

**AN ORDINANCE AMENDING THE LEBANON
MUNICIPAL CODE RELATING TO
PROCEDURES FOR PUBLIC CONTRACTING
AND DECLARING AN EMERGENCY**

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ORDINANCE NUMBER
2371
Bill Number 2 **for**
2005

WHEREAS: The Oregon Legislature adopted HB 2341 (2003 Oregon Laws, Chapter 794) ("The Public Contracting Code"), which was signed by the Governor, and has an operative date of March 1, 2005, and

WHEREAS: The Public Contracting Code requires the City of Lebanon to designate a Local Contract Review Board, and to adopt contracting rules in areas not covered by the Public Contracting Code or "Model Rules" adopted by the Attorney General, and

WHEREAS, The Public Contracting Code divides powers and duties for contracting into two categories: those that must be performed by the local "Contract Review Board"; and those that must be performed by the city's "Contracting Agency."

THE CITY OF LEBANON DOES ORDAIN AS FOLLOWS:

Section 1. Lebanon Municipal Code Sections 3.04.010 through 3.04.060 is repealed and re-adopted to read as follows:

PUBLIC CONTRACTS

3.04.010 The Lebanon City Council is designated as the local Contract Review Board under the State of Oregon Public Contracting Code. The Contract Review Board may, from time to time, delegate its powers and responsibilities consistent with the Oregon Public Contracting Code, the Model Rules, or the Lebanon Municipal Code. The City Administrator, or his/her designated purchasing agent is designated as the city's "Contracting Agency" for purposes of contracting powers and duties assigned to the City of Lebanon as a "Contracting Agency" under the State of Oregon Public Contracting Code or the Model Rules.

3.04.020 Except as specifically provided herein, Public contracts shall be let by the City of Lebanon according to the State of Oregon Public Contracting Code, including the Model Rules adopted by the Oregon Attorney General as they now exist and as they may be amended in the future, and the Lebanon Municipal Code. Definitions provided by the State of Oregon Public Contracting Code or the Model Rules shall apply to City of Lebanon procurements, except as may be specifically provided herein.

3.04.030 The following classes of public contracts are hereby exempted from competitive procurement:

- (a) Any contract exempted by the State of Oregon Public Contracting Code or Model Rules;
- (b) Change orders or contract amendments are reasonably related to the scope of work under the original contract, up to \$50,000. Change orders or other amendments that increase the initial price of the contract by more than \$50,000 must be separately approved by the Contract Review Board.
- ©) Contracts for the purchase of computer equipment and software, which may be by requests for quotations, under the procedures in Lebanon Municipal Code Section 1.555(a) and (b).
- (d) Purchases through federal programs, pursuant to ORS 279A.180.
- (e) An emergency contract, provided that the Contracting Agency adheres to the requirements of ORS 279B.080 or 279C.335(5) and the Model Rules.
- (f) Any other contract (including sole source and brand name specification contracts) where the public interest would be promoted by exempting the contract from the competitive bidding process, provided that the Contract Review Board adheres to the Public Contracting Code and the Model Rules in making the exemption.

3.04.040 Administrative staff and departments have contracting authority and responsibilities as follows:

- (1) The City Administrator (or designee) is authorized to:
 - (a) Enter into city contracts not to exceed \$50,000 without additional authorization of the Contract Review Board.
 - (b) Recommend that the Contract Review Board approve or disapprove contract awards in excess of \$50,000, or change orders or amendments to contracts of more than \$50,000.
 - ©) Consistent with the Lebanon Municipal Code, adopt forms, computer software, procedures, and administrative policies or administrative rules for all city purchases.
 - (d) Enter into contracts or permits for local concessions and street vendors (pursuant to applicable city policy) where the annual amount to be paid to or by the city is not expected to exceed \$50,000 per year.
- (2). Purchases of goods from city employees shall require authorization of the City Administrator or designee. Provision of services by city personnel shall be in accordance with the

City Personnel Policies and other applicable law.

(3) Departments (other than the otherwise provided herein), shall not contract for amounts above \$5,000. Solicitations and contracts above \$5,000 may be made upon approval of the Contracting Agency. All contracting by departments shall be according to approved city purchasing procedures adopted by the Contracting Agency or the Contract Review Board.

(4) Each department shall operate within its budget, or seek supplemental budgetary authority from City Council with respect to the contract.

