

**LANE TRANSIT DISTRICT
RESOLUTION NO. 2005-013**

A Resolution Adopting the
Lane Transit District's Purchasing Policy and Rules

Pursuant to ORS 279.055, Lane Transit District ("LTD") Board of Directors adopted Ordinance No. 30 creating a local contract review board for LTD, which solely consists of the LTD Board of Directors (the "LTD/CRB").

LTD/CRB, pursuant to Ordinance No. 30, has the power to adopt, by resolution, rules governing LTD's purchasing and public contracting policy.

LTD/CRB approved LTD's last purchasing and public contracting policy on September 18, 2002, which policy incorporated administrative changes in the Oregon Revised Statutes (ORS) and the Federal Transit Administration requirements.

The Oregon Legislature adopted HB 2341 (2003 Oregon Laws, Chapter 794), the "Public Contracting Code," which was signed by the Governor, and has an operative date of March 1, 2005. As of March 1, 2005, ORS Chapter 279 is repealed and replaced with three new subchapters: ORS 279A, 279B, and 279C.

All rules and exemptions adopted under now repealed ORS Chapter 279, including LTD's Public Purchasing Policy and Rules adopted on September 18, 2002, expired as of March 1, 2005.

As of March 1, 2005, LTD's public contracting is subject to and governed by the Oregon Attorney General Model Rules, OAR Chapter 137, Divisions 46, 47, 48, and 49 ("Model Rules"). However, LTD/CRB may adopt its own purchasing and public contracting rules that differ from Model Rules.

LTD/CRB must adopt its new purchasing and public contracting rules, by resolution, in accordance with LTD Ordinance 30, LTD Sixth Amended Ordinance No. 1, and all other applicable statutes and regulations.

The updated purchasing and public contracting rules are set forth in Exhibit A (the "Purchasing Policy and Rules").


NOW, THEREFORE, BE IT RESOLVED:

LTD/CRB hereby adopts the Purchasing Policy and Rules as set forth in Exhibit A, which is attached hereto and is incorporated herein by this reference; and

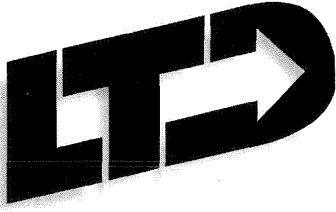
LTD/CRB hereby approves any findings and exceptions contained within the Purchasing Policy and Rules attached as Exhibit A.

Adopted by LTD/CRB on the 20~~th~~ day of April, 2005.

April 20, 2005
Date



LTD/CRB Secretary



Lane Transit District
P. O. Box 7070
Eugene, Oregon 97401
(541) 682-6100
Fax: (541) 682-6111

CERTIFICATION

The undersigned duly qualified and acting Administrative Services Manager/Clerk of the Board of the Lane Transit District certifies that the foregoing is a true and correct copy of LTD Resolution No. 2005-013, adopted at a legally convened meeting of the Board of Directors held on April 20, 2005.

A handwritten signature in black ink, appearing to read 'J. Sullivan', is written over a horizontal line.

Signature of Recording Officer

Administrative Services Manager/
Clerk of the Board

Title of Recording Officer

April 25, 2005

Date

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LTD/CRB, pursuant to Ordinance No. 30, has the power to adopt, by resolution, rules governing LTD's purchasing and public contracting policy.

LTD/CRB approved LTD's last purchasing and public contracting policy on September 18, 2002, which policy incorporated administrative changes in the Oregon Revised Statutes (ORS) and the Federal Transit Administration requirements.

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All rules and exemptions adopted under now repealed ORS Chapter 279, including LTD's Public Purchasing Policy and Rules adopted on September 18, 2002, expired as of March 1, 2005.

As of March 1, 2005, LTD's public contracting is subject to and governed by the Oregon Attorney General Model Rules, OAR Chapter 137, Divisions 46, 47, 48, and 49 ("Model Rules"). However, LTD/CRB may adopt its own purchasing and public contracting rules that differ from Model Rules.

LTD/CRB must adopt its new purchasing and public contracting rules, by resolution, in accordance with LTD Ordinance 30, LTD Sixth Amended Ordinance No. 1, and all other applicable statutes and regulations.

The updated purchasing and public contracting rules are set forth in Exhibit A (the "Purchasing Policy and Rules").

NOW, THEREFORE, BE IT RESOLVED:

LTD/CRB hereby adopts the Purchasing Policy and Rules as set forth in Exhibit A, which is attached hereto and is incorporated herein by this reference; and

LTD/CRB hereby approves any findings and exceptions contained within the Purchasing Policy and Rules attached as Exhibit A.

Adopted by LTD/CRB on the 20th day of April, 2005.

April 20, 2005
Date


LTD/CRB Secretary

Exhibit A

LANE TRANSIT DISTRICT PURCHASING POLICY AND RULES

On June 18, 1985, Lane Transit District's Board of Directors adopted Ordinance 30 creating a local contract review board for LTD. This local contract review board is known as the LTD Contract Review Board ("LTD/CRB"). Pursuant to ORS 279A.065(5), LTD/CRB hereby adopts the following purchasing policy and public contracting rules (the "Rules"). The following Rules are in lieu of the model rules adopted by the Attorney General; therefore, the Attorney General model rules do not apply to LTD. These Rules apply to all public contracts for goods and services made by or on behalf of LTD. All public contracts must be authorized, have funds available, be charged to the proper budget line item, and satisfy all pertinent governmental legal requirements, including all requirements set forth in these Rules.

SECTION 1. Definitions.

For the purposes of these Rules, the following definitions apply:

- 1.1 **Addendum or Addenda:** A document from LTD that sets forth an addition or deletion to, a modification in, or an explanation of a Solicitation Document.
- 1.2 **Affected Person or Affected Offeror:** An Offeror or Person whose ability to participate in a procurement is adversely affected by an LTD decision.
- 1.3 **Bid:** A competitive Offer submitted in response to an Invitation for Bid, binding on the Offeror, in which price and conformance to specification will be the award criteria.
- 1.4 **Bidder:** An Offeror that submits a Bid in response to an Invitation for Bid.
- 1.5 **Blanket Purchase Agreement or BPA:** A long-term contractual tool which will require purchase orders to release specific items or products for delivery to LTD during a contract period.
- 1.6 **Board of Directors:** The Board of Directors of LTD.
- 1.7 **Class Special Procurement:** A contracting procedure that differs from the procedures described for Competitive Procurements under these Rules and is for the purpose of entering into a series of contracts over time for the acquisition of a specified class of goods or services.
- 1.8 **Closing Date:** The date and time announced by LTD as the deadline for the receipt of an Offer (at least five days after last advertisement of the Solicitation Document).
- 1.9 **Competitive Procurement:** The solicitation of competitive Offers through the issuance of a Solicitation Document.
- 1.10 **Contract-Specific Special Procurement:** A contracting procedure that differs from the procedures described for Competitive Procurements under these Rules and is for the purpose of entering into a single contract or a number of related contracts for the acquisition of specified goods or services on a one-time basis or for a single project.

- 1.11 Contracting Agency:** A public body authorized by law to conduct a procurement, including without limitation LTD, the Director of the Oregon Department of Administrative Services, and any person authorized by a contracting agency to conduct a procurement on the contracting agency's behalf. Contracting Agency does not include the judicial department or the legislative department.
- 1.12 Contractor:** The person or entity awarded the Public Contract in response to a solicitation by LTD.
- 1.13 Date of Solicitation Document:** The date when the first advertisement for the Solicitation Document is published.
- 1.14 Descriptive Literature:** Materials submitted by an Offeror to provide information concerning the products available in response to a Solicitation Document.
- 1.15 Director:** LTD's Assistant General Manager.
- 1.16 Emergency Contract:** Those contracts meeting the criteria set forth in Section 6.9.
- 1.17 Foreign Contractor:** A contractor that is not domiciled, or registered to do business, in the state of Oregon.
- 1.18 Grant:** An agreement under which a Contracting Agency receives moneys, property, or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities, or other assets, from a grantor for the purpose of supporting or stimulating a program or activity of the Contracting Agency and in which no substantial involvement by the grantor is anticipated in the program or activity other than involvement associated with monitoring compliance with the grant conditions; or an agreement under which a Contracting Agency provides moneys, property, or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities, or other assets, to a recipient for the purpose of supporting or stimulating a program or activity of the recipient and in which no substantial involvement by the Contracting Agency is anticipated in the program or activity other than involvement associated with monitoring compliance with the grant conditions. Grant does not include a Public Contract for a Public Improvement, for Public Works, or for emergency work, minor alterations, or ordinary repair or maintenance necessary to preserve a Public Improvement, when under the Public Contract a Contracting Agency pays, in consideration for contract performance intended to realize or to support the realization of the purposes for which grant funds were provided to the Contracting Agency, moneys that the Contracting Agency has received under a Grant.
- 1.19 Invitation for Bid or IFB:** All documents issued by LTD used for soliciting Bids from prospective Bidders and used to explain offering procedures and requirements.
- 1.20 Lowest Responsible Bidder:** The lowest priced, responsible Bidder who has substantially complied with all prescribed public bidding procedures and requirements and who has not been disbarred by LTD under Section 13 and ORS 279B.130, disqualified pursuant to Section 6.2.4, or, if in connection with the procurement of a

Public Improvement Contract, has not be disqualified pursuant to Section 41.10 and ORS 279C.440 to 279C.450.

- 1.21 **LTD:** Lane Transit District.
- 1.22 **Offer:** A Bid, Proposal, or other response to a Solicitation Document as applicable.
- 1.23 **Offeror:** A Bidder, Proposer, or other Person, as applicable, who submits an Offer.
- 1.24 **Person:** An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.
- 1.25 **Personal Services:** Services performed as an independent contractor in a professional capacity, including but not limited to:
 - 1.25.1 Accountant;
 - 1.25.2 Attorney;
 - 1.25.3 Architectural or land use planning consultant;
 - 1.25.4 Physician;
 - 1.25.5 Dentist;
 - 1.25.6 Registered professional engineer, appraiser, or surveyor;
 - 1.25.7 Passenger aircraft pilot;
 - 1.25.8 Aerial photographer;
 - 1.25.9 Timber cruiser;
 - 1.25.10 Broadcaster;
 - 1.25.11 Artist in the performing or fine arts, including but not limited to photographer, filmmaker, painter, weaver, and sculptor;
 - 1.25.12 Consultant;
 - 1.25.13 Educational or human custodial caretaker; and
 - 1.25.14 Services requiring specialized skills, knowledge, and resources in the application of technical or scientific expertise or the exercise of professional, artistic, or management discretion or judgment.

However, Personal Services do not include:

- a. Services, even if rendered in a professional capacity, if the predominant result of the Contract is a product (for example, a contract with a landscape architect to

design a garden is for personal services, but a contract to design a garden and supply all the plants is not);

- b. Labor that is of a type that generally can be done by any competent worker, including but not limited to janitorial work, security guard work, crop spraying, laundry, and landscape maintenance; and
 - c. Trade-related activities, even if a specific license is required to engage in the activities.
- 1.26 President:** The presiding officer of LTD/CRB and who is the same person who serves as President of the LTD Board of Directors.
- 1.27 Product Sample:** A representative specimen of the item that will be offered by an Offeror in response to a Solicitation Document. Unless otherwise provided in the Solicitation Document, the Product Sample shall be the exact product or a representative portion of the product offered by the Offeror.
- 1.28 Proposal:** A competitive Offer submitted in response to a Request for Proposal, binding on the Proposer, in which price, conformance to specification, and other listed factors will be part of the award criteria.
- 1.29 Proposer:** An Offeror who submits a Proposal in response to a Request for Proposal.
- 1.30 Public Contract or Contract:** A sale or other disposal, or a purchase, lease, rental, or other acquisition, by LTD of personal property, services, including Personal Services, Public Improvement, Public Works, minor alterations, or ordinary repair or maintenance necessary to preserve a Public Improvement. Public Contract does not include grants.
- 1.31 Public Improvement:** A project for construction, reconstruction, or major renovation on real property by or for LTD. However, Public Improvement does not include either:
(i) projects for which no funds of LTD are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or
(ii) any emergency work, minor alteration, ordinary repair, or maintenance necessary in order to preserve a Public Improvement.
- 1.32 Public Works:** Has the meaning set forth in ORS 279C.800(5).
- 1.33 Receipt of Offer:** Occurs when an Offer and any associated documentation is actually received by LTD at the delivery point and/or by the person designated in the Solicitation Document.
- 1.34 Request for Proposal or RFP:** All documents issued by LTD used for soliciting Proposals from prospective Proposers and explaining offering procedures and requirements.
- 1.35 Responsive Offer (also Responsive Bid or Responsive Proposal):** An Offer that is in substantial compliance with applicable solicitation procedures, these rules, and all requirements and criteria set forth in the Solicitation Document.

- 1.36 **Responsible Offeror (also Responsible Bidder or Responsible Proposer):** An Offeror who meets the standards set forth in Section 26.1, has not been disqualified by LTD under Sections 6.2.4 and 33.3, and has not been debarred under Section 13.
- 1.37 **Rules:** These rules adopted by LTD/CRB.
- 1.38 **Signed or Signature:** Any mark, word, or symbol attached to or logically associated with a document and executed or adopted by a Person with the intent to be bound.
- 1.39 **Solicitation Document:** An Invitation for Bid, Request for Proposal, or other document issued to invite Offers from prospective Offerors pursuant to the Rules.
- 1.40 **Special Procurement:** Unless context requires otherwise, a Class Special Procurement, a Contract-Specific Special Procurement, or both.
- 1.41 **Submittal Period:** The span of time between the date of the Solicitation Document and Closing Date.
- 1.42 **Written or Writing:** Conventional paper documents, whether handwritten, typewritten, or printed, in contrast to spoken words. It also includes electronic transmission or facsimile documents when required by applicable law or permitted by a Solicitation Document or Contract.

SECTION 2. General Purchasing Authority Policy.

- 2.1 LTD Public Contracting and purchasing is centralized. As such, pursuant to ORS 279A.075, LTD/CRB hereby delegates the following contracting authority:
 - 2.1.1 The persons holding the following positions are authorized to enter into Public Contracts for LTD up to the following amounts.

a.	Purchasing Manager	\$75,000
b.	Purchasing Assistant	\$10,000
c.	Inventory Supervisor	\$10,000
d.	Parts Clerk	\$ 2,500
 - 2.1.2 The Purchasing Manager also shall have authority to enter into Sole Source procurements in an amount of \$75,000 or less, pursuant to Section 6.8 of the Rules. The General Manager shall have authority for any Sole Source procurement above \$75,000.
 - 2.1.3 In the absence of the Purchasing Manager or Inventory Supervisor, the Director of Finance shall act as the Purchasing Manager. In the absence of the Inventory Supervisor, the Purchasing Manager shall make purchases over \$2,500 and the Purchasing Assistant shall make purchases up to \$10,000. The Parts Clerk shall make purchases in an amount of \$2,500 or less. The Inventory Supervisor and Purchasing Assistant shall make all purchases up to \$10,000. The Purchasing Manager shall sign Contracts and contract modifications in the amount of \$75,000 or less. The General Manager shall sign all other Contracts exceeding \$75,000.

- 2.2 No LTD employee shall enter negotiations with any Contractors without receiving authority from the Purchasing Manager.
- 2.3 The Purchasing Manager shall be responsible for determining the most effective procurement method, in accordance with these Rules.
- 2.4 The Purchasing Manager shall see that all Solicitation Documents are circulated to pertinent LTD personnel prior to a Solicitation Document being mailed to Offerors.
- 2.5 Petty cash in the amount of \$50 or less may be used when the procurement is a non-repetitive purchase.

SECTION 3. Contract Review Board Powers; Procedures; Meetings.

- 3.1 LTD/CRB shall consist of members of the Board of Directors. LTD/CRB and all of its members shall have all the powers granted to it under ORS 279A.060 et seq. The President of the Board of Directors shall be the President of LTD/CRB.
- 3.2 LTD/CRB meetings may be held at Board of Directors meetings, or at another time after public notice. The Board of Directors may sit as LTD/CRB during its meetings without formal adjournment of the Board of Directors meeting and formally convening the LTD/CRB meeting, by announcing that it is sitting as LTD/CRB.
- 3.3 Notices of LTD/CRB meetings or other actions shall be of the same type and given in the same manner as notices of meetings or actions of the Board of Directors. LTD/CRB notices may be published as part of the Board of Director notices when the actions that are the subject of the notices will occur on the same date and at the same place.
- 3.4 A majority of the members of LTD/CRB shall constitute a quorum. Exercise of LTD/CRB authority shall be by majority vote of the entire LTD/CRB.
- 3.5 LTD/CRB proceedings shall be governed by the same procedural rules that govern the Board of Directors proceedings, insofar as they are consistent with these Rules and are applicable to LTD/CRB under ORS Chapters 279, 279A, 279B, and 279C.
- 3.6 Meetings of LTD/CRB may be held by conference call after the required public notice. If the meeting is held by conference call, the President shall conduct the meeting using a speakerphone to ensure all attending the meeting may hear.
- 3.7 On urgent or perfunctory matters, the President may poll the members of LTD/CRB by telephone. Electronic transcripts of the polling calls shall be made and retained. In the course of the poll, any member of LTD/CRB may request the matter be discussed by conference call or deferred to a meeting.
- 3.8 Prior to conference calls or telephone polls, the press and public, including persons directly interested in the subject matter of the poll, shall be given reasonable notice so that they may be present with the President at the time of the meeting or poll.
- 3.9 The agenda of the meetings of LTD/CRB shall include the following:

- 3.9.1 Unanimous consent calendar, including a brief description of each contract exempted and the amount of the contract.
- 3.9.2 A brief description of proposed exemptions, including the amount of each contract.
- 3.9.3 The agenda of a meeting of LTD/CRB may be included in the agenda of a meeting of the Board of Directors when the two meetings will be at the same place and on the same date.

3.10 Records of LTD/CRB proceedings shall be made in the same manner as those of Board of Directors proceedings and may be made a part of the latter records.

SECTION 4. Statutory Exceptions to the Oregon Public Contracting Code and the Competitive Procurement Requirements of these Rules.

