

**CITY OF SHERWOOD
ORDINANCE NO. 2001-1120**

**AN ORDINANCE REPEALING ORDINANCE 99-1070 AND ADOPTING NEW RULES OF
THE CITY OF SHERWOOD LOCAL CONTRACT REVIEW BOARD**

WHEREAS, State law mandates that all public contracts shall be based on competitive bid except as otherwise provided by law or the rules of the Local Contract Review Board; and

WHEREAS, the City of Sherwood adopted its current Local Contract Review Board Rules on February 9, 1999 through Ordinance No. 99-1070; and

WHEREAS, the city's rules contain dollar limits that are different from those allowed by current state law; and

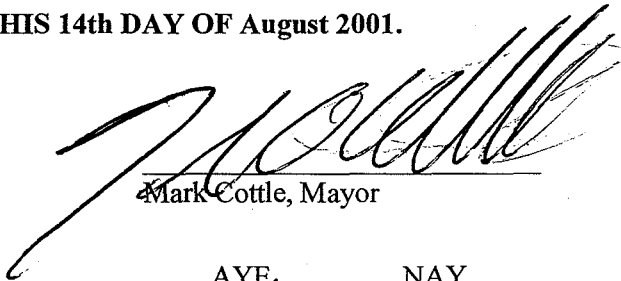
WHEREAS, the Sherwood City Council desires to update the Local Contract Review Board Rules to be in agreement with current state law.

NOW, THEREFORE THE CITY OF SHERWOOD ORDAINS AS FOLLOWS:

Section 1. The Sherwood City Council, acting as the Local Contract Review Board, hereby repeals Ordinance 99-1070 in its entirety and adopts the attached "Exhibit A" as the new Local Contract Review Board Rules.

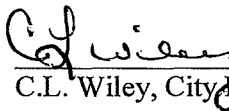
Section 2. In order to protect the interest of public health, safety, and welfare, by ensuring city facilities can be bid and constructed in the minimum amount of time, an emergency is hereby declared to exist and this Ordinance shall become effective upon its passage by the Council and approval by the Mayor.

DULY PASSED BY THE CITY COUNCIL ON THIS 14th DAY OF August 2001.



Mark Cottle, Mayor

ATTEST.


C.L. Wiley, City Recorder

	AYE	NAY
Heironimus	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Durrell	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Claus	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Weeks	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Mays	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Fox	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Cottle	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Ordinance #2001-1120

Exhibit "A"

City of Sherwood

Local Contract Review Board Rules

The following Administrative Rules (AR) have been adopted by the City Council acting as the Local Contract Review Board and are effective ~~February 9, 1999~~ August 14, 2001. These rules have been adopted pursuant to the authority granted to the Board, and shall apply to all contracting, purchasing, and disposing of personal property by the City of Sherwood.

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**SHERWOOD LOCAL CONTRACT REVIEW BOARD
ADMINISTRATIVE RULES**

AR 10.000 CONTRACTS EXEMPT FROM COMPETITIVE BIDDING AND REQUIREMENTS CONTRACTS.

10.010 1. Exemptions and Definitions.

All public contracts shall be based upon competitive bidding except the following:

- a. Contracts made with other public agencies, including the State System of Higher Education, or the federal government.
- b. Contracts that are exclusively for personal services as defined in Section 70.000. Such contracts may include incidental materials such as written reports, architectural or engineering renderings and similar supplemental materials.
- c. Contracts specifically exempt under these rules:
 - 10.015 Exemption of Contracts under Certain Dollar Amounts
 - 10.020 Contracts For Price Regulated Items
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d. As used in this section:

- (1) "Board" means the City of Sherwood Local Contract Review Board.
- (2) "City" or "The City" means Sherwood, Oregon.
- (3) "Competitive bidding" means the solicitation by the City of competitive offers which follow the formal process for advertising, bid and bid opening required by ORS Chapter 279, and applicable rules of the City of Sherwood Local Contract Review Board;
- (4) "Competitive quotes" means the solicitation of offers by the City from competing vendors. The solicitation may be by advertisement or by the City initiating a request to vendors to make an offer. The solicitation and the offer may be in writing or oral.
- (5) "Invitation to bid" means the solicitation of competitive offers in which specification, price and delivery (or project completion) will be the predominant award criteria.
- (6) "Personal property" means everything subject to ownership, which is not real property and has exchangeable value.
- (7) "Price agreement" means the same as requirements contract defined in this section.
- (8) "Request for Proposal" means the solicitation of competitive proposals, or offers, to be used as a basis for making an acquisition, or entering into a contract when specification and price will not necessarily be the predominant award criteria.
- (9) "Requirements contract" means an agreement in which the vendor agrees to supply all the purchaser's requirements that arise for an item or items within a specified time period.
- (10) "Service" means work performed to meet a demand, especially work that is not connected with manufacturing a product.
- (11) "Service contract" means a contract that calls primarily for a contractor's time and effort rather than for an end product.

(12) "Findings" means justification for the conclusion that a project is exempt from public bidding that includes, but is not limited to, information regarding:

- operational, budget and financial data
- public benefits
- value engineering
- specialized expertise required
- public safety
- market conditions
- technical complexity
- funding sources

10.015 Exemption of Contracts under Certain Dollar Amounts

Public Contracts

1. The City may, in its discretion, let public contracts not to exceed ~~\$25,000~~\$75,000 for the purchase of goods, materials, supplies and services without competitive bidding, if the City has determined that the awarding of the contract without competitive bidding will result in cost savings and the following conditions are complied with:
 - a. The contract is for a single project, and is not a component of or related to any other project.
 - b. When the amount of the contract does not exceed ~~\$2,000~~\$5,000, the City should, where feasible, obtain competitive quotes though not required.
 - c. When the amount of the contract is more than ~~\$2,000~~\$5,000, but less than ~~\$7,500~~\$75,000, the City shall obtain a minimum of three informal, competitive quotes. The City shall keep a written record of the source and amount of the quotes received. If three quotes are not available, a lesser number will suffice provided that a written record is made of the effort to obtain the quotes.
 - d. When the amount of the contract is more than ~~\$7,500~~\$5,000, but less than ~~\$25,000~~\$75,000, the City shall obtain a minimum of three competitive written quotes. If three quotes are not available, a lesser number will suffice provided that a written record is made of the effort to obtain the quotes.

Trade Related Contracts

2. The City may, in its discretion, let public contracts for trade related projects, i.e., construction, maintenance, repair, or similar labor and materials contracts without competitive bidding if the City has determined that the awarding of the contract without competitive bidding will result in cost savings and the following conditions are complied with:
 - a. The contract is for a single project, and is not a component of or related to any other project;

- b. When the amount of the contract does not exceed ~~\$2,500~~\$5,000, the City should, where feasible, obtain competitive quotes;
- c. When the amount of the contract is more than ~~\$2,500~~\$5,000 but less than ~~\$25,000~~\$75,000, except as provided in subsection (d) that the City shall obtain a minimum of three competitive quotes. The City shall keep a written record of the source and amount of the quotes received. If three quotes are not available, a lesser number will suffice provided that a written record is made of the effort to obtain the quotes.
- d. When the contract is for maintenance or repair of roads, highways or parking lots and is less than ~~\$25,000~~\$75,000, the City may let the contract without competitive bidding if a minimum of three competitive quotes are obtained. The City shall keep a written record of the source and amount of the quotes received. If three quotes are not available, a lesser number will suffice provided a written record is made of the effort to obtain the quotes.

10.020 **Contracts For Price Regulated Items**

The City may, without competitive bidding, contract for the purchase of goods or services where the rate or price for the goods or services being purchased is established by federal, state or local regulatory authority.

10.025 **Copyrighted Materials**

If the contract is for the purchase of copyrighted materials and there is only one supplier available for such goods, the City may contract for the purchase of the goods without competitive bidding.

