offeror's multi-tiered or multistep solicitation protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Solicitation Document. The Contracting Agency shall issue a Written disposition of the protest in a timely manner. If the Contracting Agency upholds the protest, in whole or in part, the Contracting Agency may in its sole discretion either issue an Addendum under C-047-0430 reflecting its disposition or cancel the Procurement or solicitation under C-047-0660.

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-047-0730 Protests and Judicial Review of Solicitations**

(1) **Purpose.** A prospective Offeror may protest the Procurement process or the Solicitation Document for a Contract solicited under ORS 279B.055, 279B.060 and 279B.085 as set forth in ORS 279B.405(2). Pursuant to ORS 279B.405(3), before seeking judicial review, a prospective Offeror must file a Written protest with the Contracting Agency and exhaust all administrative remedies.

(2) **Delivery.** Unless otherwise specified in the Solicitation Document, a prospective Offeror must deliver a Written protest to the Contracting Agency not less than ten (10) Days prior to Closing.

(3) **Content of Protest.** In addition to the information required by ORS 279B.405(4), a prospective Offeror's Written protest shall include a statement of the desired changes to the Procurement process or the Solicitation Document that the prospective Offeror believes will remedy the conditions upon which the prospective Offeror based its protest.

(4) **Contracting Agency Response.** The Contracting Agency shall not consider a Prospective Offeror's solicitation protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Solicitation Document. The Contracting Agency shall consider the protest if it is timely filed and meets the conditions set forth in ORS 279B.405(4). The Contracting Agency shall issue a Written disposition of the protest in accordance with the timeline set forth in ORS 279B.405(6). If the Contracting Agency upholds the protest, in whole or in

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part, the Contracting Agency may in its sole discretion either issue an Addendum reflecting its disposition under C-047-0430 or cancel the Procurement or solicitation under C-047-0660.

(5) **Extension of Closing.** If the Contracting Agency receives a protest from a prospective Offeror in accordance with this rule, the Contracting Agency may extend Closing if the Contracting Agency determines an extension is necessary to consider and respond to the protest.

(6) **Clarification.** Prior to the deadline for submitting a protest, a prospective Offeror may request that the Contracting Agency clarify any provision of the Solicitation Document. The Contracting Agency's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on the Contracting Agency unless the Contracting Agency amends the Solicitation Document by Addendum.

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

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

Stats. Implemented: ORS 279B.405

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by County Counsel to conform to statutory change made in 2007 Or Laws c.764 §11, 10/22/12]

#### **C-047-0740 Protests and Judicial Review of Contract Award**

(1) **Purpose.** An Offeror may protest the Award of a Contract, or the intent to Award of a Contract, whichever occurs first, if the conditions set forth in ORS 279B.410(1) are satisfied. An Offeror must file a Written protest with the Contracting Agency and exhaust all administrative remedies before seeking judicial review of the Contracting Agency's Contract Award decision.

(2) **Delivery.** Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest to the Contracting Agency within seven (7) Days after issuance of the notice of intent to Award the Contract.

(3) **Content of Protest.** An Offeror's Written protest shall specify the grounds for the protest to be considered by the Contracting Agency pursuant to ORS 279B.410(2).

(4) **Contracting Agency Response.** The Contracting Agency shall not consider an Offeror's Contract Award protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Solicitation Document. The Contracting Agency shall issue a Written disposition of the protest in a timely manner as set forth in ORS 279B.410(4). If the Contracting Agency upholds the protest, in whole or in part, the Contracting Agency may in its sole discretion either Award the Contract to the successful protestor or cancel the Procurement or solicitation.

(5) **Judicial Review.** Judicial review of the Contracting Agency's decision relating to a Contract Award protest shall be in accordance with ORS 279B.415.

Stat. Auth.: ORS 279A.065 & ORS 279B.410

Stats. Implemented: ORS 279B.410 & ORS 279B.415

[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-047-0745 Protests and Judicial Review of Qualified Products List Decisions**

(1) **Purpose.** A prospective Offeror may protest the Contracting Agency's decision to exclude the prospective Offeror's Goods from the Contracting Agency's qualified

products list under ORS 279B.115. A prospective Offeror must file a Written protest and exhaust all administrative remedies before seeking judicial review of the Contracting Agency's qualified products list decision.

(2) **Delivery.** Unless otherwise stated in the Contracting Agency's notice to prospective Offerors of the opportunity to submit Goods for inclusion on the qualified products list, a prospective Offeror must deliver a Written protest to the Contracting Agency within seven (7) Days after issuance of the Contracting Agency's decision to exclude the prospective Offeror's Goods from the qualified products list.

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

(4) **Contracting Agency Response.** The Contracting Agency shall not consider a prospective Offeror's qualified products list protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Contracting Agency's notice to prospective Offerors of the opportunity to submit Goods for inclusion on the qualified products list. The Contracting Agency shall issue a Written disposition of the protest in a timely manner. If the Contracting Agency upholds the protest, it shall include the successful protestor's Goods on the qualified products list.

(5) **Judicial Review.** Judicial review of the Contracting Agency's decision relating to a qualified products list protest shall be in accordance with ORS 279B.425.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.115

[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-047-0750 Judicial Review of Other Violations**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.420

[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-047-0760 Review of Prequalification and Debarment Decisions**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.425

[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-047-0800 Contract Amendments**

(1) **Generally.** A Contracting Agency may amend a Contract without additional competition in any of the following circumstances:

(a) **Anticipated Amendments.** A Contracting Agency may make one or more anticipated amendments to a Contract without any additional competitive process and for an unlimited amount, provided:

(A) **Scope.** The anticipated amendment is reasonably related to the Scope of any original Solicitation Document or the Original Contract.

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(B) Disclosure. The Solicitation Document or the Original Contract described the possibility of one or more Amendments, the general circumstances that might require an Amendment, and the method that the Contracting Agency would use to finalize the details and costs of an amendment.

(C) Original Contract. The Original Contract was awarded pursuant to ORS 279B.055, 279B.060, 279B.065, 279B.070, 279B.075, 279B.085, or 279A.200 through 279A.220; and

(D) Writing. All Amendments to Contracts must be in Writing and signed by the authorized representatives of the parties to the Contracts and must receive all required approvals before the Amendments will be binding on the Contracting Agency.

(b) **Unanticipated Amendments.** A Contracting Agency may make unanticipated amendments to a Contract without additional competition in any of the following circumstances:

(A) Limited Amount. A Contracting Agency may make one or more Amendments to a Contract without any additional competitive process, provided:

(i) Scope. The Amendment is reasonably related to the Scope of any original Solicitation Document or the Original Contract;

(ii) Original Contract. The Original Contract was awarded pursuant to ORS 279B.055, 279B.060, 279B.075, 279B.085, or 279A.200 through 279A.220; and

(iii) Limit. The cumulative amounts of one or more Amendments to a Contract under this subsection (A) must not exceed 25% of the Original Contract amount or \$150,000, whichever is greater.

(B) Unlimited Amount. A Contracting Agency may make one or more Amendments to a Contract without any additional competitive process and for an unlimited amount, provided:

(i)(I) the amendment is made in order to settle a contract dispute which is the subject of litigation, or in which litigation is reasonably likely to occur; or

(II) the amendment is made to a personal services contract; and

(ii) Writing. The Amendment is in Writing and signed by the authorized representatives of the parties to the Contract.

(c) Scope of Procurement. The amendment is within the scope of the Procurement as described in the Solicitation Documents, if any, or if no Solicitation Documents, as described in the sole source notice or the approval of the Special Procurement, if any. An amendment is not within the scope of the Procurement if the Agency determines that if it had described the changes to be made by the amendment in the Procurement Documents, it would likely have increased competition or affected award of the Contract.

(d) Otherwise Permitted. These Rules otherwise permit the Contracting Agency to Award a Contract without competition for the goods or services to be procured under the Amendment.

(e) Change in Law. The amendment is necessary to comply with a change in law that affects performance of the Contract.

(f) Renegotiation. The amendment results from renegotiation of the terms and conditions, including the Contract Price, of a Contract and the amendment is Advantageous to the Contracting Agency, subject to all of the following conditions:

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(A) The Goods or Services to be provided under the amended Contract are the same as the Goods or Services to be provided under the unamended Contract.

(B) The Contracting Agency determines that, with all things considered, the amended Contract is at least as favorable to the Contracting Agency as the unamended Contract.

(C) The amended Contract does not have a total term greater than allowed in the Solicitation Documents, if any, or if no Solicitation Documents, as described in the Contract or the approval of the Special Procurement, if any after combining the initial and extended terms. For example, a one-year Contract described as renewable each year for up to four additional years, may be renegotiated as a two to five-year Contract, but not beyond a total of five years

(g) **Special Rule for Amendments of Price Agreements.** The Contracting Agency may amend a Price Agreement as follows:

(A) As permitted by the Price Agreement;

(B) If the circumstances set forth in ORS 279B.140(2) exist; or

(C) As permitted by applicable law.

(2) **Small Procurements.** A Contract awarded as a Small Procurement in accordance with C-047-0265 may be amended by a Contracting Agency, but the cumulative Amendments must not increase the total Contract Price to greater than \$6,000. The Contract and all cumulative Amendments must not exceed a total amount of \$6,000.

(3) **Intermediate Procurements.** A Contract awarded as an Intermediate Procurement under C-047-0270 may be amended by a Contracting Agency, but the cumulative Unanticipated amendments shall not increase the total Contract Price to a sum that is greater than \$150,000 or twenty-five percent (25%) of the original Contract Price, whichever is greater.

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

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; Amended by Order No. 2012-41, enacted 6/17/12]

## CLACKAMAS COUNTY LOCAL CONTRACT REVIEW BOARD RULES

### DIVISION C-049

#### GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTS FOR CONSTRUCTION SERVICES

##### **C-049-0100 Application**

(1) These division C-049 rules apply to Public Improvement Contracts as well as Public Contracts for ordinary construction services that are not Public Improvements. Model Rules that apply specifically to Public Improvement Contracts are so identified.

(2) These division C-049 rules address matters covered in ORS Chapter 279C .

(3) These division C-049 Model rules become effective on March 1, 2005 and apply to the Contracts described in section (1) above first advertised, but if not advertised then entered into, on or after March 1, 2005.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279A.065  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0110 Policies**

In addition to the general Code policies set forth in ORS 279A.015, the 279C.300 policy on competition and the ORS 279C.305 policy on least-cost for Public Improvements apply to these division C-049 rules.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.300 & ORS 279C.305  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0120 Definitions**

- (1) "**Conduct Disqualification**" means a Disqualification pursuant to ORS 279C.440.
- (2) "**Disqualification**" means the preclusion of a Person from contracting with a Contracting Agency for a period of time in accordance with C-049-0370. Disqualification may be a Conduct Disqualification or DBE Disqualification.
- (3) "**Foreign Contractor**" means a Contractor that is not domiciled in or registered to do business in the State of Oregon. See C-049-0490.
- (4) "**Notice**" means any of the alternative forms of public announcement of Procurements, as described in C-049-0210.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279A.065  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0130 Competitive Bidding Requirement**

A Contracting Agency shall solicit Bids for Public Improvement Contracts by Invitation to Bid ("ITB"), except as otherwise allowed or required pursuant to ORS 279C.335 on Competitive Bidding exceptions and exemptions, 279A.030 on federal law overrides or 279A.100 on affirmative action. Also see C-049-0600 to C-049-0655 regarding the use of Alternative Contracting Methods and the exemption process.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.335  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0140 Contracts for Construction Other Than Public Improvements**

- (1) **Procurement Under ORS Chapter 279B.** Pursuant to ORS 279C.320, Public Contracts for construction services that are not Public Improvement Contracts may be procured and amended as general trade services under the provisions of ORS Chapter 279B rather than under the provisions of ORS Chapter 279C and these division 49 Rules. Emergency Contracts for construction Services that are not Public Improvement Contracts are regulated under ORS 279B.080
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(2) **Application of ORS Chapter 279C.** Non-procurement provisions of ORS Chapter 279C and these division 49 Rules may still be applicable to the resulting Contracts. See, for example, particular statutes on Disqualification (ORS 279C.440, 445 and 450); Legal Actions (ORS 279C.460 and 465); Required Contract Conditions (ORS 279C.505, 515, 520 and 530); Hours of Labor (ORS 279C.540 and 545); Retainage (ORS 279C.550, 560 and 565); Subcontracts (ORS 279C.580); Action on Payment Bonds (ORS 279C.600, 605, 610, 615, 620 and 625); Termination (ORS 279C.650, 650, 660 and 670); and all of the Prevailing Wage Rates requirements (ORS 279C.800 through 870) for Public Works Contracts.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.320

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

### **C-049-0150 Emergency Contracts; Bidding and Bonding Exemptions**

(1) **Emergency Declaration.** A Contracting Agency may declare that Emergency circumstances exist that require prompt execution of a Public Contract for Emergency construction or repair Work. The declaration shall be made at an administrative level consistent with the Contracting Agency's internal policies, by a written declaration that describes the circumstances creating the Emergency and the anticipated harm from failure to enter into an Emergency Contract. The Emergency declaration shall be kept on file as a public record.

