

RESOLUTION NO. 06-056

A RESOLUTION ADOPTING ADDITIONAL REVISIONS FOR THE COLUMBIA GATEWAY URBAN RENEWAL AGENCY'S LOCAL CONTRACT REVIEW AUTHORITY

WHEREAS, on February 28, 2005, the Columbia Gateway Urban Renewal Agency adopted Resolution No. 05-054, approving revised rules for the Agency acting in its capacity as the Local Contract Review Authority for the Agency; and

WHEREAS, the 2005 Oregon Legislature adopted legislation making several technical corrections to the state public contracting code; and

WHEREAS, the Oregon Attorney General's Office has just completed revisions to the Attorney General's Model Rules for implementing the public contracting law; and

WHEREAS, the Agency's Local Contract Review Board Rules are patterned after the Attorney General's Model Rules; and

WHEREAS, it is necessary to revise the Agency's Local Contract Review Board rules adopted by Resolution No. 05-054 to ensure those rules comply with the changes adopted by the 2005 Legislature;

NOW, THEREFORE, BE IT RESOLVED BY THE COLUMBIA GATEWAY URBAN RENEWAL AGENCY AS FOLLOWS:

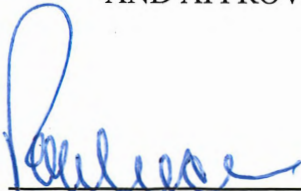
Section 1. Revised Rules Adopted. The Revised Rules set forth in Exhibit "A", attached hereto and incorporated herein by this reference, are hereby approved and adopted as the rules for the Agency's Local Contract Review Authority. These Revised Rules replace the rules adopted by Resolution No. 05-054

Section 2. Effective Date. This Resolution shall be effective as of May 8, 2006.

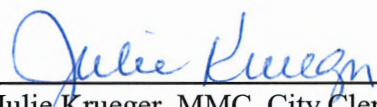
PASSED AND ADOPTED THIS 8TH DAY OF MAY, 2006.

Voting Yes, Agency Member: Broehl, Tenney, Seckora, Van Cleave, Zukin
Voting No, Agency Member: None
Absent, Agency Member: Davison
Abstaining, Agency Member: None

AND APPROVED BY THE CHAIR THIS ~~28TH~~ ^{MAY} DAY OF ~~FEBRUARY~~, 2006. *st*



Robb E. Van Cleave, Chair

Attest:


Julie Krueger, MMC, City Clerk

DIVISION 1

GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTING

01-0100

Application; Federal Law Supremacy

(1) The Model Rules adopted by the Attorney General do not apply to the Columbia Gateway Urban Renewal Agency, except where they have been incorporated into these Rules. These Rules set forth the rules of procedure for the Columbia Gateway Urban Renewal Agency. These Rules consist of the following five divisions:

- (a) This division 1, which is applicable to all Public Contracting;
- (b) Division 2, which describes procedures for Public Contracting for Goods or Services, as defined in ORS 279B.005.
- (c) Division 3, which describes procedures for Public Contracting for Architectural, Engineering and Land Surveying Services and Related Services; and
- (d) Division 4, which describes procedures for Public Contracting for Construction Services.
- (e) Division 5, which describes procedures for Personal Services Contracts for services other than architectural, engineering, land surveying services and related services covered in Division 3.

(2) In the event of conflict between rules in this division 1 and rules in divisions 2, 3, 4 and 5, the rules in divisions 2, 3 4, and 5 take precedence over the rules in this division 1.

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

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

01-0110

Definitions for the Rules

Unless the context of a specifically applicable definition in the Code requires otherwise, capitalized terms used in the Rules will have the meaning set forth in the division of the Rules in which they appear, and if not defined there, the meaning set forth in these division 1 rules, and if not defined there, the meaning set forth in the Code. The following terms, when capitalized in these Rules, shall have the meaning set forth below:

- (1) "**Addendum**" or "**Addenda**" means an addition or deletion to, a material change in, or general interest explanation of a Solicitation Document.
- (2) "**Administering Contracting Agency**" has the meaning set forth in ORS 279A.200(1) and for Interstate Cooperative Procurements includes the entities specified in ORS 279A.220(4).
- (3) "**Agency**" means the Columbia Gateway Urban Renewal Agency.
- (4) "**Award**" means, as the context requires, either the act or occurrence of the Agency's identification of the Person with whom the Agency will enter into a Contract following the resolution of any protest of the Agency's selection of that Person, and the completion of all Contract negotiations.
- (5) "**Bid**" means a Written response to an Invitation to Bid.
- (6) "**Closing**" means the date and time announced in a Solicitation Document as the deadline for submitting Offers.
- (7) "**Code**" means the Public Contracting Code, as defined in ORS 279A.010.
- (8) "**Competitive Range**" means the Proposers with whom the Agency will conduct discussions or negotiations if the Agency intends to conduct discussions or negotiations in accordance with Rule 02-0262 or Rule 04-0650.
- (9) "**Contract**" means a "Public Contract," as defined in ORS 279A.010.
- (10) "**Contract Price**" means, as the context requires, (i) the maximum payments that the Agency will make under a Contract, including bonuses, incentives and contingency amounts, if the Contractor fully performs under the Contract, (ii) the maximum not-to-exceed amount of payments specified in the Contract, or (iii) the unit prices for Goods or Services or Personal Services set forth in the Contract.

- (11) "**Contract Review Authority**" means the Columbia Gateway Urban Renewal Agency Board acting as the Local Contract Review Board pursuant to ORS 279A.060.
- (12) "**Contractor**" means the Person with whom the Agency enters into a Contract.
- (13) "**Descriptive Literature**" means Written information submitted with the Offer that addresses the Goods and Services included in the Offer.
- (14) "**Goods**" means supplies, equipment, materials, or any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, or any combination of these items.
- (15) "**Invitation to Bid**" or "**ITB**" means all documents used for soliciting Bids in accordance with either ORS 279B.055, or 279C.335.
- (16) "**Offer**" means a Written response to a Solicitation Document.
- (17) "**Offeror**" means a Person who submits an Offer.
- (18) "**Opening**" means the date, time and place announced in the Solicitation Document for the public opening of Written sealed Offers.
- (19) "**Person**" means any of the following with legal capacity to enter into a Contract: individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation or any other legal or commercial entity.
- (20) "**Personal Services**" as used in division 2 and as used in division 1 when applicable to division 2 means the services performed under a Personal Services Contract. "Personal Services" as used in division 3 and division 4, and as used in this division 1 when applicable to division 3 or division 4, or both, has the meaning set forth in ORS 279C
- (21) "**Personal Services Contract**" or "**Contract for Personal Services**" means a contract or member of a class of contracts, other than a contract for the services of an Architect, Engineer, Land Surveyor or Provider of Related Services (as defined in ORS 279C.100), that the Agency's Local Contract Review Board has designated as a Personal Services Contract pursuant to ORS 279A.055.
- (22) "**Product Sample**" means the exact Goods or a representative portion of the Goods offered in an Offer, or the Goods requested in the Solicitation Document as a sample.
- (23) "**Proposal**" means a Written response to a Request for Proposals.

(24) **“Recycled Materials”** means recycled paper (as defined in ORS 279A.010(1)(ee)), recycled PETE products (as defined in ORS 279A.010(1)(ff)), and other recycled plastic resin products and recycled products (as defined in ORS 279A.010(1)(gg)).

(25) **“Request for Qualifications”** or **“RFQ”** means a Written document issued by the Agency to which Contractors respond in Writing by describing their experience with the qualifications for the Services, Personal Services or Architectural, Engineering or Land Surveying Services, or Related Services, described in the document.

(26) **“Request for Quotes”** means a Written or oral request for prices, rates or other conditions under which a potential Contractor would provide Goods or perform Services, Personal Services or Public Improvements described in the request.

(27) **“Responsible”** means meeting the standards set forth in Rule 02-0640 or Rule 04-0370(2), and not debarred or disqualified by the Agency under Rule 02-0575 or Rule 04-0350.

(28) **“Responsible Offeror”** means as the context requires, a Responsible Bidder, Responsible Proposer or a Person who has submitted an Offer and meets the standards set forth in Rule 02-0640 or Rule 04-0370(2), and who has not been debarred or disqualified by the City under Rule 02-0575 or Rule 04-0350.

(29) **“Responsive”** means having the characteristic of substantial compliance in all material respects with applicable solicitation requirements.

(30) **“Responsive Offer”** means, as the context requires, a Responsive Bid, Responsive Proposal or other Offer that substantially complies in all material respects with applicable solicitation requirements.

(31) **“Request for Proposals”** or **“RFP”** means all documents used for soliciting Proposals in accordance with either ORS.279B.060, 279C.110 or Rule 04-0650.

(32) **“Services”** means services other than Personal Services.

(33) **“Signature”** means any Written mark, word or symbol that is made or adopted by a Person with the intent to be bound and that is attached to or logically associated with a document to which the Person intends to be bound.

(34) **“Signed”** means, as the context requires, that a Written document contains a Signature or that the act of making a Signature has occurred.

(35) **“Solicitation Document”** means an Invitation to Bid, Request for Proposals or other document issued to invite Offers from prospective Contractors pursuant to ORS Chapter 279B or 279C.

(36) "**Specification**" means any description of the physical or functional characteristics, or of the nature of the Goods or Services, including any requirement for inspecting, testing or preparing the Goods or Services for delivery and the quantities or qualities of the Goods and Services to be furnished under a Contract. Specifications generally will state the result to be obtained and occasionally may describe the method and manner of performance.

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

(38) "**Writing**" means letters, characters and symbols inscribed on paper by hand, print, type or other method of impression, intended to present or convey particular ideas or meanings. "Writing," when required or permitted by law, or required or permitted in a Solicitation Document, also means letters, characters and symbols made in electronic form and intended to represent or convey particular ideas or characters and symbols made in electronic form and intended to represent or convey particular ideas or meanings.

(39) "**Written**" means existing in Writing.

01-0120

Policy

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

01-0130

Application of the Code and Rules; Exceptions

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

(2) Except as otherwise provided in these rules, the powers and duties of the local contract review board under the Public Contracting Code shall be exercised and performed by the Agency Board and all powers and duties given or assigned to the contracting agencies by the Public Contracting Code shall be exercised or performed by the Agency Staff Coordinator or City Manager.

(3) Procedures for screening and selecting persons to perform Contracts for Personal Services for Architectural, Engineering, and Surveying Services and Related Services are set forth in division 3 of these Rules. Procedures for screening and selecting persons to perform Contracts

for Personal Services other than Architectural, Engineering, and Surveying Services and Related Services are set forth in division 5 of these Rules.

(4) Neither the Code nor these Rules apply to the contracts or the classes of contracts described in ORS 279A.025(2), a copy of which is attached as Exhibit "A".

(5) Neither the Code nor these Rules apply to the Public Contracting activities of the Contracting Agencies listed in ORS 279A.025(3), a copy of which is attached as Exhibit "A".

(6) The Agency may enter into Public Contracts under a federal program described in ORS 279A.180 without following the procedures set forth in ORS 279B.050 through 279B.085, provided that the Agency enters into the Public Contract pursuant to rules adopted by the Agency pursuant to ORS 279A.180.

(7) The Agency may enter into contracts for Goods or Services with non-profit agencies providing employment opportunities for disabled individuals pursuant to ORS 279.835 through 279.855 without following the source selection procedures set forth in either ORS 279A.200 through 279A.225, or 279B.050 through 279B.085. However, the Agency must enter into such contracts in accordance with administrative rules promulgated by the State of Oregon.

(8) Any public contract where the amount of purchase exceeds \$15,000.00 shall be awarded by the Contract Review Authority. The Contract Review Authority shall have authorized the purchase through the budget process or by other special action. Following staff review of the bids or proposals received and staff's recommendation concerning the contract award, the Contract Review Authority shall award the contract to the lowest responsible bidder or the best proposer who has submitted the proposal which is in the best interest of the Agency, based upon the criteria set forth in the request for proposal.

Contract Preferences

01-0300

Preference for Oregon Goods and Services; Nonresident Bidders

(1) Award When Offers Identical. When the Agency receives Offers identical in price, fitness, availability and quality, and chooses to award a Contract, the Agency shall award the Contract based on the following order of precedence:

- (a) The Agency shall award the Contract to the Offeror among those submitting identical offers that is offering Goods or Services or Personal Services that have been manufactured or produced in Oregon.

- (b) If two or more Offerors submit identical Offers, and both offer Goods or Services or Personal Services manufactured or produced in Oregon, the Agency shall award the Contract by drawing lots among the identical Offers offering Goods or Services or Personal Services that have been manufactured or produced in Oregon. The Offerors that submitted the identical Offers subject to the drawing of lots shall be given notice and an opportunity to be present when the lots are drawn.
- (c) If the Agency receives identical Offers, and none of the identical Offers offer Goods or Services or Personal Services manufactured or produced in Oregon, then the Agency shall award the Contract by drawing lots among the identical Offers. The Offerors that submitted the identical Offers subject to the drawing of lots shall be given notice and an opportunity to be present when the lots are drawn.

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

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

(3) **Determining if Goods or Services or Personal Services are Manufactured or Produced in Oregon.** For the purposes of complying with section 1 of this Rule, the Agency may request, either in a Solicitation Document, following Closing, or at any other time determined appropriate by the Agency, any information the Agency determines is appropriate and necessary to allow the Agency to determine if the Goods or Services or Personal Services are manufactured or produced in Oregon. The Agency may use any reasonable criteria to determine if Goods or Services or Personal Services are manufactured or produced in Oregon, provided that the criteria reasonably relate to that determination, and provided that the Agency applies those criteria equally to each Bidder or Proposer.

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

01-0310

Reciprocal Preferences

When evaluating Bids pursuant to Rule 02-0255, Rule 02-0257 or Rule 04-0370, the Agency shall add a percentage increase to the Bid of a Nonresident Bidder equal to the percentage, if any, of the preference that would be given to that Bidder in the state in which the Bidder resides. The Agency may rely on the list prepared and maintained by the Oregon Department of Administrative Services pursuant to ORS 279A.120(4) to determine both (i) whether the Nonresident Bidder's state gives preference to in-state bidders, and (ii) the amount of such preference.

01-0320

Preference for Recycled Materials

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

(2) In comparing goods from two or more Bidders or Proposers, if at least one Bidder or Proposer offers goods manufactured from recycled materials, and at least one Bidder or Proposer does not, the Agency shall select the Bidder or Proposer offering goods manufactured from recycled materials if each of the following four conditions exists:

- (a) The recycled product is available;
- (b) The recycled product meets applicable standards;
- (c) The recycled product can be substituted for a comparable non-recycled product; and
- (d) The recycled product's costs do not exceed the costs of non-recycled products by more than five percent, or a higher percentage if a written determination is made by the Agency and set forth in the Solicitation Document. For purposes of making the foregoing determination, the Agency shall consider the costs of the goods

following any adjustments the Agency makes to the price of the goods for purposes of evaluation pursuant to Rule 01-0310.

- (3) For the purposes of this Section, the Agency shall determine if goods are manufactured from recycled materials in accordance with standards established by the Agency.

Cooperative Procurement

01-0400

Authority for Cooperative Procurements

- (1) The Agency may participate in, sponsor, conduct or administer Joint Cooperative Procurements, Permissive Cooperative Procurements and Interstate Cooperative Procurements in accordance with ORS 279A.200 through 279A.225.
- (2) A solicitation and award process uses source selection methods substantially equivalent to those identified in ORS 279B.055, 279B.060 or 279B.085 when it has the characteristics set forth in ORS 279A.200(2). The Agency shall determine, in writing, whether the solicitation and award process for an Original Contract arising out of a Cooperative Procurement is substantially equivalent to those identified in ORS 279B.055, 279B.060 or 279B.085 in accordance with ORS 279A.200(2).

01-0410

Responsibilities of Administering Contracting Agencies and Purchasing Contracting Agencies

- (1) If a Contracting Agency is an Administering Contracting Agency of a Cooperative Procurement, the Contracting Agency may establish the conditions under which Persons may participate in the Cooperative Procurements administered by the Administering Contracting Agency. Such conditions may include, without limitation, whether each Person that participates in the Cooperative Procurement must pay administrative fees to the Administering Contracting Agency, whether the participants must enter into a written agreement with the Administering Contracting Agency, or any other matters related to the administration of the Cooperative Procurement and the resulting Original Contract. A Contracting Agency that acts as an Administering Contracting Agency may, but is not required to, include provisions in the Solicitation Document for a Cooperative Procurement or advertise the Solicitation Document in a manner to assist Purchasing Contracting Agencies' compliance with the Code or these Rules.
- (2) If a Contracting Agency, acting as a Purchasing Contracting Agency, enters into a Contract or Price Agreement based on a Cooperative Procurement, the Contracting Agency shall

comply with the Code and these Rules, including without limitation those sections of the Code and these Rules that govern:

- (a) The extent to which the Purchasing Contracting Agency may participate in the Cooperative Procurement;
- (b) The advertisement of the solicitation document related to the Cooperative Procurement; and
- (c) Public notice of the Purchasing Contracting Agency's intent to establish Contracts or Price Agreements based on a Cooperative Procurement.

01-0420

Joint Cooperative Procurements

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

01-0430

Permissive Cooperative Procurements

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

01-0440

Advertisements of Intent to Establish Contracts or Price Agreements through a Permissive Cooperative Procurement

- (1) For purposes of determining whether a Purchasing Contracting Agency must give notice of intent to establish a Contract through a Permissive Cooperative Procurement as required by ORS 279A.215(2)(a), the estimated amount of the procurement will exceed \$250,000 if:
 - (a) The Purchasing Contracting Agency's Contract arising out of the Permissive Cooperative Procurement expressly provides that the Purchasing Contracting Agency will make payments over the term of the Contract that will, in aggregate, exceed \$250,000, whether or not the total amount or value of the payments is expressly stated;

- (b) The Purchasing Contracting Agency's Contract arising out of the Permissive Cooperative Procurement expressly provides for payment, whether in a fixed amount or up to a stated maximum amount, that exceeds \$250,000; or
- (c) At the time the Purchasing Contracting Agency enters into the Contract, the Purchasing Contracting Agency reasonably contemplates, based on historical or other data available to the Purchasing Contracting Agency, that the total payments it will make for Goods or Services, or both, or Personal Services, under the Contract will, in aggregate, exceed \$250,000 over the anticipated duration of the Contract.

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

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

01-0450

Interstate Cooperative Procurements

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

01-0460

Advertisements of Interstate Cooperative Procurements

(1) The Solicitation Document for an Interstate Cooperative Procurement is advertised in Oregon for purposes of ORS 279A.220(2)(a) if it is advertised in Oregon in compliance with ORS 279B.055(4) or 279B.060(4) by:

- (a) The Administering Contracting Agency;
- (b) The Purchasing Contracting Agency;

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

(2) A Purchasing Contracting Agency or the Cooperative Procurement Group of which the Purchasing Contracting Agency is a member satisfies the advertisement requirement under ORS 279A.220(2)(b) if the notice is advertised in the same manner as provided in ORS 279B.055(4)(b) and (c).

01-0470

Protests and Disputes

(1) An Offeror or potential Offeror wishing to protest the procurement process, the contents of a solicitation document related to a Cooperative Procurement or the award or proposed award of an Original Contract shall make the protest in accordance with ORS 279B.400 through 279B.425 unless the Administering Contracting Agency is not subject to the Code. If the Administering Contracting Agency is not subject to the Code, then the Offeror or potential Offeror shall make the protest in accordance with the processes and procedures established by the Administering Contracting Agency.

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

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

01-0480

Contract Amendments

A purchasing Contracting Agency may amend a Contract entered into pursuant to a Cooperative Procurement as set forth in Rule 02-0800.

DIVISION 2
PUBLIC PROCUREMENTS FOR GOODS OR SERVICES

General Provisions

02-0000

Application

These division 2 rules implement ORS Chapter 279B, Public Procurements and apply to the Procurement of Goods or Services. Local Contracting Agencies, pursuant to ORS 279B.050(4)(a), may also adopt these division 2 rules to govern the Procurement of Personal Services Contracts or elect to award Personal Services Contracts under procedures set forth in ORS 279B.055 through 279B.085. These division 2 rules become effective on March 1, 2005 and apply to Contracts first advertised, but if not advertised then entered into, on or after March 1, 2005.

02-0100

Definitions

- (1) **"Advantageous"** means in the Agency's best interests, as assessed according to the judgment of the Agency.
- (2) **"Affected Person"** or **"Affected Offeror"** means a Person whose ability to participate in a Procurement is adversely affected by a Agency decision.

Source Selection

02-0250

Methods of Source Selection

Except as permitted by ORS 279B.065 through 279B.085 and ORS 279A.200 through 279A.225, the Agency shall Award a Public Contract for Goods or Services, or both, based on Offers received in response to either competitive sealed Bids pursuant to ORS 279B.055 and Rule 02-0255 or competitive sealed Proposals pursuant to ORS 279B.060 and Rule 02-0260.

Competitive Sealed Bidding

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

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

- (a) General Information.
 - (A) Notice of any pre-Offer conference as follows:
 - (i) The time, date and location of any pre-Offer conference;
 - (ii) Whether attendance at the conference will be mandatory or voluntary; and
 - (iii) A provision that provides that statements made by the Agency's representatives at the conference are not binding upon the Agency unless confirmed by Written Addendum.
 - (B) The form and instructions for submission of Bids and any other special information;
 - (C) The time, date and place of Opening;
 - (D) The office where the Solicitation Document may be reviewed;
 - (E) A statement that each Bidder must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120(1); and
 - (F) How the Agency will notify Bidders of Addenda and how the Agency will make Addenda available (See Rule 02-0430).
- (b) Agency Need. The character of the Goods or Services the Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements.

- (c) Bidding and Evaluation Process.
 - (A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;
 - (B) The Agency shall set forth objective evaluation criteria in the Solicitation Document in accordance with the requirements of ORS 279B.055(6)(a). Evaluation criteria need not be precise predictors of actual future costs, but to the extent possible, such evaluation factors shall be reasonable estimates of actual future costs based on information the Agency has available concerning future use; and
 - (C) If the Agency intends to Award Contracts to more than one Bidder pursuant to Rule 02-0600(4)(c), the Agency shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award.
- (d) Applicable preferences pursuant to ORS 279B.055(6)(b).
- (e) For Contracting Agencies subject to ORS 305.385, Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
- (f) All Contract terms and conditions, including a provision indicating whether the Contractor can assign the Contract, delegate its duties, or subcontract the delivery of the Goods or Services without prior written approval from the Agency.

02-0257

Multistep Sealed Bids

- (1) Generally. The Agency may procure Goods or Services by using multistep competitive sealed Bids pursuant to ORS 279B.055(12).
- (2) Phased Process. Multistep bidding is a phased process that seeks necessary information or unpriced technical Bids in the initial phase and regular competitive sealed bidding, inviting Bidders who submitted technically eligible Bids in the initial phase to submit competitive sealed price Bids on the technical Bids in the final phase. The Contract shall be Awarded to the lowest Responsible Bidder. If time is a factor, the Agency may require Bidders to submit a separate sealed price Bid during the initial phase to be opened after the technical evaluation.
- (3) Public Notice. Whenever multistep sealed Bids are used, public notice for the first phase shall be given in accordance with Rule 02-0300. Public notice is not required for the subsequent phases. However, the Agency shall give notice of subsequent phases to all Bidders and inform

Bidders of the right to protest Addenda issued after initial Closing pursuant to Rule 02-0430 and inform Bidders excluded from the subsequent phases of the right, if any, to protest exclusion pursuant to Rule 02-0720.

(4) Procedures Generally. In addition to the procedures set forth in Rule 02-0300 through 02-0490, the Agency shall employ the procedures set forth in this rule for multistep bidding:

- (a) Solicitation Protest. Prior to the Closing of phase one, the Agency shall provide an opportunity to protest the solicitation and under ORS 279B.405 and Rule 02-0730.
- (b) Addenda Protest. The Agency may, provide an opportunity to protest any Addenda issued during phase two pursuant to Rule 02-0430(3)(b).
- (c) Exclusion Protest. The Agency may, but is not required to provide an opportunity for a Bidder to protest exclusion from the second round of multistep sealed Bids as set forth in Rule 02-0720.
- (d) Administrative Remedy. Bidders may submit a protest to any Addenda or to any action by the Agency that has the effect of excluding the Proposer from the second phase of multistep bidding to the extent such protests are provided for in the Solicitation Document or required by this section. Failure to so protest shall be considered the Bidders's failure to pursue an administrative remedy made available to the Bidder by the Agency.
- (e) Award Protest. The Agency shall provide an opportunity to protest its intent to Award a Contract pursuant to ORS 279B.410 and Rule 02-0740. An Affected Bidder may protest, for any of the reasons set forth in Rule 02-0720(2), its exclusion from the second phase of a multistep sealed Bid, or an Addendum issued following initial Closing, if the Agency did not previously provide Bidders the opportunity to protest such exclusion or Addendum.

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

- (a) Form. Multistep sealed bidding shall be initiated by the issuance of an Invitation to Bid in the form and manner required for competitive sealed Bids except as hereinafter provided. In addition to the requirements set forth in Rule 02-0255(2), the multistep Invitation to Bid shall state:
 - (A) That un-priced technical Bids are requested;

- (B) Whether price Bids are to be submitted at the same time as un-priced technical Bids; if they are, that such price Bids shall be submitted in a separate sealed envelope;
 - (C) That the solicitation is a multistep sealed Bid Procurement, and priced Bids will be considered only in the second phase and only from those Bidders whose un-priced technical Bids are found eligible in the first phase;
 - (D) The criteria to be used in the evaluation of un-priced technical Bids;
 - (E) That the Agency, to the extent that it finds necessary, may conduct oral or written discussions for the purposes of clarification of the un-priced technical Bids;
 - (F) That the Goods or Services being procured shall be furnished generally in accordance with the Bidder's technical Bid as found to be finally eligible and shall meet the requirements of the Invitation to Bid.
 - (G) Whether Bidders excluded from subsequent phases have a right to protest the exclusion before the notice of intent to Award. Such information can be given or changed by Addenda.
- (b) Addenda to the Invitation to Bid. After receipt of un-priced technical Bids, Addenda to the Invitation to Bid shall be distributed only to Bidders who submitted un-priced technical Bids.
 - (c) Receipt and Handling of Un-priced Technical Bids. Un-priced technical Bids need not be opened publicly.
 - (d) Evaluation of Un-Priced Technical Bids. Un-priced technical Bids submitted by Bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation to Bid. Un-priced technical Bids shall be categorized as:
 - (A) Eligible;
 - (B) Potentially eligible; that is, reasonably susceptible of being made eligible; or
 - (C) Ineligible. The Agency shall record in writing the basis for determining a Bid ineligible and make it part of the Procurement file. The Agency may initiate phase two of the procedure if, in the Agency's opinion, there are sufficient eligible un-priced technical Bids to assure effective price

competition in the second phase without technical discussions. If the Agency finds that such is not the case, the Agency may issue an Addendum to the Invitation to Bid or engage in technical discussions as set forth in subsection (5)(e) of this rule.

- (e) Discussion of Un-priced Technical Bids. The Agency may seek clarification of a technical Bid by any eligible, or potentially eligible Bidder. During the course of such discussions, the Agency shall not disclose any information derived from one un-priced technical Bid to any other Bidder. Once discussions are begun, any Bidder who has not been notified that its Bid has been finally found ineligible may submit supplemental information amending its technical Bid at any time until the Closing of the final step established by the Agency. Such submission may be made at the request of the Agency or upon the Bidder's own initiative.
- (f) Notice of Ineligible Un-priced Technical Bid. When the Agency determines a Bidder's un-priced technical Bid to be ineligible, such Bidder shall not be afforded an additional opportunity to supplement its technical Bids.
- (g) Mistakes During Multistep Sealed Bidding. Mistakes may be corrected or Bids may be withdrawn during phase one:
 - (A) Before un-priced technical Bids are considered;
 - (B) After any discussions have commenced under subsection (5)(e);
 - (C) When responding to any Addenda of the Invitation to Bid; or
 - (D) In accord with Rule 02-0470.
- (6) Revisions to Solicitation Specifications. After Closing of phase one, the Agency may issue Addenda that modify the Specifications for the Goods or Services being procured or that modify other terms and conditions of the Invitation to Bid. The Agency shall provide such Addenda to all Bidders who initially submitted unpriced technical Bids. The Agency may then require Bidders to submit revised unpriced technical Bids.
- (7) Procedure for Phase Two of Multistep Sealed Bidding.
 - (a) Initiation. Upon the completion of phase one, the Agency shall invite each eligible Bidder to submit a price Bid.
 - (b) Conduct. The Agency shall conduct phase two as any other competitive sealed Bid Procurement except:

- (A) As specifically set forth in this rule;
- (B) No public notice need be given of this invitation to submit price Bids because such notice was previously given.

02-0260

Competitive Sealed Proposals

(1) Generally. The Agency may procure Goods or Services by competitive sealed Proposals as set forth in ORS 279B.060. A Request for Proposal is used to initiate a competitive sealed Proposal solicitation and shall contain the information required by ORS 279B.060(2) and by section 2 of this rule. The Agency shall provide public notice of the competitive sealed Proposal as set forth in Rule 02-0300.