10.030 **Library Aggregate Purchases - Library Periodicals**

1. Purchases of library materials for the City library pursuant to the exemption rule, AR 10.015, are exempt from the \$25,000 aggregate restriction of that rule.
2. Purchases for the library of subscriptions for periodicals including journals, magazines, and similar publications may be made without competitive bidding.

10.035 **Advertising Contracts**

The City may purchase advertising without competitive bidding.

10.040 **Equipment Maintenance Repair and Overhaul**

1. Contracts for equipment maintenance, repair, or overhaul may be let without competitive bidding, subject to the following conditions:
 - a. The services and/or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing; or
 - b. The services and/or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source.
2. If the contract exceeds \$10,000, the City shall document in its procurement file the reasons why competitive bids or quotes were deemed to be impractical.

10.045 **Purchases of Used Personal Property**

Subject to the provisions of this rule, the City may purchase used personal property without competitive bidding and without obtaining competitive quotes, if the City has determined that the purchase will result in cost savings and will not diminish competition or encourage favoritism. "Used personal property or equipment" is property or equipment that has been placed in use by a previous owner or user for a period of time recognized in the relevant trade or industry as "used" at the time of the purchase. "Used personal property or equipment" generally does not include property or equipment if the City was the previous user, whether under a lease, as part of a demonstration, trial project, or similar arrangement.

- a. For purchases of used property or equipment costing less than \$10,000 the City shall, where feasible, obtain three competitive quotes, unless the City has determined and documented that a purchase without obtaining competitive quotes will result in cost savings to the City.
- b. For purchases of used personal property or equipment over \$10,000, or up to the maximum dollar limitation stated in AR 10.015, the City shall obtain and keep a written record of the source of amount of quotes received. If three quotes are not available, a written record must be made of the attempt to obtain quotes.
- c. If the total purchase is estimated to exceed the maximum dollar limitation stated in AR 10.015, the Department shall submit a written request for written approval from the City Manager prior to making the purchase.

10.050 Purchases Under Established Requirements Contracts

1. When the price of goods and services has been established by a requirements contract pursuant to AR 10.060, the City may purchase the goods and services from the supplier without subsequent competitive bidding.
2. The City may use the requirements contract entered into by another public contracting agency when a formal interagency agreement exists between the City and the other agency.

10.055 Gasoline, Diesel Fuel, Heating Oil, Lubricants and Asphalt

1. The City may, without competitive bidding, purchase gasoline, diesel fuel, heating oil, lubricants, and asphalt subject to the following conditions:
 - a. Prior to selection of the contractor, the City seeks competitive quotes from at least three vendors in the area;
 - b. The City makes its purchase from the least expensive source; and
 - c. The City retains written justification for the purchase made.

10.060 Requirements Contracts

1. The City may enter into requirements contracts whereby it is agreed to purchase requirements or an anticipated need at a predetermined price providing the following conditions are complied with:
 - a. The contract must be let by competitive bidding pursuant to the requirements of Chapter 279, Oregon Revised Statutes and applicable rules of the City's Local Contract Review Board.
 - b. The term of the contract including renewals does not exceed three years.

- c. Emergency purchases declared pursuant to ORS 279.015(4) and AR 80.010

10.065 **Investment Contracts**

The City may, without competitive bidding, contract for the purpose of the investment of public funds or the borrowing of funds by the City when such investment or borrowing is contracted pursuant to duly enacted statute, ordinance, charter or constitution.

10.070 **Insurance Contracts**

1. Contracts for insurance where either the annual or aggregate premium exceeds \$10,000 must be let by formal competitive bidding or by one of the following procedures:

a. Agent of Record

The City may appoint a licensed insurance agent ("agent of record") to perform insurance services in connection with more than one insurance contract. Among the services to be provided is the securing of competitive proposals from insurance carriers for all coverage's for which the agent of record is given responsibility. Proposals for coverage are presented to the City Manager or designee for approval.

- (1) Prior to the selection of an agent of record, the City shall make reasonable efforts to inform known insurance agents in the competitive market area that it is considering such selection. These efforts shall include a public advertisement in at least one newspaper of general circulation in the area. The advertisement shall generally describe the nature of the insurance that the City will require. If the amount of the annual premium for insurance other than employee benefits insurance is likely to exceed \$10,000 per year, such notice shall also include a public advertisement in at least one insurance trade publication of general circulation in the state.
- (2) An agent's appointment shall not exceed a period of three years, but the same agent(s) may be selected in a subsequent period. Agents must qualify the appointment prior to each period as if each appointment period were the first.
- (3) In selecting an agent of record, the City shall select the agent(s) most likely to perform the most cost-effective services.

b. Specific Proposals for Insurance Contracts

The City may solicit proposals from licensed insurance agents for the purpose of acquiring specific insurance contracts subject to the following conditions:

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

- (2) The City shall select an agent on the basis of the most competitive offer considering coverage, premium cost, and service to be provided.

10.075 Employee Benefit Insurance

The City may purchase employee benefit insurance without competitive bidding.

10.080 Data and Word Processing Contracts

1. Contracts for acquisition of data and word processing hardware and systems software may be let using alternative competitive procurement methods subject to the following conditions:
 - a. If the contract amount does not exceed \$25,000, the City shall, as a minimum, follow informal competitive procurement methods per AR 10.015. Prior to selection of a vendor, reasonable efforts will be made to solicit proposals from three or more vendors. Justification of award shall be documented and become a public record of the agency.
 - b. If the contract amount exceeds \$25,000, the City may use the request for proposal process (AR 10.110) and shall solicit written proposals. Solicitations shall be requested from appropriate vendors appearing on lists compiled by the City or by advertising in an appropriate trade publication of general circulation when required by statute. The City shall document the evaluation and award process, which will be part of the public record justifying the award.
 - c. If the amount of the contract exceeds \$500,000, in addition to the requirements of subsection (1)(b) of this rule, the City shall provide; vendors competing in this category of procurement the opportunity to review the evaluation of their proposal before final management review and selection.

10.081 Telecommunications Systems Contracts

1. Contracts for acquisition of telecommunications system hardware and software may be let using alternate competitive procurement methods subject to the following conditions:
 - a. If the contract amount does not exceed \$25,000, the City shall as a minimum obtain competitive quotes. Prior to selection of a vendor reasonable efforts will be made to solicit proposals from three or more vendors. Justification of award shall be documented and become a public record of the City.
 - b. If the contract amount exceeds \$25,000, the City may use the request-for-proposal process (AR 10.110) and shall solicit written proposals. Solicitations shall be requested from appropriate vendors appearing on lists compiled by the City or by advertising in an appropriate trade publication of general circulation when required by statute.
2. The telecommunications solicitation authorized in subsection 1(b) shall:
 - a. State the contractual requirements in the solicitation document;
 - b. State the evaluation criteria to be applied in awarding the contract and the roles of any evaluation committee. Criteria that would be used to identify the proposal that best meets the public contracting agency's needs may include, but are not limited to cost, quality, service, compatibility, product reliability, operating efficiency, and expansion potential; and

- c. State the provisions made for vendors to comment on any specifications that they feel limit competition.
- d. Be advertised in accordance with ORS 279.025 and AR 30.015

10.082 **Telecommunications Services**

- 1. The intent of this rule is for the City to secure the most competitive, cost-effective telecommunications services, while meeting service performance requirements and reducing unnecessary administrative processing.
- 2. "Telecommunications Services" means the lease or rental of the use of voice and data transmission facilities or services, or of central office services, but does not include acquisition of switch or station equipment or acquisition or installation of wire and cable.
- 3. In determining the appropriate procurement method of telecommunication services, the City will determine whether competition exists. In determining competition, the City may consider the following factors:
 - a. The extent to which alternative providers exist in the relevant geographic and service market. The relevant market will vary from service category to service category and cannot be predetermined in advance.
 - b. The extent to which alternative services offered are comparable or substitutable in technology, service provided, and performance. For example, if the City's requirement is for digital services, analog services are not comparable or substitutable.
 - c. The extent to which alternative providers can respond to the City's interests in consistency and continuity of services throughout its service area, volume discounts, and centralized management. The City must document for the record its findings on these factors or any other factors used in determining whether competition exists. In developing its findings, the City may solicit information either through informal telephone or written contacts, or through a formal Request for Information.
- 4. Upon determining that competition does not exist for the relevant service and geographical area, the City may proceed to secure the service on a sole source basis, as described in AR 10.085, and following all applicable rules and procedures.