These Rules requiring Public Contracts to be awarded through the Competitive Procurement process do not apply to the following types of contracts:

- 4.1 Contracts between other Contracting Agencies or the federal government.
- 4.2 Contracts made with qualified nonprofit agencies providing employment opportunities for disabled individuals . If federal funds are to be used by LTD for the procurement, this exemption is not available.
- 4.3 Contracts for insurance.
- 4.4 Grants.
- 4.5 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.
- 4.6 Acquisitions or disposal of real property or an interest in real property.
- 4.7 Energy performance savings contracts.
- 4.8 Contracts, agreements or other documents approved by the General Manager and entered into, issued, or established in connection with:
 - 4.8.1 The incurring of debt by LTD, 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; or
 - 4.8.2 The investment of funds by LTD as authorized by law, and other financial transactions of LTD that by their character cannot practically be established under the Competitive Procurement procedures required by Oregon law or these Rules.

- 4.9 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.
- 4.10 Any procurement that is made under 10 U.S.C. 381, the Electronic Government Act of 2002 (P.L. 107-347) or other federal law that is, as determined by LTD/CRB, similar to 10 U.S.C. 381 or Section 211 of the Electronic Government Act of 2002 in effectuating or promoting transfers of property to contracting agencies.

SECTION 5. Additional Exceptions: Class Special Procurements.

LTD/CRB finds that the following Class Special Procurements are unlikely to encourage favoritism in awarding Public Contracts or diminish competition for Public Contracts and that these Class Special Procurements will result in substantial cost savings to LTD or the public and will otherwise substantially promote the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under the Competitive Procurement requirements of these Rules. LTD, therefore, adopts the following Class Special Procurements:

- 5.1 Contracts for Rolling Stock may be awarded pursuant to the "Competitive Proposal" procedure detailed in FTA Circular 4220.1E, as amended from time to time. For the purposes of this Section 5.1, "Rolling Stock" means buses, transportation vans, vehicles used to repair or support those vehicles, and any other vehicle or component included in the definition of Rolling Stock by federal statute, regulation, or guideline.
- 5.2 All contracts for utility services regulated by federal, state, or local regulating authority.
- 5.3 Contracts for equipment repair or overhaul if one of the following criteria are satisfied:
 - 5.3.1 The service or parts required are unknown and cannot be determined without extensive preliminary dismantling or testing;
 - 5.3.2 The service or parts required are for sophisticated equipment and the service or parts installation requires specially trained personnel that are available from only one source; or
 - 5.3.3 LTD shall solicit quotes from at least three firms, where practicable, and award to the firm whose offer is most advantageous to LTD considering all factors.
- 5.4 LTD may procure contracts for Personal Services or trade services using the RFP process under these Rules rather than the IFB process under these Rules.
- 5.5 LTD/CRB may adopt other Special Procurements in accordance with the following procedures:
 - 5.5.1 A written request for a Special Procurement shall be submitted to LTD/CRB. Such request shall describe the proposed contracting procedure, the goods or services or the class of goods or services to be acquired through the Special Procurement, and the circumstances that justify the use of a Special Procurement under the standards set forth in Sections 5.5.2.

- 5.5.2** LTD/CRB finds that the written request submitted under Section 5.5.1 demonstrates that the use of a Special Procurement as described in the request or an alternative procedure prescribed by LTD/CRB will:
- a. Be unlikely in that the exemption will encourage favoritism in the award of Public Contracts or substantially diminish competition for Public Contracts; and
 - b. Result in substantial cost savings to LTD or the public, or otherwise substantially promote the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under the Competitive Procurement procedures of these Rules.
- 5.5.3** Public notice of the approval process for a proposed Special Procurement must be published at least once in at least one newspaper of general, county-wide circulation in Lane County a minimum of seven (7) days prior to approval and a minimum of at least fourteen (14) days prior to award of the Contract. The public notice shall describe the goods or services or class of goods or services to be acquired through the Special Procurement.
- 5.5.4** If a Public Contract is awarded through a Special Procurement, LTD shall award the Contract to the Offeror whom Offer LTD determines in writing to be the most advantageous to LTD.
- 5.5.5** When LTD/CRB approves a Class Special Procurement under this Section 5, LTD may award Public Contracts to acquire goods or services within the class of goods or services in accordance with the terms of LTD/CRB's approval without making a subsequent request for a Special Procurement.
- 5.5.6** A Person may protest the approval of or request for approval of a Special Procurement in accordance with Section 36.3.

SECTION 6. Additional Statutory Exceptions.

6.1 Affirmative Action.

- 6.1.1** The provisions of these Rules may not be construed to prohibit LTD from engaging in public contracting practices designed to promote affirmative action goals, policies, or programs for disadvantaged or minority groups.
- 6.1.2** Pursuant to ORS 279A.100, LTD may limit competition on Public Contracts for goods and services, or on other Public Contracts with an estimated cost of \$50,000 or less to carry out affirmative action policies, in accordance with policies and procedures established by LTD.

6.2 Emerging Small Businesses.

- 6.2.1** As set forth in ORS 279A.105, LTD may require a Contractor to subcontract some part of a Contract to, or to obtain materials to be used in performing the Contract from:

- a. A business enterprise that is certified under ORS 200.055 as an emerging small business; or
- b. A business enterprise that is:
 - (i) Certified under ORS 200.055 as an emerging small business; and
 - (ii) Is located in or draws its workforce from economically distressed areas, as designated by the Oregon Economic and Community Development Department.

6.2.2 A subcontractor certified under ORS 200.055 as an emerging small business is located in or draws its workforce from economically distressed areas if:

- a. Its principal place of business is located in an area designated as economically distressed by the Oregon Economic and Community Development Department pursuant to administrative rules adopted by the Oregon Economic and Community Development Department; or
- b. The Contractor certifies in writing to LTD that a substantial number of the subcontractor's employees or subcontractors that will manufacture the goods or complete the services under the Contract reside in an area designated as economically distressed by the Oregon Economic and Community Development Department pursuant to administrative rules adopted by the Oregon Economic and Community Development Department. For the purposes of making the foregoing determination, LTD shall determine in each particular instance what proportion of a Contractor's subcontractor's employees or subcontractors constitute a substantial number.

6.2.3 LTD may require that a Public Contract be awarded to a "Responsible Bidder" defined in ORS 200.005, who LTD determines has made good faith efforts as prescribed in ORS 200.045(2). For purposes of this Section 6.2, "Responsible Bidder" includes a responsible Proposer that has made good faith efforts as prescribed in ORS 200.045(3).

6.2.4 DBE Disqualification.

- a. LTD may disqualify a Person from bidding or participating in any LTD Contracts under ORS 200.065(5), or suspend a Person's right to bid on or participate in any Public Contract pursuant to ORS 200.075(1) after providing the Person with notice and a reasonable opportunity to be heard in accordance with sections (d) and (e) of this Section 6.2.4.
- b. As provided in ORS 200.065 and 200.075, LTD may disqualify or suspend a Person's right to submit an Offer or to participate in a Contract (e.g., act as a subcontractor) as follows:
 - (i) For a DBE Disqualification under ORS 200.065, LTD may disqualify a Person upon finding that the Person engaged in any of the activities made unlawful by ORS 200.065(1) or (2), or if the

Person has been disqualified by another Contracting Agency pursuant to ORS 200.065.

- (ii) For a DBE Disqualification under ORS 200.075, LTD may suspend a Person upon finding that the Person engaged in any of the acts prohibited by ORS 200.075(a) through (c).
- c. LTD may disqualify or suspend a Person's right to submit Offers or participate in Public Contracts only for the length of time permitted by ORS 200.065 or 200.075, as applicable.
- d. LTD must notify the Person in Writing of a proposed DBE Disqualification pursuant to this Section 6.2.4, served personally or by registered or certified mail, return receipt requested. This notice must:
 - (i) State that LTD intends to disqualify or suspend the Person;
 - (ii) Set forth the reasons for the DBE Disqualification;
 - (iii) 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 LTD 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;
 - (iv) Include a statement of the authority and jurisdiction under which the hearing will be held;
 - (v) Include a reference to the particular sections of the statutes and rules involved;
 - (vi) State the proposed DBE Disqualification period; and
 - (vii) State that the Person may be represented by legal counsel.
- e. Hearing. LTD shall schedule a hearing upon its receipt of the Person's timely request. LTD 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 the hearing.

6.2.5 If federal funds are involved in the procurement, LTD shall not provide a preference to emerging small businesses under this Section 6.2.

6.3 Preference for Oregon goods and services; Nonresident Offeror.

6.3.1 "Nonresident Offeror" means an Offeror who is not a resident Offeror.

6.3.2 "Resident Offeror" means an Offeror that has paid unemployment taxes or income taxes in this state during the twelve (12) calendar months immediately preceding submission of the Offer, has a business address in this state and has stated in the Offer whether Offeror is a "Resident Offeror" under this Section 6.3.

- 6.3.3** For the purposes of complying with this Section 6.3, LTD may request, either in a Solicitation Document, following the Closing Date, or at any other time determined appropriate by LTD, any information LTD determines is appropriate and necessary to allow LTD to determine if the goods or services or Personal Services are manufactured or produced in Oregon. LTD 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 LTD applies those criteria equally to each Offeror.
- 6.3.4** When evaluating Offerors pursuant to Sections 26, 27 and 28, LTD shall add a percentage increase to the Offer of a Nonresident Offeror equal to the percentage, if any, of the preference that would be given to that Offeror in the state in which the Offeror resides. LTD 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 Offeror's state gives preference to in-state bidders, and (ii) the amount of such preference.
- 6.3.5** If federal funds are involved in the procurement, LTD shall not provide a preference for Oregon goods and services under this Section 6.3.
- 6.4** Recycled Materials Preference.
- 6.4.1** Notwithstanding provisions of law requiring LTD to award a Contract to the Responsible Bidder with the lowest Responsive Bid or the Responsible Proposer with the best Proposal or provider of a quotation, and in accordance with Section 6.4.2, LTD shall give preference to the procurement of goods manufactured from recycled materials.
- 6.4.2** In comparing goods from two or more Offerors, if at least one Offeror offers goods manufactured from recycled materials, and at least one Offeror does not, LTD shall select the Offeror 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 (5%) or a higher percentage if a written determination is made by LTD and set forth in the Solicitation Document. For purposes of making the foregoing determination, LTD shall consider the costs of the goods following any adjustments LTD makes to the price of the goods for purposes of evaluation pursuant to this Section 6.4.

6.5 Cooperative Procurements and Price Agreements.

6.5.1 For the purposes of these Rules, the following definitions shall apply:

- a. **“Administering Contracting Agency”** means a Contracting Agency that solicits and establishes the original Contract for procurement of goods, services or Public Improvements in a Cooperative Procurement.
- b. **“Cooperative Procurement”** means a procurement conducted by or on behalf of LTD and one or more other Contracting Agencies. “Cooperative procurement” includes but is not limited to multiparty Contracts and Price Agreements.
- c. **“Cooperative Procurement Group”** means a group of Contracting Agencies joined through an intergovernmental agreement for the purposes of facilitating Cooperative Procurements.
- d. **“Interstate Cooperative Procurement”** means a Permissive Cooperative Procurement in which the Administering Contracting Agency is a governmental body, domestic or foreign, that is authorized under the governmental body’s laws, rules, or regulations to enter into Public Contracts and in which one or more of the participating agencies are located outside this state.
- e. **“Joint Cooperative Procurement”** means a Cooperative Procurement in which the participating Contracting Agencies or the Cooperative Procurement Group and the agencies’ or group’s contract requirements or estimated contract requirements for Price Agreements are identified.
- f. **“Original Contract”** means the initial Contract or Price Agreement solicited and awarded during a Cooperative Procurement by an Administering Contracting Agency.
- g. **“Permissive Cooperative Procurement”** means a Cooperative Procurement in which the Purchasing Contracting Agencies are not identified.
- h. **“Purchasing Contracting Agency”** means a Contracting Agency that procures goods, services, or Public Improvements from a Contractor based on the original Contract established by an Administering Contracting Agency.

6.5.2 LTD may participate in, sponsor, conduct, or administer Cooperative Procurements as follows:

- a. **Joint Cooperative Procurement.** If LTD chooses to participate in, sponsor, conduct, or administer a Joint Cooperative Procurement, LTD may do so only in accordance with ORS 279A.210.

- b. Permissive Cooperative Procurement. If LTD chooses to participate in, sponsor, conduct, or administer a Permissive Cooperative Procurement, LTD may do so only in accordance with ORS 279A.215.
- c. Interstate Cooperative Procurement. If LTD chooses to participate in, sponsor, conduct, or administer an Interstate Cooperative Procurement, LTD may do so only in accordance with ORS 279A.220.
- d. If LTD is required to provide public notice in connection with a Cooperative Procurement, LTD may satisfy such notice requirements by including the information required in the Solicitation Document related to the Cooperative Procurement and by including instructions in the Solicitation Document to potential Offerors describing how they may submit comments in response to LTD's intent to establish a Contract or Price Agreement through the Cooperative Procurement.
- e. Any protests related to a Cooperative Procurement, or disputes related to a Contract or Price Agreement arising out of a Cooperative Procurement, shall be made and resolved as set forth in ORS 279A.225.

6.6 Small Procurements. LTD may, without following the requirements for an IFB or RFP set forth in these Rules, procure micro-purchases for goods, services, or supplies not exceeding \$5,000, if the Purchasing Manager or the Director of Finance determines the price is fair and reasonable. A contract awarded under this Section 6.6 may be amended if approved by the Purchasing Manager or the Director of Finance, but the cumulative amendments cannot exceed \$6,000. If federal funds are used in the procurement, micro-purchases shall not exceed \$2,500, and any amendments must be in accordance with federal rules and regulations.

6.7 Intermediate Procurements. LTD may, without following the requirements for an IFB or RFP set forth in these Rules, procure intermediate purchases of goods, supplies, and/or services exceeding \$5,000 but not exceeding \$150,000, provided such Contracts are awarded in accordance with the Intermediate Procurement procedures set forth in this Section 6.7. LTD must find that the awarding of a Contract using these Intermediate Procurement procedures will not encourage favoritism or diminish competition, and will result in substantial cost savings to LTD. In making this determination, LTD shall comply with the following:

6.7.1 Reasonable efforts are made to obtain at least three quotes prior to awarding a Contract pursuant to this Section 6.7. If three quotes are not available, fewer will suffice if a written record is made of the effort to obtain quotes.

6.7.2 A written record is made of all sources of the quotes received.

6.7.3 LTD shall not award Contracts totaling in excess of \$150,000 to any one Contractor during one fiscal year pursuant to this Section 6.7.

6.8 Sole Source. LTD may, without following the Competitive Procurement requirements of the Rules and without competition, award contracts for goods or services if the LTD Purchasing Manager has determined, in writing, that the goods or service are available from only one source ("Sole Source") and the following criteria are met:

6.8.1 LTD Purchasing Manager's written finding includes the following:

- a. That the efficient utilization of existing goods requires the acquisition of compatible goods or services;
- b. That the goods or services required for the exchange of software or data with other public or private agencies are available from only one source;
- c. That the goods or services are for use in a pilot or an experimental project; or
- d. Other findings that support the conclusion that the goods or services are available from only one source.

6.8.2 If LTD Purchasing Manager's findings fall under Section 6.8.1(d) above, LTD shall document that LTD has undertaken reasonable efforts to identify alternate sources and has determined that competition is inadequate. Further, LTD shall:

- a. Prepare a cost analysis in connection with any procurements under a Section 6.8.1(d) Sole Source exception; and
- b. If the Sole Source procurement is over \$75,000, LTD shall advertise the procurement in a publication that crosses state boundaries and shall not contract for the procurement for a minimum of five (5) calendar days after the date of publication.

6.8.3 LTD's Purchasing Manager shall promptly submit to LTD/CRB a written report on the Sole Source procurement that includes the following:

- a. A description of the Sole Source purchase;
- b. A description of the procedure used to determine that the service or product is available from only a Sole Source; and
- c. The monetary amount (including price analysis/cost analysis).

6.8.4 To the extent reasonably practical, LTD shall negotiate with the Sole Source to obtain contract terms advantageous to LTD.

6.8.5 If federal funds are involved, LTD shall report Sole Source contracts to the FTA, as required by FTA regulations.

6.9 Emergency Contracts. LTD may, without following the Competitive Procurement requirements of the Rules and without competition, make or authorize procurements of goods or services in an emergency. In making such a procurement, LTD shall document the nature of the emergency and describe the source selection methods used for the procurement.

- 6.9.1 For a contract of \$50,000 or less, the General Manager shall, by written resolution, document the nature of the emergency and describe the source selection methods used for the procurement.
- 6.9.2 For a contract over \$50,000, LTD/CRB shall, by written resolution, document the nature of the emergency and describe the source selection methods used for the procurement.
- 6.9.3 A contract must be awarded within sixty (60) days following the written resolution of the General Manager or Board of Directors.

SECTION 7. Specifications for Contracts.

- 7.1 Except as set forth in Sections 7.3 and 7.4 below, specifications for public contracts shall not expressly or implicitly require any product by any brand name or mark, nor the product of any particular manufacturer or seller unless the products so identified are followed by the terms "or equal specifications." Notwithstanding the foregoing, nothing in this Section 7, shall prohibit LTD from specifying one or more comparable products as examples of quality, performance, functionality, or other characteristics of the product needed by LTD.
- 7.2 LTD shall determine what constitutes a product that is equal or superior to the product specified, and any such determination by LTD shall be final.
- 7.3 If federal funds are not utilized in the procurement, LTD may develop and maintain a list of qualified products in instances where the testing or examination of goods before initiating the procurement is necessary or desirable to best meet LTD's requirements, such as (i) when it is impractical to create specific design or performance specifications for a type of product to be purchased; or (ii) when there are certain safety requirements the product must meet. If LTD desires to develop a list of qualified products, LTD shall follow the procedure set forth below in this Section 7.
 - 7.3.1 LTD must make reasonable efforts to notify all known manufacturers or vendors of competitive products of its intention to accept applications for inclusion in its list of products. Notification shall include public notice, published at least once in at least one newspaper of general, county-wide circulation in Lane County.
 - 7.3.2 LTD may establish deadlines for the submission of applications of similar products; however, applicants shall be allowed to submit applications until at least fifteen (15) days prior to the advertisement of the procurement document which will rely on the list of qualified products.
 - 7.3.3 If an application for inclusion in a list of products is denied, or an existing inclusion is revoked, LTD shall notify the applicant in writing. The applicant may appeal to LTD/CRB for a review of the denial or revocation.
- 7.4 Provided federal funds are not used in the procurement, LTD may also specify a particular product or list of products by brand name or mark without the term "or equal specifications" if LTD determines that only the identified product or list of products will meet its needs and such determination is based on one or more of the following Written determinations:

- 7.4.1 The specification of a product by brand name or mark, or the product of a particular manufacturer or seller, would result in substantial cost savings to LTD;
- 7.4.2 There is only one manufacturer or seller of the product of the quality required;
- 7.4.3 Efficient utilization of existing goods, equipment, or supplies requires the acquisition of compatible goods, equipment, or supplies; or
- 7.4.4 The use of such particular product or list of products by brand name or mark is unlikely to encourage favoritism in awarding Public Contracts or diminish competition for Public Contracts.

