

RESOLUTION NO. 540

A RESOLUTION RELATING TO THE ESTABLISHMENT OF THE CANBY CITY COUNCIL AS THE LOCAL CONTRACT REVIEW BOARD PURSUANT TO REVISED STANDARDS AND REGULATIONS AND ESTABLISHING REVISED EXEMPTIONS FROM COMPETITIVE BIDDING.

WHEREAS, ORS 279.049 provides that the Attorney General of the State of Oregon shall prepare and maintain model rules of procedure appropriate for use by all public contracting agencies relating to bid procedures, advertisements, awarding of bids, retainage, claims, liens, bid security, payment of performance bonds, and other matters involving public contract; and

WHEREAS, the Director of the State Department of Oregon Department of General Services is directed by ORS 279.015 and ORS 279.017 to prepare standards relating to exemptions from competitive bidding; and

WHEREAS, pursuant to OAR 125-300-000(1), Local Political Subdivisions may adopt in whole or in part any of the public contract exemptions adopted by the Director of the Department of General Services; and

WHEREAS, the City of Canby, in accordance with Canby Municipal Code Section 2.16.020, had previously adopted the states model contracting rules as temporary rules for the City to follow until such time as, by resolution, the City adopted new rules to supersede any portion or all of the temporary rules; and

WHEREAS, the Attorney General for the State of Oregon and the Director of the Department of General Services have adopted revised standards relating to public contracting and exemptions from competitive bidding.

NOW THEREFORE BE IT RESOLVED BY THE CANBY CITY COUNCIL:

Section 1. The City of Canby hereby adopts the following revised procedures, requirements and exemptions for public contracting:

A. Standards for Public Bidding and Public Improvement Contracts. The Canby City Council, as the local contract review board for the City of Canby, shall act pursuant to the definitions, regulations and standards of Oregon Administrative Rules, Chapter 137, Division 30 and Division 40 as they now exist or may subsequently be amended relating to public bidding and public improvement contracts. The aforesaid Administrative Rules as they exist on the date of adoption of this resolution, which are set forth as Exhibit "A" are attached hereto and incorporated herein by reference.

B. Exemptions. The Canby City Council, acting as the local contract review board shall act pursuant to the powers and subject to the public contract exemptions, definitions, procedures and standards contained in OAR Chapter 125, Divisions 300-360, excluding Division 330, as they now exist or as they may subsequently be amended. The aforesaid Administrative Rules, as they exist on the date of adoption of this resolution, which are set forth as Exhibit "B" are attached hereto and incorporated herein by reference. In addition, contracts for the purchase of goods where competitive bids for the same goods have been obtained by the State

of Oregon or any other Oregon public contracting agency and the contract is to be awarded to the party to whom the contract was awarded by the State or public agency, are exempt from competitive bidding so long as the price of the goods is the same or lower than that paid by the State or public agency.

C. Appeal Disqualification. The person who has been disqualified as a bidder may appeal such disqualifications to the Canby City Council as provided in this section:

1. the person shall within three (3) business days after receipt of notice of disqualification, in writing notify the City Administrator that the person wishes to appeal the decision;
2. immediately upon receipt of such written notice of appeal, the City Administrator shall inform the Canby City Council;
3. upon receipt of appeal, the City Administrator shall notify the person appealing of the time and place of the hearing; and
4. the Canby City Council shall consider de novo the notice of disqualification, the record of the investigation made by the City Administrator and any events provided by the parties. The hearing shall be public and the appeal decided within ten (10) days after receiving the notification. The Canby City Council's decision and the reasons therefore shall be in writing.

ADOPTED by the Canby City Council this 2nd day of June, 1993.

ATTEST:


Scott Taylor, Mayor


Marilyn K. Perkett, City Recorder

DIVISION 30

PUBLIC BIDDING RULES

Definitions

137-30-000 For purposes of these rules the following definitions apply:

(1) "Bid": A competitive offer in which price, delivery (or project completion) and conformance to specification will be the predominant award criteria. When authorized by an exemption granted by the public contract review entity, bid also includes a proposal wherein a solicitation of competitive proposals or offers is utilized for procurement when specification and price will not necessarily be the predominant award criteria.

(2) "Bidder": A person who submits a bid in response to a public contracting agency's Invitation to Bid.

(3) "Proposer": A person who submits a proposal in response to a public contracting agency's Request for Proposals.

(4) "Bidding period": The span of time between the date of the invitation to bid and the time and date set for receipt of bids. A minimum of fourteen (14) calendar days shall be provided, unless a shorter time is deemed necessary in the public interest for a particular procurement.

(5) "Bid opening": The date, time and place set for opening of competitive bids.

(6) "Bid closing": The date and time announced as the deadline for the receipt of bids.

(7) "Lowest responsible bidder": The lowest bidder who has substantially complied with all prescribed public bidding procedures and requirements and who has not been disqualified by the public contracting agency under ORS 279.037. (ORS 279.029(1)).

(8) "Addenda to the bid documents": Additions or changes to the bid documents defined as addenda shall be labeled as such and distributed in accordance with these rules.

(9) "Descriptive literature": Materials submitted by prospective vendors to provide information concerning the products available in response to the bid.

(10) "Bid sample": A representative specimen of the item that will be available in response to the bid.

(11) "Contract release order": The document authorizing an additional purchase on an existing requirements contract or price agreement.

COMMENTARY: By statute these rules do not apply to procurements related to personal service contracts, however, many of the requirements of ORS Chapter 279 and these rules will apply to requests for proposals used to procure other goods and services. An exemption from competitive bidding does not exempt the contract from other statutory requirements. These rules are intended not to confuse this issue. Where it was felt to be appropriate, reference has been made to invitations to bid and requests for proposals, or to bids and proposals.

Stat. Auth.: ORS Ch. 279.049
Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Competitive Bidding CLACKAMAS LAW LIBRARY
137-30-005 Contracts issued by the public agency shall be awarded by competitive bidding except as otherwise exempted under the provisions of ORS 279.015, 279.017, 279.053 or 279.056.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Bids are Offers

137-30-007 (1) The bid constitutes the bidder's offer to enter into a contract which, if accepted by the public contracting agency, shall bind the bidder to a contract unless the bid is withdrawn prior to a bid opening under OAR 137-30-060.

(2) The bid shall constitute a "firm offer," unless bidders are specifically authorized to take exceptions or to leave terms open to negotiation by bid documents published under certain exemptions from the general requirement for "strict" competitive bidding such as the Request for Proposals exemption, OAR 123-310-025. Unless the taking of exceptions or post-award negotiation is authorized by the Invitation to Bid or Request for Proposals, each bid must constitute a complete offer, fully responsive to the bid invitation.

(3) Unless expressly authorized by the Invitation to Bid or the Request for Proposals, bidders shall not make their bids or proposals contingent upon the public contracting agency's acceptance of specifications or contractual terms that conflict with or are in addition to those advertised in the Invitation to Bid or Request for Proposals.

COMMENTARY:

-1- The statutory requirement for competitive bidding is intended for the benefit of the public, and not for the advantage of any particular bidder. *Judson Pacific-Murphy Co. v. Durkee*, 144 Cal App2d 377, 383, 301 P2d 97 (1956). This rule emphasizes that under a competitive contracting system that authorizes the rejection of any or all bids (ORS 279.025(2)(i), 279.035), no bidder or proposer has a legal right to compel the acceptance of its bid or proposal. Instead, the bid or proposal constitutes an offer which is not binding on the public contracting agency until the offer is finally accepted by the public contracting agency. Therefore, the mere notice of award to the "lowest responsible bidder" or "best" proposal does not constitute the formation of a contract.

-2- Conversely, the bid or proposal, if otherwise in substantial compliance with all prescribed bidding procedures, does result in a contract if the bid or proposal is not withdrawn prior to the time and date set for bid closing (OAR 137-30-060), and the public contracting agency has made a final decision to award the contract to the bidder or proposer. Therefore, unless the Invitation to Bid or the Request for Proposals expressly authorizes the taking of exceptions, or reserves the right to negotiate the contract terms or specifications, no terms in the advertisement or request may be changed by conditions stated in the bid or proposal. Generally, the time for vendors to seek changes in the specifications or contractual terms is prior to bid closing, as provided in OAR 137-30-050. Bidders and proposers run a serious risk that their bids or proposals will be rejected if they make their bids contingent on the public contracting agency's acceptance of changes in or additions to specifications or contract terms.

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Stat. Auth.: ORS Ch. 279.049
Hist.: JD 6-1990, f. & cert. ef. 7-23-90

Eligibility to Bid on Construction Contracts

137-30-008 A person shall not submit a bid or proposal to do work as a construction "contractor" as defined in ORS 701.005(2) unless that person is first registered with the Construction Contractors Board. Bids from persons who fail to comply with this requirement shall be deemed nonresponsive and be rejected, unless contrary to federal law.

Stat. Auth.: ORS Ch. 279.049
Hist.: JD 6-1990, f. & cert. ef. 7-23-90

Bid Documents

137-30-010 (1) The bid documents shall include the following:

(a) Instructions and information to bidders concerning the bid submission requirements, including the time and date set for opening of bids, the address of the office to which bids are to be delivered, and any other special information;

(b) Where applicable, the purchase description, specifications, delivery or performance schedule, inspection and acceptance requirements, and special evaluation factors; and

(c) The contract terms and conditions, including warranty and bonding or other bid security requirements, as applicable;

(d) All addenda issued by the public agency.

(2) Determination of contractual terms and conditions:

(a) The public agency is authorized to determine the contractual provisions, and terms and conditions of solicitations and contracts, provided such provisions, terms and conditions are not contrary to statutory or regulatory requirements.

(3) Terms and conditions applicable to public contracts:

(a) In addition to the Oregon preference requirement in ORS 279.021(1), and the reciprocal preference requirements of ORS 279.029(2) and (3), the public agency shall establish standard terms and conditions including those applicable as prescribed by ORS 279.310 to 279.575:

(A) Payment of laborers and materialmen; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279.312);

(B) Payment of claims by public officers (ORS 279.314);

(C) Hours of labor (ORS 279.316 and 279.338);

(D) Environmental and natural resources regulations (ORS 279.318);

(E) Payment for medical care and attention to employees (ORS 279.320);

(F) Voluntary termination of the contract (ORS 279.326);

(G) Suspension of the work (ORS 279.328 - 279.333);

(H) Maximum hours and overtime (ORS 279.334);

(I) Claims for overtime (ORS 279.336);

(J) Overtime requirement for local governments (ORS 279.340 and 279.342);

(K) Prevailing wage rates (ORS 279.348 - 279.365);

(L) Retainage (ORS 279.400 - 279.430 and 279.575);

(M) Contractor's bonds (ORS 279.526 and 279.536);

(N) Notice of claim (ORS 279.528);

(O) Labor and material liens (ORS 279.538 and 279.540);

(P) Liability in absence of bond (ORS 279.542);

(Q) Progress payments (ORS 279.575).

(b) Other terms, conditions and requirements applicable to public contracts include:

(A) Certification by contractor of compliance with the Oregon tax laws in accordance with ORS 305.385;

(B) Certification by contractor of nondiscrimination in obtaining required subcontractors in accordance with ORS 279.11. (See OAR 137-30-100(4));

(C) A provision substantially providing that: "The Contractor, its subcontractors, if any, and all employers working under this Agreement/Contract are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, which requires them to provide Workers' Compensation coverage for all their subject workers." (ORS 279.320(2)); and

(D) In cases where the contract calls for work as described in ORS 701.005(2) (i.e., construction work), certification by the "contractor" that the contractor is registered with the Construction Contractors Board in accordance with ORS 701.035 to 701.055. (Federal regulations may prohibit this requirement when federal funds are involved);

(E) Certification by the contractor that all subcontractors performing work as described in ORS 701.005(2) (i.e., construction work) will be registered with the Construction Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence work under the contract;

(F) A condition requiring the use of a certified inmate work force in accordance with ORS 279.319, if the contract is for the removal, abatement or demolition of asbestos in a state building;

(G) Any other requirement imposed by federal or state law, regulation, rule or ordinance which is applicable to the contract. ORS 279.056 provides that where federal funds are involved, federal laws, rules and regulations shall govern in case of conflict with any of the provisions of ORS 279.011 to 279.063.

(c) Such terms, conditions and requirements shall become an integral part of each contract.

(4) Special terms and conditions: The public agency also may establish special terms and conditions applicable to specified categories of contracts. Any special terms and conditions shall be included in the bid documents and become an integral part of those contracts.

(5) Compliance and exceptions to terms and conditions:

(a) Bidders are responsible for noting the terms and conditions included as applicable to each set of bid documents;

(b) By signing and returning the bid or proposal form, the bidder is acknowledging acceptance of and the intent to abide by the terms and conditions;

(c) A public agency has the right to reject any bid or proposal that takes exception to specifications or to contract terms unless the right to take exception is expressly granted in the

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Invitation to Bid or Request for Proposals. Bids or proposals which take exception to the specifications or contract terms, or which are made contingent upon the public agency's acceptance of different or additional specifications or terms, may be rejected because they are not responsive to the Invitation to Bid or the Request for Proposals;

(d) Any exceptions to the terms and conditions must be clearly stated in writing by the bidder in the signed returned bid or proposal. Exceptions to the terms and conditions become contractual obligations only upon written acceptance by the public agency.

COMMENTARY:

-1- Generally, a bidder or proposer who makes its bid or proposal contingent on the public agency's acceptance of materially differing terms or specifications must be rejected. See *Smith/Tug vs. Columbia-Pac. Towing*, 250 Or 612, 643-44, 443 P2d 205 (1968) (bidder's conditioning of bid on state agency's acceptance of additional contract terms that were advantageous to the bidder was a material variance from the bid invitation, and the resulting contract consequently was invalid).

-2- In some instances, a public contracting agency may authorize, in the Invitation to Bid or the Request for Proposals, the taking of exceptions. Additionally, when a public agency, pursuant to an exemption from "strict" competitive bidding, leaves certain specifications, terms or conditions open to negotiations, as is not uncommon under certain federal Request for Proposal processes, bidders may take exceptions or propose additional provisions. However, the general rule is that bidders must object to specifications or contract terms and conditions prior to bid closing, as provided in OAR 137-30-050. Thus, under the general rule, a public contracting agency must reject any bid or proposal which does not substantially comply with all prescribed public bidding procedures and requirements, including but not limited to, a bid or proposal which expressly or impliedly takes exception to such procedures or requirements.