10.083 **Office Copier Purchases**

- 1. The City may enter into multiple price agreements or requirements contracts for either the purchase or lease of office copying equipment. Except for this multiple award exemption, such agreements shall otherwise conform to the requirements of AR 10.060.
- 2. In exercising this exemption the City shall fully consider the operating capabilities, limitations and cost of each brand or model and select that brand which will produce the best combination of performance and cost per copy for each application.

10.085 **Single Seller of Product Required**

Subject to all requirements of AR 20.030, the City may purchase without competitive bidding if there is only one seller of a product of the quality required, or if the efficient utilization of existing equipment or supplies requires specification of a compatible product for which there is only one seller.

10.090

Contract Amendments (Including Change Orders And Extra Work)

1. Any contract amendment for additional work including change orders, extra work, field orders, or other change in the original specifications which increases the original contract price, may be made with the contractor without competitive bidding subject to the following conditions:
 - a. The original contract was let by competitive bidding, unit prices or bid alternates were provided that established the cost for additional work, and a binding obligation exists on the parties covering the terms and conditions of the additional work; or
 - b. The amount of the aggregate cost increase resulting from all amendments shall not exceed 15 percent of the initial contract. Amendments made pursuant to section (a) of this rule are not included in computing the aggregate amount under this section. If the aggregate cost increase resulting from amendments exceeds the 15 percent limit, the amendments must go before the Board for approval.

10.100

Affirmative Action Contracts

1. Public contracts may be awarded without competitive bidding pursuant to a specific Affirmative Action plan. Affirmative Action is a program designed to insure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age, or physical or mental handicap, including, but not limited to, personnel practices of contractors, "set-aside" programs, and minority business enterprises.
2. No provision contained in Chapter 771, Oregon Law 1975, shall be construed to prohibit the City from engaging in bidding and contracting practices designed to accomplish affirmative action goals for disadvantaged or minority groups.
3. In carrying out the affirmative action policy, by appropriate ordinance, resolution, or administrative rule, the City may limit competitive bidding on any public contract for procurement of goods and services or on any other public contract estimated to cost \$50,000 or less, to contracting entities owned or controlled by persons described in subsection (1) of this section.

10.105

Responsibility of Public Agencies

The City shall pursue a policy of providing opportunities for available contracts to emerging small business and shall cooperate with the Advocate for Minority, Women, and Emerging Small Business to determine the best means by which to make such opportunities available.

The City may also exempt from competitive bidding, contracts with qualified non-profit organizations providing employment opportunities for disabled individuals.

10.110

Request for Proposal

1. The City may, at its discretion, use request-for-proposal competitive procurement methods subject to the following conditions:
 - a. Contractual requirements are stated clearly in the solicitation document.
 - b. Evaluation criteria to be applied in awarding the contract and the role of an evaluation committee are stated clearly in the solicitation document.

- (1) Criteria used to identify the proposal that best meets the public contracting needs may include but are not limited to cost, quality, service, compatibility, product reliability, operating efficiency and expansion potential.
- c. Solicitation document clearly states all complaint processes and remedies available.
- d. Solicitation document states the provisions made for vendors to comment on any specifications that they feel limit competition.
- e. The selection process shall not inhibit competition or encourage favoritism and will result in cost savings to the City. The above shall be documented as findings in the contract administration record.
- f. The procurement is advertised and a written solicitation document issued that invites the submission of sealed, written offers to be opened publicly at a designated time and place.

10.115 Purchase Off Contract by Other Public Agencies

1. The City may purchase any good or service without complying with the bidding requirements of these rules if the good or service is purchased from a bidder that has been awarded a contract for the same good or service by another public agency through its public contract purchasing procedures, if (279.015(1)(G)):
 - a. The original contract met the requirements of ORS Chapter 279;
 - b. The contract allows other public agency usage of the contract; and
 - c. The original contracting public agency agrees to the use of the original contract.
2. The purchase shall be on the same terms, or terms which are no less favorable to the purchase in all material respects, as the contract awarded by the original public agency.

10.120 Oil or Hazardous Material Removal

1. The City may enter into public contracts without competitive bidding when ordered to cleanup oil or hazardous waste pursuant to the authority granted the Department of Environmental Quality (DEQ) under ORS Chapter 466, especially ORS 466.605 through 466.680, and this order necessitates the prompt establishment and performance of the contract in order to comply with the statutes regarding spill or release of oil or hazardous material that have created an emergency condition. Comprehensive cleanup rules are set forth in OAR 340-122-205 to 340-122-360. In exercising its authority under this exemption the City shall:
 - a. To the extent reasonable under the circumstances, encourage competition by attempting to make informal solicitations or to obtain informal quotes from potential suppliers of goods or services.
 - b. Make written findings describing the circumstances requiring cleanup or a copy of the DEQ order ordering such cleanup.
 - c. Record the measures taken under subsection (a) of this section to encourage competition, the amount of the quotes or proposals obtained, if any, and the reason for selection the contractor selected.

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

10.125 Construction Manager/General Contractor Contracts

1. A contract for a public improvement may be exempted from competitive bidding under these rules for Construction Manager/General Contractor (CM/GC) contracts where applicable, which are exempt as a class, from the bidding requirements of ORS 279.015.
2. When the CM/GC form of contract is used, the department must prepare written findings justifying the use of the CM/GC process for the particular project under the standards of ORS 279.015 (2). The department is responsible for preparing said findings and shall submit its recommendation to the City Manager for review. The department shall also furnish a copy of the said findings to the City Attorney for review as to form and content. The recommendation with the written findings shall be submitted to the City Council, sitting as the Contract Review Board for their approval. The City Council shall award the contract.

10.130 Negotiations with Lowest Responsive, Responsible Bidder when all Bids exceed Costs Estimates

3. If a project is competitively bid and all responsive bids from responsible bidders exceed the City's cost estimate, the City, in accordance with rules adopted by the City may negotiate with the lowest responsive, responsible bidder, prior to awarding the contract, in order to solicit value engineering and other options to attempt to bring the project within the City's cost estimates.
4. A negotiation with the lowest responsive, responsible bidder pursuant to this paragraph shall not result in the award of the contract to that bidder if the scope of the project is significantly changed from the original bid proposal.
5. Notwithstanding any other provision of law, the records of a bidder used in contract negotiation pursuant to this paragraph are not subject to public inspection until after the negotiated contract has been awarded or the negotiation process has been terminated.

AR 20.000 BRAND NAMES OR MARKS

20.010 Specification of Particular Brand Names or Products

1. Specifications for public contracts shall not expressly or implicitly require any product of any particular manufacturer or seller except pursuant to an exemption under AR 20.020 (Copyrighted Materials), 20.030 (Single Manufacturer Or Compatible Products), 20.040 (Product Prequalification), or 20.050 (Brand Name or Mark Exemption Applications).
2. If there is no other practical method of specification, the City may designate a particular brand name, make, or product "or equal", but this practice should be avoided whenever possible.

20.020 **Copyrighted Materials**

The City may specify a specific copyrighted product. This exemption does not include patented or trade mark goods.