The inclusion of a particular product by brand name or mark pursuant to this Section 7.4 shall be subject to review only as provided under Section 36.7.

SECTION 8. Competitive Procurement and Procedures.

- 8.1 In general, all Public Contracts awarded by LTD shall be awarded through the Competitive Procurement process, except as otherwise allowed by law and/or as set forth in these Rules. Notwithstanding any exceptions to Competitive Procurement allowed by these Rules, LTD may nevertheless award a Contract using the Competitive Procurement process in these Rules.
- 8.2 If federal funds are involved, federal laws, rules and regulations shall govern the procurement in the event of a conflict with these Rules or any applicable Oregon statutory laws or regulations. Further, if federal funds are involved in the procurement, federal laws, rules, and regulations shall govern and preempt any Competitive Procurement exceptions listed under Section 4, Section 5, or Section 6 of these Rules in the event of a conflict between the federal laws, rules, and regulations and Section 4, Section 5, or Section 6 of these Rules.
- 8.3 Except as otherwise expressly allowed by these Rules, LTD must award a Public Contract using either an IFB or an RFP.
 - 8.3.1 **Invitation for Bid.** LTD may use the IFB process, when: (i) no discussion with Offerors is needed; (ii) complete specifications and requirements for the purchase are available; and (iii) LTD believes it will receive optimum value by the selection of the lowest-priced offer meeting all specifications and requirements.
 - 8.3.2 **Request for Proposal.** LTD may use the RFP process when LTD believes it will receive optimum value by (i) negotiating with the Offerors as permitted under Sections 10 and 11.2; (ii) selecting the offer based on both price and non-price related factors; and (iii) the Contract to be awarded is for personal or trades services as set forth in Section 5.4 or the requirements of Section 5.5 have been met.
- 8.4 **Procurement of Architectural and Engineering Services.** LTD shall procure architectural and engineering services in accordance with the procedures set forth in Section 40 of these Rules.

- 8.5 Contracts for Public Improvements.** The general Competitive Procurement processes and procedures set forth in these Rules, as supplemented or modified by Section 41, shall be applicable to the procurement of Contracts for Public Improvements.

SECTION 9. Solicitation Documents.

All Solicitation Documents for either an IFB or RFP shall contain the following:

- 9.1** General solicitation information as follows:
- 9.1.1** All information required by ORS 279B.055(2);
 - 9.1.2** Notice and information about pre-Offer conferences, including, without limitation, the time, date, and place of any pre-Offer conferences, whether such conferences are mandatory or voluntary, and that any statement by LTD at such conference is not binding on LTD unless confirmed in writing;
 - 9.1.3** The form, instructions, and requirements for Offer preparation and submission, including whether Offers may be submitted by facsimile;
 - 9.1.4** The Closing Date and time after which Offers will not be accepted;
 - 9.1.5** The address to which Offers are to be delivered;
 - 9.1.6** The time, date, and place set for opening of Offers;
 - 9.1.7** The office where the Solicitation Document may be reviewed;
 - 9.1.8** A statement that each Offeror to a Solicitation Document must identify whether the Offeror is a "resident Offeror," as defined in ORS 279A.120;
 - 9.1.9** Offeror's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4);
 - 9.1.10** Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385;
 - 9.1.11** A statement explaining how LTD will notify Offerors of Addenda, if any, and how to obtain Addenda, if any;
 - 9.1.12** The purchase description, specifications, delivery and performance schedule, inspection and acceptance requirements;
 - 9.1.13** Offer protest specifications;
 - 9.1.14** Procedures for claiming a confidential information exemption;
 - 9.1.15** If LTD intends to award Public Contracts to more than one Offeror pursuant to Section 26.6;

9.3 Evaluation Process.

- 9.3.1** The procurement document shall contain a statement that LTD may reject any Offer not in compliance with all prescribed procedures and requirements and other applicable laws, and that LTD may reject for good cause any or all Offers upon LTD's finding that it is in its best interest to do so. Reasons for any such cancellation or rejection shall be documented in Writing and made part of the solicitation file.
- 9.3.2** The procurement document shall contain a statement that LTD may delay or suspend any solicitation or procurement upon LTD's finding that it is in its best interest to do so. Reasons for any such delay or suspension shall be documented in Writing and made part of the solicitation file.
- 9.3.3** If the Solicitation Document is an IFB, LTD shall set forth objective evaluation criteria in the Solicitation Document in accordance with ORS 279B.055(6). Examples of objective evaluation criteria include, but are not limited to, conversion costs, transportation costs, volume weighting, trade-in allowances, cash discounts, depreciation allowances, cash discounts, depreciation allowances, cartage penalties, ownership or life-cycle cost formulas, performance history on other private and Public Contracts, experience of key personnel, adequacy of equipment and physical plant, financial ability, sources of supply, references, and warranty provisions.
- 9.3.4** If the Solicitation Document is an RFP, LTD shall set forth in the Solicitation Document the manner and/or method for evaluating Proposals and the evaluation criteria LTD will use in evaluating Proposals. Further, LTD may employ any combination of the procurement methods of Contractor selection set forth in ORS 279B.060(6)(b). Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management capability, technical expertise, personnel qualifications, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or facilities, financial ability, sources of supply, references, and warranty provisions. Further, if LTD is willing to negotiate the terms and conditions of the contract, LTD must state that in the Solicitation Document and identify the areas open to negotiation.
- 9.3.5** Objective evaluation factors included in a Solicitation Document need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors shall:
- a. Be reasonable estimates based upon information LTD staff has available concerning future use; and
 - b. Treat all Offers equitably.
- 9.4** LTD's Purchasing Manager also may include any other special terms and conditions applicable to the contracts to be awarded including, without limitation, provisions regarding whether the Contract can assign or delegate its obligations or subcontract without the prior written approval of LTD.

SECTION 10. Competitive Range, Multi-Tiered and Multi-Step Proposals.

- 10.1** If the RFP calls for the establishment of a competitive range or allows for multi-tiered or multi-step Proposals, or allows for discussions or negotiations, LTD, in addition to procedures applicable to RFP process set forth in these Rules, shall follow the procedures set forth in Section 10 for competitive range, multi-tiered and multi-step RFPs.
- 10.2** In addition to the procedures set forth in these Rules for RFPs, LTD shall employ the procedures set forth in this rule for multi-step RFPs:
- 10.2.1** Solicitation Protest. Prior to the closing of the initial phase of a multi-step or multi-tiered RFP, LTD shall provide an opportunity to protest the solicitation under Section 36.5 and ORS 279B.405.
 - 10.2.2** Addenda Protest. LTD may, but is not required to, provide an opportunity to protest any Addenda issued during the second phase of a multi-step or multi-tiered RFP pursuant to Section 18.
 - 10.2.3** Exclusion Protest. LTD may, but is not required to, provide an opportunity for a Proposer to protest exclusion from the competitive range or exclusion from the second phase of a multi-step or multi-tiered RFP process as set forth in Section 36.5.
 - 10.2.4** Administrative Remedy. If protests under Sections 10.2.2 or 10.2.3 are provided for in the RFP, failure of a Proposer to so protest shall be considered a failure by Proposer to pursue an administrative remedy made available to the Proposer by LTD.
 - 10.2.5** Award Protest. LTD shall provide an opportunity to protest its intent to Award a Contract pursuant to Section 36.5 and ORS 279B.410. An Affected Offeror may protest, for any of the bases set forth in Section 36.4.2, its exclusion from the competitive range or any phase after the initial phase of a multi-step or multi-tiered RFP, or an Addendum issued following closing of the initial phase, if LTD did not previously provide Proposers the opportunity to protest such exclusion or Addendum.
- 10.3** When LTD's RFP process conducted pursuant to ORS 279B.060(6)(b) calls for LTD to establish a competitive range at any stage in the RFP process, it shall do so as follows:
- 10.3.1** Determining Competitive Range.
 - a. LTD shall establish a competitive range after evaluating all Responsive Proposals in accordance with the evaluation criteria set forth in the RFP. After such evaluation, LTD shall determine and rank the Proposers in the competitive range.
 - b. LTD may increase the number of Proposers in the competitive range if LTD's evaluation of Proposals establishes a natural break in the scores of Proposers indicating that a number of Proposers greater than the initial

competitive range are closely competitive, or have a reasonable chance of being determined the Responsible Proposer with the best Responsive Proposal. LTD may decrease the number of Proposers in the initial competitive range only if the excluded Proposers have no reasonable chance to be the Responsible Proposer with the best Responsive Proposal.

- 10.3.2** LTD shall provide Written notice to all Proposers identifying Proposers in the competitive range. LTD may, but is not required to, provide an opportunity for Proposers excluded from the competitive range to protest LTD's evaluation and determination of the competitive range in accordance with Section 36.4.
- 10.3.3** After determination of the competitive range and after any protest period provided in accordance with Section 10.3.2 expires, or after LTD has provided a final response to any protest, whichever date is later, then LTD 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; or
 - b. Engage in discussions with Proposers in the competitive range and accept revised Proposals from them as set forth in Section 10.3.4 and, following such discussions and receipt and evaluation of revised Proposals, conduct negotiations as set forth in Section 10.3.5 with the Proposers in the competitive range.
 - c. An unsuccessful Proposer may protest LTD's intent to Award in accordance with Section 36.6 and ORS 279B.410.
- 10.3.4** If LTD chooses to enter into discussions with and receive best and final Proposals (see Section 36.6), LTD shall proceed as follows:
- a. LTD 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 that were identified in the RFP as the subject of discussions. LTD may conduct discussions for the following purposes:
 - (i) Informing eligible Proposers of deficiencies in their initial Proposals;
 - (ii) Notifying eligible Proposers of parts of their Proposals for which LTD would like additional information; or
 - (iii) Otherwise allowing Eligible Proposers to develop revised Proposals that will allow LTD to obtain the best Proposal based on the requirements and evaluation criteria set forth in the RFP.
 - b. LTD may conduct discussions with each Eligible Proposer necessary to fulfill the purposes of this Section 10.3, but need not conduct the same amount of discussions with each Eligible Proposer. LTD may terminate

discussions with any Eligible Proposer at any time. However, LTD shall offer all Eligible Proposers the same opportunity to discuss their Proposals with LTD before LTD notifies Eligible Proposers of the date and time pursuant to Section 10.3.6 that best and final Proposals will be due.

- (i) In conducting discussions, LTD:
 - (1) Shall treat all Eligible Proposers fairly and shall not favor any Eligible Proposer over another;
 - (2) Shall disclose other Eligible Proposer's Proposals or discussions only in accordance with ORS 279B.060(6)(a)(B) or (C); and
 - (3) 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 RFP.

- (ii) At any time during the time allowed for discussions, LTD may:
 - (1) Continue discussions with a particular Eligible Proposer;
 - (2) Terminate discussions with a particular Eligible Proposer and continue discussions with other Eligible Proposers; or
 - (3) Conclude discussions with all remaining Eligible Proposers and provide notice pursuant to Section 10.3.6 to the Eligible Proposers requesting best and final Proposals.

10.3.5 After the protest period provided in accordance with Section 36.6 expires, or after LTD has provided a final response to any protest, whichever date is later, LTD shall commence negotiations in accordance with this Section 10.3.5.

- a. LTD may commence serial negotiations with the highest-ranked Eligible Proposers or commence simultaneous negotiations with all Eligible Proposers as follows:
 - (i) After initial determination of which Proposals are responsive; or
 - (ii) After initial determination of the competitive range in accordance with Section 10.3.1; or
 - (iii) After conclusion of discussions with all Eligible Proposers and evaluation of revised Proposals (see Section 10.3.4).

- b. Conducting Negotiations.
 - (i) Scope. LTD may negotiate:

- (1) The statement of Work;
 - (2) The Contract price as it is affected by negotiating the statement of Work; and
 - (3) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the RFP or Addenda thereto. Accordingly, Proposers shall not submit, and LTD shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the RFP or Addenda thereto.
- (ii) At any time during discussions or negotiations that LTD conducts in accordance with Sections 10.3.4 or 10.3.5, LTD may terminate discussions or negotiations with the highest-ranked Proposer, or the Proposer with whom it is currently discussing or negotiating, if LTD reasonably believes that:
- (1) The Proposer is not discussing or negotiating in good faith; or
 - (2) 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. If LTD is conducting serial negotiations and LTD terminates negotiations with a Proposer in accordance with Section 10.3.5.b(ii), LTD may then commence negotiations with the next highest scoring Proposer in the competitive range, and continue the process described in this Section 10.3.5 until LTD has either:
- (i) Determined to Award the Contract to the Proposer with whom it is currently discussing or negotiating; or
 - (ii) Completed one round of discussions or negotiations with all Proposers in the competitive range, unless LTD provided for more than one round of discussions or negotiations in the RFP, in which case LTD has completed all rounds of discussions or negotiations required.
- d. If LTD chooses to conduct competitive negotiations, LTD may negotiate simultaneously with competing Proposers. LTD:
- (i) Shall treat all Proposers fairly and shall not favor any Proposer over another; and
 - (ii) May disclose other Proposer's Proposals or the substance of negotiations with other Proposers only if LTD notifies all of the Proposers with whom LTD will engage in negotiations of LTD's

intent to disclose before engaging in negotiations with any Proposer.

- e. Any oral modification of a Proposal resulting from negotiations under this Section 10.3.5 shall be reduced to Writing by the Proposer.

10.3.6 If best and final Proposals are required, LTD shall establish a common date and time by which Proposers must submit best and final Proposals. Best and final Proposals shall be submitted only once; provided, however, LTD may make a Written determination that it is in LTD's best interest to conduct additional discussions or negotiations or change LTD's requirements and require another submission of best and final Proposals. Otherwise, no discussion of or changes in the best and final Proposals shall be allowed prior to award of the Contract. Proposers shall also be informed that if they do not submit notice of withdrawal or another best and final Proposal, their immediately previous Proposal will be construed as their best and final Proposal. LTD shall evaluate Proposals as modified by the best and final Proposal. LTD shall conduct evaluations as described in Section 26, 27, and 28. LTD shall not modify evaluation factors or their relative importance after the date and time that best and final Proposals are due.

SECTION 11. Multi-Step IFB and RFP Procurements.

11.1 Multi-Step Sealed Bids. If LTD considers it impractical to initially prepare an IFB that contains a procurement description to support a Contract award based on price, LTD may procure goods or services by using a multi-step IFB process pursuant to ORS 279B.055(12). A multi-step IFB process is a phased process that seeks necessary information or unpriced technical Bids in the initial phase and invites Bidders who submitted technically eligible Bids in the initial phase to submit competitive sealed price Bids on the technical Bids in the second, final phase. As with any IFB process, LTD shall award the Contract to the lowest Responsible Bidder. If time is a factor, LTD may require Bidders to submit a separate sealed price Bid during the initial phase to be opened after the technical evaluation.

11.1.1 Public Notice. Whenever the multi-step IFB process is used, public notice for the first phase shall be given in accordance with Section 14. Public notice is not required for the subsequent phases. However, LTD shall give notice of subsequent phases to all Bidders that submitted a Bid in the first phase and inform Bidders of the right to protest any Addenda issued after the closing of the initial phase pursuant to Section 18 and inform any Bidders excluded from the subsequent phases of the right, if any, to protest exclusion pursuant to Section 36.4.

11.1.2 In addition to the procedures set forth in these Rules for IFBs, LTD shall employ the procedures set forth in this rule for multi-step IFBs:

- a. **Solicitation Protest.** Prior to the closing of the initial phase, LTD shall provide an opportunity to protest the solicitation under Section 36.5 and ORS 279B.405.

- b. Addenda Protest. LTD may, but is not required to, provide an opportunity to protest any Addenda issued during the second phase pursuant to Section 18.
- c. Exclusion Protest. LTD may, but is not required to, provide an opportunity for a Bidder to protest exclusion from the phase of the multi-step IFB process as set forth in Section 36.4.
- d. Administrative Remedy. If protests under Sections 11.1.2.b or 11.1.2.c are provided for in the IFB, failure of a Bidder to so protest shall be considered a failure by a Bidder to pursue an administrative remedy made available to the Bidder by LTD.
- e. Award Protest. LTD shall provide an opportunity to protest its intent to Award a Contract pursuant to Section 36.6 and ORS 279B.410. An Affected Offeror may protest, for any of the bases set forth in Section 36.4.2, its exclusion from the second phase of a multi-step IFB.

11.1.3 Initial Phase of the Multi-Step IFB Process.

- a. A multi-step IFB shall be initiated by the issuance of an IFB in the form and manner required for competitive sealed Bids except as hereinafter provided. In addition to the requirements set forth in Section 9, the multi-step IFB shall provide:
 - (i) That unpriced technical Bids are requested;
 - (ii) Whether price Bids are to be submitted at the same time as unpriced technical Bids; if they are, that such price Bids shall be submitted in a separate sealed envelope;
 - (iii) That the IFB is a multi-step sealed IFB procurement, and priced Bids will be considered only in the second phase and only from those Bidders whose unpriced technical Bids are found eligible in the initial, first phase;
 - (iv) The criteria to be used in the evaluation of unpriced technical Bids;
 - (v) That LTD, to the extent that it finds it necessary, may conduct oral or written discussions for the purposes of clarification of the unpriced technical Bids;
 - (vi) 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 IFB; and
 - (vii) 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. After receipt of unpriced technical Bids, Addenda to the IFB shall be distributed only to Bidders who submitted unpriced technical Bids.
- c. Unpriced technical Bids need not be opened publicly.
- d. Unpriced technical Bids submitted by Bidders shall be evaluated solely in accordance with the criteria set forth in the IFB. Unpriced technical Bids shall be categorized as:
 - (i) Eligible;
 - (ii) Potentially eligible; that is, reasonably susceptible of being made eligible; or
 - (iii) Ineligible. IF LTD finds a Bid ineligible, it shall record in Writing the basis for determining the Bid ineligible and make it part of the procurement file.