(2) Request for Proposal. Prior to issuing a Request for Proposal, Agency staff shall submit the RFP to the Contract Review Authority for its review and approval. In addition to the provisions required by ORS 279B.060(2), the Request for Proposal shall include the following:

- (a) General Information.
 - (A) Notice of any pre-Offer conference as follows:
 - (i) The time, date and location of any pre-Offer conference; and
 - (ii) Whether attendance at the conference will be mandatory or voluntary; and
 - (iii) A provision that provides that statements made by the Agency's representatives at the conference are not binding upon the Agency unless confirmed by Written Addendum.
 - (B) The form and instructions for submission of Proposals and any other special information;
 - (C) The time, date and place of Opening;
 - (D) The office where the Solicitation Document may be reviewed; and
 - (E) How the Agency will notify Proposers of Addenda and how the Agency will make Addenda available (See Rule 02-0430).

- (b) Agency Need. The character of the Goods or Services the Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements.
- (c) Proposal and Evaluation Process.
 - (A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;
 - (B) The Agency shall set forth selection criteria in the Solicitation Document in accordance with the requirements of ORS 279B.060(2)(h)(E). Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates of actual future costs based on information available to the Agency; and
 - (C) If the Agency intends to Award Contracts to more than one Proposer pursuant to Rule 02-0600(4)(d), the Agency must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award.
- (d) Applicable Preferences described in ORS 279A.125(2) and 282.210.
- (e) For Contracting Agencies subject to ORS 305.385, Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
- (f) All Contract terms and conditions, including a provision indicating whether the Contractor can assign the Contract, delegate its duties, or subcontract the Goods or Services without prior written approval from the Agency.

02-0261

Procedures for Competitive Range, Multi-tiered and Multistep Proposals

(1) Generally. The Agency may procure Goods or Services employing any combination of the methods of Contractor selection as set forth in ORS 279B.060(6)(b). In addition to the procedures set forth in Rule 02-0300 through 02-0490 for methods of Contractor selection that call for the establishment of a Competitive Range or include discussions or negotiations, the Agency shall employ the procedures set forth in this rule for Competitive Range, multi-tiered and multistep Proposals.

(2) Solicitation Protest. Prior to the initial Closing, the Agency shall provide an opportunity to protest the solicitation under ORS 279B.405 and Rule 02-0730.

(3) Addenda Protest. The Agency may provide an opportunity to protest, pursuant to Rule 02-0430, any Addenda issued pursuant to ORS 279B.060(6)(d).

(4) Exclusion Protest. The Agency may provide before the notice of an intent to Award an opportunity for a Proposer to protest exclusion from the Competitive Range or from subsequent phases of multi-tiered or multistep sealed Proposals as set forth in Rule 02-0720.

(5) Administrative Remedy. Proposers may submit a protest to any Addenda or to any action by the Agency that has the effect of excluding the Proposer from subsequent phases of a multiple-tiered or multistep Request for Proposals to the extent such protests are provided for in the Solicitation Document. Failure to so protest shall be considered the Proposer's failure to pursue an administrative remedy made available to the Proposer by the Agency.

(6) Award Protest. The Agency shall provide an opportunity to protest its intent to Award a Contract pursuant to ORS 279B.410 and Rule 02-0740. An Affected Proposer may protest, for any of the reasons set forth in Rule 02-0720(2), its exclusion from the Competitive Range or any phase of a multi-tiered or multistep sealed Proposal, or an Addendum issued following initial Closing, if the Agency did not previously provide Proposers the opportunity to protest such exclusion or Addendum.

02-0262

Competitive Range, Discussions and Negotiations

(1) Competitive Range. When the Agency's solicitation process conducted pursuant to ORS 279B.060(6)(b) calls for the Agency to establish a Competitive Range at any stage in the Procurement process, it shall do so as follows:

(a) Determining Competitive Range.

(A) The Agency shall establish a Competitive Range after evaluating all Responsive Proposals in accordance with the evaluation criteria set forth in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria set forth in the Request for Proposals, the Agency shall determine and rank the Proposers in the Competitive Range.

(B) The Agency may increase the number of Proposers in the Competitive Range if the Agency's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the most Advantageous Proposer. The Agency may decrease the number of Proposers in the initial Competitive Range

only if the excluded Proposers have no reasonable chance to be the most advantageous Proposer.

- (b) **Protesting Competitive Range.** The Agency shall provide Written notice to all Proposers identifying Proposers in the Competitive Range. The Agency may provide an opportunity for Proposers excluded from the Competitive Range to protest the Agency's evaluation and determination of the Competitive Range in accordance with Rule 02-0720.
 - (c) **Intent to Award; Discuss or Negotiate.** After determination of the Competitive Range and after any protest period provided in accordance with subsection (1)(b) expires, or after the Agency has provided a final response to any protest, whichever date is later, the Agency may either:
 - (A) Provide Written notice to all Proposers in the Competitive Range of its intent to Award the Contract to the highest-ranked Proposer in the Competitive Range.
 - (i) An unsuccessful Proposer may protest the Agency's intent to Award in accordance with Rule 02-0740 and ORS 279B.410.
 - (ii) After the protest period provided in accordance with Rule 02-0740 expires, or after the Agency has provided a final response to any protest, whichever date is later, the Agency shall commence negotiations in accordance with section (3) of this rule with Proposers in the Competitive Range; or
 - (B) Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them as set forth in section (2) of this rule and following such discussions and receipt and evaluation of revised Proposals, conduct negotiations as set forth in section (3) of this rule with the Proposers in the Competitive Range.
- (2) **Discussions; Revised Proposals.** If the Agency chooses to enter into discussions with and receive best and final Offers (See Rule 02-0262(4)), the Agency shall proceed as follows:
- (a) **Initiating Discussions.** The Agency shall initiate oral or written discussions with all Proposers submitting Responsive Proposals or all Proposers in the Competitive Range (collectively "eligible Proposers") regarding their Proposals with respect to the provisions of the RFP that the Agency identified in the RFP as the subject of discussions. The Agency may conduct discussions for the following purposes:
 - (A) Informing eligible Proposers of deficiencies in their initial Proposals;

- (B) Notifying eligible Proposers of parts of their Proposals for which the Agency would like additional information; or
 - (C) Otherwise allowing eligible Proposers to develop revised Proposals that will allow the Agency to obtain the best Proposal based on the requirements and evaluation criteria set forth in the Request for Proposals.
- (b) Conducting Discussions. The Agency may conduct discussions with each eligible Proposer necessary to fulfill the purposes of this section 2, but need not conduct the same amount of discussions with each eligible Proposer. The Agency may terminate discussions with any eligible Proposer at any time. However, the Agency shall offer all eligible Proposers the same opportunity to discuss their Proposals with the Agency before the Agency notifies eligible Proposers of the date and time pursuant to section 4 that best and final Proposals will be due.
- (A) In conducting discussions, the Agency:
 - (i) Shall treat all eligible Proposers fairly and shall not favor any eligible Proposer over another;
 - (ii) Shall disclose other eligible Proposer's Proposals or discussions only in accordance with 279B.060(6)(a)(B) or (C);
 - (iii) May adjust the evaluation of a Proposal as a result of a discussion under this section. The conditions, terms, or price of the Proposal may be altered or otherwise changed during the course of the discussions provided the changes are within the scope of the Request for Proposals.
 - (B) At any time during the time allowed for discussions, the Agency may:
 - (i) Continue discussions with a particular eligible Proposer;
 - (ii) Terminate discussions with a particular eligible Proposer and continue discussions with other eligible Proposers; or
 - (iii) Conclude discussions with all remaining eligible Proposers and provide notice pursuant to section 4 of this rule to the eligible Proposers requesting best and final Offers.

(3) Negotiations.

(a) Initiating Negotiations. The Agency may commence serial negotiations with the highest-ranked eligible Proposers or commence simultaneous negotiations with all eligible Proposers as follows:

(A) After initial determination of which Proposals are Responsive; or

(B) After initial determination of the Competitive Range in accordance with section (1) of this rule; or

(C) After conclusion of discussions with all eligible Proposers and evaluation of revised Proposals (See section (2) of this rule).

(b) Conducting Negotiations.

(A) Scope. The Agency may negotiate:

(i) The statement of Work;

(ii) The Contract Price as it is affected by negotiating the statement of Work; and

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

(B) Terminating Negotiations. At any time during discussions or negotiations that the Agency conducts in accordance with sections (2) or (3) of this rule, the Agency may terminate discussions or negotiations with the highest-ranked Proposer, or the Proposer with whom it is currently discussing or negotiating, if the Agency reasonably believes that:

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

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

- (c) Continuing Serial Negotiations. If the Agency is conducting serial negotiations and the Agency terminates negotiations with a Proposer in accordance with paragraph 3(b)(B) of this rule, the Agency may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in section (3) of this rule until the Agency has either:
 - (A) Determined to Award the Contract to the Proposer with whom it is currently discussing or negotiating; or
 - (B) Completed one round of discussions or negotiations with all Proposers in the Competitive Range, unless the Agency provided for more than one round of discussions or negotiations in the Request for Proposals, in which case the Agency has completed all rounds of discussions or negotiations.
- (d) Competitive Simultaneous Negotiations. If the Agency chooses to conduct competitive negotiations, the Agency may negotiate simultaneously with competing Proposers. The Agency:
 - (A) Shall treat all Proposers fairly and shall not favor any Proposer over another;
 - (B) May disclose other Proposer's Proposals or the substance of negotiations with other Proposers only if the Agency notifies all of the Proposers with whom the Agency will engage in negotiations of the Agency's intent to disclose before engaging in negotiations with any Proposer.
- (e) Any oral modification of a Proposal resulting from negotiations under this section (3) shall be reduced to Writing by the Proposer.

(4) Best and Final Offers. If best and final Offers are required, the Agency shall establish a common date and time by which Proposers must submit best and final Offers. Best and final Offers shall be submitted only once; provided, however, the Agency may make a written determination that it is in the Agency's best interest to conduct additional discussions, negotiations or change the Agency's requirements and require another submission of best and final Offers. Otherwise, no discussion of or changes in the best and final Offers shall be allowed prior to Award. Proposers shall also be informed if they do not submit notice of withdrawal or another best and final Offer, their immediately previous Offer will be construed as their best the final Offer. The Agency shall evaluate Offers as modified by the best and final Offer. The Agency shall conduct evaluations conducted as described in Rule 02-0600. The Agency shall not modify evaluation factors or their relative importance after the date and time that best and final Offers are due.

Multistep Sealed Proposals

- (1) Generally. The Agency may procure Goods or Services by using multistep competitive sealed Proposals pursuant to ORS 279B.060(6)(b)(G).
- (2) Phased Process. Multistep sealed Proposals is a phased Procurement process that seeks necessary information or un-priced technical Proposals in the initial phase and invites Proposers who submitted technically qualified Proposals in the initial phase to submit competitive sealed price Proposals on the technical Proposers in the second phase. The Contract shall be Awarded to the Responsible Proposer submitting the most Advantageous Proposal in accordance with the terms of the Solicitation Document applicable to the second phase. If time is a factor, the Agency may require Proposers to submit a separate sealed price Proposal during the initial phase to be opened after the technical evaluation.
- (3) Public Notice. Whenever multistep sealed Proposals are used, public notice for the first phase shall be given in accordance with Rule 02-0300. Public notice is not required for the second phase. However, the Agency shall give notice of the subsequent phases to all Proposers and inform any Proposers excluded from the subsequent phases of the right, if any, to protest exclusion pursuant to Rule 02-0720.
- (4) Procedure for Phase One of Multistep Sealed Proposals.
 - (a) Form. Multistep sealed Proposals shall be initiated by the issuance of a Request for Proposal in the form and manner required for competitive sealed Proposals except as provided in this rule. In addition to the requirements set forth in Rule 02-0260(2), the multistep Request for Proposal shall state:
 - (A) That un-priced technical Proposals are requested;
 - (B) Whether price Proposals are to be submitted at the same time as un-priced technical Proposals; that if they are, such price Proposals shall be submitted in a separate sealed envelope;
 - (C) That the solicitation is a multistep sealed Proposal Procurement, and that priced Proposals will be considered only in the subsequent phases from those Proposers whose un-priced technical Proposals are found qualified in the first phase;
 - (D) The criteria to be used in the evaluation of un-priced technical Proposals;

- (E) That the Agency, to the extent that it finds necessary, may conduct oral or written discussions of the un-priced technical Proposals;
 - (F) That the Goods or Services being procured shall be furnished generally in accordance with the Proposer's technical Proposal as found to be finally qualified and shall meet the requirements of the Request for Proposal.
 - (G) Whether Proposers excluded from subsequent phases have a right to protest the exclusion. Such information can be given or changed through Addenda.
- (b) Addenda to the Request for Proposal. After receipt of un-priced technical Proposals, Addenda to the Request for Proposal shall be distributed only to Proposers who submitted un-priced technical Proposals.
 - (c) Receipt and Handling of Un-priced Technical Proposals. Un-priced technical Proposals need not be opened publicly.
 - (d) Evaluation of Un-Priced Technical Proposals. Un-priced technical Proposals shall be evaluated solely in accordance with the criteria set forth in the Request for Proposal. Un-priced technical Proposals shall be categorized as:
 - (A) Qualified;
 - (B) Potentially qualified; that is, reasonably susceptible of being made qualified; or
 - (C) Unqualified. The Agency shall record in writing the basis for determining a Proposal unqualified and make it part of the Procurement file. The Agency may initiate phase two of the procedure if, in the Agency's opinion, there are sufficient qualified or potentially qualified un-priced technical Proposals to assure effective price competition in the second phase without technical discussions. If the Agency finds that such is not the case, the Agency shall issue an Addendum to the Request for Proposal or engage in technical discussions as set forth in subsection 4(e).
 - (e) Discussion of Un-priced Technical Proposals. The Agency may seek clarification of a technical Proposal of any Proposer who submits a qualified, or potentially qualified technical Proposal. During the course of such discussions, the Agency shall not disclose any information derived from one un-priced technical Proposal to any other Proposer. Once discussions are begun, any Proposer who has not been notified that its Proposal has been finally found unqualified may submit supplemental information amending its technical Proposal at any time until the

Closing date established by the Agency. Such submission may be made at the request of the Agency or upon the Proposer's own initiative.

- (f) Notice of Unqualified Un-priced Technical Proposal. When the Agency determines a Proposer's un-priced technical Proposal to be unqualified, such Proposer shall not be afforded an additional opportunity to supplement its technical Proposals.
 - (g) Mistakes During Multistep Sealed Proposals. Mistakes may be corrected or Proposals may be withdrawn during phase one:
 - (A) Before un-priced technical Proposals are considered;
 - (B) After any discussions have commenced under subsection 4(e) of this rule;
 - (C) When responding to any Addenda to the Request for Proposal; or
 - (D) In accordance with Rule 02-0470.
- (5) Methods of Contractor Selection for Phase One. In conducting phase one, the Agency may employ any combination of the methods of Contractor selection that call for the establishment of a Competitive Range or include discussions, negotiations, or best and final offers as set forth in Rule 02-0261 and Rule 02-0262. If the Agency uses such methods of Contractor selection, it shall follow the procedures set forth in Rule 02-0261 and Rule 02-0262.
- (6) Procedure for Phase Two.
- (a) Initiation. Upon the completion of phase one, the Agency shall invite each qualified Proposer to submit price Proposals.
 - (b) Conduct. The Agency shall conduct phase two as any other competitive sealed Proposal Procurement except:
 - (A) As specifically set forth in this rule; and
 - (B) No public notice need be given of the request to submit price Proposals because such notice was previously given.

02-0265

Small Procurements

(1) Generally. For Procurements of Goods or Services less than or equal to \$15,000 the Agency may Award a Contract as a small Procurement pursuant to ORS 279B.065 and in accordance with rules promulgated by the Agency pursuant to ORS 279A.070.

- (a) For purchases up to the sum of \$500.00, an authorized Agency employee may use a field purchase order to purchase needed items, without any other approval.
- (b) For purchases in an amount in excess of \$500.00, and up to \$2,500.00, a department head can approve a purchase only after obtaining at least three (3) competitive quotes from responsible and responsive bidders.
- (c) For purchases in an amount in excess of \$2,500.00 and up to \$7,500.00, a department head can approve a purchase only after obtaining at least three (3) written quotes from responsible and responsive bidders.
- (d) For purchases in an amount in excess of \$7,500.00, and up to \$15,000.00, a purchase order must be approved by the Agency Staff Coordinator or City Manager only after at least three (3) written quotes have been obtained from responsible and responsive bidders.
- (e) In soliciting quotes under this rule, Agency staff members shall endeavor to obtain quotes from bidders who have paid unemployment taxes or income taxes in the state of Oregon during the 12 calendar months immediately preceding the submission of the quote, and who have a business address in Wasco County.
- (f) The selection criteria for deciding which quote to select for award of a small procurement purchase may be limited to price or some combination of price, experience, specific expertise, availability, project understanding, contractor capacity, responsibility and similar factors.

(2) Amendments. The Agency may amend a Public Contract Awarded as a small Procurement in accordance Rule 02-0800, but the cumulative amendments shall not increase the total Contract Price to greater than \$25,000.

Sole-source Procurements

- (1) Generally. The Agency may Award a Public Contract without competition as a sole-source Procurement pursuant to the requirements of ORS 279B.075.
- (2) Public Notice. If, but for the Agency's determination that it may enter into a Contract as a sole-source, the Agency would be required to select a Contractor using source selection methods set forth in either ORS 279B.055 or 279B.060, the Agency shall give public notice of the Contract Review Authority's determination that the Goods or Services or class of Goods or Services are available from only one source in a manner similar to public notice of competitive sealed Bids under ORS 279B.055(4) and Rule 02-0300. The public notice shall describe the Goods or Services to be acquired by a sole-source Procurement, identify the prospective Contractor and include the date, time and place that protests are due. The Agency shall give such public notice at least seven (7) Days before Award of the Contract.
- (3) Procedure. The Agency, prior to purchase must document the procurement file with the Agency's findings of current market research to support the determination that the product or service is available from only one seller or source. The Agency's findings must also include:
 - (a) A brief description of the contract or contracts to be covered, including volume of contemplated future purchases;
 - (b) Description of the product or service to be purchased; and
 - (c) The reasons the Agency is using this procurement method, which must include at least one of the following:
 - (A) Efficient utilization of existing supplies and services requires the acquisition of compatible supplies and services; or
 - (B) The goods and services required for the exchange of software or data with other public or private agencies are available from only one source; or
 - (C) The particular product is for use in a pilot or experimental project; or
 - (D) Other findings that support the conclusion that the goods or services are available from only one source.
- (4) Protest. An Affected Person may protest the Contract Review Authority's determination that the Goods or Services or class of Goods or Services are available from only one source in accordance with Rule 02-0710.

02-0275

Emergency Procurements

The Agency may award a Public Contract as an Emergency Procurement, in an amount not to exceed \$100,000, using a procurement method which encourages competition that is practicable under the circumstances. The award of Public Contract as an Emergency Procurement which exceeds the sum of \$100,000 shall be awarded by the Contract Review Authority, using a procurement method which encourages competition that is practicable under the circumstances.

02-0280

Special Procurements

(1) Generally. The Agency may Award a Public Contract as a Special Procurement pursuant to the requirements of ORS 279B.085.

(2) Public Notice. The Agency shall give public notice of (1) its request for approval of a Special Procurement and (2) the Contract Review Authority's approval of a Special Procurement in a manner similar to public notice of competitive sealed Bids under ORS 279B.055(4) and Rule 02-0300. The public notice shall describe the Goods or Services or class of Goods or Services to be acquired through the Special Procurement. The Agency shall give such public notice of its request for approval of a Special Procurement at least seven (7) Days prior to the approval of the Special Procurement by the Contract Review Authority. The Agency shall give such public notice of the approval of a Special Procurement at least fourteen (14) Days before Award of the Contract.

(3) Pursuant to ORS 279B.085, the following contracts are classified as "special procurements", exempt from the requirements of traditional competitive bidding:

(a) Brand Names or Products.

(A) Solicitation specifications for public contracts must not expressly or implicitly require any product of any particular manufacturer or seller except as expressly authorized in subsections (2) and (3) of this rule.

(B) The Agency may specify a particular brand name, make or product suffixed by "or equal", "or approved equal", "or equivalent", "or approved equivalent", or similar language if there is no other practical method of specification.

- (C) The Agency may specify a brand name, mark, or product without an “or equal” or equivalent suffix if there is no practical method of specification, after documenting in the procurement file the following information:
 - (i) A brief description of the solicitation(s) to be covered, including volume of contemplated future purchases;
 - (ii) The brand name, make, or product to be specified; and
 - (iii) The reasons the Agency is seeking this procurement method, which must include at least one of the following findings in the procurement file:
 - 1) It is unlikely that specification of the brand name, mark or product will encourage favoritism in the award of public contracts or substantially diminish competition; or
 - 2) Specification of the brand name, mark or product would result in substantial cost savings to the Agency; or
 - 3) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies.
- (b) Advertising Contracts. The Agency should use competitive methods wherever possible to achieve the best value, and document in the procurement file the reasons why a competitive process was deemed to be impractical.
- (c) Contracts for Price Regulated Items.
 - (A) The Agency may, without competitive bidding, contract for the direct purchase of supplies and services being where the rate for the supplies and services being purchased is established by federal, state, or local regulatory authority.
 - (B) The Agency should use competitive methods wherever possible to achieve best value and document in the procurement file the reasons why a competitive process was deemed to be impractical.
- (d) Purchase of Used Personal Property.
 - (A) The Agency may purchase used property or equipment without competitive bidding, if at the time of purchase, the Agency has determined

and documented that the purchase will (i) be unlikely to encourage favoritism or diminish competition, and (ii) result in substantial cost savings or promote the public interest.

- (B) “Used personal property or equipment” means the property or equipment which has been placed in its intended use by a previous owner or user for a period of time recognized in the relevant-trade or industry as qualifying the personal property or equipment as “used”, at the time of the Agency purchase. “Used property or equipment” generally does not include property or equipment if the Agency was the previous user, whether under a lease, as part of a demonstration, trial or pilot project, or similar arrangement.
- (C) For purchases of used personal property or equipment costing an amount not exceeding \$150,000, the Agency must, where feasible, obtain three competitive quotes, unless the Agency has determined and documented that a purchase without obtaining competitive quotes will result in cost savings to the Agency and will not diminish competition or encourage favoritism.
- (D) For purchases of used personal property or equipment exceeding \$150,000, the Agency must obtain and keep a written record of the source and amount of quotes received. If three quotes are not available, a written record must be made of the attempts to obtain quotes.
- (e) Gasoline, Diesel Fuel, Heating Oil, Lubricants and Asphalts. Contracts for the purchase of gasoline, diesel fuel, heating oil, lubricants and asphalts are exempt from formal competitive bidding requirements 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.
- (f) Copyrighted Materials. If the contract is for the purchase of copyrighted materials and there is only one known supplier available for such goods, the Agency may contract for the purchase of the goods without competitive bidding.
- (g) Periodicals. The Agency may purchase subscriptions for periodicals, including journals, magazines, and similar publications without competitive bidding.
- (h) Investment Contracts. The Agency may, without competitive bidding, contract for the purpose of the investment of public funds or the borrowing of funds by the Agency when such investment or borrowing is contracted pursuant to duly enacted statute, ordinance, charter, or constitution.

- (i) Insurance Contracts. Contracts for insurance shall be let by one of the following alternative procedures:
 - (A) Insurance Consultant. The Agency may solicit proposals from insurance agents to perform insurance services as the Agency's insurance consultant 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 insurance consultant is given responsibility:
 - (i) As part of the RFP process for selection of an insurance consultant, the 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 Dalles and in at least one insurance trade publication of general circulation in the state. The advertisement shall generally describe the nature of the insurance that the Agency will require.
 - (ii) Any contract period shall not exceed three years. An insurance consultant may serve more than one contract period. An insurance consultant of record shall qualify for a contract prior to each period as if each contract period were the first.
 - (iii) In selecting an insurance consultant, the Agency shall select the consultant or consultants most likely to perform the most effective services.
 - (B) Specific Proposals for Insurance Contracts. As an alternative to the process provided in section (i), the Agency may solicit proposals from insurance agents for the purpose of acquiring specific insurance contracts subject to the following conditions:
 - (i) The 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. These efforts shall include public advertisements in at least one newspaper of general circulation in The Dalles area and at least one insurance trade publication of general circulation in the state. The advertisement shall state the specific nature of the insurance acquired.

- (ii) The Agency shall select an insurance agent on the basis of the most advantageous offer considering coverage, premium cost, and service to be provided.

- (j) Oil or Hazardous Material Removal. The Agency may enter into public contracts without competitive bidding when ordered to cleanup oil or hazardous waste pursuant to the authority granted the Department of Environmental Quality (DEQ) under ORS 466.605 through 466.680 and this order necessitates the prompt establishment and performance of the contract in order to comply with the statutes regarding spill or release of oil or hazardous materials. In exercising its authority under this exemption, the Agency shall:
 - (A) To the extent reasonable under the circumstances, encourage competition by attempting to make informal solicitations or to obtain informal quotes from potential suppliers of goods or services;
 - (B) Make written findings describing the circumstances requiring cleanup or a copy of the DEQ order ordering such cleanup;
 - (C) Record the measures taken under subsection (a) of this section to encourage competition, the amount of the quotes or proposals obtained, if any, and the reason for selecting the contractor selected; and
 - (D) Not contract pursuant to this exemption in the absence of an order from the Department of Environmental Quality to cleanup a site with a time limitation that would not permit hiring a contractor under the usual competitive bidding procedures.

- (k) Goods purchased through the State of Oregon. Contracts for the purchase of goods or materials if competitive bids for the same goods or materials have been obtained by the State of Oregon, the contract is awarded to the same party that the State dealt with, and the price of the goods or materials is the same or lower than that paid by the State.

- (l) Auction Sales of Personal Property. Personal property may be sold at auction, after the property has been declared surplus, if the Agency determines that the auction contemplated will probably result in a higher net return than if the property were sold by competitive written bid.

- (m) Sales of Personal Property. The Agency may sell personal property after the property has been declared surplus, 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:

- (A) When the current market value per item is deemed to be less than \$1,000.00, the Agency may establish a selling price, schedule and advertise a sale date, and sell to the first qualified buyer meeting the sale terms; or
 - (B) When the current value per item is deemed to exceed \$1,000.00, 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. 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 Agency may negotiate a sale subject to the following conditions:
 - (i) An appraisal of the market value of the property is obtained and documented and the negotiated sale price exceeds the market value; or
 - (ii) The sale amount exceeds the highest bid received through the bidding or auction process.
- (n) Donations of Personal Property.
- (A) The Agency may transfer personal property after the property has been declared surplus, including recyclable or reclaimed materials, without remuneration or only nominal remuneration without competitive bids to the following activities:
 - (i) Another public agency; or
 - (ii) 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
 - (iii) Any recognized non-profit activity which is certified to receive federal surplus property.
 - (B) The Agency 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:

- (i) A determination has been made that the property is not needed for other public purposes;
 - (ii) If the property has a current market value of \$250.00 or more, the donation or sale shall:
 - 1) Be approved by the Agency Staff Coordinator or City Manager;
 - 2) Be documented by the Agency to be clearly in the public interest;
 - (iii) The Agency determines this is the most efficient and cost-effective method for disposing of the property.
- (C) The Agency shall maintain a record of all transfers, donations or sales authorized by sections (A) and (B) of this rule.
- (o) Information technology contracts. The Agency may enter into a contract to acquire information technology hardware and software, without competitive bidding, subject to the following conditions:
- (A) If the contract does not exceed \$75,000, the Agency shall, at a minimum, follow the provisions of Rule 02-0265. Prior to selecting a contractor, reasonable efforts shall be made to solicit proposals from three or more vendors. Justification of the award shall be documented and become a public record of the Agency.
 - (B) If the contract amount exceeds \$75,000, the Agency shall determine and use the best procurement method and shall solicit written proposals in accordance with the requirements of these Local Contract Review Board Rules. 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 is estimated to exceed \$500,000, the Agency shall provide proposers an opportunity to review the evaluation of their proposals before final selection.
- (p) Telecommunications Systems Contracts. The Agency may enter into a contract to acquire telecommunications system hardware and software, without competitive bidding, subject to the following conditions:

- (A) If the contract amount does not exceed \$75,000, the Agency shall at a minimum obtain competitive quotes. Prior to selection of a contractor, 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 \$75,000, the Agency shall determine the best procurement method and shall solicit written proposals in accordance with these Local Contract Review Board Rules.
- (C) The telecommunications solicitation method authorized in subsection (p)(B) of this rule shall:
 - (i) State the contractual requirements in the solicitation document;
 - (ii) State the evaluation criteria to be applied in awarding the contract and the role of any evaluation committee. Criteria that would be used to identify the proposal that best meets the Agency's needs may include, but are not limited to, cost, quality, service and support, compatibility and interconnectivity with the Agency's existing telecommunications system, product or system reliability, vendor viability and financial stability, operating efficiency, and expansion potential;
 - (iii) State the provisions made for bidders or proposers to comment on any specifications which they feel limit competition; and
 - (iv) Be advertised in accordance with rule 02-0300.
- (q) Banking services. The Agency may contract for banking services in accordance with the following provisions:
 - (A) The Agency may solicit proposals from local banking institutions for provide banking services for the Agency. As part of the RFP process for the selection of a bank, the Agency shall make reasonable efforts to inform known banking institutions in the competitive market area that it is considering such a selection. These efforts shall include a public advertisement in at least one newspaper of general circulation in The Dalles and in at least one trade publication of general circulation in the state. The advertisement shall generally describe the nature of the banking services the Agency will require.