(2) **Competition for Emergency Contracts.** Pursuant to ORS 279C.320(1), Emergency Contracts are regulated under ORS 279B.080. For emergency procurement of construction services that are not public improvements, the Contracting Agency shall ensure competition for an Emergency Contract as reasonable and appropriate under the Emergency circumstances, and may include written requests for Offers, oral requests for Offers or direct appointments without competition in cases of extreme necessity, in whatever solicitation time periods the Contracting Agency considers reasonable in responding to the Emergency.

(3) **Emergency Contract Scope.** Although no dollar limitation applies to Emergency Contracts, the scope of the Contract must be limited to Work that is necessary and appropriate to remedy the conditions creating the Emergency as described in the declaration.

(4) **Emergency Contract Modification.** Emergency Contracts may be modified by change order or amendment to address the conditions described in the original declaration or an amended declaration that further describes additional work necessary and appropriate for related Emergency circumstances.

(5) **Excusing Bonds.** Pursuant to ORS 279C.380(4) and this rule, the Emergency declaration may also state that the Contracting Agency waives the requirement of furnishing a performance bond and payment bond for the Emergency Contract. After making such an Emergency declaration the bonding requirements are excused for the procurement but the Emergency declaration does not affect the separate Public Works bond requirement for the benefit of the Bureau of Labor and Industries (BOLI) in enforcing prevailing wage rate and overtime payment requirements. See BOLI rules at OAR 839-025-0015.

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Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.080, 279C.320 & 279C.380(4)

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0160 Intermediate Procurements; Competitive Quotes and Amendments**

(1) **General.** Public Improvement Contracts estimated by the Contracting Agency not to exceed \$100,000 may be Awarded in accordance with intermediate level procurement procedures for competitive quotes established by this rule.

(2) **Selection Criteria.** The selection criteria may be limited to price or some combination of price, experience, specific expertise, availability, project understanding, contractor capacity, responsibility and similar factors.

(3) **Request for Quotes.** Contracting Agencies shall utilize written requests for quotes whenever reasonably practicable. For Public Works Contracts, oral quotations may be utilized only in the event that Written copies of the prevailing wage rates are not required by the Bureau of Labor and Industries.

(4) **Number of Quotes; Record Required.** Contracting Agencies shall seek at least three competitive quotes, and keep a written record of the sources and amounts of the quotes received. If three quotes are not reasonably available the Contracting Agency shall make a written record of the effort made to obtain those quotes.

(5) **Award.** If Awarded, the Contracting Agency shall Award the Contract to the prospective contractor whose quote will best serve the interests of the Contracting Agency, taking into account price as well as any other applicable factors such as, but not limited to, experience, specific expertise, availability, project understanding, contractor capacity and responsibility. If Award is not made to the Offeror offering the lowest price, the Contracting Agency shall make a written record of the basis for Award.

(6) **Price Increases.** Intermediate level Public Improvement Contracts obtained by competitive quotes may be increased above the original amount of Award when a Contracting Agency determines that a price increase is warranted for additional Work reasonably related to the scope of the original procurement.

(7) **Amendments.** Amendments of intermediate level Public Improvement Contracts that exceed the thresholds stated in section (1) are specifically authorized by the Code, when made in accordance with this Rule. Accordingly, such amendments are not considered new procurements and do not require an exemption from competitive bidding.

Stat. Auth.: ORS 279A.065

Stats. Implemented: Temporary provisions relating to competitive quotes were not codified but compiled as Legislative Counsel notes following ORS 279C.410.

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

## **FORMAL PROCUREMENT RULES; PUBLIC IMPROVEMENTS**

### **C-049-0200 Solicitation Documents; Required Provisions; Assignment or Transfer**

(1) **Solicitation Document.** Pursuant to ORS 279C.365 and this rule, the Solicitation Document shall include the following:

(a) **General Information;**

- (A) Identification of the Public Improvement project, including the character of the Work, and applicable plans, Specifications and other Contract documents;
  - (B) Notice of any pre-Offer conference as follows:
    - (i) The time, date and location of any pre-Offer conference;
    - (ii) Whether attendance at the conference will be mandatory or voluntary; and
    - (iii) That statements made by the Contracting Agency's representatives at the conference are not binding upon the Contracting Agency unless confirmed by Written Addendum.
  - (C) The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be prequalified if prequalification is a requirement;
  - (D) The name and title of the authorized Contracting Agency Person designated for receipt of Offers and contact Person (if different);
  - (E) Instructions and information concerning the form and submission of Offers, including the address of the office to which Offers must be delivered, any Bid or Proposal security requirements, and any other required information or special information, e.g., whether Offers may be submitted by facsimile or electronic means (See C-049-0300 regarding facsimile Bids or Proposals and C-049-0310 regarding electronic Procurement);
  - (F) The time, date and place of Opening;
  - (G) The time and date of Closing after which a Contracting Agency will not accept Offers, which time shall be not less than five Days after the date of the last publication of the advertisement. 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 C-049-0360. For timing issues relating to Addenda, see C-049-0250;
  - (H) The office where the Specifications for the Work may be reviewed;
  - (I) A statement that each Bidder to an ITB must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120;
  - (J) If the Contract resulting from a solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 et seq.), 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 ORS 279C.840 or 40 U.S.C. 3141 to 3148.";
  - (K) A statement that the Contracting Agency will not receive or consider an Offer for a Public Improvement Contract for work as a contractor or landscape contractor unless the Offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as specified in C-049-0230;
  - (L) Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;
  - (M) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See C-049-0440(3));
  - (N) How the Contracting Agency will notify Offerors of Addenda and how the Contracting Agency will make Addenda available (See C-049-0250); and
  - (O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in C-049-0360.
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**(b) Evaluation Process:**

(A) A statement that the Contracting Agency may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, including the requirement to demonstrate the Bidder's responsibility under ORS 279C.375(3)(b), and may reject for good cause all Offers after finding that doing so is in the public interest;

(B) The anticipated solicitation schedule, deadlines, protest process and evaluation process, if any;

(C) Evaluation criteria, including the relative value applicable to each criterion, that the Contracting Agency will use to determine the Responsible Bidder with the lowest Responsive Bid (where Award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of Competitive Proposals is authorized under ORS 279C.335 and C-049-0620), along with the process the Contracting Agency will use to determine acceptability of the Work;

(i) If the Solicitation Document is an Invitation to Bid, the Contracting Agency shall set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors shall be objective, reasonable estimates based upon information the Contracting Agency has available concerning future use;

(ii) If the Solicitation Document is a Request for Proposals, the Contracting Agency shall refer to the additional requirements of C-049-0650; and

**(c) Contract Provisions.** The Contracting Agency shall include 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 applicable Contract provisions required by Oregon law as follows:

(A) Prompt payment to all Persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279C.505(1));

(B) Demonstrate that an employee drug testing program is in place (ORS 279C.505(2));

(C) If the Contract calls for demolition Work described in ORS 279C.510(1), a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;

(D) If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective (ORS 279C.510(2));

(E) Payment of claims by public officers (ORS 279C.515(1));

(F) Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515(2), including the rate of interest;

(G) Person's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279C.515(3));

(H) Hours of labor in compliance with ORS 279C.520;

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- (I) Environmental and natural resources regulations (ORS 279C.525);
- (J) Payment for medical care and attention to employees (ORS 279C.530(1));
- (K) A Contract provision substantially as follows: "All employers, including Contractor, that employ subject Workers who Work under this Contract in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530(2));
- (L) Maximum hours, holidays and overtime (ORS 279C.540);
- (M) Time limitation on claims for overtime (ORS 279C.545);
- (N) Prevailing wage rates (ORS 279C.800 to 279C.870);
- (O) BOLI public works bond (ORS 279C.830(2));
- (P) Retainage (ORS 279C.550 to 279C.570);
- (Q) Prompt payment policy, progress payments, rate of interest (ORS 279C.570);
- (R) Contractor's relations with subcontractors (ORS 279C.580);
- (S) Notice of claim (ORS 279C.605);
- (T) [reserved]; and
- (U) Contractor's certification that all subcontractors performing Work described in ORS 701.005(2) (i.e., construction Work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence Work under the Contract.

(2) **Assignment or Transfer Restricted.** Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, or transfer rights, nor delegate duties under the Contract, either in whole or in part, without the Contracting Agency's prior Written consent. Unless otherwise agreed by the Contracting Agency in Writing, such consent shall not relieve the Contractor of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If the Contracting Agency consents in Writing to an assignment, sale, disposal or transfer of the Contractor's rights or delegation of Contractor's duties, the Contractor and its surety, if any, shall remain liable to the Contracting Agency for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the Contracting Agency otherwise agrees in Writing.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.110(4), 279A.120, 279C.365, 279C.370, 279C.375, 279C.390, 279C.505 to 580, 279C.605, 305.385, 468A.720, 701.005 & 701.055

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0210 Notice and Advertising Requirements; Posting**

(1) **Notice and Distribution Fee.** A Contracting Agency shall furnish "Notice" as set forth below in subsections (a) through (c), to a number of Persons sufficient for the purpose of fostering and promoting competition. The Notice shall indicate where, when, how and for how long the Solicitation Document may be obtained and generally describe the Public Improvement project or Work. The Notice may contain any other appropriate information. The Contracting Agency may charge a fee or require a deposit for the

Solicitation Document. The Contracting Agency may furnish Notice using any method determined to foster and promote competition, including:

- (a) Mailing Notice of the availability of Solicitation Documents to Persons that have expressed an interest in the Contracting Agency's Procurements;
- (b) Placing Notice on the Contracting Agency's Electronic Procurement System; or
- (c) Placing Notice on the Contracting Agency's Internet Web site.

(2) **Advertising.** Pursuant to ORS 279C.360 and this rule, a Contracting Agency shall advertise every solicitation for competitive Bids or competitive Proposals for a Public Improvement Contract, unless the Board has exempted the solicitation from the advertisement requirement as part of a competitive Bidding exemption under ORS 279C.335.

(a) Unless the Contracting Agency publishes by Electronic Advertisement as permitted under subsection 2(b), the Contracting Agency shall publish the advertisement for Offers at least once in at least one newspaper of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as the Contracting Agency may determine to be necessary or desirable to foster and promote competition.

(b) A Contracting Agency may publish by Electronic Advertisement if the Board determines Electronic Advertisement is likely to be cost effective and, by rule or order, authorizes Electronic Advertisement.

(c) The Contracting Agency shall publish an advertisement for Offers in at least one trade newspaper of general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000.