11.1.4 LTD may initiate the second phase of the IFB process if, in LTD's opinion, there are sufficient eligible unpriced technical Bids to assure effective price competition in the second phase without technical discussions. If LTD finds that such is not the case, LTD may issue an Addendum to the IFB or engage in technical discussions as set forth in Section 11.1.5.

11.1.5 LTD may seek clarification of a technical Bid by any eligible, or potentially eligible Bidder. During the course of such discussions, LTD shall not disclose any information derived from one unpriced 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 second phase as established by LTD. Such submission may be made at the request of LTD or upon the Bidder's own initiative.

11.1.6 If LTD determines a Bidder's unpriced technical Bid to be ineligible, such Bidder shall not be afforded an additional opportunity to supplement its technical Bid.

11.1.7 Mistakes may be corrected or Bids may be withdrawn during the initial phase:

- a. Before unpriced technical Bids are considered;
- b. After any discussions have commenced under Section 11.1.5;
- c. When responding to any Addenda of the IFB; or
- d. In accordance with Section 23.

11.1.8 Second Phase of Multi-Step IFB Process.

- a. Upon the completion of phase one, LTD shall either:

- (i) Open price Bids submitted in the initial phase (if price Bids were required to be submitted) from Bidders whose unpriced technical Bids were found to be eligible; or
 - (ii) If price Bids have not been submitted, technical discussions have been held, or Addenda to the IFB have been issued, invite each eligible Bidder to submit a price Bid.
- b. The second phase shall be conducted as any other IFB procurement except:
- (i) As specifically set forth in this rule; and
 - (ii) No public notice need be given of this invitation to submit price Bids because such notice was previously given.

11.2 Multi-Step Sealed Proposals. LTD may procure goods or services by using a multi-step RFP process pursuant to ORS 279B.060(6)(b)(G). A multi-step RFP process is a phased process that seeks necessary information or unpriced technical Proposals in the initial phase and invites Proposers who submitted technically eligible Proposals in the initial phase to submit competitive sealed price Proposals on the technical Proposals in the second, final phase. As with any RFP process, LTD shall award the Contract to the Responsible Proposer submitting the best, Responsive Proposal. If time is a factor, LTD may require Proposers to submit a separate sealed price Proposal during the initial phase to be opened after the technical evaluation.

11.2.1 Public Notice. Whenever the multi-step RFP process is used, public notice for the first phase shall be given in accordance with Section 14. Public notice is not required for the subsequent phases. However, LTD shall give notice of subsequent phases to all Proposers that submitted a Proposal in the first phase and inform Proposers of the right to protest any Addenda issued after the closing of the initial phase pursuant to Section 18 and inform any Proposers excluded from the subsequent phases of the right, if any, to protest exclusion pursuant to Section 36.4.

11.2.2 Initial Phase of the Multi-Step RFP Process.

- a. A multi-step RFP shall be initiated by the issuance of an RFP in the form and manner required for competitive sealed Proposals except as hereinafter provided. In addition to the requirements set forth in Sections 9 and 10, the multi-step RFP shall provide:
 - (i) That unpriced technical Proposals are requested;
 - (ii) Whether price Proposals are to be submitted at the same time as unpriced technical Proposals; if they are, that such price Proposals shall be submitted in a separate sealed envelope;
 - (iii) That the RFP is a multi-step sealed RFP procurement, and priced Proposals will be considered only in the second phase and only

from those Proposers whose unpriced technical Proposals are found qualified in the initial, first phase;

- (iv) The criteria to be used in the evaluation of unpriced technical Proposals;
- (v) That LTD, to the extent that it finds it necessary, may conduct oral or written discussions for the purposes of clarification of the unpriced technical Proposals;
- (vi) 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 RFP; and
- (vii) Whether Proposers 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. After receipt of unpriced technical Proposals, Addenda to the RFP shall be distributed only to Proposers who submitted unpriced technical Proposals.

c. Unpriced technical Proposals need not be opened publicly.

d. Unpriced technical Proposals submitted by Proposers shall be evaluated solely in accordance with the criteria set forth in the RFP. Unpriced technical Bids shall be categorized as:

- (i) Qualified;
- (ii) Potentially qualified; that is, reasonably susceptible of being made qualified; or
- (iii) Unqualified. IF LTD finds a Proposal unqualified, it shall record in Writing the basis for determining the Proposal unqualified and make it part of the procurement file.

11.2.3 LTD may initiate the second phase of the RFP process if, in LTD's opinion, there are sufficient qualified unpriced technical Proposals to assure effective price competition in the second phase without technical discussions. If LTD finds that such is not the case, LTD may issue an Addendum to the RFP or engage in technical discussions as set forth in Section 11.2.4.

11.2.4 LTD may seek clarification of a technical Proposal by any qualified, or potentially qualified, Proposer. During the course of such discussions, LTD shall not disclose any information derived from one unpriced 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 of the second phase as established by LTD. Such submission may be made at the request of LTD or upon the Proposer's own initiative.

11.2.5 If LTD determines a Proposer's unpriced technical Proposal to be unqualified, such Proposer shall not be afforded an additional opportunity to supplement its technical Proposal.

11.2.6 Mistakes may be corrected or Proposals may be withdrawn during the initial phase:

- a. Before unpriced technical Proposals are considered;
- b. After any discussions have commenced under Section 11.2.4;
- c. When responding to any Addenda of the RFP; or
- d. In accordance with Section 23.

11.2.7 Second Phase of the Multi-Step RFP Process.

- a. Upon the completion of the first phase, LTD shall either:
 - (i) Open price Proposals submitted in the initial phase (if price Proposals were required to be submitted) from Proposers whose unpriced technical Proposals were found to be qualified; or
 - (ii) If price Proposals have not been submitted, technical discussions have been held, or Addenda to the RFP have been issued, invite each qualified Proposer to submit a price Proposal.
- b. The second phase shall be conducted as any other RFP procurement except:
 - (i) As specifically set forth in this rule; and
 - (ii) That no public notice need be given of this request to submit price Proposals because such notice was previously given.

SECTION 12. Prequalification.

12.1 LTD may, in accordance with these Rules and ORS 279B.120 to 279B.130, permit or require prospective Offerors to prequalify. If LTD permits or requires Offerors to prequalify, LTD shall provide the following:

12.1.1 The information required to be submitted by the prospective Offerors;

12.1.2 The form(s) and application(s) to be used by the prospective Offerors seeking prequalification;

12.1.3 The time for submitting an application for prequalification;

12.1.4 The period of time the prequalification will be valid; and

12.1.5 The type and nature of the contract(s) that the prospective Offeror will be qualified to compete for.

12.2 The deadline for receipt of prequalification applications must be set long enough after the date the notice of prequalification is issued or advertised to allow prospective Offerors a reasonable opportunity to complete and submit the application materials. In no event may the deadline be set earlier than fifteen (15) days after the issue date of the notice of prequalification.

12.3 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 to be qualified to perform substantially similar Contracts for LTD.

12.4 LTD shall approve or deny each application in accordance with ORS 279B.120 and 279B.125 and these Rules.

12.5 In determining whether to approve an application, LTD may only consider the applicable standards set forth in ORS 279B.110(2).

12.6 If LTD subsequently has reasonable cause to believe that there has been a substantial change in the condition of a prospective Offeror, heretofore prequalified, who is no longer qualified or is less qualified, LTD may revoke or revise or reissue the prequalification upon reasonable notice to the prospective Offeror. The notice shall state the reasons found under ORS 279B.120 for revocation or revision of the prequalification and shall inform the Offeror of its right to a hearing under ORS 279B.425. A revocation or revision does not apply to any Contract for which advertisement of a Solicitation Document commenced prior to the date the notice of revocation or revision was received by the prequalified prospective Offeror.

12.7 Any information submitted by an Offeror or prospective Offeror in connection with an application for prequalification that the Offeror deems confidential and/or a trade secret shall clearly be labeled "confidential trade secret."

12.8 Any prospective Offeror who wishes to appeal a revocation or revision may do so in accordance with ORS 279B.125.

SECTION 13. Debarment of Prospective Offerors.

13.1 LTD may debar prospective Offerors from consideration of the award of a Contract by LTD 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.

13.2 LTD shall provide such notice required under ORS 279B.130, in Writing, personally delivered or sent by registered or certified mail, to the prospective Offeror. The notice shall specify the following:

13.2.1 That LTD intends to debar the prospective Offeror;

13.2.2 The reasons for the debarment;

13.2.3 The period of debarment, which period may not be longer than three (3) years; and

13.2.4 A statement of the prospective Offeror's appeal rights and appeal deadlines.

13.3 LTD shall notify the prospective Offeror, in Writing, personally delivered or sent by registered or certified mail, of the debarment of the Offeror. The notice shall specify the following:

13.3.1 The effective date and period of the debarment;

13.3.2 The reasons for the debarment; and

13.3.3 A statement of the debarred Offeror's appeal rights and appeal deadlines.

13.4 Notwithstanding the limitation on the term for debarment in ORS 279B.130(1)(b), LTD may determine that a previously debarred Offeror is not responsible prior to Award of a Contract.

13.5 LTD 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.

13.6 If a prospective Offeror wishes to appeal a debarment by LTD, such prospective Offeror may do so in accordance with ORS 279B.130.

SECTION 14. Public Notice of Procurement.

14.1 LTD shall provide public notice of every Solicitation Document in accordance with this Section 14. Such notices shall be in the manner specified in Section 14.2 and contain all information set forth in Section 14.2. Notices may also contain any other appropriate information. LTD may charge a fee or require a deposit for copies of the Solicitation Documents. LTD may give additional notice using any method determined by LTD to foster and promote competition, including:

14.1.1 Mailing notice of availability of Solicitation Documents to any prospective Offerors that have expressed an interest in LTD's procurements; or

14.1.2 Placing notice on LTD's Web site if the requirements of Section 14.3 are met.

14.2 Unless LTD/CRB authorizes the publication of notice of the Solicitation Document in electronic format on its Web site, every Solicitation Document shall be advertised by publication 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 LTD's Purchasing Manager may determine to be necessary or desirable to foster and promote competition. All advertisements for Solicitation Documents shall state:

- 14.2.1 Where, when, how, and for how long the Solicitation Documents may be obtained;
 - 14.2.2 That the Closing Date shall not be less than fourteen (14) days from the first notice for an IFB or thirty (30) days from the first notice for an RFP, unless LTD/CRB determines that a shorter interval is in LTD'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 Section 14.2 and the Closing Date be less than seven (7) days as set forth in ORS 279B.055(4)(f).
 - 14.2.3 The address where Offers will be received and the name and title of the person designated to receive Offers;
 - 14.2.4 The date that prequalification applications must be filed, if prequalification is a requirement;
 - 14.2.5 The character of the services or work to be done or the products or goods to be purchased;
 - 14.2.6 The office where specifications for the Contract and terms and conditions of the Contract may be reviewed;
 - 14.2.7 The date, time, and place that Offers will be publicly opened;
 - 14.2.8 That each Offer must contain a statement as to whether the Offeror is a "Resident Bidder" as defined in ORS 279A.120;
 - 14.2.9 That LTD may reject any Offer not in compliance with all prescribed public contracting procedures and requirements and may reject for good cause any or all Offers upon a finding by LTD that it is in LTD's best interest to do so;
 - 14.2.10 Whether or not a contractor must be licensed under ORS 468A.720;
 - 14.2.11 If applicable, the federal funding amount or percentage of the project that will be paid for by federal funds;
 - 14.2.12 If applicable, that the Contract is for a Public Work subject to ORS Chapter 279C or the Davis Bacon Act (40 U.S.C. §276(a)); and
 - 14.2.13 Any other information LTD deems appropriate.
- 14.3 If LTD/CRB desires to advertise the procurement on its Web site, it shall: (i) publish notice of its intent to do so weekly, for not less than four (4) consecutive weeks, in at least one newspaper of general circulation in the area where the Contract is to be performed; and (ii) post in its business office a notice of its intent that LTD will publish the advertisement on its Web site. This notice shall include LTD's Web site address where the procurement will be advertised.

- 14.4** If the Contract is for a Public Improvement having an estimated cost in excess of \$125,000, then in addition to the foregoing requirements of this Section 14, LTD shall follow the procedures set forth in Sections 39 and 41 of these Rules.

SECTION 15. Pre-Offer Conferences.

At the option of LTD, pre-Offer conferences may be held to explain the procurement requirements and/or to conduct site inspections. LTD may require attendance at the pre-Offer conference as a condition for making an Offer. Such conferences shall be announced to all prospective Offerors in the Solicitation Documents. The pre-Offer conference shall be held within a reasonable time after the Solicitation Documents have been issued to allow Offerors to become aware of it, but sufficiently before the Closing Date to allow consideration of the conference results in preparing Offers. Statements at the pre-Offer conference shall not change the Solicitation Document unless confirmed to all prospective Offerors by means of a written Addendum to the Solicitation Document.

SECTION 16. Offer Preparation and Submission.

- 16.1** Offers shall be typed or prepared in ink and shall be Signed in ink by the Offeror or authorized representative of the Offeror.
- 16.2** Offers shall be submitted in a sealed envelope, appropriately marked and in accordance with the instructions in the Solicitation Document.
- 16.3** Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless otherwise instructed in the Solicitation Document.
- 16.4** Alterations, corrections, or erasures, if any, to its Offer shall be initialed in ink by Offeror and submitted prior to opening of the Offers and in accordance with the requirements for submitting an Offer set forth in the Solicitation Document.
- 16.5** Offers shall include all documents, descriptive literature, and/or samples required under the Solicitation Document. LTD will dispose of product samples, or make them available for Offerors to retrieve, in accordance with the Solicitation Document.
- 16.6** It is Offeror's responsibility to ensure that its Offer is actually submitted in the manner and format specified in the Solicitation Document and to the delivery point and/or person designated in the Solicitation Document. LTD will not be responsible for any Offer not submitted in accordance with the requirements of the Solicitation Document.
- 16.7** It is Offeror's responsibility for ensuring that LTD receives its Offer prior to the Closing Date, regardless of the method used to deliver and submit the Offer.
- 16.8** Any information submitted by Offeror in connection with an Offer that Offeror deems confidential and/or a trade secret shall clearly be labeled "confidential trade secret."
- 16.9** The Offer is Offeror'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 LTD's acceptance for the period specified in Section 24 below. LTD's award of the Contract constitutes acceptance of the Offer and binds the Offeror to the Contract.

- 16.10** Except to the extent the Proposer is authorized to propose certain terms and conditions pursuant to Section 10, a Proposer shall not make its Proposal contingent upon LTD's acceptance of any terms or conditions (including specifications) other than those contained in the Solicitation Document.
- 16.11** By signing and submitting the Offer, the Offeror acknowledges that it has received and understands the terms and conditions of the Solicitation Document and that it accepts and agrees to be bound by those terms and conditions. If the RFP permits proposal of alternative terms under Section 10, the Proposer's Proposal shall include the non-negotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by LTD.
- 16.12** LTD may authorize Offerors to submit facsimile Offers. If LTD determines that Bid or Proposal security is or will be required, LTD should not authorize facsimile Offers unless LTD has another method for receipt of such security. Prior to authorizing the submission of facsimile Offers, LTD shall determine that its equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time. In addition, LTD shall establish administrative procedures and controls: (i) to receive, identify, record, and safeguard facsimile Offers; (ii) to ensure timely delivery of Offers to the location of the opening of Offers; and (iii) to preserve the Offers as sealed. LTD shall include a provision that it shall not be responsible for any failure attributable to the transmission or receipt of the facsimile Offer.

SECTION 17. Offer Security.

- 17.1** LTD may, but does not have to, require Offer security for Contracts other than Public Improvement Contracts. If LTD does require Offer security, it shall not exceed ten percent (10%) of the Offeror's Offer.
- 17.2** LTD shall require Offer security on all Public Improvement Contracts in accordance with Section 39 of these Rules.
- 17.3** The following forms of Offer security will be accepted by LTD:
- 17.3.1** A Surety Bond from a surety company authorized to do business in the State of Oregon and meeting any applicable federal regulations;
 - 17.3.2** An irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or
 - 17.3.3** A cashier's check, certified check, or savings and loan secured check.
- 17.4** **Return of Offer Security.** The Offer security of all unsuccessful Offerors shall be returned after a Contract has been executed, or all other Offers have been rejected. LTD may return the Offer security of unsuccessful Offerors after Offer opening but prior to award, if the return does not prejudice the Contract Award and provided that the security of at least the three (3) lowest Offerors is retained pending the execution of a Contract.
- 17.5** **Retention of Offer Security.** LTD may retain Offer security in accordance with ORS 279B.055(3) if the Offer is in response to an IFB or in accordance with ORS 279B.060(3) if the Offer is in response to an RFP.

SECTION 18. Addenda to Solicitation Documents.

- 18.1** LTD may modify a Solicitation Document only by Written Addenda. The Offeror shall provide Written acknowledgment of the receipt of any Addendum issued either with the Solicitation Document or separately prior to Offer opening, on the form included with the Addendum. Offeror must acknowledge the Addendum by including the Addendum number and signing the "Receipt of Addendum" section. If the Addendum is issued prior to the Closing Date, this Signed acknowledgment must be returned at the same time and in the same envelope with the Offer.
- 18.2** The Solicitation Document shall notify all prospective Offerors of how LTD will make Addenda available before the Closing Date, and at each subsequent step or tier of evaluation, if LTD will engage in a multi-step IFB process in accordance with Section 11.1 of these Rules, or a multi-tiered or multi-step RFP process in accordance with Section 10 and Section 11.2 of these Rules. For example, LTD may mail notice of Addenda to all prospective Offerors known to have obtained Solicitation Documents or may provide notice by posting such notice of Addenda on LTD's Web site.
- 18.3** All Addenda shall be issued within a reasonable time to allow prospective Offerors to consider them in preparing their Offers. Where circumstances mandate quick action, and where the change or correction described in an Addendum is minor, as determined at the discretion of LTD, the time period between issuance of the Addendum and the Closing Date may be as little as seventy-two (72) hours, but in the absence of such a finding by LTD, the time period shall be at least five (5) calendar days. If necessary, LTD may notify prospective Offerors by telephone, followed by written confirmation.
- 18.4** Notwithstanding Section 18.3 of these Rules, an Addendum that modifies the evaluation criteria selection process or procedure for any tier of competition under a multi-step IFB or a multi-tiered or multi-step RFP issued in accordance with ORS 279B.060(6)(d) and Section 10 through Section 11 must be issued no fewer than five (5) days before the beginning of that tier or step of competition, unless LTD determines that a shorter period is sufficient to allow Offerors to prepare for that step or tier of competition. LTD shall document the factors in making such determination.
- 18.5** Unless the Addendum provides a different deadline, an Offeror must submit any protest or request for change to the Addendum within twenty-four (24) hours following the issuance of the Addendum, or until the last day the Offeror may submit a request for change under Section 20 or protest under Section 36.5, whichever is longer. If a request for change or protest is made pursuant to this section, LTD will only consider requests for change or protests to the Addendum. LTD will not consider requests for change or protests on any matter not directly addressed by the Addendum. Notwithstanding any provision of this Section 18, LTD is not required to provide a protest period for Addenda issued after the initial Closing Date during a multi-tier or multi-step procurement process.