20.030 **Single Manufacturer or Compatible Products**

1. If there is only one manufacturer or seller of a product of the quality required, or if the required product is data processing equipment which will be used for research where there are requirements for exchange of software and data with other research establishments, or if the efficient utilization of the existing equipment or supplies requires a compatible product of a particular manufacturer or seller, the City may specify such particular product subject to the following conditions:
 - a. The product is selected on the basis of the most competitive offer considering quality and cost. The term "cost" includes not only the product price but also other items of expense such as costs related to quality of conversion.
 - b. Prior to awarding the contract, the City has made reasonable effort to notify known vendors of competing or comparable products of the intended specifications and invited such vendors to submit competing proposals.
 - c. If the purchase does not exceed \$25,000, such notice and invitation may be informal.
 - d. If the amount of the purchase exceeds \$25,000, such notice shall include advertisement in at least one newspaper of general circulation in the area where the contract is to be performed and shall be timely to allow competing vendors a reasonable opportunity to make proposals.
2. If the amount of the purchase exceeds \$25,000 and is not also pursuant to the data and word processing exemption (AR 10.080), the City shall document its actions in the bid file. Such documentation shall include:
 - a. A brief description of the proposed contract or contracts.
 - b. A detailed description of the reasons why the product and/or seller was selected and any competing products and/or sellers that were rejected. The description shall also include the efforts taken by the City to notify and invite proposals from competing vendors.
3. If the City intends to make several purchases of the product of a particular manufacturer or seller for a period not to exceed two years, it may so state in the documentation required by subsection (1)(b) and (2) of this rule, and such documentation shall be sufficient notice as to subsequent purchases.

20.040 **Product Prequalification**

1. When it is impractical to create specific design or performance specifications for a type of product to be purchased, the City may specify a list of approved products by reference to particular manufacturers or sellers in accordance with the following product pre-qualification procedure:

- a. The City has made reasonable efforts to notify known manufacturers or vendors of competitive products of its intention to accept applications for inclusion in its list of prequalified products. Notification shall include advertisement in a trade journal of statewide distribution when possible. In lieu of advertising, the City may notify vendors and manufacturers appearing on the appropriate list maintained by the Department of General Services of the State of Oregon.
 - b. The City permits application for prequalification of similar products up to 15 days prior to advertisement for bids on the product.
2. If an application for inclusion in a list of prequalified products is denied, or an existing prequalification revoked, the City shall notify the applicant in writing. The applicant may appeal to the Board for a review of the denial or revocation in the same manner as an appeal of disqualification or denial provided in AR 30.110(5).

20.050 Brand Name or Mark Exemption Applications

1. The City may apply for and receive a brand name or mark exemption ruling from the Board for current and contemplated future purchases. Applications shall contain the following information:
 - a. A brief description of the contract or contracts to be covered. The description should include contemplated future purchases.
 - b. The brand name, mark, or product to be specified.
 - c. The reasons the City is seeking the exemption.

20.060 Conditions Of Brand Name Exemptions

1. The Board may grant exemptions if any of the following conditions are met:
 - a. The exemption is not likely to encourage favoritism in public contracts or substantially diminish competition and will result in cost savings.
 - b. There is only one manufacturer or seller of the product of the quality required, or efficient utilization of existing equipment or supplies requires acquisition of compatible equipment or supplies.
 - c. The exemption is requested for the purchase of a particular product to be used in an experimental project.

AR 30.000 PUBLIC BIDDING PROCEDURES

30.002 Definitions

For purposes of these rules the following definitions apply:

1. "Addenda to the Bid Documents" means additions or changes to the bid documents. Addenda shall be labeled as such and distributed in accordance with these rules.
2. "Bid" means a competitive offer in which price, delivery (or project completion) and conformance to specification will be the predominant award criteria.
3. "Bid Closing" means the date and time announced as the deadline for the receipt of bids.
4. "Bid Opening" means the date, time and place set for opening of competitive bids.

5. "Bid Sample" means a representative specimen of the item that will be available in response to the bid.
6. "Bidder" is a person who submits a bid in response to the City's Invitation to Bid.
7. "Bidding Period" means the span of time between the date of the invitation to bid and the time and date set for receipt of bids. A minimum of fourteen (14) calendar days shall be provided, unless a shorter time is deemed necessary in the public interest for a particular procurement.
8. Contract: The written agreement, including the City's solicitation document and the accepted portions of a bid or proposal, between the city and the contractor describing the work to be done and the obligations of the parties. Depending upon the goods and services being procured, the City may use "contract" as meaning a purchase order, price agreement, or other contract document in addition to the City's solicitation document and the accepted portions of a bid or proposal. If the contract is for a public improvement, the "contract" may consist of the City's solicitation document, including any addenda, the general and special conditions governing the work, the accepted portions of the bid or proposal, the performance and payment bond (if required), plans, technical specifications, approved shop drawings, and any contract amendments, including approved change orders.
9. Contract Price: The total of the awarded bid or proposal amount, including any approved alternates, and any fully executed change orders or amendments.
10. "Contract Release Order" means the document authorizing an additional purchase on an existing requirements contract.
11. Contractor: The individual, firm or corporation awarded the public contract to furnish the City the goods, services or work procured in the City's solicitation.
12. "Descriptive Literature" means materials submitted by prospective vendors to provide information concerning the products available in response to the bid.
13. Facsimile: Electronic equipment that communicates and reproduces both printed and handwritten material. If used in conjunction with a reference to a document, e.g., facsimile bid, the term refers to a document (in the example given, a bid) that has been transmitted to and received by the City via facsimile.
14. "Lowest Responsible Bidder" means the lowest bidder who has substantially complied with all prescribed public bidding procedures and requirements and who has not been disqualified by the public contracting agency under ORS 279.037 (ORS 279.029(1)).
15. Proposal: A competitive offer, binding on the proposer and submitted in response to a Request for Proposals, where proposal evaluation and contract award is based on criteria such as proposer qualifications and experience, product features and characteristics, service equality and efficiency, and conformance with the specifications and requirements of the solicitation. Price may be an evaluation criterion for proposals, but will not necessarily be the predominant basis for contract award.
16. "Proposer" is a person who submits a proposal in response to the City's Request for Proposals.

17. Solicitation Document: An Invitation to Bid or Request for Proposals, which included all documents, whether attached or incorporated by reference, utilized for soliciting bids or proposals.
18. Specification: Any description of the physical or functional characteristics, or of the nature of a supply, service or construction item. Specifications may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery and the quantities or qualities of materials to be furnished under the contract. Specifications generally will state the result to be obtained and may, on occasion, describe the method and manner of doing the work to be performed. Specifications may be incorporated by reference and/or through attachment to the contract.

30.005 Competitive Bidding

1. Contracts issued by the City shall be awarded by competitive bidding except as otherwise exempted under the provisions of ORS 279.015(1)(a)-(g), (2) (3) or (4), 279.017, 279.029(2), 279.053, 279.056, 279.059(2), 279.096, 279.570, 279.850, 282.210 or under AR 10.000 of these rules.
2. It is the policy of the City to encourage public contracting competition that supports openness and impartiality to the maximum extent possible.
3. The City finds that:
 - a. Competition exists not only in prices, but also in the technical competence of suppliers, in their ability to make timely deliveries and in the quality and performance of their products and services and that a balance must exist between performance competition and price competition.
 - b. The nature of effective competition varies with the product or service being procured and that while competitive sealed bids are a common method of procurement, it is not always the most advantageous or practical method of source selection.
 - c. Meaningful competition can be achieved through a variety of methods when procuring products or services. The methods include but are not limited to:
 - (1) Price competition as represented by the initial or acquisition price;
 - (2) Competition as represented by price and performance evaluations of the competing items and suppliers;
 - (3) Competition as represented by evaluation of the capabilities of bidders or proposers to perform needed services;
 - (4) Competition as represented by evaluation of the capabilities of the bidders or proposers to perform the services followed by a negotiation on price; or
 - (5) Competition as represented by another method of procurement that is reasonably calculated to satisfy the City's needs.
4. All public contracts shall be made under conditions that foster competition among a sufficient number of potential suppliers that offer a wide spectrum of products and services and that represent a broad marketplace. Fostering competition shall be reflected in:

- a. Writing specifications and procurement documents in a simple and easy to read format;
 - b. Searching for new sources of supply;
 - c. Attempting to make solicitation documents simple and inviting;
 - d. Everyday courtesy shown to prospective suppliers and contractors; and
 - e. The way information on contracting opportunities is provided to suppliers, including but not limited to advertisement in publications of general circulation and any other reasonable methods that encourage competition and that are consistent with ORS 279.025.
5. The City may evaluate every aspect of competition in its effort to purchase products or services, choose the appropriate solicitation process or award contracts in accordance with the criteria described herein and arrive at offers that represent optimal value to the City.
 6. Public improvement contracts shall not be subject to subsections 2 through 5 of this rule.