(d) All advertisements for Offers shall set forth:

- (A) The Public Improvement project;
- (B) The office where Contract terms, conditions and Specifications may be reviewed;
- (C) The date that Persons must file applications for prequalification under ORS 279C.340, if prequalification is a requirement, and the class or classes of Work for which Persons must be prequalified;
- (D) The scheduled Closing, which shall not be less than five Days after the date of the last publication of the advertisement;
- (E) The name, title and address of the Contracting Agency Person authorized to receive Offers;
- (F) The scheduled Opening; and
- (G) If applicable, that the Contract is for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 et seq.).

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0220 Prequalification of Offerors**

(1) **Prequalification.** Pursuant to ORS 279C.430 and this rule, two types of prequalification are authorized:

- (a) **Mandatory Prequalification.** A Contracting Agency may, by rule, resolution, ordinance or other law or regulation, require mandatory prequalification of Offerors

on forms prescribed by the Contracting Agency's Contract Review Authority. A Contracting Agency must indicate in the Solicitation Document if it will require mandatory prequalification. Mandatory prequalification is when a Contracting Agency conditions a Person's submission of an Offer upon the Person's prequalification. The Contracting Agency shall not consider an Offer from a Person that is not prequalified if the Contracting Agency required prequalification.

(b) **Permissive Prequalification.** A Contracting Agency may prequalify a Person for the Contracting Agency's solicitation list on forms prescribed by the Contracting Agency's Contract Review Authority, but in permissive prequalification the Contracting Agency shall not limit distribution of a solicitation to that list.

(2) **Prequalification Presumed.** If an Offeror is currently prequalified by either the Oregon Department of Transportation or the Oregon Department of Administrative Services to perform Contracts, the Offeror shall be rebuttably presumed qualified to perform similar Work for other Contracting Agencies.

(3) **Standards for Prequalification.** A Person may prequalify by demonstrating to the Contracting Agency's satisfaction:

- (a) That the Person's financial, material, equipment, facility and personnel resources and expertise, or ability to obtain such resources and expertise, indicate that the Person is capable of meeting all contractual responsibilities;
- (b) The Person's record of performance;
- (c) The Person's record of integrity;
- (d) The Person is qualified to contract with the Contracting Agency. (See, C-049-0390(2) regarding standards of responsibility.)

(4) **Notice Of Denial.** If a Person fails to prequalify for a mandatory prequalification, the Contracting Agency shall notify the Person, specify the reasons under section (3) of this rule and inform the Person of the Person's right to a hearing under ORS 279C.445 and 279C.450.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0230 Eligibility to Bid or Propose; Registration or License**

(1) **Construction Contracts.** A Contracting Agency shall not consider a Person's Offer to do Work as a contractor, as defined in ORS 701.005(2), unless the Person has a current, valid certificate of registration issued by the Construction Contractors Board at the time the Offer is made.

(2) **Landscape Contracts.** A Contracting Agency shall not consider a Person's Offer to do Work as a landscape contractor as defined in ORS 671.520(2), unless the Person has a current, valid landscape contractors license issued pursuant to ORS 671.560 by the State Landscape Contractors Board at the time the offer is made.

(3) **Noncomplying Entities.** The Contracting Agency shall deem an Offer received from a Person that fails to comply with this rule nonresponsive and shall reject the Offer as stated in ORS 279C.365(1)(k), unless contrary to federal law or subject to different timing requirements set by federal funding agencies.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0240 Pre-Offer Conferences**

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

(2) **Required attendance.** The Contracting Agency may require attendance at the pre-Offer conference as a condition for making an Offer. Unless otherwise specified in the Solicitation Document, a mandatory attendance requirement is considered to have been met if, at any time during the mandatory meeting, a representative of an offering firm is present.

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

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

(5) **Contracting Agency Announcement.** The Contracting Agency must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with C-049-0200(1)(a)(B).

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0250 Addenda to Solicitation Documents**

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

(2) **Notice and Distribution.** The Contracting Agency shall notify prospective Offerors of Addenda consistent with the standards of Notice set forth in C-049-0210(1). The Solicitation Document shall specify how the Contracting Agency will provide notice of Addenda and how the Contracting Agency will make the Addenda available (see, C-049-0200(1)(a)(N)). For example, "Contracting Agency will not mail notice of Addenda, but will publish notice of any Addenda on Contracting Agency's Web site. Addenda may be downloaded off the Contracting Agency's Web site. Offerors should frequently check the Contracting Agency's Web site until closing, i.e., at least once weekly until the week of Closing and at least once daily the week of the Closing."

(3) **Timelines; Extensions.** The Contracting Agency shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The Contracting Agency may extend the Closing if the Contracting Agency determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by public interest, the Contracting Agency shall not issue

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Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.

(4) **Request for Change or Protest.** Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in C-049-0260, by the close of the Contracting Agency's next business day after issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under C-049-0260, whichever date is later. The Contracting Agency shall consider only an Offeror's request for change or protest to the Addendum; the Contracting Agency shall not consider a request for change or protest to matters not added or modified by the Addendum, unless the Offeror submits the request for change or protest before the deadline for the Contracting Agency's receipt of request for change or protests as set forth in C-049-0260(2) and (3).

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0260 Request for Clarification or Change; Solicitation Protests**

(1) **Clarification.** Prior to the deadline for submitting a Written request for change or protest, an Offeror may request that the Contracting Agency clarify any provision of the Solicitation Document. The Contracting Agency's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on the Contracting Agency unless the Contracting Agency amends the Solicitation Document by Addendum.

(2) **Request for Change.**

(a) Delivery. An Offeror may request in Writing a change to the Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver the Written request for change to the Contracting Agency not less than 10 Days prior to Closing.

(b) Content of Request for Change.

(A) An Offeror's Written request for change shall include a statement of the requested change(s) to the Contract terms and conditions, including any Specifications, together with the reason for the requested change.

(B) An Offeror shall mark its request for change as follows:

(i) "Contract Provision Request for Change"; and

(ii) Solicitation Document number (or other identification as specified in the Solicitation Document).

(3) **Protest.**

(a) Delivery. An Offeror may protest Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest on those matters to the Contracting Agency not less than 10 Days prior to Closing.

(b) Content of Protest.

(A) An Offeror's Written protest shall include:

(i) A detailed statement of the legal and factual grounds for the protest;

(ii) A description of the resulting prejudice to the Offeror; and

(iii) A statement of the desired changes to the Contract terms and conditions, including any Specifications.

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(B) An Offeror shall mark its protest as follows:

- (i) "Contract Provision Protest"; and
- (ii) Solicitation Document number (or other identification as specified in the Solicitation Document).

(4) **Contracting Agency Response.** The Contracting Agency is not required to consider an Offeror's request for change or protest after the deadline established for submitting such request or protest. The Contracting Agency shall provide notice to the applicable Person if it entirely rejects a protest. If the Contracting Agency agrees with the Person's request or protest, in whole or in part, the Contracting Agency shall either issue an Addendum reflecting its determination under C-049-0260 or cancel the solicitation under C-049-0270.

(5) **Extension of Closing.** If a Contracting Agency receives a Written request for change or protest from an Offeror in accordance with this rule, the Contracting Agency may extend Closing if the Contracting Agency determines an extension is necessary to consider the request or protest and issue an Addendum, if any, to the Solicitation Document.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.345 & ORS 279C.365

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0270 Cancellation of Solicitation Document**

(1) **Cancellation in the Public Interest.** A Contracting Agency may cancel a solicitation for good cause if the Contracting Agency finds that cancellation is in the public interest. The Contracting Agency's reasons for cancellation shall be made part of the solicitation file.

(2) **Notice of Cancellation.** If the Contracting Agency cancels a solicitation prior to Opening, the Contracting Agency shall provide Notice of cancellation in accordance with C-049-0210(1). Such notice of cancellation shall:

- (a) Identify the solicitation;
- (b) Briefly explain the reason for cancellation; and
- (c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.

(3) **Disposition of Offers.**

- (a) Prior to Offer Opening. If the Contracting Agency cancels a solicitation prior to Offer Opening, the Contracting Agency shall return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the Contracting Agency shall open the Offer to determine the source and then return it to the Offeror.
- (b) After Offer Opening. If the Contracting Agency rejects all Offers, the Contracting Agency shall retain all such Offers as part of the Contracting Agency's solicitation file.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.395

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

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**C-049-0280 Offer Submissions**

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

(a) In competitive Bidding and competitive Proposals, the Offer is always a "Firm Offer," i.e., the Offer shall be held open by the Offeror for the Contracting Agency's acceptance for the period specified in C-049-0410. The Contracting Agency may elect to accept the Offer at any time during the specified period, and the Contracting Agency's Award of the Contract to a Bidder constitutes acceptance of the Offer and binds the Offeror to the Contract.

(b) Notwithstanding the fact that a competitive Proposal is a "Firm Offer" for the period specified in OAR 137-049-0410, the Contracting Agency may elect to discuss or negotiate certain contractual provisions, as identified in these rules or in the Solicitation Document, with the Proposer. See C-049-0650 on Requests for Proposals and C-049-0290 on Bid or Proposal Security. Where negotiation is permitted by the rules or the Solicitation Document, Proposers are bound to an obligation to negotiate in good faith and only on those terms that the rules or the Solicitation Document has reserved for negotiation.

(2) **Responsive Offer.** A Contracting Agency may Award a Contract only to a Responsible Offeror with a Responsive Offer.

(3) **Contingent Offers.** Except to the extent that an Offeror is authorized to propose certain terms and conditions pursuant to C-049-0650, an Offeror shall not make an Offer contingent upon the Contracting Agency's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

(4) **Offeror's Acknowledgement.** By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits proposal of alternative terms under C-049-0650, the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the Contracting Agency in Writing.

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

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

(7) **Documents.** An Offeror shall provide the Contracting Agency with all documents and descriptive literature required under the Solicitation Document.

(8) **Facsimile or Electronic Submissions.** If the Contracting Agency permits facsimile or electronic Offers in the Solicitation Document, the Offeror may submit facsimile or electronic Offers in accordance with the Solicitation Document. The Contracting Agency shall not consider facsimile or electronic Offers unless authorized by the Solicitation Document.

(9) **Product Samples and Descriptive Literature.** A Contracting Agency may require Product Samples or descriptive literature if it is necessary or desirable to evaluate the quality, features or characteristics of the offered items. The Contracting Agency will dispose of Product Samples, or return or make available for return Product Samples to the Offeror in accordance with the Solicitation Document.

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**(10) Identification of Offers.**

(a) To ensure proper identification and handling, Offers shall be submitted in a sealed envelope appropriately marked or in the envelope provided by the Contracting Agency, whichever is applicable.

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

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

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

**C-049-0290 Bid or Proposal Security**

(1) **Security Amount.** If a Contracting Agency requires Bid or Proposal security, it shall be not more than 10% or less than 5% of the Offeror's Bid or Proposal, consisting of the base Bid or Proposal together with all additive alternates. A Contracting Agency shall not use Bid or Proposal security to discourage competition. The Contracting Agency shall clearly state any Bid or Proposal security requirements in its Solicitation Document. The Offeror shall forfeit Bid or Proposal security after Award if the Offeror fails to execute the Contract and promptly return it with any required Performance Bond and Payment Bond and, in the case of Proposal security, with any required proof of insurance. See ORS 279C.365(5) and 279C.385.

(2) **Requirement for Bid Security (Optional for Proposals).** Unless a Contracting Agency has otherwise exempted a solicitation or class of solicitations from Bid security pursuant to ORS 279C.390, the Contracting Agency shall require Bid security for its solicitation of Bids for Public Improvements. This requirement applies only to Public Improvement Contracts with a value, estimated by the Contracting Agency, of more than \$100,000. Contracts for less than \$100,000 are exempt pursuant to ORS 279C.390. The Contracting Agency may require Bid security even if it has exempted a class of solicitations from Bid security. Contracting Agencies may also require Proposal security in RFPs . See ORS 279C.400(5).