SECTION 19. Pre-Closing Date Modification or Withdrawal of Offer.

- 19.1** Offers, once submitted, may be modified in Writing prior to the Closing Date. Any modifications shall be prepared on the Offeror's letterhead, Signed by an authorized representative, and shall state that the new document supersedes or modifies the prior Offer. Offeror shall prepare and submit any modification in accordance with the

requirements of Section 16. Facsimile modification shall not be accepted unless expressly authorized in the Solicitation Document. To ensure the integrity of the procurement process, the envelope containing any modifications to an Offer shall be marked as follows:

Offer Modification
Offer Number or Other Identification

19.2 Offers may be withdrawn by Written notification on Offeror's letterhead, Signed by an authorized representative, delivered to the individual and location specified in the Solicitation Document, and received prior to the Closing Date. Offers also may be withdrawn in person prior to the scheduled Closing Date upon presentation of appropriate identification and evidence of authority satisfactory to LTD.

19.2.1 Unopened Offers withdrawn under this Section 19.2 may be released to the Offeror after voiding any date and time stamp.

19.2.2 Requests to withdraw Offers shall be marked as follows:

Offer Withdrawal
Offer Number or Other Identification

19.3 All documents relating to the modification or withdrawal of an Offer shall be made a part of the appropriate procurement file.

SECTION 20. Request for Change or Clarification.

20.1 An Offeror may submit a written request for a change to the Solicitation Document and/or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver the written request for change to LTD not less than ten (10) days prior to the initial Closing Date. In submitting a request for change, the Offeror shall include a statement of the requested change(s) together with the detailed reason for the requested change. All requests for change shall be marked as follows:

Request for Change
Offer Number or Other Identification

20.2 LTD shall not consider an Offeror's request for change after the deadline established for submitting such request. LTD shall provide notice to the applicable Offeror if it entirely rejects a request. If LTD is agreeable to the request, in whole or in part, LTD shall issue an Addendum, in accordance with Section 18, reflecting its determination.

20.3 Prior to the deadline for submitting a request for change, an Offeror may request that LTD clarify any provision of the Solicitation Document. LTD's clarification to an Offeror,

whether orally or in writing, does not change the Solicitation Document and is not binding on LTD unless LTD amends the Solicitation Document by an Addendum.

SECTION 21. Receipt, Opening, and Recording of Offers.

- 21.1** Upon LTD's receipt of an Offer and/or modification to an Offer, LTD shall time-date stamp or mark by hand the time and date of receipt of the Offer and shall store the Offer and/or modification, unopened, in a secure place until Offer opening. If Offers or modifications are opened inadvertently or are opened prior to the time and date set for Offer opening, the Offers or modification documents shall be resealed and stored for opening at the correct time. If an Offer or modification to an Offer is resealed, documentation of this procedure shall be placed in the procurement file.
- 21.2** Offers and modifications shall be opened publicly at the time, date, and place designated in the Solicitation Document.
- 21.2.1** In the case of an IFB, if witnesses are present at the Offer opening, and to the extent practicable, the name of each Offeror, the Offer price(s), and such other information as LTD considers appropriate, shall be read aloud. On voluminous Offers, Offerors may be advised, as part of the Solicitation Document, that the Offers will not be read aloud.
- 21.2.2** In the case of an RFP, if the Solicitation Document so provides, LTD will not read Offers aloud at the public opening. Further, Proposals may be opened in a manner to avoid disclosure of contents to competing Proposers during, when applicable, the process negotiation, but LTD shall record and make available the identity of all Proposers from and after opening of the Proposals. Notwithstanding ORS 192.410 to 192.505, LTD does not have to open Proposals to public inspection until after the notice of intent to award a Contract is issued. Further, the fact that Proposals are opened at a meeting defined in ORS 192.610 does not make their contents subject to disclosure, regardless of whether LTD fails to give notice of, or provide for an executive session for the purpose of, opening Proposals.
- 21.3** Except as provided above, the opened Offers shall be available for public inspection. Notwithstanding the requirement to make Offers available for public inspection, LTD may withhold from disclosure to the public materials that are exempt or conditionally exempt from disclosure under ORS 192.501 and 192.502. LTD may verify and determine that the information claimed to be exempt under ORS 192.501 and/or 192.502, in fact, is exempt or conditionally exempt from disclosure. If LTD determines that such designation is not in accordance with applicable law, LTD shall make those portions of the Offer available for public inspection. Offeror shall clearly designate any such information as exempt/conditionally exempt under ORS 192.501 and/or 192.502. Further, Offeror shall separate such material designated as exempt/conditionally exempt from other submitted materials. Prices, makes, model, or catalog numbers of items offered, scheduled delivery dates, and terms of payment shall be publicly available regardless of any designation to the contrary.

SECTION 22. Late Offers, Late Withdrawals, and Late Modifications.

- 22.1** Any Offer, request for modification of an Offer, or request for withdrawal of an Offer received by LTD after the Closing Date will be considered late. Except as set forth in Section 22.2 below, late Offers or late requests for modification or withdrawal shall not be considered by LTD.
- 22.2** A late Offer, late request for modification of an Offer, or late request for withdrawal of an Offer shall be considered by LTD either if: (i) expressly permitted in Section 23 or (ii) the Offeror has an original, unaltered receipt issued by LTD acknowledging the timely receipt of the Offer or request for modification or withdrawal and such receipt contains LTD's time-date stamp clearly and legibly showing that the Offer or request for modification or withdrawal was received prior to the Closing Date.

SECTION 23. Mistakes in Offers.

- 23.1** This Section 23 proscribes the actions LTD may take if LTD discovers mistakes in an Offer after the Closing Date but prior to award of the Contract.
- 23.2** LTD shall carefully consider a request to clarify or withdraw an Offer because of a mistake to protect the integrity of the Competitive Procurement process and to assure fairness. If the mistake is attributable to an error in judgment, LTD shall not allow the Offeror to correct or withdraw the Offer. If the mistake is attributable to a minor informality or a clerical error, LTD may take the following action:
- 23.2.1** LTD may waive, or permit the 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 is an insignificant mistake that can be waived or corrected promptly without prejudice to other Offerors or LTD. A minor informality does not affect price, quantity, quality, delivery, or substantive contractual conditions. Examples of minor informalities include, but are not limited to, the failure of an Offeror to:
- a. Submit the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;
 - b. Sign the Offer form in the designated block, provided Offeror's signature appears in the Offer, evidencing an intent to be bound; or
 - c. Acknowledge receipt of an Addendum to the Solicitation Document, provided it is clear on the face of the Offer that the Offeror received the Addendum and intended to be bound by its terms, and that the Addendum involved did not affect price, quantity, quality, or delivery.
- 23.2.2** LTD may permit the Offeror to correct a clerical error if the intended Offer and clerical error are clearly evident on the face of the Offer, and the Offeror confirms LTD's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples of clerical errors include typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors. For discrepancies between unit prices and extended prices, unit prices shall prevail.

23.2.3 LTD 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 Section 23 or an error in judgment;
- c. That the error cannot be corrected or waived under this Section 23.2;
- d. That 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 Offeror acted without gross negligence in submitting an Offer that contained a claimed error;
- f. That Offeror will suffer substantial detriment if LTD does not grant Offeror permission to withdraw the Offer;
- g. That LTD's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on LTD or the public it represents; and
- h. That Offeror promptly gave notice of the claimed error to LTD.

The criteria in Section 23.2.3 shall determine whether LTD will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether LTD will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Offer security), or without liability to LTD based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by LTD, whether by Award to the next lowest responsive and Responsible Bidder or the Responsible Proposer with the best Proposal, or by resort to a new solicitation.

23.3 LTD shall reject any Offer in which a mistake is clearly evident on the face of the Offer and the intended correct Offer cannot be substantiated from accompanying documents, i.e., documents submitted with the Offer pursuant to the Solicitation Document requirements.

23.4 The procedures and criteria set forth in this Section 23 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 these Rules only to the extent permitted by applicable law.

SECTION 24. Time for Acceptance.

Offers are "Firm Offers," irrevocable and binding on the Offeror for not less than thirty (30) days from the Closing Date, unless otherwise specified in the Solicitation Document.

SECTION 25. Extension of Time for Acceptance of Offers.

Notwithstanding Section 24, after opening Offers, LTD may request, orally or in Writing, that Offerors agree, in Writing, to extend the time during which LTD may accept their Offers. If the Offerors agree to such extension, the Offer shall continue as a Firm Offer for the agreed-upon extension.

SECTION 26. Evaluation.

26.1 Responsibility. Before awarding a Contract, LTD shall make a determination that the Offeror submitting the lowest Responsive Bid or the best Responsive Proposal is responsible. LTD shall use the standards set forth in ORS 279B.110 and Section 33 to determine if a Bidder or a Proposer is responsible. If LTD 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.

26.2 LTD may require an Offeror to submit Product Samples, Descriptive Literature, technical data, or other material, and may require any of the following prior to award:

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

26.2.2 Examination of such elements as appearance, finish, or feel; or

26.2.3 Other examinations to determine whether the product conforms to the specifications set forth in the Solicitation Document.

26.3 LTD shall evaluate product acceptability only in accordance with the evaluation criteria set forth in the Solicitation Document and only to determine that the product does, in fact, meet the criteria provided in the Solicitation Document. LTD shall reject any Offer that provides a product that does not meet the requirements set forth in the Solicitation Document. LTD's rejection of an Offer because it offers goods and/or services that do not conform to the requirements of the Solicitation Document is not considered a disqualification and is not appealable under ORS 279B.130.

26.4 Evaluation of Bids. If LTD solicited Bids using an IFB, the following procedures apply:

26.4.1 The Contract, if awarded, shall be awarded to the Responsible Bidder with the lowest Responsive Bid. LTD shall evaluate the Bids using only the objective criteria that was set forth in the IFB to determine the Responsible Bidder that submitted the lowest Responsive Bid. In determining the lowest Responsive Bid, LTD shall add a percent increase to the Bid of any nonresident Bidder equal to the percent, if any, of the preference given that Bidder in the state in which the Bidder resides.

26.4.2 Nothing in this Section 26.4 shall be deemed to permit a Contract award to a Responsible Bidder submitting a higher quality item than that designated in the IFB if such Bidder does not also have the lowest Responsive Bid.

26.4.3 After Bid opening, LTD may conduct discussion with Responsible Bidders, submitting apparent Responsive Bids, for the purpose of clarification to assure

full understanding of the Bid. All Bids, in LTD's sole discretion, which need clarification shall be accorded such an opportunity. LTD shall document clarification of any Bidder's Bid in the procurement file.

26.4.4 Except as permitted by Section 26.4.3, LTD shall not negotiate with any Bidder.

26.5 Evaluation of Proposals. If LTD solicited Proposals using an RFP, the following procedures apply:

26.5.1 The Contract, if awarded, shall be awarded to the Responsible Proposer with the best Responsive Proposal. LTD shall evaluate the Proposals using only the criteria that was set forth in the RFP and allowed by applicable law. LTD shall evaluate the Proposals to determine the Responsible Proposer that submitted the best Responsive Proposal.

26.5.2 If LTD permitted negotiation in accordance with Section 10, LTD may negotiate with Proposers in determining the best Proposal by a Responsible Proposer.

26.6 Award.

26.6.1 General. In general, if awarded, LTD shall award the Contract to the Responsible Bidder who submitted the lowest Responsive Bid or to the Responsible Proposer who submitted the best Responsive Proposal. In awarding the Contract, LTD shall evaluate the Offer only on the basis set forth in the Solicitation Document, these Rules, and applicable law. If consistent with the provisions of the Solicitation Document and it is in the public interest, LTD may award by item, groups of items, or entire Offer.

26.6.2 An IFB or RFP 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 LTD's expected purchases, or the grand total of all items.

26.6.3 Multiple Awards. Notwithstanding Section 26.6.1, LTD may award multiple Contracts under an IFB or RFP in accordance with the criteria set forth in the Solicitation Document. Multiple awards shall not be made if a single award will meet LTD's needs, including but not limited to 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 Offerors that multiple Contracts may be awarded for the IFB or RFP shall not preclude LTD from awarding a single Contract for such procurement. If the IFB or RFP permits the award of multiple Contracts, LTD shall specify in the Solicitation Document the criteria it will use to choose from the multiple Contracts when purchasing goods or services.

26.6.4 Partial Awards. If after evaluation of Offers, LTD determines that an acceptable Offer has been received for only parts of the requirements of the Solicitation Document:

- a. LTD may award a Contract for the parts of the Solicitation Document for which acceptable Offers have been received; or
- b. LTD may reject all Offers and may issue a new Solicitation Document on the same or revised terms, conditions, and specifications.

26.6.5 All or None Offers. LTD may award all or none Offers if the evaluation shows an all or none award to be the lowest cost for Bids or the best of the Proposals of those submitted.

26.7 If federal funds are involved, a cost or price analysis must be made for every procurement, including Contract modifications, as outlined in FTA Circular 4220.1E, as amended.

26.7.1 LTD can accomplish a price analysis by comparison of proposed prices received in response to a Solicitation Document, by comparison of prior Contract prices for same or similar products or services, by comparison with competitive published price lists, and by comparison of proposed prices with independent cost estimates.

26.7.2 LTD must perform a cost analysis if there is a single Offer and there is no pricing data available, as defined above, or for Contract modifications and change orders valued at more than \$100,000. A cost analysis means reviewing and evaluating the separate cost elements and proposed profit of an Offeror's cost or pricing data in order to form an opinion on the degree to which the proposed costs represent what the Contract should cost, assuming reasonable economy and efficiency. To perform a cost analysis, each element of cost must be reviewed to determine whether an Offeror's estimate contains an accurate and reasonable prediction of the costs that will be incurred during Contract performance. The Contract price is figured by adding a rate of profit determined to be fair. All reasonable costs of performance should be considered.

SECTION 27. Life Cycle Costing.

27.1 In determining the lowest Bid or best Proposal, LTD may use "Life Cycle Costing," provided LTD meets the requirements of Section 27.2. As used in this rule, "Life Cycle Costing" means determining the cost of a product for its estimated useful life, including its disposal.

27.2 If LTD uses Life Cycle Costing in connection with a procurement, LTD must comply with the following requirements:

27.2.1 LTD shall identify in the Solicitation Document those factors that, for evaluation purposes, will have cost implications over the life of the product and that will be used to adjust the Bid or Proposal price of the product;

27.2.2 The Solicitation Document shall clearly set out the factors and the methodology to be used in calculating the Life Cycle Costing adjustments; and

27.2.3 The Life Cycle Costing adjustments shall be applied to the price of the product(s) offered in the Bid or Proposal. After application of the Life Cycle

Costing adjustments, the Bid or Proposal that results in the lowest overall ownership costs shall be considered the lowest Bid or best Proposal for purposes of price evaluation of the product(s).

SECTION 28. Low Tie Offers.

- 28.1 Definition.** "Low Tie Offers" are either (i) low tie Responsive Bids from Responsible Bidders; or (ii) high tie Responsive Proposals from Responsible Proposers that are identical in price, fitness, availability, and quality.
- 28.2 Award.** If awarded, LTD shall award the Contract in the following order of precedence:
- 28.2.1** LTD shall prefer the goods or services that have been manufactured in Oregon in accordance with ORS 279A.120.
- 28.2.2** If Low Tie Offers remain tied after application of Section 28.2.1, preference shall be awarded according to the following order of precedence:
- a.** Preference shall be given to the Offeror whose principal offices or headquarters are located in Oregon.
 - b.** If a tie still remains after applying subsection a. above, award shall be made by drawing lots among any tied Oregon Offerors. LTD shall give such Offerors notice and an opportunity to be present when the lots are drawn.
 - c.** If none of the tied Offerors is located in Oregon, award of the Contract shall be made by drawing lots among all tied Offerors.
- 28.2.3** If federal funds are to be used in the procurement, neither Section 28.2.1 nor Sections 28.2.2.a. and b. shall apply. In such event, award of the Contract shall be made by drawing lots pursuant to Section 28.2.2.c.

SECTION 29. Notice of Intent to Award.

- 29.1** LTD 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 LTD determines that circumstances require prompt execution of the Contract, in which case LTD may provide a shorter notice period. LTD shall document the specific reasons for the shorter notice period in the procurement file.
- 29.2** LTD's award shall not be final until the later of the following:
- 29.2.1** The expiration of the protest period provided pursuant to Section 36.6; or
 - 29.2.2** LTD provides Written responses to all timely-filed protests denying the protests and affirming the award.

SECTION 30. Documentation of Award.

- 30.1 Basis of Award.** Following award of a Contract, LTD shall make a record showing the basis for determining the successful Offeror as part of the procurement file.
- 30.2 Contents of Award Record.** LTD's record shall consist of the following:
- 30.2.1** Offers received by LTD.
 - 30.2.2** If in response to an IFB, the completed Bid tabulation sheet and Written justification for any rejection of lower Bids.
 - 30.2.3** If in response to an RFP, the completed evaluation of Proposals and Written justification for any rejection of higher scoring Proposals.
 - 30.2.4** If LTD engaged in any methods of Contractor selection described in ORS 279B.060(b)(6) and Sections 10 and 11.2, Written documentation of the content of any discussions, negotiations, best and final Offers, or any other procedures LTD used to select a Proposer to which LTD awarded a Contract.

SECTION 31. Foreign Contractor (ORS 279A.120).

If the amount of the Contract exceeds \$10,000 and the Contractor is a "Nonresident Bidder," the Contractor shall promptly report to the Oregon Department of Revenue on forms to be provided by the Department of Revenue the total Contract price, terms of payment, length of Contract, and such other information as the Department of Revenue may require before final payment can be made on the Contract. A copy of the report shall be forwarded to LTD. LTD must satisfy itself that the requirement of this Section 31 has been complied with before LTD issues a final payment on the Public Contract. For the purposes of these Rules, a Nonresident Bidder is defined under ORS 279A.120(a).