(5) Each Department shall plan purchase requirements sufficiently in advance so that orders can be placed in economical quantities.

(6) The City Administrator or designee shall process requisition forms and negotiate purchases on the most favorable terms in accordance with adopted ordinances, state laws, policies and procedures.

3.04.050 Notice of public improvement contracts may be published electronically where the Contracting Agency finds that such publication is likely to be cost effective, as provided in ORS 279C.360.

3.04.060 Public improvement contracts estimated by the Contracting Agency not to exceed \$50,000 may be let by competitive quote under the following procedures:

(a) The Contracting Agency shall informally solicit at least three price quotes from prospective contractors. If three prospective contractors are not available, then fewer quotes may be solicited, and the Contracting Agency shall maintain records of the attempts to obtain quotes.

(b) The Contracting Agency shall award the contract to the prospective contractor whose quote will best serve the interests of the City of Lebanon, taking into account price and other applicable factors, such as experience, specific expertise, availability, project understanding, contractor capacity, and contractor responsibility. If the contract is not awarded on the basis of the lowest price, the Contracting Agency shall make a written record of the basis for the award.

(c) A procurement may not be artificially divided or fragmented to qualify for the informal contract award procedures provided by this section.

(d) A public improvement contract let under this section may be amended by change order as provided in Lebanon Municipal Code Section 3.04.040(1)(b).

(e) Public improvement contracts in excess of \$50,000 shall be let in accordance with the

provisions of ORS 279C.

3.04.070 Personal services contracts (other than personal services contracts for architectural or engineering services), are subject to the rules established by this section:

(a) Personal service contracts will be used to retain the services of independent contractors, other than architects or engineers. Nothing in this section shall apply to the employment of regular city employees.

(b) Unless otherwise approved by the City Administrator, all personal service contracts shall require the contractor to defend, indemnify, and hold harmless the city, its officers, agents and employees against and from any and all claims or demands for damages of any kind arising out of or connected in any way with the contractor's performance thereunder and shall include a waiver of contractor's right to ORS 30.285 and ORS 30.287 indemnification and defense.

(c) Unless otherwise approved by the City Administrator, city personal service contracts shall contain a provision requiring the person or entity providing the service to obtain and maintain liability insurance coverage in at least the amount of the city's tort liability limits, naming the city as an additional named insured, during the life of the contract.

(d) All city personal service contracts shall contain all contract provisions mandated by State law. These provisions may be incorporated in the personal service contract by reference to State law, unless State law provides otherwise. The City Attorney's Office will prepare model contract provisions for use in city personal service contracts.

(e) The following procedure shall be observed in the selection of personal service contractors:

(1) For personal service contracts involving an anticipated fee of \$25,000 or less per annum, the City Administrator or his or her designated officer may negotiate a contract for such services with any qualified contractor of his or her selection.

(2) For personal service contracts involving an anticipated fee of more than \$25,000 per annum, the City Administrator or his or her designated officer shall solicit at least three (3) prospective contractors who shall appear to have at least minimum qualifications for the proposed assignment, notify each prospective contractor in reasonable detail of the proposed assignment, and determine the prospective contractor's interest and ability to perform the proposed assignment. In the event that the City Administrator or the designee cannot

procure at least three (3) prospective contractors, the selection process may proceed, but the City Administrator shall document the reasons why three contractors have not been successfully solicited.

(3) The City Administrator or his or her designated officer may arrange for any or all interested prospective contractors to be interviewed for the assignment by an appropriate city employee or by an interview committee.

(4) Following a review of the qualifications and interview, where conducted, of the interested prospective contractors, the City Administrator or his or her designated officer shall select the prospective contractor, and shall prepare a personal service contract.

(f) The above provisions regarding selection procedures do not apply to amendments, modifications or supplements to executed personal service contracts.

(g) The following criteria shall be considered in the evaluation and selection of a personal service contractor:

(1) Specialized experience in the type of work to be performed.

(2) Capacity and capability to perform the work, including any specialized services within the time limitations for the work.

(3) Educational and professional record, including past record of performance on contracts with governmental agencies and private parties with respect to cost control, quality of work, ability to meet schedules, and contract administration, where applicable; and

(4) Availability to perform the assignment and familiarity with the area in which the specific work is located, including knowledge of design or techniques peculiar to it, where applicable.