(3) **Form of Bid or Proposal Security.** A Contracting Agency may accept only the following forms of Bid or Proposal security:

(a) A surety bond from a surety company authorized to do business in the State of Oregon;

(b) An irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or

(c) A cashier's check or Offeror's certified check.

(4) **Return of Security.** A Contracting Agency shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been fully executed and all required bonds have been provided, or after all Offers have been rejected. The Contracting Agency may return the Bid or Proposal security of unsuccessful Offerors prior to Award if the return does not prejudice Contract Award and the security of at least the Bidders with the three lowest Bids, or the Proposers with the three highest scoring Proposals, is retained pending execution of a Contract.

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Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, ORS 279C.385 & ORS 279C.390

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0300 Facsimile Bids and Proposals**

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

- (a) To receive, identify, record and safeguard facsimile Offers;
- (b) To ensure timely delivery of Offers to the location of Opening; and
- (c) To preserve the Offers as sealed.

(2) **Provisions To Be Included in Solicitation Document.** In addition to all other requirements, if the Contracting Agency authorizes a facsimile Offer for Bids or Proposals, the Contracting Agency shall include in the Solicitation Document (other than in a request for quotes) the following:

- (a) A provision substantially in the form of the following: "A 'facsimile Offer', as used in this Solicitation Document, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by the Contracting Agency via a facsimile machine.";
  - (b) A provision substantially in the form of the following: "Offerors may submit facsimile Offers in response to this Solicitation Document. The entire response must arrive at the place and by the time specified in this Solicitation Document.";
  - (c) A provision that requires Offerors to Sign their facsimile Offers;
  - (d) A provision substantially in the form of the following: "The Contracting Agency reserves the right to Award the Contract solely on the basis of the facsimile Offer. However, upon the Contracting Agency's request the apparent successful Offeror shall promptly submit its complete original Signed Offer. ";
  - (e) The data and compatibility characteristics of the Contracting Agency's receiving facsimile machine as follows:
    - (A) Telephone number; and
    - (B) Compatibility characteristics, e.g., make and model number, receiving speed, communications protocol; and
  - (f) A provision that the Contracting Agency is not responsible for any failure attributable to the transmission or receipt of the facsimile Offer including, but not limited to the following:
    - (A) Receipt of garbled or incomplete documents;
    - (B) Availability or condition of the receiving facsimile machine;
    - (C) Incompatibility between the sending and receiving facsimile machine;
    - (D) Delay in transmission or receipt of documents;
    - (E) Failure of the Offeror to properly identify the Offer documents;
    - (F) Illegibility of Offer documents; and
    - (G) Security and confidentiality of data.
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Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.365  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0310 Electronic Procurement**

(1) **General.** Contracting Agencies may utilize Electronic Advertisement of Public Improvement Contracts in accordance with ORS 279C.360(1), provided that advertisement of such Contracts with an estimated Contract Price in excess of \$125,000 must also be published in a trade newspaper of general statewide circulation, and may post notices of intent to Award electronically as provided by ORS 279C.410(7).

(2) **Alternative Procedures.** In the event that a Contracting Agency desires to allow Electronic Offers for a Public Improvement Contract, it shall first promulgate supporting procedures substantially in conformance with C-047-0330 (Electronic Procurement under ORS Chapter 279B), taking into account ORS Chapter 279C requirements for written bids, opening bids publicly, bid security, first-tier subcontractor disclosure and inclusion of prevailing wage rates.

(3) **Interpretation.** Nothing in this rule shall be construed as prohibiting Contracting Agencies from making procurement documents for Public Improvement Contracts available in electronic format as well as in hard copy when Bids are to be submitted only in hard copy. See ORS 279C.365(2).

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.365  
[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

### **C-049-0320 Pre-Closing Modification or Withdrawal of Offers**

(1) **Modifications.** An Offeror may modify its Offer in Writing prior to the Closing. An Offeror shall prepare and submit any modification to its Offer to the Contracting Agency in accordance with C-049-0280, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:

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

(2) **Withdrawals.**

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

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

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

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.360(2), 279C.365, 279C.375 & 279C.395

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0330 Receipt, Opening and Recording of Offers; Confidentiality of Offers**

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

(2) **Opening and Recording.** A Contracting Agency shall publicly open Offers including any modifications made to the Offer pursuant to C-049-0320. In the case of Invitations to Bid, to the extent practicable, the Contracting Agency shall read aloud the name of each Bidder, the Bid price(s), and such other information as the Contracting Agency considers appropriate. In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the Contracting Agency will not read Offers aloud.

(3) **Availability.** After Opening, the Contracting Agency shall make Bids available for public inspection, but pursuant to ORS 279C.410 Proposals are not subject to disclosure until after notice of intent to award is issued. In any event Contracting Agencies may withhold from disclosure those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.501(2); 646.461 to 646.475. To the extent the Contracting Agency determines such designation is not in accordance with applicable law, the Contracting Agency shall make those portions available for public inspection. The Offeror shall separate information designated as confidential from other nonconfidential information at the time of submitting its Offer. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and shall be publicly available regardless of an Offeror's designation to the contrary.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0340 Late Bids, Late Withdrawals and Late Modifications**

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. A Contracting Agency shall not consider late Offers, withdrawals or modifications except as permitted in C-049-0350 or C-049-0390.

Stat. Auth.: ORS 279A.065

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

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[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0350 Mistakes**

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

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

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

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

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

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

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

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

(A) The nature of the error;

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

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

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

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

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

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

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

(d) The criteria in subsection (2)(c) of this rule shall determine whether a Contracting Agency will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether a Contracting Agency will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to the Contracting Agency based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by the Contracting Agency, whether by Award to the next lowest Responsive and Responsible Bidder or the best Responsive and Responsible Proposer, or by resort to a new solicitation.

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

(4) **Identification of Mistakes after Award.** The procedures and criteria set forth above are Offeror's only opportunity to correct mistakes or withdraw Offers because of a mistake. Following Award, an Offeror is bound by its Offer, and may withdraw its Offer or rescind a Contract entered into pursuant to this division C-049 only to the extent permitted by applicable law.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0360 First-Tier Subcontractors; Disclosure and Substitution**

(1) **Required Disclosure.** Within two working hours after the Bid Closing on an ITB for a Public Improvement having a Contract Price anticipated by the Contracting Agency to exceed \$100,000, all Bidders shall submit to the Contracting Agency a disclosure form as described by ORS 279C.370(2), identifying any first-tier subcontractors (those Entities that would be contracting directly with the prime contractor) that will be furnishing labor or labor and materials on the Contract, if Awarded, whose subcontract value would be equal to or greater than:

- (a) Five percent of the total Contract Price, but at least \$15,000; or
- (b) \$350,000, regardless of the percentage of the total Contract Price.

(2) **Bid Closing, Disclosure Deadline and Bid Opening.** For each ITB to which this rule applies, the Contracting Agency shall:

- (a) Set the Bid Closing on a Tuesday, Wednesday or Thursday, and at a time between 2 p.m. and 5 p.m., except that these Bid Closing restrictions do not apply to an ITB for maintenance or construction of highways, bridges or other transportation facilities, and provided that the two-hour disclosure deadline described by this rule would not then fall on a legal holiday;
  - (b) Open Bids publicly immediately after the Bid Closing; and
  - (c) Consider for Contract Award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed by the Contracting Agency.
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- (3) **Bidder Instructions and Disclosure Form.** For the purposes of this rule, a Contracting Agency in its solicitation shall prescribe the disclosure form that must be utilized, substantially in the form set forth in ORS 279C.370(2).
- (4) **Submission.** A Bidder shall submit the disclosure form required by this rule either in its Bid submission, or within two Working hours after Bid Closing in the manner specified by the ITB.
- (5) **Responsiveness.** Compliance with the disclosure and submittal requirements of ORS 279C.370 and this rule is a matter of Responsiveness. Bids that are submitted by Bid Closing, but for which the disclosure submittal has not been made by the specified deadline, are not Responsive and shall not be considered for Contract Award.
- (6) **Substitution.** Substitution of affected first-tier subcontractors shall be made only in accordance with ORS 279C.585. Contracting Agencies shall accept Written submissions filed under that statute as public records. Aside from issues involving inadvertent clerical error under ORS 279C.585, Contracting Agencies do not have a statutory role or duty to review, approve or resolve disputes concerning such substitutions. See ORS 279C.590 regarding complaints to the Construction Contractors Board on improper substitution.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0370 Disqualification of Persons**

- (1) **Authority.** A Contracting Agency may disqualify a Person from consideration of Award of the Contracting Agency's Contracts after providing the Person with notice and a reasonable opportunity to be heard in accordance with sections (2) and (4) of this rule.
- (a) Standards for Conduct Disqualification. As provided in ORS 279C.440, a Contracting Agency may disqualify a Person for:
- (A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.
  - (B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the Person's responsibility as a contractor.
  - (C) Conviction under state or federal antitrust statutes.
  - (D) Violation of a contract provision that is regarded by the Contracting Agency to be so serious as to justify Conduct Disqualification. A violation under this subsection 1(a)(D) may include but is not limited to material failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a Person's failure to perform or unsatisfactory performance caused by acts beyond the Person's control is not a basis for Disqualification.
- (b) Standards for DBE Disqualification. As provided in ORS 200.065, 200.075 or 279A.110, a Contracting Agency may disqualify a Person's right to submit an Offer or to participate in a Contract (e.g. subcontractors) as follows:
- (A) For a DBE Disqualification under ORS 200.065, the Contracting Agency may disqualify a Person upon finding that:
    - (i) The Person fraudulently obtained or retained or attempted to obtain or retain or aided another Person to fraudulently obtain or retain or attempt to obtain or
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retain certification as a disadvantaged, minority, women or emerging small business enterprise; or

(ii) The Person knowingly made a false claim that any Person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit; or

(iii) The Person has been disqualified by another Contracting Agency pursuant to ORS 200.065.

(B) For a DBE Disqualification under ORS 200.075, the Contracting Agency may disqualify a Person upon finding that:

(i) The Person has entered into an agreement representing that a disadvantaged, minority, women, or emerging small business enterprise, certified pursuant to ORS 200.055 ("Certified Enterprise"), will perform or supply materials under a Public Improvement Contract without the knowledge and consent of the Certified Enterprise; or

(ii) The Person exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any Certified Enterprise; or

(iii) The Person uses a Certified Enterprise to perform services under a contract or to provide supplies under a Public Improvement Contract to meet an established Certified Enterprise goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the contract.

(iv) If a Person is Disqualified for a DBE Disqualification under ORS 200.075, the affected Contracting Agency shall not permit such Person to participate in that Contracting Agency's Contracts.

(C) For a DBE Disqualification under ORS 279A.110, a Contracting Agency may disqualify a Person if the Contracting Agency finds that the Person discriminated against minority, women or emerging small business enterprises in awarding a subcontract under a contract with that Contracting Agency.

(2) **Notice of Intent to Disqualify.** The Contracting Agency shall notify the Person in Writing of a proposed Disqualification personally or by registered or certified mail, return receipt requested. This notice shall:

(a) State that the Contracting Agency intends to disqualify the Person;

(b) Set forth the reasons for the Disqualification;

(c) Include a statement of the Person's right to a hearing if requested in Writing within the time stated in the notice and that if the Contracting Agency does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived its right to a hearing;

(d) Include a statement of the authority and jurisdiction under which the hearing will be held;

(e) Include a reference to the particular sections of the statutes and rules involved;

(f) State the proposed Disqualification period; and

(g) State that the Person may be represented by legal counsel.

(3) **Hearing.** The Contracting Agency shall schedule a hearing upon the Contracting Agency receipt of the Person's timely request. The Contracting Agency shall notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.