SECTION 32. Availability of Award Decisions.

- 32.1 Contract Documents.** To the extent required by the Solicitation Document, LTD shall deliver to the successful Offeror a Signed purchase order, Price Agreement, or other Contract documents, as applicable.
- 32.2 Notification of Unsuccessful Offerors.** LTD will notify unsuccessful Offerors within three (3) days of a Contract award. Tabulations of received Bids or evaluation summaries of received Proposals may be obtained for a nominal charge, either in person or by submitting a Written request to LTD accompanied by payment. If the request is in Writing, it must include the Solicitation Document number and have a self-addressed, postage-prepaid envelope enclosed.
- 32.3 Availability of Procurement File.** After notice of intent to award under Section 29, LTD shall make the completed procurement file available for public review at LTD's main office in accordance with these Rules and applicable law. Notwithstanding the requirement to make the procurement file available for public inspection, as set forth in Section 21, LTD may withhold from disclosure to the public materials that are exempt or conditionally exempt from disclosure under ORS 192.501 and 192.502.

- 32.4 Copies from Procurement File.** Copies of material from the procurement file may be obtained upon payment of a reasonable copying charge.
- 32.5 Debriefing.** If the procurement utilized the RFP process, unsuccessful Proposers may, within three (3) days after receipt of notice of intent to award, submit to LTD a Written request for a debriefing of the award decision. LTD shall hold a debriefing for all unsuccessful Proposers who timely submitted a Written request within five (5) days after receipt of such requests, or as soon as reasonably practical. LTD will cover the following topics at the debriefing:
- 32.5.1** LTD's evaluation of the significant weaknesses or deficient factors in the unsuccessful Proposers' Proposals;
 - 32.5.2** The overall evaluated cost and technical rating of the successful Proposal, the overall evaluated cost and technical rating of the unsuccessful Proposals of the debriefed Proposers, and the overall ranking of all Proposals;
 - 32.5.3** A summary of the rationale for the award;
 - 32.5.4** In the case of a Proposal that proposes a commercial item as an end item under the Contract, the make and model of the item being provided by the successful Proposer; and
 - 32.5.5** The debriefing will not include a point-by-point comparison of all Proposals, and LTD will not disclose any information that is exempt from disclosure by these Rules and/or applicable law.

SECTION 33. Rejection of Offers.

- 33.1** LTD has the right to reject any or all Offers if it is in LTD's best interest, as determined by LTD. If LTD rejects all Offers, LTD shall notify all Offerors of the rejection of all Offers, along with the reasons for rejection of all Offers.
- 33.2** LTD shall reject an Offer upon finding that the Offer:
- 33.2.1** Is contingent upon LTD's acceptance of terms and conditions that differ from the Solicitation Document;
 - 33.2.2** Takes exceptions to terms and conditions (including specifications) in the Solicitation Document or Contract;
 - 33.2.3** Attempts to prevent public disclosure of matters in contravention of the terms and conditions of the Solicitation Document or in contravention of applicable law;
 - 33.2.4** Is not in substantial compliance with the Solicitation Document or the prescribed public solicitation process; or
 - 33.2.5** Is late.

33.3 LTD shall reject an Offer upon finding that the Offeror:

- 33.3.1** Has not prequalified, if prequalification was required;
- 33.3.2** Has been debarred as set forth in Section 13 and ORS 279B.130 or disqualified pursuant to Section 6.2.4;
- 33.3.3** Has been declared ineligible under ORS 279.361 by the Bureau of Labor and Industries, if the Contract is for a Public Work;
- 33.3.4** Is not qualified by the CCB, if the Contract is for a Public Improvement;
- 33.3.5** Has not submitted the required Offer security, if required by the Solicitation Document;
- 33.3.6** Is not a Responsible Offeror. In determining if an Offeror is responsible, LTD must determine pursuant to ORS 279B.110 that the Offeror has appropriate financial, technical, material, equipment, facility, and personnel resources and expertise necessary to demonstrate Offeror's ability to meet all Contract requirements. In making this determination, LTD may investigate to determine if Offeror has a satisfactory record of contract performance, a satisfactory record of integrity, a satisfactory record of compliance with public policy, and is legally qualified to contract with LTD. LTD may require Offeror to supply all necessary information in connection with its inquiry into Contractor's responsibility; or
- 33.3.7** Has not met the requirements of ORS 279A.105, if required by the Solicitation Document.

For the purposes of this Section 33, LTD 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 Section 33 or to apply the debarment provisions of ORS 279B.130.

SECTION 34. Cancellation, Delay, or Suspension of Procurement.

- 34.1** LTD may cancel, delay, or suspend an IFB, RFP, or any other procurement if LTD finds it is in LTD's best interest, as determined by LTD. LTD reasons for such cancellation, delay, or suspension, as applicable, shall become part of the procurement file.
- 34.2** If such cancellation, delay, or suspension is prior to the Closing Date, LTD shall provide notice of such cancellation, delay, or suspension in the same manner as LTD initially provided notice of the solicitation. If such cancellation, delay, or suspension is after the Closing Date, LTD shall provide notice to all Offerors who submitted Offers.
- 34.3** LTD shall not be liable to any Offeror for any loss or expense caused by or resulting from the cancellation, delay, or suspension of a solicitation or award.

SECTION 35. Disposition of Offers if Solicitation Document Canceled.

- 35.1 Prior to Offer Opening.** When a Solicitation Document is canceled prior to Offer opening, all Offers received will be returned to Offerors unopened, if submitted with a clearly visible return address. If there is no return address on the envelope, the Offer will be opened to determine the source and then returned to Offeror.
- 35.2 After Offer Opening.** If LTD cancels the procurement after opening, LTD may either return the Offers or retain them for the procurement file. If all Offers are rejected, LTD shall retain any Offers received as part of LTD's procurement file.

SECTION 36. Protest Procedures.

36.1 Offerors may protest to LTD that they were prejudiced by LTD's procurement or award procedures. All protests must be submitted in Writing to LTD in accordance with these Rules.

36.2 General Procedures.

36.2.1 All protests shall be marked as follows:

Offer or Award Protest
Offer Number or Other Identification

36.2.2 The burden is on the protesting Offeror to produce evidence to sustain its protest. Unless a hearing is required by statute, LTD may base its decision on Offeror's or LTD's written materials or, in its discretion, may allow oral testimony. If oral testimony will be allowed, LTD shall provide the protesting Offeror with notice of such allowance, and the oral testimony shall be heard within ten (10) business days after the protesting Offeror receives the notice allowing oral testimony.

36.2.3 If federal funds are used in the procurement at issue, an Offeror may seek review by the FTA after the Offeror has complied with the protest procedures of this Section 36 and if otherwise permitted under FTA Circular 4220.1E, as amended. The FTA also may entertain a protest that alleges that LTD failed to have or follow its written protest procedures. Any protest to the FTA must be filed by the Offeror with the FTA not later than five (5) days after the date the protesting Offeror receives notice of the decision of LTD, or within five (5) days after the protesting Offeror knows or has reason to know that LTD has failed to render a final decision.

36.2.4 Unless otherwise required by federal rules or regulations or Oregon statutes, LTD shall not be obligated to postpone Offer opening or award of a Contract pending resolution of a protest where LTD determines that proceeding with the selection process or award is in the best interest of LTD. LTD shall document the basis and include it in the procurement file.

36.3 Protests and Judicial Review of Special Procurements.

36.3.1 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 LTD and exhaust all administrative remedies.

36.3.2 Delivery.

- a. An Affected Person must deliver a Written protest to LTD 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. 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 LTD within fourteen (14) days after the first date of public notice of the approval of a Special Procurement by LTD, unless a different protest period is provided in the public notice of the approval of a Special Procurement.

36.3.3 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.

36.3.4 Contract Review Authority Response.

- a. LTD shall not consider an Affected Person's protest of LTD's request for approval of a Special Procurement submitted after the timeline established for submitting such protest under this Section 36.3 or such different time period as may be provided in the public notice of the request for approval of a proposed Special Procurement. LTD shall issue a Written disposition of the protest in a timely manner. If LTD 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. LTD 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 Section 36.3 or such different time period as may be provided in the public notice of the approval of a Special Procurement. LTD shall issue a Written disposition of the protest in a timely manner. If LTD 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.

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

36.4 Protests and Judicial Review of Multi-Tiered and Multi-Step Solicitations.

36.4.1 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 LTD and exhaust all administrative remedies.

36.4.2 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 LTD'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 those ineligible Offerors are ineligible for inclusion in the competitive range because: their Proposals were not Responsive, or LTD committed a substantial violation of a provision in the Solicitation Document or of an applicable procurement statute, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been included in the competitive range.

36.4.3 Delivery. Unless otherwise specified in the Solicitation Document, an Affected Offeror must deliver a Written protest to LTD within five (5) business days after issuance of the notice of the competitive range or notice of subsequent tiers or steps.

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

36.4.5 LTD Response. LTD shall not consider an Affected Offeror's multi-tiered or multi-step solicitation protest submitted after the timeline established for submitting such protest under Section 36.4, or such different time period as may be provided in the Solicitation Document. LTD shall issue a Written disposition of the protest in a timely manner. If LTD upholds the protest, in whole or in part, LTD may in its sole discretion either issue an Addendum under Section 18 reflecting its disposition or cancel the procurement or solicitation under Section 34.

36.4.6 Judicial Review. Judicial review of LTD's decision relating to a multi-tiered or multi-step solicitation protest shall be in accordance with ORS 279B.420.

36.5 Protests and Judicial Review of Solicitations.

36.5.1 Purpose. A prospective Offeror may protest the procurement process or the Solicitation Document, including its specifications, terms, and/or conditions 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 LTD and exhaust all administrative remedies.

- 36.5.2 Contract-Specific Special Procurements.** Notwithstanding Section 36.5.1, a Person may not protest, challenge, or review a Contract-Specific Special Procurement unless approval of such Contract-Specific Special Procurement by LTD has been invalidated by a reviewing circuit court under ORS 279B.400.
- 36.5.3 Delivery.** Unless otherwise specified in the Solicitation Document, a prospective Offeror must deliver a Written protest to LTD not less than five (5) business days prior to the Closing Date.
- 36.5.4 Content of Protest.** The protest must include a detailed statement of the legal and factual grounds for the protest, include the claimed prejudice to the Offeror, demonstrate how the procurement process is contrary to law or how the Solicitation Document is flawed, include evidence or supporting documentation for the grounds on which the protest is based, and include the course of action the prospective Offeror would like LTD to take.
- 36.5.5 LTD Response.** LTD shall not consider a Prospective Offeror's solicitation protest submitted after the timeline established for submitting such protest under this Section 36.5, or such different time period as may be provided in the Solicitation Document. LTD shall consider the protest if it is timely filed and meets the conditions set forth in Section 36.5.4 and ORS 279B.405(4). LTD shall issue a Written disposition of the protest no less than three (3) business days prior to the Closing Date, unless LTD makes a Written determination that circumstances exist that require a shorter time limit. If LTD upholds the protest, in whole or in part, LTD may in its sole discretion either issue an Addendum reflecting its disposition under Section 18 or cancel the Procurement or solicitation under Section 34.
- 36.5.6 Extension of Closing.** If LTD receives a protest from a prospective Offeror in accordance with this Section 36.5, LTD may extend the Closing Date if LTD determines an extension is necessary to consider and respond to the protest.
- 36.5.7 Judicial Review.** Judicial review of LTD's decision relating to a solicitation protest shall be in accordance with ORS 279B.405.

36.6 Protests and Judicial Review of Contract Award.

- 36.6.1 Purpose.** An Offeror may protest the award of a Contract, or the intent to award 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 LTD and exhaust all administrative remedies before seeking judicial review of LTD's Contract award decision.
- 36.6.2 Delivery.** Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest to LTD within five (5) business days after issuance of the notice of intent to award the Contract.
- 36.6.3 Content of Protest.** An Offeror's Written protest shall include a detailed statement of the legal and factual grounds for the protest, the claimed prejudice to the Offeror, and the course of action the Offer would like LTD to take.

- 36.6.4 LTD Response.** LTD shall not consider an Offeror's Contract award protest submitted after the timeline established for submitting such protest under this Section 36.6, or such different time period as may be provided in the Solicitation Document. LTD shall issue a Written disposition of the protest in a timely manner. If LTD upholds the protest, in whole or in part, LTD may in its sole discretion either award the Contract to the successful protestor or cancel the procurement or solicitation.
- 36.6.5 Judicial Review.** Judicial review of LTD's decision relating to a Contract award protest shall be in accordance with ORS 279B.415.

36.7 Protests and Judicial Review of Qualified Products List Decisions.

- 36.7.1 Purpose.** A prospective Offeror may protest LTD's decision to exclude the prospective Offeror's goods from LTD's qualified products list under Section 7 and ORS 279B.115. A prospective Offeror must file a Written protest and exhaust all administrative remedies before seeking judicial review of LTD's qualified products list decision.
- 36.7.2 Delivery.** Unless otherwise stated in LTD'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 LTD within five (5) business days after issuance of LTD's decision to exclude the prospective Offeror's goods from the qualified products list.
- 36.7.3 Content of Protest.** The prospective Offeror's protest shall be in Writing and must specify the grounds upon which the protest is based.
- 36.7.4 LTD Response.** LTD shall not consider a prospective Offeror's qualified products list protest submitted after the timeline established for submitting such protest under this Section 36.7, or such different time period as may be provided in LTD's notice to prospective Offerors of the opportunity to submit goods for inclusion on the qualified products list. LTD shall issue a Written disposition of the protest in a timely manner. If LTD upholds the protest, it shall include the successful protestor's goods on the qualified products list.
- 36.7.5 Judicial Review.** Judicial review of LTD's decision relating to a qualified products list protest shall be in accordance with ORS 279B.425.

- 36.8 Judicial Review of Other Violations.** All protests of any other violation of ORS Chapter 279A or 279B by LTD for which no judicial remedy is otherwise provided in the Oregon Public Contracting Code is subject to judicial review as set forth in ORS 279B.420.

SECTION 37. Contract Modification.

- 37.1 Additional Goods or Services.** Any amendments for additional work or product requested by LTD, which is reasonably within the scope of work under the original Contract, including change orders, extra work, field orders, or other changes in the original specifications that increases the original Contract price, may be made with the Contractor without the Competitive Procurement process, provided one or more of the following criteria is satisfied:

- 37.1.1 The original Contract (i) was let under the Competitive Procurement process; and (ii) imposes a binding obligation on the parties covering the terms and conditions of the additional work or product; or
- 37.1.2 The aggregate increase resulting from all amendments to a Contract shall not exceed ten percent (10%) of the initial Contract amount, or twenty percent (20%) of the initial Contract amount if such aggregate increase does not exceed \$100,000.
- 37.2 **Small or Intermediate Contract.** LTD may amend a Contract awarded as small or intermediate Procurement pursuant to this Section 37, only if the total price of the Contract after the increase does not exceed the amount set forth in Section 6.6 for Small Procurements if Contract was originally awarded under Section 6.6 or Section 6.7 for Intermediate Procurements in the Contract was originally awarded under Section 6.7.
- 37.3 **Emergency Contract.** LTD may amend a Contract awarded as an emergency if the emergency justification for entering into the Contract still exists, and the amendment is necessary to address the continuing emergency.
- 37.4 **Price Agreements.** LTD may amend or terminate a Price Agreement as follows:
 - 37.4.1 As permitted by the Price Agreement;
 - 37.4.2 As permitted by this Section 37;
 - 37.4.3 If the circumstances set forth in ORS 279B.140(2) exist; or
 - 37.4.4 As permitted by applicable law.

SECTION 38. Right to Audit Records.

- 38.1 Contractors and subcontractors shall maintain all fiscal records relating to Contracts with LTD in accordance with generally accepted accounting principles ("GAAP"), unless otherwise specified in the Solicitation Document or Contract documents. Additionally, Contractors and subcontractors shall maintain all other records relating to Contracts with LTD in a manner to clearly document the following:
 - 38.1.1 Contractors' and subcontractors' performance under the Contract(s); and
 - 38.1.2 Any claims arising from or relating to Contractors' and subcontractors' performance under the Contract(s). Contractors and subcontractors shall make all records (books, fiscal records, and all other records and documents, hereafter the "Records") relating to their performance and any claims under a Contract with LTD reasonably accessible to LTD, whether or not litigation has been filed in connection with such claims.
- 38.2 **Inspection and Audit.** LTD may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the Records of any Person who has submitted cost or pricing data according to the terms of a Contract with LTD to the extent that the Records relate to such cost or pricing data. If a Person must provide cost or pricing data under a Contract with LTD, that person or entity shall maintain such Records and keep such Records accessible and available for a minimum period of three (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 longer, unless a shorter period is otherwise authorized by LTD in Writing.

- 38.3 Inspection; Contract Audit.** LTD shall be entitled to inspect, examine, copy, and audit any of Contractors' or subcontractors' Records as provided under Section 38.1. Contractors and subcontractors shall maintain and keep such Records accessible and available for a minimum period of three (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 by LTD in writing.

SECTION 39. Performance Security.

- 39.1 Public Improvements Contract.** Unless the required performance bond is waived under ORS 279C.380(1)(a) or exempted by all of LTD/CRB pursuant to Section 39.3 below, Contractor shall execute and deliver to LTD, a payment bond and a performance bond, each in a sum equal to the Contract price, for any Public Improvement Contracts.
- 39.2 Other Public Contracts.** LTD may require performance and payment security for other Public Contracts.
- 39.3 Exemption and/or Waiver.** If all members of LTD/CRB concur:
- 39.3.1** LTD/CRB may exempt certain contracts or classes of contracts from the requirements for performance and/or payment security pursuant to ORS 279C.390; provided, however, LTD may require payment and/or performance security even though the Contract is one of a class exempted by LTD/CRB.
 - 39.3.2** LTD/CRB may waive the performance and/or payment security requirements in cases of emergency pursuant to ORS 279C.380(4).
 - 39.3.3** If federal funds are used in the procurement of a Public Improvement Contract in excess of \$100,000, the exemptions under this Section 39 are not available.
- 39.4 Requirement for Surety Bond.** LTD shall only accept a surety bond furnished by a surety company authorized to do business in Oregon as performance security, unless specified in the Solicitation Document. If specified in the Solicitation Document, LTD may accept the following alternative forms of payment and performance security: (i) a cashier's check or certified check in an amount equal to one hundred percent (100%) of the Contract price; or (ii) an irrevocable letter of credit issued by an insured institution as defined in ORS 706.008 in an amount equal to one hundred percent (100%) of the Contract price.
- 39.5 Time for Submission.** The apparent successful Offeror must furnish the required performance bond and payment bond within ten (10) days of LTD's request. If Offeror fails to furnish the bond prior to the deadline, LTD may reject the Offer, may forfeit the Offeror's Offer security, and may award the Contract to the Bidder with the next lowest Responsive Bid or the Proposer with the next highest-scoring Proposal.