30.008 Eligibility to Bid on Construction Contracts

A person shall not submit a bid or proposal to work as a construction "contractor" as defined in ORS 701.005(2) unless that person is first registered with the Construction Contractors Board or licensed by the State Landscape Contractor's Board as required by ORS 671.530. Bids from persons who fail to comply with this requirement shall be deemed nonresponsive and be rejected, unless contrary to federal law.

30.010 Bid Documents

1. The bid documents shall include the following:
 - a. Instructions and information to bidders concerning the bid submission requirements, including the time and date set for opening of bids, the address of the office to which bids are to be delivered, and any other special information, e.g. whether bids or proposals may be submitted by facsimile;
 - b. Where applicable, the purchase description, specifications, delivery or performance schedule, inspection and acceptance requirements, and special evaluation factors;
 - c. The contract terms and conditions, including warranty and bonding or other bid security requirements, as applicable; and
 - d. All addenda issued by the City.
2. Determination of Contractual Terms and Conditions
 - a. The City is authorized to determine the contractual provisions, and terms and conditions of solicitations and contracts, provided such provisions, terms and conditions are not contrary to statutory or regulatory requirements.
3. Terms and Conditions Applicable to Public Contracts
 - a. In addition to the Oregon preference requirement in ORS 279.021(1), and the reciprocal preference requirements of 279.029(2) and (3), the City shall establish standard terms and conditions including those applicable as prescribed by ORS 279.310 to ORS 279.650:

- (1) Payment of laborers and material men; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279.312);
- (2) Payment of claims by public officers (ORS 279.314);
- (3) Hours of labor (ORS 279.316 and 279.338);
- (4) Environmental and natural resources regulations (ORS 279.318);
- (5) Payment for medical care and attention to employees (ORS 279.320);
- (6) Voluntary termination of the contract (ORS 279.326);
- (7) Suspension of the work (ORS 279.328 - 279.333);
- (8) Maximum hours and overtime (ORS 279.334);
- (9) Claims for overtime (ORS 279.336);
- (10) Overtime requirement for local governments (ORS 279.340 and 279.342);
- (11) Prevailing wage rates (ORS 279.348 - 279.365);
- (12) Retainage (ORS 279.400 - 279.435);
- (13) Contractor's bond (ORS 279.526 and 279.536);
- (14) Notice of claim (ORS 279.528);
- (15) Labor and material liens (ORS 279.538 and 279.540);
- (16) Liability in absence of bond (ORS 279.542);
- (17) Progress payments (ORS 279.435); and
- (18) Subcontractors (ORS 279.445);
- (19) Use of recovered resources and recycled materials (ORS 279.545 to 279.555);
- (20) Paper conservation guidelines (ORS 279.565);
- (21) Preference for recycled materials (ORS 279.570);
- (22) Recycled oil use and preference (ORS 279.580 to 279.596);
- (23) Retreaded tires use and preference (ORS 279.605 to 279.617);
- (24) Preference to paper products that reduce waste or are recycled (ORS 279.621 and 279.650).

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

- (1) Certification by contractor of compliance with the Oregon tax laws in accordance with ORS 305.385.
- (2) Certification by contractor of nondiscrimination in obtaining required subcontractors in accordance with ORS 279.11 (see OAR 137-30-100(4)).
- (3) A provision substantially providing that: "The Contractor, its subcontractors, if any, and all employers working under this agreement/contract are subject employers under the Oregon Workers'

Compensation Law and shall comply with ORS 656.017, which requires them to provide Workers' Compensation coverage for all their subject workers" (ORS 279.320(2)).

- (4) In cases where the contract calls for work as described in ORS 701.005(2) (i.e., construction work), certification by the "contractor" that the contractor is registered with the Construction Contractors Board in accordance with ORS 701.035 to 701.055. (Federal regulations may prohibit this requirement when federal funds are involved.
 - (5) Certification by the contractor that all subcontractors performing work as described in ORS 701.005(2) will be registered with the Construction Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence work under this contractor.
 - (6) A condition requiring the use of certified inmate work force in accordance with ORS 279.319, if the contract is for the removal, abatement, or demolition of asbestos.
 - (7) Any other requirement imposed by federal or state law, regulation, rule, or ordinance that is applicable to the contract. ORS 279.056 provides that where federal funds are involved, federal laws, rules, and regulations shall govern in case of conflict with any of the provisions of ORS 279.011 to 279.063.
- c. Such terms, conditions, and requirements shall become an integral part of each contract.

4. Special Terms and Conditions

The City may also establish special terms and conditions applicable to specified categories of contracts. Any special terms and conditions shall be included in the bid documents and become an integral part of those contracts.

5. Compliance and Exceptions to Terms and Conditions

- a. Bidders shall be responsible for noting the terms and conditions included as applicable to each set of bid documents.
- b. By signing and returning the bid proposal form, the bidder is acknowledging acceptance of and the intent to abide by the terms and conditions.
- c. The City has the right to reject any bid or proposal that takes exception to specifications or to contract terms unless the right to take exception is expressly granted in the Invitation to Bid or Request for Proposals. Bids or proposals which take exception to the specifications or contract terms, or which are made contingent upon the City's acceptance of different or additional specifications or terms, may be rejected because they are not responsive to the Invitation to Bid or the Request for Proposals.
- d. Any exceptions to the terms and conditions must be clearly stated in writing by the bidder in the signed returned proposal. The city reserves the right to reject any bid that takes exception to the terms and conditions. Exceptions to the terms and conditions become contractual obligations only upon written acceptance by the City.

Commentary

In compliance with the provisions of ORS 279.318 and subsection 3(a)(4) of this section, the following is a list of federal, state, and local agencies of which the City has knowledge that have enacted ordinances or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that may affect the performance of the contract:

Federal Agencies:

Agriculture, Department of

Forest Service

Soil Conservation Service

Defense, Department of

Army Corps of Engineers

Energy, Department of

Federal Energy Regulatory

Commission

Environmental Protection Agency

Health and Human Services

Department of

Housing and Urban Development,

Department of Solar Energy

Conservation Bank

Interior, Department of

Bureau of Sport Fisheries and Wildlife

Bureau of Outdoor Recreation

Bureau of Land Management

Bureau of Mines

Bureau of Indian Affairs

Bureau of Reclamation

Geological Survey

Minerals Management Service

Labor, Department of

Mine Safety and Health Administration

Occupational Safety and Health Administration

Transportation, Department of

Coast Guard

Federal Highway Administration

Water Resources Council

State Agencies:

Administrative Services, Department of

Agriculture, Department of

Columbia River Gorge Commission

Consumer & Business Services, Department of

Oregon Occupational Safety & Health Division

Energy, Department of

Environmental Quality, Department of

Fish and Wildlife, Department of

Forestry, Department of

Geology and Mineral Industries, Department of

Human Resources, Department of

Land Conservation and Development Commission

Parks and Recreation, Department of

Soil and Water Conservation Commission

State Engineer

State Land Board

Water Resources Board

Local Agencies:

City Council

County Court

County Commissioners, Board of

Port Districts

Metropolitan Service Districts

County Service Districts

Sanitary Districts

Water Districts

Fire Protection Districts

30.012

Bids Are Offers

1. The bid constitutes the bidder's offer to enter into a contract which, if accepted by the City, shall bind the bidder to a contract unless the bid is withdrawn prior to a bid opening under AR 30.060(2).
2. The bid shall constitute a "firm offer" unless bidders are specifically authorized to take exceptions or to leave terms open to negotiation by bid documents published under certain exemptions from the general requirement for "strict" competitive bidding such as the Request for Proposals exemption (AR 10.110). Unless the taking of exceptions or post-award negotiation is authorized by the Invitation to Bid or Request for Proposals, each bid must constitute a complete offer, fully responsive to the bid invitation.
3. Unless expressly authorized by the Invitation to Bid or the Request for Proposals, bidders shall not make their bids or proposals contingent upon the City's acceptance of specifications or contractual terms that conflict with or are in addition to those advertised in the Invitation to Bid or Request for Proposals.