-3- In compliance with the provisions of ORS 279.318 and paragraph (3)(a)(D) of this section, the following is a list of federal, state and local agencies of which the public agency has knowledge that have enacted ordinances or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that may affect the performance of the Contract:

-1- Federal Agencies:

- a- Agriculture, Department of
- A- Forest Service
- B- Soil Conservation Service
- b- Defense, Department of: Army Corps of Engineers
- c- Environmental Protection Agency
- d- Interior, Department of
- A- Bureau of Sport Fisheries and Wildlife
- B- Bureau of Outdoor Recreation
- C- Bureau of Land Management
- D- Bureau of Indian Affairs
- E- Bureau of Reclamation
- e- Labor, Department of: Occupational Safety and Health Administration

- f- Transportation, Department of
- A- Coast Guard
- B- Federal Highway Administration
- 2- State Agencies:

- a- Agriculture, Department of
- b- Environmental Quality, Department of

- c- Fish and Wildlife, Department of
- d- Forestry, Department of
- e- Geology and Mineral Industries, Department of
- f- Human Resources, Department of
- g- Land Conservation and Development Commission
- h- Soil and Water Conservation Commission
- i- State Engineer
- j- State Land Board
- k- Water Resources Board
- 3- Local Agencies:
- a- City Council
- b- County Court
- c- County Commissioners, Board of
- d- Port Districts
- e- Metropolitan Service Districts
- f- County Service Districts
- g- Sanitary Districts
- h- Water Districts
- i- Fire Protection Districts.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Public Notice

137-30-015 (1) Distribution. Bid documents and notices of the availability of bid documents shall be mailed or otherwise furnished to a sufficient number of bidders for the purpose of securing competition. Notices of availability shall indicate where, when, and for how long the bid documents may be obtained; generally describe the supply, service or construction desired; and may contain other appropriate information. The public agency may charge a fee or require a deposit for the bid documents.

(2) Advertising:

(a) Unless exempted, every notice of solicitation of bids shall be advertised. An advertisement for bids shall be published 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 public agency may determine to be necessary or desirable to ensure competition;

(b) All advertisements for bids shall state:

(A) The date and time after which bids will not be received; which date shall not be less than five (5) days after the date of the last publication of the advertisement;

(B) The date that prequalification applications must be filed if prequalification is a requirement;

(C) The character of the work to be done or the items to be purchased;

(D) The office where contract terms, conditions and specifications may be seen;

(E) The name title and address of the person designated to receive bids;

(F) The date, time, and place that bids will be publicly opened;

(G) That the bid may be rejected for not complying with all prescribed public bidding procedures and requirements;

(H) That any or all bids may be rejected for good cause upon a finding that it is in the public interest to do so;

(I) That the bid must include a statement concerning whether bidder is a "resident bidder," as defined in ORS 279.029;

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(J) Whether or not a contractor or subcontractor must be licensed, under ORS 468.883, to work with asbestos-containing materials.

(3) Posting of bid advertisement. A copy of each bid advertisement shall be posted at the business office of the public agency. Bidders may obtain a copy upon request.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90

Bid Preparation

Bid Preparation Instructions

137-30-020 (1) Bids shall be typed or prepared in ink and shall be signed in ink by the bidder or an authorized representative of the bidder. The public agency shall not accept telephonic facsimile bids or signatures.

(2) Bids shall be made on the bid form provided.

(3) Alterations or erasures, if any, shall be initialed in ink by the person signing the bid.

(4) Bids shall contain a fully executed bid package, including all required documents and descriptive literature.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Bidder Prequalification

137-30-025 (1) A public agency may require mandatory prequalification of bidders on forms prescribed by the Director of the State Department of General Services. When prequalification is required by the bid documents as a condition for bidding, the agency shall not consider the bid(s) of any prospective bidder who is not prequalified in accordance with the public agency's adopted rules and regulations.

(2) If a bidder is currently prequalified by either the State Department of Transportation or the State Department of General Services to perform contracts, the bidder shall be rebuttably presumed qualified to perform similar work for other public agencies. (ORS 279.047).

Stat. Auth.: ORS Ch. 279

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84

Bidder Submissions

137-30-030 (1) Bid samples and descriptive literature. Bid samples or descriptive literature may be required when it is necessary or desirable to evaluate required characteristics of the items bid. Bid samples will be returned in accordance with provisions contained in the bid documents.

(2) Identification of bids. To ensure proper identification and special handling, bids shall be submitted in a sealed envelope appropriately marked or in the envelope provided by the agency, whichever is applicable. The public agency shall not be responsible for the proper identification and handling of bids not submitted in the designated manner or format.

(3) Receipt of bid. It is the bidder's responsibility to ensure that bids are received by the public agency prior to the stated bid closing time.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Bid Security

137-30-035 (1) Public improvement contracts. Bid security not to exceed 10 percent of the base bid(s) shall be required for public improvement contracts where the amount of the contract exceeds \$10,000. The bid security shall be forfeited if the bidder fails to execute the contract promptly and properly if awarded. (ORS 279.031).

(2) Other public contracts. Bid security not to exceed 10 percent of the bid may be required by the public agency for other contracts in order to guarantee acceptance of the award. This requirement shall be stated in the bid documents.

(3) Contracts under \$10,000. Bid security for contracts of less than \$10,000 may be required by a public agency, but shall not be used to discourage competition and shall not exceed 10 percent of the bid.

(4) Form of bid security. The following forms of bid security will be accepted by the public agency:

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

(b) Cashier's check, certified check, or savings and loan secured check; or

(c) Annual surety bond filed with the public agency (except for public improvements contracts).

(5) Return of bid security. The bid security of all unsuccessful bidders shall be returned after a contract has been executed, or all bids have been rejected. The public agency may return the bid security of unsuccessful bidders after bid opening but prior to award, if the return does not prejudice bid award and provided that the security of at least the three lowest bidders is retained pending the execution of a contract.

COMMENTARY: A number of agencies have established procedures whereby an annual surety bond is filed with the public agency for bidding purposes in an amount sufficient to provide adequate bid security, pursuant to ORS 279.027, for all bids during the year for a particular bidder. The common practice is to file a surety bond for bid bond purposes in an amount of \$50,000 to \$100,000, which will cover 10 percent of the amount of the bid for the contract for any given number of bids that are outstanding with that agency at any given time. Public agencies are encouraged to develop procedures such as this which facilitate vendors submitting bids and not having to provide new bid bonds each time. This is especially true when vendors are doing a volume of business with a public agency such as the Department of General Services.

Stat. Auth.: ORS Ch. 279

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84

Pre-Bid Conferences

137-30-040 The public agency may hold pre-bid conferences to explain the procurement requirements or to conduct site inspections. As a condition for bidding, the public agency may require attendance at the pre-bid conference. Such conferences shall be announced to all prospective bidders in the bid documents. The pre-bid conference shall be held within a reasonable time after the bid documents have been issued, but sufficiently before bid closing to allow consideration

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of the conference results in preparing bids. Statements at the pre-bid conference shall not change the bid documents unless they are confirmed to all prospective bidders by means of a written addendum to the bid documents.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Brand Name Products

137-30-045 Product requirement by brand name prohibited. Specifications for public contracts shall not expressly or implicitly require any product by any brand name or mark, nor the product of any particular manufacturer or seller except pursuant to exemptions granted under ORS 279.017(2). For state agencies, exemptions under that statute include, but are not limited to:

(1) OAR 125-310-060 and 125-340-020, Copyrighted Materials.

(2) OAR 125-310-120 and 125-340-030, Single Seller of Product Required and Single Manufacturer or Compatible Products.

(3) OAR 125-340-010, Specification of Particular Brand Names or Products.

(4) Public agencies may identify products by brand names so long as "approved equal" or "or equal" is included in the bid documents.

COMMENTARY:

-1- Some agencies have developed procedures for approved equals and also have made an effort to obtain exemptions authorized by the Oregon Administrative Rules as outlined in this rule. It is recognized that there is tension between either setting forth an approved equal or exempting certain products from the public bidding process, or from the requirement that no specification of brand name or mark be made.

-2- This tension is caused by the statutory policy in ORS 279.029 that the bids be awarded to the lowest responsible bidder. ORS 279.023 also requires public agencies to make every effort to construct public improvements at the least cost to the public agency. This least cost policy carries over in all other types of public contracts. The public agency, and the citizens of Oregon who support it with their tax dollars desire to get the most value for the public dollar spent. However, in some circumstances it is necessary, in order to get the kind of quality demanded by the public, either to exempt certain classes of materials or to set forth preapproved equals.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Protest of Bid Specifications or Contract Terms

137-30-050 (1) Time for submission of protest: Unless a different deadline is specified in the Invitation to Bid or Request for Proposals, protests of bid specifications or contract terms shall be presented to the public agency in writing and in accordance with the following deadlines:

(a) Public improvement contract — ten (10) calendar days prior to bid closing;

(b) Other public contracts — five (5) calendar days prior to bid closing;

(c) Such protest or request for change shall include the reasons for protest or request, and any proposed changes to specifications or terms. No protest against award because of the content of bid specifications or contract terms shall be considered after the deadline established for submitting such protest.

(2) Extension of opening date. If any bid specification protest is received in accordance with section (1) of this rule, the bid opening date may be extended if the public agency determines an extension is necessary to allow consideration of the protest and issuance of any addenda to the bid documents.

(3) Identification of protest. Envelopes containing protests of bid specifications shall be marked as follows:

Bid Specification Protest Bid Number or Other Identification

COMMENTARY:

-1- As noted in the commentary to OAR 137-30-010(5), bids or proposals that contain or are contingent upon material changes in specifications or contract terms generally run the risk of being rejected as non-responsive to the bid or proposal documents. Therefore, if bidders or proposers find certain specifications or contract terms unacceptable, they must protest them or request changes within the time lines established by this rule; protests made at any other time will not be considered.

-2- The purpose of this requirement is to permit public agencies to correct, prior to the submission of bids or proposals, technical or contractual requirements that may be unlawful, improvident, or which unjustifiably may restrict competition. By permitting corrections prior to the submission of bids or proposals, this requirement eliminates the waste of resources inherent in post-selection protests and in the possible rejection of bids. In order to have their complaints or requests considered, bidders or proposers must submit them within the time established in this rule.

-3- A public contracting agency shall not be required to consider, at any subsequent time, a bidder's or proposer's objections to specifications or contract terms unless those objections have been presented in a timely manner under this rule.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Addenda to Bid Documents

137-30-055 (1) Form. Changes to bid documents shall be accomplished by addenda. The bidder shall acknowledge receipt of all addenda issued, either with the bid or separately prior to bid opening.

(2) Distribution. Addenda shall be sent to all prospective bidders known either to have obtained the bid documents or attended any mandatory pre-bid conference.

(3)(a) Timeliness. Addenda shall be issued within a reasonable time (five (5) days prior to bid closing) to allow prospective bidders to consider them in preparing their bids, but in no case less than 72 hours before the bid closing. If necessary, the public agency may notify prospective bidders of addenda by telegram, telephonic facsimile or

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telephone, followed by a confirming written addendum;

(b) In its discretion, the public agency may extend the bid closing date and time to allow prospective bidders to analyze and adjust to changes made by addenda. The public agency shall notify prospective bidders of the new closing date and time either in the addendum or in writing accompanying the addendum.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Pre-Opening Modification or Withdrawal of Bids

137-30-060 (1) Modifications. Once submitted, bids may be modified in writing prior to the time and date set for bid closing. Any modifications shall be prepared on the company letterhead, signed by an authorized officer, state that the new document supersedes or modifies the prior bid and be submitted in a sealed envelope, appropriately marked. The public agency shall not accept telegraphic modification, telephonic facsimile, or similar modifications. To ensure the integrity of the bidding process, the envelope containing any modifications to a bid shall be marked as follows:

Bid Modification

Bid Number or Other Identification

(2) Withdrawals:

(a) Bids may be withdrawn by written notification on company letterhead, signed by an authorized person, and received prior to the time and date set for bid closing. Bids also may be withdrawn in person, prior to the scheduled bid closing, upon presentation of appropriate identification;

(b) Unopened bids withdrawn under subsection (a) of this section, may be released to the bidder after voiding any date and time stamp used;

(c) Requests to withdraw mailed bids shall be marked as follows:

Bid Withdrawal

Bid Number or Other Identification

(3) Documentation. All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate bid file.

COMMENTARY:

-1- All of the rules on submission of bids by vendors recognize that the burden of submitting information and getting the bid in on time is on the vendor. No exceptions can be allowed to this requirement since one of the fundamentals of the public competitive bidding process is that all vendors be treated equitably. Once an exception is made to allow submission of a bid after the scheduled bid closing, there is no way to narrow that exception in such a manner that it will be applied fairly to all vendors. Therefore, a strict rule must be applied that prevents acceptance of any kind of bid or other pre-bid submission that is received after the time and date listed in the notification.

-2- Public agencies are encouraged to use a date and time stamp in order to verify the time and day of receipt of the bids. The official clock should be that of a

purchasing officer in charge of opening the bids, or some other identifiable time piece located in the purchasing office of the public agency.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Receipt, Opening, and Recording of Bids

137-30-065 (1) Receipt. Upon its receipt, each bid and modification shall be time-stamped or marked by hand but not opened, and shall be stored in a secure place until bid opening. If bids or modifications are opened inadvertently or are opened prior to the time and date set for bid opening because they were improperly identified by the bidder, the bids or authorized modification documents shall be resealed and stored for opening at the correct time. When this occurs, documentation of this procedure shall be placed in the bid file.

(2) Opening and recording. Bids and modifications shall be opened publicly, at the time, date, and place designated in the bid documents. To the extent practicable, the name of each bidder, the bid price(s), and such other information as considered appropriate shall be read aloud. On voluminous bids, the public agency may advise bidders, as part of the bid documents, that the bid items and prices will not be read aloud.

(3) Availability. Prior to award, and except to the extent the bidder designates trade secrets or other proprietary data to be confidential, the opened bids shall be available for public inspection. ORS 192.501(2). Application of the Oregon Public Records Law shall determine if the confidential information claimed to be exempt is in fact exempt from disclosure. In order to facilitate public inspection of the nonconfidential portion of the bid, material designated as confidential shall accompany the bid but shall be readily separable from it. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment shall be publicly available regardless of any designation to the contrary.

COMMENTARY:

-1- After opening the bids, public agencies need time prior to award to evaluate the bids that were submitted. This requirement is especially valid in cases where a large number of specifications have been included and the bids have been submitted in an alternative or deductive basis.

-2- However, the public agency must recognize that open bids shall be available for public inspection following bid closing to the extent the bids do not contain trade secrets that fall within the parameters of ORS 192.500(1)(b). Submitted bids are a matter of public record and public agencies should make every effort to make these available to interested members of the public.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Late Bids, Late Withdrawals, and Late Modifications

137-30-070 (1) Definition. Any bid received after the time and date set in the bid documents for receipt of bids is late. Any request for bid

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withdrawal or modification received after the time and date set for bid closing is late.

(2) Disposition. No late bids, late proposals, late modifications, or late withdrawals shall be considered.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Mistakes in Bids

137-30-075 (1) General. Clarification or withdrawal of a bid because of an inadvertent, nonjudgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. Except as provided in this rule, if the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a nonjudgmental mistake is permissible but only to the extent it is not contrary to the interest of the public agency or the fair treatment of other bidders.