SECTION 40. Procurement of Architectural and Engineering Services.

40.1 Definitions. In addition to the definitions set forth in ORS 279C.100, the following definitions apply to Section 40:

40.1.1 “Consultant” means an Architect, Engineer, Land Surveyor, or provider of Related Services.

40.1.2 “Related Services” means personal services, other than architectural, engineering, and land surveying services, that are related to the planning, design, engineering, or oversight of public improvement projects or components thereof, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, environmental impact studies, hazardous substances or hazardous waste or toxic substances testing services, wetland delineation studies, wetland mitigation studies, Native American studies, historical research services, endangered species studies, rare plant studies, biological services, archaeological services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services, and owner’s representative services or land-use planning services.

40.2 Selection Procedure.

40.2.1 General. Competitive RFP procedures, based on the Brooks Act, shall be used when procuring Consultant services. The Brooks Act requires that:

- a. An Offeror’s qualifications be evaluated;
- b. Price be excluded as an evaluation factor;
- c. Negotiations be conducted with only the most qualified Offeror; and
- d. Failing agreement on price, negotiations with the next most qualified Offeror be conducted until a Contract award can be made to the most qualified Offeror whose price is fair and reasonable.

40.2.2 State Funds. If LTD: (i) receives moneys from the State Highway Fund or a grant or loan from the State that will be used to pay for any portion of the design and construction of the project; and (ii) where the total amount of any grants, loans, or moneys from either the State Highway Fund or the State exceeds thirty-five percent (35%) of the value of the project; and (iii) where the value of the project exceeds \$400,000, LTD shall use an RFP procurement process set forth under Section 40.2.1 and shall select a Consultant on the basis of qualifications. LTD may consider pricing factors only after it has selected candidates based on qualifications. In selecting candidates based on qualifications, LTD may consider some or all of the following:

- a. Specialized experience, capabilities, and technical competence that may be demonstrated by the proposed approach and methodology to meet the project requirements;

- b. Resources available to perform the work and the proportion of the candidate staff's time that would be spent on the project, including any specialized services, within the applicable time limits;
- c. Record of past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control, and contract administration;
- d. Ownership status and employment practices regarding minority, women, and emerging small businesses or historically underutilized businesses;
- e. Availability to the project locale;
- f. Familiarity with the project locale; and
- g. Proposed project management techniques.

40.3 Ties Among Proposers. If LTD determines after the ranking of Proposers that two or more Proposers are equally qualified, LTD shall select the Proposer to which the Contract will be awarded pursuant to Section 28.

40.4 Request for Change or Clarification. Consultants who are prospective Offerors may submit a Written request for a change or clarification to the Solicitation Document and/or Contract terms and conditions pursuant to the procedures set forth in Section 20.

40.5 Protest and Judicial Review Procedures.

40.5.1 Solicitation Protest and Request. Consultants may submit a Written protest of anything contained in the Solicitation Document, pursuant to the procedures provided under Sections 36.2 and 36.5.

40.5.2 Protest of Consultant Selection. LTD shall provide to all Proposers a copy of the selection notice that LTD 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 LTD pursuant to the procedures provided under Section 36.2 and 36.6.

40.6 Cancellation. LTD may cancel a solicitation or reject all Proposals or responses to a Solicitation Document issued pursuant to this Section 40, without liability to LTD at anytime after issuing the Solicitation Document, if LTD determines it is in its best interest to do so, as determined by LTD. Consultants responding to a Solicitation Document are solely responsible for all costs they may incur in connection with submitting Proposals.

SECTION 41. Public Improvement Contracts.

41.1 Application. This Section 41 applies to Public Improvement Contracts and addresses matters covered in ORS Chapter 279C, except for Architectural, Engineering, Land Surveying, and Related Services, which are addressed in Section 40. LTD shall follow all applicable sections of these Rules, including those for IFB and RFP procurements, in connection with the procurement of Public Improvement Contracts except to the extent this Section 41 requires alternate or additional procedures.

- 41.2 Construction Contracts other than Public Improvements.** LTD may enter into Contracts for minor alteration, ordinary repair, or maintenance of Public Improvements, as well as any other construction Contract that is not defined as a "Public Improvement" under ORS 279A.010, in accordance with the provisions these Rules applicable to trade services.
- 41.3 Competitive Procurement.** LTD shall solicit Bids for Public Improvement Contracts by IFB, except as otherwise allowed or required pursuant to these Rules, ORS 279C.335, and federal statutes and regulations.
- 41.4 Exceptions.** As provided above in Section 41.3, all Public Improvement Contracts shall be based upon competitive Bids except:
- 41.4.1** A Contract for goods or services if the value of the Contract is less than \$5,000. In awarding a Contract under this Section 41.4.1, LTD shall follow the procedures for Small Procurements set forth in Section 6.6.
- 41.4.2 Emergency Contracts.** Pursuant to ORS 279C.335(5) and this Section 41.4.2, LTD may declare that emergency circumstances exist that require prompt execution of a Contract for emergency construction or repair work. In awarding an Emergency Contract under this Section 41.4.2, LTD shall follow the procedures for Emergency Contracts set forth in Section 6.9. Further, pursuant to ORS 279C.380(4) and this Section 41.4.2, the emergency declaration may also state that LTD waives the requirement of furnishing a performance bond and payment bond for the Emergency Contract.
- 41.4.3 Intermediate Procurements.** Public Improvement Contracts estimated by LTD 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 set forth in this Section 41.4.3. A procurement may not be artificially divided or fragmented so as to constitute an intermediate procurement under this Section 41.4.3 or to circumvent competitive procurement requirements under the Section 41.3. Intermediate procurements under this Section 41.4.3 need not be made through IFB process. However, nothing in this Section 41.4.3 may be construed as prohibiting LTD from conducting a procurement that does not exceed the thresholds in Section 41.4.3 under an IFB process. LTD shall follow the procedures set forth below in procuring a Public Improvement Contract under this Section 41.4.3:
- a. 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.
 - b. Request for Quotes.** LTD 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 LTD 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.

- c. **Number of Quotes; Record Required.** LTD 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 LTD shall make a written record of the effort made to obtain those quotes.
- d. **Award.** If LTD awards a Contract, LTD shall award the Contract to the prospective Contractor whose quote will best serve LTD's interests, taking into account the announced selection criteria. If Award is not made to the Offeror offering the lowest price, LTD shall make a written record of the basis for Award.
- e. **Amendments.** A Contract awarded under this Section 41.4.3 may be amended only if the total price of the Contract after the increase does not exceed the thresholds set forth in this Section 41.4.3.

41.4.4 LTD may exempt other Public Improvement Contracts or a class of Public Improvement Contracts from the competitive bidding requirements of this Section 41.4 upon approval of the following findings:

- a. It is unlikely that the exemption will encourage favoritism in the awarding of Public Improvement Contracts or substantially diminish competition for Public Improvement Contracts; and
- b. The awarding of Public Improvement Contracts under the exemption will result in substantial cost savings to LTD. In making the finding, LTD may consider the type, cost, and amount of the Contract, the number of persons available to Bid, and such other factors as may be deemed appropriate.
- c. In granting exemptions under this Section 41.4.4, LTD shall, when appropriate, direct the use of alternate contracting methods that take account of market realities and modern practices and are consistent with the public policy of encouraging competition.

Before final adoption of Findings exempting a Public Improvement Contract or class of Public Improvement Contracts under this section, LTD shall hold a public hearing. Notification of the public hearing shall be published in at least one trade newspaper of general statewide circulation a minimum of fourteen (14) days prior to the hearing. The notice shall state that the public hearing is for the purpose of taking comments on LTD's draft Findings for an exemption from the Competitive Procurement requirement. At the time of the notice, copies of the draft Findings shall be made available to the public. At the option of LTD, the notice may describe the process by which the Findings are finally adopted and may indicate the opportunity for any further public comment. At the public hearing, LTD shall offer an opportunity for any interested party to appear and present comment. If LTD is required to act promptly due to

circumstances beyond its control that do not constitute an emergency, notification of the public hearing can be published simultaneously with LTD's solicitation of offers, as long as responses to the solicitation are due at least five (5) days after the meeting and approval of the Findings.

41.5 Solicitation Documents. Pursuant to ORS 279C.365 and this Section 41.5, in addition to the information required under Section 9.1, the Solicitation Document for a Public Improvement project shall include the following:

41.5.1 Identification of the Public Improvement project, including the character of the work, applicable plans, specifications, and other contract documents;

41.5.2 A statement that LTD will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the CCB, or is licensed by the State Landscape Contractors Board, as applicable and as required by law; and

41.5.3 Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects.

41.6 Evaluation Process. In addition to the evaluation factors set forth in Section 9.3, LTD, if the Solicitation Document is an RFP, may include the following additional evaluation factors set forth in Section 41.12.

41.7 Contract Provisions. In addition to the information required under Section 9.2, the Solicitation Document for a Public Improvement project shall include all contract terms and conditions, including warranties, insurance, and bonding requirements, that LTD considers appropriate for the Public Improvement project. LTD must also include the following provisions required by Oregon law as follows:

41.7.1 Payment of claims by public officers in compliance with ORS 279C.515;

41.7.2 Environmental and natural resources regulations in compliance with ORS 279C.525;

41.7.3 Claims for overtime in compliance with ORS 279C.545;

41.7.4 If the Contract is for a Public Improvement, a condition that the Contractor shall demonstrate it has established a drug-testing program for employees in compliance with ORS 279C.505(2);

41.7.5 Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.512;

41.7.6 Person's right to file a complaint with the CCB for all Contracts related to a Public Improvement Contract in compliance with ORS 279C.515;

41.7.7 Fee paid to BOLI, if applicable, in compliance with ORS 279C.825;

41.7.8 Prompt payment policy in compliance with ORS 279C.570;

41.7.9 Contractor's relations with subcontractors in compliance with ORS 279C.580;

41.7.10 Notice of claim in compliance with ORS 279C.605;

41.7.11 Contractor's certification that all subcontractors performing work described in ORS 701.005(2) (i.e., construction work) will be registered with the CCB 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;

41.7.12 Progress payments in compliance with ORS 279C.570; and

41.7.13 Retainage in compliance with ORS 279C.550 to 279C.570.

41.8 First-Tier Subcontractors: Disclosure and Substitution.

41.8.1 **Required Disclosure.** Within two (2) working hours after the Closing Date on an IFB for a Public Improvement having a contract price anticipated by LTD to exceed \$100,000, all Bidders shall submit to LTD a disclosure form as described by this Section 41.8, 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 (5%) of the total contract price, but at least \$15,000; or
- b. \$350,000, regardless of the percentage of the total contract price.

41.8.2 **Bid Closing, Disclosure Deadline, and Bid Opening.** For each IFB to which this Section 41.8 applies, LTD shall:

- a. Receive Bids until the time identified as the Closing Date and at the location described in the IFB;
- b. Set a subsequent time and place for Bid opening, which time is at least two (2) working hours after the Closing Date; 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 LTD.

41.8.3 **Bidder Instructions and Disclosure Form.** For purposes of this rule, LTD in its procurement for competitive Bids 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) five percent (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:

- (1) The subcontractor's name;
- (2) The category of work that the subcontractor would be performing; and
- (3) 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.

LTD MUST REJECT A BID IF THE BIDDER FAILS TO SUBMIT THE DISCLOSURE FORM WITH THIS INFORMATION BY THE STATED DEADLINE. (See LTD Rules Section 41.8.3.)

- 41.8.4 Submission.** A Bidder shall submit the disclosure form required by this Section 41.8 either in its Bid submission or within two working hours after the Closing Date in the manner specified by the IFB.
- 41.8.5 Responsiveness.** Compliance with the disclosure and submittal requirements of ORS 279C.370 and this Section 41.8 is a matter of responsiveness. Bids which are submitted by the Closing Date, 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.
- 41.8.6 LTD Role.** LTD shall obtain, and make available for public inspection, the disclosure forms required by ORS 279C.370 and this Section 41.8. LTD shall also provide copies of disclosure forms to the Bureau of Labor and Industries as required by ORS 279C.835. LTD is not required to determine the accuracy or completeness of the information provided on the disclosure forms.
- 41.8.7 Substitution.** Substitution of affected first-tier subcontractors shall be made only in accordance with ORS 279C.585. LTD shall accept Written submissions filed under that statute as public records. Aside from issues involving inadvertent clerical error under ORS 279C.585, LTD 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 CCB on improper substitution. However, LTD is not precluded from making related inquiries or investigating complaints in order to enforce contract provisions that require compliance generally with laws, rules, and regulations.

41.9 Prequalification. LTD may, in accordance with these Rules and ORS 279C.430, permit or require prospective Offerors to prequalify. If LTD permits or requires Offerors to prequalify, LTD shall provide the following:

- 41.9.1** The information required to be submitted by the prospective Offerors;
- 41.9.2** The form(s) and application(s) to be used by the prospective Offerors seeking prequalification;
- 41.9.3** The time for submitting an application for prequalification;
- 41.9.4** The period of time the prequalification will be valid; and
- 41.9.5** The type and nature of the Contract(s) that the prospective Offeror will be qualified to compete for.

The deadline for receipt of prequalification applications must be set long enough after the date the notice of prequalification is issued or advertised to allow prospective Offerors a reasonable opportunity to complete and submit the application materials. In no event may the deadline be set earlier than fifteen (15) days after the issue date of the notice of prequalification.

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 refutably presumed to be qualified to perform substantially similar Contracts for LTD.

LTD shall approve or deny each application in accordance with ORS 279C.430 and 279C.450 and this Section 41.

In determining whether to approve an application, LTD may only consider the applicable standards set forth in ORS 279C.375(2)(b).

If LTD subsequently has reasonable cause to believe that there has been a substantial change in the condition of a prospective Offeror, heretofore prequalified, who is no longer qualified or is less qualified, LTD may revoke or revise or reissue the prequalification upon reasonable notice to the prospective Offeror. The notice shall state the reasons found under ORS 279C.375(2)(b) for revocation or revision of the prequalification and shall inform the Offeror of its right to a hearing under ORS 279C.445 and 279C.450. A revocation or revision does not apply to any Contract for which advertisement of a Solicitation Document commenced prior to the date the notice of revocation or revision was received by the prequalified prospective Offeror.

Any information submitted by an Offeror or prospective Offeror in connection with an application for prequalification that the Offeror deems confidential and/or a trade secret shall clearly be labeled "confidential trade secret."

Any prospective Offeror who wishes to appeal a revocation or revision may do so in accordance with ORS 279C.445 and 279C.450.

41.10 Disqualification of Prospective Offerors.

- 41.10.1** LTD may disqualify prospective Offerors from consideration of the award of a Contract by LTD for the reasons set forth in ORS 279C.440(2) after providing notice and the opportunity for hearing as set forth in ORS 279C.445 and 279C.450.
- 41.10.2** In lieu of the disqualification process described in Section 41.10.1, LTD may petition the CCB to disqualify a person from consideration for award of LTD's Public Improvement Contracts for the reasons listed in this Section 41.10 and ORS 279C.440(2). The CCB shall provide the Person with notice and a reasonable opportunity to be heard.
- 41.10.3** If LTD seeks to disqualify a prospective Offeror under Section 41.10.1, LTD shall provide such notice required under ORS 279C.440, in Writing, personally delivered or sent by registered or certified mail, to the prospective Offeror. The notice shall specify the following:
- a. That LTD intends to disqualify the prospective Offeror;
 - b. The reasons for the disqualification;
 - c. The period of disqualification, which period may not be longer than three (3) years; and
 - d. A statement of the prospective Offeror's appeal rights and appeal deadlines.
- 41.10.4** If LTD disqualifies a prospective Offeror under Section 41.10.1, LTD shall notify the prospective Offeror, in Writing, personally delivered or sent by registered or certified mail, of the debarment of the Offeror. The notice shall specify the following:
- a. The effective date and period of the disqualification;
 - b. The reasons for the disqualification; and
 - c. A statement of the disqualified Offeror's appeal rights and appeal deadlines.
- 41.10.5** Notwithstanding the limitation on the term for disqualification in ORS 279C.44(1)(c), LTD may determine that a previously disqualified Offeror is not responsible prior to award of a Contract.
- 41.10.6** LTD 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 disqualification 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.

41.10.7 If a prospective Offeror wishes to appeal a disqualification by LTD, such prospective Offeror may do so in accordance with ORS 279C.445 and 279C.450.

41.11 Protest and Judicial Review Procedures. The protest procedures set forth in Section 36 shall be applicable to the procurement and award of Public Improvement Contracts under this Section 41.

41.12 Alternative Contracting Methods. Alternate contracting methods allow for 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). Two common alternate methods include Design-Build contracting, CM/GC forms of contracting.

41.12.1 Definitions.

- a. **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 ("GMP") to complete the Contract; act as general contractor; hold all subcontracts, self-perform portions of the Work as may be allowed by LTD 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 LTD, architect/engineers and other consultants.
- b. **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 LTD, and manages both design and construction. In this form of Contract, a single Person provides LTD with all of the services necessary to both design and construct the project.

41.12.2 Use of Alternative Contracting Methods. As provided above in Section 41.3 and ORS Chapter 279C Public Improvement Contracts should be competitively Bid unless a statutory exemption applies or LTD has exempted a individual or class of Contracts in accordance with ORS 279C.335 and Section 41.4. LTD may utilize an alternate contracting method and an alternative contracting method only if authorized in accordance with ORS 279C.335, 279C.400 to 279C.410, and Section 41.4.

41.12.3 Evaluation Factors. In addition to the evaluation factors for RFPs set forth in these Rules, LTD may also include the following evaluation factors if using an alternate contracting method:

- a. In CM/GC contracting, factors may 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.

- b. In Design-Build contracting, in addition to Section 41.12.3, 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.