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(4) **Notice of Disqualification.** The Contracting Agency will notify the Person in Writing of its Disqualification, personally or by registered or certified mail, return receipt requested. The notice shall contain:

- (a) The effective date and period of Disqualification;
- (b) The grounds for Disqualification; and
- (c) A statement of the Person's appeal rights and applicable appeal deadlines. For a Conduct Disqualification or a DBE Disqualification under ORS 279A.110, the disqualified person must notify the Contracting Agency in Writing within three business Days after receipt of the Contracting Agency's notice of Disqualification if the Person intends to appeal the Contracting Agency's decision.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0380 Bid or Proposal Evaluation Criteria**

(1) **General.** A Public Improvement Contract, if Awarded, shall be Awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. See C-049-0390, and Rules for Alternative Contracting Methods at C-049-0600 to C-049-0690.

(2) **Bid Evaluation Criteria.** Invitations to Bid may solicit lump-sum Offers, unit-price Offers or a combination of the two.

(a) **Lump Sum.** If the ITB requires a lump-sum Bid, without additive or deductive alternates, or if the Contracting Agency elects not to award additive or deductive alternates, Bids shall be compared on the basis of lump-sum prices, or lump-sum base Bid prices, as applicable. If the ITB calls for a lump-sum base Bid, plus additive or deductive alternates, the total Bid price shall be calculated by adding to or deducting from the base Bid those alternates selected by the Contracting Agency, for the purpose of comparing Bids.

(b) **Unit Price.** If the Bid includes unit pricing for estimated quantities, the total Bid price shall be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by the Contracting Agency, for the purpose of comparing Bids. Contracting Agencies shall specify within the Solicitation Document the estimated quantity of the procurement to be used for determination of the low Bidder. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price shall govern. See C-049-0350(2)(b).

(3) **Proposal Evaluation Criteria.** If the Contracting Agency's Contract Review Authority has exempted the Procurement of a Public Improvement from the competitive Bidding requirements of ORS 279C.335(1), and has directed the Contracting Agency to use an Alternative Contracting Method under ORS 279C.335(3), the Contracting Agency shall set forth the evaluation criteria in the Solicitation Documents. See C-049-0650, ORS 279C.335 and 279C.405.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335

[Adopted by Order NO. 2005-34, enacted 2/24/05]

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**C-049-0390 Offer Evaluation and Award; Determination of Responsibility**

(1) **General.** If Awarded, the Contracting Agency shall Award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer or Proposers submitting the best, Responsive Proposal or Proposals, provided that such Person is not listed by the Construction Contractors Board as disqualified to hold a Public Improvement Contract. See ORS 279C.375(3)(a). The Contracting Agency may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in the public interest. ORS 279C.375(5) permits multiple contract awards when specified in the Solicitation Documents.

(2) **Determination of Responsibility.** Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the Contracting Agency must have information that indicates that the Offeror meets the standards of responsibility set forth in ORS 279C.375(3)(b). To be a Responsible Offeror, the Contracting Agency must determine that the Offeror:

- (a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to demonstrate the capability of the Offeror to meet all contractual responsibilities;
  - (b) Has completed previous contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that, to the extent the costs associated with and time available to perform a previous contract were within the Offeror's control, the Offeror stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. A Contracting Agency should carefully scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in contract performance. In reviewing the Offeror's performance, the Contracting Agency should determine whether the Offeror's deficient performance was expressly excused under the terms of contract, or whether the Offeror took appropriate corrective action. The Contracting Agency may review the Offeror's performance on both private and Public Contracts in determining the Offeror's record of contract performance. The Contracting Agency shall make its basis for determining an Offeror not Responsible under this paragraph part of the Solicitation file;
  - (c) Has a satisfactory record of integrity. An Offeror may lack integrity if a Contracting Agency determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to a Contracting Agency. A Contracting Agency may find an Offeror not Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Conduct Disqualification under C-049-0370 may be used to determine an Offeror's integrity. A Contracting Agency may find an Offeror non-responsible based on previous convictions of offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the Offeror's performance of a contract or subcontract. The Contracting Agency shall make its basis for determining that an Offeror is not Responsible under this paragraph part of the Solicitation file;
  - (d) Is legally qualified to contract with the Contracting Agency; and
  - (e) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by the
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Contracting Agency concerning responsibility, the Contracting Agency shall base the determination of responsibility upon any available information, or may find the Offeror not Responsible.

(3) **Contracting Agency Evaluation.** The Contracting Agency shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. The Contracting Agency shall not evaluate an Offer using any other requirement or criterion.

(4) **Offeror Submissions.**

(a) The Contracting Agency may require an Offeror to submit Product Samples, descriptive literature, technical data, or other material and may also require any of the following prior to Award:

- (A) Demonstration, inspection or testing of a product prior to Award for characteristics such as compatibility, quality or workmanship;
- (B) Examination of such elements as appearance or finish; or
- (C) Other examinations to determine whether the product conforms to Specifications.

(b) The Contracting Agency shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. The Contracting Agency shall reject an Offer providing any product that does not meet the Solicitation Document requirements. A Contracting Agency's rejection of an Offer because it offers nonconforming Work or materials is not Disqualification and is not appealable under ORS 279C.445.

(5) **Evaluation of Bids.** The Contracting Agency shall use only objective criteria to evaluate Bids as set forth in the ITB. The Contracting Agency shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid.

(a) **Nonresident Bidders.** In determining the lowest Responsive Bid, the Contracting Agency shall, in accordance with C-046-0310, add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.

(b) **Clarifications.** In evaluating Bids, a Contracting Agency may seek information from a Bidder only to clarify the Bidder's Bid. Such clarification shall not vary, contradict or supplement the Bid. A Bidder must submit Written and Signed clarifications and such clarifications shall become part of the Bidder's Bid.

(6) **Evaluation of Proposals.** See C-049-0650 regarding rules applicable to Requests for Proposals.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0395 Notice of Intent to Award**

(1) **Notice.** At least seven days before the Award of a Public Improvement Contract, the Contracting Agency shall issue to each Bidder (pursuant to ORS 279C.375(2)) and each Proposer (pursuant to ORS 279C.410(7)), or post electronically or otherwise, a notice of the Contracting Agency's intent to Award the Contract. This requirement does not apply to Award of a small (under \$5,000) or intermediate (informal competitive quotes) Public Improvement Contract awarded under ORS 279C.335(1)(c) or (d).

(2) **Form and Manner of Posting.** The form and manner of posting notice shall conform to customary practices within the Contracting Agency's procurement system, and may be

made electronically.

(3) **Finalizing Award.** The Contracting Agency's Award shall not be final until the later of the following:

- (a) Seven Days after the date of the notice, unless the Solicitation Document provided a different period for protest; or
- (b) The Contracting Agency provides a Written response to all timely-filed protests that denies the protest and affirms the Award.

(4) **Prior Notice Impractical.** Posting of notice of intent to award shall not be required when the Contracting Agency determines that it is impractical due to unusual time constraints in making prompt Award for its immediate procurement needs, documents the Contract file as to the reasons for that determination, and posts notice of that action as soon as reasonably practical.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375

[Adopted by Order No.2008-08, enacted 1/31/08]

#### **C-049-0400 Documentation of Award; Availability of Award Decisions**

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

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

- (a) All submitted Bids;
- (b) Completed Bid tabulation sheet; and
- (c) Written justification for any rejection of lower Bids.

(3) **Contents of Award Record for Proposals.** Where the use of Requests for Proposals is authorized as set forth in C-049-0650, the Contracting Agency's record shall include:

- (a) All submitted Proposals.
- (b) The completed evaluation of the Proposals;
- (c) Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and
- (d) If the Contracting Agency permitted negotiations in accordance with C-049-0650, the Contracting Agency's completed evaluation of the initial Proposals and the Contracting Agency's completed evaluation of final Proposals.

(4) **Contract Document.** The Contracting Agency shall deliver a fully executed copy of the final Contract to the successful Offeror.

(5) **Bid Tabulations and Award Summaries.** Upon request of any Person the Contracting Agency shall provide tabulations of Awarded Bids or evaluation summaries of Proposals. A nominal charge may be payable in advance. Requests must contain the Solicitation title and, if requested, be accompanied by a self-addressed, stamped envelope. Contracting Agencies may also provide tabulations of Bids and Proposals Awarded on designated Web sites or on the Contracting Agency's Electronic Procurement System.

(6) **Availability of Solicitation Files.** The Contracting Agency shall make completed solicitation files available for public review at the Contracting Agency.

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Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

#### **C-049-0410 Time for Contracting Agency Acceptance; Extension**

(1) **Time for Offer Acceptance.** An Offeror's Bid, or Proposal submitted as a Firm Offer (see C-049-0280), is irrevocable, valid and binding on the Offeror for not less than 30 Days from Closing unless otherwise specified in the Solicitation Document.

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375

[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-049-0420 Negotiation With Bidders Prohibited**

Except as permitted by ORS 279C.340 and C-049-0430 when all bids exceed the cost estimate, a Contracting Agency shall not negotiate with any Bidder prior to Contract Award. After Award of the Contract, the Contracting Agency and Contractor may modify the Contract only by change order or amendment to the Contract in accordance with C-049-0910.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-049-0430 Negotiation When Bids Exceed Cost Estimate**

(1) **Generally.** In accordance with ORS 279C.340, if all Responsive Bids from Responsible Bidders on a competitively Bid Project exceed the Contracting Agency's Cost Estimate, prior to Contract Award the Contracting Agency may negotiate Value Engineering and Other Options with the Responsible Bidder submitting the lowest, Responsive Bid in an attempt to bring the Project within the Contracting Agency's Cost Estimate. The subcontractor disclosure and substitution requirements of C-049-0360 do not apply to negotiations under this rule.

(2) **Definitions.** The following definitions apply to this administrative rule:

(a) **"Cost Estimate"** means the Contracting Agency's most recent pre-Bid, good faith assessment of anticipated Contract costs, consisting either of an estimate of an architect, engineer or other qualified professional, or confidential cost calculation Worksheets, where available, and otherwise consisting of formal planning or budgetary documents.

(b) **"Other Options"** means those items generally considered appropriate for negotiation in the RFP process, relating to the details of Contract performance as specified in C-049-0650, but excluding any material requirements previously announced in the solicitation process that would likely affect the field of competition.

(c) **"Project"** means a Public Improvement.

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(d) "**Value Engineering**" means the identification of alternative methods, materials or systems which provide for comparable function at reduced initial or life-time cost. It includes proposed changes to the plans, Specifications, or other Contract requirements which may be made, consistent with industry practice, under the original Contract by mutual agreement in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the Public Improvement. Cost savings include those resulting from life cycle costing, which may either increase or decrease absolute costs over varying time periods.

(3) **Rejection of Bids.** In determining whether all Responsive Bids from Responsible Bidders exceed the Cost Estimate, only those Bids that have been formally rejected, or Bids from Bidders who have been formally disqualified by the Contracting Agency, shall be excluded from consideration.

(4) **Scope of Negotiations.** Contracting Agencies shall not proceed with Contract Award if the scope of the Project is significantly changed from the original Bid. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other Bidders would have been expected by the Contracting Agency to participate in the Bidding process had the change been made during the solicitation process rather than during negotiation. This rule shall not be construed to prohibit resolicitation of trade subcontracts.

(5) **Discontinuing Negotiations.** The Contracting Agency may discontinue negotiations at any time, and shall do so if it appears to the Contracting Agency that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to rebid any portion of the project, or to obtain subcontractor pricing information upon request, shall be considered a lack of good faith.

(6) **Limitation.** Negotiations may be undertaken only with the lowest Responsive, Responsible Bidder pursuant to ORS 279C.340. That statute does not provide any additional authority to further negotiate with Bidders next in line for Contract Award.

(7) **Public Records.** To the extent that a Bidder's records used in Contract negotiations under ORS 279C.340 are public records, they are exempt from disclosure until after the negotiated Contract has been awarded or the negotiation process has been terminated, at which time they are subject to disclosure pursuant to the provisions of the Oregon Public Records Law, ORS 192.410 to 192.505.