30.013 Facsimile Bids and Proposals

1. Authorization.

The City may authorize the submission of bids or proposals by facsimile. However, prior to authorizing the submission of bids or proposals by facsimile, the City shall consider whether its equipment, personnel and procedures are ready to receive a reasonable number of transmissions within a short period of time and, in addition, the City, prior to authorizing submission by facsimile, shall establish the means and method for sealing or securing the transmitted documents to preserve the "sealed" requirement of competitive procurement.

2. Required Factors.

In determining whether to authorize facsimile bids or proposals, the City shall consider factors such as:

- a. Anticipated bid or proposal size and volume;
- b. Whether there is an urgent need for the goods or services being procured;
- c. Frequency of price changes;
- d. Availability, reliability, speed, and capacity of the receiving facsimile equipment;
- e. Adequacy of administrative procedures and controls for receiving, identifying, recording, and safeguarding facsimile bids or proposals, and ensuring their timely delivery to the bid proposal opening location; and
- f. Whether bid or proposal security must or will be required to be submitted since it cannot be acceptably transmitted by facsimile.

3. Provision to be Included in Solicitation Document.

If facsimile transmission is authorized, the City will modify the following provision to meet its needs and insert it into the City's solicitation document:

- a. **Definition.** Facsimile bid or proposal, as used in this solicitation, means of a bid or proposal, modification of a bid or proposal, or withdrawal of a bid or proposal that is transmitted to and received by the City via electronic equipment that communicates and reproduces both printed and handwritten material.

- b. **Timely Submission.** Bidders (or proposers) may submit facsimile bids (or proposals) in response to this solicitation. The entire response must arrive at the place and by the time specified in the solicitation document.
- c. **Rejection of Bids or Proposals.** Facsimile bids or proposals that fail to furnish required representations or information, or that reject or take exception to any of the terms, conditions, and provisions of the solicitation, may be rejected and excluded from consideration.
- d. **Signatures.** Facsimile bids or proposals must contain the required signatures.
- e. **Request for Original.** The City reserves the right to make the contract award solely on facsimile bid or proposal. However, if requested to do so by the City representative, the apparently successful bidder or proposer agrees to promptly submit the complete original signed bid or proposal.
- f. **Transmission Information.** Facsimile receiving data and compatibility characteristics are as follows:
 - (1) Telephone number of receiving facsimile equipment;
 - (2) Compatibility characteristics of receiving facsimile equipment *e.g.* make and model number, receiving speed, and communications protocol.
- g. **Responsibility for Transmission Failure.** If the bidder or proposer chooses to transmit a facsimile bid or proposal, the City will not be responsible for any failure attributable to the transmission or receipt of the facsimile bid or proposal including, but not limited to the following:
 - (1) Receipt of garbled or incomplete bid or proposal documents.
 - (2) Availability or condition of the receiving facsimile equipment.
 - (3) Incompatibility between the sending and receiving equipment.
 - (4) Delay in transmission or receipt of bid or proposal documents.
 - (5) Failure of the bidder or proposer to properly identify the bid or proposal documents.
 - (6) Illegibility of bid or proposal documents.
 - (7) Security and confidentiality of bid or proposal data.

30.015 Public Notice

1. Distribution

Bid documents and notices of the availability of bid documents shall be mailed, placed on the Oregon Department of Administrative Service's electronic procurement system known as the "Vendor Information Program," or otherwise furnished to a sufficient number of bidders for the purpose of securing competition. Notice of availability shall indicate where, when, and for how long the bid documents may be obtained; generally describe the supply, service or construction desired; and may contain other appropriate information. The City may charge a fee or require a deposit for the bid documents.

2. Advertising

- a. Unless exempted, every formal solicitation of bids shall be advertised. An advertisement for bids shall be published at least once in at least one newspaper of general circulation in the area where the contract is to be performed and in as many additional issues and publications as the City may determine to be necessary or desirable to ensure competition.
- b. All advertisements for bids shall state:
 - (1) The date and time after which bids will not be received, which date shall not be less than five (5) days after the date of the last publication of the advertisement;
 - (2) The date that prequalification applications must be filed if prequalification is a requirement;
 - (3) The character of the work to be done or the items to be purchased;
 - (4) The office where contract terms, conditions, and specifications may be seen;
 - (5) The name, title, and address of the person designated to receive bids;
 - (6) The date, time, and place that bids will be publicly opened;
 - (7) That the bid may be rejected for not complying with all prescribed public bidding procedures and requirements;
 - (8) That any or all bids may be rejected for good cause upon a finding that is in the public interest to do so;
 - (9) That the bid must include a statement concerning whether bidder is a "resident bidder," as defined in ORS 279.029; and
 - (10) Whether or not a contractor or subcontract must be licensed, under ORS 468.883, to work with asbestos-containing materials; and
 - (11) That no bid or proposal for a construction contract shall be received or considered by the City unless the bidder or proposer is registered with the Construction Contractors Board, as required by ORS 701.035 et seq., or licensed by the State Landscape Contractors Board, as required by ORS 671.530.

3. Posting of Bid Advertisement

A copy of each bid advertisement shall be posted at the business office of the City. Bidders may obtain a copy upon request.

30.020 Bid Preparation

Bid Preparation Instructions:

1. Except as otherwise allowed in AR 30.013, as applicable, bids shall be typed or prepared in ink and shall be signed in ink by the bidder or an authorized representative of the bidder. The City will not accept telephonic facsimile bids or signatures unless specified in the bid document.
2. Bids shall be made on the bid form provided unless otherwise instructed in the bid document.

3. Except as otherwise allowed in AR 30.013, as applicable, alterations or erasures, if any, shall be initialed in ink by the person signing the bid.
4. Bids shall contain a fully executed bid package, including all required documents and descriptive literature.
5. If specifically allowed by the solicitation documents, bids or proposals may be submitted by facsimile, but only if the City has the equipment and means necessary to receive bids or proposals by facsimile.

30.025 Bidder Prequalification

The City may require mandatory prequalification of bidders on forms prescribed in the bid document. When prequalification is required by the bid documents as a condition for bidding, the City shall not consider the bid(s) of any prospective bidder who is not prequalified in accordance with the City's adopted rules and regulations (ORS 279.039).

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

30.030 Bidder Submissions

1. Bid Samples and Descriptive Literature

Bid samples or descriptive literature may be required when it is necessary to evaluate required characteristics of the item bid. Bid samples will be returned in accordance with provisions contained in the bid documents.

2. Identification of Bids

Bids shall be submitted in a sealed envelope appropriately marked or in the envelope provided by the City, whichever is applicable, to ensure proper identification and special handling. If the City permits bids or proposals to be submitted by facsimile, the bidder or proposer must identify and submit bid or proposal documents exactly as required in the City's solicitation documents. The City shall not be responsible for the proper identification and handling of any bids not submitted in the designated manner or format to the required delivery point.

3. Receipt of Bid

It is the bidder's responsibility to ensure that bids are received by the City at the required delivery point prior to the stated bid closing time regardless of the method used to submit or transmit them.

30.035 Bid Security

(Also see AR 50.000)

1. Public Improvement Contracts

Bid security not to exceed 10 percent of the base bid(s) shall be required for public improvement contracts where the amount of the contract exceeds \$10,000 (ORS 279.027(3); 279.033). The bid security shall be forfeited if the bidder fails to execute the contract promptly and properly if awarded (ORS 279.031).