(2) Mistakes discovered after bid closing but before award. This subsection prescribes procedures to be applied in situations where mistakes in bids are discovered after the time and date set for bid closing but before award:

(a) Minor informalities. Minor informalities are matters of form rather than substance that are evident from the bid documents, or are insignificant mistakes that can be waived or corrected promptly without prejudice to other bidders or the public agency; that is, the informality does not affect price, quantity, quality, delivery, or contractual conditions except in the case of informalities involving unit price. Examples include, but are not limited to the failure of a bidder to:

(A) Return the number of signed bids or the number of other documents required by the bid documents;

(B) Sign the bid form in the designated block so long as a signature appears in the bid documents evidencing an intent to be bound;

(C) Acknowledge receipt of an addendum to the bid documents, but only if:

(i) It is clear from the bid that the bidder received the addendum and intended to be bound by its terms; or

(ii) The addendum involved did not affect price, quantity, quality, or delivery.

(b) Mistakes where intended correct bid is evident. If the mistake and the intended correct bid are clearly evident on the face of the bid form, or can be substantiated from accompanying documents, the public agency may accept the bid. Examples of mistakes that may be clearly evident on the face of the bid form are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors. Mistakes that are clearly evident on the face of the bid form also may include instances in which the intended correct bid is made clearly evident by simple arithmetic calculations. For example, missing unit price may be established by dividing the total bid item by the quantity of units for that item, and a missing or incorrect total bid for an item may be established by multiplying the unit price by the quantity when those figures are available on the bid. For

discrepancies between unit prices and extended prices, unit prices shall prevail;

(c) Mistakes where intended correct bid is not evident. The public agency may not accept a bid in which a mistake is clearly evident on the face of the bid form but the intended correct bid is not clearly evident or cannot be substantiated from accompanying documents.

COMMENTARY: Bidders and proposers should be especially careful to avoid mistakes, omissions, and ambiguities in their submissions. Unless a public contracting agency can determine with reasonable certainty, exclusively from the face of the bid or proposal, the intended meaning of a bid or proposal item, the bid or proposal generally must be rejected as not complying with required bidding procedures. Additionally, ambiguous bids or proposals (those that reasonably can be read in more than one way) create serious problems in determining the bidder's or proposer's intent, and are vulnerable to rejection.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Time for Acceptance

137-30-080 Bids shall be valid and binding offers for thirty (30) days unless otherwise specified in the bid documents.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Extension of Time for Acceptance of Bid

137-30-085 Notwithstanding OAR 137-30-080, after opening bids, the public agency may request orally or in writing that bidders extend the time in writing during which the public agency may accept their bids.

Stat. Auth.: ORS Ch. 279

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84

Bid Evaluation and Award

137-30-090 (1) General. The contract, if awarded, is to be awarded to the lowest responsible bidder. Consistent with the provisions of the bid documents, and in the public interest as determined by the public agency, awards may be made by item, groups of items, or entire bid. The public agency reserves the right to reject any bid not in compliance with the bid documents or with all prescribed public bidding procedures (ORS 279.025(2)(i)), and to reject any or all bids upon a finding of the agency that it is in the public interest to do so (ORS 279.035).

(2) Special requirements. The bid documents shall set forth any special requirements and criteria which will be used to determine the lowest responsible bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the bid documents or public agency regulation.

(3) Product acceptability:

(a) The bid documents shall set forth the evaluation criteria to be used in determining product acceptability. The public agency may require the submission of bid samples, descriptive literature, technical data, or other material, and

may also provide for accomplishing any of the following prior to award:

(A) Demonstration, inspection or testing of a product prior to award for such characteristics as quality or workmanship;

(B) Examination of such elements as appearance, finish, taste, or feel; or

(C) Other examinations to determine whether the product conforms with specifications.

(b) The acceptability evaluation is conducted only to determine that a bidder's offering is acceptable as provided in the bid documents. Any bidder's product which does not meet the minimum requirements shall be rejected. Product rejections are not considered bidder disqualifications and are not grounds for appeal under ORS 279.043.

(4) Determination of lowest responsible bidder. Following determination of product acceptability as set forth in section (3) of this rule, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the public agency in accordance with the evaluation criteria set forth in the bid documents. Only objectively measurable criteria which are set forth in the bid documents shall be applied in determining the lowest responsible bidder. Examples of such criteria include, but are not limited to, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, and ownership or life cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs; but to the extent possible, such evaluation factors shall:

(a) Be reasonable estimates based upon information the public agency has available concerning future use;

(b) Treat all bids equitably; and

(c) Recognize that public policy requires acquisitions and public improvements to be accomplished at the least cost. ORS 279.023(1).

(5) Restrictions. Nothing in this section shall be deemed to permit contract award to a bidder submitting a higher quality item than that designated in the bid documents if such bidder is not also the lowest responsible bidder as determined under section (4) of this rule. Further, this section does not permit negotiations with any bidder.

COMMENTARY:

-1- Although section (4) of this rule suggests that price evaluation will be conducted only after product acceptability has been examined, nothing in this rule is intended to prescribe the order or timing of the evaluation of particular components of a bid or proposal. Frequently, in order to save resources, public contracting agencies will review price first, and then determine whether the apparent low bid or best proposal meets all product specifications. This promotes efficiency by minimizing the time spent in evaluating proposals or bids that do not appear to be competitive. A public contracting agency has discretion to evaluate bids and product acceptability in the order that best meets its needs, consistent with fairness to all bidders and proposers.

-2- Depending upon whether product acceptability or price is evaluated first, the public contracting agency must evaluate each bid or proposal (or the apparent low bid or proposal) and determine whether each bid or proposal substantially complied with all prescribed public bidding procedures and requirements. If two or

more bids substantially comply with such procedures and requirements, the public contracting agency must award the contract to the lowest responsible bidder. If two or more proposals substantially comply with all prescribed public bidding procedures and requirements, the public contracting agency must award the contract to the responsible proposer whose proposal best meets the terms, conditions, specifications and requirements which are expressly stated in, or necessarily implied from, the RFP.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Low Tie Bids

137-30-095 (1) Definition. Low tie bids are low responsive bids from responsible bidders that are identical in price, fitness, availability and quality and which meet all the requirements and criteria set forth in the bid documents.

(2) Award:

(a) Low tie bids are subject to the Oregon preference contained in ORS 279.021(1): "In all public contracts, the public contracting agency shall prefer goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal".

(b) Low tie bids that remain tied after application of the statutory Oregon preference shall be awarded according to the following sequence:

(A) Preference shall be given to the bidder whose principal offices or headquarters are located in Oregon;

(B) If a tie still remains after applying paragraph (A) of this subsection, award shall be made by drawing lots among any tied Oregon bidders. Such bidders shall be given notice and an opportunity to be present when the lots are drawn;

(C) If none of the tied bidders is located in Oregon, award of the contract shall be made by drawing lots.

COMMENTARY:

-1- The Oregon Preference Law has been the subject of great concern and controversy in the past. Pursuant to ORS 279.021, public contracting agencies are required to prefer goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal. This means that the Oregon Preference Law applies only when there is a tie bid.

-2- However, the statute does not require that the Oregon Preference Law be applied to goods manufactured out of Oregon but for a company whose headquarters are in Oregon. This sometimes can result in some interesting disparities and perceived unequal treatment. For example, a firm may be headquartered in Oregon and have all of its plants in Oregon except one, which is located in another state, and the goods submitted pursuant to the public contract might be from the out-of-state plant. Those goods would not qualify for the Oregon Preference Law. Unless the statute is modified, the Preference Law in Oregon is very narrow. However, note the reciprocal preference requirements of ORS 279.029(2) and (3). The Department of General Services maintains a list of states providing for instate preference.

Stat. Auth.: ORS Ch. 279.049

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Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Rejection of Individual Bids or Proposals

137-30-100 (1) General. This section applies to rejections, in whole or in part, of individual bids or proposals. In accordance with ORS 279.035, the public agency may reject in whole or in part, any bid or proposal not in compliance with all prescribed bidding procedures and requirements, and may reject for good cause any bid or proposal upon a written finding of the agency that it is in the public interest to do so.

(2) Reasons for rejection. Reasons for rejecting a bid or proposal include but are not limited to finding that:

(a) The bidder has not prequalified under ORS 279.039, or is disqualified under ORS 200.075 or 279.037; or

(b) The bidder has been declared ineligible by the Commissioner of the Bureau of Labor and Industries under ORS 279.361; or

(c) The bid is not responsive, that is, it does not conform in all material respects to bid document requirements, including all prescribed public bidding procedures and requirements; or

(d) The supply, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the bid documents or permissible alternates or other accept-ability criteria set forth in the bid documents; or

(e) The bidder is not capable of satisfying the terms and conditions of the public contract in a timely manner due to financial incapacity, inability to obtain bonding, loss of license, or other objective cause; or

(f) The bidder within the last 5 years has been found, in a civil, criminal or administrative proceeding, to have committed fraud, misrepresentation, price-rigging, unlawful anti-competitive conduct, or similar behavior; or

(g) The bidder has been determined responsible (i.e., adjudicated by a court, or as determined in writing by the contracting agency in the case of a public contract) for more than one breach of a public or private contract or contracts in the last 3 calendar years before the scheduled date of the bid opening; or

(h) The bid security has not been submitted or properly executed as required by the bid documents; or

(i) The bidder has not met the emerging small business, disadvantaged business, minority business and women business enterprise requirements, if any, established by the public agency, and has not made a good faith effort in accordance with ORS 200.075 and 279.059 to comply with the requirements prior to the time bids are opened; or

(j) The bidder has failed to certify in accordance with section (4) of this rule;

(k) Other circumstances of the particular bid, proposal, or bidder indicate that acceptance of the bid would impair the integrity of the selection process or result in an imprudent contract by the public contracting agency.

(3) Form of Business Entity. For purposes of this rule the corporate or business form of bidders shall be subject to scrutiny, so that previously-disqualified bidders, or their officers and directors,

may not by subterfuge, change of apparent ownership, or other adjustments in formal appearance, avoid application of this rule or of the disqualification provisions of ORS 279.037 to 279.045.

(4) The bidder shall certify as part of the bid documents accompanying the bid on a public contract that the contractor has not discriminated against minority, women or emerging small business enterprises in obtaining any required subcontracts.

COMMENTARY:

-1- Although public contracting agencies are authorized to reject bids that do not materially comply with the bid documents and with all prescribed bidding procedures, a bidder frequently will not receive notice of a defective bid in instances when that bid would not, in any event, have been a low bid. Rather than undertaking the additional task of rejecting the bids, public agencies frequently treat such bids simply as "losing" bids.

-2- Therefore, the fact that an unsuccessful bid or proposal was not rejected does not constitute a representation or indication by a public contracting agency that the bid was in compliance with the bid documents or with prescribed bidding procedures, and bidders or proposers cannot rely on the fact that earlier bids or proposals were not rejected as an indication that their bids or proposals were acceptable.

-3- For the rejection of individual bids or proposals otherwise complying with prescribed bidding procedures and requirements, for good cause and upon a finding of public interest see the commentary to OAR 137-30-102.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90

Rejection of all Bids or Proposals

137-30-102 (1) Bid rejection. All bids or proposals may be rejected for good cause upon a written finding by the agency it is in the public interest to do so. Notification of rejection of all bids or proposals, along with the good cause justification and finding of public interest, shall be sent to all who submitted a bid.

(2) Rejection criteria. Reasons for rejecting all bids or proposals include but are not limited to finding that:

(a) Due to the content of or error in the bid documents, including its terms, conditions or specifications, the solicitation process unnecessarily restricted competition for the public contract; or

(b) The price, quality, or performance presented by the lowest or best responsible bidder is, in the opinion of the public agency, too costly or of insufficient quality to justify acceptance of the bid or proposal; or

(c) Misconduct, error, or ambiguous or misleading provisions in the bid documents threaten the fairness and integrity of the competitive process; or

(d) Causes other than legitimate market forces threaten the integrity of the competitive procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and

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inadvertent or intentional errors in the bid documents.

COMMENTARY:

-1- Pursuant to ORS 279.035, a public agency may reject any or all bids for good cause upon a written finding by the public agency that it is in the public interest to do so. This does not allow arbitrary or discriminatory action on the part of the public agency, but does allow rejection of bids where flaws in the award criteria or other defects in the specifications have been discovered pursuant to the scrutiny generated by the bidding process.

-2- The agency shall create a written record of its reasons for bid rejection which provides a concise explanation of the reasons why such action is in the public interest.

-3- ORS 279.025(2)(i) and 279.035 confer broad discretion on public contracting agencies to reject all bids or proposals when the rejection is in the public interest. This statutory authority is a valuable protection against the establishment of questionable or legally vulnerable public contracts in cases in which the competitive procedure, due to apparent defects or other problems, is questionable. Bid rejection also may protect public agencies in instances in which bids or price proposals are higher than the funds budgeted and allocated to finance a particular contract. Additionally, bid rejection may protect a public agency from being required to contract for goods, services, or projects that, due to defects in the agency's specifications, will not meet the agency's needs. However, the rejection of bids frequently is uneconomical, because it wipes out efforts both of the public agency and of bidders or proposers in the preparation of bid documents.

-4- In the case of the rejection of individual bids even greater care needs to be taken. ORS 279.035 does allow public contracting agencies to reject any bid not in compliance with prescribed bidding procedures and the requirements of the bid documents. However, a rejection of individual bids for other reasons requires specific written findings by the agency that good cause exists and that such action is in the public interest.

Stat. Auth.: ORS Ch. 179, 279.049

Hist.: JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90

Protest of Award

137-30-104 (1) Notice of award. The written notice of award of the contract shall constitute a final decision of the agency to award the contract if no written protest of the notice of award is filed with the public contracting agency within fourteen (14) calendar days of the notice of award or such other period as provided in the agency's solicitation. If a protest is timely filed, the notice of award is a final decision of the agency only upon issuance of a written decision denying the protest and affirming the award. The notice of award and any written decision denying a protest shall be sent to every bidder or proposer who provided an address.

(2) Right to protest. Any actual bidder or proposer who is adversely affected or aggrieved by the public contracting agency's notice of award of the contract to another bidder or proposer on the same solicitation shall have fourteen (14) calendar days after notice of award to submit to the public contracting agency a written protest of the notice of award. The written protest shall specify the

grounds upon which the protest is based. The period of fourteen (14) calendar days in which to submit a written protest may be shortened or lengthened by the public contracting agency, as provided in the agency's solicitation. In order to be an adversely affected or aggrieved bidder or proposer with a right to submit a written protest, a bidder or proposer must itself claim to be eligible for award of the contract as the lowest responsible bidder or best proposer and must be next in line for award, i.e., the protester must claim that all lower bidders or better proposers are ineligible for award because they are nonresponsive or nonresponsible. A public contracting agency shall not entertain a protest submitted after the time period established in this rule or such different period as may be provided in the agency's solicitation.