(5) Any other factors relevant to the particular contract.

(h) The selection procedures described in this section may be waived by the City Administrator, at his or her discretion where an emergency exists that could not have been reasonably foreseen and requires such prompt execution of a contract to remedy the situation that

there is not sufficient time to permit utilization of the selection procedures.

(I) The City Administrator is delegated the authority to sign all personal service contracts.

(j) Nothing contained in this section shall preclude the city from complying with provisions of Federal or State law that require the city to utilize a different selection or contracting procedure.

3.04.080 Disposition of surplus personal property may be made, at the discretion of the City Administrator or his/her designee, under provisions of the State of Oregon Public Contracting Code, or the Model Rules, or under the provisions of this section:

(a) From time to time and after personal property owned by the City of Lebanon is determined by the City Administrator or his/her designee to be surplus to the needs of the city, the city may sell the property at public auction. The city may utilize a contracting firm, approved by the Contract Review Board, for disposition of the property on terms and conditions contained in a contract approved by the Contract Review Board. The city shall give notice of the public auction by posting notice of the means by which the property will be disposed of on the City of Lebanon Internet Website, or by advertisement in a newspaper of general circulation. However, if the City Administrator shall determine that other disposition is beneficial to the City, he or she may make such finding and, with the approval of the Contract Review Board, dispose of such items through donation, state surplus, or other method determined to be in the best interests of the City.

(b) Auction sales may be conducted entirely on the internet. Sale shall be for cash to the highest bidder. All proceeds of the sale shall be paid to the city's general fund, subject to the terms and conditions of the contract (if any) approved by the Contract Review Board between the City of Lebanon and a firm selected to conduct the auction.

(c) All personal property sold pursuant to this section shall be sold as-is without any warranty, either express or implied, of any kind, including but not limited to warranties of title or fitness for any purpose. Upon receiving payment for the personal property from the successful bidder, the person or company conducting the auction shall execute an appropriate bill of sale, which shall recite that the sale is without warranty, as provided in this sub-section.

3.04.090 If bids are solicited for a public improvement contract, and all bids exceed the budget for the project, the Contracting Agency may, prior to contract award, negotiate for a price within the project budget under the following procedures:

(a) Negotiations will begin with the lowest, responsive and responsible bidder. If negotiations are not successful, then the Contracting Agency may begin negotiations with the second lowest

responsive, responsible bidder, and so on.

(b) Negotiations may include the inclusion of value engineering and other options to attempt to bring the project cost within the budgeted amount.

©) A contract may not be awarded under this section if the scope of the project is significantly changed from the description in the original bid documents.

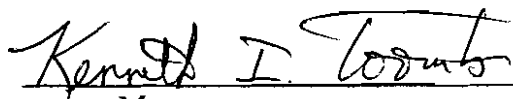
(d) The Contracting Agency will adhere to the provisions of ORS 279C.340 in applying this section.

3.04.100 The Contracting Agency shall adopt appropriate purchasing policies dealing with ethics, environmental considerations and the like, subject to review and modification by the Contract Review Board.

3.04.110 In the event of a conflict between any provision of the State of Oregon Public Contracting Code or the Model Rules and this chapter of the Lebanon Code, the provisions of the State of Oregon Contracting Code or the Model Rules shall control.

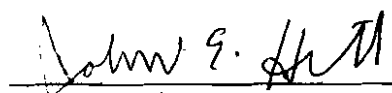
Section 2. Emergency declared to exist. Because the revised State Public Contracting Code takes effect on March 1, 2005, the public fiscal welfare requires that this ordinance take effect immediately upon its passage.

Approved by a vote of 6 for and 0 against by the Lebanon City Council this 23rd day of February, 2005.



Mayor

ATTEST:



City Recorder

APPENDIX A TO CHAPTER 3.04**Division 30 Public Bidding Rules****137-30-000 DEFINITIONS**

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. Bid also includes a proposal when authorized by the public contract review entity where a solicitation of competitive proposals or offers is utilized for procurement when specification and price will not necessarily be the predominant award criteria;
- (2) **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;
- (3) **Bid Opening:** The date, time and place set for opening of competitive bids.
- (4) **Bid Closing:** The date and time announced as the deadline for the receipt of bids;
- (5) **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));
- (6) **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;
- (7) **Descriptive Literature:** Materials submitted by prospective vendors to provide information concerning the products available in response to the bid;
- (8) **Bid Sample:** A representative specimen of the item that will be available in response to the bid;
- (9) **Contract Release Order:** The document authorizing an additional purchase on an existing requirements contract;

137-30-005 COMPETITIVE BIDDING

Contracts issued by the public agency shall be awarded by competitive bidding except as otherwise exempted under the provisions of ORS 279.015, 279.053 or 279.056.