2. Other Public Contracts

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

3. Contracts Under \$10,000

Bid security for contracts of less than \$10,000 shall be required only in critical circumstances, so as not to discourage competition.

4. Form of Bid Security

The City will accept the following forms of bid security:

- a. Surety bond from a surety company authorized to do business in the State of Oregon;
- b. Cashier's check, certified check, or savings and loan secured check; or
- c. Annual surety bond filed with the City (except for public improvements contracts).

5. Return of Bid Security

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

30.040

Pre-Bid Conferences

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

30.050

Protest of Bid Specifications

1. Time for Submission of Protest

Unless a different deadline is specified in the Invitation to Bid or Request for Proposal, requests for change or protests of bid specifications or contract terms shall be presented to the City in writing in accordance with the following timelines:

- a. Public Improvement Contract - ten (10) calendar days prior to bid closing.
- b. Other Public Contracts - five (5) calendar days prior to bid closing.
- c. Such protest or request for change shall include the reasons for protest or request, and any proposed changes to specifications or terms. No protest against award because of the content of bid specifications or contract terms shall be considered after the deadline established for submitting such protest.

2. Extension of Opening Date

If any bid specification protest is received in accordance with section (1) above, the bid opening date may be extended if necessary to allow consideration of the protest and issuance of any addenda to the bid documents.

3. Identification of Protest

Envelopes containing protests of bid specifications shall be marked as follows:

Bid Specification Protest

Bid Number or Other Identification

30.055 Addenda to Bid Documents

1. Form

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

2. Distribution

Addenda shall be sent to all prospective bidders known to have obtained the bid documents or attended any mandatory pre-bid conferences.

3. Timeliness

a. Addenda shall be issued within a reasonable time prior to bid closing to allow prospective bidders to consider them in preparing their bids, but in no case less than 72 hours before the bid closing. If necessary, the City may notify prospective bidders by telegram, telephonic facsimile or telephone. If telephone is used, the City shall confirm the oral notice with a written addendum.

b. In its discretion, the City may extend the bid closing date and time to allow prospective bidders to analyze and adjust to changes made by Addenda. The City shall notify prospective bidders of the new closing date and time either in the Addendum or in writing accompanying the Addendum.

30.060 Pre-Opening Modification or Withdrawal of Bids

1. Modifications

Bids once submitted may be modified in writing prior to the time and date set for bid closing. Any modifications shall be prepared on the company letterhead, signed by an authorized officer, and state that the new document supersedes or modifies the prior bid. The City may accept telegraphic modification, telephone facsimile, or similar modifications, if it has authorized the submittal of documents by one or more of these means in accordance with AR 30.013. To ensure the integrity of the bidding process, the envelope or electronically transmitted document containing any modifications to a bid or proposal shall be marked as follows:

Bid (or Proposal) Modification

Bid Number or Other Identification

2. Withdrawals

- a. Bids may be withdrawn by written notification on company letterhead signed by an authorized person and received prior to the time and date set for bid closing. Bids also may be withdrawn in person prior to the scheduled bid closing upon presentation of appropriate identification.
- b. Unopened bids withdrawn under subsection (a) above may be released to the bidder after voiding any date and time stamp used.
- c. Requests to withdraw mailed bids shall be marked as follows:

Bid Withdrawal

Bid Number or Other Identification

3. Documentation

All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate bid file

30.065 Receipt, Opening, and Recording of Bids

1. Receipt

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

2. Opening and Recording

Bids and modifications shall be opened publicly, at the time, date, and place designated in the bid documents. If witnesses are present at the bid opening, and to the extent practicable, the name of each bidder, the bid price(s), and such other information as considered appropriate, shall be read aloud. On voluminous bids the City may advise bidders as part of the bid documents that the bid items and prices will not be read aloud.

3. Availability

The opened bids shall be available for public inspection prior to award except to the extent the bidder designates trade secrets or other proprietary data to be confidential (ORS 192.501(2)). The City shall verify and determine that the confidential information claimed to be exempt is in fact exempt from disclosure under the Oregon Public Records Law. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices, makes, model or catalog number of items offered, scheduled delivery dates, and terms of payment shall be publicly available regardless of any designation to the contrary.

30.070 **Late Bids, Late Withdrawals, and Late Modifications**

1. Definition

Any bid received after the time and date set in the bid documents for receipt of bids is late. Any request for bid withdrawal or modification received after the time and date set for bid closing is late.

2. Disposition

Late bids, late modification, or late withdrawals shall not be considered.

30.075 **Mistakes in Bids**

1. General

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

2. Mistakes Discovered After Bid Closing but Before Award

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

a. Minor Informalities

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

- (1) Return the number of signed bids or the number of other documents required by the bid documents;
- (2) Sign the bid form in the designated block so long as a signature appears in the bid documents evidencing an intent to be bound; or
- (3) Acknowledge receipt of an addendum to the bid documents, but only if:
 - (a) It is clear from the bid that the bidder received the addendum and intended to be bound by its terms; or
 - (b) The addendum involved did not affect price, quantity, quality, or delivery.

b. Mistakes Where Intended Correct Bid is Evident

If the mistake and the intended correct bid are clearly on the face of the bid form, or can be substantiated from accompanying documents, the City may accept the bid. Examples of mistakes that may be clearly evident on the face of the bid form are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors. Mistakes that are clearly evident on the face of the bid form

or proposal document also may include instances in which the intended correct bid or proposal item is made clearly evident by simple arithmetic calculations. For example, a missing unit price may be established by dividing the total bid or proposal item by the quantity of units for that item, and a missing or incorrect total bid or proposal price for an item may be established by multiplying the unit price by the quantity when those figures are available on the bid or proposal. For discrepancies between unit prices and extended prices, unit prices shall prevail.

c. Mistakes where Intended Correct Bid is not Evident

The City may not accept a bid in which a mistake is clearly evident on the face of the bid form but the intended correct bid is not clearly evident or cannot be substantiated from accompanying documents.

30.080 **Time for Acceptance**

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

30.085 **Extension of Time for Acceptance of Bid**

Notwithstanding AR 30.080, after opening bids, the City may request orally or in writing that bidders extend the time in writing during which the City may accept their bids.

30.090 **Bid Evaluation and Award**

1. General. The contract, if awarded, is to be awarded to the lowest responsive and responsible bidder or the best responsive and responsible proposer. Consistent with the provisions of the bid documents and in the public interest as determined by the City, awards may be made by item, groups of items, or entire bid. The City reserves the right to reject any bid not in compliance with the bid documents or with all prescribed public bidding procedures (ORS 279.025(i)) and to reject any or all bids upon a finding by the City that it is in the public interest to do so (ORS 279.035).
2. Special Requirements
 - a. The bid documents shall set forth any special requirements and criteria that will be used to determine the lowest responsible bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the bid documents or City regulation.
 - b. In determining the lowest responsible bidder, the City shall, for the purpose of awarding the contract, add a percent increase on the bid of a nonresident bidder equal to the percent, if any, of the preference given to that bidder in the state in which the bidder resides.
 - c. The City may rely on a list provided for by the Oregon Department of Administrative Services pursuant to ORS 279.029(3) for preference provided for by this section.
3. Product Acceptability
 - a. The bid documents shall set forth the evaluation criteria to be used in determining product acceptability. The City may require the submission of bid samples, descriptive literature, technical data, or other material, and may also provide for accomplishing any of the following prior to award.

- (1) Demonstration, inspection or testing of a product prior to award for such characteristics as quality or workmanship;
- (2) Examination of such elements as appearance, finish, taste, or feel; or
- (3) Other examinations to determine whether the product conforms to specifications.

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

4. Determination of Lowest Responsive and Responsible Bidder

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

- a. Be reasonable estimates based upon information the City has available concerning future use;
- b. Treat all bids equitably; and
- c. Recognize that public policy requires acquisitions and public improvements to be accomplished at the least cost. ORS 279.023(1).