(3) Authority to resolve protests. The head of the public contracting agency, or such person's designee, shall have the authority to settle or resolve a written protest submitted under section (2) of this rule, supra.

(4) Decision. If the protest is not settled or resolved by mutual agreement, the head of the public contracting agency, or such person's designee, shall promptly issue a written decision on the protest.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 6-1990, f. & cert. ef. 7-23-90

Negotiation With Bidders Prohibited

137-30-105 Unless a request for proposal is used, the public agency shall not negotiate with any bidder prior to award of a contract. After award of the contract, modifications to the contract shall be made with change orders of addenda to the contract and in accordance with the exemption rules of the applicable public contract review authority.

Stat. Auth.: ORS Ch. 279

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84

Bidder Disqualification

137-30-110 (1) Grounds for disqualification. As provided in ORS 279.037, the following are grounds for bidder disqualification:

(a) The person does not have sufficient financial ability to perform the contract. If a bond is required to ensure performance of a contract, evidence that the person can acquire a surety bond in the amount and type required shall be sufficient to establish financial ability;

(b) The person does not have equipment available to perform the contract;

(c) The person does not have key personnel available of sufficient experience to perform the contract; or

(d) The person has repeatedly breached contractual obligations to public and private contracting agencies.

(2) As provided in ORS 200.075, the following are grounds for suspension of a bidder's, contractor's or subcontractor's right to bid or participate in a public contract:

(a) If the person has entered into any agreement representing that a certified disadvantaged, minority women or emerging small business enterprise will be performing or supplying materials under a public improvement contract

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without the knowledge and consent of the certified enterprise;

(b) If the person exercises management decision making control over the internal operations, as defined by ORS 200.075(1)(b), of any certified disadvantaged, minority, women or emerging small business enterprise;

(c) If the person uses a disadvantaged, minority women or emerging small business enterprise to perform contracting services or provide supplies under a public improvement contract to meet an established DBE/MBE/WBE/ESB goal, when the enterprise does not perform a commercially useful function, as defined by ORS 200.075(3) in performing its obligations under the contract.

(3) Investigation. The public agency may make such investigation as is necessary to determine whether a person is qualified. If a bidder or prospective bidder fails to supply information promptly as requested by the public agency, such failure is grounds for disqualification.

(4) Trade secret. Any information voluntarily submitted by a bidder or prospective bidder pursuant to an investigation under section (2) of this rule or, in a prequalification statement required by ORS 279.039, or in a prequalification request submitted pursuant to ORS 279.041 shall be deemed a trade secret pursuant to ORS 192.501(2) if requested by the person submitting the information and verified to be a trade secret by the public agency.

(5) Notice of disqualification. The bidder or prospective bidder will be notified in writing by personal service or certified mail of the public agency's decision to disqualify the person from bidding with the public agency. The notice shall contain:

(a) The effective date of the disqualification and the effective period of disqualification;

(b) The grounds for disqualification from bidding; and

(c) A statement of the contractor's appeal rights and applicable appeal deadlines.

(6) Appeal of disqualification. If a contractor wishes to appeal the public agency decision to disqualify, the contractor must notify the public agency in writing within three (3) business days after receipt of the notification.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Cancellation of Invitations to Bid

137-30-115 (1) Cancellation in the public interest. An invitation to bid may be cancelled in whole or in part when it is in the public interest as determined by the public agency. The reasons therefor shall be made part of the bid file.

(2) Notice of cancellation. When an invitation to bid is cancelled prior to bid opening, notice of cancellation shall be sent to all holders of bid documents. Such notice of cancellation shall:

(a) Identify the invitation to bid;

(b) Briefly explain the reason for cancellation; and

(c) Where appropriate, explain that an opportunity will be given to compete on any resolicitation. (ORS 279.035).

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90

Disposition of Bids or Proposals if Bid Cancelled

137-30-120 (1) Prior to bid opening. When an invitation for bids is cancelled prior to bid opening, all bids received will be returned to bidders unopened, if submitted with a clearly visible return address. If there is no return address on the envelope, the bid will be opened to determine the source and then returned to sender.

(2) After bid opening. When all bids are rejected, the bids received shall be retained and become part of the public agency's permanent file.

Stat. Auth.: ORS Ch. 279

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84

Documentation of Award

137-30-125 (1) Basis of award. Following award, a record showing the basis for determining the successful bidder shall be made a part of the bid file.

(2) Contents of award record. The record shall consist of:

(a) Completed bid tabulation sheet; and

(b) Written justification for any rejection of lower bids.

Stat. Auth.: ORS Ch. 279

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84

Foreign Contractor (ORS 279.021)

137-30-130 If the amount of the contract exceeds \$10,000 and the contractor is a "foreign contractor", the contractor shall promptly report to the Oregon Department of Revenue on forms to be provided by the Department of Revenue the total contract price, terms of payment, length of contract and such other information as the Department of Revenue may require before final payment can be received on the contract. A copy of the report shall be forwarded to the agency. The public agency shall satisfy itself that the above requirements have been complied with before it issues final payment on the contract. For the purposes of this rule, a foreign contractor is one who is not domiciled in or registered to do business in the State of Oregon.

COMMENTARY: The submission of statements regarding the status of foreign contractors is recommended to be made as promptly as possible to the Oregon Department of Revenue. This should normally be accomplished within 60 days from the date of the execution of a contract. The Oregon Department of Revenue should be consulted for information in this regard. In order to avoid a claim for back corporate income taxes or appropriate withholding of wages to the State of Oregon, a prompt execution of this form is required.

Stat. Auth.: ORS Ch. 279

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84

Availability of Award Decisions

137-30-135 (1) Contract documents. A signed purchase order, price agreement, or contract document, as applicable, shall be sent to the successful bidder.

(2) Notification to unsuccessful bidders. Unsuccessful bidders need not be notified. Tabulations of awarded bids may be obtained for a nominal charge in person or by submitting to the public agency a written request, accompanied by payment, stating the bid number and enclosing a self-addressed, stamped envelope.

(3) Availability of bid files. Completed bid files shall be available for public review at the public agency.

(4) Copies from bid files. Copies of material from bid files, other than previously described tabulation sheets, may be obtained upon payment of a reasonable copying charge.

COMMENTARY:

-1- The Secretary of State rule OAR 166-40-060(2) includes the following requirements on retention of contract documents after award:

-a- For all service contracts the original must be kept for two years after the contract has been completely executed;

-b- Capital contracts must be kept permanently;

-c- Goods contracts must be kept for seven years after maturity;

-d- Intergovernmental and interagency agreements must be kept permanently.

-2- Any copies of the originals must be kept for two years after maturity in all of the categories listed above. These rules are binding on all state agencies and all political subdivisions of the State of Oregon.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Performance Security

137-30-140 (1) Public improvements contract. Except in emergencies, when the requirement may be waived pursuant to ORS 279.029(5), or unless the requirement is exempted pursuant to ORS 279.033, a performance bond in a sum equal to the contract price shall be required for all public improvement contracts in excess of \$10,000.

(2) Other public contracts. The public agency may require performance security for other public contracts. Such requirements shall be stated in the bid documents.

(3) Contracts under \$10,000. Performance bonds for a contract under \$10,000 may be required by a public agency, but shall not be used to discourage competition.

(4) Requirement for surety bond. A surety bond furnished by a surety company authorized to do business in Oregon is the only acceptable form of performance security unless otherwise specified in the bid documents.

(5) Time for submission. Upon request by the public agency, the apparent successful bidder must furnish the required performance bond within 10 days. Prompt submittal of the performance bond is required to ensure timely project initiation. Failure to furnish the bond prior to the deadline may result in rejection of the bid, forfeiture of bid security, and award to the next lowest responsible bidder.

COMMENTARY:

-1- Public agencies are encouraged to provide sufficient information in the bid documents regarding the requirements for acceptable security. ORS 279.029 requires that all contracts for public improvements include a performance bond. An exception from this

requirement is authorized under OAR 125-360-020 if the amount of the contract for the public improvement is less than \$10,000. Except for this exception, the bond, required by ORS 279.029, can be waived only in cases where an emergency exists or as provided in ORS 279.033.

-2- To declare such an emergency, all members of the governing board of the public contracting agency must concur. The standard for declaring an emergency is when the public contracting agency or public would suffer material injury by delay or other cause. Public agencies are advised to be cautious in this regard since under ORS 279.542, whenever a bond is not executed there is joint liability on the part of both the officers of the public agency which let the contract and the public body itself for payment of any liens which may be filed. This liability can include personal liability of the public officials. Extreme caution is recommended in the declaration of an emergency pursuant to ORS 279.029(5). All public agencies should be advised of the liability requirements imposed under Oregon law. In addition, ORS 279.542 appears to create this potential liability when the public agency required the bond for other than public improvement contracts and contracts under \$10,000. Therefore, once the bond is required, it should not be released until the period for filing claims has run.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Right to Audit Records

137-30-145 (1) Audit of cost or pricing data. The public agency may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data according to the terms of a contract to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, for which cost or pricing data are required, shall maintain such books and records that relate to such cost or pricing data for three (3) years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

(2) Contract audit. The public agency shall be entitled to audit the books and records of a contractor or any subcontractor under any contract or subcontract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three (3) years from the date of final payment under the prime contract and by the subcontractor for a period of three (3) years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing.

Stat. Auth.: ORS Ch. 279

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84

Right to Inspect Plant

137-30-150 (1) Time for inspection. The public agency may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded.

(2) Access to plant or place of business. As a condition of bidding, bidders agree that the public

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agency may enter a contractor's or subcontractor's plant or place of business during normal business hours for the following purposes:

(a) Inspect and/or test supplies or services for acceptance by the public agency pursuant to the terms of the bid;

(b) Investigate in connection with a bidder's application, a minority business certification, or bidder qualification.

(3) Contractual provisions. Contracts may provide that the public agency may inspect supplies and services at the contractor's or subcontractor's facility and perform tests to determine whether they conform to the bid documents, or, after award, to the contract requirements, and therefore are acceptable. Such inspections and tests shall be conducted in accordance with the terms of the contract.

(4) Procedures for trial use and testing. The public agency may establish operational procedures governing the testing and trial use of equipment, materials and the application of resulting information and data to specifications or procurements.

(5) Conduct of inspections:

(a) Inspectors. Inspections or tests shall be performed so as not to unduly delay the work of the contractor or subcontractor. No change of any provision of the specifications or the contract may be required by the inspector without written authorization of the public agency, unless otherwise specified in the bid documents. The presence or absence of an inspector shall not relieve the contractor or subcontractor from any requirement of the contract;

(b) Location. When an inspection is made in the plant or place of business of a contractor or subcontractor, such contractor or subcontractor

shall provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing;

(c) Time of testing or inspection. Inspection or testing of supplies and services performed at the plant or place of business of any contractor or subcontractor shall be performed at reasonable times during normal business hours.

(6) Inspection of construction projects. On-site inspection of construction shall be performed in accordance with the terms of the contract.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Contract Cancellation Procedures

137-30-155 (1) Grounds for cancellation. The public agency may cancel a contract for any violation of the provisions of the contract. Such provisions generally include, but are not limited to:

(a) Standard terms and conditions included in all contracts;

(b) Product or service specifications;

(c) Delivery or completion requirements; or

(d) Contracted pricing and price escalation/de-escalation clauses.

(2) No cancellation of a public contract shall, unless limited by the terms of the particular contract, restrict or abrogate any other remedy available to the public contracting agency that is provided either by law or under the particular contract.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

DIVISION 40

PUBLIC IMPROVEMENT CONTRACTS

Application

137-40-000 In addition to the requirements set forth in Division 30 of these rules the following rules apply to public improvement contracts.

Stat. Auth.: ORS Ch. 279

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84

Competitive Bidding

137-40-005 (1) Public improvement contracts, if awarded, shall be awarded by the public agency to the lowest responsible bidder as defined by statute, unless otherwise exempt under ORS 279.015, 279.017, 279.053 or 279.056.

(2) In addition to the requirements of ORS 279.025 and OAR 137-30-015, a public agency requesting bids for a public works project shall first determine whether the project requires a contractor licensed under ORS 468.883 to work with asbestos or asbestos-containing material. The public agency shall include in the bid advertisement a statement whether performance of the contract requires a contractor licensed to do asbestos abatement work under ORS 468.883. (ORS 468.889).

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Public Notice

137-40-010 (1) Trade newspaper advertisement. In addition to the requirements of OAR 137-30-015, public improvements having an estimated cost in excess of \$50,000 shall be advertised for bids in at least one trade newspaper of general state-wide circulation.

(2) Prevailing wage rate notice. If the following conditions apply, the public agency shall include in the public notice a statement that the bidder shall comply with the requirements of the prevailing wage law in ORS 279.350:

(a) The bid must be for public works as defined in ORS 279.348(3) which includes construction, reconstruction, major renovation or painting of roads, highways, buildings, structures and improvements of all types which are carried on or contracted for by any public agency to serve the public interest but do not include the reconstruction or renovation of privately owned property which is leased by a public agency;

(b) The contract price for the project exceeds \$10,000; and

(c) The project is not regulated under the Davis-Bacon Act (40 USC 276a). (ORS 279.357).

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the office of the Department of Justice.]

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Bid Evaluation and Award

137-40-015 Award of a public improvement contract shall be to the lowest responsible bidder on

the basis of total bid price. If the bid includes unit prices and extensions for estimated quantities, the total bid price for the purpose of comparing bids will be the total sum computed from bid quantities and the unit prices entered thereon by the bidder, with due adjustments being made for alternate items and any specified or authorized reductions, additions or changes. In case of conflict between a unit price and the corresponding extended amount, the unit price shall govern.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Contract Cancellation Procedures

137-40-020 (1) Termination due to circumstances beyond the control of the contractor (ORS 279.326, 279.328, 279.330, 279.332):

(a) Reasons for termination. The agency may, by a written order or upon written request from the contractor, terminate the contract or a portion thereof if any of the following occur:

(A) The contractor is prevented from completing the work for reasons beyond the control of the public agency;

(B) Completion of the project is beyond control of the contractor;

(C) Or for any reason considered by the public agency to be in the public interest (other than a labor dispute or any third party judicial proceeding relating to the work other than a suit or action filed in regards to a labor dispute). These reasons may include, but are not necessarily limited to, nonavailability of materials, phenomena of nature of catastrophic proportions or intensity, executive orders of the President related to national defense, congressional or state acts related to funding.

(b) Payment when contract is terminated. When the contract, or any portion thereof, is terminated before completion of all items of work in the contract, payment will be made for the actual items of work completed under the contract, or by mutual agreement, for items of work partially completed. No claim for loss of anticipated profits will be allowed.