137-30-010 BID DOCUMENTS**(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), the public agency shall establish standard terms and conditions including those applicable as prescribed by ORS 279.310 to ORS 279.575:

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

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

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

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

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

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

(vii) Suspension of the work (ORS 279.328 — 279.333);

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

(ix) Claims for overtime (ORS 279.336);

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

(xi) Prevailing wage rates (ORS 279.348 — 279.365);

(xii) Retainage (ORS 279.400 — 279.430 and ORS 279.575);

(xiii) Contractor's bond (ORS 279.526 and 279.536);

(xiv) Notice of claim (ORS 279.528);

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

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

(xvii) Progress payments (ORS 279.575).

(b) Such terms and conditions shall become an integral part of each contract.

(4) Special Terms and Conditions.

The public agency may also 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 proposal form, the bidder is acknowledging acceptance of and the intent to abide by the terms and conditions.

(c) Any exceptions to the terms and conditions must be clearly stated in writing by the bidder in the signed returned proposal. The public agency reserves the right to reject any bid which takes exception to the terms and conditions. Exceptions to the terms and conditions become contractual obligations only upon written acceptance by the public agency.

Commentary

In compliance with the provisions of ORS 279.318, the following is a list of federal, state and local agencies of which the Owner 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:

Federal Agencies:

Agriculture, Department of
Forest Service
Soil Conservation Service

Defense, Department of
Army Corps of Engineers

Environmental Protection Agency

Interior, Department of
Bureau of Sport Fisheries and Wildlife
Bureau of Outdoor Recreation
Bureau of Land Management
Bureau of Indian Affairs
Bureau of Reclamation

Labor, Department of
Occupational Safety and Health Administration

Transportation, Department of
Coast Guard
Federal Highway Administration

State Agencies:

Agriculture, Department of
Environmental Quality, Department of
Fish and Wildlife, Department of
Forestry, Department of
Geology and Mineral Industries, Department of
Human Resources, Department of
Land Conservation and Development Commission
Soil and Water Conservation Commission
State Engineer
State Land Board
Water Resources Board

Local Agencies:

City Council
County Court
County Commissioners, Board of
Port Districts
Metropolitan Service Districts
County Service Districts
Sanitary Districts
Water Districts

Fire Protection Districts

137-30-015 PUBLIC NOTICE

(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. Notice 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 formal 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:

(i) 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.

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

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

(iv) The office where specifications may be seen;

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

(vi) The date, time, and place that bids will be publicly opened.

(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.

137-30-20 BID PREPARATION**Bid Preparation Instructions**

(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.

(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.

137-30-025 BIDDER PREQUALIFICATION

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.

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).

137-30-030 BIDDER SUBMISSIONS

(1) **Bid Samples and Descriptive Literature.** Bid samples or descriptive literature may be required when it is necessary 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.** Bids shall be submitted in a sealed envelope appropriately marked or in the envelope provided by the agency, whichever is applicable, to ensure proper identification and special handling. The public agency shall not be responsible for the proper identification and handling of any bids not submitted in the designated envelope.

(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.

137-30-035 BID SECURITY

(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 shall be required only in critical circumstances, so as not to discourage competition.

(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 improvement 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.

137-30-040 PRE-BID CONFERENCES

Pre-bid conferences may be held by the public agency to explain the procurement requirements or conduct site inspections. The public agency may require attendance at the pre-bid conference as a condition for bidding. 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 to allow bidders to become aware of it, but sufficiently before bid closing to allow consideration of the conference results in preparing bids. Statements at the prebid conference shall not change the bid documents unless confirmed to all prospective bidders by means of a written addendum to the bid documents.

137-30-045 BRAND NAME PRODUCTS

(1) 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 authorized by Oregon Administrative Rule, including but not limited to:

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

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

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

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

Commentary

Some agencies have developed procedures for approved equals and also 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 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.