- (B) Any contract period shall be at the Agency's discretion. A banking institution may serve more than one contract period. A banking institution of record shall qualify for a contract prior to each period as if each contract period were the first.
- (C) In selecting a banking institution to provide services, the Agency shall select the institution most likely to perform the most effective services.

(4) Protest. An Affected Person may protest the approval of or request for approval of a Special Procurement in accordance with ORS 279B.400 and Rule 02-0700.

02-0285

Cooperative Procurements

The Agency may participate in, sponsor, conduct, or administer Cooperative Procurements as set forth in ORS 279A.200 through 279A.225 and Rule 01-0400 through 01-0480.

Procurement Process

02-0300

Public Notice of Solicitation Documents

(1) Notice of Solicitation Documents; Fee. The Agency shall provide public notice of every Solicitation Document in accordance with section (2) of this rule. The Agency may give additional notice using any method it determines appropriate to foster and promote competition, including:

- (a) Mailing notice of the availability of the Solicitation Document to Persons that have expressed an interest in the Agency's Procurements;
- (b) Placing notice on the City's Internet World Wide Web site.

(2) Advertising. The Agency shall advertise every notice of a Solicitation Document as follows:

- (a) The Agency shall publish the advertisement for Offers in accordance with the requirements of ORS 279B.055(4) and 279B.060(4).

(3) Content of Advertisement. All advertisements for Offers shall set forth:

- (a) Where, when, how, and for how long the Solicitation Document may be obtained;

- (b) A general description of the Goods or Services to be acquired;
 - (c) The interval between the first date of notice of the Solicitation Document given in accordance with subsection 2(a) or (b) above and Closing, which shall not be less than fourteen (14) Days for an Invitation to Bid and thirty (30) Days for a Request for Proposals, unless the Agency determines that a shorter interval is in the public's interest, and that a shorter interval will not substantially affect competition. However, in no event shall the interval between the first date of notice of the Solicitation Document given in accordance with subsection 2(a) or (b) above and Closing be less than seven (7) Days as set forth in ORS 279B.055(4)(f). The Agency shall document the specific reasons for the shorter public notice period in the Procurement file;
 - (d) The date that Persons must file applications for prequalification if prequalification is a requirement and the class of Goods or Services is one for which Persons must be prequalified;
 - (e) The office where Contract terms, conditions and Specifications may be reviewed;
 - (f) The name, title and address of the individual authorized by the Agency to receive Offers;
 - (g) The scheduled Opening; and
 - (h) Any other information the Agency deems appropriate.
- (4) Posting Advertisement for Offers. The Agency shall post a copy of each advertisement for Offers at the principal business office of the Agency. A Proposer may obtain a copy of the advertisement for Offers upon request.
- (5) Fees. The Agency may charge a fee or require a deposit for the Solicitation Document.
- (6) Notice of Addenda. The Agency shall provide potential Offerors notice of any Addenda to a Solicitation Document in accordance with Rule 02-0430.

02-0310

Bids or Proposals are Offers

- (1) Offer and Acceptance. The Bid or Proposal is the Bidder's or Proposer's Offer to enter into a Contract. The Offer is a "Firm Offer," i.e., the Offer shall be held open by the Offeror for the Agency's acceptance for the period specified in Rule 02-0480. The Agency's Award of the Contract constitutes acceptance of the Offer and binds the Offeror to the Contract.

(2) Contingent Offers. Except to the extent the Proposer is authorized to propose certain terms and conditions pursuant to Rule 02-0262, a Proposer shall not make its Offer contingent upon the Agency's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

(3) Offeror's Acknowledgment. By Signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits proposal of alternative terms under Rule 02-0262, the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the Agency in Writing.

Bid and Proposal Preparation

02-0400

Offer Preparation

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

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

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

02-0410

Offer Submission

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

(2) Identification of Offers.

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

whichever is applicable. If the Agency permits facsimile Offers in the Solicitation Document, the Offeror may submit and identify facsimile Offers in accordance with these division 2 rules and the instructions set forth in the Solicitation Document.

- (b) The Agency is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.
- (3) Receipt of Offers. The Offeror is responsible for ensuring the Agency receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

02-0420

Pre-Offer Conferences

- (1) Purpose. The Agency may hold pre-Offer conferences with prospective Offerors prior to Closing, to explain the Procurement requirements, obtain information, or to conduct site inspections.
- (2) Required Attendance. The Agency may require attendance at the pre-Offer conference as a condition for making an Offer.
- (3) Scheduled Time. If the Agency holds a pre-Offer conference, it shall be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference.
- (4) Statements Not Binding. Statements made by the Agency's representative at the pre-Offer conference do not change the Solicitation Document unless the Agency confirms such statements with a Written Addendum to the Solicitation Document.
- (5) Agency Announcement. The Agency must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with Rule 02-0255(2) or Rule 02-0260(2).

02-0430

Addenda to Solicitation Document

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

(2) Notice and Distribution. The Agency shall notify prospective Offerors of Addenda in a manner intended to foster competition and to make prospective Offerors aware of the Addenda. The Solicitation Document shall specify how the Agency will provide notice of Addenda and how the Agency will make the Addenda available before Closing, and at each subsequent step or tier of evaluation if the Agency will engage in a multistep competitive sealed Bid process in accordance with Rule 02-0257, or a multi-tiered or multistep competitive sealed Proposal process in accordance with Rule 02-0261 through Rule 02-0263.

(3) Timelines; Extensions.

- (a) The Agency shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The Agency may extend the Closing if the Agency determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by a countervailing public interest, the Agency shall not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.
- (b) Notwithstanding subsection 3(a) of this rule, an Addendum that modifies the evaluation criteria, selection process or procedure for any tier of competition under a multistep sealed Bid or a multi-tiered or multistep sealed Proposal issued in accordance with ORS 279B.060(6)(d) and Rule 02-0261 through Rule 02-0263 must be issued no fewer than five (5) Days before the beginning of that tier or step of competition, unless the Agency determines that a shorter period is sufficient to allow Offerors to prepare for that tier or step of competition. The Agency shall document the factors it considered in making that determination, which may include, without limitation, the scope of the changes to the Solicitation Document, the location of the remaining eligible Proposers, or whether shortening the period between issuing an Addendum and the beginning of the next tier or step of competition favors or disfavors any particular Proposer or Proposers.

(4) Request for Change or Protest. Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in Rule 02-0730, by the close of the Agency's next business day after issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under Rule 02-0730, whichever date is later. If the date established in the previous sentence falls after the deadline for receiving protests to the Solicitation Document in accordance with Rule 02-0730, then the Agency may consider an Offeror's request for change or protest to the Addendum only, and the Agency shall not consider a request for change or protest to matters not added or modified by the Addendum. Notwithstanding any provision of this section (4) of this rule, the Agency is not required to provide a protest period for Addenda issued after initial Closing during a multi-tier or multistep Procurement process conducted pursuant to ORS 279B.055 or ORS 279B.060.

02-0440

Pre-Closing Modification or Withdrawal of Offers

- (1) Modifications. An Offeror may modify its Offer in Writing prior to the Closing. An Offeror shall prepare and submit any modification to its Offer to the Agency in accordance with Rule 02-0400 and Rule 02-0410, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:
 - (a) Bid (or Proposal) Modification; and
 - (b) Solicitation Document Number (or other identification as specified in the Solicitation Document).
- (2) Withdrawals.
 - (a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, signed by an authorized representative of the Offeror, delivered to the individual and location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by the Agency prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in person prior to the Closing, upon presentation of appropriate identification and evidence of authority satisfactory to the Agency.
 - (b) The Agency may release an unopened Offer withdrawn under subsection 2(a) of this rule to the Offeror or its authorized representative, after voiding any date and time stamp mark.
 - (c) The Offeror shall mark the Written request to withdraw an Offer as follows:
 - (A) Bid (or Proposal) Withdrawal; and
 - (B) Solicitation Document Number (or Other Identification as specified in the Solicitation Document).
- (3) Documentation. The Agency shall include all documents relating to the modification or withdrawal of Offers in the appropriate Procurement file.

02-0450

Receipt, Opening, and Recording of Offers; Confidentiality of Offers

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

(2) Opening and Recording. The Agency shall publicly open Offers including any modifications made to the Offer pursuant to Rule 02-0440(1). In the case of Invitations to Bid, to the extent practicable, the Agency shall read aloud the name of each Bidder, and such other information as the Agency considers appropriate. However, the Agency may withhold from disclosure information in accordance with ORS 279B.055(5)(c) and 279B.060(5). In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the Agency will not read Offers aloud.

02-0460

Late Offers, Late Withdrawals and Late Modifications

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. An Agency shall not consider late Offers, withdrawals or modifications except as permitted in Rule 02-0470 or Rule 02-0262.

02-0470

Mistakes

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

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

- (a) The Agency may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the

face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:

- (A) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;
 - (B) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and
 - (C) Acknowledge receipt of an Addendum to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addendum and intended to be bound by its terms; or the Addendum involved did not affect price, quality or delivery.
- (b) The Agency may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms the Agency's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example a missing unit price may be established by dividing the total price for the units by the quantity of units for that item or a missing, or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). In the event of a discrepancy, unit prices shall prevail over extended prices.
- (c) The Agency may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:
- (A) The nature of the error;
 - (B) That the error is not a minor informality under this subsection or an error in judgment;
 - (C) That the error cannot be corrected or waived under subsection (b) of this section;
 - (D) That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;

- (E) That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;
 - (F) That the Offeror will suffer substantial detriment if the Agency does not grant the Offeror permission to withdraw the Offer;
 - (G) That the Agency's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on the Agency or the public it represents; and
 - (H) That the Offeror promptly gave notice of the claimed error to the Agency.
- (d) The criteria in subsection (2)(c) of this rule shall determine whether the Agency will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether the Agency will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to the Agency based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by the Agency, whether by Award to the next lowest Responsive and Responsible Bidder or the most Advantageous Responsive and Responsible Proposer, or by resort to a new solicitation.

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

(4) Identification of Mistakes after Award. The procedures and criteria set forth above are Offeror's only opportunity to correct mistakes or withdraw Offers because of a mistake. Following Award, an Offeror is bound by its Offer, and may withdraw its Offer or rescind a Contract entered into pursuant to this division 2 only to the extent permitted by applicable law.

02-0480

Time for Agency Acceptance

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

02-0490

Extension of Time for Acceptance of Offer

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

Qualifications and Duties

02-0500

Responsibility of Bidders and Proposers

Before Awarding a Contract the Agency shall determine that the Bidder submitting the lowest Bid or Proposer submitting the most Advantageous Proposal is Responsible. The Agency shall use the standards set forth in ORS 279B.110 and Rule 02-0640(1)(c)(F) to determine if a Bidder or Proposer is Responsible. In the event the Agency determines a Bidder or Proposer is not Responsible it shall prepare a Written determination of non-Responsibility as required by ORS 279B.110 and shall reject the Offer.

02-0525

Qualified Products Lists

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

02-0550

Prequalification of Prospective Offerors

- (1) The Agency may prequalify prospective Offerors pursuant to ORS 279B.120 and 279B.125.
- (2) Notwithstanding the prohibition against revocation of prequalification in ORS 279B.120(3), the Agency may determine that a prequalified Offeror is not Responsible prior to Contract Award.
- (3) Offerors who have prequalified for the State of Oregon for similar work may be considered to be prequalified by the Agency. A determination of prequalification by the Agency is valid for a period of three years.

02-0575

Debarment of Prospective Offerors

- (1) Generally. The Agency may Debar prospective Offerors for the reasons set forth in ORS 279A.110 or after providing notice and the opportunity for hearing as set forth in ORS 279B.130.
- (2) Responsibility. Notwithstanding the limitation on the term for Debarment in ORS 279B.130(1)(b), the Agency may determine that a previously Debarred Offeror is not Responsible prior to Contract Award.
- (3) Imputed Knowledge. The Agency may attribute improper conduct of a Person or its affiliate or affiliates having a contract with a prospective Offeror to the prospective Offeror for purposes of Debarment where the impropriety occurred in connection with the Person's duty for or on behalf of, or with the knowledge, approval, or acquiescence of, the prospective Offeror.
- (4) Limited Participation. The Agency may allow a Debarred Person to participate in solicitations and Contracts on a limited basis during the Debarment period upon Written determination that participation is Advantageous to the Agency. The determination shall specify the factors on which it is based and define the extent of the limits imposed.

Offer Evaluation and Award

02-0600

Offer Evaluation and Award

- (1) Agency Evaluation. The Agency shall evaluate Offers only as set forth in the Solicitation Document, pursuant to ORS 279B.055(6)(a) and 279B.060(6)(b), and in accordance with applicable law. The Agency shall not evaluate Offers using any other requirement or criterion.
 - (a) Evaluation of Bids.
 - (A) Nonresident Bidders. In determining the lowest Responsive Bid, the Agency shall apply the reciprocal preference set forth in ORS 279A.120(2)(b) and Rule 01-0310 for Nonresident Bidders.
 - (B) Public Printing. The Agency shall for the purpose of evaluating Bids apply the public printing preference set forth in ORS 282.210.
 - (C) Award When Bids are Identical. If the Agency determines that one or more Bids are identical under Rule 01-0300, the Agency shall Award a Contract in accordance with the procedures set forth in Rule 01-0300.

- (b) Evaluation of Proposals.
 - (A) Award When Proposals are Identical. If the Agency determines that one or more Proposals are identical under Rule 01-0300, the Agency shall Award a Contract in accordance with the procedures set forth in Rule 01-0300.
 - (B) Public Printing. The Agency shall for the purpose of evaluating Proposals apply the public printing preference set forth in ORS 282.210.
 - (c) Recycled Materials. When procuring Goods, the Agency shall give preference for recycled materials as set forth in ORS 279A.125 and Rule 01-0320.
- (2) Clarification of Bids. After Bid Opening, the Agency may conduct discussions with apparent Responsive Bidders for the purpose of clarification to assure full understanding of the Bid. All Bids, in the Agency's sole discretion, needing clarification shall be accorded such an opportunity. The Agency shall document clarification of any Bidder's Bid in the Procurement file.
- (3) Negotiations Prohibited.
- (a) Bids. Except as permitted by section 2 of this rule, the Agency shall not negotiate with any Bidder. After Award of the Contract, the Agency and Contractor may only modify the Contract in accordance with Rule 02-0800.
 - (b) Requests for Proposals. The Agency may conduct discussions or negotiate with Proposers only in accordance with ORS 279B.060(6)(b) and Rule 02-0262 After Award of the Contract, the Agency and Contractor may only modify the Contract in accordance with Rule 02-0800.
- (4) Award.
- (a) General. If Awarded, the Agency shall Award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the most Advantageous, Responsive Proposal. The Agency may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in the public interest.
 - (b) Multiple Items. An Invitation to Bid or Request for Proposals may call for pricing of multiple items of similar or related type with Award based on individual line item, group total of certain items, a "market basket" of items representative of the Agency's expected purchases, or grand total of all items.
 - (c) Multiple Awards -- Bids.

- (A) Notwithstanding subsection 4(a) of this rule, the Agency may Award multiple Contracts under an Invitation to Bid in accordance with the criteria set forth in the Invitation to Bid. Multiple Awards shall not be made if a single Award will meet the Agency's needs, including but not limited to adequate availability, delivery, service, or product compatibility. A multiple Award may be made if Award to two or more Bidders of similar Goods or Services is necessary for adequate availability, delivery, service or product compatibility. Multiple Awards may not be made for the purpose of dividing the Procurement into multiple solicitations, or to allow for user preference unrelated to utility or economy. A notice to prospective Bidders that multiple Contracts may be Awarded for any Invitation to Bid shall not preclude the Agency from Awarding a single Contract for such Invitation to Bid.
 - (B) If an Invitation to Bid permits the Award of multiple Contracts, the Agency shall specify in the Invitation to Bid the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services.
- (d) Multiple Awards – Proposals.
- (A) Notwithstanding subsection 4(a) of this rule, the Agency may Award multiple Contracts under a Request for Proposals in accordance with the criteria set forth in the Request for Proposals. Multiple Awards shall not be made if a single Award will meet the Agency's needs, including but not limited to adequate availability, delivery, service or product compatibility. A multiple Award may be made if Award to two or more Proposers of similar Goods or Services is necessary for adequate availability, delivery, service or product compatibility. Multiple Awards may not be made for the purpose of dividing the Procurement into multiple solicitations, or to allow for user preference unrelated to obtaining the most Advantageous Contract. A notice to prospective Proposers that multiple Contracts may be Awarded for any Request for Proposals shall not preclude the Agency from Awarding a single Contract for such Request for Proposals.
 - (B) If a Request for Proposals permits the Award of multiple Contracts, the Agency shall specify in the Request for Proposals the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services.
- (e) Partial Awards. If after evaluation of Offers, the Agency determines that an acceptable Offer has been received for only parts of the requirements of the Solicitation Document:

- (A) The Agency may Award a Contract for the parts of the Solicitation Document for which acceptable Offers have been received; or
 - (B) The Agency may reject all Offers and may issue a new Solicitation Document on the same or revised terms, conditions and Specifications.
- (f) All or none Offers. The Agency may Award all or none Offers if the evaluation shows an all or none Award to be the lowest cost for Bids or the most Advantageous for Proposals of those submitted.

02-0610

Notice of Intent to Award

- (1) Notice of Intent to Award. The Agency shall provide Written notice of its intent to Award to all Bidders and Proposers pursuant to ORS 279B.135 at least seven (7) Days before the Award of a Contract, unless the Agency determines that circumstances require prompt execution of the Contract, in which case the Agency may provide a shorter notice period. The Agency shall document the specific reasons for the shorter notice period in the Procurement file.
- (2) Finality. The Agency's Award shall not be final until the later of the following:
- (a) The expiration of the protest period provided pursuant to Rule 02-0740; or
 - (b) The Agency provides Written responses to all timely-filed protests denying the protests and affirming the Award.

02-0620

Documentation of Award

- (1) Basis of Award. After Award, the Agency shall make a record showing the basis for determining the successful Offeror part of the Agency's Procurement file.
- (2) Contents of Award Record. The Agency's record shall include:
- (a) For Bids:
 - (A) Bids;
 - (B) Completed Bid tabulation sheet; and
 - (C) Written justification for any rejection of lower Bids.

- (b) For Proposals:
 - (A) Proposals;
 - (B) The completed evaluation of the Proposals;
 - (C) Written justification for any rejection of higher scoring Proposals; and
 - (D) If the Agency engaged in any of the methods of Contractor selection described in ORS 279B.060(6)(b) and Rule 02-0261 through Rule 02-0263, Written documentation of the content of any discussions, negotiations, best and final Offers, or any other procedures the Agency used to select a Proposer to which the Agency awarded a Contract.

02-0630

Availability of Award Decisions

- (1) Contract Documents. To the extent required by the Solicitation Document, the Agency shall deliver to the successful Offeror a Contract, Signed purchase order, Price Agreement, or other Contract documents as applicable.
- (2) Availability of Award Decisions. A Person may obtain tabulations of Awarded Bids or evaluation summaries of Proposals for a minimal charge, in person or by submitting to the Agency a Written request accompanied by payment. The requesting Person shall provide the Solicitation Document number and enclose a self-addressed, stamped envelope. In addition, the Agency may make available tabulations of Bids and Proposals through the Agency's website.
- (3) Availability of Procurement Files. After notice of intent to Award, the Agency shall make Procurement files available in accordance with applicable law.

02-0640

Rejection of an Offer

- (1) Rejection of an Offer.
 - (a) The Agency may reject any Offer as set forth in ORS 279B.100.
 - (b) The Agency shall reject an Offer upon the Agency's finding that the Offer:
 - (A) Is contingent upon the Agency's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;

- (B) Takes exception to terms and conditions (including Specifications) set forth in the Solicitation Document;
 - (C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of the Solicitation Document or in contravention of applicable law;
 - (D) Offers Goods or Services that fail to meet the Specifications of the Solicitation Document;
 - (E) Is late;
 - (F) Is not in substantial compliance with the Solicitation Document; or
 - (G) Is not in substantial compliance with all prescribed public Procurement procedures.
- (c) The Agency shall reject an Offer upon the Agency's finding that the Offeror:
- (A) Has not been prequalified under ORS 279B.120 and the Agency required mandatory prequalification;
 - (B) Has been Debarred as set forth in ORS 279B.130 or has been disqualified pursuant to Rule 01-0210(4);
 - (C) Has not met the requirements of ORS 279A.105, if required by the Solicitation Document;
 - (D) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;
 - (E) Has failed to provide the certification of non-discrimination required under ORS 279A.110(4); or
 - (F) Is non-Responsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the Agency must have information that indicates that the Offeror meets the applicable standards of Responsibility. To be a Responsible Offeror, the Agency must determine pursuant to ORS 279B.110 that the Offeror:
 - (i) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain

the resources and expertise, necessary to indicate the capability of the Offeror to meet all contractual responsibilities; and

- (ii) Has a satisfactory record of contract performance. The Agency should carefully scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in contract performance. In reviewing the Offeror's performance, the Agency should determine whether the Offeror's deficient performance was expressly excused under the terms of the contract, or whether the Offeror took appropriate corrective action. The Agency may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. The Agency shall make its basis for determining an Offeror non-Responsible under this subparagraph part of the Procurement file pursuant to ORS 279B.110(2)(b);
- (iii) Has a satisfactory record of integrity. An Offeror may lack integrity if the Agency determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to the Agency. The Agency may find an Offeror non-Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Debarment under ORS 279B.130 may be used to determine an Offeror's integrity. The Agency shall make its basis for determining that an Offeror is non-Responsible under this subparagraph part of the Procurement file pursuant to ORS 279B.110(2)(c);
- (iv) Is qualified legally to contract with the Agency; and
- (v) Has supplied all necessary information in connection with the inquiry concerning Responsibility. If the Offeror fails to promptly supply information requested by the Agency concerning Responsibility, the Agency shall base the determination of Responsibility upon any available information, or may find the Offeror non-Responsible.

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

02-0650

Rejection of All Offers

- (1) **Rejection.** The Agency may reject all Offers as set forth in ORS 279B.100. The Agency shall notify all Offerors of the rejection of all Offers, along with the reasons for rejection of all Offers.
- (2) **Criteria.** The Agency may reject all Offers based upon the following criteria:
 - (a) The content of or an error in the Solicitation Document, or the Procurement process unnecessarily restricted competition for the Contract;
 - (b) The price, quality or performance presented by the Offerors are too costly or of insufficient quality to justify acceptance of any Offer;
 - (c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;
 - (d) Causes other than legitimate market forces threaten the integrity of the competitive process. These causes may include, without limitation, those that tend to limit competition, such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the Solicitation Document;
 - (e) The Agency cancels the Procurement or solicitation in accordance with Rule 02-0660; or
 - (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

02-0660

Cancellation of Procurement or Solicitation

- (1) **Cancellation in the Public Interest.** The Agency may cancel a Procurement or solicitation as set forth in ORS 279B.100.
- (2) **Notice of Cancellation Before Opening.** If the Agency cancels a Procurement or solicitation prior to Opening, the Agency shall provide Written notice of cancellation in the same manner that the Agency initially provided notice of the solicitation. Such notice of cancellation shall:

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

(3) Notice of Cancellation After Opening. If the Agency cancels a Procurement or solicitation after Opening, the Agency shall provide Written notice of cancellation to all Offerors who submitted Offers.

02-0670

Disposition of Offers if Procurement or Solicitation Canceled

(1) Prior to Opening. If the Agency cancels a Procurement or solicitation prior to Opening, the Agency shall return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the Agency shall open the Offer to determine the source and then return it to the Offeror.

(2) After Opening. If the Agency cancels a Procurement or solicitation after Opening, the Agency:

- (a) May return Proposals in accordance with ORS 279B.060(5)(c); and
- (b) Shall keep Bids in the Procurement file.

(3) Rejection of All Offers. If the Agency rejects all Offers, the Agency shall keep all Proposals and Bids in the Procurement file.

Legal Remedies

02-0700

Protests and Judicial Review of Special Procurements

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

- (2) Delivery.
 - (a) Protest of Request for Approval of a Special Procurement. An Affected Person must deliver a Written protest to the Contract Review Authority for the Agency within fourteen (14) Days after the first date of public notice of a proposed Special Procurement, unless a different protest period is provided in the public notice of the proposed Special Procurement.
 - (b) Protest of Approval of a Special Procurement. Notwithstanding the requirements for filing a writ of review under ORS Chapter 34 pursuant to ORS 279B.400(4)(a), an Affected Person must deliver a Written protest to the Contract Review Authority for the Agency within seven (7) Days after the first date of public notice of the approval of a Special Procurement by the Contract Review Authority for the Agency, unless a different protest period is provided in the public notice of the approval of a Special Procurement.
- (3) Content of Protest. The Written protest must include:
 - (a) A detailed statement of the legal and factual grounds for the protest;
 - (b) A description of the resulting harm to the Affected Person; and
 - (c) The relief requested.
- (4) Contract Review Authority Response.
 - (a) Protest of Request for Approval of a Special Procurement: The Contract Review Authority shall not consider an Affected Person's protest of the Agency's request for approval of a Special Procurement submitted after the timeline established for submitting such protest under this rule or such different time period as may be provided in the public notice of the request for approval of a proposed Special Procurement. The Contract Review Authority shall issue a Written disposition of the protest in a timely manner. If the Contract Review Authority upholds the protest, in whole or in part, it may in its sole discretion implement the sustained protest in the approval of the Special Procurement, or deny the request for approval of the Special Procurement.
 - (b) Protest of Approval of a Special Procurement: The Contract Review Authority shall not consider an Affected Person's protest of the approval of a Special Procurement submitted after the timeline established for submitting such protest under this rule or such different time period as may be provided in the public notice of the approval of a Special Procurement. The Contract Review Authority shall issue a Written disposition of the protest in a timely manner. If the Contract

Review Authority upholds the protest, in whole or in part, it may in its sole discretion implement the sustained protest in the approval of the Special Procurement, or revoke the approval of the Special Procurement.

(5) **Judicial Review.** An Affected Person may not seek judicial review of the Contract Review Authority's denial of a protest of a request for approval of a Special Procurement. An Affected Person may seek judicial review of the Contract Review Authority's decision relating to a protest of the approval of a Special Procurement in accordance with ORS 279B.400.

02-0710

Protests and Judicial Review of Sole-Source Procurements

(1) **Purpose.** For sole-source Procurements requiring public notice under Rule 02-0270, an Affected Person may protest the determination of the Contract Review Authority or designee that the Goods or Services or class of Goods or Services are available from only one source. Pursuant to ORS 279B.420(3)(f), before seeking judicial review, an Affected Person must file a Written protest with the Contract Review Authority or designee and exhaust all administrative remedies.

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

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

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

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

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

Protests and Judicial Review of Multi-Tiered and Multistep Solicitations

- (1) **Purpose.** An Affected Offeror may protest exclusion from the Competitive Range or from subsequent tiers or steps of a solicitation in accordance with the applicable Solicitation Document. When such a protest is permitted by the Solicitation Document, then pursuant to ORS 279B.420(3)(f), before seeking judicial review, an Affected Offeror must file a Written protest with the Agency and exhaust all administrative remedies.
- (2) **Basis for Protest.** An Affected Offeror may protest its exclusion from a tier or step of competition only if the Offeror is Responsible and submitted a Responsive Offer and but for the Agency's mistake in evaluating the Offeror's or other Offerors' Offers, the protesting Offeror would have been eligible to participate in the next tier or step of competition. (For example, the protesting Offeror must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Offerors are removed from consideration, and that those ineligible Offerors are ineligible for inclusion in the Competitive Range because: their Proposals were not Responsive, or the Agency committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.)
- (3) **Delivery.** Unless otherwise specified in the Solicitation Document, an Affected Offeror must deliver a Written protest to the Agency within seven (7) Days after issuance of the notice of the Competitive Range or notice of subsequent tiers or steps.
- (4) **Content of Protest.** The Affected Offeror's protest shall be in Writing and must specify the grounds upon which the protest is based.
- (5) **Agency Response.** The Agency shall not consider an Affected Offeror's multi-tiered or multistep solicitation protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Solicitation Document. The Agency shall issue a Written disposition of the protest in a timely manner. If the Agency upholds the protest, in whole or in part, the Agency may in its sole discretion either issue an Addendum under Rule 02-0430 reflecting its disposition or cancel the Procurement or solicitation under Rule 02-0660.
- (6) **Judicial Review.** Judicial review of the Agency's decision relating to a multi-tiered or multistep solicitation protest shall be in accordance with ORS 279B.420.