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

Stats. Implemented: ORS 279C.340

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0440 Rejection of Offers**

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

(a) A Contracting Agency may reject any Offer upon finding that to accept the Offer may impair the integrity of the Procurement process or that rejecting the Offer is in the public interest.

(b) The Contracting Agency shall reject an Offer upon the Contracting Agency's finding that the Offer:

- (A) Is contingent upon the Contracting Agency's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;
- (B) Takes exception to terms and conditions (including Specifications);
- (C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of Solicitation Document or in contravention of applicable law;

- (D) Offers Work or goods that fail to meet the Specifications of the Solicitation Document;
  - (E) Is late;
  - (F) Is not in substantial compliance with the Solicitation Documents;
  - (G) Is not in substantial compliance with all prescribed public solicitation procedures.
- (c) The Contracting Agency shall reject an Offer upon the Contracting Agency's finding that the Offeror:
- (A) Has not been prequalified under ORS 279C.430 and the Contracting Agency required mandatory prequalification;
  - (B) Has been Disqualified;
  - (C) Has been declared ineligible under ORS 279C.860 by the Commissioner of Bureau of Labor and Industries and the Contract is for a Public Work;
  - (D) Is listed as not qualified by the Construction Contractors Board, if the Contract is for a Public Improvement;
  - (E) Has not met the requirements of ORS 279A.105 if required by the Solicitation Document;
  - (F) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;
  - (G) Has failed to provide the certification required under section 3 of this rule;
  - (H) Is not Responsible. See C-049-0390(2) regarding Contracting Agency determination that the Offeror has met statutory standards of responsibility.
- (2) **Form of Business.** For purposes of this rule, the Contracting Agency may investigate any Person submitting an Offer. The investigation may include that Person's officers, Directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this rule or to apply the Disqualification provisions of ORS 279C.440 to 279C.450 and C-049-0370.
- (3) **Certification of Non-Discrimination.** The Offeror shall certify and deliver to the Contracting Agency Written certification, as part of the Offer that the Offeror has not discriminated and will not discriminate against minority, women or emerging small business enterprises in obtaining any required subcontracts. Failure to do so shall be grounds for disqualification.
- (4) **Rejection of all Offers.** A Contracting Agency may reject all Offers for good cause upon the Contracting Agency's Written finding it is in the public interest to do so. The Contracting Agency shall notify all Offerors of the rejection of all Offers, along with the good cause finding.
- (5) **Criteria for Rejection of All Offers.** The Contracting Agency may reject all Offers upon a Written finding that:
- (a) The content of or an error in the Solicitation Document, or the solicitation process unnecessarily restricted competition for the Contract;
  - (b) The price, quality or performance presented by the Offerors is too costly or of insufficient quality to justify acceptance of the Offer;
  - (c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;
  - (d) Causes other than legitimate market forces threaten the integrity of the competitive Procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful
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- anti-competitive conduct and inadvertent or intentional errors in the solicitation process or Solicitation Document;
- (e) The Contracting Agency cancels the solicitation in accordance with C-049-0270;
  - or
  - (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05 amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0450 Protest of Contractor Selection, Contract Award**

- (1) **Purpose.** An adversely affected or aggrieved Offeror must exhaust all avenues of administrative review and relief before seeking judicial review of the Contracting Agency's Contractor selection or Contract Award decision.
  - (2) **Notice of Competitive Range.** Unless otherwise provided in the RFP, when the competitive proposal process is authorized under C-049-0650, the Contracting Agency shall provide Written notice to all Proposers of the Contracting Agency's determination of the Proposers included in the Competitive Range. The Contracting Agency's notice of the Proposers included in the Competitive Range shall not be final until the later of the following:
    - (a) 10 Days after the date of the notice, unless otherwise provided therein; or
    - (b) Until the Contracting Agency provides a Written response to all timely-filed protests that denies the protest and affirms the notice of the Proposers included in the Competitive Range.
  - (3) **Notice of Intent to Award.** Unless otherwise provided in the Solicitation Document, the Contracting Agency shall provide Written notice to all Offerors of the Contracting Agency's intent to Award the Contract. The Contracting Agency's Award shall not be final until the later of the following:
    - (a) Seven Days after the date of the notice, unless the Solicitation Document provided a different period for protest; or
    - (b) The Contracting Agency provides a Written response to all timely-filed protests that denies the protest and affirms the Award.
  - (4) **Right to Protest Award.**
    - (a) An adversely affected or aggrieved Offeror may submit to the Contracting Agency a Written protest of the Contracting Agency's intent to Award within seven Days after issuance of the notice of intent to Award the Contract, unless a different protest period is provided under the Solicitation Document.
    - (b) The Offeror's protest must be in Writing and must specify the grounds upon which the protest is based.
    - (c) An Offeror is adversely affected or aggrieved only if the Offeror is eligible for Award of the Contract as the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer submitting the best Responsive Proposal and is next in line for Award, i.e., the protesting Offeror must claim that all lower Bidders or higher-scored Proposers are ineligible for Award:
      - (A) Because their Offers were nonresponsive; or
      - (B) The Contracting Agency committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for
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such substantial violation, been the Responsible Bidder offering the lowest Bid or the Responsible Proposer offering the highest-ranked Proposal.

(d) The Contracting Agency shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document.

**(5) Right to Protest Competitive Range.**

(a) An adversely affected or aggrieved Proposer may submit to the Purchasing Manager a Written protest of the Contracting Agency's decision to exclude the Proposer from the Competitive Range within seven Days after issuance of the notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document. (See procedural requirements for the use of RFPs at C-049-0650.)

(b) The Proposer's protest shall be in Writing and must specify the grounds upon which the protest is based.

(c) A Proposer is adversely affected only if the Proposer is responsible and submitted a Responsive Proposal and is eligible for inclusion in the Competitive Range, i.e., the protesting Proposer must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Proposers are removed from consideration, and that those ineligible Proposers are ineligible for inclusion in the Competitive Range because:

(A) Their Proposals were not responsive; or

(B) The Contracting Agency committed a substantial violation of a provision in the RFP or of an applicable Procurement statute or administrative rule, and the protesting Proposer was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.

(d) The Contracting Agency shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest a Contracting Agency's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.

(6) **Authority to Resolve Protests.** The Purchasing Manager has authority to settle or resolve a Written protest submitted in accordance with the requirements of this rule.

(7) **Decision of Purchasing Manager.** If a protest is not settled, the Purchasing Manager shall promptly issue a Written decision on the protest.

(8) **Appeal to County Administrator.** An adversely affected or aggrieved Proposer may appeal the Purchasing Manager's decision on its protest to the County Administrator within seven days after issuance of the decision of the Purchasing Manager. The appeal must be in writing and must specify the grounds upon which the appeal is based. The County Administrator shall not consider an appeal submitted after the time period established in this Rule.

(9) **Authority to Resolve Appeals.** The County Administrator has authority to settle or resolve a Written appeal submitted in accordance with the requirements of this Rule.

(10) **Decision of County Administrator.** If an appeal is not settled, the County Administrator shall issue a Written decision on the appeal. Judicial review of this decision will be available if provided by statute.

(11) **Award.** The successful Offeror shall promptly execute the Contract after the Award is final. The Contracting Agency shall execute the Contract only after it has obtained all applicable required documents and approvals.

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Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.375, 279C.380, 279C.385 & 279C.460  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0460 Performance and Payment Security; Waiver**

(1) **Public Improvement Contracts.** Contractors shall execute and deliver to the Contracting Agency a performance bond and a payment bond each in a sum equal to the Contract Price for all Public Improvement Contracts in excess of \$1,000,000, unless the required performance bond is waived under ORS 279C.380(1)(a), excused in cases of emergency under ORS 279C.380(4), or unless the Board exempts a Contract or classes of contracts from the required performance bond and payment bond pursuant to ORS 279C.390.

(2) **Other Construction Contracts.** A Contracting Agency may require performance security for other construction Contracts that are not Public Improvement Contracts. Such requirements shall be expressly set forth in the Solicitation Document.

(3) **Requirement for Surety Bond.** The Contracting Agency shall accept only a performance bond furnished by a surety company authorized to do business in Oregon unless otherwise specified in the Solicitation Document (i.e., the Contracting Agency may accept a cashier's check or certified check in lieu or all or a portion of the required performance bond if specified in the Solicitation Document). The payment bond must be furnished by a surety company authorized to do business in Oregon, and in an amount equal to the full contract price.

(4) **Time for Submission.** The apparent successful Offeror must promptly furnish the required performance security and payment security upon the Contracting Agency's request. If the Offeror fails to furnish the performance security as requested, the Contracting Agency may reject the Offer and Award the Contract to the Responsible Bidder with the next lowest Responsive Bid or the Responsible Proposer with the next highest-scoring Responsive Proposal, and, at the Contracting Agency's discretion, the Offeror shall forfeit its Bid or Proposal security.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.375, ORS 279C.380 & ORS 279C.390  
[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; Amended by Ord. 03-2016, 8/11/16]

### **C-049-0470 Substitute Contractor**

If the Contractor provided a performance bond, the Contracting Agency may afford the Contractor's surety the opportunity to provide a substitute contractor to complete performance of the Contract. A substitute contractor shall perform all remaining Contract Work and comply with all terms and conditions of the Contract, including the provisions of the performance bond and the payment bond. Such substitute performance does not involve the Award of a new Contract and shall not be subject to the competitive Procurement provisions of ORS Chapter 279C.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.365, 279C.370, 279C.375, 279C.380 & 279C.390  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

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**C-049-0490 Foreign Contractor**

If the Contract Price exceeds \$10,000 and the Contractor is a Foreign Contractor, the Contractor shall promptly report to the Oregon Department of Revenue on forms provided by the Department of Revenue, the Contract Price, terms of payment, Contract duration and such other information as the Department of Revenue may require before final payment can be made on the Contract. A copy of the report shall be forwarded to the Contracting Agency. The Contracting Agency Awarding the Contract shall satisfy itself that the above requirements have been complied with before it issues final payment on the Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.120

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**C-049-0600 Alternative Contracting Methods**

Contracting Agencies may use Alternative Contracting Methods for Public Improvement Contracts by using exemptions granted pursuant to ORS 279C.335 and competitive proposals under ORS 279C.400. Those methods include, but are not limited to, Design-Build, Energy Savings Performance Contract (ESPC) and Construction Manager/General Contractor (CM/GC) forms of contracting.

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

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

**C-049-0610 Definitions for Alternative Contracting Methods**

The following definitions shall apply to C-049-0600:

(1) **Alternative Contracting Methods** means innovative Procurement techniques for obtaining Public Improvement Contracts, utilizing processes other than the traditional method of Design-Bid-Build (with Award based solely on price, in which a final design is issued with formal Bid documents, construction services are obtained by sealed Bid Awarded to the lowest Responsive, Responsible Bidder, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design-Build contracting, CM/GC forms of contracting and ESPCs, as well as other developing techniques such as general "performance contracting" and "cost plus time" contracting.

(2) **Construction Manager/General Contractor (or "CM/GC")** means a form of Procurement that results in a Public Improvement Contract for a Construction Manager/General Contractor to undertake project team involvement with design development; constructability reviews; value engineering, scheduling, estimating and subcontracting services; establish a Guaranteed Maximum Price to complete the Contract Work; act as General Contractor; hold all subcontracts, self-perform portions of the Work as may be allowed by the Contracting Agency under the CM/GC Contract; coordinate and manage the building process; provide general Contractor expertise; and act as a member of the project team along with the Contracting Agency, architect/engineers and other consultants. CM/GC also refers to a Contractor under this form of Contract, sometimes known as the "Construction Manager at Risk."

(3) **Design-Build** means a form of Procurement that results in a Public Improvement Contract in which the construction Contractor also provides or obtains specified design

services, participates on the project team with the Contracting Agency, and manages both design and construction. In this form of Contract, a single Person provides the Contracting Agency with all of the services necessary to both design and construct the project.