(c) Responsibility for completed work if contract terminated. Termination of the contract or a portion thereof shall not relieve the contractor of responsibility for the work completed, nor shall it relieve the surety of its obligation for any just claims arising from the work performed.

(2) Termination of contract for default (ORS 279.333):

(a) If the contractor should persistently or repeatedly refuse to or fail to supply enough properly skilled workers or proper materials for the efficient execution of the project, or should fail to make prompt payment to subcontractors for material or labor, or persistently disregard laws, ordinances or the instructions of the public agency, or otherwise be guilty of a substantial violation of any provision of the contract, then the public agency, without prejudice to any other right or remedy and after giving the contractor or the surety seven (7) days written notice, may terminate the employment of the contractor and take possession of the premises and of all materials, tools and appliances thereon as well as all other materials whether on the premises or not, on which

the contractor has received partial payment. The public agency may finish the work by whatever method it may deem expedient.

(b) Required response to declaration of default. If the above action is taken, the contractor or the surety shall provide the public agency with immediate and peaceful possession of all of the materials, tools and appliances located on the premises, as well as all other materials whether on the premises or not, on which the contractor has received any progress payment. Further, the contractor shall not be entitled to receive any further payment until the work is completed. On the completion of the work, determination shall be made by the public agency of the total amount the contractor would have been entitled to receive for the work, under the terms of the contract, had the contractor completed the work. If the difference between said total amount and the sum of all amounts previously paid to the contractor, which difference will hereinafter be called the "unpaid balance", exceeds the expense incurred by the public agency in completing the work, including expense for additional managerial and administrative services, such excess will be paid to the contractor, with the consent of the surety. If, instead, the expense incurred by the public agency exceeds the unpaid balance, the amount of the excess shall be paid to the public agency by the contractor or the surety.

(c) Expense of completion. The expense incurred by the public agency shall be as determined and certified by the public agency.

(d) Refusal to perform. In addition to and apart from the above-mentioned right of the public agency to terminate the employment of the contractor, the contract may be cancelled by the public agency for any willful failure or refusal on the part of the contractor to perform faithfully the contract according to all of its terms and conditions; however, in such event neither the contractor nor the surety shall be relieved from damages or losses suffered by the public agency on account of the contractor's breach of contract.

(e) Remedies are cumulative. The public agency may, at its discretion, avail itself of any or all of the above rights or remedies and invoke any one of the above rights or remedies without prejudice and without precluding the public agency from subsequently invoking any other right or remedy set forth above or elsewhere in the contract.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Retainage (ORS 279.420, 279.435)

137-40-025 (1) Retainage of five percent. Unless the charter of the public agency contains provisions requiring retainage by the public agency of more than five percent of the contract price of the work completed, the amount to be retained from any given progress payment will be such that when added to the sum of amount previously retained, it will equal not more than five percent of the value of completed work. However, if the contract work is 50 percent completed and the work is progressing satisfactorily, the retainage may be reduced or eliminated on the remaining progress payments. Any reduction or elimination of retainage shall be

allowed only upon written application of the contractor, which application shall include written approval of the contractor's surety; except that when the contract work is 97-1/2 percent completed, the public agency may without application by the contractor, reduce the retained amount to 100 percent of the value of the contract work remaining to be done. If retainage has been reduced or eliminated, the public agency reserves the right in protecting its interests to reinstate at any time retainage from further progress payments.

(2) Alternatives to cash retainage. In lieu of cash retainage to be held by the agency, the contractor may select one of the following options:

(a) Deposit of securities:

(A) The contractor may deposit bonds or securities with the agency or in any bank or trust company to be held for the benefit of the public agency. In such event, the public agency shall reduce the retainage in an amount equal to the value of the bonds and securities. This reduction in retainage will be made in the progress payments made subsequent to the time the contractor deposits the bonds and securities.

(B) The value of the bonds and securities will be determined periodically by the public agency and the amount retained on progress payments will be adjusted accordingly. The bonds and securities deposited by the contractor shall be fully assigned to the public agency or be payable to the public agency on demand and shall be of a character approved by the Director of the Department of General Services, including but not limited to the following:

(i) Bills, certificates, notes or bonds of the United States.

(ii) Other obligations of the United States or its agencies.

(iii) Obligations of any corporation wholly owned by the Federal Government.

(iv) Indebtedness of the Federal National Mortgage Association.

(v) Time certificates of deposit or savings account passbooks issued by the commercial bank, savings and loan association, or mutual savings bank, duly authorized to do business in Oregon.

(vi) Corporation bonds rated A or better by a recognized rating service.

(vii) General obligation bonds of the State of Oregon or any political subdivision thereof.

(viii) General obligation improvement warrants issued pursuant to ORS 287.502.

(ix) Irrevocable letters of credit from a bank doing business in Oregon.

(C) At the time the public agency determines that all requirements for the protection of the public agency's interest have been fulfilled, all bonds and securities deposited as above provided will be released to the contractor.

(b) Deposit in interest-bearing accounts. Upon written request of the contractor, the public agency shall deposit any amounts withheld as retainage in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the public agency. Earnings on such account shall accrue to the contractor. When the public contracting agency is an agency of the State of Oregon, the account shall be established through the State Treasurer;

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(c) The public agency may, at its discretion, allow the contractor to deposit a surety bond in a form acceptable to the public agency in lieu of all or a portion of funds retained, or to be retained. The contractor shall accept like bonds from subcontractors and suppliers when the public agency allows surety bonds for retainage.

(3) Recovery of costs. If the public agency incurs additional costs as a result of the exercise of any of the options for retainage described herein, the public agency may recover such costs from the contractor by reduction of the final payment. As work on the contract progresses, the public agency shall, upon request, inform the contractor of all accrued costs.

COMMENTARY:

-1- When a contractor elects to deposit securities with a bank or trust company in lieu of retainage on public contracts, the securities will be held by the custodian in fully transferable form and under the control of the public agency.

-2- Non-negotiable securities so deposited shall have proper instruments attached to enable the public agency to effect transfer of title should the contractor be unable to fulfill the contract obligations.

-3- The custodian bank or trust company will issue a safekeeping receipt for the securities to the public agency. The receipt will describe the securities, the par value, the name of the contractor, and project number or other project identification.

-4- Unless otherwise mutually agreed, the value placed upon said securities shall be market value.

-5- Securities deposited in the manner described above will be released by the bank or trust company only upon the written instructions and authorization of the public agency.

-6- In lieu of the above, an escrow agreement mutually acceptable to the contractor and the public agency and the bank or trust company may be used.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Progress Payments (ORS 279.435)

137-40-030 (1) Request for progress payments. At a regular time each month, the contractor shall, if required by the contract documents, submit to the public agency a request for payment based upon an estimate of the amount of work completed and of the value of such completed work. This request shall also include an estimate of the amount of value of acceptable material to be incorporated in the completed work which has been delivered and acceptably stored. Upon verification and approval of the public agency, the sum of these values will be referred to as the "value of completed work". With these estimates as a base, a progress payment will be made to the contractor, which progress payment shall be equal to the value of completed work, less such amounts as may have been previously paid, less such other amounts as may be deductible or as may be owing and due to the public agency for any cause, and less an amount to be retained in protection of the public agency's interests.

(2) Progress payments do not mean acceptance of work. Progress payments shall not be construed as an acceptance or approval of any part of the work covered thereby, and they shall in no manner

relieve the contractor of responsibility for defective workmanship or material.

(3) Estimates for progress payments. The estimates upon which progress payments are based are not represented to be accurate estimates, and all quantities shown therein are subject to correction in the final estimate. If the contractor uses such estimates as a basis for making payments to subcontractors, this is at the contractor's own risk, and the contractor shall bear all loss that may result.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Final Inspection (ORS 279.435(3))

137-40-035 (1) Notification of Completion. When the contractor determines that all construction work on the project has been completed, the contractor shall so notify the public agency in writing. Within 15 days of receiving said notice, the public agency shall make an inspection of the project and project records. If, at such inspection, all construction provided for and ordered under the contract is complete and satisfactory to the public agency, and all certifications, bills, forms and documents have been submitted properly, such inspection shall constitute the final inspection.

(2) Instructions to complete the work. If, however, at any inspection, the agency finds that any work, in whole or in part, is unsatisfactory, or finds that all certifications, bills, forms and documents have not been submitted properly, the public agency shall within 15 days provide instructions to the contractor on outstanding requirements to complete the project. When the contractor determines that it has fully complied with, and executed the instructions, the contractor shall notify the public agency in writing. The public agency shall make another inspection within 15 days after such notice, and this inspection shall constitute the final inspection provided construction work has been completed satisfactorily. If the work has not been completed satisfactorily this procedure shall be repeated until it has been completed satisfactorily.

(3) Acknowledgment of acceptance. When the agency finds that all work required under the contract has been completed satisfactorily, the public agency shall acknowledge acceptance of the work in writing.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Final Estimate and Final Payment (ORS 279.435(3))

137-40-040 (1) Submission of final estimate. As soon as practicable after final inspection of the work under the contract, if unit prices were applicable, the public agency shall prepare a final estimate of the quantities of the various classes of work performed. Following a determination of the total amount due the contractor, and following final acceptance of the work by the agency, final payment shall be made to the contractor.

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(2) Set-off of prior payments. All prior partial estimates and payments shall be subject to correction in the final estimate and payment.

(3) Interest. Beginning 30 days after the date of final acceptance of the project by the public agency, the public agency shall pay to the contractor interest at the rate established by state statute on any money due and payable to the contractor.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 6-1990, f. & cert. ef. 7-23-90

Claims For Unpaid Labor or Supplies

137-40-045 (1) Right of action. As provided in ORS 279.526, a person, claiming to have supplied labor or materials for work on a public improvement contract let by the public agency for which the person has not been paid by the prime contractor or any subcontractor, has a right of action on the contractor's bond. This right arises if the person has not been paid in full and has given written notice of a claim pursuant to ORS 279.528 within 120 days of last providing labor or furnishing materials, or within 150 days of providing labor or furnishing materials if the claim is for a required contribution to a fund of any employee benefit plan.

(2) Notice of claim:

(a) To initiate a claim against the contractor's bond, a person shall file a notice of claim in the form and manner attached as Exhibit 1. Such notice must be given to the contractor and Secretary of State if the contract is with a state agency, or the clerk or auditor of the public agency which let the contract if the public agency is other than a state agency.

(b) Any notice of claim shall include at a minimum the following information:

- (A) Name and address of the claimant;
- (B) Name of prime contractor;
- (C) Title of project and contract date;
- (D) Name of the public agency;

(E) Name of bonding company (may be obtained from public agency);

(F) Name of contractor or subcontractor to whom labor or material supplied.

(3) Response to notice of claim. Upon receipt of such notice of claim, the public agency shall:

- (a) Send acknowledgment to claimant;
- (b) Send copy of notice to prime contractor;
- (c) File copy of Notice with bonding (surety) company.

(4) Referral to surety company. If the contract has been completed and all funds disbursed to the prime contractor, all claims shall be referred to the surety company for resolution. The state agency or other public agency shall not arrange for second payments directly to subcontractors or suppliers for work already paid for by the public agency.

(5) Discretionary payment of claim. If the contract is still in force, the state agency or other public agency may, in accordance with ORS 279.314, pay a valid claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due to the contractor under the contract.

(6) Liability for claim. If the state agency or other public agency chooses to make such a payment as provided in ORS 279.314, the contractor or the contractor's surety shall not be relieved from obligation with respect to any unpaid claims.

COMMENTARY: Referral of claims by unpaid material suppliers and laborers to the surety for disposition will allow an expeditious manner of settling the validity of the claims, and avoid the situation where a public agency is ruling on whether a claim is valid without knowing the underlying circumstances regarding both delivery and performance of the subcontractor.

Stat. Auth.: ORS Ch. 279.049

Hist.: JD 3-1984, f. 9-27-84, ef. 10-1-84; JD 3-1987, f. & ef. 5-18-87; JD 6-1990, f. & cert. ef. 7-23-90

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Exhibit 1
(137-40-045)

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To: (Insert Secretary of State or name of the public agency, and
contractor)

NOTICE IS HEREBY GIVEN that the undersigned, (insert name of subcontractor or supplier), a (corporation, partnership, sole proprietorship, etc.), as claimant, has a claim for (labor performed by the claimant, materials supplied by the claimant, etc.), generally consisting of (brief description) in the sum of \$ _____ against the bond taken from (name of prime contractor), as principal, and (name of bonding company), as surety, for the construction of the (title of project) at (name of agency), (city), Oregon, said contract dated (insert date) by and between (name of public agency), and (name of prime contractor), as Contractor. Such material or labor was supplied to (name of contractor or subcontractor).

(Insert a brief description of the work concerning which the bond was taken.)

DATED this _____ day of _____, 19 ____.

By: _____
(claimant's name and title)

EXHIBIT "A"
1 - Exhibit

(January, 1988)

PUBLIC CONTRACT EXEMPTIONS

DIVISION 300

INTRODUCTION AND DEFINITIONS

[ED. NOTE: Chapter 690, Oregon Laws 1983, Section 20 abolished the Public Contract Review Board (OAR Chapter 127) and transferred those responsibilities to the Department of General Services.]

Purpose and Statutory Authority

125-300-000 (1) Purpose. These rules prescribe public contract exemptions for all state agencies and those local political subdivisions that have contracted with the Department of General Services to serve as their public contract review authority as provided in OAR 125-10-005. These rules may be adopted in whole or in part by any political subdivision public contract review authority.

(2) Statutory Authority. These rules are authorized by ORS 279.015(2) and 279.017(2).

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Definitions

125-300-001 As used in this Chapter, unless the context requires otherwise:

(1) "Department" means the Department of General Services.

(2) "Director" means the Director of the Department of General Services.

(3) "Public agency" or "Public contracting agency" means any agency of the State of Oregon or any political subdivision thereof authorized by law to enter into public contracts and any public body created by intergovernmental agreement.

(4) "Public contract" means any purchase, lease or sale by a public agency of personal property, public improvements or services other than agreements which are for personal service.

(5) "Requirements contract" means an agreement in which the vendor agrees to supply all the purchaser's requirements that arise for an item or items within a specified time period.

(6) "Price agreement" means the same as requirements contract defined above.

(7) "Service" means work performed to meet a demand, especially work that is not connected with manufacturing a product.

(8) "Service Contract" means a contract that calls primarily for a contractor's time and effort rather than for an end product.

(9) "Request for Proposal" means the solicitation of competitive proposals, or offers, to be used as a basis for making an acquisition, or entering into a contract when specification and price will not necessarily be the predominant award criteria.

(10) "Public contract review authority" means a local contract review board created pursuant to ORS 279.055 or the Department of General Services if the local political subdivision has contracted with the Department to serve as its public contract review authority as provided in OAR 125-10-005. For State of Oregon agencies, the review authority is the Director of the Department of General Services.