Protests and Judicial Review of Solicitations

- (1) Purpose.
 - (a) A prospective Offeror may protest the Procurement process or the Solicitation Document for a Contract solicited under ORS 279B.055, 279B.060 and 279B.085 as set forth in ORS 279B.405(2)(a). Pursuant to ORS 279B.405(3), before seeking judicial review, a prospective Offeror must file a Written protest with the Agency and exhaust all administrative remedies.
 - (b) Contract-Specific Special Procurements. Notwithstanding section 1(a) of this rule, a Person may not protest, challenge, or review a Contract-Specific Special Procurement except upon the occurrence of the conditions set forth in ORS 279B.405(2)(b).
- (2) Delivery. Unless otherwise specified in the Solicitation Document, a prospective Offeror must deliver a Written protest to the Agency not less than ten (10) Days prior to Closing.
- (3) Content of Protest. In addition to the information required by ORS 279B.405(4), a prospective Offeror's Written protest shall include a statement of the desired changes to the Procurement process or the Solicitation Document that the prospective Offeror believes will remedy the conditions upon which the prospective Offeror based its protest.
- (4) Agency Response. The Agency shall not consider a Prospective Offeror's solicitation protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Solicitation Document. The Agency shall consider the protest if it is timely filed and meets the conditions set forth in ORS 279B.405(4). The Agency shall issue a Written disposition of the protest in accordance with the timeline set forth in ORS 279B.405(6). If the Agency upholds the protest, in whole or in part, the Agency may in its sole discretion either issue an Addendum reflecting its disposition under Rule 02-0430 or cancel the Procurement or solicitation under Rule 02-0660.
- (5) Extension of Closing. If the Agency receives a protest from a prospective Offeror in accordance with this rule, the Agency may extend Closing if the Agency determines an extension is necessary to consider and respond to the protest.
- (6) Clarification. Prior to the deadline for submitting a protest, a prospective Offeror may request that the Agency clarify any provision of the Solicitation Document. The Agency's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on the Agency unless the Agency amends the Solicitation Document by Addendum.

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

02-0740

Protests and Judicial Review of Contract Award

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

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

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

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

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

02-0745

Protests and Judicial Review of Qualified Products List Decisions

(1) Purpose. A prospective Offeror may protest the Agency's decision to exclude the prospective Offeror's Goods from the Agency's qualified products list under ORS 279B.115. A prospective Offeror must file a Written protest and exhaust all administrative remedies before seeking judicial review of the Agency's qualified products list decision.

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

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

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

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

02-0750

Judicial Review of Other Violations

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

02-0760

Review of Prequalification and Debarment Decisions

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

02-0800

Contract Amendments

(1) Additional Goods or Services. The Agency may amend a Contract without additional competition to add additional Goods or Services within the Scope of the Solicitation Document, or if no Solicitation Document, the Contract, or in the instance of a Special Procurement the approval of Special Procurement subject to the following conditions:

- (a) The original Contract was Awarded pursuant to ORS 279B.055, 279B.060, 279B.065, 279B.070, 279B.075, 279B.085, or 279A.200 through 279A.225; and
- (b) One of the following two conditions are satisfied:

- (A) The additional Goods or Services are required by reason of existing or new laws, rules, regulations or ordinances of federal, state or local agencies, that affect performance of the original Contract; or
- (B) The prices for the Goods or Services are modified only as follows:
 - (i) When prices for the Goods or Services are based on unit prices, unit prices that establish the cost basis for the additional Goods or Services were provided in the Offer or original Contract and those prices do not increase except as permitted by an escalation clause in the Contract; or
 - (ii) When prices for the Goods or Services are not based on unit prices, options that establish the cost basis for the additional Goods or Services were provided in the Solicitation Document, Offer, or original Contract.

(2) Renegotiated Contract. The Agency may renegotiate the terms and conditions, including the Contract Price, of a Contract without additional competition and amend a Contract if it is Advantageous to the Agency subject to the following conditions:

- (a) The amended Contract is within the Scope of the Solicitation Document, or if no Solicitation Document, the Contract, or in the instance of a Special Procurement the approval of Special Procurement;
- (b) The Agency must determine that, with all things considered, the renegotiated Contract is at least as favorable to the Agency as the original Contract; and
- (c) The renegotiated Contract will not have a total term greater than allowed in the original Solicitation Document, Contract or approval of a Special Procurement after combining the initial and extended terms. For example, a one-year Contract, renewable each year for up to four additional years, may be renegotiated as a two to five-year Contract, but not beyond a total of five years. Also, if multiple Contracts with a single Contractor are restated as a single Contract, the term of the single Contract may not have a total term greater than the longest term of any of the prior Contracts.
- (d) If a Contractor offers a lower price in exchange for a change in term or condition that was expressly rejected in the original solicitation, the amended Contract may be structured with this changed term as an optional, but not as a mandatory Contract term.

- (e) If the Contract is the result of a Cooperative Procurement, the amended Contract may not materially change the terms, conditions, and prices of the Original Contract.

- (3) Small Contract. The Agency may amend a Contract Awarded as small Procurement pursuant to sections 1 or 2 of this rule, provided also the total increase in Contract price does not exceed the amount set forth in Rule 02-0265 for small Procurements.

- (4) Emergency Contract. The Agency may amend a Contract Awarded as an emergency Procurement if the emergency justification for entering into the Contract still exists, and the amendment is necessary to address the continuing emergency.

- (5) Price Agreements. The Agency may amend or terminate a Price Agreement as follows:
 - (a) As permitted by the Price Agreement;
 - (b) As permitted by this rule;
 - (c) If the circumstances set forth in ORS 279B.140(2) exist; or
 - (d) As permitted by applicable law.

DIVISION 3

CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING, LAND SURVEYING AND RELATED SERVICES CONTRACTS

03-0100

Application; Effective Date

- (1) These division 3 rules apply to the screening and selection of Architects, Engineers and Land Surveyors, and providers of Related Services under Contracts, and set forth the following procedures:
 - (a) Procedures through which the Agency selects Consultants to perform Architectural, Engineering, or Land Surveying Services, or Related Services; and
 - (b) Two-tiered procedures for selection of Architects, Engineers, Land Surveyors and providers of Related Services for certain Public Improvements owned and maintained by a Local Government.
- (2) **Effective Date.** These division 3 rules become effective on March 1, 2005 and apply to the above-described Contracts first advertised, but if not advertised then entered into, on or after March 1, 2005.

03-0110

Definitions

In addition to the definitions set forth in ORS 279A.010, ORS 279C.100, and Rule 01-0110, the following definitions apply to these division 3 rules:

- (1) "**Consultant**" means an Architect, Engineer, Land Surveyor, or provider of Related Services. A Consultant includes a business entity that employs Architects, Engineers, Land Surveyors or providers of Related Services, or any combination of the foregoing.
- (2) "**Estimated Fee**" means the Agency's reasonably projected fee to be paid for a Consultant's services under the anticipated Contract, excluding all anticipated reimbursable or other non-professional fee expenses. The Estimated Fee is used solely to determine the applicable Contract solicitation method and is distinct from the total amount payable under the Contract. The Estimated Fee shall not be used as a basis to resolve other Public Contracting issues, including without limitation, direct purchasing authority or Public Contract review and approval under ORS 291.047.

(3) **"Project"** means all components of the Agency's planned undertaking that gives rise to the need for a Consultant's Architectural, Engineering, or Land Surveying Services, or Related Services under a Contract.

(4) **"Proposer"** means a Consultant who submits a proposal to the Agency in response to a Request for Proposals.

(5) **"Request for Qualifications"** or **"RFQ"** means a written document issued by the Agency to which Consultants respond with a description of their experience with and qualifications for the Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFQ and from which the Agency creates a list of Consultants who are qualified to perform those services, but which is not intended to result in a Contract between a Consultant and the Agency.

03-0120

List of Interested Consultants; Performance Record

(1) Consultants who are engaged in the lawful practice of their profession and who are interested in providing Architectural, Engineering, or Land Surveying Services or Related Services may annually submit a statement describing their qualifications and related performance information to the Agency's office addresses. The Agency may use this information to create a list of prospective Consultants and may update this list at least once every two years.

(2) The Agency may compile and maintain a record of each Consultant's performance under Contracts with the Agency, including information obtained from Consultants during an exit interview. Upon request and in accordance with the Oregon Public Records Law (ORS 192.410 through 192.505) the Agency may make available copies of the records.

03-0130

Applicable Selection Procedures; Pricing Information

(1) When contracting with Consultants under the conditions listed in ORS 279C.110(2), the Agency shall follow the applicable selection procedure under either Rule 03-0210 (Informal Selection Procedure), Rule 03-0220 (Formal Selection Procedure), or Rule 03-0200 (Direct Appointment Procedure). The Agency shall not solicit or use pricing policies and proposals or other pricing information to determine a Consultant's compensation until after the Agency has selected the most qualified Consultant in accordance with the applicable selection procedure.

(2) When the conditions under ORS 279C.110(2) do not exist, the Agency shall follow one of the following selection procedures:

- (a) When selecting a Consultant on the basis of qualifications alone, the Agency shall follow the applicable selection procedure under either Rule 03-0210 (Informal Selection Procedure), Rule 03-0220 (Formal Selection Procedure) or Rule 03-0200 (Direct Appointment Procedure);
- (b) When selecting a Consultant on the basis of price competition alone, the Agency shall follow either the provisions under division 2 for obtaining and evaluating Bids, or Rule 03-0200 (Direct Appointment Procedure); and
- (c) When selecting a Consultant on the basis of price and qualifications, The Agency shall follow either the provisions under Division 2 for obtaining and evaluating Proposals, or Rule 03-0200 (Direct Appointment Procedure). The Agency may request and consider a Proposer's pricing policies, proposals and other pricing information submitted with a Proposal.

Selection Procedures

03-0200

Direct Appointment Procedure

- (1) The Agency may enter into a Contract directly with a Consultant without following the selection procedures set forth elsewhere in these rules if:
 - (a) The Agency finds that an Emergency exists; or
 - (b) The Estimated Fee to be paid under the Contract does not exceed \$25,000; or
 - (c) For the Agency, the Architectural, Engineering, or Land Surveying Services, or Related Services to be performed under the Contract:
 - (A) Consist of or are related to Architectural, Engineering, or Land Surveying Services, or Related Services that have been substantially described, planned or otherwise previously studied in an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering, or Land Surveying Services, or Related Services rendered under the earlier Contract; and
 - (B) The Agency used a formal selection procedure described in rules applicable to the Agency under either ORS 279.049 or 279A.065, whichever was in effect at the time the Agency selected Consultant for the earlier Contract; or

- (C) Consultant will be assisting the Agency by providing analysis, testing services, testimony or similar services for a Project that is, or is reasonably anticipated to be, the subject of a claim, lawsuit or other form of action, whether legal, equitable, administrative or otherwise.
- (2) The Agency may select Consultants for Contracts under this rule from the following sources:
- (a) The Agency's list of Consultants that is created under Rule 03-0120 (List of Interested Consultants; Performance Record);
 - (b) Another Contracting Agency's list of Consultants that the Contracting Agency has created under Rule 03-0120 (List of Interested Consultants; Performance Record), with written consent of that Contracting Agency; or
 - (c) All Consultants offering the required Architectural, Engineering, or Land Surveying Services, or Related Services that the Agency reasonably can identify under the circumstances.
- (3) The Agency shall direct negotiations with Consultants selected under this rule toward obtaining written agreement on:
- (a) Consultant's performance obligations and performance schedule;
 - (b) Payment methodology and a maximum amount payable to Contractor for the Architectural, Engineering, or Land Surveying Services, or Related Services required under the Contract that is fair and reasonable to the Agency as determined solely by the Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, or Land Surveying Services, or Related Services; and
 - (c) Any other provisions the Agency believes to be in the Agency's best interest to negotiate.

03-0210

Informal Selection Procedure

- (1) The Agency may use the informal selection procedure described in this rule to obtain a Contract if the Estimated Fee is expected not to exceed \$150,000.
- (2) When using the informal selection procedure the Agency shall:

- (a) Create a Request for Proposals that includes at a minimum the following:
 - (A) A description of the Project for which Consultant's Architectural, Engineering, or Land Surveying Services, or Related Services are needed and a description of the Architectural, Engineering, or Land Surveying Services, or Related Services that will be required under the resulting Contract;
 - (B) Anticipated Contract performance schedule;
 - (C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including construction services;
 - (D) Date and time Proposals are due and other directions for submitting Proposals;
 - (E) Criteria upon which most qualified Consultant will be selected. Selection criteria may include, but are not limited to, the following:
 - (i) Amount and type of resources and number of experienced staff Consultant has available to perform the Architectural, Engineering, or Land Surveying Services, or Related Services described in the Request for Proposals within the applicable time limits, including the current and projected workloads of such staff and the proportion of time such staff would have available for the Architectural, Engineering, or Land Surveying Services, or Related Services;
 - (ii) Proposed management techniques for the Architectural, Engineering, or Land Surveying Services, or Related Services described in the Request for Proposals;
 - (iii) Consultant's capability, experience and past performance history and record in providing similar Architectural, Engineering, or Land Surveying Services, or Related Services, including but not limited to quality of work, ability to meet schedules, cost control methods and contract administration practices;
 - (iv) Approach to Architectural, Engineering, or Land Surveying Services, or Related Services described in the Request for Proposals and design philosophy, if applicable;

- (v) Proposer's geographic proximity to and familiarity with the physical location of the Project;
 - (vi) Volume of work, if any, previously awarded to Proposer, with the objective of effecting equitable distribution of Contracts among qualified Consultants, provided such distribution does not violate the principle of selecting the most qualified Consultant for the type of professional services required;
 - (vii) Ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;
 - (viii) Pricing policies, proposals and other pricing information when the conditions under ORS 279C.110(2) do not exist.
- (F) A Statement that Proposers responding to the RFP do so solely at their expense, and the Agency is not responsible for any Proposer expenses associated with the RFP; and
 - (G) A statement directing Proposers to the protest procedures set forth in these division 3 rules.
- (b) Provide a Request for Proposals to a minimum of five prospective Consultants drawn from:
 - (A) The Agency's list of Consultants that is created and maintained under Rule 03-0120 (List of Interested Consultants; Performance Record);
 - (B) Another Contracting Agency's list of Consultants that is created and maintained under Rule 03-0120 (List of Interested Consultants; Performance Record); or
 - (C) All Consultants the Agency reasonably can locate that offer the desired Architectural, Engineering, or Land Surveying Services, or Related Services, or any combination of the foregoing.
 - (c) Review and rank all Proposals received according to the criteria set forth in the Request for Proposals, and select the three highest ranked Proposers.

(3) If the Agency does not cancel the RFP after it reviews and ranks each Proposer, the Agency will begin negotiating a Contract with the highest ranked Proposer. The Agency shall direct negotiations toward obtaining written agreement on:

- (a) Consultant's performance obligations and performance schedule;
- (b) Payment methodology and a maximum amount payable to Contractor for the Architectural, Engineering, or Land Surveying Services, or Related Services required under the Contract that is fair and reasonable to the Agency as determined solely by the Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, or Land Surveying Services, or Related Services; and
- (c) Any other provisions the Agency believes to be in the Agency's best interest to negotiate.

(4) The Agency shall, either orally or in writing, formally terminate negotiations with the highest ranked Proposer if the Agency and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The Agency may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, in accordance with section (3) of this rule, until negotiations result in a Contract. If negotiations with any of the top three Proposers do not result in a Contract within a reasonable amount of time, the Agency may end the particular informal solicitation and thereafter may proceed with a new informal solicitation under this rule or proceed with a formal solicitation under Rule 03-0220 (Formal Selection Procedure).

(5) The Agency shall terminate the informal selection procedure and proceed with the formal selection procedure under Rule 03-0220 if the scope of the anticipated Contract is revised during negotiations so that the Estimated Fee will exceed \$150,000. Notwithstanding the foregoing, the Agency may continue Contract negotiations with the Proposer selected under the informal selection procedure if the Agency makes written determinations that contracting with that Proposer will:

- (a) Promote efficient use of the Agency's resources and result in substantial cost savings to the Agency; and
- (b) Protect the integrity of the Public Contracting process and the competitive nature of the procurement by not encouraging favoritism or substantially diminishing competition in the award of the Contract.

03-0220

Formal Selection Procedure

(1) Subject to Rule 03-0130 (Applicable Selection Procedures; Pricing Information), the Agency shall use the formal selection procedure described in this rule to select Consultants if the Consultants cannot be selected under either Rule 03-0200 (Direct Appointment Procedure) or

under Rule 03-0210 (Informal Selection Procedure). The formal selection procedure described in this rule may otherwise be used at the Agency's discretion.

(2) The Agency shall obtain Contracts through public advertisement of Requests for Proposals, or Requests for Qualifications followed by a Request for Proposals. Prior to issuing a Request for Proposals, Agency staff shall submit the RFP to the Contract Review Authority for its review and approval.

(a) Except as provided in subsection (b) of this section, the Agency shall advertise each RFP and RFQ at least once in at least one newspaper of general circulation in the area where the Project is located and in as many other issues and publications as may be necessary or desirable to achieve adequate competition. Other issues and publications may include, but are not limited to, local newspapers, trade journals, and publications targeted to reach the minority, women and emerging small business enterprise audiences.

(A) The Agency shall publish the advertisement within a reasonable time before the deadline for the Proposal submission or response to the RFQ but in any event no fewer than fourteen (14) calendar days before the closing date set forth in the RFP or RFQ.

(B) The Agency shall include a brief description of the following items in the advertisement:

(i) The Project;

(ii) A description of the Architectural, Engineering, or Land Surveying Services, or Related Services the Agency seeks;

(iii) How and where Consultants may obtain a copy of the RFP or RFQ; and

(iv) The deadline for submitting a Proposal or response to the RFQ.

(b) The Agency may send notice of the RFP or RFQ directly to all Consultants on the Agency's list of Consultants that is created and maintained under Rule 03-0120 (List of Interested Consultants; Performance Record).

(3) Request for Qualifications Procedure. The Agency may use the RFQ procedure to evaluate potential Consultants and establish a short list of qualified Consultants to whom the Agency may issue an RFP for some or all of the Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFQ.

- (a) The Agency shall include the following, at a minimum, in each RFQ:
 - (A) A brief description of the Project for which the Agency is seeking Consultants;
 - (B) A description of the Architectural, Engineering, or Land Surveying Services, or Related Services the Agency seeks for the Project;
 - (C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including construction services;
 - (D) The deadline for submitting a response to the RFQ;
 - (E) A description of required Consultant qualifications for the Architectural, Engineering, or Land Surveying Services, or Related Services the Agency seeks;
 - (F) The RFQ evaluation criteria.
 - (G) A statement whether or not the Agency will hold a pre-qualification meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFQ and if a pre-qualification meeting will be held, the location of the meeting and whether or not attendance is mandatory; and
 - (H) A Statement that Proposers responding to the RFQ do so solely at their expense, and the Agency is not responsible for any Proposer expenses associated with the RFQ.

- (b) The Agency may include a request for any or all of the following in each RFQ:
 - (A) A statement describing Consultant's general qualifications and related performance information;
 - (B) A description of Consultant's specific qualifications to perform the Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFQ including Consultant's available resources and recent, current and projected workloads;
 - (C) A list of similar Architectural, Engineering, or Land Surveying Services, or Related Services and references concerning past performance, and a

copy of all records, if any, of Consultant's performance under Contracts with any other public entity;

- (D) The number of Consultant's experienced staff available to perform the Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFQ, including such personnel's specific qualifications and experience and an estimate of the proportion of time that such personnel would spend on those services;
 - (E) Approach to Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFQ and design philosophy, if applicable;
 - (F) Proposer's geographic proximity to and familiarity with the physical location of the Project;
 - (G) Ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;
 - (H) Pricing policies, proposals and other pricing information if the conditions under ORS 279C.110(2) do not exist; and
 - (I) Any other information the Agency deems reasonable necessary to evaluate Consultants' qualifications.
- (c) RFQ Evaluation Committee. The Agency shall establish an RFQ evaluation committee of at least two individuals to review, score and rank the responding Consultants according to the evaluation criteria. The Agency may appoint to the evaluation committee Agency employees or employees of other public agencies with experience in architecture, engineering, or land surveying, Related Services, construction or Public Contracting. If Agency procedure permits, the Agency may include on the evaluation committee private practitioners of architecture, engineering, land surveying or related professions. The Agency shall designate one member of the evaluation committee as the evaluation committee chairperson.
- (d) The Agency may use any reasonable screening or evaluation method to establish a short list of qualified Consultants, including but not limited to:
- (A) Requiring Consultants responding to an RFQ to achieve a threshold score before qualifying for placement on the short list;
 - (B) Placing a pre-determined number of the highest scoring Consultants on a short list;

- (C) Placing on a short list only those Consultants with certain essential qualifications or experience, whose practice is limited to a particular subject area, or who practice in a particular geographic locale or region, provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFP.
- (e) After the evaluation committee reviews, scores and ranks the responding Consultants, the Agency shall establish a short list of at least three qualified Consultants, provided however, that if four or fewer Consultants responded to the RFQ, then:
 - (A) The Agency may establish a short list of fewer than three qualified Consultants; or
 - (B) The Agency may cancel the RFQ and issue an RFP.
- (f) No Consultant will be eligible for placement on the Agency's short list established under subsection (3)(d) of this rule if Consultant or any of Consultant's principals, partners or associates are members of the Agency's RFQ evaluation committee.
- (g) Except when the RFQ is cancelled, the Agency shall provide a copy of the subsequent RFP to each Consultant on the short list.

(4) Formal Selection of Consultants Through Request for Proposals. The Agency shall use the procedure described in section (4) of this rule when issuing an RFP for a Contract described in section (1) of this rule.

- (a) RFP Required Contents. The Agency using the formal selection procedure shall include at least the following in each Request for Proposals, whether or not the RFP is preceded by an RFQ:
 - (A) General background information, including a description of the Project and the specific Architectural, Engineering, or Land Surveying Services, or Related Services sought for the Project, the estimated Project cost, the estimated time period during which the Project is to be completed, and the estimated time period in which the specific Architectural, Engineering, or Land Surveying Services, or Related Services sought will be performed.
 - (B) The RFP evaluation process and criteria which will be used to select the most qualified Proposer, including the number of points applicable to each criterion. If the Agency does not indicate the applicable number of points, then each criterion is worth the same number of points. Evaluation criteria may include, but are not limited to, the following:

- (i) Proposer's availability and capability to perform the Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFP;
- (ii) Experience of Proposer's key staff persons in providing similar Architectural, Engineering, or Land Surveying Services, or Related Services on comparable Projects;
- (iii) The amount and type of resources, and number of experienced staff persons Proposer has available to perform the Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFP;
- (iv) The recent, current and projected workloads of the staff and resources referenced in section (4)(a)(B)(iii), above;
- (v) The proportion of time Proposer estimates that the staff referenced in section (4)(a)(B)(iii), above, would spend on the Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFP;
- (vi) Proposer's demonstrated ability to complete successfully similar Architectural, Engineering, or Land Surveying Services, or Related Services on time and within budget, including whether or not there is a record of satisfactory performance under Rule 03-0120 (List of Interested Consultants; Performance Record);
- (vii) References and recommendations from past clients;
- (viii) Proposer's performance history in meeting deadlines, submitting accurate estimates, producing high quality work, and meeting financial obligations;
- (ix) Status and quality of any required license or certification;
- (x) Proposer's knowledge and understanding of the Project and Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFP as shown in Proposer's approach to staffing and scheduling needs for the Architectural, Engineering, or Land Surveying Services, or Related Services and proposed solutions to any perceived design and constructability issues;
- (xi) Results from interviews, if conducted;

- (xii) Design philosophy, if applicable, and approach to the Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFP;
 - (xiii) Pricing policies, proposals and other pricing information when the conditions under ORS 279C.110(2) do not exist; and
 - (xiv) Any other criteria that the Agency seems relevant to the Project and Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFP, including, where the nature and budget of the Project so warrant, a design competition between competing Proposers.
- (C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including construction services;
 - (D) Whether interviews are possible and if so, the weight or points applicable to the potential interview;
 - (E) The date and time Proposals are due, and the delivery location for Proposals;
 - (F) Reservation of the right to seek clarifications of each Proposal;
 - (G) Reservation of the right to negotiate a final Contract that is in the best interest of the Agency;
 - (H) Reservation of the right to reject any or all Proposals and reservation of the right to cancel the RFP at anytime if doing either would be in the public interest as determined by the Agency;
 - (I) A Statement that Proposers responding to the RFP do so solely at their expense, and the Agency is not responsible for any Proposer expenses associated with the RFP;
 - (J) A statement directing Proposers to the protest procedures set forth in these rules;
 - (K) Special Contract requirements, including but not limited to disadvantaged business enterprise ("DBE"), minority business enterprise ("MBE"), women business enterprise ("WBE") and emerging small business enterprise ("ESB") participation goals or good faith efforts with respect to

DBE, MBE, WBE and ESB participation, and federal requirements when federal funds are involved;

- (L) A statement whether or not the Agency will hold a pre-Proposal meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFP and if a pre-Proposal meeting will be held, the location of the meeting and whether or not attendance is mandatory;
 - (M) A request for any information the Agency deems reasonably necessary to permit the Agency to evaluate, rank and select the most qualified Proposer to perform the Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFP; and
 - (N) A sample form of the Contract.
- (b) RFP Evaluation Committee. The Agency shall establish a committee of at least three individuals to review, score and rank Proposals according to the evaluation criteria set forth in the RFP. If the RFP has followed an RFQ, the Agency may include the same members who served on the RFQ evaluation committee. The Agency may appoint to the evaluation committee Agency employees or employees of other public agencies with experience in architecture, engineering, land surveying, Related Services, construction or Public Contracting. At least one member of the evaluation committee must be the Agency employee. If Agency procedure permits, the Agency may include on the evaluation committee private practitioners of architecture, engineering, land surveying or related professions. The Agency shall designate one of its employees who also is a member of the evaluation committee as the evaluation committee chairperson.
- (A) No Proposer will be eligible for award of the Contract under the RFP if Proposer or any of Proposer's principals, partners or associates are members of Agency's RFP evaluation committee for the Contract;
 - (B) If the RFP provides for the possibility of Proposer interviews, the evaluation committee may elect to interview Proposers if the evaluation committee considers it necessary or desirable. If the evaluation committee conducts interviews, it shall award up to the number of points indicated in the RFP for the anticipated interview; and
 - (C) The evaluation committee shall provide to the Agency the results of the scoring and ranking for each Proposer.

- (c) If the Agency does not cancel the RFP after it receives the results of the scoring and ranking for each Proposer, the Agency will begin negotiating a Contract with the highest ranked Proposer. The Agency shall direct negotiations toward obtaining written agreement on:
 - (A) Consultant's performance obligations and performance schedule;
 - (B) Payment methodology and a maximum amount payable to Contractor for the Architectural, Engineering, or Land Surveying Services, or Related Services required under the Contract that is fair and reasonable to the Agency as determined solely by the Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, or Land Surveying Services, or Related Services; and
 - (C) Any other provisions the Agency believes to be in the Agency's best interest to negotiate.
- (d) The Agency shall, either orally or in writing, formally terminate negotiations with the highest ranked Proposer if the Agency and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The Agency may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, and so on, in accordance with section (4)(c) of this rule, until negotiations result in a Contract. If negotiations with any Proposer do not result in a Contract within a reasonable amount of time, the Agency may end the particular formal solicitation. Nothing in this rule precludes the Agency from proceeding with a new formal solicitation for the same Architectural, Engineering, or Land Surveying Services, or Related Services described in the RFP that failed to result in a Contract.

03-0230

Ties Among Proposers

(1) If the Agency is selecting a Consultant on the basis of qualifications alone and determines after the ranking of Proposers that two or more Proposers are equally qualified, the Agency may select a candidate through any process that the Agency believes will result in the best value for the Agency taking into account the scope, complexity and nature of the Architectural, Engineering, or Land Surveying Services. The process shall instill public confidence through ethical and fair dealing, honesty and good faith on the part of the Agency and Proposers and shall protect the integrity of the Public Contracting process. Once a tie is broken, the Agency and the selected Proposer shall proceed with negotiations under Rule 03-0210(3) or Rule 03-0220(4)(c), as applicable.

(2) If the Agency is selecting a Consultant on the basis of price alone, or on the basis of price and qualifications, and determines after the ranking of Proposers that two or more Proposers are identical in terms of price or are identical in terms of price and qualifications, then the Agency shall follow the procedure set forth in Rule 02-0300, (Preferences for Oregon Goods and Services; Nonresident Bidders, to select the Consultant).