This tension is caused by the statutory policy in ORS 279.029 that the bids be awarded to the lowest responsible bidder. There is also public policy expressed in ORS 279.023 that public agencies shall make every effort to construct public improvements at the least cost to the public agency. This least cost policy also carries over in all other types of public contracts where the interests of 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 to either exempt certain classes of materials or to set forth preapproved equals, that will ensure an available market for the item desired by the public entity.

137-30-050 PROTEST OF BID SPECIFICATIONS

(1) **Time for Submission of Protest.** Protests of bid specifications shall be presented to the public agency in writing in accordance with the following timelines:

- (a) Public Improvement Contract — ten (10) calendar days prior to bid closing;
- (b) Other Public Contracts — five (5) calendar days prior to bid closing;

Such protest shall include the reasons for protest and any proposed changes to specifications. No protest against award because of the contract of bid specifications 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) above, the bid opening date may be extended if necessary to allow consideration of the protest and issue 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

137-30-055 ADDENDA TO BID DOCUMENTS

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

(2) **Distribution.** Addenda shall be sent to all prospective bidders known to have obtained the bid documents or attending any mandatory prebid conferences.

(3) **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 by telegram or telephone, followed by a confirming written addendum.

137-30-060 PRE-OPENING MODIFICATION OR WITHDRAWAL OF BIDS

(1) **Modifications.** Bids once submitted 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, and state that the new document supersedes or modifies the prior bid. Telegraphic modification shall not be accepted unless authorized in the bid documents. 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) above, 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

All of the rules on submission of bids by vendors recognize that the burden of submitting information and the bid 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 fairly. It is recognized that sometimes harsh results can occur due to unforeseen circumstances such as car accidents, plane wrecks, or other personal emergencies. However, 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.

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.

137-30-065 RECEIPT, OPENING, AND RECORDING OF BIDS

(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. If witnesses are present at the bid opening, and 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.** The opened bids shall be available for public inspection to award except to the extent the bidder designates trade secrets or other proprietary data to be confidential. ORS 192.500(l)(b). The public agency shall verify and determine that the confidential information claimed to be exempt is in fact exempt from disclosure under the Oregon Public Records Law. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the non-confidential portion of the bid. 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

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

However, recognition must be made by the public agency 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(l)(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.

137-30-070 LATE BIDS, LATE WITHDRAWALS, AND LATE MODIFICATIONS

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

(2) **Disposition.** Late bids, late modifications, or late withdrawals shall not be considered.

137-30-075 MISTAKES IN BIDS

(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 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:

- (i) Return the number of signed bids or the number of other documents required by the bid documents;
 - (ii) Sign the bid form in the designated block so long as a signature appears in the bid documents evidencing an intent to be bound;
 - (iii) Acknowledge receipt of an addendum to the bid documents, but only if:
 - (A) It is clear from the bid that the bidder received the addendum and intended to be bound by its terms; or
 - (B) 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. 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 document.

137-30-080 TIME FOR ACCEPTANCE

Bids shall be valid for thirty (30) days unless otherwise specified in the bid documents.

137-30-085 EXTENSION OF TIME FOR ACCEPTANCE OF BID

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.

137-30-090 BID EVALUATION AND AWARD

(1) **General.** The contract, if awarded, is to be awarded to the lowest responsible bidder. Consistent with the provisions of the bid documents, awards may be made by item, groups of items, or entire bid in the public interest as determined by the public agency. The public agency reserves the right to reject any bid not in compliance with the bid documents or all bids pursuant to ORS 279.035 when it is in the public interest to do so.

(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:

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

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

(iii) 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 subsection (3) 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 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, 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; and

(b) Treat all bids equitably.

(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 subsection (4) of this section. Further, this section does not permit negotiations with any bidder.

137-30-095 LOW TIE BIDS

(1) Definition. Low tie bids are low respective bids for 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:

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

(ii) If a tie still remains after applying (i) above, 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.

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

Commentary

An area of great concern and controversy during the recession in Oregon over the last few years has been the Oregon Preference Law. Public contracting agencies are required pursuant to ORS 279.021 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 only when there is a tied bid does the Oregon Preference Law come into effect.

However, the law 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 a 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 would 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.

137-30-100 REJECTION OF INDIVIDUAL BIDS OR PROPOSALS

(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 not in compliance with all prescribed bidding procedures and requirements. No bid shall be considered unless the bid security, properly executed, has been submitted with the bid as required by the bid documents.