41.13 Post-Project Evaluation. ORS 279C.355 requires that LTD 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 LTD's best interest to use an alternative contracting method or RFP. The evaluation must be delivered to the LTD/CRB within thirty (30) days of the date LTD "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:

- 41.13.1 Financial information, consisting of cost estimates, any guaranteed maximum price, changes, and actual costs;
- 41.13.2 A narrative description of successes and failures during design, engineering, and construction; and
- 41.13.3 An objective assessment of the use of the alternative contracting method or RFP as compared to the exemption Findings.

41.14 Design-Build Contracts.

41.14.1 General. The Design-Build form of contracting has technical complexities that are not readily apparent. In order to use the Design-Build process, LTD should 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.

41.14.2 Selection. Design-Build selection criteria may include those factors set forth above in Section 41.12.3.

41.14.3 Licensing. If a Design-Build Contractor is not an Oregon licensed design professional, LTD 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.

41.14.4 Performance Security. In addition to the performance security requirements in Section 39 above, 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.

41.14.5 Contract Requirements. LTD shall include the following requirements in its Design-Build contracting practices:

- 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 LTD, as well as requirements for professional liability insurance.
- c. **Risk Allocation.** The Contract shall clearly identify the extent to which LTD 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 LTD 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 LTD is benefited from such deliverables.

41.15 Construction Manager/General Contractor (CM/GC).

41.15.1 General. The CM/GC form of contracting is a technically complex project delivery system. LTD should 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 LTD and design professional, although in CM/GC there is a separate contract between LTD and design professional. In order to utilize the CM/GC method, LTD should 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. LTD 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. LTD may consider value engineering, building systems analysis, life cycle costing analysis, and construction planning that lead to cost savings. LTD should 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 LTD, design professionals, and Contractor, in which the Contractor will assist in addressing specific project challenges through preconstruction services. LTD 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.

41.15.2 Selection. CM/GC selection criteria may include those factors set forth above in Section 41.12.3.

41.15.3 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.

41.15.4 Performance Security. In addition to the performance security requirements in Section 39 above, ORS 279C.380(2) provides that for CM/GC contracts, in which a GMP may be established by an amendment authorizing construction period services following preconstruction period services, Contractor shall provide the performance security required by ORS 279C.380(1) and Section 39, upon execution of an amendment establishing the GMP. LTD shall also require Contractor to provide bonds equal to the value of construction services authorized by any early work amendment in advance of the GMP amendment. Such bonds must be provided before construction starts.

41.15.4 Contract Requirements. LTD shall include the following requirements in its CM/GC contracting practices:

- 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 LTD's benefit.

- 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. **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:
 - (1) Early Procurement of materials and supplies;
 - (2) Early release of Bid packages, such as for site development; and
 - (3) Other advance Work related to critical components of the Contract.
- i. **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 LTD 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.
- j. **Subcontractor Approvals and Protests.** The Contract shall clearly establish whether LTD must approve subcontract awards, and to what extent, if any, LTD will resolve procurement protests of subcontractors and suppliers. In any event, LTD shall retain the right to monitor the subcontracting process in order to protect LTD's interests.

- k. **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 LTD approval of CM/GC self-performance.
- l. **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 LTD.

41.16 Contract Suspension, Termination, and Cancellation Procedures.

41.16.1 Suspension of Work. In the event LTD suspends performance of work for any reason considered by LTD 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.

41.16.2 Termination by Mutual Agreement. LTD and the Contractor may terminate the Contract or a divisible portion thereof if:

- a. LTD 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);
- b. Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the work; and
- c. When a contract, or any divisible portion thereof, is terminated pursuant to this Section 41.16, LTD shall pay the Contractor a reasonable amount of compensation for preparatory work completed, and for costs and expenses arising out of termination. LTD 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.

41.16.3 Public Interest Termination. LTD 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 LTD unilaterally terminates the Contract for any reason considered by LTD to be in the public interest.

41.16.4 Responsibility for Completed Work. Termination of the Contract or a divisible portion thereof shall not relieve the Contractor of responsibility for the work completed, nor shall it relieve the surety of its obligation for any just claims arising from the work performed.

41.16.5 Remedies Cumulative. LTD may, at its discretion, avail itself of any or all of rights or remedies set forth in these Rules, in the Contract or available at law or in equity.

41.17 Waiver of Delay Damages Against Public Policy. Any clause in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from LTD's unreasonable delay in performing the Contract is void and unenforceable, as against public policy. However, contract provisions requiring notice of delay, providing for alternative dispute resolution such as arbitration or mediation, providing other procedures for settling contract disputes, or providing for reasonable liquidated damages, are enforceable.

41.18 Progress Payments.

41.18.1 Request for Progress Payments. At a regular time each month, the Contractor shall, as required by the Contract, submit to LTD a request for payment based upon an estimate of the amount of work completed. At LTD's discretion, this request may also include an estimate of the amount and value of material to be incorporated in the completed work that has been delivered and acceptably stored. Upon verification and approval by LTD, the sum of these estimates is referred to as the "value of completed work." With these estimates as a base, LTD shall make a progress payment to the Contractor, which progress payment shall be equal to: (i) the value of completed work; (ii) less such amounts as may have been previously paid; (iii) less such other amounts as may be deductible or as may be owing and due to LTD for any cause; and (iv) less the appropriate amount of retainage.

41.18.2 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 they shall in no manner relieve the Contractor of responsibility for defective workmanship or material.

41.19 Retainage in Public Improvement Contracts.

41.19.1 Retainage of Five Percent. The amount to be retained from any given progress payment will be such that when added to the sum of amounts previously retained will equal not more than five percent (5%) of the estimated value of completed work. If Contractor has performed at least fifty percent (50%) of the work and the work is progressing satisfactorily, upon Contractor's submission of a Written application containing the surety's Written approval, LTD may, in its discretion, reduce or eliminate retainage on any remaining progress payments. LTD shall respond in Writing to all such applications within a reasonable time. When the contract work is ninety-seven and a half percent (97.5%) completed, LTD may, in its discretion and without application by the Contractor, reduce the retained amount to one hundred percent (100%) of the value of the uncompleted contract work. LTD may at any time reinstate retainage. Retainage shall be included in the final payment of the contract price.

41.19.2 Deposit in Interest-Bearing Accounts. Upon Written request of the Contractor, LTD shall deposit any amounts withheld as retainage in an interest-

bearing account in a bank, savings bank, trust company, or savings association for the benefit of LTD. Earnings on such account shall accrue to the Contractor.

41.19.3 Recovery of Costs. LTD may recover from Contractor all costs incurred in the proper handling of cash retainage, by reductions of the final payment.

41.20 Interest.

41.20.1 Prompt Payment Policy. LTD shall pay promptly all payments due and owing to the Contractor on Contracts for Public Improvements.

41.20.2 Interest on Progress Payments. Late payment interest shall begin to accrue on payments due and owing on the earlier of thirty (30) days after receipt of invoice or fifteen (15) days after LTD's 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 thirty percent (30%).

41.20.3 Interest on Final Payment. Final payment on the contract price, including retainage, shall be due and owing no later than thirty (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 (1.5%) per month until paid.

41.20.4 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 (30) days after the Contractor submitted a claim for payment to LTD in Writing or otherwise in accordance with the contract requirements.

41.21 Final Inspection.

41.21.2 Notification of Completion. When the Contractor determines that all work on the project has been completed, the Contractor shall so notify LTD in Writing. LTD shall inspect the project and project records within fifteen (15) days of receiving Contractor's notice of completion. If, at such inspection, all work under the Contract is complete and satisfactory to LTD, and all certifications, bills, forms, and documents have been submitted properly, such inspection shall constitute the final inspection.

41.21.2 Instructions to Complete the Work. If, however, at any inspection, LTD finds any work, in whole or in part, unsatisfactory, or finds that all certifications, bills, forms, and documents have not been submitted properly, LTD shall within fifteen (15) days from receipt of notice of completion from the Contractor, provide instructions to the Contractor on outstanding requirements to complete

the project. At such time as the Contractor determines full compliance with, and the execution of such instructions, the Contractor shall notify LTD in Writing. LTD shall make another inspection within fifteen (15) days after such notice to determine if all required contract work has been completed satisfactorily. This process will continue until LTD finds that all work required under the Contract has been completed satisfactorily.

41.22 LTD Payment for Unpaid Labor or Supplies.

41.22.1 Contract Incomplete. If the Contract is still in force, LTD may, in accordance with ORS 279C.515(1), pay a valid claim to a Person furnishing the labor or services, and charge the amount against payments due or to become due to the Contractor under the Contract. If LTD 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.

41.22.2 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. LTD shall not make payments to subcontractors or suppliers for work already paid for by LTD.

SECTION 42. Public Works Contracts.

42.1 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.

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

42.2.1 LTD's authority to pay certain unpaid claims and charge such amounts to Contractors, as set forth in ORS 279C.515(1).

42.2.2 Maximum hours of labor and overtime, as set forth in ORS 279C.520(1).

42.2.3 Employer notice to employees of hours and days that employees may be required to work, as set forth in ORS 279C.520(2).

42.2.4 Contractor required payments for certain services related to sickness or injury, as set forth in ORS 279C.530.

42.2.5 Requirement for payment of prevailing rate of wage, as set forth in ORS 279C.830(1).

42.2.6 Requirement for payment of fee to BOLI, as set forth in ORS 279C.830(2) and administrative rule of the BOLI commissioner.

42.3 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:

- 42.3.1 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 LTD's Web site or the BOLI Web site) when procurement specifications are also made available in electronic format.
- 42.3.2 Reference to payment of fee to BOLI, as required by ORS 279C.830(2).

SECTION 43. Standards of Conduct.

The Rules in this Section 43 are applicable to all LTD officers, employees, board members, or agents engaged in the selection, award, and administration of third-party contracts supported by FTA funds. The Rules in this Section 43 are intended to supplement the State of Oregon Government Ethics law that is applicable to and governs the conduct of all public officers, employees, board members, or agents, and is contained in Chapter 244 of the Oregon Revised Statutes.

43.1 Conflict of Interest. No officers, employees, board members, or agents of LTD shall participate in the selection, award, or administration of a Contract if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

- 43.1.1 The officer, employee, board member, or agent;
- 43.1.2 Any member of their immediate family;
- 43.1.3 His or her partner; or
- 43.1.4 An organization that employs, or is about to employ, any of the above, has a financial or any other interest in the firm selected for award.

Any conflict of interest, real or apparent, must be reported to the Director and, if an employee, their immediate supervisor, if applicable. After careful review of the situation, the representative may be disqualified from participating in selection, award, or administration of the Contract involved.

No officers, employees, board members, or agents of LTD shall in any way use their position or office to obtain financial gain for themselves or any member of their household, or any business with which the employee or a member of the employee's household is associated, other than an honorarium or an employee's official salary or reimbursement of expense.

Employees shall not take or divert the funds of LTD to private use of that employee or anyone else.

No officers, employees, board members, or agents of LTD shall seek or hold a substantial undisclosed financial interest in any organization doing business with LTD. It will be the responsibility of each officer, employee, board member, or agent of LTD to review his/her financial holdings and report to the Director the nature of any possible conflict, requesting the Director to appoint another person to dispose of the matter giving rise to the actual or possible conflict.

No LTD employee or business owned or operated by an LTD employee shall contract with LTD to supply any goods or services.

- 43.2 Gratuities.** LTD's officers, employees, board members, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from Contractors, potential contractors, or parties to sub-agreements. This does not include unsolicited items of nominal intrinsic value, such as notepads or pens that can be used by all employees. Such items must be added to the supplies inventory for use by all.

Product or service discounts specific to LTD officers, employees, board members, or agents shall be prohibited from personal use by representatives if the discounts come from a vendor who transacts business with LTD. Discount opportunities that are offered to all public officers, employees, board members, or agents are acceptable.

Any LTD officers, employees, board members, or agents who received a gift, gratuity, or promotional merchandise, the acceptance of which would constitute violation of this policy, shall immediately return said gift or gratuity to the donor. Within five (5) working days, the officers, employees, board members, or agents shall report, in Writing, to the Director the receipt and subsequent return of said gift or gratuity.

- 43.3 Complaints.** Employees who have reason to believe a violation of ethical practices as stipulated herein has occurred are encouraged to pursue their concerns with appropriate supervisory and management staff of LTD.

The Director shall investigate any complaints or concerns of violations of this policy. The Director may decide not to act on a complaint if there is reason to believe that:

- 43.3.1** Other remedies or avenues for the complaint are available but have not been pursued;
- 43.3.2** The complaint concerns an issue beyond the authority of the Director;
- 43.3.3** The complaint is trivial, frivolous, or not made in good faith; or
- 43.3.4** The complaint has been too long delayed to justify examination of the relevant facts.

Upon completion of investigation, the Director will advise in writing the findings of the investigation, and any penalties recommended.

- 43.4 Disciplinary Action.** The Director shall follow penalties guidelines imposed in ORS Chapter 244. In addition, employees may be subject to disciplinary action up to and including termination from employment. Such disciplinary action shall be consistent with administrative personnel policies and collective bargaining agreements. Contractors who are found to violate the Code of Ethics may have their Contracts terminated and may be banned from providing LTD with goods or services in the future.

SECTION 44. Contract Administration.

- 44.1 Contract Files.** LTD must establish files containing the records of all procurement and contract actions. Contract files should be organized as to allow a file reviewer to reconstruct and understand the history of the procurement and Contract in the absence of the contract administrator. All personnel who deal with the Contractor should maintain records of contract activity, particularly those project personnel who are involved in monitoring the Contractor's performance. Maintenance of records will include notations of any problems or unusual occurrences, so that it is possible to recreate the circumstances surrounding any area of controversy or dispute that might arise.
- 44.2 Monitoring of Contracts.** Inspection of goods and services shall be performed routinely during the life of the Contract to ensure conformance with the specifications of the Contract. The reviews and inspections shall be performed as often as is reasonably necessary during the life of the Contract to ensure conformance. Records of such inspections shall be part of the contract file. Inspections and tests shall not unduly delay the work.
- 44.3 Written Procurement History.** A record shall be maintained detailing the history of a procurement. At a minimum, the records shall include:
- 44.3.1** The rationale for the method of procurement;
 - 44.3.2** Selection of contract type;
 - 44.3.3** Reasons for Contractor selection or rejections; and
 - 44.3.4** The basis for the contract price.

SECTION 45. Lobbying Certification Administration.

All contracts over \$100,000 for which Contractors have filed certification shall be reviewed periodically to determine if Standard Form LLL has been filed. If Standard Form LLL has been filed, it shall be reported, per the instructions, to FTA and updated quarterly. Once Standard Form LLL has been filed with LTD, a copy of the form shall be kept in the contract file, and a tickler file set up to ensure receipt of any subsequent updates.

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ATTACHMENT A FEDERAL REGULATIONS

ALL OR PART OF THIS CONTRACT IS FEDERALLY FUNDED. Contractor shall comply with the following applicable federal regulations in addition to all other specifications, terms and conditions of this Invitation for Bid or Request for Proposal. As used in these regulations, "Contracting Officer" means the Purchasing Administrator employed by LTD.

The following provisions and references can be reviewed in Purchasing.

Contractor shall comply with the following provisions regardless of the contract amount:

<u>Drug and Alcohol Testing</u>	49 U.S.C. §5331 49 CFR PARTS 653 & 654 49 CFR PART 661
<u>Charter/School Bus Requirements</u>	49 U.S.C. §5323 (d) 49 CFR PT 604 & 605
<u>Cargo Preference</u>	46 U.S.C. 1241 46 CFR PART 381
<u>Seismic Safety</u>	42 U.S.C. 7701 et seq 49/ CFR PT 41
<u>Energy Conservation Requirements</u>	42 U.S.C. 6321 et seq 49 CFR PART 18
<u>Bus Testing</u>	49 U.S.C. 5323 (c) 49 CFR PART 665
<u>Pre-Award and Post Delivery Audit Requirements</u>	49 U.S.C. 5323 49 CFR PART 663
<u>Access to Records and Reports</u>	49 U.S.C. 5325 18 CFR 18.36 (I) 49 CFR 633.17
<u>Federal Changes</u>	49 CFR PART 18
<u>No Government Obligation to Third Parties</u>	
<u>Program Fraud</u>	31 U.S.C. 3801 49 CFR PART 31 18 U.S.C 1001 49 U.S.C. 5307
<u>Federal Privacy Act Requirements</u>	5 U.S.C. 552
<u>Civil Rights</u>	NUMEROUS, SEE MANUAL
<u>Patent Rights, Rights in Data</u>	37 CFR PART 401 49 CFR PARTS 18 & 19
<u>Transit Employee Protective Agreements</u>	49 U.S.C. § 5310, § 5311, § 5333 29 CFR PART 215
<u>Disadvantaged Business Enterprises</u>	49 CFR PART 23
<u>State and Local Law Requirements</u>	
<u>Incorporation of Federal Transit Administration (FTA)</u>	FTA CIRC 4220.1D

Contractor shall comply with the following provisions if this is a construction contract exceeding \$2,000:

<u>Davis-Bacon Act</u>	40 U.S.C. & 167; 276a-276a-5 (1995) 29 CFR § 5 (1995)
<u>Contract Work Hours and Safety Standards</u>	40 U.S.C. § 327-333 29 CFR § 5, 29 CFR § 1926
<u>Copeland Act</u>	40 U.S.C. 276c, 29 CFR § 3 29 CFR § 5

Contractor shall comply with the following provisions if this contract amount exceeds \$10,000:

<u>Recycled Products</u>	42 U.S.C. 6962
(Total purchased in current or prev FY)	40 CFR PART 247, EX. ORDER 12873
<u>Termination</u>	49 U.S.C. PART 18, FTA CIRC 4220.1D

Contractor shall comply with the following provisions of the Federal Acquisition regulations (FAR) if this contract amount exceeds \$100,000:

<u>Government-wide Debarment and (Suspension Nonprocurement)</u>	49 CFR PART 29, EXECUTIVE ORDER 12549
<u>Buy America Requirements</u>	49 U.S.C. §5323 (j)
<u>Clean Water</u>	33 U.S.C. 1251
<u>Lobbying</u>	31 U.S.C. 1352 49 CFR PART 19
<u>Bonding Requirements</u>	FTA GRANT AGMT PT II SEC 118 (h&I)
<u>Clean Air</u>	42 U.S.C. 7401 et seq 40 CFR 15.61 49 CFR PART 18 49 CFR PART 20
<u>Breach of Contract and Dispute Resolution</u>	49 CFR PART 18, FTA CIRC 4220.1D

CFR=Code of Federal Regulations
U.S.C.= United States Code
EO=Executive Order

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