03-0240

Protest Procedures

(1) RFP Protest and Request for Change. Consultants may submit a written protest of anything contained in an RFP and may request a change to any provision, specification or contract term contained in an RFP, no later than seven (7) calendar days prior to the date Proposals are due unless a different deadline is indicated in the RFP. Each protest and request for change must include the reasons for the protest or request, and any proposed changes to the RFP provisions, specifications or contract terms. The Agency will not consider any protest or request for change that is submitted after the submission deadline.

(2) Protest of Consultant Selection.

(a) Single Award. In the event of an award to a single Proposer, the Agency shall provide to all Proposers a copy of the selection notice that the Agency sent to the highest ranked Proposer. A Proposer who claims to have been adversely affected or aggrieved by the selection of the highest ranked Proposer may submit a written protest of the selection to the Agency no later than seven (7) calendar days after the date of the selection notice unless a different deadline is indicated in the RFP. A Proposer submitting a protest must claim that the protesting Proposer is the highest ranked Proposer because the Proposals of all higher ranked Proposers failed to meet the requirements of the RFP or because the higher ranked Proposers otherwise are not qualified to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP.

(b) Multiple Award. In the event of an award to more than one Proposer, the Agency shall provide to all Proposers copies of the selection notices that the Agency sent to the highest ranked Proposers. A Proposer who claims to have been adversely affected or aggrieved by the selection of the highest ranked Proposers may submit a written protest of the selection to the Agency no later than seven (7) calendar days after the date of the selection notices, unless a different deadline is indicated in the RFP. A Proposer submitting a protest must claim that the protesting Proposer is one of the highest ranked proposers because the Proposals of all higher ranked Proposers failed to meet the requirements of the RFP, or because a sufficient number of Proposals of higher ranked Proposers to include the protesting Proposer in the group of highest ranked Proposers failed to meet the

requirements of the RFP. In the alternative, a Proposer submitting a protest must claim that the Proposals of all higher ranked Proposers, or a sufficient number of higher ranked Proposers to include the protesting Proposer in the group of highest ranked Proposers, otherwise are not qualified to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP.

(3) Resolution of Protests. A duly authorized representative of the Agency shall resolve all timely submitted protests within a reasonable time following the Agency's receipt of the protest and once resolved, shall promptly issue a written decision on the protest to the Proposer who submitted the protest. If the protest results in a change to the RFP, the Agency shall revise the RFP accordingly and shall re-advertise the RFP in accordance with these rules.

(4) Judicial Review. Proposers may be able to obtain judicial review of the Agency's protest disposition pursuant to ORS 34.010 through 34.100.

03-0250

RFP or RFQ Cancellation; Costs

The Agency may cancel a solicitation, whether informal or formal, or reject all Proposals or responses to RFQs, or any combination of the foregoing, without liability to the Agency at anytime after issuing an RFP or RFQ, if the Agency believes it is in the public interest to do so. Consultants responding to either RFPs or RFQs are responsible for all costs they may incur in connection with submitting Proposals and responses to RFQs.

03-0260

Two-Tiered Selection Procedure for Agency Public Improvement Projects

(1) If the Agency requires a Consultant to perform Architectural, Engineering, or Land Surveying Services, or Related Services for a Public Improvement owned and maintained by the Agency, and a State Agency will serve as the lead Contracting Agency and will enter into Contracts with Consultants for Architectural, Engineering, or Land Surveying Services, or Related Services, for that Public Improvement, the State Contracting Agency shall utilize the two-tiered selection process described below to obtain these Contracts with Consultants.

(2) Tier One. The Agency shall, when feasible, identify no fewer than the three (3) most qualified Proposers responding to an RFP that was issued under the applicable selection procedures described in Rule 03-0210 (Informal Selection Procedure) and 03-0220 (Formal Selection Procedure), or from among Consultants identified under Rule 03-0200 (Direct Appointment Procedure), and shall notify the Agency of the Consultants selected.

- (3) Tier Two. The Agency shall either:
 - (a) Select a Consultant from the list of Proposers provided from the State Contracting Agency to perform the Architectural, Engineering, or Land Surveying Services, or Related Services for the Agency's Public Improvement; or
 - (b) Select a Consultant to perform the Architectural, Engineering, or Land Surveying Services, or Related Services for the Agency's Public Improvement through an alternative process adopted by the Agency, consistent with the provisions of the applicable RFP, if any, and these division 3 rules.
- (4) The State Contracting Agency shall thereafter begin Contract negotiations with the selected Consultant in accordance with the negotiation provisions in Rule 03-0220(4)(c).

Post-Selection Considerations

03-0300

Prohibited Payment Methodology; Purchase Restrictions

- (1) Except as otherwise allowed by law, the Agency shall not enter into any Contract which includes compensation provisions that expressly provide for payment of:
 - (a) Consultant's costs under the Contract plus a percentage of those costs; or
 - (b) A percentage of the Project construction costs or total Project costs.
- (2) Except as otherwise allowed by law, the Agency shall not enter into any Contract in which:
 - (a) The compensation paid under the Contract is solely based on or limited to the Consultant's hourly rates for the Consultant's personnel working on the Project and reimbursable expenses incurred during the performance of work on the Project (sometimes referred to as a "time and materials" Contract); and
 - (b) The Contract does not include a maximum amount payable to Contractor for the Architectural, Engineering, or Land Surveying Services, or Related Services required under the Contract.
- (3) Except in cases of Emergency or in the particular instances noted in the subsections below, the Agency shall not purchase any building materials, supplies or equipment for any building, structure or facility constructed by or for the Agency from any Consultant under a Contract with the Agency to perform Architectural, Engineering or Land Surveying Services, or

Related Services, for the building, structure or facility. This prohibition does not apply if either of the following circumstances exists:

- (a) Consultant is providing Architectural, Engineering or Land Surveying Services, or Related Services under a Contract with the Agency to perform Design-Build services or Energy Savings Performance Contract services (see Rule 04-0670 and Rule 04-0680).
- (b) That portion of the Contract relating to the acquisition of building materials, supplies or equipment was awarded to Consultant pursuant to applicable law governing the award of such contracts.

03-0310

Effect of Material Alteration or Delay of Project

If the Agency delays or delays and then materially alters a Project for which the Agency has entered a Contract, and the Contract has expired or been terminated, the Agency may enter a Contract with the same Consultant to perform either the same Architectural, Engineering, or Land Surveying Services, or Related Services described in the Contract or Architectural, Engineering, or Land Surveying Services, or Related Services as amended to reflect the Agency's material alteration of the Project if no more than one year has passed since expiration or termination of the Contract and the Agency makes written findings that entering a Contract with Consultant:

- (1) Will promote efficient use of public funds and resources and result in substantial cost savings to the Agency;
- (2) Will not encourage favoritism in the contracting process; and
- (3) Will not substantially diminish competition for future contracts with Consultants.

03-0320

Contract Amendments

(1) The Agency may amend any Contract if the Agency, in its sole discretion, determines that the amendment is within the scope of services contemplated under the RFP and that the amendment would not materially impact the field of competition for the services described in the RFP. In making this determination, the Agency shall consider potential alternative methods of procuring the services contemplated under the proposed amendment. An amendment would not materially impact the field of competition for the services described in the RFP if the Agency

reasonably believes that the number of Proposers would not significantly increase if the RFP were re-issued to include the additional services.

(2) The Agency may amend any Contract if the additional services are required by reason of existing or new laws, rules, regulations or ordinances of federal, state or local agencies, that affect performance of the original Contract.

(3) All amendments to Contracts must be in writing, must be signed by an authorized representative of the Consultant and the Agency and must receive all required approvals before the amendments will be binding on the Agency.

DIVISION 4

GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTS FOR CONSTRUCTION SERVICES

04-0100

Application

- (1) These division 4 rules apply to Public Improvement Contracts as well as Public Contracts for ordinary construction Services that are not Public Improvements. Rules that apply specifically to Public Improvement Contracts are so identified.
- (2) These division 4 rules address matters covered in ORS Chapter 279C (with the exception of Architectural, Engineering, Land Surveying and Related Services, all of which are addressed in division 3 of these Rules).
- (3) These division 4 rules become effective on March 1, 2005 and apply to the Contracts described in section (1) above first advertised, but if not advertised then entered into, on or after March 1, 2005.

04-0110

Policies

In addition to the general Code policies set forth in ORS 279A.015, the 279C.300 policy on competition and the ORS 279C.305 policy on least-cost for Public Improvements apply to these division 4 rules.

04-0120

Definitions

- (1) "**Conduct Disqualification**" means a Disqualification pursuant to ORS 279C.440.
- (2) "**Disqualification**" means the preclusion of a Person from contracting with the Agency for a period of time in accordance with Rule 04-0350. Disqualification may be a Conduct Disqualification or DBE Disqualification.
- (3) "**Foreign Contractor**" means a Contractor that is not domiciled in or registered to do business in the State of Oregon. See Rule 04-0460.

(4) **"Notice"** means any of the alternative forms of public announcement of Procurements, as described in Rule 04-0210.

(5) **"Work"** means the furnishing of all materials, equipment, labor and incidentals necessary to successfully complete any individual item or the entire Contract and the carrying out and completion of all duties and obligations imposed by the Contract.

04-0130

Competitive Bidding Requirement

The Agency shall solicit Bids for Public Improvement Contracts by Invitation to Bid ("ITB"), except as otherwise allowed or required pursuant to ORS 279C.335 on Competitive Bidding exceptions and exemptions, 279A.030 on federal law overrides or 279A.100 on affirmative action. Also see Rule 04-0600 to Rule 04-0690 regarding the use of Alternative Contracting Methods and the exemption process.

04-0140

Contracts for Construction Other Than Public Improvements

(1) **Procurement Under ORS Chapter 279B.** Pursuant to ORS 279C.320, Public Contracts for construction Services that are not Public Improvement Contracts, other than Emergency Contracts regulated under ORS 279C.335(6) and Rule 04-0150, may be procured and amended as general trade services under the provisions of ORS Chapter 279B rather than under the provisions of ORS Chapter 279C and these division 4 rules.

(2) **Application of ORS Chapter 279C.** Non-procurement provisions of ORS Chapter 279C and these division 4 rules may still be applicable to the resulting Contracts. See, for example, particular statutes on Disqualification (ORS 279C.440, 445 and 450); Legal Actions (ORS 279C.460 and 465); Required Contract Conditions (ORS 279C.505, 515, 520 and 530); Hours of Labor (ORS 279C.540 and 545); Retainage (ORS 279C.550, 560 and 565); Subcontracts (ORS 279C.580); Action on Payment Bonds (ORS 279C.600, 605, 610, 615, 620 and 625); Termination (ORS 279C.650, 655, 660 and 670); and all of the Prevailing Wage Rates requirements (ORS 279C.800 through 870) for Public Works Contracts.

04-0150

Emergency Contracts; Bidding and Bonding Exemptions

(1) **Emergency Declaration.** Pursuant to ORS 279C.335(6) and this rule, the Agency Staff Coordinator or City Manager may declare that Emergency circumstances exist that require prompt execution of a Public Contract for Emergency construction or repair Work. The

declaration shall be made at an administrative level consistent with the Agency's internal policies, by a written declaration that describes the circumstances creating the Emergency and the anticipated harm from failure to enter into an Emergency Contract. The Emergency declaration shall exempt the Public Contract from the competitive bidding requirements of ORS 279C.335(1) and shall thereafter be kept on file as a public record.

(2) **Competition for Contracts.** The Agency shall ensure competition for an Emergency Contract as reasonable and appropriate under the Emergency circumstances, and may include written requests for Offers, oral requests for Offers or direct appointment without competition in cases of extreme necessity, in whatever Solicitation time periods the Agency considers reasonable in responding to the Emergency.

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

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

(5) **Excusing Bonds.** Pursuant to ORS 279C.380(4) and this rule, the Emergency declaration may also state that the Agency waives the requirement of furnishing a performance bond and payment bond for the Emergency Contract. After making such an Emergency declaration the bonding requirements are excused for the procurement, but this Emergency declaration does not affect the separate Public Works bond requirement for the benefit of the Bureau of Labor and Industries (BOLI) in enforcing prevailing wage rate and overtime payment requirements. See Rule 04-0815 and BOLI rules at 839-025-0015.

04-0160

Intermediate Procurements; Competitive Quotes and Amendments

(1) **General.** Public Improvement Contracts estimated by the Agency not to exceed \$100,000, or not to exceed \$50,000 in the case of Contracts for highways, bridges and other transportation projects, may be Awarded in accordance with intermediate level procurement procedures for competitive quotes established by this rule.

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

(3) **Request for Quotes.** The Agency shall utilize written requests for quotes whenever reasonably practicable. Written request for quotes shall include the selection criteria to be utilized in selecting a Contractor and, if the criteria are not of equal value, their relative value or ranking. When requesting quotations orally, prior to requesting the price quote the Agency shall state any additional selection criteria and, if the criteria are not of equal value, their relative value. For Public Works Contracts, oral quotations may be utilized only in the event that Written copies of the prevailing wage rates are not required by the Bureau of Labor and Industries.

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

(5) **Award.** If Awarded, the Agency shall Award the Contract to the prospective contractor whose quote will best serve the interests of the Agency, taking into account the announced selection criteria. If Award is not made to the Offeror offering the lowest price, the Agency shall make a written record of the basis for Award.

(6) **Price Increases.** Intermediate level Public Improvement Contracts obtained by competitive quotes may be increased above the original amount of Award by Agency issuance of a Change to the Work or Amendment, pursuant to Rule 04-0910, within the following limitations:

(a) Up to an aggregate Contract Price increase of 25% over the original Contract amount when the Agency Staff Coordinator or City Manager or the Manager's authorized designee determines that a price increase is warranted for additional reasonably related Work, and;

(b) Up to an aggregate Contract Price increase of 50% over the original Contract amount, when the Agency Staff Coordinator or City Manager or the Manager's authorized designee determines that a price increase is warranted for additional reasonably related Work and the Local Contract Review Authority approves the increase.

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

Formal Procurement Rules

04-0200

Solicitation Documents; Required Provisions; Assignment or Transfer

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

(a) **General Information.**

- (A) Identification of the Public Improvement project, including the character of the Work, and applicable plans, Specifications and other Contract documents;
- (B) Notice of any pre-Offer conference as follows:
 - (i) The time, date and location of any pre-Offer conference;
 - (ii) Whether attendance at the conference will be mandatory or voluntary; and
 - (iii) That statements made by the Agency's representatives at the conference are not binding upon the Agency unless confirmed by Written Addendum.
- (C) The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be prequalified if prequalification is a requirement;
- (D) The name and title of the authorized Agency employee designated for receipt of Offers and contact Person (if different);
- (E) Instructions and information concerning the form and submission of Offers, including the address of the office to which Offers must be delivered, any Bid or Proposal security requirements, and any other required information or special information, e.g., whether Offers may be submitted by facsimile or electronic means;
- (F) The time, date and place of Opening;
- (G) The time and date of Closing after which the Agency will not accept Offers, which time shall be not less than five Days after the date of the last

publication of the advertisement. If the Agency is issuing an Invitation to Bid (“ITB”) that may result in a Public Improvement Contract with a value in excess of \$100,000, the Agency shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and Rule 04-0360. For timing issues relating to Addenda, see Rule 04-0250;

- (H) The office where the Specifications for the Work may be reviewed;
- (I) A statement that each Bidder to an ITB must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120;
- (J) If the Contract resulting from a Solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 276a), a statement that no Offer will be received or considered by the Agency unless the Offer contains a statement by the Offeror as a part of its Offer that "Contractor agrees to be bound by and will comply with the provisions of ORS 279C.840 or 40 U.S.C. 276a.";
- (K) A statement that the Agency will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as specified in Rule 04-0230;
- (L) Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;
- (M) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See Rule 04-0420(3));
- (N) How the Agency will notify Offerors of Addenda and how the Agency will make Addenda available (See Rule 04-0250); and
- (O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in Rule 04-0340.

(b) **Evaluation Process:**

- (A) A statement that the Agency may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, and may reject for good cause all Offers upon the Agency's finding that it is in the public interest to do so;

- (B) The anticipated Solicitation schedule, deadlines, protest process and evaluation process, if any;
- (C) Evaluation criteria, including the relative value applicable to each criterion, that the Agency will use to determine the Responsible Bidder with the lowest Responsive Bid (where Award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of Competitive Proposals is authorized under ORS 279C.335 and Rule 04-0620), along with the process the Agency will use to determine acceptability of the Work;
 - (i) If the Solicitation Document is an Invitation to Bid, the Agency shall set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors shall be objective, reasonable estimates based upon information the Agency has available concerning future use;
 - (ii) If the Solicitation Document is a Request for Proposals, the Agency shall refer to the additional requirements of Rule 04-0650; and
- (c) **Contract Provisions.** The Agency shall include all Contract terms and conditions, including warranties, insurance and bonding requirements, that the Agency considers appropriate for the Public Improvement project. The Agency must also include all applicable Contract provisions required by Oregon law as follows:
 - (A) Prompt payment to all Persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279C.505(1));
 - (B) Demonstrate that an employee drug testing program is in place (ORS 279C.505(2));
 - (C) If the Contract calls for demolition Work described in ORS 279C.510(1), a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;

- (D) If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective (ORS 279C.510(2));
- (E) Payment of claims by public officers (ORS 279C.515(1));
- (F) Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515(2), including the rate of interest;
- (G) Person's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279C.515(3));
- (H) Hours of labor in compliance with ORS 279C.520;
- (I) Environmental and natural resources regulations (279C.525);
- (J) Payment for medical care and attention to employees (ORS 279C.530(1));
- (K) A Contract provision substantially as follows: "All employers, including Contractor, that employ subject Workers who Work under this Contract in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530(2));
- (L) Maximum hours, holidays and overtime (ORS 279C.540);
- (M) Time limitation on claims for overtime (ORS 279C.545);
- (N) Prevailing wage rates (ORS 279C.800 to 279C.870);
- (O) Fee paid to BOLI (ORS 279C.830);
- (P) BOLI Public Works bond (ORS 279C.830(3));
- (Q) Retainage (ORS 279C.550 to 279C.570);
- (R) Prompt payment policy, progress payments, rate of interest (ORS 279C.570);
- (S) Contractor's relations with subcontractors (ORS 279C.580);

- (T) Notice of claim (ORS 279C.605);
- (U) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385; and
- (V) Contractor's certification that all subcontractors performing Work described in ORS 701.005(2) (i.e., construction Work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence Work under the Contract.

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

04-0210

Notice and Advertising Requirements; Posting

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

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

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

- (a) The Agency shall publish the advertisement for Offers at least once in at least one newspaper of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as the Agency may determine to be necessary or desirable to foster and promote competition.
- (b) In addition to the Agency's publication required under subsection 2(a), the Agency shall also publish an advertisement for Offers in at least one trade newspaper of general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000.
- (c) All advertisements for Offers shall set forth:
 - (A) The Public Improvement project;
 - (B) The office where Contract terms, conditions and Specifications may be reviewed;
 - (C) The date that Persons must file applications for prequalification under ORS 279C.430, if prequalification is a requirement, and the class or classes of Work for which Persons must be prequalified;
 - (D) The scheduled Closing, which shall not be less than five Days after the date of the last publication of the advertisement;
 - (E) The name, title and address of the Agency employee authorized to receive Offers;
 - (F) The scheduled Opening; and
 - (G) If applicable, that the Contract is for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 276(a)).

04-0220

Prequalification of Offerors

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

- (a) Mandatory Prequalification. The Agency may, by rule, resolution, ordinance or other law or regulation, require mandatory prequalification of Offerors on forms prescribed by the Agency's Contract Review Authority. The Agency must indicate in the Solicitation Document if it will require mandatory prequalification.

Mandatory prequalification is when the Agency conditions a Person's submission of an Offer upon the Person's prequalification. The Agency shall not consider an Offer from a Person that is not prequalified if the Agency required prequalification.

- (b) **Permissive Prequalification.** The Agency may prequalify a Person for the Agency's Solicitation list on forms prescribed by the Agency's Contract Review Authority, but in permissive prequalification the Agency shall not limit distribution of a Solicitation to that list. The Agency's determination of prequalification shall be valid for a period of three years.

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

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

- (a) That the Person's financial, material, equipment, facility and personnel resources and expertise, or ability to obtain such resources and expertise, indicate that the Person is capable of meeting all contractual responsibilities;
- (b) The Person's record of performance;
- (c) The Person's record of integrity;
- (d) The Person is qualified to contract with the Agency. (See, Rule 04-0370(2) regarding standards of responsibility.)

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

04-0230

Eligibility to Bid or Propose; Registration or License

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

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

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

04-0240

Pre-Offer Conferences

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

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

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

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

(5) **Agency Announcement.** The Agency must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with Rule 04-0200(1)(a)(B).

04-0250

Addenda to Solicitation Documents

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

(2) **Notice and Distribution.** The Agency shall notify prospective Offerors of Addenda consistent with the standards of Notice set forth in Rule 04-0210(1). The Solicitation Document shall specify how the Agency will provide notice of Addenda and how the Agency will make the Addenda available (see, Rule 04-0200(1)(a)(N)).

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

(4) **Request for Change or Protest.** Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in Rule 04-0260, by the close of the Agency's next business day after issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under Rule 04-0260, whichever date is later. The Agency shall consider only an Offeror's request for change or protest to the Addendum; the Agency shall not consider a request for change or protest to matters not added or modified by the Addendum, unless the Offeror submits the request for change or protest before the deadline for the Agency's receipt of request for change or protests as set forth in Rule 04-0260(2) and (3).

04-0260

Request for Clarification or Change; Solicitation Protests

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

(2) **Request for Change.**

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

(b) Content of Request for Change.

- (A) An Offeror's Written request for change shall include a statement of the requested change(s) to the Contract terms and conditions, including any Specifications, together with the reason for the requested change.
- (B) An Offeror shall mark its request for change as follows:
 - (i) "Contract Provision Request for Change"; and
 - (ii) Solicitation Document number (or other identification as specified in the Solicitation Document).

(3) **Protest.**

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

(b) Content of Protest.

- (A) An Offeror's Written protest shall include:
 - (i) A detailed statement of the legal and factual grounds for the protest;
 - (ii) A description of the resulting prejudice to the Offeror; and
 - (iii) A statement of the desired changes to the Contract terms and conditions, including any Specifications.
- (B) An Offeror shall mark its protest as follows:
 - (i) "Contract Provision Protest"; and
 - (ii) Solicitation Document number (or other identification as specified in the Solicitation Document).

(4) **Agency Response.** The Agency is not required to consider an Offeror's request for change or protest after the deadline established for submitting such request or protest. The Agency shall provide notice to the applicable Person if it entirely rejects a protest. If the Agency agrees with the Person's request or protest, in whole or in part, the Agency shall either issue an Addendum reflecting its determination under Rule 04-0260 or cancel the Solicitation under Rule 04-0270.

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

04-0270

Cancellation of Solicitation Document

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

(2) **Notice of Cancellation.** If the Agency cancels a Solicitation prior to Opening, the Agency shall provide Notice of cancellation in accordance with Rule 04-0210(1). Such notice of cancellation shall:

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

(3) **Disposition of Offers.**

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

04-0280

Offer Submissions

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

- (a) In competitive Bidding, the Offer is always a "Firm Offer," i.e., the Offer shall be held open by the Offeror for the Agency's acceptance for the period specified in Rule 04-0390. The Agency's Award of the Contract to a Bidder constitutes acceptance of the Offer and binds the Offeror to the Contract.
 - (b) In competitive Proposals, the Solicitation Document shall describe whether Offers are to be made and considered as "Firm Offers" that may be accepted without negotiation, as in the case of competitive Bidding, or whether Offers are subject to discussion, negotiation or otherwise are not to be considered as final offers. See Rule 04-0650 on Requests for Proposals and Rule 04-0290 on Bid or Proposal Security.
- (2) **Responsive Offer.** The Agency may Award a Contract only to a Responsible Offeror with a Responsive Offer.
- (3) **Contingent Offers.** Except to the extent that an Offeror is authorized to propose certain terms and conditions pursuant to Rule 04-0650, an Offeror shall not make an Offer contingent upon the Agency's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.
- (4) **Offeror's Acknowledgment.** By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits proposal of alternative terms under Rule 04-0650, the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the Agency in Writing.
- (5) **Instructions.** An Offeror shall submit and Sign its Offer in accordance with the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document.
- (6) **Forms.** An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.
- (7) **Documents.** An Offeror shall provide the Agency with all documents and descriptive literature required under the Solicitation Document.
- (8) **Product Samples and Descriptive Literature.** The Agency may require Product Samples or descriptive literature if it is necessary or desirable to evaluate the quality, features or characteristics of the offered items. The Agency will dispose of Product Samples, or return or

make available for return Product Samples to the Offeror in accordance with the Solicitation Document.

(9) **Identification of Offers.**

- (a) To ensure proper identification and handling, Offers shall be submitted in a sealed envelope appropriately marked or in the envelope provided by the Agency, whichever is applicable.
- (b) The Agency is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.

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

04-0290

Bid or Proposal Security

(1) **Security Amount.** If the Agency requires Bid or Proposal security, it shall be not more than 10% or less than 5% of the Offeror's Bid or Proposal, consisting of the base Bid or Proposal together with all additive alternates. The Agency shall not use Bid or Proposal security to discourage competition. The Agency shall clearly state any Bid or Proposal security requirements in its Solicitation Document. The Offeror shall forfeit Bid or Proposal security after Award if the Offeror fails to execute the Contract and promptly return it with any required Performance Bond and Payment Bond and, in the case of Proposal security, with any required proof of insurance. See ORS 279C.365(4) and 279C.385.

(2) **Requirement for Bid Security (Optional for Proposals).** Unless the Agency has otherwise exempted a Solicitation or class of Solicitations from Bid security pursuant to ORS 279C.390, the Agency shall require Bid security for its Solicitation of Bids for Public Improvements. This requirement applies only to Public Improvement Contracts with a value, estimated by the Agency, of more than \$100,000 or, in the case of Contracts for highways, bridges and other transportation projects, more than \$50,000. See ORS 279C.365(5). The Agency may require Bid security even if it has exempted a class of Solicitations from Bid security. The Agency may require Proposal security in RFPs when Award of a Public Improvement Contract may be made without negotiation following receipt of a Firm Offer as described in Rule 04-0280(1)(b). See ORS 279C.400(5).

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

- (a) A surety bond from a surety company authorized to do business in the State of Oregon;
- (b) An irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or
- (c) A cashier's check or Offeror's certified check.

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

04-0300

Pre-Closing Modification or Withdrawal of Offers

(1) **Modifications.** An Offeror may modify its Offer in Writing prior to the Closing. An Offeror shall prepare and submit any modification to its Offer to the Agency in accordance with Rule 04-0280, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:

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

(2) **Withdrawals.**

- (a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, signed by an authorized representative of the Offeror, delivered to the location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by the Agency prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in Person prior to the Closing, upon presentation of appropriate identification and satisfactory evidence of authority.
- (b) The Agency may release an unopened Offer withdrawn under subsection 2(a) to the Offeror or its authorized representative, after voiding any date and time stamp mark.

- (c) The Offeror shall mark the Written request to withdraw an Offer as follows:
 - (A) Bid (or Proposal) Withdrawal; and
 - (B) Solicitation Number (or Other Identification as specified in the Solicitation Document).

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

04-0310

Receipt, Opening and Recording of Offers; Confidentiality of Offers

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

(2) **Opening and Recording.** The Agency shall publicly open Offers including any modifications made to the Offer pursuant to Rule 04-0320. In the case of Invitations to Bid, to the extent practicable, the Agency shall read aloud the name of each Bidder, the Bid price(s), and such other information as the Agency considers appropriate. In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the Agency will not read Offers aloud.

(3) **Availability.** After Opening, the Agency shall make Bids available for public inspection, but pursuant to ORS 279C.410 Proposals are not subject to disclosure until after notice of intent to award is issued. In any event, the Agency may withhold from disclosure those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.501(2); 646.461 to 646.475. To the extent the Agency determines such designation is not in accordance with applicable law, the Agency shall make those portions available for public inspection. The Offeror shall separate information designated as confidential from other nonconfidential information at the time of submitting its Offer. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and shall be publicly available regardless of an Offeror's designation to the contrary.

04-0320

Late Bids, Late Withdrawals and Late Modifications

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. The Agency shall not consider late Offers, withdrawals or modifications except as permitted in Rule 04-0330 or Rule 04-0370.

04-0330

Mistakes

- (1) **Generally.** To protect the integrity of the competitive Procurement process and to assure fair treatment of Offerors, the Agency should carefully consider whether to permit waiver, correction or withdrawal of Offers for certain mistakes.
- (2) **Agency Treatment of Mistakes.** The Agency shall not allow an Offeror to correct or withdraw an Offer for an error in judgment. If the Agency discovers certain mistakes in an Offer after Opening, but before Award of the Contract, the Agency may take the following action:
 - (a) The Agency may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:
 - (A) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;
 - (B) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and
 - (C) Acknowledge receipt of an Addendum to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addendum and intended to be bound by its terms; or the Addendum involved did not affect price, quality or delivery.
 - (b) The Agency may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms the Agency's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example a

missing unit price may be established by dividing the total price for the units by the quantity of units for that item or a missing, or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). In the event of a discrepancy, unit prices shall prevail over extended prices.