(2) **Reasons for Rejection.** Reasons for rejecting a bid include but are not limited to:

(a) The bidder has not prequalified under ORS 279.039, or has been disqualified under ORS 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 documents; 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 acceptability criteria set forth in the bid documents.

137-30-105 NEGOTIATION WITH BIDDERS PROHIBITED

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 or addenda to the contract and in accordance with the exemption rules of the applicable public contract review authority.

137-30-110 BIDDER DISQUALIFICATION

(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) **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.

(3) **Trade Secret.** Any information voluntarily submitted by a bidder or prospective bidder pursuant to an investigation under subsection (2) of this section 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 192.500(l)(b) and (e) if requested by the person submitting the information and verified to be a trade secret by the public agency.

(4) **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.

(5) **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.

137-30-115 CANCELLATION OF INVITATIONS TO BID

(1) **Cancellation in the Public Interest.** An invitation to bid may be cancelled, in whole or in part, and all

bids may be rejected 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. When an invitation to bid is cancelled after bid opening, notice shall be sent to those bidders who submitted a bid. The 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)

Commentary

A public agency may reject all bids if in the judgment of the agency it is in the public interest to do so pursuant to ORS 279.035. This does not allow arbitrary or discriminatory action on the part of the public agency, but it does provide an escape hatch to situations where flaws exist in the award criteria or other defects in the specifications which have been discovered pursuant to the scrutiny generated by the bidding process.

Public agencies are encouraged to utilize this escape hatch sparingly, only in cases where the public interest does not call for rejection of all bids. Commonly, where all the bids come in higher than the budgeted and allocated funds this allows the public agency to reject the bids and wait for a time when the price may be lower or more funds may be available. Furthermore, ORS 279.035 also allows public contracting agencies to reject any bid not in compliance to prescribe public bidding procedures and the requirements of the bid documents.

137-30-120 DISPOSITION OF BIDS OR PROPOSALS IF BID CANCELLED

(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.

137-30-125 DOCUMENTATION OF AWARD

(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.

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

137-30-130 FOREIGN CONTRACTOR (ORS 279.021)

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.

137-30-135 AVAILABILITY OF AWARD DECISIONS

(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 stating the bid number and 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

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

1. For all service contracts the original must be kept for two years after the contract has been completely executed;
2. Capital contracts must be kept permanently;
3. Goods contracts must be kept for seven years after maturity;

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.

137-30-140 PERFORMANCE SECURITY

(1) **Public Improvements Contract.** Except in emergencies, when the requirement may be waived pursuant to ORS 279.029(3), a performance bond in a sum equal to the contract price shall be required for all 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 shall be utilized only in critical circumstances, so as not 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 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, and forfeiture of bid security and award to the next lowest responsible bidder.

Commentary

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 for state agencies was authorized under OAR 125-360-020 if the amount of the contract for the public improvement is less than \$10,000. The bond can be waived only in cases where an emergency exists.

If such an emergency is declared and concurred in by all members of the governing board of the public contracting agency, the standard for declaring such 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 which let the contract as well as the public body itself for payment of any liens which may be filed. This can include personal liability of the public officials. Extreme caution is recommended in the declaration of an emergency pursuant to ORS 279.029(3). All public agencies should be advised of the liability requirements imposed under Oregon law.

136-30-145 RIGHT TO AUDIT RECORDS

(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.

137-30-150 RIGHT TO INSPECT PLANT

(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 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 contract requirements, and are therefore 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 requirements 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.

137-30-155 CONTRACT CANCELLATION PROCEDURES

Grounds for Cancellation. A contract may be cancelled by the public agency for any violation of the

amount, the unit price shall govern.

137-40-020 CONTRACT CANCELLATION PROCEDURES

(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 written order or upon written request from the contractor, terminate the contract or a portion thereof if any of the following occur:

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

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

(iii) Or for any reason considered by the public agency to be in the public interest (other than a labor dispute or reason of 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, phenomenon 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 workmen 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 or preclude the public agency from subsequently invoking any other right or remedy set forth above or elsewhere in the contract.

137-40-025 RETAINAGE (ORS 279.420, 279.575)

(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 amounts previously retained will equal not more than five percent of the value of completed work except 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.** 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.

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 a 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.

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. Interest earned on such account shall accrue to the contractor.

(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.