(11) "Personal property" means everything subject to ownership which is not real property and has exchangeable value.

(12) "Personal service contracts" means the types of contracts defined in OAR 125-310-092(1).

(13) "Invitation to bid" means the solicitation of competitive offers in which specification, price and delivery (or project completion) will be the predominant award criteria.

(14) "Competitive bidding" means the issuing of invitations to bid which follow the formal process for advertising, bid, and bid opening required by ORS Chapter 279.

(15) "Competitive quotes" means the solicitation by the public contracting agency of offers from competing vendors. The solicitation may be by advertisement or by the public contracting agency initiating a request to vendors to make an offer. The solicitation and the offer may be in writing or oral.

(16) "Construction Manager/General Contractor" means a method of public works contracting that centers on utilization of a Construction Manager, who coordinates and manages the building process, provides general contractor expertise, performs value engineering and is a member of the construction team with the owner, architect/engineers and other consultants as the project may require.

Stat. Auth.: ORS Ch. 279.015(2) & 283.060

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84; GS 2-1991(Temp), f. & cert. ef. 1-15-91; GS 5-1991, f. & cert. ef. 4-9-91

[ED. NOTE: The text of Temporary Rules is not printed in the Oregon Administrative Rules Compilation. Copies may be obtained from the adopting agency or the Secretary of State.]

Exemptions

125-300-010 All public contracts shall be based upon formal competitive bidding except the following:

(1) Contracts made with other public agencies or the federal government.

(2) Contracts which are for personal services and are covered by OAR 125-310-092.

(3) Contracts specifically exempt under the provisions of the rules in Divisions 310 through 360 of this Chapter.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

DIVISION 310

GENERAL EXEMPTIONS

Life Cycle Costing

125-310-015 (1) In determining the lowest responsible bidder, in the award of a contract, a public contracting agency may use the concept of life cycle costing if it complies with section (2) of this rule. As used in this rule, life cycle costing means determining the cost of a product for its useful life.

(2)(a) Prior to the time of writing specifications for the product, the public contracting agency shall identify those factors which will have cost implications over the life of the product;

(b) The Invitation to Bid shall set out clearly the factors and methodology to be used in life cycle cost adjustments;

(c) At or after the formal bid opening, the results of life cycle costing adjustments shall be applied to the base bid, and the bidder whose total bid results in the lowest ownership cost, taking into account the life cycle costing adjustments, shall be considered the lowest responsible bidder.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Contracts Under Certain Dollar Amounts

125-310-020 (1) Public contracting agencies may, in their discretion, let public contracts not to exceed \$25,000 for the purchase of goods, materials, supplies and services without formal competitive bidding, if the agency has determined that the awarding of the contract without formal competitive bidding will result in cost savings and the following conditions are complied with:

(a) The contract is for a single project, and is not a component of or related to any other project;

(b) When the amount of the contract does not exceed \$2,500, the public contracting agency should, where feasible, obtain competitive quotes;

(c) When the amount of the contract is more than \$2,500, but less than \$25,000, the public contracting agency shall obtain a minimum of three competitive quotes. The public contracting agency shall keep a written record of the source and amount of the quotes received. If three quotes are not available, a lesser number will suffice provided that a written record is made of the effort to obtain the quotes;

(d) Agencies are to abide by ORS 279.835, regarding Qualified Rehabilitation Facilities, and seek to identify and contact at least three Minority or Women firms, if available, when pricing goods and services under this rule. A list of firms is maintained by the Advocate for Minority, Women and Emerging Small Business Enterprise.

(2) Public contracting agencies may, in their discretion, let public contracts for trade related projects, i.e., construction, maintenance, repair, or similar labor and materials contracts without formal competitive bidding if the agency has determined that the awarding of the contract without formal competitive bidding will result in cost savings and the following conditions are complied with:

(a) The contract is for a single project, and is not a component of or related to any other project;

(b) When the amount of the contract does not exceed \$2,500, the public contracting agency should, where feasible, obtain competitive quotes;

(c) When the amount of the contract is more than \$2,500, but less than \$25,000, except as provided in subsection (d) of this section the public contracting agency shall obtain a minimum of three competitive quotes. The public contracting agency shall keep a written record of the source and amount of the quotes received. If three quotes are not available, a lesser number will suffice provided that a written record is made of the effort to obtain the quotes;

(d) When the contract is for maintenance or repair of roads, highways or parking lots and is less than \$25,000, the public contracting agency may let the contract without formal competitive bidding if a minimum of three competitive quotes are obtained. The public contracting agency shall keep a written record of the source and amount of the quotes received. If three quotes are not available, a lesser number will suffice provided a written record is made of the effort to obtain the quotes;

(e) When the contract is a public improvement contract of less than \$50,000, and the bidders are being drawn exclusively from a list of certified Emerging Small Businesses maintained by the Advocate for Minority, Women and Emerging Small Business, the public contracting agency may let the contract without formal competitive bidding after a good faith effort to obtain a minimum of three competitive quotes. To obtain maximum exposure for all firms and guard against favoritism, care shall be taken to obtain quotes from different firms each time the list is used. The public contracting agency shall keep a written record of the source and amount of the quotes received. A lesser number of quotes will suffice provided a written record is maintained of the effort to obtain three quotes.

Stat. Auth.: ORS 200.090, 279.015(2), 279.053, 279.840, & 283.060

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84; GS 14-1990(Temp), f. & cert. ef. 6-5-90; GS 21-1990, f. & cert. ef. 11-14-90; GS 25-1990, f. & cert. ef. 11-27-90

[ED. NOTE: The text of Temporary Rules is not printed in the Oregon Administrative Rules Compilation. Copies may be obtained from the adopting agency or the Secretary of State.]

Request for Proposal

125-310-025 Public contracting agencies may, at their discretion, use request-for-proposal competitive procurement methods subject to the following conditions:

(1) Contractual requirements are stated clearly in the solicitation document.

(2) Evaluation criteria to be applied in awarding the contract and the role of an evaluation committee are stated clearly in the solicitation document. Criteria used to identify the proposal that best meets the public contracting needs may include but are not limited to cost, quality, service, compatibility, product reliability, operating efficiency and expansion potential.

(3) Solicitation document clearly states all complaint processes and remedies available.

(4) Solicitation document states the provisions made for vendors to comment on any specifications which they feel limit competition.

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(5) The selection process shall not inhibit competition or encourage favoritism and will result in cost savings to the state. The above shall be documented as findings in the contract administration record.

Stat. Auth.: ORS 279.015(2) & 283.060

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84; GS 3-1990, f. & cert. ef. 1-12-90

Request for Proposal — Construction Manager/General Contractor

125-310-026 Public contracting agencies may seek individual or class exemptions from the Director of the Department of General Services to use request-for-proposal procedures, in accordance with the requirements of OAR 125-310-025, for the selection of construction manager/general contractor firms (CM/GC) who will be required to establish guaranteed maximum prices for constructing public improvements, subject to the following conditions:

(1) Contractual requirements are stated clearly in the solicitation document (OAR 125-310-025(1)). The contract shall describe the methods by which the CM/GC shall competitively select other contractors and subcontractors to perform the work of the improvement. Further, the contract shall describe completely the methods by which the CM/GC and its affiliated or subsidiary entities, if any, may compete to perform the work of the improvement; such methods shall include, at a minimum, public opening of sealed bids at a preannounced time and place.

(2) Evaluation criteria to be applied in selecting the CM/GC firm are stated clearly in the solicitation document (OAR 125-310-025(2)). Criteria used to identify the CM/GC firm which best meets the public contracting needs may include but are not limited to cost, quality, experience relevant to the improvement to be constructed, and time required to commence and complete the improvement.

(3) The public contracting agency shall prepare written findings to support the use of the CM/GC contracting method and submit them to the Director of the Department of General Services for approval. The findings must show compliance with paragraphs (a) and (b) of section (2) of ORS 279.015. The public contracting agency shall retain the findings and make them available upon request. These findings shall address as many of the following items as are applicable:

(a) The public contracting agency has competitively bid a public improvement project and failed to receive a responsive, responsible bid within the cost estimate established by the agency or its consultant. There are de facto cost savings from not redesigning and/or rebidding the project;

(b) There are expected substantial savings on direct construction costs;

(c) The owner needs to have use of the project within the stated project schedule and there will be program and cost consequences if the required use is delayed;

(d) The technical complexity or unique character of the project requires the coordination of multiple disciplines;

(e) The use of value engineering through cooperation among the architect/engineer,

contractor and owner is important to the project's delivery on time and within budget;

(f) There are other factors which demonstrably affect cost.

(4) Notwithstanding the requirement to have the findings described in section (3) of this rule, approved by the Director of the Department of General Services, the director hereby finds that the Department of General Services, the Department of Corrections and the Oregon State System of Higher Education possess the organizational capability to employ the Request for Proposal — Construction Manager/General Contractor method in their discretion. This discretion is subject to the following conditions: The above agencies shall prepare written findings to support the use of the CM/GC contracting method. The findings must show compliance with paragraphs (a) and (b) of section (2) of ORS 279.015 and address section (3) of this rule. The public contracting agency shall retain the findings and make them available upon request. In all other respects, the Department of General Services, the Department of Corrections and the Oregon State System of Higher Education shall follow the requirements of this rule as set forth above.

Stat. Auth.: ORS 279.015(2) & 283.060

Hist.: GS 3-1991, f. & cert. ef. 1-15-91; GS 11-1992, f. & cert. ef. 4-27-92

Emergency Contracts

125-310-030 (1) Pursuant to ORS 279.015(3) and (4), public contracting agencies may, in their discretion, let public contracts without formal competitive bidding if an emergency exists and the emergency consists of circumstances creating a substantial risk of loss, damage, interruption of services or threat to public health or safety that could not have been reasonably foreseen and requires prompt execution of a contract to remedy the condition.

(2) The governing body of a public contracting agency may, by order, resolution or other official action appropriate to its governing law and practices, declare the existence of the emergency stating with specificity, either in the order resolution or other documentation of official action, or in the minutes or record of its official proceedings, the emergency conditions necessitating the prompt execution of the contract.

(3) The chief executive of a public contracting agency or another officer authorized by the agency may declare the existence of the emergency, which shall authorize the agency to enter into an emergency contract with a price under \$25,000. The officer must make written findings describing the emergency conditions necessitating prompt execution of the contract.

(4) Any contract awarded under this exemption shall be awarded within 60 days following declaration of the emergency unless an extension is granted pursuant to ORS 279.015(4).

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84; GS 2-1988, f. 6-22-88, cert. ef. 6-24-88

Emergency Contracts Under ORS 279.015(2)

125-310-032 (1) Public contracting agencies

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may enter into public contracts without competitive bidding when circumstances that could not reasonably be anticipated necessitate the prompt establishment and performance of the contract in order to preserve public funds, property, or the uninterrupted provision of government services. In exercising its authority under this exemption, the agency shall:

(a) To the extent reasonable under the circumstances, encourage competition by attempting to make informal solicitations or to obtain informal quotes from potential suppliers of goods or services;

(b) Make written findings describing the circumstances that require the prompt performance of the contract and of the harm anticipated to result from failing to establish the contract on an expedited basis;

(c) Record the measures taken under subsection (a) of this section to encourage competition, the amounts of the quotes or proposals obtained, if any, and the reason for selecting the contractor.

(2) An agency shall not contract pursuant to this exemption in the absence of a substantial risk of loss, damage, or interruption of services that would occur if contract performance awaited the time necessary, given the complexity of the project, to solicit, receive and analyze bids or proposals.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 3-1988, f. 6-22-88, cert. ef. 6-24-88

Equipment Repair and Overhaul

125-310-035 (1) Contracts for equipment repair or overhaul may be let without formal competitive bidding, 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.

(2) If the contract exceeds \$10,000, the public contracting agency shall document in its procurement file the reasons why competitive bids or quotes were deemed to be impractical.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Contracts for Price Regulated Items

125-310-040 Public contracting agencies may, without competitive bidding, contract for the direct purchase of goods or services where the rate or price for the goods or services being purchased is established by federal, state, or local regulatory authority.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Laboratory and Medical Supplies

125-310-045 Public contracting agencies are not required to purchase the following specified laboratory and medical supplies on the basis of a single award to the lowest responsible bidder, but instead may purchase different brands of the same item by awarding contracts, after competitive bidding, to the lowest responsible bidder for each

brand. The laboratory and medical supplies affected by this rule are:

(1) Drugs, biologicals, blood fractions, and blood components;

(2) Intravenous solutions and associated supplies for administration;

(3) Microbiologicals, biochemicals, and diagnostic reagents;

(4) Surgical dressings;

(5) Heart valves;

(6) E.E.G., E.K.G., electrodes, charts, and associated supplies;

(7) Sterilizing wraps;

(8) Catheters, medical tubes, and associated supplies;

(9) Surgical and orthopedic instruments;

(10) Hearing aids;

(11) Pacemakers;

(12) Dental supplies;

(13) Laboratory small package chemicals;

(14) Biology supplies.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Gasoline, Diesel Fuel, Heating Oil, Lubricants and Asphalts

125-310-055 Public contracting agencies are exempt from formal competitive bidding requirements for the purchase of gasoline, diesel fuel, heating oil, lubricants and asphalts if the agency seeks competitive quotes from a majority of vendors in the area, makes its purchase from the least expensive source, and retains written justification for the purchase made.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Copyrighted Materials

125-310-060 If the contract is for the purchase of copyrighted materials and there is only one known supplier available for such goods, the public contracting agency may contract for the purchase of the goods without competitive bidding.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Periodicals

125-310-068 Public contracting agencies may purchase subscriptions for periodicals, including journals, magazines, and similar publications without competitive bidding.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Items for Resale by Public Educational Agency Student Stores

125-310-070 Public educational agencies operating student stores may, without competitive bidding, purchase personal property for resale within the stores.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Purchases of Used Personal Property

125-310-075 Public contracting agencies may

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purchase used personal property for \$10,000 or less without competitive bidding if the agency has determined that the direct purchase without competitive bidding will result in cost savings. For purchases of used personal property over \$10,000, three competitive quotes shall be obtained. If three quotes are not available, a written record must be made of the attempt to obtain quotes.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Advertising Contracts

125-310-080 Public contracting agencies may purchase advertising without competitive bidding.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Investment Contracts

125-310-090 Public contracting agencies may, without competitive bidding, contract for the purpose of the investment of public funds or the borrowing of funds by a public agency when such investment or borrowing is contracted pursuant to duly enacted statute, ordinance, charter, or constitution.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Personal Service Contracts

125-310-092 (1) Personal service contracts are not, according to the definition of "public contract" in ORS 279.011(5), subject to the competitive bidding provisions of ORS Chapter 279. Rather, personal service contracts, except those for architectural, engineering and related services as described in ORS 279.712(2), are subject to the provisions of ORS 291.021 and OAR Chapter 122. Pursuant to ORS 279.051(2), this rule describes a method for distinguishing between personal service contracts and public contracts, particularly service contracts, and provides examples of contracts or classes of contracts which are or are not personal service contracts.