- (c) The Agency may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:
 - (A) The nature of the error;
 - (B) That the error is not a minor informality under this subsection or an error in judgment;
 - (C) That the error cannot be corrected or waived under subsection (b) of this section;
 - (D) That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;
 - (E) That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;
 - (F) That the Offeror will suffer substantial detriment if the Agency does not grant the Offeror permission to withdraw the Offer;
 - (G) That the Agency's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on the Agency or the public it represents; and
 - (H) That the Offeror promptly gave notice of the claimed error to the Agency.
- (d) The criteria in subsection (2)(c) of this rule shall determine whether the Agency will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether the Agency will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to the Agency based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by the Agency, whether by Award to the next lowest Responsive and Responsible Bidder or the best Responsive and Responsible Proposer, or by resort to a new solicitation.

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

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

04-0340

First-Tier Subcontractors; Disclosure and Substitution

(1) **Required Disclosure.** Within two working hours after the Bid Closing on an ITB for a Public Improvement having a Contract Price anticipated by the Agency to exceed \$100,000, all Bidders shall submit to the Agency a disclosure form as described by ORS 279C.370(2), identifying any first-tier subcontractors (those Entities that would be contracting directly with the prime contractor) that will be furnishing labor or labor and materials on the Contract, if Awarded, whose subcontract value would be equal to or greater than:

- (a) Five percent of the total Contract Price, but at least \$15,000; or
- (b) \$350,000, regardless of the percentage of the total Contract Price.

(2) **Bid Closing, Disclosure Deadline and Bid Opening.** For each ITB to which this rule applies, the Agency shall:

- (a) Set the Bid Closing on a Tuesday, Wednesday or Thursday, and at a time between 2 p.m. and 5 p.m., except that these Bid Closing restrictions do not apply to an ITB for maintenance or construction of highways, bridges or other transportation facilities, and provided that the two-hour disclosure deadline described by this rule would not then fall on a legal holiday;
- (b) Open Bids publicly immediately after the Bid Closing; and
- (c) Consider for Contract Award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed by the Agency.

(3) **Bidder Instructions and Disclosure Form.** For the purposes of this rule, the Agency in its Solicitation shall:

- (a) Prescribe the disclosure form that must be utilized, substantially in the form set forth in ORS 279C.370(2); and
- (b) Provide instructions in a notice substantially similar to the following:
"Instructions for First-Tier Subcontractor Disclosure". Bidders are required to disclose information about certain first-tier subcontractors when the contract value for a Public Improvement is greater than \$100,000 (see ORS 279C.370). Specifically, when the contract amount of a first-tier subcontractor furnishing labor or labor and materials would be greater than or equal to: (i) 5% of the project Bid, but at least \$15,000, or (ii) \$350,000 regardless of the percentage, the Bidder must disclose the following information about that subcontract either in its Bid submission, or within two hours after Bid Closing:
 - (A) The subcontractor's name;
 - (B) The category of Work that the subcontractor would be performing; and
 - (C) The dollar value of the subcontract. If the Bidder will not be using any subcontractors that are subject to the above disclosure requirements, the Bidder is required to indicate "NONE" on the accompanying form.

THE AGENCY MUST REJECT A BID IF THE BIDDER FAILS TO SUBMIT THE DISCLOSURE FORM WITH THIS INFORMATION BY THE STATED DEADLINE (see Rule 04-0340).

- (4) **Submission.** A Bidder shall submit the disclosure form required by this rule either in its Bid submission, or within two Working hours after Bid Closing in the manner specified by the ITB.
- (5) **Responsiveness.** Compliance with the disclosure and submittal requirements of ORS 279C.370 and this rule is a matter of Responsiveness. Bids that are submitted by Bid Closing, but for which the disclosure submittal has not been made by the specified deadline, are not Responsive and shall not be considered for Contract Award.
- (6) **Agency Role.** The Agency shall obtain, and make available for public inspection, the disclosure forms required by ORS 279C.370 and this rule. The Agency shall also provide copies of disclosure forms to the Bureau of Labor and Industries as required by ORS 279C.835. The Agency is not required to determine the accuracy or completeness of the information provided on disclosure forms.
- (7) **Substitution.** Substitution of affected first-tier subcontractors shall be made only in accordance with ORS 279C.585. The Agency shall accept Written submissions filed under that statute as public records. Aside from issues involving inadvertent clerical error under ORS

279C.585, The Agency does not have a statutory role or duty to review, approve or resolve disputes concerning such substitutions. See ORS 279C.590 regarding complaints to the Construction Contractors Board on improper substitution.

04-0350

Disqualification of Persons

(1) **Authority.** The Agency may disqualify a Person from consideration of Award of the Agency's Contracts after providing the Person with notice and a reasonable opportunity to be heard in accordance with sections (2) and (4) of this rule.

- (a) Standards for Conduct Disqualification. As provided in ORS 279C.440, the Agency may disqualify a Person for:
 - (A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.
 - (B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the Person's responsibility as a contractor.
 - (C) Conviction under state or federal antitrust statutes.
 - (D) Violation of a contract provision that is regarded by the Agency to be so serious as to justify Conduct Disqualification. A violation under this subsection 1(a)(D) may include but is not limited to material failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a Person's failure to perform or unsatisfactory performance caused by acts beyond the Person's control is not a basis for Disqualification.
- (b) Standards for DBE Disqualification. As provided in ORS 200.065, 200.075 or 279A.110, the Agency may disqualify a Person's right to submit an Offer or to participate in a Contract (e.g. subcontractors) as follows:
 - (A) For a DBE Disqualification under ORS 200.065, the Agency may disqualify a Person upon finding that:

- (i) The Person fraudulently obtained or retained or attempted to obtain or retain or aided another Person to fraudulently obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise; or
 - (ii) The Person knowingly made a false claim that any Person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit; or
 - (iii) The Person has been disqualified by another Agency pursuant to ORS 200.065.
- (B) For a DBE Disqualification under ORS 200.075, the Agency may disqualify a Person upon finding that:
- (i) The Person has entered into an agreement representing that a disadvantaged, minority, women, or emerging small business enterprise, certified pursuant to ORS 200.055 ("Certified Enterprise"), will perform or supply materials under a Public Improvement Contract without the knowledge and consent of the Certified Enterprise; or
 - (ii) The Person exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any Certified Enterprise; or
 - (iii) The Person uses a Certified Enterprise to perform services under a contract or to provide supplies under a Public Improvement Contract to meet an established Certified Enterprise goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the contract.
 - (iv) If a Person is Disqualified for a DBE Disqualification under ORS 200.075, the Agency shall not permit such Person to participate in that Agency's Contracts.
- (C) For a DBE Disqualification under ORS 279A.110, the Agency may disqualify a Person if the Agency finds that the Person discriminated against minority, women or emerging small business enterprises in awarding a subcontract under a contract with that Agency.

(2) **Notice of Intent to Disqualify.** The Agency shall notify the Person in Writing of a proposed Disqualification personally or by registered or certified mail, return receipt requested. This notice shall:

- (a) State that the Agency intends to disqualify the Person;
- (b) Set forth the reasons for the Disqualification;
- (c) Include a statement of the Person's right to a hearing if requested in Writing within the time stated in the notice and that if the Agency does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived its right to a hearing;
- (d) Include a statement of the authority and jurisdiction under which the hearing will be held;
- (e) Include a reference to the particular sections of the statutes and rules involved;
- (f) State the proposed Disqualification period; and
- (g) State that the Person may be represented by legal counsel.

(3) **Hearing.** The Agency shall schedule a hearing upon the Agency receipt of the Person's timely request. The Agency shall notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.

(4) **Notice of Disqualification.** The Agency will notify the Person in Writing of its Disqualification, personally or by registered or certified mail, return receipt requested. The notice shall contain:

- (a) The effective date and period of Disqualification;
- (b) The grounds for Disqualification; and
- (c) A statement of the Person's appeal rights and applicable appeal deadlines. For a Conduct Disqualification or a DBE Disqualification under ORS 279A.110, the disqualified person must notify the Agency in Writing within three business Days after receipt of the Agency's notice of Disqualification if the Person intends to appeal the Agency's decision.

04-0360

Bid or Proposal Evaluation Criteria

- (1) **General.** A Public Improvement Contract, if Awarded, shall be Awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. See Rule 04-0370, and Rules for Alternative Contracting Methods at Rule 04-0600 to Rule 04-0690.
- (2) **Bid Evaluation Criteria.** Invitations to Bid may solicit lump-sum Offers, unit-price Offers or a combination of the two.
 - (a) **Lump Sum.** If the ITB requires a lump-sum Bid, without additive or deductive alternates, or if the Agency elects not to award additive or deductive alternates, Bids shall be compared on the basis of lump-sum prices, or lump-sum base Bid prices, as applicable. If the ITB calls for a lump-sum base Bid, plus additive or deductive alternates, the total Bid price shall be calculated by adding to or deducting from the base Bid those alternates selected by the Agency, for the purpose of comparing Bids.
 - (b) **Unit Price.** If the Bid includes unit pricing for estimated quantities, the total Bid price shall be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by the Agency, for the purpose of comparing Bids. The Agency shall specify within the Solicitation Document the estimated quantity of the procurement to be used for determination of the low Bidder. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price shall govern. See Rule 04-0330(2)(b).
- (3) **Proposal Evaluation Criteria.** If the Agency's Contract Review Authority has exempted the Procurement of a Public Improvement from the competitive Bidding requirements of ORS 279C.335(1), and has directed the Agency to use an Alternative Contracting Method under ORS 279C.335(3), the Agency shall set forth the evaluation criteria in the Solicitation Documents. See Rule 04-0650, ORS 279C.335 and 279C.405.

04-0370

Offer Evaluation and Award; Determination of Responsibility

- (1) **General.** If Awarded, the Agency shall Award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer or Proposers submitting the best, Responsive Proposal or Proposals, provided that such Person is not listed by the

Construction Contractors Board as disqualified to hold a Public Improvement Contract. See ORS 279C.375(2)(a). The Agency may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in the public interest.

(2) **Determination of Responsibility.** Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the Agency must have information that indicates that the Offeror meets the standards of responsibility set forth in ORS 279.375(2)(b). To be a Responsible Offeror, the Agency must determine that the Offeror:

- (a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to demonstrate the capability of the Offeror to meet all contractual responsibilities;
- (b) Has a satisfactory record of contract performance. The Agency should carefully scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in contract performance. In reviewing the Offeror's performance, the Agency should determine whether the Offeror's deficient performance was expressly excused under the terms of contract, or whether the Offeror took appropriate corrective action. The Agency may review the Offeror's performance on both private and Public Contracts in determining the Offeror's record of contract performance. The Agency shall make its basis for determining an Offeror not Responsible under this paragraph part of the Solicitation file;
- (c) Has a satisfactory record of integrity. An Offeror may lack integrity if the Agency determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to the Agency. The Agency may find an Offeror not Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Conduct Disqualification under Rule 04-0370 may be used to determine an Offeror's integrity. The Agency shall make its basis for determining that an Offeror is not Responsible under this paragraph part of the Solicitation file;
- (d) Is qualified legally to contract with the Agency; and
- (e) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by the Agency concerning responsibility, the Agency shall base the determination of responsibility upon any available information, or may find the Offeror not Responsible.

(3) **Documenting City Determinations.** The Agency shall document its compliance with ORS 279C.375(3) and the above sections of this rule on a Responsibility Determination Form substantially as set forth in ORS 279C.375(3)(c), and file that form with the Construction Contractors Board within 30 days after Contract Award.

(4) **Agency Evaluation.** The Agency shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. The Agency shall not evaluate an Offer using any other requirement or criterion.

(5) **Offeror Submissions.**

(a) The Agency may require an Offeror to submit Product Samples, descriptive literature, technical data, or other material and may also require any of the following prior to Award:

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

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

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

(b) The Agency shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. The Agency shall reject an Offer providing any product that does not meet the Solicitation Document requirements. The Agency's rejection of an Offer because it offers nonconforming Work or materials is not Disqualification and is not appealable under ORS 279C.445.

(6) **Evaluation of Bids.** The Agency shall use only objective criteria to evaluate Bids as set forth in the ITB. The Agency shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid.

(a) Nonresident Bidders. In determining the lowest Responsive Bid, the Agency shall, in accordance with Rule 01-0310, add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.

(b) Clarifications. In evaluating Bids, the Agency may seek information from a Bidder only to clarify the Bidder's Bid. Such clarification shall not vary, contradict or supplement the Bid. A Bidder must submit Written and Signed clarifications and such clarifications shall become part of the Bidder's Bid.

- (c) **Negotiation Prohibited.** The Agency shall not negotiate scope of Work or other terms or conditions under an Invitation to Bid process prior to Award.

(7) **Evaluation of Proposals.** See Rule 04-0650 regarding rules applicable to Requests for Proposals.

04-0380

Documentation of Award; Availability of Award Decisions

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

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

- (a) All submitted Bids;
- (b) Completed Bid tabulation sheet; and
- (c) Written justification for any rejection of lower Bids.

(3) **Contents of Award Record for Proposals.** Where the use of Requests for Proposals is authorized as set forth in Rule 04-0650, the Agency's record shall include:

- (a) All submitted Proposals.
- (b) The completed evaluation of the Proposals;
- (c) Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and
- (d) If the Agency permitted negotiations in accordance with Rule 04-0650, the Agency's completed evaluation of the initial Proposals and the Agency's completed evaluation of final Proposals.

(4) **Contract Document.** The Agency shall deliver a fully executed copy of the final Contract to the successful Offeror.

(5) **Bid Tabulations and Award Summaries.** Upon request of any Person the Agency shall provide tabulations of Awarded Bids or evaluation summaries of Proposals for a nominal charge which may be payable in advance. Requests must contain the Solicitation Document number and, if requested, be accompanied by a self-addressed, stamped envelope. The Agency may also provide tabulations of Bids and Proposals Awarded on designated Web sites.

(6) **Availability of Solicitation Files.** The Agency shall make completed Solicitation files available for public review at the Agency.

(7) **Copies from Solicitation Files.** Any Person may obtain copies of material from Solicitation files upon payment of a reasonable copying charge.

04-0390

Time for Agency Acceptance; Extension

(1) **Time for Offer Acceptance.** An Offeror's Bid, or Proposal submitted as a Firm Offer (see Rule 04-0280), is irrevocable, valid and binding on the Offeror for not less than 30 Days from Closing unless otherwise specified in the Solicitation Document.

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

04-0395

Notice of Intent to Award

(1) **Notice.** At least seven days before the Award of a Public Improvement Contract, the Agency shall issue to each Bidder (pursuant to ORS 279C.375(2)) and each Proposer (pursuant to ORS 279C.410(7)), or post electronically or otherwise, a notice of the Agency's intent to Award the Contract. This requirement does not apply to Award of a small procurement or emergency Public Improvement Contract awarded under ORS 279C.335(1)(c) or (d) or (6).

(2) **Form and Manner of Posting.** The form and manner of posting notice shall conform to customary practices within the Agency's procurement system, and may be made electronically.

(3) **Finalizing Award.** The Agency's Award shall not be final until the later of the following:

(a) Seven Days after the date of the notice, unless the Solicitation Document provided a different period for protest; or

(b) The Agency provides a Written response to all timely-filed protests that denies the protest and affirms the Award.

(4) **Prior Notice Impractical.** Posting of notice of intent to award shall not be required when the Agency determines that it is impractical due to unusual time constraints in making prompt

Award for its immediate procurement needs, documents the Contract file as to the reasons for that determination, and posts notice of that action as soon as reasonably practical.

04-0400

Negotiation With Bidders Prohibited

- (1) **Bids.** Except as permitted by ORS 279C.340 and Rule 04-0410 when all bids exceed the cost estimate, the Agency shall not negotiate with any Bidder prior to Contract Award. After Award of the Contract, the Agency and Contractor may modify the Contract only by change order or amendment to the Contract in accordance with Rule 04-0910.
- (2) **Requests for Proposals.** The Agency may conduct discussions or negotiations with Proposers only in accordance with the requirements of Rule 04-0650.

04-0410

Negotiation When Bids Exceed Cost Estimate

- (1) **Generally.** In accordance with ORS 279C.340, if all Responsive Bids from Responsible Bidders on a competitively Bid Project exceed the Agency's Cost Estimate, prior to Contract Award the Agency may negotiate Value Engineering and Other Options with the Responsible Bidder submitting the lowest, Responsive Bid in an attempt to bring the Project within the Agency's Cost Estimate. The subcontractor disclosure and substitution requirements of Rule 04-0340 do not apply to negotiations under this rule.
- (2) **Definitions.** The following definitions apply to this administrative rule:
 - (a) **"Cost Estimate"** means the Agency's most recent pre-Bid, good faith assessment of anticipated Contract costs, consisting either of an estimate of an architect, engineer or other qualified professional, or confidential cost calculation Worksheets, where available, and otherwise consisting of formal planning or budgetary documents.
 - (b) **"Other Options"** means those items generally considered appropriate for negotiation in the RFP process, relating to the details of Contract performance as specified in Rule 04-0650, but excluding any material requirements previously announced in the Solicitation process that would likely affect the field of competition.
 - (c) **"Project"** means a Public Improvement.

(d) **"Value Engineering"** means the identification of alternative methods, materials or systems which provide for comparable function at reduced initial or life-time cost. It includes proposed changes to the plans, Specifications, or other Contract requirements which may be made, consistent with industry practice, under the original Contract by mutual agreement in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the Public Improvement. Cost savings include those resulting from life cycle costing, which may either increase or decrease absolute costs over varying time periods.

(3) **Rejection of Bids.** In determining whether all Responsive Bids from Responsible Bidders exceed the Cost Estimate, only those Bids that have been formally rejected, or Bids from Bidders who have been formally disqualified by the Agency, shall be excluded from consideration.

(4) **Scope of Negotiations.** The Agency shall not proceed with Contract Award if the scope of the Project is significantly changed from the original Bid. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other Bidders would have been expected by the Agency to participate in the Bidding process had the change been made during the Solicitation process rather than during negotiation. This rule shall not be construed to prohibit resolicitation of trade subcontracts.

(5) **Discontinuing Negotiations.** The Agency may discontinue negotiations at any time, and shall do so if it appears to the Agency that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to rebid any portion of the project, or to obtain subcontractor pricing information upon request, shall be considered a lack of good faith.

(6) **Limitation.** Negotiations may be undertaken only with the lowest Responsive, Responsible Bidder pursuant to ORS 279C.340. That statute does not provide any additional authority to further negotiate with Bidders next in line for Contract Award.

(7) **Public Records.** To the extent that a Bidder's records used in Contract negotiations under ORS 279C.340 are public records, they are exempt from disclosure until after the negotiated Contract has been awarded or the negotiation process has been terminated, at which time they are subject to disclosure pursuant to the provisions of the Oregon Public Records Law, ORS 192.410 to 192.505.

04-0420

Rejection of Offers

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

- (a) The Agency may reject any Offer upon finding that to accept the Offer may impair the integrity of the Procurement process or that rejecting the Offer is in the public interest.
- (b) The Agency shall reject an Offer upon the Agency's finding that the Offer:
 - (A) Is contingent upon the Agency's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;
 - (B) Takes exception to terms and conditions (including Specifications);
 - (C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of Solicitation Document or in contravention of applicable law;
 - (D) Offers Work or goods that fail to meet the Specifications of the Solicitation Document;
 - (E) Is late;
 - (F) Is not in substantial compliance with the Solicitation Documents;
 - (G) Is not in substantial compliance with all prescribed public Solicitation procedures.
- (c) The Agency shall reject an Offer upon the Agency's finding that the Offeror:
 - (A) Has not been prequalified under ORS 279C.430 and the Agency required mandatory prequalification;
 - (B) Has been Disqualified;
 - (C) Has been declared ineligible under ORS 279C.860 by the Commissioner of Bureau of Labor and Industries and the Contract is for a Public Work;
 - (D) Is listed as not qualified by the Construction Contractors Board, if the Contract is for a Public Improvement;
 - (E) Has not met the requirements of ORS 279A.105 if required by the Solicitation Document;
 - (F) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;

- (G) Has failed to provide the certification required under section 3 of this rule;
- (H) Is not Responsible. See Rule 04-0370(2) regarding Agency determination that the Offeror has met statutory standards of responsibility.

(2) **Form of Business.** For purposes of this rule, the Agency may investigate any Person submitting an Offer. The investigation may include that Person's officers, Directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this rule or to apply the Disqualification provisions of ORS 279C.440 to 279C.450 and Rule 04-0370.

(3) **Certification of Non-Discrimination.** The Offeror shall certify and deliver to the Agency Written certification, as part of the Offer that the Offeror has not discriminated and will not discriminate against minority, women or emerging small business enterprises in obtaining any required subcontracts. Failure to do so shall be grounds for disqualification.

(4) **Rejection of all Offers.** The Agency may reject all Offers for good cause upon the Agency's Written finding it is in the public interest to do so. The Agency shall notify all Offerors of the rejection of all Offers, along with the good cause justification and finding.

(5) **Criteria for Rejection of All Offers.** The Agency may reject all Offers upon a Written finding that:

- (a) The content of or an error in the Solicitation Document, or the Solicitation process unnecessarily restricted competition for the Contract;
- (b) The price, quality or performance presented by the Offerors is too costly or of insufficient quality to justify acceptance of the Offer;
- (c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;
- (d) Causes other than legitimate market forces threaten the integrity of the competitive Procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct and inadvertent or intentional errors in the Solicitation Document;
- (e) The Agency cancels the Solicitation in accordance with Rule 04-0270; or
- (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

04-0430

Protest of Contractor Selection, Contract Award

- (1) **Purpose.** An adversely affected or aggrieved Offeror must exhaust all avenues of administrative review and relief before seeking judicial review of the Agency's Contractor selection or Contract Award decision.
- (2) **Notice of Competitive Range.** Unless otherwise provided in the RFP, when the competitive proposal process is authorized under Rule 04-0650, the Agency shall provide Written notice to all Proposers of the Agency's determination of the Proposers included in the Competitive Range. The Agency's notice of the Proposers included in the Competitive Range shall not be final until the later of the following:
 - (a) 10 Days after the date of the notice, unless otherwise provided therein; or
 - (b) Until the Agency provides a Written response to all timely-filed protests that denies the protest and affirms the notice of the Proposers included in the Competitive Range.
- (3) **Notice of Intent to Award.** The Agency shall provide Written notice to all Offerors of the Agency's intent to Award the Contract, as provided by Rule 04-0395.
- (4) **Right to Protest Award.**
 - (a) An adversely affected or aggrieved Offeror may submit to the Agency a Written protest of the Agency's intent to Award within seven Days after issuance of the notice of intent to Award the Contract, unless a different protest period is provided under the Solicitation Document.
 - (b) The Offeror's protest must be in Writing and must specify the grounds upon which the protest is based.
 - (c) An Offeror is adversely affected or aggrieved only if the Offeror is eligible for Award of the Contract as the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer submitting the best Responsive Proposal and is next in line for Award, i.e., the protesting Offeror must claim that all lower Bidders or higher-scored Proposers are ineligible for Award:
 - (A) Because their Offers were nonresponsive; or
 - (B) The Agency committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or

administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been the Responsible Bidder offering the lowest Bid or the Responsible Proposer offering the highest-ranked Proposal.

- (d) The Agency shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest the Agency's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.

(5) **Right to Protest Competitive Range.**

- (a) An adversely affected or aggrieved Proposer may submit to the Agency a Written protest of the Agency's decision to exclude the Proposer from the Competitive Range within seven Days after issuance of the notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document. (See procedural requirements for the use of RFPs at Rule 04-0650.)
- (b) The Proposer's protest shall be in Writing and must specify the grounds upon which the protest is based.
- (c) A Proposer is adversely affected only if the Proposer is responsible and submitted a Responsive Proposal and is eligible for inclusion in the Competitive Range, i.e., the protesting Proposer must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Proposers are removed from consideration, and that those ineligible Proposers are ineligible for inclusion in the Competitive Range because:
 - (A) Their Proposals were not responsive; or
 - (B) The Agency committed a substantial violation of a provision in the RFP or of an applicable Procurement statute or administrative rule, and the protesting Proposer was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.
- (d) The Agency shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest the Agency's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.

(6) **Authority to Resolve Protests.** The Agency Staff Coordinator or City Manager, or the Manager's designee, may settle or resolve a Written protest submitted in accordance with the requirements of this rule.

(7) **Decision.** If a protest is not settled, the Agency Staff Coordinator or City Manager, or the Manager's designee, shall promptly issue a Written decision on the protest. Judicial review of this decision will be available if provided by statute.

(8) **Award.** The successful Offeror shall promptly execute the Contract after the Award is final. The Agency shall execute the Contract only after it has obtained all applicable required documents and approvals.

04-0440

Performance and Payment Security; Waiver

(1) **Public Improvement Contracts.** Unless the required performance bond is waived under ORS 279C.380(1)(a), excused in cases of emergency under ORS 279C.380(4), or unless the Agency's Contract Review Authority exempts a Contract or classes of contracts from the required performance bond and payment bond pursuant to ORS 279C.390, the Contractor shall execute and deliver to the Agency a performance bond and a payment bond each in a sum equal to the Contract Price for all Public Improvement Contracts. This requirement applies only to Public Improvement Contracts with a value, estimated by the Agency, of more than \$100,000 or, in the case of Contracts for highways, bridges and other transportation projects, more than \$50,000. See ORS 279C.380(5). Also see Rule 04-0815 and BOLI rules at OAR 839-025-0015 regarding the separate requirement for a Public Works bond.

(2) **Other Construction Contracts.** The Agency may require performance security for other construction Contracts that are not Public Improvement Contracts. Such requirements shall be expressly set forth in the Solicitation Document.

(3) **Requirement for Surety Bond.** The Agency shall accept only a performance bond furnished by a surety company authorized to do business in Oregon unless otherwise specified in the Solicitation Document (i.e., the Agency may accept a cashier's check or certified check in lieu or all or a portion of the required performance bond if specified in the Solicitation Document). The payment bond must be furnished by a surety company authorized to do business in Oregon, and in an amount equal to the full contract price.

(4) **Time for Submission.** The apparent successful Offeror must promptly furnish the required performance security upon the Agency's request. If the Offeror fails to furnish the performance security as requested, the Agency may reject the Offer and Award the Contract to the Responsible Bidder with the next lowest Responsive Bid or the Responsible Proposer with

the next highest-scoring Responsive Proposal, and, at the Agency's discretion, the Offeror shall forfeit its Bid or Proposal security.

04-0450

Substitute Contractor

If the Contractor provided a performance bond, the Agency may afford the Contractor's surety the opportunity to provide a substitute contractor to complete performance of the Contract. A substitute contractor shall perform all remaining Contract Work and comply with all terms and conditions of the Contract, including the provisions of the performance bond and the payment bond. Such substitute performance does not involve the Award of a new Contract and shall not be subject to the competitive Procurement provisions of ORS Chapter 279C.

04-0460

Foreign Contractor

If the Contract Price exceeds \$10,000 and the Contractor is a Foreign Contractor, the Contractor shall promptly report to the Oregon Department of Revenue on forms provided by the Department of Revenue, the Contract Price, terms of payment, Contract duration and such other information as the Department of Revenue may require before final payment can be made on the Contract. A copy of the report shall be forwarded to the Agency. The Agency shall satisfy itself that the above requirements have been complied with before it issues final payment on the Contract.

Alternative Contracting Methods

04-0600

Purpose

Rules 04-0600 to 04-0690 are intended to provide guidance to Contracting Agencies regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as may be directed by the Agency's Contract Review Authority under ORS 279C.335. Those methods include, but are not limited to, Design-Build, Energy Savings Performance Contract (ESPC) and Construction Manager/General Contractor (CM/GC) forms of contracting. As to ESPC contracting, Rules 04-0600 to 04-0690 implement the requirements of ORS 279C.335 pertaining to the adoption of model rules appropriate for use by all Contracting Agencies to govern the procedures for entering into ESPCs.

Definitions for Alternative Contracting Methods

The following definitions shall apply to these Rules 04-0600 to 04-0690 rules, unless the context requires otherwise:

(1) **Alternative Contracting Methods** means innovative Procurement techniques for obtaining Public Improvement Contracts, utilizing processes other than the traditional method of Design-Bid-Build (with Award based solely on price, in which a final design is issued with formal Bid documents, construction services are obtained by sealed Bid Awarded to the lowest Responsive, Responsible Bidder, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design-Build contracting, CM/GC forms of contracting and ESPCs, which are specifically addressed in Rules 04-0600 to 04-0690, as well as other developing techniques such as general "performance contracting" and "cost plus time" contracting, for which procedural requirements are identified under Rules 04-0600 to 04-0690.