(4) **Energy Savings Performance Contract (or "ESPC")** means a Public Improvement Contract between a Contracting Agency and a Qualified Energy Service Company for the identification, evaluation, recommendation, design and construction of Energy Conservation Measures, including a Design-Build Contract, that guarantee energy savings or performance.

(5) **Guaranteed Maximum Price (or "GMP")** means the total maximum price provided to the Contracting Agency by the Contractor, and accepted by the Contracting Agency, that includes all reimbursable costs of and fees for completion of the Contract Work, as defined by the Public Improvement Contract, except for material changes in the scope of Work. It may also include particularly identified contingency amounts.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-049-0620 Use of Alternative Contracting Methods**

(1) **Competitive Bidding Exemptions.** ORS Chapter 279C requires a competitive Bidding process for Public Improvement Contracts unless a statutory exception applies, a class of Contracts has been exempted or an individual Contract has been exempted in accordance with ORS 279C.335 and any applicable Contracting Agency rules. Use of Alternative Contracting Methods may be directed by the Board as an exception to the prescribed Public Contracting practices in Oregon, and their use must be justified in accordance with the Code.

(2) **Post-Project Evaluation.** ORS 279C.355 requires that the Contracting Agency prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 for which the competitive Bidding process was not used.

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

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

[Adopted by Order NO. 2005-34, enacted 2/24/05]

#### **C-049-0645 Requests for Qualifications (RFQ)**

As provided by ORS 279C.405(1), Contracting Agencies may utilize Requests for Qualifications (RFQs) to obtain information useful in the preparation or distribution of a Request for Proposals (RFPs). When using RFQs as the first step in a two step solicitation process, in which distribution of the RFPs will be limited to the firms identified as most qualified through their submitted statements of qualification, Contracting Agencies shall first advertise and provide notice of the RFQ in the same manner in which RFPs are advertised, specifically stating that RFPs will be distributed only to the firms selected in the RFQ process. In such cases the Contracting Agencies shall also provide within the RFQ a protest provision substantially in the form of C-049-0450(5) regarding protests of the Competitive Range. Thereafter, contracting agencies may distribute RFPs to the selected firms without further advertisement of the solicitation.

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Stat. Auth.: ORS 279C.405, 279A.065  
Stats. Implemented: ORS 279C.405  
[Adopted by Board Order 2010-21, enacted 3/18/10]

### **C-049-0650 Requests for Proposals (RFP)**

- (1) **Generally.** The use of competitive proposals must be specially authorized for a Public Improvement Contract under the competitive bidding requirement of ORS 279C.335(1), OAR 137-049-0130 and 137-049-0600 to 137-049-0690. Also see ORS 279C.400 to 279C.410 for statutory requirements regarding competitive Proposals.
- (2) **Solicitation Documents.** In addition to the Solicitation Document requirements of OAR 137-049-0200, this rule applies to the requirements for Requests for Proposals for a Public Improvement. RFP Solicitation Documents shall conform to the following standards:
- (a) The Contracting Agency shall set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references and warranty provisions. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates based on information available to the Contracting Agency;
  - (b) When the Contracting Agency is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, the Contracting Agency must authorize Offerors to propose alternative terms and conditions. The Contracting Agency must describe the evaluation and discussion or negotiation process, including how the Contracting Agency will establish a Competitive Range (if any);
  - (c) If the Contracting Agency intends to Award Contracts to more than one Proposer, the Contracting Agency must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award.
- (3) **Evaluation of Proposals.**
- (a) Evaluation. The Contracting Agency shall evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. The Contracting Agency shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.
    - (A) Clarifications. In evaluating Proposals, a Contracting Agency may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer must submit Written and Signed clarifications and such clarifications shall become part of the Proposer's Proposal.
  - (b) After evaluation of all Proposals in accordance with the criteria set forth in the Request for Proposals, the Contracting Agency will establish the highest ranked Proposer or establish a Competitive Range.
- (4) **Notice.** Unless otherwise provided in the Solicitation Document, the Contracting Agency shall provide Written notice to all Offerors of the County's intent to award a Contract, or establishment of a Competitive Range.
- (5) **Discussions; Revised Proposals.** If the Contracting Agency chooses to enter into discussions with and receive revised Proposals from the Proposers, the Contracting Agency shall proceed as follows:
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(a) General Discussions. The Contracting Agency shall initiate oral or Written discussions with Proposers. The Contracting Agency may conduct discussions for the following purposes:

- (A) Informing Proposers of deficiencies in their initial Proposals;
- (B) Notifying Proposers of parts of their Proposals for which the Contracting Agency would like additional information; and
- (C) Otherwise allowing Proposers to develop revised Proposals that will allow the Contracting Agency to obtain the best Proposal based on the requirements and evaluation criteria set forth in the Request for Proposals.

(b) Competitive Range Discussions. The Contracting Agency may conduct discussions with each Proposer in the Competitive Range necessary to fulfill the purposes of this section, but need not conduct the same amount of discussions with each Proposer. The Contracting Agency may terminate discussions with any Proposer in the Competitive Range at any time. However, the Contracting Agency shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with Contracting Agency before the Contracting Agency notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.

- (A) In conducting discussions, the Contracting Agency:
  - (i) Shall treat all Proposers fairly and shall not favor any Proposer over another;
  - (ii) Shall not discuss other Proposers' Proposals;
  - (iii) Shall not suggest specific revisions that a Proposer should make to its Proposal, and shall not otherwise direct the Proposer to make any specific revisions to its Proposal.

(B) At any time during the time allowed for discussions, the Contracting Agency may:

- (i) Continue discussions with a particular Proposer;
- (ii) Terminate discussions with a particular Proposer and continue discussions with other Proposers in the Competitive Range; or
- (iii) Conclude discussions with all remaining Proposers in the Competitive Range and provide notice to the Proposers in the Competitive Range to submit revised Proposals.

(c) Revised Proposals. If the Contracting Agency does not cancel the Solicitation at the conclusion of the Contracting Agency's discussions with all remaining Proposers in the Competitive Range, the Contracting Agency shall give all remaining Proposers in the Competitive Range notice of the date and time by which they must submit revised Proposals. This notice constitutes the Contracting Agency's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in the Contracting Agency's notice.

(A) Upon receipt of the revised Proposals, the Contracting Agency shall score the revised Proposals based upon the evaluation criteria set forth in the Request for Proposals, and rank the revised Proposals based on the Contracting Agency's scoring.

(B) The Contracting Agency may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the Request for Proposals.

(d) Intent to Award; Protest. The Contracting Agency shall provide Written notice to all Proposers in the Competitive Range of the Contracting Agency's intent to Award the Contract. An unsuccessful Proposer may protest the Contracting Agency's intent to

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Award in accordance with C-049-0450. After the protest period provided in accordance with that rule expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency shall commence final Contract negotiations.

**(6) Negotiation.**

(a) Limited Negotiation. If the Contracting Agency did not permit negotiation in its Request for Proposals, the Contracting Agency may, nonetheless, negotiate with the highest-ranked Proposer, but may then only negotiate the:

- (A) Statement of Work; and
- (B) Contract Price as it is affected by negotiating the statement of Work.
- (C) The process for discussions or negotiations that is outlined and explained in subsections (5), (6)(b) and (6)(c) of this rule does not apply to this limited negotiation.

(b) Initiating Competitive Range Negotiations. The Contracting Agency may determine to commence negotiations with the highest-ranked Proposer in the Competitive Range following the:

- (A) Initial determination of the Competitive Range; or
- (B) Conclusion of discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.

(c) Conducting Negotiations.

- (A) Scope. The Contracting Agency may negotiate:
  - (i) The statement of Work;
  - (ii) The Contract Price as it is affected by negotiating the statement of Work; and
  - (iii) Any other terms and conditions reasonably related to the Request for Proposals. Accordingly, Proposers shall not submit, and Contracting Agency shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to the Request for Proposals.

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

- (a) The Proposer is not discussing or negotiating in good faith; or
- (b) Further discussions or negotiations with the Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.

**(8) Continuing Negotiations.** If the Contracting Agency terminates discussions or negotiations with a Proposer, the Contracting Agency may then commence negotiations with the next highest scoring Proposer, and continue the process described in this rule until the Contracting Agency has either:

- (a) Determined to Award the Contract to the Proposer with whom it is currently discussing or negotiating; or
- (b) Completed one round of discussions or negotiations with all Proposers in the Competitive Range, unless the Contracting Agency provided for more than one round of discussions or negotiations in the Request for Proposals.

**(9) Discretionary Negotiations.** If the Solicitation Document provided that discussions or negotiations may occur at Contracting Agency's discretion, the Contracting Agency may forego discussions and negotiations.

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(10) **Negotiation Team.** If the Contracting Agency proceeds with discussions or negotiations, the Contracting Agency shall establish a negotiation team tailored for the acquisition. The Contracting Agency's team may include legal, technical and negotiating personnel.

(11) **Cancellation.** Nothing in this rule shall restrict or prohibit the Contracting Agency from canceling the solicitation at any time.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

### **C-049-0655 Methods of Contractor Selection Authorized**

Methods of Contractor selection, including but not limited to award based solely on the ranking of proposals, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or any combination of methods, are authorized when such methods and the procedures to be followed are described in a Request for Proposals.

Stat. Auth.: ORS 279A.065

Stat. Implemented: ORS 279C.410(5), ORS 279C.405(2)

[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0820 Retainage**

(1) **Withholding of Retainage.** Except to the extent a Contracting Agency's enabling laws require otherwise, a Contracting Agency shall not retain an amount in excess of five percent of the Contract Price for Work completed. If the Contractor has performed at least 50 percent of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written approval, the Contracting Agency may, in its discretion, reduce or eliminate retainage on any remaining progress payments. The Contracting Agency shall respond in Writing to all such applications within a reasonable time. When the Contract Work is 97-1/2 percent completed, the Contracting Agency may, at its discretion and without application by the Contractor, reduce the retained amount to 100 percent of the value of the remaining unperformed Contract Work. A Contracting Agency may at any time reinstate retainage. Retainage shall be included in the final payment of the Contract Price.

(2) **Form of Retainage.** Unless a Contracting Agency that reserves an amount as retainage finds in writing that accepting a bond or instrument described in part (a) or (b) of this section poses an extraordinary risk that is not typically associated with the bond or instrument, the Contracting Agency, in lieu of withholding moneys from payment, shall accept from the Contractor:

(a) Bonds, securities or other instruments that are deposited and accepted as provided in

subsection (4)(a) of this rule; or

(b) A surety bond deposited as provided in subsection (4)(b) of this rule.

(3) **Deposit in interest-bearing accounts.** Upon request of the Contractor, a Contracting Agency shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the Contracting Agency.

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Earnings on such account shall accrue to the Contractor. State Contracting Agencies shall establish the account through the State Treasurer.

(4) **Alternatives to cash retainage.** In lieu of cash retainage to be held by a Contracting Agency, the Contractor may substitute one of the following:

(a) Deposit of bonds, securities, or other instruments:

(A) The Contractor may deposit bonds, securities, or other instruments with the Contracting Agency or in any bank or trust company to be held for the benefit of the Contracting Agency. If the Contracting Agency accepts the deposit, the Contracting Agency shall reduce the cash retainage by an amount equal to the value of the bonds and securities, and reimburse the excess to the Contractor.

(B) Bonds, securities, or other instruments deposited or acquired in lieu of cash retainage must be of a character approved by the Oregon Department of Administrative Services, which may include, without limitation:

(i) Bills, certificates, notes or bonds of the United States.

(ii) Other obligations of the United States or agencies of the United States.

(iii) Obligations of a corporation wholly owned by the Federal Government.

(iv) Indebtedness of the Federal National Mortgage Association.

(v) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.

(vi) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

(C) Upon the Contracting Agency's determination that all requirements for the protection of the Contracting Agency's interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu of retainage.