(2) A public contracting agency may, subject to an analysis and determination of appropriateness in accordance with subsection (2)(a) through (c) of this rule, enter into a personal service contract with an independent contractor without competitive bidding under ORS Chapter 279 when the agency needs to have a personal service performed which requires the contractor to exercise a high degree of technical skill or professional judgment and expertise:

(a) The nature of the tasks to be performed, the needs of the public contracting agency and the interests of the public form the basis for distinguishing between personal service contracts and public contracts. Hence, if:

(A) The public contracting agency requires a product or service for which the agency has developed or is reasonably able to develop, respectively, adequate design and/or performance specifications; and

(B) Selecting a contractor on the basis of lowest price would be likely to meet the agency's needs, then the tasks should be performed pursuant to a public contract let in accordance with the

competitive bidding provisions of ORS Chapter 279. Conversely, if a public contracting agency is reasonably unable to develop adequate design and/or performance specifications but must instead have the assistance of the contractors training, knowledge and expertise to develop a scope of work statement and selecting the contractor on the basis of lowest price would be unlikely to meet the agency's needs, then the tasks would most appropriately be performed under a personal service contract. Such a personal service contract should be entered into in accordance with the provisions, as the case may be, of ORS 291.021 or 279.712(2). In determining whether its needs will be met through award of a personal service contract rather than a public contract, the public contracting agency should consider whether selecting the contractor on the basis of qualifications rather than lowest price will result in the agency obtaining the best value for its money.

(b) A personal service contract is appropriate where the contract is awarded primarily on the basis of the contractors qualifications, including but not limited to, such criteria as experience, training, knowledge and expertise, technical skill, creativity, artistic ability, performance history, and demonstrated ability to exercise sound professional judgment. Price will be, at most, a secondary criterion for awarding a personal service contract;

(c) A personal service contract is not appropriate where price is or should be the primary selection criterion. A public contract, in contrast to a personal service contract, will be awarded primarily on the basis of price; criteria such as experience, training, knowledge and expertise, technical skill, creativity, artistic ability, performance history, and demonstrated ability to exercise sound professional judgment, which may be taken into account during the selection process, will be of only secondary importance. Unless otherwise statutorily excepted, a public contract must be awarded based on:

(A) Competitive bidding pursuant to ORS 279.015(1); or

(B) An alternative competitive process under ORS 279.015(2).

(3) Personal service contracts may include, but are not limited to, the following:

(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; physician or dentist; registered professional engineer; appraiser or surveyor; passenger aircraft pilot; aerial photographer; timber cruiser; data processing consultant or broadcaster;

(b) Contracts for services as an artist in the performing or fine arts, including but not limited to persons identified as photographer, filmmaker, 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 and human custodial care services.

(4) The following are not personal service contracts:

(a) Contracts, even though in a professional

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capacity, if 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, including a contract with a temporary service or personnel agency, to supply labor which is of a type that can generally be done by any competent worker, e.g., data entry, key punch, janitorial, security guard, crowd management, crop spraying, laundry, and landscape maintenance service contracts;

(c) Contracts for trade-related activities considered to be labor and material contracts;

(d) Contracts for services of a trade-related activity, to accomplish routine, continuing and necessary functions, 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.

Stat. Auth.: ORS 279.011, 279.051(2), 279.712(2) & 283.060
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84; GS 3-1992, f. & cert. ef. 2-3-92

Single Seller of Product Required

125-310-120 Subject to the requirements of OAR 125-340-030, public contracting agencies may purchase without competitive bidding if there is only one seller of a product of the quality required, or if the efficient utilization of existing equipment or supplies requires specification of a compatible product for which there is only one seller.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Food Service Contracts

125-310-135 (1) For purposes of this rule food service means a contract in which the contractor agrees to perform for a public contracting agency all of the following functions: the purchase, preparation, and service of meals and related services.

(2) Contracts for food services may be let without formal competitive bidding subject to the following conditions:

(a) Prior to the selection of a contractor, the public 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.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Employee Benefit Insurance

125-310-139 Public contracting agencies may purchase employee benefit insurance without competitive bidding

Stat. Auth.: ORS Ch. 179 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Insurance Contracts

125-310-140 Contracts for insurance where

either the annual or aggregate premium exceeds \$5,000 must be let by formal competitive bidding or by one of the following procedures:

(1) Agent of Record: The public contracting agency may appoint a licensed insurance agent ("agent of record") to perform insurance services in connection with more than one insurance contract. Among the services to be provided is the securing of competitive proposals from insurance carriers for all coverages for which the agent of record is given responsibility:

(a) Prior to the selection of an agent of record, the public contracting agency shall make reasonable efforts to inform known insurance agents in the competitive market area that it is considering such selection. These efforts shall include a public advertisement in at least one newspaper of general circulation in the area where the contract is to be performed. The advertisement shall generally describe the nature of the insurance that the public contracting agency will require. If the amount of the annual premium for insurance, other than employee benefits insurance is likely to exceed \$10,000 per year, such notice shall also include a public advertisement in at least one insurance trade publication of general circulation in the state;

(b) Any appointment period shall not exceed three years. Agents may serve more than one appointment period. Agents must qualify for appointment prior to each period as if each appointment period were the first;

(c) In selecting an agent of record, the public contracting agency shall select the agent(s) most likely to perform the most cost-effective services.

(2) Specific Proposals for Insurance Contracts: The public contracting agency may solicit proposals from licensed insurance agents for the purpose of acquiring specific insurance contracts subject to the following conditions:

(a) The public contracting agency shall make reasonable efforts to inform known insurance agents in the competitive market area of the subject matter of the contract, and to solicit proposals for providing the services required in connection with the contract. Such efforts shall include public advertisements in at least one newspaper of general circulation in the area where the public contracting agency is located. If the amount of annual premium for insurance, other than employee benefits insurance is likely to exceed \$10,000 per year, such notice shall also include a public advertisement in at least one insurance trade publication of general circulation in the state;

(b) The public contracting agency shall select an agent on the basis of the most competitive offer considering coverage, premium cost, and service to be provided.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Affirmative Action Contracts

125-310-145 Public contracts may be let without competitive bidding if the letting of the contract is pursuant to a specific affirmative action plan. Affirmative action is a program designed to insure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age, or physical or mental handicap, including, but not limited to,

personnel practices of contractors, "set-aside" programs and minority business enterprises.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Contract Amendments (Including Change Orders and Extra Work)

125-310-150 Any contract amendment for additional work including change orders, extra work, field orders, or other change in the original specifications which increases the original contract price, may be made with the contractor without competitive bidding subject to the following conditions:

(1) The original contract was let by competitive bidding, unit prices or bid alternates were provided that established the cost for additional work, and a binding obligation exists on the parties covering the terms and conditions of the additional work.

(2) The amount of the aggregate cost increase resulting from all amendments shall not exceed 20 percent of the initial contract. Contracts for the renovation or remodeling of buildings may have aggregate amendments not exceeding 33 percent of the initial contract. Amendments made pursuant to section (1) of this rule are not included in computing the aggregate amount under this section.

Stat. Auth.: ORS 279.015(2) & 283.060
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84; GS 22-1990, f. & cert. ef. 11-14-90; GS 24-1990, f. & cert. ef. 11-27-90

Purchases of Hospital and Medical Supplies and Equipment

125-310-205 Public contracting agencies which are members of legally established purchasing cooperatives are exempt from the requirements of competitive bidding and the requirements contract provisions of OAR 125-310-300 on purchases of hospital and medical supplies and hospital and medical equipment through the cooperative.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Equipment and Supplies Used in Intercollegiate or Interscholastic Athletic Programs

125-310-210 Public contracting agencies are exempt from the prohibition in ORS 279.017 from requiring products by brand name or make or the products of particular manufacturers or sellers in purchasing and contracting for equipment and supplies used in intercollegiate or interscholastic athletic programs. The agency shall use as a minimum the request-for-proposal process (OAR 125-310-025) and shall utilize procedures that will maintain the integrity of ORS 279.015.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Purchase of Ocean Going Vessels

125-310-215 Public contracting agencies are exempt from the requirements of competitive bidding for purchases made for its ocean going vessels when the ships are in other than home port.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Oregon Counties; Ballots, Ballot Pages, and Ballot Cards

125-310-225 Oregon Counties are exempt from competitive bidding requirements for the printing of ballots, including ballot pages and labeling of ballot cards.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Purchases of Cadaveric Organs

125-310-230 Public contracting agencies are exempt from competitive bidding requirements for the purchase of cadaveric organs.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Radio and Television Contracts Used in Athletic Programs

125-310-240 (1) Public contracting agencies are exempt from the requirements of competitive bidding for radio and television services provided athletic programs. As an alternative to competitive bidding, the agencies shall as a minimum use the request-for-proposal process (OAR 125-310-025) and request proposals from all interested vendors of such services. The request for proposal shall include minimum qualifications specifications and shall invite the interested vendors to propose other ancillary services.

(2) Each ancillary service shall be accompanied by a dollar value which reflects current purchase price for the service and a description of its use and application. Contracts may be awarded for not more than three years.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Requirements Contracts

125-310-300 Public contracting agencies may enter into requirements contracts whereby it is agreed to purchase requirements for an anticipated need at a pre-determined price providing the following conditions are complied with:

(1) The contract must be let by competitive procurement process pursuant to the requirements of these rules.

(2) The term of the contract including renewals does not exceed three years.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Purchases Under Requirements Contracts

125-310-310 (1) When the price of goods and services has been established by a requirements contract pursuant to OAR 125-310-300, public contracting agencies may purchase the goods and services from the supplier without subsequent competitive bidding.

(2) One public contracting agency may use the requirements contract entered into by another public contracting agency when a formal inter-agency agreement exists between the two agencies.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Purchases Under Federal Contracts

125-310-315 (1) When the price of goods and services has been established by a contract with an agency of the federal government pursuant to a federal contract award, public contract agencies may purchase the goods and services from the supplier without subsequent competitive bidding. In exercising this authority under this exemption, the agency shall:

(a) Include in the contract file a letter or memoranda from the appropriate federal agency granting permission to the public contracting agency to purchase under the federal contract;

(b) Include in the contract file documentation showing the cost savings to be gained from anticipated purchases from the federal contract.

(2) An agency shall not contract pursuant to this exemption in the absence of a substantial cost savings to be realized by using this alternative purchasing method.

(3) Purchases may only be made under this rule if they are within the delegated authority of the agency or if there has been a specific delegation of authority to do so granted to the agency by the Department of General Services, Purchasing Division.

Stat. Auth.: ORS 279.015(2) & 283.060

Hist.: GS 4-1990(Temp), f. & cert. ef. 2-9-90; GS 11-1990, f. & cert. ef. 5-4-90

[ED. NOTE: The text of Temporary Rules is not printed in the Oregon Administrative Rules Compilation. Copies may be obtained from the adopting agency or the Secretary of State.]

Specific Exemptions

125-310-320 (1) Public contracting agencies may request a ruling from their appropriate public contract review authority exempting a particular contract or contracts from the bidding requirements of ORS 279.015 which are not otherwise exempted under these rules. The request shall contain the following:

(a) The nature of the project;

(b) Estimated cost of the project;

(c) A narrative description of the cost savings anticipated by the exemption from competitive bidding and the reasons competitive bidding would be inappropriate;

(d) Proposed alternative contracting and purchasing practices to be employed; and

(e) The estimated date by which it would be necessary to let the contract.

(2) The review authority may require such additional information as is deemed necessary to determine whether a specific contract is to be exempt from competitive bidding.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Oil or Hazardous Material Removal

125-310-330 (1) Public contracting agencies may enter into public contracts without competitive bidding when ordered to cleanup oil or hazardous waste pursuant to the authority granted the Department of Environmental Quality (DEQ) under ORS Chapter 466, especially ORS 466.605 through 466.680, and this order necessitates the prompt establishment and performance of the contract in order to comply with the statutes regarding spill or release of oil or hazardous material that have created an emergency condition. Comprehensive cleanup rules are set forth at OAR 340-122-205 to 340-122-360. In exercising its authority under this exemption the agency shall:

(a) To the extent reasonable under the circumstances, encourage competition by attempting to make informal solicitations or to obtain informal quotes from potential suppliers of goods or services;

(b) Make written findings describing the circumstances requiring cleanup or a copy of the DEQ order ordering such cleanup;

(c) Record the measures taken under subsection (a) of this section to encourage competition, the amount of the quotes or proposals obtained, if any, and the reason for selecting the contractor selected.

(2) An agency shall not contract pursuant to this exemption in the absence of an order from the Department of Environmental Quality to cleanup a site with a time limitation that would not permit hiring a contractor under the usual competitive bidding procedures.

Stat. Auth.: ORS 279.015(2), (3) & 283.060

Hist.: GS 5-1990(Temp), f. & cert. ef. 2-9-90; GS 12-1990, f. & cert. ef. 5-4-90

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**OREGON ADMINISTRATIVE RULES
CHAPTER 125, DIVISION 320 — GENERAL SERVICES DIVISION**

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PUBLIC CONTRACT EXEMPTIONS**DIVISION 320****INFORMATION SYSTEM CONTRACTS****Data and Word Processing Contracts**

125-320-010 Contracts for acquisition of data and word processing hardware and systems software may be let using alternate competitive procurement methods subject to the following conditions:

(1) If the contract amount does not exceed \$25,000, the public contracting agency shall, as a minimum, follow informal competitive procurement methods. Prior to selection of a vendor, reasonable efforts will be made to solicit proposals from three or more vendors. Justification of award shall be documented and become a public record of the agency.

(2) If the contract amount exceeds \$25,000, the public contracting agency may use the request for proposal process (OAR 125-310-025) and shall solicit written proposals in accordance with the requirements of the Model Public Contract Rules. Solicitations shall be requested from appropriate vendors appearing on lists compiled by the agency or by advertising in an appropriate trade publication of general circulation when required by statute. The agency shall document the evaluation and award process, which will be part of the public record justifying the award.

(3) If the amount of the contract exceeds \$500,000, in addition to the requirements of section (2) of this rule, the public contracting agency shall provide vendors an opportunity to review the evaluation of their proposals before final selection.

Stat. Auth.: ORS 279.015(2) & 283.060

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84; GS 12-1992, f. & cert. ef. 5-22-92

Telecommunications Systems Contracts

125-320-020 (1) Contracts for acquisition of telecommunications system hardware and software may be let using alternate competitive procurement methods subject to the following conditions:

(a) If the contract amount does not exceed \$25,000, the public contracting agency shall as a minimum obtain competitive quotes. Prior to selection of a vendor reasonable efforts will be made to solicit proposals from three or more vendors. Justification of award shall be documented and become a public record of the agency;

(b) If the contract amount exceeds \$25,000, the public contracting agency may use the request-for-proposal process (OAR 125-310-025) and shall solicit written proposals in accordance with the requirements of the Model Public Contract Rules. Solicitations shall be requested from appropriate vendors appearing on lists compiled by the agency or by advertising in an appropriate trade publication of general circulation when required by statute.