137-40-030 PROGRESS PAYMENTS (ORS 279.575)

(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 and 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 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.

137-40-035 FINAL INSPECTION (ORS 279.575(3))

(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. The public agency shall make an inspection of the project and project records within 15 days of receiving said notice. If, at such inspection, all construction provided for and ordered under the contract is complete and satisfactory to the public agency, and all certificates, 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, any work in whole or in part is found unsatisfactory, or it is found 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. At such time as the contractor determines full compliance with, and the execution of such 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.

(3) **Acknowledgment of Acceptance.** Upon satisfactory completion of all work required under the contract, the public agency shall acknowledge acceptance of the work in writing.

137-40-040 FINAL ESTIMATE AND FINAL PAYMENT (ORS 279.575(3))

(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.

(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.

137-40-045 CLAIMS FOR UNPAID LABOR OR SUPPLIES

(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, if a notice of such claim has been filed prior to the expiration of six (6) months following the acceptance of the work by the public agency.

(2) **Notice of Claim.** To initiate a claim against the contractor's bond, a person should file with the auditor or clerk of the public agency a Notice of Claim in the form and manner attached as Exhibit A (see page 21).

Any notice of claim should include 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).

(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 contractor;
- (c) File copy of Notice with Secretary of State;
- (d) 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, the public agency shall refer all claims to the surety company for resolution. The 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 public body 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 public body chooses to make such 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

One of the methods that may be utilized by a public agency in the event of unpaid materialmen and laborers, is to refer those claims to the surety for disposition. This procedure should be done with the consent of all parties. However, this will allow an expeditious manner of settling the validity of the claims, and avoid the situation where a public is ruling on whether a claim is valid without knowing the underlying circumstances regarding both delivery and performance of the subcontractor.

APPENDIX B TO CHAPTER 3.04**OREGON ADMINISTRATIVE RULES
CHAPTER 125, DIVISION 300-360 —
PUBLIC CONTRACT EXEMPTIONS****DIVISION 300****INTRODUCTION AND DEFINITIONS****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 ORS 279.017(2).

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 services.
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 rule 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.

Exemptions

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

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

(B) Contracts which are for personal services and are covered by rule 125-300-092.

(C) Contracts specifically exempt under the provisions of the rules in the following Divisions.

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.

Contracts Under Certain Dollar Amounts

125-310-020 (1) Public contracting agencies may, in their discretion, let public contracts not to exceed \$15,000 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 \$1,000, the public contracting agency should, where feasible obtain competitive quotes.

(c) When the amount of the contract is more than \$1,000, but less than \$15,000, 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.

(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 \$1,000, the public contracting agency should, where feasible, obtain competitive quotes.

(c) When the amount of the contract is more than \$1,000, but less than \$10,000, except as provided in subsection (d) 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 more than \$10,000, but 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.

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.
 - (a) 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.

Emergency Contracts

125-310-030 (1) Public contracting agencies may, in their discretion, let public contracts without formal competitive bidding if an emergency exists and the emergency consists of circumstances that could not have been reasonably foreseen and requires prompt execution of a contract to remedy the condition.

(2) Public contracting agencies required to act by governing body shall adopt a resolution indicating the existence of the emergency stating with specificity the emergency conditions necessitating the prompt execution of the contract.

(3) Public contracting agencies with a single executive officer must make detailed 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).

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.

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.

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, biological, 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.

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 purchases from the least expensive source, and

retains written justification for the purchase made.

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.

Periodicals

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

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.

Purchases of Used Personal Property

125-310-075 Public contracting agencies may 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.

Advertising Contracts

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

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 of funds is contracted pursuant to duly enacted statute, ordinance, charter, or constitution.

Personal Service Contracts

125-310-092 (1) The following are personal service contracts:

(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.

(2) The following are not personal service contracts:

(a) Contracts, even though in a professional capacity, if predominantly for a product, e.g., a contract with a landscape architect to design a garden is for personal services, but a contract to design a garden and supply all the shrubs and trees is predominately for a tangible product.

(b) A service contract to supply labor which is of a type that can generally be done by any competent worker, e.g., janitorial, security guard, crop spraying, laundry and landscape maintenance service contracts.

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

(d) Contracts for services of a trade-related activity, even though a specific license is required to engage in the activity. Examples are repair and/or maintenance of all types of equipment or structures.