(2) **Construction Manager/General Contractor (or "CM/GC")** means a form of Procurement that results in a Public Improvement Contract for a Construction Manager/General Contractor to undertake project team involvement with design development; constructability reviews; value engineering, scheduling, estimating and subcontracting services; establish a Guaranteed Maximum Price to complete the Contract Work; act as General Contractor; hold all subcontracts, self-perform portions of the Work as may be allowed by the Agency under the CM/GC Contract; coordinate and manage the building process; provide general Contractor expertise; and act as a member of the project team along with the Agency, architect/engineers and other consultants. CM/GC also refers to a Contractor under this form of Contract, sometimes known as the "Construction Manager at Risk."

(3) **Design-Build** means a form of Procurement that results in a Public Improvement Contract in which the construction Contractor also provides or obtains specified design services, participates on the project team with the Agency, and manages both design and construction. In this form of Contract, a single Person provides the Agency with all of the services necessary to both design and construct the project.

(4) **Energy Conservation Measures (or "ECMs") (also known as "energy efficiency measures")** means, as used in ESPC Procurement, any equipment, fixture or furnishing to be added to or used in an existing building or structure, and any repair, alteration or improvement to an existing building or structure that is designed to reduce energy consumption and related costs, including those costs related to electrical energy, thermal energy, water consumption, waste disposal, and future contract-labor costs and materials costs associated with maintenance of the building or structure. For purposes of Rules 04-0600 to 04-0690, use of either or both of the terms "building" or "structure" shall be deemed to include existing energy, water and waste

disposal systems connected or related to or otherwise used for the building or structure when such system(s) are included in the project, either as part of the project together with the building or structure, or when such system(s) are the focus of the project. Maintenance services are not Energy Conservation Measures, for purposes of Rules 04-0600 to 04-0690.

(5) **Energy Savings Guarantee** means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the Agency that certain energy savings and performance will be achieved for the project covered by the RFP, through the installation and implementation of the agreed-upon ECMs for the project. The Energy Savings Guarantee shall include, but shall not be limited to, the specific energy savings and performance levels and amounts that will be guaranteed, provisions related to the financial remedies available to the Agency in the event the guaranteed savings and performance are not achieved, the specific conditions under which the ESCO will guarantee energy savings and performance (including the specific responsibilities of the Agency after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.

(6) **Energy Savings Performance Contract (or "ESPC")** means a Public Improvement Contract between the Agency and a Qualified Energy Service Company for the identification, evaluation, recommendation, design and construction of Energy Conservation Measures, including a Design-Build Contract, that guarantee energy savings or performance.

(7) **Guaranteed Maximum Price (or "GMP")** means the total maximum price provided to the Agency by the Contractor, and accepted by the Agency, that includes all reimbursable costs of and fees for completion of the Contract Work, as defined by the Public Improvement Contract, except for material changes in the scope of Work. It may also include particularly identified contingency amounts.

(8) **Measurement and Verification (or "M & V")** means, as used in ESPC Procurement, the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy-using systems pre-installation and post-installation.

(9) **Project Development Plan** means a secondary phase of services performed by an ESCO in an ESPC Procurement when the ESCO performs more extensive design of the agreed-upon ECMs for the project, provides the detailed provisions of the ESCO's Energy Savings Guarantee that the fully installed and commissioned ECMs will achieve a particular energy savings level for the building or structure, and prepares an overall report or plan summarizing the ESCO's services during this secondary phase of the Work and otherwise explaining how the agreed-upon ECMs will be implemented during the design and construction phase of the Work; The term "Project Development Plan" can also refer to the report or plan provided by the ESCO at the conclusion of this phase of the Work.

(10) **Qualified Energy Service Company (or "ESCO")** means, as used in ESPC Procurement, a company, firm or other legal Person with the following characteristics: demonstrated technical, operational, financial and managerial capabilities to design, install, construct, commission, manage, measure and verify, and otherwise implement Energy Conservation Measures and other Work on building systems or building components that are directly related to the ECMs in existing buildings and structures; a prior record of successfully performing ESPCs on projects involving existing buildings and structures that are comparable to the project under consideration by the Agency; and the financial strength to effectively guarantee energy savings and performance under the ESPC for the project in question, or the ability to secure necessary financial measures to effectively guarantee energy savings under an ESPC for that project.

(11) **Technical Energy Audit** means, as used in ESPC Procurement, the initial phase of services to be performed by an ESCO that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the Agency of the ESCO's Findings during this initial phase of the Work; the term "Technical Energy Audit" can also refer to the report provided by the ESCO at the conclusion of this phase of the Work.

04-0620

Use of Alternative Contracting Methods

(1) **Competitive Bidding Exemptions.** ORS Chapter 279C requires a competitive Bidding process for Public Improvement Contracts unless a statutory exception applies, a class of Contracts has been exempted or an individual Contract has been exempted in accordance with ORS 279C.335 and any applicable Agency rules. Use of Alternative Contracting Methods may be directed by the Agency's Contract Review Authority as an exception to the prescribed Public Contracting practices in Oregon, and their use must be justified in accordance with the Code and Rules 04-0600 to 04-0690. See Rule 04-0630 regarding required Findings and restrictions on class exemptions.

(2) **Energy Savings Performance Contracts.** Unlike other Alternative Contracting Methods covered by Rules 04-0600 to 04-0690, ESPCs may be exempted from the competitive Bidding process for Public Improvement Contracts pursuant to ORS 279C.335, if the Agency complies with the procedures set forth in Rules 04-0600 to 04-0690 related to the Solicitation, negotiation and contracting for ESPC services.

(3) **Post-Project Evaluation.** ORS 279C.355 requires that the Agency prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 for which the competitive Bidding process was not used. The purpose of this evaluation is to determine whether it was actually in the Agency's best interest to use an Alternative Contracting Method. The evaluation must be delivered to the Agency's Contract Review Authority within 30 Days of

the date the Agency "accepts" the Public Improvement project, which event is typically defined in the Contract. In the absence of such definition, acceptance of the Project occurs on the later of the date of final payment or the date of final completion of the Work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:

- (a) Financial information, consisting of cost estimates, any Guaranteed Maximum Price, changes and actual costs;
- (b) A narrative description of successes and failures during design, engineering and construction; and
- (c) An objective assessment of the use of the Alternative Contracting Method as compared to the exemption Findings.

04-0630

Findings, Notice and Hearing

- (1) **Cost Savings Factors.** When Findings are required under ORS 279C.335 to exempt a Contract or class of Contracts from competitive Bidding requirements, the "substantial cost savings" criterion at ORS 279C.335(2)(b) allows consideration of the type, cost, amount of the Contract, number of Entities available to Bid, and "such other factors as may be deemed appropriate."
- (2) **Required Information.** Likewise, the statutory definition of "Findings" at ORS 279.330 means the justification for the Agency conclusion that includes, "but is not limited to," information regarding eight identified areas.
- (3) **Addressing Cost Savings.** Accordingly, when the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the "substantial cost savings" requirement may be addressed by a combination of:
 - (a) Specified Findings that address the factors and other information specifically identified by statute, including an analysis or reasonable forecast of future cost savings as well as present cost savings; and
 - (b) Additional Findings that address industry practices, surveys, trends, past experiences, evaluations of completed projects required by ORS 279C.355 and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable, such Findings shall relate back to the specific characteristics of the project or projects at issue in the exemption request.

(4) **Favoritism and Competition.** The criteria at ORS 279C.335(2)(a) that it is "unlikely" that the exemption will "encourage favoritism" or "substantially diminish competition" may be addressed in contemplating the use of Alternative Contracting Methods by specifying the manner in which an RFP process will be utilized, that the Procurement will be formally advertised with public notice and disclosure of the planned Alternative Contracting Method, competition will be encouraged, Award made based upon identified selection criteria and an opportunity to protest that Award.

(5) **Descriptions.** Findings supporting a competitive bidding exemption must describe with specificity the Alternative Contracting Method to be used in lieu of competitive bidding, including, but not limited to, whether a one step (Request for Proposals) or two step (beginning with Requests for Qualifications) solicitation process will be utilized. The Findings may also describe anticipated characteristics or features of the resulting Public Improvement Contract. However, the purpose of an exemption from competitive bidding is limited to a determination of the Procurement method. Any unnecessary or incidental descriptions of the specific details of the anticipated Contract within the supporting Findings are not binding upon the Agency. The parameters of the Public Improvement Contract are those characteristics or specifics that are announced in the Solicitation Document.

(6) **Class Exemptions.** In making the findings supporting a class exemption the Agency shall clearly identify the class with respect to its defining characteristics. Those characteristics shall include some combination of Project descriptions or locations, time periods, contract values or method of procurement or other factors that distinguish the limited and related class of Projects from the Agency's overall construction program. Classes shall not be defined solely by funding sources, such as a particular bond fund, or by method of procurement, but must be defined by characteristics that reasonably relate to the exemption criteria set forth in ORS 279C.335(2).

(7) **Public Hearing.** Before final adoption of Findings exempting a Public Improvement Contract from the requirement of competitive bidding, the Agency shall give notice and hold a public hearing as required by ORS 279C.335(4). The hearing shall be for the purpose of receiving public comment on the Agency's draft Findings.

04-0640

Competitive Proposals; Procedure

Contracting Agencies may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS 279C.400 to 279C.410 and Rules 04-0600 to 04-690, unless other applicable statutes control the Agency's use of competitive Proposals for Public Improvement Contracts. Also see the subdivision of rules in this division entitled Rules 04-0200 to 04-0460, and RFP related rules under the Alternative Contracting Methods subdivision at Rules 04-0640 to 04-0660. For ESPCs, the following RFP process shall be utilized if the Agency desires the Procurement process to be

exempt from the competitive Bidding requirements of ORS 279C.335. The RFP process for the Alternative Contracting Methods identified in Rules 04-0600 to 04-0690 includes the following steps:

- (1) Agency staff shall obtain prior approval of the Contract Review Authority to use any of the Alternative Contract Methods.
- (2) **Proposal Evaluation.** Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. For ESPC Proposal evaluations, the Agency may provide in the RFP that qualifications-based evaluation factors will outweigh the Agency's consideration of price-related factors, due to the fact that prices for the major components of the Work to be performed during the ESPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation. Proposal evaluation shall be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall:
 - (a) Be reasonable estimates based on information available to the Agency;
 - (b) Treat all Proposals equitably; and
 - (c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the Agency. See ORS 279C.305.
- (3) **Evaluation Factors.**
 - (a) In basic negotiated construction contracting, where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that affect cost or quality.
 - (b) In CM/GC contracting, in addition to (a) above, those factors may also include the ability to respond to the technical complexity or unique character of the project, analyze and propose solutions or approaches to complex project problems, coordination of multiple disciplines, the time required to commence and complete the improvement, and related matters that affect cost or quality.
 - (c) In Design-Build contracting, in addition to (a) and (b) above, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience and related matters that affect cost or quality.

- (d) In ESPC contracting, in addition to the factors set forth in subsections (a), (b) and (c) above, those factors may also include sample Technical Energy Audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP, financial statements and related information of joint venturers comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting energy guarantee Contract levels, the specific Person that will provide the Energy Savings Guarantee to be offered by the ESCO, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the Work under the ESPC, the ESCO's team members and consultants to be assigned to the project, the ESCO's experience in the Energy Savings Performance Contracting field, the ESCO's experience acting as the prime contractor on previous ESPC projects (as opposed to a sub-contractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular project between the Agency and the ESCO, the ESCO's equipment performance guarantee policies and procedures, the ESCO's energy savings and cost savings guarantee policies and procedures, the ESCO's project cost guarantee policies and procedures, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the Work and the ESCO's fee structure for all phases of the ESPC.

(4) **Contract Negotiations.** Contract terms may be negotiated to the extent allowed by the RFP and Rules 04-0600 to 04-0690, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See Rule 04-0650. Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that affect cost or quality. In ESPC contracting, terms that may be negotiated also include the scope of preliminary design of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the scope of services to be performed by the ESCO during the Project Development Plan phase of the Work, the detailed provisions of the Energy Savings Guarantee to be provided by the ESCO and scope of Work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the Work, consistent with the requirements of Rule 04-0680 below.

04-0645

Requests for Qualifications (RFQ)

As provided by ORS 279C.410(9), the Agency may utilize Requests for Qualifications (RFQs) to obtain information useful in the preparation or distribution of a Request for Proposals (RFPs). When using RFQs as the first step in a two step solicitation process, in which distribution of the RFPs will be limited to the firms identified as most qualified through their submitted statements of qualification, the Agency shall first advertise and provide notice of the RFQ in the same manner in which RFPs are advertised, specifically stating that RFPs will be distributed only to the qualified firms in the RFQ process. In such cases the Agency shall also provide within the RFQ a protest provision substantially in the form of Rule 04-0430(5) regarding protests of the Competitive Range. Thereafter, the Agency may distribute RFPs to those qualified firms without further advertisement of the solicitation.

04-0650

Requests for Proposals (RFP)

(1) **Generally.** The use of competitive proposals must be specially authorized for a Public Improvement Contract under the competitive bidding requirement of ORS 279C.335(1), Rule 04-0130 and Rules 04-0600 to 04-0690. Also see ORS 279C.400 to 279C.410 for statutory requirements regarding competitive Proposals, and Rule 04-0640 regarding competitive Proposal procedures.

(2) **Solicitation Documents.** In addition to the Solicitation Document requirements of Rule 04-0200, this rule applies to the requirements for Requests for Proposals. RFP Solicitation Documents shall conform to the following standards:

- (a) The Agency shall set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references and warranty provisions. See Rule 04-0640. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates based on information available to the Agency;
- (b) When the Agency is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, the Agency must identify the specific terms and conditions in or provisions of the Solicitation Document that are subject to negotiation or discussion and authorize Offerors to

propose certain alternative terms and conditions in lieu of the terms and conditions the Agency has identified as authorized for negotiation. The Agency must describe the evaluation and discussion or negotiation process, including how the Agency will establish the Competitive Range;

- (c) The anticipated size of the Competitive Range shall be stated in the Solicitation document, but may be decreased if the number of Proposers that submit responsive Proposals is less than the specified number, or may increased as provided in Rule 04-0650(4)(a)(B);
- (d) When the Agency intends to Award Contracts to more than one Proposer, the Agency must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. The Agency shall also include the criteria it will use to determine how the Agency will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular Contractor to provide goods or services from those Contractors Awarded Contracts.

(3) **Evaluation of Proposals.**

- (a) Evaluation. The Agency shall evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. The Agency shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.
 - (A) Clarifications. In evaluating Proposals, the Agency may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer must submit Written and Signed clarifications and such clarifications shall become part of the Proposer's Proposal.
 - (B) Limited Negotiation. If the Agency did not permit negotiation in its Request for Proposals, the Agency may, nonetheless, negotiate with the highest-ranked Proposer, but may then only negotiate the:
 - (i) Statement of Work; and
 - (ii) Contract Price as it is affected by negotiating the statement of Work.
 - (iii) The process for discussions or negotiations that is outlined and explained in subsections (5)(b) and (6) of this rule does not apply to this limited negotiation.

- (b) Discussions; Negotiations. If the Agency permitted discussions or negotiations in the Request for Proposals, the Agency shall evaluate Proposals and establish the Competitive Range, and may then conduct discussions and negotiations in accordance with this rule.
 - (A) If the Solicitation Document provided that discussions or negotiations may occur at Agency's discretion, the Agency may forego discussions and negotiations and evaluate all Proposals in accordance with this rule.
 - (B) If the Agency proceeds with discussions or negotiations, the Agency shall establish a negotiation team tailored for the acquisition. The Agency's team may include legal, technical and negotiating personnel.
 - (c) Cancellation. Nothing in this rule shall restrict or prohibit the Agency from canceling the Solicitation at any time.
- (4) **Competitive Range; Protest; Award.**
- (a) Determining Competitive Range.
 - (A) If the Agency does not cancel the Solicitation, after the Opening the Agency will evaluate all Proposals in accordance with the evaluation criteria set forth in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria set forth in the Request for Proposals, the Agency will determine and rank the Proposers in the Competitive Range.
 - (B) The Agency may increase the number of Proposers in the Competitive Range if the Agency's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the best Proposer after the Agency's evaluation of revised Proposals submitted in accordance with the process described in this rule.
 - (b) Protesting Competitive Range. The Agency shall provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest the Agency's evaluation and determination of the Competitive Range in accordance with Rule 04-0430.
 - (c) Intent to Award; Discuss or Negotiate. After the protest period provided in accordance with these rules expires, or after the Agency has provided a final response to any protest, whichever date is later, the Agency may either:

- (A) Provide Written notice to all Proposers in the Competitive Range of its intent to Award the Contract to the highest-ranked Proposer in the Competitive Range.
 - (i) An unsuccessful Proposer may protest the Agency's intent to Award in accordance with Rule 04-0430.
 - (ii) After the protest period provided in accordance with Rule 04-0430 expires, or after the Agency has provided a final response to any protest, whichever date is later, the Agency shall commence final Contract negotiations with the highest-ranked Proposer in the Competitive Range; or
- (B) Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them, and, following such discussions and receipt and evaluation of revised Proposals, conduct negotiations with the Proposers in the Competitive Range.

(5) **Discussions; Revised Proposals.** If the Agency chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, the Agency shall proceed as follows:

- (a) Initiating Discussions. The Agency shall initiate oral or Written discussions with all of the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP that the Agency identified in the RFP as the subject of discussions. The Agency may conduct discussions for the following purposes:
 - (A) Informing Proposers of deficiencies in their initial Proposals;
 - (B) Notifying Proposers of parts of their Proposals for which the Agency would like additional information; and
 - (C) Otherwise allowing Proposers to develop revised Proposals that will allow the Agency to obtain the best Proposal based on the requirements and evaluation criteria set forth in the Request for Proposals.
- (b) Conducting Discussions. The Agency may conduct discussions with each Proposer in the Competitive Range necessary to fulfill the purposes of this section, but need not conduct the same amount of discussions with each Proposer. The Agency may terminate discussions with any Proposer in the Competitive Range at any time. However, the Agency shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with Agency before

the Agency notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.

- (A) In conducting discussions, the Agency:
 - (i) Shall treat all Proposers fairly and shall not favor any Proposer over another;
 - (ii) Shall not discuss other Proposers' Proposals;
 - (iii) Shall not suggest specific revisions that a Proposer should make to its Proposal, and shall not otherwise direct the Proposer to make any specific revisions to its Proposal.
- (B) At any time during the time allowed for discussions, the Agency may:
 - (i) Continue discussions with a particular Proposer;
 - (ii) Terminate discussions with a particular Proposer and continue discussions with other Proposers in the Competitive Range; or
 - (iii) Conclude discussions with all remaining Proposers in the Competitive Range and provide notice to the Proposers in the Competitive Range to submit revised Proposals.
- (c) Revised Proposals. If the Agency does not cancel the Solicitation at the conclusion of the Agency's discussions with all remaining Proposers in the Competitive Range, the Agency shall give all remaining Proposers in the Competitive Range notice of the date and time by which they must submit revised Proposals. This notice constitutes the Agency's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in the Agency's notice.
 - (A) Upon receipt of the revised Proposals, the Agency shall score the revised Proposals based upon the evaluation criteria set forth in the Request for Proposals, and rank the revised Proposals based on the Agency's scoring.
 - (B) The Agency may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the Request for Proposals.
- (d) Intent to Award; Protest. The Agency shall provide Written notice to all Proposers in the Competitive Range of the Agency's intent to Award the Contract. An

unsuccessful Proposer may protest the Agency's intent to Award in accordance with Rule 04-0430. After the protest period provided in accordance with that rule expires, or after the Agency has provided a final response to any protest, whichever date is later, the Agency shall commence final Contract negotiations.

(6) **Negotiations.**

(a) Initiating Negotiations. The Agency may determine to commence negotiations with the highest-ranked Proposer in the Competitive Range following the:

- (A) Initial determination of the Competitive Range; or
- (B) Conclusion of discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.

(b) Conducting Negotiations.

(A) Scope. The Agency may negotiate:

- (i) The statement of Work;
- (ii) The Contract Price as it is affected by negotiating the statement of Work; and
- (iii) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the Request for Proposals. Accordingly, Proposers shall not submit, and the Agency shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the Request for Proposals.

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

- (A) The Proposer is not discussing or negotiating in good faith; or
- (B) Further discussions or negotiations with the Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.

- (d) Continuing Negotiations. If the Agency terminates discussions or negotiations with a Proposer, the Agency may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this rule until the Agency has either:
 - (A) Determined to Award the Contract to the Proposer with whom it is currently discussing or negotiating; or
 - (B) Completed one round of discussions or negotiations with all Proposers in the Competitive Range, unless the Agency provided for more than one round of discussions or negotiations in the Request for Proposals.

04-0660

RFP Pricing Mechanisms

- (1) A Request for Proposals may result in a lump sum Contract Price, as in the case of competitive Bidding. Alternatively, a cost reimbursement Contract may be negotiated.
- (2) Economic incentives or disincentives may be included to reflect stated Agency purposes related to time of completion, safety or other Public Contracting objectives, including total least cost mechanisms such as life cycle costing.
- (3) A Guaranteed Maximum Price (GMP) is used as the pricing mechanism for CM/GC where a total Contract Price is provided in the design phase in order to assist the Agency in determining whether the project scope is within the Agency's budget, and allowing for design changes during preliminary design rather than after final design Work has been completed.
 - (a) If this collaborative process is successful, the Contractor shall propose a final GMP, which may be accepted by the Agency and included within the Contract.
 - (b) If this collaborative process is not successful, and no mutually agreeable resolution on GMP can be achieved with the Contractor, then the Agency shall terminate the Contract. The public Agency may then proceed to negotiate a new Contract (and GMP) with the firm that was next ranked in the original selection process, or employ other means for continuing the project under ORS Chapter 279C.
- (4) When cost reimbursement Contracts are utilized, regardless of whether a GMP is included, the Agency shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

04-0670

Design-Build Contracts

- (1) **General.** The Design-Build form of contracting, as defined at Rule 04-0610(3), has technical complexities that are not readily apparent. Contracting Agencies shall use this contracting method only with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to use the Design-Build process, the Agency must be able to reasonably anticipate the following types of benefits:
- (a) Obtaining, through a Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;
 - (b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;
 - (c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims;
 - (d) Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance Work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased projects); or
 - (e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.
- (2) **Authority.** The Agency shall utilize the Design-Build form of contracting only in accordance with the requirements of these Rules 04-0600 to 04-0690 rules. See particularly Rule 04-0620 on "Use of Alternative Contracting Methods" and Rule 04-0680 pertaining to ESPCs.
- (3) **Selection.** Design-Build selection criteria may include those factors set forth above in Rule 04-0640(2)(a), (b) and (c).
- (4) **QBS Inapplicable.** Because the value of construction services predominates the Design-Build form of contracting, the qualifications based selection (QBS) process mandated by ORS 279C.110 for State Contracting Agencies in obtaining certain consultant services is not applicable.

(5) **Licensing.** If a Design-Build Contractor is not an Oregon licensed design professional, the Agency shall require that the Design-Build Contractor disclose in its Written Offer that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and ORS 672.060(11) regarding the offer of engineering services that are appurtenant to construction services.

(6) **Performance Security.** ORS 279C.380(1)(a) provides that for Design-Build Contracts the surety's obligation on performance bonds, or the Bidder's obligation on cashier's or certified checks accepted in lieu thereof, includes the preparation and completion of design and related professional services specified in the Contract. This additional obligation, beyond performance of construction services, extends only to the provision of professional services and related design revisions, corrective Work and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage.

(7) **Contract Requirements.** The Agency shall conform its Design-Build contracting practices to the following requirements:

- (a) **Design Services.** The level or type of design services required must be clearly defined within the Procurement documents and Contract, along with a description of the level or type of design services previously performed for the project. The services to be performed shall be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.
- (b) **Professional Liability.** The Contract shall clearly identify the liability of design professionals with respect to the Design-Build Contractor and the Agency, as well as requirements for professional liability insurance.
- (c) **Risk Allocation.** The Contract shall clearly identify the extent to which the Agency requires an express indemnification from the Design-Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.
- (d) **Warranties.** The Contract shall clearly identify any express warranties made to the Agency regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.

- (e) Incentives. The Contract shall clearly identify any economic incentives and disincentives, the specific criteria that apply and their relationship to other financial elements of the Contract.
- (f) Honoraria. If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the Solicitation process on the basis that the Agency is benefitted from such deliverables.

04-0680

Energy Savings Performance Contracts (ESPC)

(1) **Generally**. Rules 04-0600 to 04-0690 include a limited, efficient method for Public Contract Contracting Agencies to enter into ESPCs outside the competitive Bidding requirements of ORS 279C.335 for existing buildings or structures, but not for new construction. If the Agency chooses not to utilize the ESPC Procurement method provided for by Rules 04-0600 to 04-0690, the Agency may still enter into an ESPC by complying with the competitive Bidding exemption process set forth in ORS 279C.335, or by otherwise complying with the Procurement requirements applicable to any Agency not subject to all the requirements of ORS 279C.335.

(2) **ESPC Contracting Method**. The ESPC form of contracting, as defined at Rule 04-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the Agency, as well as the additional technical complexities associated with a Design-Build Contract. The Agency shall only utilize the ESPC contracting method with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the ESPC contracting process, the Agency must be able to reasonably anticipate one or more of the following types of benefits:

- (a) Obtaining, through an ESCO, the following types of integrated services: facility profiling, energy baseline studies, ECMs, Technical Energy Audits, project development planning, engineering design, plan preparation, cost estimating, life cycle costing, construction administration, project management, construction, quality control, operations and maintenance staff training, commissioning services, M & V services and required documentation as a fully integrated function with a single point of responsibility;
- (b) Obtaining, through an ESCO, an Energy Savings Guarantee;
- (c) Integrating the Technical Energy Audit phase and the Project Development Plan phase into the design and construction phase of Work on the project;
- (d) Reducing the risk of design flaws, misunderstandings and conflicts inherent in the construction process, through the integration of ESPC services;

- (e) Obtaining innovative design solutions through the collaboration of the members of the ESCO integrated ESPC services team;
- (f) Integrating cost-effective ECMs into an existing building or structure, so that the ECMs pay for themselves through savings realized over the useful life of the ECMs;
- (g) Preliminary design, development, implementation and an Energy Savings Guarantee of ECMs into an existing building or structure through an ESPC, as a distinct part of a major remodel of that building or structure that is being performed under a separate remodeling Contract; and
- (h) Satisfying local energy efficiency design criteria or requirements.

(3) **Authority.** If the Agency desires to pursue an exemption from the competitive Bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086), the Agency shall utilize the ESPC form of contracting only in accordance with the requirements of Rules 04-0600 to 04-0690.

(4) **No Findings Required.** The Agency is only required to comply with the ESPC contracting procedures set forth in Rules 04-0600 to 04-0690 in order for the ESPC to be exempt from the competitive Bidding processes of ORS 279C.335. No Findings are required for an ESPC to be exempt from the competitive Bidding process for Public Improvement Contracts pursuant to ORS 279C.335, unless the Agency is subject to the requirements of ORS 279C.335 and chooses not to comply with the ESPC contracting procedures set forth in Rules 04-0600 to 04-0690.

(5) **Selection.** ESPC selection criteria may include those factors set forth above in Rule 04-0640(3)(a), (b), (c) and (d). Since the Energy Savings Guarantee is such a fundamental component in the ESPC contracting process, Proposers must disclose in their Proposals the identity of any Person providing (directly or indirectly) any Energy Savings Guarantee that may be offered by the successful ESCO during the course of the performance of the ESPC, along with any financial statements and related information pertaining to any such Person.

(6) **QBS Inapplicable.** Because the value of construction services predominates in the ESPC method of contracting, the qualifications based selection (QBS) process mandated by ORS 279C.110 for State Contracting Agencies in obtaining certain consultant services is not applicable.

(7) **Licensing.** If the ESCO is not an Oregon licensed design professional, the Agency shall require that the ESCO disclose in the ESPC that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See

ORS 671.030(5) regarding the offer of architectural services, and ORS 672.060(11) regarding the offer of engineering services that are appurtenant to construction services.

(8) **Performance Security.** At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the ESCO must provide a performance bond and a payment bond, each for 100% of the full Contract Price, including the construction and design and related professional services specified in the ESPC Design-Build Contract, pursuant to ORS 279C.380(1)(a). For ESPC Design-Build Contracts, these "design and related professional services" include conventional design services, commissioning services, training services for the Agency's operations and maintenance staff, and any similar professional services provided by the ESCO under the ESPC Design-Build Contract prior to final completion of construction. M & V services, and any services associated with the ESCO's Energy Savings Guarantee are not included in these ORS 279C.380(1)(a) "design and related professional services." Nevertheless, the Agency may require that the ESCO provide performance security for M & V services and any services associated with the ESCO's Energy Savings Guarantee, if the Agency so provides in the RFP.

(9) **Contracting Requirements.** Contracting Agencies shall conform their ESPC contracting practices to the following requirements:

(a) General ESPC Contracting Practices. An ESPC involves a multi-phase project, which includes the following contractual elements:

(A) A contractual structure which includes general Contract terms describing the relationship of the parties, the various phases of the Work, the contractual terms governing the Technical Energy Audit for the project, the contractual terms governing the Project Development Plan for the project, the contractual terms governing the final design and construction of the project, the contractual terms governing the performance of the M & V services for the project, and the detailed provisions of the ESCO's Energy Savings Guarantee for the project.