(2) The telecommunications solicitation authorized in subsection (1)(b) of this rule shall:

(a) State the contractual requirements in the solicitation document;

(b) State the evaluation criteria to be applied in awarding the contract and the roles of any

evaluation committee. Criteria that would be used to identify the proposal that best meets the public contracting agency's needs may include, but are not limited to cost, quality, service, compatibility, product reliability, operating efficiency, and expansion potential;

(c) State the provisions made for vendors to comment on any specifications which they feel limit competition.

Stat. Auth.: ORS 279.015(2) & 283.060

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84; GS 12-1992, f. & cert. ef. 5-22-92

Telecommunications Services

123-320-025 (1) The intent of this administrative rule is for public contracting agencies to secure the most competitive, cost-effective telecommunications services, while meeting service performance requirements and reducing unnecessary administrative processing.

(2) "Telecommunications Services" means the lease or rental of the use of voice and data transmission facilities or services, or of central office services, but does not include acquisition of switch or station equipment or acquisition or installation of wire and cable.

(3) In determining the appropriate procurement method for telecommunications services, the public contracting agency will determine whether competition exists. In determining competition, the agency may consider the following factors:

(a) The extent to which alternative providers exist in the relevant geographic and service market. The relevant market will vary from service category to service category and cannot be predetermined in advance. For example, an alternative long distance provider might offer services in Portland, but not in Medford, or the rest of the state;

(b) The extent to which alternative services offered are comparable or substitutable in technology, service provided, and performance. For example, if the 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 agency's interests in consistency and continuity of services throughout its service area, volume discounts, and centralized management. For example, to be considered for the State of Oregon's provider, any long distance provider must be able to support the State's centralized automated billing requirements. The 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 agency may solicit the information either through informal telephone or written contacts, or through a formal Request for Information.

(4) Upon determination that competition does not exist for the relevant service and geographical area, the agency may proceed to secure the service on a sole source basis, as described in OAR 125-310-120, and following all applicable rules and procedures.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84; GS 5-1986(Temp), f. & ef. 6-26-86; GS 9-1986, f. & ef. 12-22-86

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CHAPTER 125, DIVISION 320 — GENERAL SERVICES DIVISION

[ED. NOTE: The text of Temporary Rules is not printed in the Oregon Administrative Rules Compilation. Copies may be obtained from the adopting agency or the Secretary of State.]

Office Copier Purchases

125-320-030 (1) Public contracting agencies may enter into multiple price agreements or requirements contracts for either the purchase or lease of office copying equipment. Except for this multiple award exemption, such agreements shall

otherwise conform to the requirements of OAR 125-310-300.

(2) In exercising this exemption the public agency shall fully consider the operating capabilities, limitations and cost of each brand or model and select the brand which will produce the best combination of performance and cost per copy for each application.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

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CHAPTER 125, DIVISION 330 -- DEPARTMENT OF GENERAL SERVICES

DIVISION 330

STATE AGENCY SPECIFIC

Office of the Secretary of State; Signs for Polling Places

125-330-010 The Office of the Secretary of State is exempt from competitive bidding requirements for the purchase of signs for the identification of polling places.

Stat. Auth: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Commission for the Blind "Snap Pack" Packaging System

125-330-020 The Commission for the Blind is exempt from competitive bidding requirements for the purchase of equipment and materials involved in the "Snap Pack" packaging system, developed by the Volvo Company of Sweden, for use by the Oregon Industries for the Blind.

Stat. Auth: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Purchases of Alcoholic Liquor for Resale

125-330-030 In the purchase of alcoholic liquor for resale, the Oregon Liquor Control Commission is exempt from the requirements of competitive bidding and the statutory restriction on the purchase of a product by brand name.

Stat. Auth: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Department of Human Resources Purchases of Perishable Food Service Supplies

125-330-040 The Mental Health and Developmental Disability Services Division of the Department of Human Resources is exempt from

the requirements of competitive bidding when purchasing perishable food service supplies for the sandwich project operated by patients in the Psychiatric Program of the Oregon State Hospital.

Stat. Auth.: ORS Ch. 279.015(2), 279.019 & 283.060
Hist.: GS 5-1989(Temp), f. & cert. ef. 8-31-89; GS 7-1990, f. & cert. ef. 2-28-90

[ED. NOTE: The text of Temporary Rules is not printed in the Oregon Administrative Rules Compilation. Copies may be obtained from the adopting agency or the Secretary of State.]

Department of Parks and Recreation Agreements with State Park Cooperative Associations

125-330-050 The Department of Parks and Recreation is exempt from the requirements of competitive bidding when entering into agreements with Cooperative Associations pursuant to ORS 390.120 through 390.150, ORS 184.619 and administrative rules specifically addressing this subject.

Stat. Auth.: ORS Ch. 279.015(2), 279.019 & 283.060
Hist.: GS 8-1990, f. & cert. ef. 2-28-90

Travel Information Council Sign Panel Purchase Program

125-330-060 The Travel Information Council is exempt from public contract competitive bidding requirements when acquiring logo sign panels and backboards to be installed on Oregon Highway right-of-ways to the extent such logo sign panels and backboards are paid for entirely by private businesses.

Stat. Auth.: ORS Ch. 279.015(2) & 283.060
Hist.: GS 16-1990(Temp), f. & cert. ef. 7-24-90; GS 20-1990, f. 11-14-90, cert. ef. 12-14-90

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OREGON ADMINISTRATIVE RULES
CHAPTER 125, DIVISION 340 — GENERAL SERVICES DIVISION

PUBLIC CONTRACT EXEMPTIONS

DIVISION 340

BRAND NAMES OR MARKS

Specifications of Particular Brand Names or Products

125-340-010 (1) Specifications for public contracts shall not expressly or implicitly require any product of any particular manufacturer or seller except pursuant to an exemption under OAR 125-310-060 (Copyrighted Materials), 125-340-030 (Single Manufacturer or Compatible Products), 125-340-040 (Product Prequalification), or 125-340-050 (Brand Name or Mark Exemption Applications).

(2) If there is no other practical method of specification, public contracting agencies may designate a particular brand name, make, or product "or equal", but this practice should be avoided whenever practicable.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Copyrighted Materials

125-340-020 Public contracting agencies may specify a specific copyrighted product. This exemption does not include patented or trade mark goods.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Single Manufacturer or Compatible Products

125-340-030 (1) If there is only one manufacturer or seller of a product of the quality required, or if the required product is data processing equipment which will be used for research where there are requirements for exchange of software and data with other research establishments, or if the efficient utilization of the existing equipment or supplies requires a compatible product of a particular manufacturer or seller, a public contracting agency may specify such particular product subject to the following conditions:

(a) The product 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 public contracting agency has made reasonable effort to notify all known vendors of competing or comparable products of the intended specifications and invited such vendors to submit competing proposals;

(c) If the purchase does not exceed \$25,000, such notice and invitation may be informal;

(d) If the amount of the purchase exceeds \$25,000, 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 reasonably opportunity to make proposals.

(2) If the amount of the purchase exceeds \$25,000 and is not also pursuant to the data and

word processing exemption, OAR 125-320-010, the public contracting agency shall document its actions in the bid file. Such documentation shall include:

(a) A brief description of the proposed contract or contracts;

(b) A detailed description of the reasons why the product and/or seller was selected and any competing products and/or sellers that were rejected. The description shall also include the efforts taken by the public contracting agency to notify and invite proposals from competing vendors.

(3) If the public contracting agency intends to make several purchases of the product of a particular manufacturer or seller for a period not to exceed two years, it may so state in the documentation required by subsection (1)(b) and section (2) of this rule, and such documentation shall be sufficient notice as to subsequent purchases.

Stat. Auth.: ORS 279.015(2) & 283.060

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84; GS 12-1992, f. & cert. ef. 5-22-92

Product Prequalification

125-340-040 (1) When it is impractical to create specific design or performance specification for a type of product to be purchased, a public contracting agency may specify a list of approved products by reference to particular manufacturers or sellers in accordance with the following product prequalification procedure:

(a) The agency has made reasonable efforts to notify all known manufacturers or vendors of competitive products of its intention to accept applications for inclusion in its list of prequalified products. Notification shall include advertisement in a trade journal of state-wide distribution when possible. In lieu of advertising, an agency may notify vendors and manufacturers appearing on the appropriate list maintained by the Department;

(b) The agency permits application for prequalification of similar products up to 15 days prior to advertisement for bids on the product.

(2) If an application for inclusion in a list of prequalified products is denied, or an existing prequalification revoked, the agency shall notify the applicant in writing. The applicant may appeal to the appropriate contract review authority.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Brand Name or Mark Exemption Applications

125-340-050 A public contracting agency may apply for and receive a brand name or mark exemption ruling from the appropriate contract review authority for current and contemplated future purchases. Applications shall contain the following information:

(1) A brief description of the contract or contracts to be covered. The description should include contemplated future purchases.

(2) The brand name, mark, or product to be specified.

(3) The reasons the agency is seeking the exemption.

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CHAPTER 125, DIVISION 340 — GENERAL SERVICES DIVISION

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Conditions of Exemptions

125-340-060 The public contract review authority may grant exemptions if any of the following conditions are met:

(1) The exemption is not likely to encourage favoritism in public contracts or substantially diminish competition and will result in cost savings.

(2) There is only one manufacturer or seller of the product of the quality required, or efficient utilization of existing equipment or supplies requires acquisition of compatible equipment or supplies.

(3) The exemption is requested for the purchase of a particular product to be used in an experimental project.

Stat. Auth.: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

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CHAPTER 125, DIVISION 350 — DEPARTMENT OF GENERAL SERVICES

DIVISION 350

PROPERTY DISPOSITION

Auction Sales of Personal Property

125-350-010 Personal property may be sold at auction if the agency responsible for the sale determines that the auction contemplated will probably result in a higher net return than if the property were sold by competitive written bid.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Sales of Personal Property

125-350-015 Public contracting agencies may sell personal property, including recyclable or reclaimed materials, without formal competitive bidding if the agency has determined that a negotiated sale will result in increased net revenue and the following conditions are complied with:

(1) The personal property has been made available to other state agencies and local governmental units in accordance with ORS 283.235, if the seller is the State of Oregon.

(2) When the current market value per item is deemed to be less than \$1,000, the public contracting agency may establish a selling price, schedule and advertise a sale date, and sell to the first qualified buyer meeting the sale terms.

(3) When the current value per item is deemed to exceed \$1,000, the personal property must be offered for competitive written bid and be advertised in accordance with ORS 279.025, or be offered for sale at public auction in accordance with OAR 125-350-010. If no bids are received or if a determination is made that the market value of the property exceeds the offer of the highest responsible bidder, all bids may be rejected and the public 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 exceeds the market value; or

(b) The sale amount exceeds the highest bid received through the bidding or auction process.

(4) Notwithstanding the above, surplus and excess property offered for sale through a state operated retail sales outlet, such as the Department of General Services' General Store, may be sold to the public utilizing the fixed price, fair market value method. Prices shall be established using methods that are generally accepted and used by the industry. This includes, but is not limited to, consulting vendors selling like goods, e.g., antique dealers or liquidators.

Stat. Auth.: ORS Ch. 279.015(2),(3) & 283.060

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84; GS 17-1990(Temp), f. & cert. ef. 8-30-90; GS 28-1990, f. & cert. ef. 12-19-90

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Liquidation Sales of Personal Property

125-350-020 Public contracting agencies may sell personal property through a commercially recognized third party liquidator if the agency has determined that a liquidation sale will result in increased net revenue and the following conditions are complied with:

(1) The personal property has been made available to other state agencies and local governmental units in accordance with ORS 283.235, if the seller is the State of Oregon.

(2) The selection of the liquidator was conducted, as a minimum, by the competitive request-for-proposal process governed by OAR 125-310-025.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Donations of Personal Property

125-350-025 (1) Public agencies may transfer personal property, including recyclable or reclaimed materials, without remuneration or only nominal remuneration without competitive bids 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 state agency and which is certified to receive federal surplus property; or

(c) Any recognized non-profit activity which is certified to receive federal surplus property.

(2) Public agencies may donate or sell, without competitive bids, surplus personal property to recognized private non-profit social or health service activities, subject to the following conditions:

(a) A determination has been made that the property is not needed for other public purposes;

(b) If the property has a current market value of \$250 or more, the donation or sale shall:

(A) Be approved by the public agency's chief executive officer;

(B) Be documented by the agency to be clearly in the public interest.

(c) The agency determines this is the most efficient and cost-effective method for disposing of the property.

(3) The public contracting agency shall maintain a record of all transfers, donations or sales authorized by sections (1) and (2) of this rule.

Stat. Auth.: ORS Ch. 279 & 283

Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

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CHAPTER 125, DIVISION 360 — DEPARTMENT OF GENERAL SERVICES

DIVISION 360

**WAIVER OF SECURITY BID AND
PERFORMANCE BOND**

Bid Security Requirements

125-360-010 A public contracting agency may, in its discretion, waive the bid security requirements of ORS 279.027 for contracts other than those for public improvements.

Stat. Auth: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Contracts Under \$10,000

125-360-020 A public contracting agency may, in its discretion, waive the bid security requirements of ORS 279.027 and performance bond requirements of ORS 279.029 if the amount of the contract for the public improvement is less than \$10,000.

Stat. Auth: ORS Ch. 279 & 283
Hist.: GS 2-1984, f. 6-5-84, ef. 6-15-84

Emerging Small Business Contracts Under \$100,000

125-360-030 (1) As public contracting agency may, in its discretion, pursuant to ORS 279.033 and this rule, waive the bid security requirements of ORS 279.027 and the performance bond requirements

of ORS 279.029 when the public improvement project:

(a) Is under \$100,000; and
(b) Is being undertaken through a program where the bidders are drawn exclusively from a list of certified Emerging Small Businesses maintained by the Advocate for Minority, Women and Emerging Small Business; and

(c) The agency has been provided funds by the legislature for the purpose of assisting Emerging Small Businesses.

(2) A public contracting agency may waive bid security requirements and/or the performance bond requirements pursuant to this rule under the following conditions:

(a) There exists an emerging small business account or like source of funds containing an unexpended and unobligated balance; and

(b) The public contracting agency has authority to encumber and make payments from the account; and

(c) The public contracting agency encumbers an amount in the account to cover the costs of each project wherein the bid security and/or the performance bond is waived.

Stat. Auth.: ORS Ch. 279.015(2), 279.033 & 283.060
Hist.: GS 15-1990(Temp), f. & cert. ef. 6-5-90; GS 6-1991, f. & cert. ef. 4-9-91

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