Single Seller of Product Required

125-310-120 Subject to the requirements of rule 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.

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.

Employee Benefit Insurance

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

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:

(a) 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 agency 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.

(b) Special 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.

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, personal practices of

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

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; or

(2) The amount of the aggregate cost increase resulting from all amendments shall not exceed 10% of the initial contract, or 20% of the initial contract when the initial contract is for a face amount not exceeding \$100,000. Amendments made pursuant to section (1) of this rule are not included in computing the aggregate amount under this section.

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 rule 125-310-300 on purchases of hospital and medical supplies and hospital and medical equipment through the cooperative.

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 the contracting for equipment and supplies used in intercollegiate or interscholastic athletic programs. The agency shall use as a minimum the request-for-proposal process (rule 125-310-025) and shall utilize procedures that will maintain the integrity of ORS 279.015.

Purchases for 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.

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.

Purchases of Cadaveric Organs

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

Radio and Television Contracts Used in Athletic Programs

125-310-240 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 (rule 125-310-025) and request proposals from all interested vendors of such services. The request for proposal shall include minimum qualification specifications and shall invite the interested vendors to propose other ancillary services.

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.

Requirements Contracts

125-310-300 (1) 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:

- (a) The contract must be let by competitive procurement process pursuant to the requirements of these rules.
- (b) The term of the contract including renewals does not exceed three years.

Purchases Under Requirements Contracts

125-310-310 (1) When the price of goods and services has been established by a requirements contract pursuant to rule 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.

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.

DIVISION 320

INFORMATION SYSTEMS CONTRACTS

Data and Word Processing Contracts

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

(a) If the contract amount does not exceed \$15,000, 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.

(b) If the contract amount exceeds \$15,000, the public contracting agency may use the request for proposal process (rule 125-310-025) and shall solicit written proposals. 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.

(c) If the amount of the contract exceeds \$500,000, in addition to the requirements of subsection (1)(b) of this rule, the public contracting agency shall:

(A) Provide an opportunity for vendors to review requirements and, prior to submitting proposals, comment on any specifications which they feel limit competition;

(B) Provide that residual values be considered only if they are clearly ascertainable; and

(C) Provide that cost of conversion will be minimized by the agency. Vendors competing in this category of procurement shall be given the opportunity to review the evaluation of their proposal before final management review and selection. If there is less than a 1% difference between the performance/cost ratio of the highest ranked proposals, appropriate consideration must be given to the procurement of equipment which will encourage competition.

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 \$15,000, 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 \$15,000, the public contracting agency may use the request-for-

proposal process (rule 125-310-025) and shall solicit written proposals. 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) shall:

(a) State the contractual requirements in the solicitations 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.

Telecommunications Services and Equipment

125-320-025 (1) Public agencies may continue the existing telecommunications services and equipment after January 1, 1984 from the current provider, or the appropriate AT&T companies assigned such service or product area under the divestiture orders of *United States v Western Electric Co., et al., No. 82-0192, The District Court, District of Columbia, 1983.*

(2) Any new type of service or equipment or any major replacement of existing services or equipment where the rate is not established by federal, state, or local regulatory authority shall be acquired by competitive procurement.

(3) This rule is intended to provide an orderly transition period. The rule is automatically repealed on July 1, 1986.

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 rule 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 that brand which will produce the best combination of performance and cost per copy for each application.

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.

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 the use by the Oregon Industries for the Blind.

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.

DIVISION 340**BRAND NAMES OR MARKS****Specification 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 rules 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.

Copyrighted Materials

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

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. If the purchase does not exceed \$15,000, such notice and

invitation may be informal. If the amount of the purchase exceeds \$15,000, such notice shall include advertisement in at least one newspaper of general circulation in the area where the contract is to be performed and shall be timely to allow competing vendors a reasonable opportunity to make proposals.

(2) If the amount of the purchase exceeds \$15,000 and is not also pursuant to the date and word processing exemption, rule 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 severable 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), and such documentation shall be sufficient notice as to subsequent purchases.

Product Prequalification

125-340-040 (1) When it is impractical to create specific design or performance specifications 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.

Brand Name or Mark Exemption Applications

125-340-050 A public contracting agency may apply for and receive a brand name or make 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.

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.

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.

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; and

(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; or

(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.

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:

(a) 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; and

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

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 subsections (1) and (2) of this section.

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.

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.