(B) The various phases of the ESCO's Work will include the following:

(i) The Technical Energy Audit phase of the Work;

(ii) The Project Development Plan phase of the Work;

(iii) A third phase of the Work that constitutes a Design-Build Contract, during which the ESCO completes any plans and Specifications required to implement the ECMs that have been agreed to by the parties to the ESPC, and the ESCO performs all construction,

commissioning, construction administration and related services to actually construct the project; and

- (iv) A final phase of the Work, whereby the ESCO, independently or in cooperation with an independent consultant hired by the Agency, performs M & V services to ensure that the Energy Savings Guarantee identified by the ESCO in the earlier phases of the Work and agreed to by the parties has actually been achieved.
- (b) Design-Build Contracting Requirements in ESPCs. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the Agency shall conform its Design-Build contracting practices to the Design-Build contracting requirements set forth in Rule 04-0670(7) above.
- (c) Pricing Alternatives. The Agency may utilize one of the following pricing alternatives in an ESPC:
- (A) A fixed price for each phase of the services to be provided by the ESCO;
 - (B) A cost reimbursement pricing mechanism, with a maximum not-to-exceed price or a GMP; or
 - (C) A combination of a fixed fee for certain components of the services to be performed, a cost reimbursement pricing mechanism for the construction services to be performed with a GMP, a single or annual fixed fee for M & V services to be performed for an identified time period after final completion of the construction Work, and a single or annual Energy Savings Guarantee fixed fee payable for an identified time period after final completion of the construction Work that is conditioned on certain energy savings being achieved at the facility by the ECMs that have been implemented by the ESCO during the project (in the event an annual M & V services fee and annual Energy Savings Guarantee fee is utilized by the parties, the parties may provide in the Design-Build Contract that, at the sole option of the Agency, the ESCO's M & V services may be terminated prior to the completion of the M & V/Energy Savings Guarantee period and the Agency's future obligation to pay the M & V services fee and Energy Savings Guarantee fee will likewise be terminated, under terms agreed to by the parties).
- (d) Permitted ESPC Scope of Work. The scope of Work under the ESPC is restricted to implementation and installation of ECMs, as well as other Work on building systems or building components that are directly related to the ECMs, and that, as an integrated unit, will pay for themselves over the useful life of the ECMs

installed. The permitted scope of Work for ESPCs resulting from a Solicitation under Rules 04-0600 to 04-0690 does not include maintenance services for the project facility.

04-0690

Construction Manager/General Contractor (CM/GC)

(1) **General.** The CM/GC form of contracting, as defined at Rule 04-0610(2), is a technically complex project delivery system. The Agency shall use this contracting method only with the assistance of knowledgeable staff or consultants who have a demonstrated capability of managing the CM/GC process in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, Public Contracting and project management. Unlike the Design-Build form of contracting, the CM/GC form of contracting does not contemplate a "single point of responsibility" under which the Contractor is responsible for successful completion of all Work related to a performance Specification. The CM/GC has defined contract obligations, including responsibilities as part of the project team along with the Agency and design professional, although in CM/GC there is a separate contract between the Agency and design professional. In order to utilize the CM/GC method, the Agency must be able to reasonably anticipate the following types of benefits:

- (a) Time Savings. The Public Improvement has significant schedule ramifications, such that concurrent design and construction are necessary in order to meet critical deadlines and shorten the overall duration of construction. The Agency may consider operational and financial data that show significant savings or increased opportunities for generating revenue as a result of early completion, as well as less disruption to public facilities as a result of shortened construction periods;
- (b) Cost Savings. Early Contractor input during the design process is expected to contribute to significant cost savings. The Agency may consider value engineering, building systems analysis, life cycle costing analysis and construction planning that lead to cost savings. The Agency shall specify any special factors influencing this analysis, including high rates of inflation, market uncertainty due to material and labor fluctuations or scarcities, and the need for specialized construction expertise due to technical challenges; or
- (c) Technical Complexity. The Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between the Agency, design professionals and Contractor, in which the Contractor will assist in addressing specific project challenges through pre-construction services. The Agency may consider the need for Contractor input on issues such as operations of the facility during construction, tenant occupancy, public safety, delivery of an

early budget or GMP, financing, historic preservation, difficult remodeling projects and projects requiring complex phasing or highly coordinated scheduling.

- (2) **Authority.** The Agency shall use the CM/GC form of contracting only in accordance with the requirements of these rules. See particularly Rule 04-0620 on "Use of Alternative Contracting Methods."
- (3) **Selection.** CM/GC selection criteria may include those factors set forth above in Rule 04-0640(2)(a),(b) and (c).
- (4) **Basis for Payment.** The CM/GC process adds specified Construction Manager services to traditional General Contractor services, requiring full Contract performance within a negotiated Guaranteed Maximum Price (GMP). The basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for Work and services rendered, which together shall not exceed the GMP. See GMP definition at Rule 04-0610(7) and Pricing Mechanisms at Rule 04-0660.
- (5) **Contract Requirements.** The Agency shall conform its CM/GC contracting practices to the following requirements:
 - (a) Setting the GMP. The GMP shall be set at an identified time consistent with industry practice, after supporting information reasonably considered necessary to its use has been developed, and the supporting information shall define with particularity both what is included and excluded from the GMP. A set of drawings and Specifications shall be produced establishing the GMP scope.
 - (b) Adjustments to the GMP. The Contract shall clearly identify the standards or factors under which changes or additional Work will be considered outside of the Work scope that warrants an increase in the GMP, as well as criteria for decreasing the GMP. The GMP shall not be increased without a concomitant increase to the scope defined at the establishment of the GMP or most recent GMP amendment.
 - (c) Cost Savings. The Contract shall clearly identify the disposition of any cost savings resulting from completion of the Work below the GMP; that is, under what circumstances, if any, the CM/GC might share in those cost savings, or whether they accrue only to the Agency's benefit. (Note that unless there is a clearly articulated reason for sharing such cost savings, they should accrue to the Agency.)
 - (d) Cost Reimbursement. The Contract shall clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, including any category of "General Conditions" (a general grouping of direct costs that are not

separately invoiced, subcontracted or included within either overhead or fee), and may also incorporate a mutually-agreeable cost-reimbursement standard.

- (e) Audit. Cost reimbursements shall be made subject to final audit adjustment, and the Contract shall establish an audit process to ensure that Contract costs are allowable, properly allocated and reasonable.
- (f) Fee. Compensation for the CM/GC's services shall be paid on the basis of a fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee should be expressly defined wherever possible. The fee, first expressed as a proposed percentage of all reimbursable costs, shall be identified during and become an element of the selection process. It shall subsequently be expressed as a fixed amount when the GMP is established.
- (g) Incentives. The Contract shall clearly identify any economic incentives, the specific criteria that apply and their relationship to other financial elements of the Contract (including the GMP).
- (h) Controlled Insurance Programs. For projects anticipated to exceed \$75 Million, the Contract shall clearly identify whether an Owner Controlled or Contractor Controlled Insurance Program is anticipated or allowable. If so, the Contract shall clearly identify (1) anticipated cost savings from reduced premiums, claims reductions and other factors, (2) the allocation of cost savings, and (3) safety responsibilities and/or incentives.
- (i) Early Work. The RFP shall clearly identify, whenever feasible, the circumstances under which any of the following activities may be authorized and undertaken for compensation prior to establishing the GMP:
 - (A) Early Procurement of materials and supplies;
 - (B) Early release of Bid packages for such things as site development; and
 - (C) Other advance Work related to critical components of the Contract.
- (j) Subcontractor Selection. The Contract shall clearly describe the methods by which the CM/GC shall publicly receive, open and record Bids or price quotations, and competitively select subcontractors to perform the Contract Work based upon price, as well as the mechanisms by which the Agency may waive those requirements. The documents shall also describe completely the methods by which the CM/GC and its affiliated or subsidiary entities may compete to perform the Work, including, at a minimum, advance notice to the public of the CM/GC's

intent to compete and a public Opening of Bids or quotations by an independent party.

- (k) Subcontractor Approvals and Protests. The Contract shall clearly establish whether the Agency must approve subcontract awards, and to what extent, if any, the Agency will resolve Procurement protests of subcontractors and suppliers. The related procedures and reporting mechanisms shall be established with certainty, including whether the CM/GC acts as the Agency's representative in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the Agency shall retain the right to monitor the subcontracting process in order to protect Agency's interests.
- (l) CM/GC Self-Performance. Whenever feasible, the Contract shall establish the elements of Work the CM/GC may self-perform without competition, including, for example, the Work of the job-site general conditions. In the alternative, the Contract shall include a process for Agency approval of CM/GC self-performance.
- (m) Socio-Economic Programs. The Contract shall clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and Agency.

Contract Provisions

04-0800

Required Contract Clauses

The Agency shall include in all formal Solicitations for Public Improvement Contracts all of the ORS Chapter 279C required Contract clauses, as set forth in the checklist contained in Rule 04-0200(1)(c) regarding Solicitation Documents. The following series of rules provide further guidance regarding particular Public Contract provisions.

04-0810

Waiver of Delay Damages Against Public Policy

The Agency shall not place any provision in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from the Agency's unreasonable delay in performing the Contract. However, Contract provisions requiring notice of delay, providing for alternative dispute resolution such as arbitration (where allowable) or

mediation, providing other procedures for settling contract disputes, or providing for reasonable liquidated damages, are permissible.

04-0815

BOLI Public Works Bond

Pursuant to ORS 279C.830(3), the specifications for every Public Works Contract shall contain a provision stating that the Contractor and every subcontractor must have a Public Works bond filed with the Construction Contractors Board before starting Work on the project, unless otherwise exempt. This bond is in addition to performance bond and payment bond requirements. See BOLI rule at OAR 839-025-0015.

04-0820

Retainage

(1) **Withholding of Retainage.** Except to the extent the Agency's enabling laws require otherwise, the Agency shall not retain an amount in excess of five percent of the Contract Price for Work completed. If the Contractor has performed at least 50 percent of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written approval, the Agency may, in its discretion, reduce or eliminate retainage on any remaining progress payments. The Agency shall respond in Writing to all such applications within a reasonable time. When the Contract Work is 97-1/2 percent completed, the Agency may, at its discretion and without application by the Contractor, reduce the retained amount to 100 percent of the value of the remaining unperformed Contract Work. The Agency may at any time reinstate retainage. Retainage shall be included in the final payment of the Contract Price.

(2) **Deposit in interest-bearing accounts.** Upon request of the Contractor, the Agency shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the Agency. Earnings on such account shall accrue to the Contractor.

(3) **Alternatives to cash retainage.** In lieu of cash retainage to be held by the Agency, the Contractor may substitute one of the following:

(a) Deposit of securities:

(A) The Contractor may deposit bonds or securities with the Agency or in any bank or trust company to be held for the benefit of the Agency. In such event, the Agency shall reduce the retainage by an amount equal to the

value of the bonds and securities, and reimburse the excess to the Contractor.

(B) Bonds and securities deposited or acquired in lieu of retainage shall be of a character approved by the Oregon Department of Administrative Services, which may include, without limitation:

- (i) Bills, certificates, notes or bonds of the United States.
- (ii) Other obligations of the United States or its Contracting Agencies.
- (iii) Obligations of any corporation wholly owned by the Federal Government.
- (iv) Indebtedness of the Federal National Mortgage Association.

(C) Upon the Agency's determination that all requirements for the protection of the Agency's interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu of retainage.

(b) Deposit of surety bond. The Agency, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the Agency in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond shall accept surety bonds from its subcontractors and suppliers in lieu of retainage. In such cases, retainage shall be reduced by an amount equal to the value of the bond, and the excess shall be reimbursed.

(4) **Recovery of costs.** The Agency may recover from the Contractor all costs incurred in the proper handling of cash retainage and securities, by reduction of the final payment.

(5) **Additional Retainage When Certified Payroll Statements Not Filed.** Pursuant to ORS 279C.845(7), if a Contractor is required to file certified payroll statements and fails to do so, the Agency shall retain 25 percent of any amount earned by the Contractor on a Public Works Contract until the Contractor has filed such statements with the Agency. The Agency shall pay the Contractor the amount retained under this provision within 14 days after the Contractor files the certified statements, regardless of whether a subcontractor has filed such statements (but see ORS 279C.845(1) regarding the requirement for both contractors and subcontractors to file certified statements with the Agency). See BOLI rule at OAR 839-025-0010.

04-0830

Contractor Progress Payments

(1) **Request for progress payments.** Each month the Contractor shall submit to the Agency its Written request for a progress payment based upon an estimated percentage of Contract completion. At the Agency's discretion, this request may also include the value of material to be incorporated in the completed Work that has been delivered to the premises and appropriately stored. The sum of these estimates is referred to as the "value of completed Work." With these estimates as a base, the Agency will make a progress payment to the Contractor, which shall be equal to: (i) the value of completed Work; (ii) less those amounts that have been previously paid; (iii) less other amounts that may be deductible or owing and due to the Agency for any cause; and (iv) less the appropriate amount of retainage.

(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, and shall not relieve the Contractor of responsibility for defective workmanship or material.

04-0840

Interest

(1) **Prompt payment policy.** The Agency shall pay promptly all payments due and owing to the Contractor in accordance with the provisions in the contract documents.

(2) **Interest on progress payments.** Late payment interest shall begin to accrue on payments due and owing on the earlier of 30 Days after receipt of invoice or 15 Days after Agency approval of payment (the "Progress Payment Due Date"). The interest rate shall equal three times the discount rate on 90-day commercial paper in effect on the Progress Payment Due Date at the Federal Reserve Bank in the Federal Reserve district that includes Oregon, up to a maximum rate of 30 percent.

(3) **Interest on final payment.** Final payment on the Contract Price, including retainage, shall be due and owing no later than 30 Days after Contract completion and acceptance of the Work. Late-payment interest on such final payment shall thereafter accrue at the rate of one and one-half percent per month until paid.

(4) **Settlement or judgment interest.** In the event of a dispute as to compensation due a Contractor for Work performed, upon settlement or judgment in favor of the Contractor, interest on the amount of the settlement or judgment shall be added to, and not made part of, the settlement or judgment. Such interest, at the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District that includes Oregon, shall accrue from the later of the Progress Payment Due Date, or thirty Days after the Contractor submitted a

claim for payment to the Agency in Writing or otherwise in accordance with the Contract requirements.

04-0850

Final Inspection

(1) **Notification of Completion; inspection.** The Contractor shall notify the Agency in Writing when the Contractor considers the Contract Work completed. Within 15 Days of receiving Contractor's notice, the Agency will inspect the project and project records, and will either accept the Work or notify the Contractor of remaining Work to be performed.

(2) **Acknowledgment of acceptance.** When the Agency finds that all Work required under the Contract has been completed satisfactorily, the Agency shall acknowledge acceptance of the Work in Writing.

04-0860

Public Works Contracts

(1) **Generally.** ORS 279C.800 to 279C.870 regulates Public Works Contracts, as defined in ORS 279C.800(5), and requirements for payment of prevailing wage rates. Also see administrative rules of the Bureau of Labor and Industries (BOLI) at OAR chapter 839.

(2) **Required Contract Conditions.** As detailed in the above statutes and rules, every Public Works Contract must contain the following provisions:

- (a) Agency authority to pay certain unpaid claims and charge such amounts to Contractors, as set forth in ORS 279C.515(1).
- (b) Maximum hours of labor and overtime, as set forth in ORS 279C.520(1).
- (c) Employer notice to employees of hours and days that employees may be required to work, as set forth in ORS 279C.520(2).
- (d) Contractor required payments for certain services related to sickness or injury, as set forth in ORS 279C.530.
- (e) Requirement for payment of prevailing rate of wage, as set forth in ORS 279C.830(1).
- (f) Requirement for payment of fee to BOLI, as set forth in ORS 279C.830(2) and administrative rule of the BOLI commissioner.

(3) **Requirements for Specifications.** The Specifications for every Public Works Contract, consisting of the procurement package (such as the Project Manual, Bid or Proposal Booklets, Request for Quotes or similar procurement Specifications), must contain the following provisions:

- (a) The prevailing rate of wage, as required by ORS 279C.830(1), physically contained within or attached to hard copies of procurement Specifications, and by a downloadable direct link to the specific wage rates that apply to the project (either on the Agency web site or the BOLI web site) when procurement Specifications are also made available in electronic format.
- (b) If applicable, the federal prevailing rate of wage and information concerning whether the state or federal rate is higher in each trade or occupation in each locality, as determined by BOLI in a separate publication. See BOLI rules at OAR 839-025-0020 and 0035.
- (c) Reference to payment of fee to BOLI, as required by ORS 279C.830(2).

04-0870

Specifications; Brand Name Products

(1) **Generally.** The Agency's Solicitation Document shall not expressly or implicitly require any product by brand name or mark, nor shall it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279C.345(2).

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

04-0880

Records Maintenance; Right to Audit Records

(1) **Records Maintenance; Access.** Contractors and subcontractors shall maintain all fiscal records relating to Contracts in accordance with generally accepted accounting principles ("GAAP"). In addition, Contractors and subcontractors shall maintain all other records necessary to clearly document (i) their performance; and (ii) any claims arising from or relating to their performance under a Public Contract. Contractors and subcontractors shall make all records pertaining to their performance and any claims under a Contract (the books, fiscal records and all other records, hereafter referred to as "Records") accessible to the Agency at reasonable times and places, whether or not litigation has been filed as to such claims.

(2) **Inspection and Audit.** The Agency may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the Records of any Person that has submitted cost or pricing data according to the terms of a Contract to the extent that the Records relate to such cost or pricing data. If the Person must provide cost or pricing data under a Contract, the Person shall maintain such Records that relate to the cost or pricing data for 3 years from the date of final payment under the Contract, unless a shorter period is otherwise authorized in Writing.

(3) **Records Inspection; Contract Audit.** The Agency, and its authorized representatives, shall be entitled to inspect, examine, copy, and audit any Contractor's or subcontractor's Records, as provided in section 1 of this rule. The Contractor and subcontractor shall maintain the Records and keep the Records accessible and available at reasonable times and places for a minimum period of 3 years from the date of final payment under the Contract or subcontract, as applicable, or until the conclusion of any audit, controversy or litigation arising out of or related to the Contract, whichever date is later, unless a shorter period is otherwise authorized in Writing.

04-0890

Agency Payment for Unpaid Labor or Supplies

(1) **Contract incomplete.** If the Contract is still in force, the Agency may, in accordance with ORS 279C.515(1), pay a valid claim to the Person furnishing the labor or services, and charge the amount against payments due or to become due to the Contractor under the Contract. If the Agency chooses to make such a payment as provided in ORS 279C.515(1), the Contractor and the Contractor's surety shall not be relieved from liability for unpaid claims.

(2) **Contract completed.** If the Contract has been completed and all funds disbursed to the prime Contractor, all claims shall be referred to the Contractor's surety for resolution. The Agency shall not make payments to subcontractors or suppliers for Work already paid for by the Agency.

04-0900

Contract Suspension; Termination Procedures

(1) **Suspension of Work.** In the event the Agency suspends performance of Work for any reason considered by the Agency to be in the public interest other than a labor dispute, the Contractor shall be entitled to a reasonable extension of Contract time, and to reasonable compensation for all costs, including a reasonable allowance for related overhead, incurred by the Contractor as a result of the suspension.

(2) **Termination of Contract by mutual agreement for reasons other than default.**

- (a) Reasons for termination. The parties may agree to terminate the Contract or a divisible portion thereof if:
 - (A) The Agency suspends Work under the Contract for any reason considered to be in the public interest (other than a labor dispute, or any judicial proceeding relating to the Work filed to resolve a labor dispute); and
 - (B) Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the Work.
- (b) Payment. When a Contract, or any divisible portion thereof, is terminated pursuant to this section (2), the Agency shall pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. The Agency shall also pay for all Work completed, based on the Contract Price. Unless the Work completed is subject to unit or itemized pricing under the Contract, payment shall be calculated based on percent of Contract completed. No claim for loss of anticipated profits will be allowed.

(3) **Public interest termination by Agency.** The Agency may include in its Contracts terms detailing the circumstances under which the Contractor shall be entitled to compensation as a matter of right in the event the Agency unilaterally terminates the Contract for any reason considered by the Agency to be in the public interest.

(4) **Responsibility for completed Work.** Termination of the Contract or a divisible portion thereof pursuant to this rule shall not relieve either the Contractor or its surety of liability for claims arising out of the Work performed.

(5) **Remedies cumulative.** The Agency may, at its discretion, avail itself of any or all rights or remedies set forth in these rules, in the Contract, or available at law or in equity.

04-0910

Changes to the Work and Contract Amendments

(1) **Definitions for Rule.** As used in this rule:

- (a) "**Amendment**" means a Written modification to the terms and conditions of a Public Improvement Contract, other than by Changes to the Work, within the general scope of the original Procurement that requires mutual agreement between the Agency and the Contractor.

- (b) **"Changes to the Work"** means a mutually agreed upon change order, or a construction change directive or other Written order issued by the Agency or its authorized representatives to the Contractor requiring a change in the Work within the general scope of a Public Improvement Contract and issued under its changes provisions in administering the Contract and, if applicable, adjusting the Contract Price or contract time for the changed work.

(2) **Changes Provisions.** Changes to the Work are anticipated in construction and, accordingly, Contracting Agencies shall include changes provisions in all Public Improvement Contracts that detail the scope of the changes clause, provide pricing mechanisms, authorize the Agency or its authorized representatives to issue Changes to the Work and provide a procedure for addressing Contractor claims for additional time or compensation. When Changes to the Work are agreed to or issued consistent with the Contract's changes provisions they are not considered to be new Procurements and an exemption from competitive bidding is not required for their issuance by the Agency.

(3) **Change Order Authority.** The Agency may establish internal limitations and delegations for authorizing Changes to the Work, including dollar limitations. Dollar limitations on Changes to the Work are not set by these Rules, but such changes are limited by the above definition of that term.

(4) **Contract Amendments.** Contract Amendments within the general scope of the original Procurement are not considered to be new Procurements and an exemption from competitive bidding is not required in order to add components or phases of Work specified in or reasonably implied from the Solicitation Document. Amendments to a Public Improvement Contract may be made only when:

- (a) They are within the general scope of the original Procurement;
- (b) The field of competition and Contractor selection would not likely have been affected by the Contract modification. Factors to be considered in making that determination include similarities in Work, project site, relative dollar values, differences in risk allocation and whether the original Procurement was accomplished through Competitive Bidding, Competitive Proposals, competitive quotes, sole source or Emergency contract;
- (c) In the case of a Contract obtained under an Alternative Contracting Method, any additional Work was specified or reasonably implied within the findings supporting the competitive bidding exemption; and
- (d) The Amendment is made consistent with applicable legal requirements.

DIVISION 5

PERSONAL SERVICE CONTRACTS FOR SERVICES OTHER THAN ARCHITECTURAL, ENGINEERING, LAND SURVEYING AND RELATED SERVICES

05-0100

Application

(1) Personal Services Contracts. A contract for personal services, other than for architectural, engineering, land surveying and related services, is a contract that calls for specialized skills, knowledge, and resources in the application of highly technical or scientific expertise, or the exercise of professional, artistic, or management discretion or judgment. Qualifications and performance history, expertise, knowledge and creativity, and the ability to exercise sound professional judgment are typically the primary considerations when selecting a personal services contractor, with price being secondary. "Architect, Engineer, Land Surveying and Related Services" are covered by the provisions set out in Division 3. Personal service contracts may include, but are not limited to the following:

- (a) Contracts for services performed in a professional capacity including services of an accountant, attorney, physician or dentist, information technology consultant, or broadcaster;
- (b) Contracts for services as an artist in the performing or fine arts including any person identified as a photographer, filmmaker, painter, weaver, or sculptor;
- (c) Contracts for services that are specialized, creative and research-oriented;
- (d) Contracts for services as a consultant; and
- (e) Contracts for educational services.

Personal Services Contracts do not include:

In order to qualify as a personal service contract, the contract must provide that a minimum of seventy-five percent (75%) of the contract price be allocated for the purchase of personal services. For example, a contract to supply all hardware and standard software is not a Personal Services Contract, but a contract with a technology consultant to design or develop a new computer system is a Personal Services Contract. A Personal Services Contract does not include a contract with a temporary service or personnel agency to supply labor which is of a type that can generally be done by any skilled worker.

05-0200

Procedure

The Agency must either select a sourcing method from one of the following methods: Competitive sealed bidding, Competitive sealed proposals, Small procurements, Sole-source procurements, Emergency procurements, or Special procurements and follow the screening, selection, evaluation, and award procedures set forth for the selected sourcing method in Division 2 of these Rules; or the Agency can use the direct appointment procedure set forth in Rule 03-0200.

EXHIBIT "A"

279A.025 Application of Public Contracting Code. (1) Except as provided in subsections (2) to (4) of this section, the Public Contracting Code applies to all public contracting.

(2) The Public Contracting Code does not apply to:

(a) Contracts between contracting agencies or between contracting agencies and the federal government;

(b) Insurance and service contracts as provided for under ORS 414.115, 414.125, 414.135 and 414.145 for purposes of source selection;

(c) Grants;

(d) Contracts for professional or expert witnesses or consultants to provide services or testimony relating to existing or potential litigation or legal matters in which a public body is or may become interested;

(e) Acquisitions or disposals of real property or interest in real property;

(f) Sole-source expenditures when rates are set by law or ordinance for purposes of source selection;

(g) Contracts for the procurement or distribution of textbooks;

(h) Procurements by a contracting agency from an Oregon Corrections Enterprises program;

(i) The procurement, transportation or distribution of distilled liquor, as defined in ORS 471.001, or the appointment of agents under ORS 471.750 by the Oregon Liquor Control Commission;

(j) Contracts entered into under ORS chapter 180 between the Attorney General and private counsel or special legal assistants;

(k) Contracts for the sale of forest products, as defined in ORS 321.005, from lands owned or managed by the State Board of Forestry and the State Forestry Department;

(L) Contracts for forest protection or forest related activities, as described in ORS 477.406, by the State Forester or the State Board of Forestry;

(m) Sponsorship agreements entered into by the Director of the Oregon State Fair and Exposition Center in accordance with ORS 565.080 (4);

(n) Contracts entered into by the Housing and Community Services Department in exercising the department's duties prescribed in ORS chapters 456 and 458, except that the department's public contracting for goods and services, as defined in ORS 279B.005, is subject to ORS chapter 279B;

(o) Contracts entered into by the State Treasurer in exercising the powers of that office prescribed in ORS chapters 178, 286, 287, 288, 289, 293, 294 and 295, including but not limited to investment contracts and agreements, banking services, clearing house services and collateralization agreements, bond documents, certificates of participation and other debt repayment agreements, and any associated contracts, agreements and documents, regardless of whether the obligations that the contracts, agreements or documents establish are general, special or limited, except that the State Treasurer's public contracting for goods and services, as defined in ORS 279B.005, is subject to ORS chapter 279B;

(p) Energy savings performance contracts;

(q) Contracts, agreements or other documents entered into, issued or established in connection with:

(A) The incurring of debt by a public body, including but not limited to the issuance of bonds, certificates of participation and other debt repayment obligations, and any associated contracts, agreements or other documents, regardless of whether the obligations that the contracts, agreements or other documents establish are general, special or limited;

(B) The making of program loans and similar extensions or advances of funds, aid or assistance by a public body to a public or private body for the purpose of carrying out, promoting or sustaining activities or programs authorized by law; or

(C) The investment of funds by a public body as authorized by law, and other financial transactions of a public body that by their character cannot practically be established under the competitive contractor selection procedures of ORS 279B.050 to 279B.085;

(r) Contracts for employee benefit plans as provided in ORS 243.105 (1), 243.125 (4), 243.221, 243.275, 243.291, 243.303 and 243.565; or

(s) Any other public contracting of a public body specifically exempted from the code by another provision of law.

(3) The Public Contracting Code does not apply to the public contracting activities of:

(a) The Oregon State Lottery Commission;

(b) The Oregon University System and member institutions, except as provided in ORS 351.086;

(c) The legislative department;

(d) The judicial department;

(e) Semi-independent state agencies listed in ORS 182.451, 182.452 and 182.454, except as provided in ORS 279.835 to 279.855 and 279A.250 to 279A.290;

(f) Oregon Corrections Enterprises;

(g) The Oregon Film and Video Office, except as provided in ORS 279A.100 and 279A.250 to 279A.290;

(h) The Travel Information Council, except as provided in ORS 279A.250 to 279A.290;

(i) The Appraiser Certification and Licensure Board, except as provided in ORS 279.835 to 279.855 and 279A.250 to 279A.290; or

(j) Any other public body specifically exempted from the code by another provision of law.

(4) ORS 279A.200 to 279A.225 and 279B.050 to 279B.085 do not apply to contracts made with qualified nonprofit agencies providing employment opportunities for disabled individuals under ORS 279.835 to 279.855. [2003 c.794 §5; 2003 c.794 §5a]