(b) Deposit of surety bond. A Contracting Agency, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the Contracting Agency in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond shall accept surety bonds from its subcontractors and suppliers in lieu of retainage. In such cases, retainage shall be reduced by an amount equal to the value of the bond, and the excess shall be reimbursed.

(5) **Recovery of costs.** A Contracting Agency may recover from the Contractor all costs incurred in the proper handling of retainage by reduction of the final payment.

(6) **Additional Retainage When Certified Payroll Statements Not Filed.** Pursuant to ORS 279C.845(7), if a Contractor is required to file certified payroll statements and fails to do so, the Contracting Agency shall retain 25 percent of any amount earned by the Contractor on a Public Works Contract until the Contractor has filed such statements with the Contracting Agency. The Contracting Agency shall pay the Contractor the amount retained under this provision within 14 days after the Contractor files the certified statements, regardless of whether a subcontractor has filed such statements (but see ORS 279C.845(1) regarding the requirement for both contractors and subcontractors to file certified statements with the Contracting Agency). See BOLI rule at OAR 839-025-0010.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2010-21, enacted 3/18/10.]

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**C-049-0860 Public Works Contracts**

(1) **Generally.** ORS 279C.800 to 279C.870 regulates Public Works Contracts, as defined in ORS 279C.800(6), and requirements for payment of prevailing wage rates. Also see administrative rules of the Bureau of Labor and Industries (BOLI) at OAR chapter 839.

(2) **Required Contract Conditions.** As detailed in the above statutes and rules, every Public Works Contract must contain the following provisions:

- (a) Contracting Agency authority to pay certain unpaid claims and charge such amounts to Contractors, as set forth in ORS 279C.515(1).
- (b) Maximum hours of labor and overtime, as set forth in ORS 279C.520(1).
- (c) Employer notice to employees of hours and days that employees may be required to work, as set forth in ORS 279C.520(2).
- (d) Contractor required payments for certain services related to sickness or injury, as set forth in ORS 279C.530.
- (e) Requirement for payment of prevailing rate of wage, as set forth in ORS 279C.830(1).

(3) **Requirements for Specifications.** The Specifications for every Public Works Contract, consisting of the procurement package (such as the Project Manual, Bid or Proposal Booklets, Request for Quotes or similar procurement Specifications), must contain the following provisions:

- (a) The prevailing rate of wage, as required by ORS 279C.830(1)(a): (i) physically contained within or attached to hard copies of procurement Specifications;(ii) included by a statement incorporating the applicable wage rate publication into the Specifications by reference, in compliance with OAR 839-025-0020; or, (iii) when the rates are available electronically or by Internet access, the rates may be incorporated into the Specifications by referring to the rates and providing adequate information on how to access them in compliance with OAR 839-025-0020.
- (b) If 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 subsection 3(a) of this rule apply. See BOLI rules at OAR 839-025-0020 and 0035.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08; amended by Order No. 2010-21, enacted 3/18/10.]

**C-049-0870 Specifications; Brand Name Products**

(1) **Generally.** The Contracting Agency's Solicitation Document shall not expressly or implicitly require any product by brand name or mark, nor shall it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279C.345(2).

(2) **Equivalents.** A Contracting Agency may identify products by brand names so long as the following language: "approved equal"; "or equal"; "approved equivalent" or "equivalent," or similar language is included in the Solicitation Document. The Contracting Agency shall determine, in its sole discretion, whether an Offeror's alternate product is "equal" or "equivalent."

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Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.345  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0900 Contract Suspension; Termination Procedures**

- (1) **Suspension of Work.** In the event a Contracting Agency suspends performance of Work for any reason considered by the Contracting Agency to be in the public interest other than a labor dispute, the Contractor shall be entitled to a reasonable extension of Contract time, and to reasonable compensation for all costs, including a reasonable allowance for related overhead, incurred by the Contractor as a result of the suspension.
- (2) **Termination of Contract by mutual agreement for reasons other than default.**
- (a) Reasons for termination. The parties may agree to terminate the Contract or a divisible portion thereof if:
- (A) The Contracting Agency suspends Work under the Contract for any reason considered to be in the public interest (other than a labor dispute, or any judicial proceeding relating to the Work filed to resolve a labor dispute); and
- (B) Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the Work.
- (b) Payment. When a Contract, or any divisible portion thereof, is terminated pursuant to this section (2), the Contracting Agency shall pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. The Contracting Agency shall also pay for all Work completed, based on the Contract Price. Unless the Work completed is subject to unit or itemized pricing under the Contract, payment shall be calculated based on percent of Contract completed. No claim for loss of anticipated profits will be allowed.
- (3) **Public interest termination by Contracting Agency.** A Contracting Agency may include in its Contracts terms detailing the circumstances under which the Contractor shall be entitled to compensation as a matter of right in the event the Contracting Agency unilaterally terminates the Contract for any reason considered by the Contracting Agency to be in the public interest.
- (4) **Responsibility for completed Work.** Termination of the Contract or a divisible portion thereof pursuant to this rule shall not relieve either the Contractor or its surety of liability for claims arising out of the Work performed.
- (5) **Remedies cumulative.** The Contracting Agency may, at its discretion, avail itself of any or all rights or remedies set forth in these rules, in the Contract, or available at law or in equity.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.650, 279C.326, 279C.655, 279C.660, 279C.665 & 279C.670  
[Adopted by Order NO. 2005-34, enacted 2/24/05]

### **C-049-0910 Contract Amendments on Public Improvements**

- (1) **”Amendment”** as used in this rule means a Written modification to the terms and conditions of a Public Improvement Contract which is reasonably related to the scope of the original Procurement and requires mutual agreement between the Contracting Agency and the Contractor.
- (2) **Contract Amendments.** Contract Amendments are not considered to be new Procurements and an exemption from competitive bidding is not required in order to add components or phases of Work specified in or reasonably related to the scope of the
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original procurement. Amendments to a Public Improvement Contract may be made only when they are reasonably related to the scope of the original Procurement.

Stat. Auth.: ORS 279A.065

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

[Adopted by Order NO. 2005-34, enacted 2/24/05; Amended by Order No. 2008-08, enacted 1/31/08]

## DIVISION C-050

### AUTHORITY TO SIGN CONTRACTS

#### **C-050-0100 Delegation of Authority to sign Contracts and Amendments**

(1) **Application.** The Board has authority to sign all Contracts and Contract amendments for the Contracting Agency. The purpose of these division C-050 rules is to establish a limited delegation of that authority to sign Contracts and Contract amendments. In other words, these rules identify the persons other than the Board who have the authority to sign Contracts and Contract amendments for the Contracting Agency. They do not address the type of procurement process that is to be followed, such as Invitation to Bid, Request for Proposals, or other procurement process.

(2) **Authority to Sign Contracts and Contract Amendments.**

(a) Officers and employees of Clackamas County holding the positions listed in this subsection have the authority to sign Contracts with a value not to exceed a total of \$150,000 in the aggregate for any one project or for any one contractor in a single fiscal year.

(b) The listed persons also have authority to sign Contract amendments, if the amendment does not exceed 10% of the original Contract amount or \$150,000 for the entirety of the term of the Contract, whichever is less.

Assessor

Business and Community Services Director

Business and Community Services Deputy Director

C-Com Director

Chief Deputy

County Clerk

Community Corrections Director

County Administrator

County Counsel

Deputy County Administrator

District Attorney

District Attorney Office Administrator (Administrative Services Manager)

Emergency Management Director

Employee Services Director

Employee Services Deputy Director

Family Court Services Director

Finance Director

Finance Deputy Director

Health, Housing and Human Services Director

Health, Housing and Human Services Deputy Director

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Technology Services Director  
 Technology Services Deputy Director  
 Justice of the Peace  
 Juvenile Department Director  
 Law Library Librarian  
 Public and Government Relations Director  
 Procurement Division Director  
 Sheriff  
 Tourism and Development Council Executive Director  
 Transportation and Development Director  
 Transportation and Development Deputy Director  
 Treasurer  
 Undersheriff  
 Water Environment Services Director

(3) **District Attorney's, Sheriff's, Treasurer's, Assessor's County Clerk's and Justice of the Peace's Additional Authority.** In addition to the authority granted above in subsection (2), the District Attorney, the Sheriff, the Treasurer, the Assessor the County Clerk and the Justice of the Peace have the authority to sign Contract amendments, for contracts other than Public Improvement contracts, which do not exceed 10% of the original contract amount, or \$150,000, whichever is greater.

(4) **DTD Director's and WES Director's Additional Authority.** In addition to the authority granted above in subsection (2), the Transportation and Development Director, and the Water and Environment Services Director, have the authority to sign Contract amendments, for Public Improvement contracts, which do not exceed 10% of the original contract amount, or \$150,000, whichever is greater.

(5) **County Administrator's Additional Authority.** In addition to the authority granted above in subsection (2), the County Administrator has the authority to sign Contract amendments for both Public Improvement contracts and other contracts, which do not exceed 10% of the original contract amount, or \$150,000, whichever is greater.

In addition to the authority granted above, when (i) there exists an emergency such that a quorum of the Board of County Commissioners cannot meet before an action must be taken for the protection of the public and/or public goods, or (ii) a quorum of the Board of County Commissioners is not assembled for two or more regularly scheduled public business meetings, then the County Administrator is authorized to enter into contracts and contract amendments for the purchase of products and or services for any amount under the following conditions:

- (a) The Office of County Counsel has reviewed and approved the contract or amendment;
- (b) Sufficient monies are available to fund the contract or amendment; and
- (c) The County Administrator shall not approve any contract or amendment, or take any other action, that requires a public hearing.

In such circumstances, it is the intent of the Board to grant the County Administrator sufficient authority to take such actions as are necessary to make certain emergencies are addressed and/or that County business can continue until such time as a quorum can be convened. The County Administrator shall provide a full report to the Board of County Commissioners at their next available business meeting on the exercise of any authority provided for under this provision.

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(6) **Authority Exclusive.** The delegations of authority set forth in this section are exclusive, and no other persons have authority to perform such functions without express written authority from the Board granted after the adoption of this section. All previous delegations of authority adopted by the Board with respect to these Rules are hereby repealed. The County Administrator has other authority granted in Chapters 2.05 and 2.09 of the County Code, such as the authority to sign employment contracts.

(7) **Other Limits.** The authority granted in this section to sign Contract amendments does not override the limits on Contract amendments for Contracts awarded as small Procurements under C-047-0265 or intermediate Procurements under C-047-0270.

Amendments to small Procurements shall not increase the Contract Price to greater than \$6,000. Amendments to intermediate Procurements shall not exceed 25% of the original Contract Price or \$25,000, whichever is greater.

[Adopted by Order NO. 2005-34, enacted 2/24/05; amended by Order No. 2006-366, enacted 8-24-06; Amended by Order No. 2008-08, enacted 1/31/08; Amended by Order No. 2008-165, enacted 10/16/08; Amended by Order No. 2009-84, enacted 7/9/09; amended by Order No. 2010-21, enacted 3/18/10; Amended by Order No. 2012-41, enacted 6/7/12; amended by Order No. 2014-123, enacted 12/18/14; amended by Order No. 2015-124, enacted 12/10/15; amended by Ord. 03-2016, 8/11/16.]

#### **C-050-0200 Avoidance of Delay Costs**

(1) The County Administrator has the authority to sign amendments to Public Improvement Contracts, for contract amounts exceeding those set forth in C-050-0100, under the following conditions:

(a) The amendment modifies bid items that have been defined under the original Contract, or addresses Differing Site Conditions, and

(b) The time needed to seek approval from the Board may result in delay costs or claims payable to the contractor.

(2) A report shall be provided to the members of the Board following every use of the authority. The amendment shall be placed before the Board for review at the earliest opportunity. The authority granted in this section is in addition to the authority granted in Rule C-050-0100.

[Adopted by Order NO. 2005-34, enacted 2/24/05]

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