5. Restrictions

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

6. Determination of best, responsive and responsible proposer. Proposals will be evaluated to determine which proposer offers the best solution to the City in accordance with the evaluation criteria set forth in the solicitation documents. Only the criteria that are set forth in the solicitation documents shall be applied. The criteria shall be as objective as possible. Examples of evaluation criteria may include, but are not limited to, cost, quality, service, compatibility, product reliability, operating efficiency, expansion potential, performance history on other private and public contracts, experience of key personnel, adequacy of equipment and/or physical plant, financial wherewithal, sources of supply, references and warranty provisions. Evaluation factors need not be precise predictors of actual future costs and performance; but to the extent possible, such evaluation factors shall:

- a. Be reasonable estimates based on information available to the City;
- b. Treat all proposals equitably;
- c. Recognize that public policy requires acquisitions and public improvements to be accomplished at the least cost. ORS 279.023(1).

7. Restrictions. Nothing in this section shall be deemed to permit contract award to a proposer submitting a higher quality item than that designated in the solicitation documents if such proposer is not also the best, responsive and responsible proposer as determined under section (6) of this rule. Negotiations with proposers are permitted in accordance with AR 30.105.

8. No assignment or transfer of contract rights. Unless an express provision of the public contract otherwise provides, the contractor shall not assign, sell or transfer rights, nor delegate responsibilities, under public contract, either in whole or in part, without first obtaining the City's prior written consent. Unless otherwise agreed by the City in writing, such consent shall not relieve the contractor of any obligations under a public contract, and any assignee or transferee shall be considered the agent of the contract and bound to abide by all provisions of the public contract. Except in the event of a notation, if the City consents in writing to an assignment, sale, or transfer of the contractor's rights and responsibilities, the contractor and its surety, if any, shall remain ultimately liable to the City for complete performance of the public contract as if no such assignment, sale, or transfer had occurred.

30.091 **Life Cycle Cost Analysis**

1. In determining the lowest responsible bidder, in the award of a contract, the City may use the concept of life cycle costing if it complies with section (2) of this rule. As used in this rule, life cycle costing means determining the cost of a product for its useful life.
2. The City shall follow the following procedures:
 - a. At the time of writing specifications for the product, the City shall identify those factors which will have cost implications over the life of the product and which,

for evaluation purposes, will be used to adjust the bid or proposal price of the product.

- b. The Invitation to Bid or Request for Proposal shall set out clearly the factors and methodology to be used in life cycle cost adjustments.
- c. The results of life cycle costing adjustments shall be applied to the bid or proposal price of the products(s) offered, and the bid or proposal that results in the lowest overall ownership cost, taking into account the life cycle costing adjustments, shall be considered the lowest bid or best proposal for purposes of bid or proposal price evaluation.

30.092 **Responsible Bidders; Responsibility Investigation**

- 1. A responsible bidder is one who has:
 - a. Adequate financial resources to perform the contract, or the ability to obtain such resources. The City shall require acceptable evidence of the bidder's ability to provide or obtain the required financial resources. Acceptable evidence normally consists of, but is not limited to, current and recent balance sheets; income statements; cash flow statements; and/or a performance bond from an acceptable surety in an amount equal to the bid or proposal price. Such evidence may also include a commitment or specific arrangement, that will be in existence at the time of contract award, to rent, purchase, or otherwise acquire the needed facilities, equipment, or other resources;
 - b. The ability to comply with the required or proposed delivery or performing schedule, taking into consideration all existing commercial and public business commitments;
 - c. A satisfactory performance record. A bidder who is, or recently has been, seriously deficient in contract performance shall be presumed to be nonresponsible, unless the City determines that the circumstances were properly beyond the contractor's control or that the control has taken appropriate corrective action. Record of failure to perform acceptably is strong evidence on nonresponsibility. The City shall consider the number of contracts involved and the extent of the deficiency of each in making this evaluation. In addition, the City may consider whether the bidder's performance history demonstrates responsibility as defined in ORS 200.005(11) and 200.045(3);
 - d. Key personnel available of sufficient experience, as determined by the contract agency, to perform the contracts;
 - e. The necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain these skills and abilities, as required to satisfactorily perform the contract. These may include, as appropriate, such elements as production control procedures, property control systems, and quality assurance measures applicable to materials to be produced or services to be performed by the bidder and its proposed subcontractor(s);
 - f. The necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and

- g. Is otherwise qualified and eligible to receive award under applicable laws and regulations.
2. The City has the right, prior to awarding any public contract, to make such investigation as is necessary to determine whether a bidder is responsible. This investigation may include, but is not limited to:
 - a. An inquiry into the responsibility of the bidder's proposed subcontractors and suppliers.
 - b. Requiring a bidder to demonstrate its financial ability to perform the contract, as provided in subsection (1) (a) of this rule. In exercising this right, the City shall notify the apparent successful bidder in writing to submit such documentation as the City deems necessary to complete a thorough evaluation of the bidder's financial ability.
 - c. By submitting a bid, a bidder authorizes the City to request any credit report information the City deems necessary to investigate and evaluate whether a bidder is sufficiently financially responsible to perform the contract(s).
 3. If a bidder fails to promptly supply, or have supplied, information requested by the City during its responsibility investigation, such failure should be grounds for a finding of nonresponsibility.
 4. A responsible proposer is one who has the attributes, qualities, or capability of a responsible bidder as set forth in subsections (1)(a) through (g) of this rule. The City has the right, as set forth in section (2), to make such investigations as necessary to determine whether a proposer is responsible.
 5. Only bids and proposals from responsible bidders or proposers, as defined in this rule, shall be eligible for contract award. Bids or proposals from nonresponsible bidders shall be rejected as provided in AR 30.100.

30.093

Responsive and Nonresponsive Bids or Proposals; Acceptance and Rejection

1. A "responsive bid or proposal" is one that complies in all material aspects with an Invitation to Bid or Request for Proposals and with all prescribed public bidding procedures and requirements.
2. A "nonresponsive bid or proposal" is, except in the case of minor informalities as provided in AR 30.075(2), one which:
 - a. Omits, or is unclear as to, the price or price cannot be determined in the bid or proposal documents;
 - b. Offers goods or services of a quality or quantity different from that requested in the Invitation to Bid or Request for Proposals;
 - c. Requires a delivery date different from that required in the Invitation to Bid or Request for Proposals;
 - d. Takes exception to the terms and conditions of the Invitation to Bid or Request for Proposals;
 - e. Is conditional upon the City's acceptance of terms and conditions different from those contained in the Invitation to Bid or Request for Proposals; or

- f. Contains a deviation which, if the bid or proposal were accepted, would give the bidder or proposer a substantial advantage or benefit not shared by other bidders or proposers to the Invitation to Bid or Request for Proposals.
3. The City shall accept, and consider for award, only those bids or proposals that are responsive as defined in this rule. Nonresponsive bids or proposals shall be rejected, as outlined in AR 30.100.

30.096 **Low Tie Bids**

1. **Definition**
Low tie bids are low responsive bids from responsible bidders that are identical in price, fitness, availability and quality and which meet all the requirements and criteria set forth in the bid documents.
2. **Award**
 - a. Low tie bids are subject to the Oregon preference contained in ORS 279.021(1):
"In all public contracts, the public contracting agency shall prefer goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal."
 - b. Low tie bids that remain tied after application of the statutory Oregon preference shall be awarded according to the following sequence:
 - (1) Preference shall be given to the bidder whose principal offices or headquarters are located in Oregon.
 - (2) If a tie still remains after applying (1) above, award shall be made by drawing lots among any tied Oregon bidders. Such bidders shall be given notice and an opportunity to be present when the lots are drawn.
 - (3) If none of the tied bidders is located in Oregon, award of the contract shall be made by drawing lots.

Commentary

Pursuant to ORS 279.021, public contract agencies are required to prefer goods or services that have been manufactured or produced in this state if price, fitness, availability, and quality are otherwise equal. This means that the Oregon Preference Law applies only when there is a tie bid.

Note that this preference statute only applies to goods or services that are manufactured in this state. Thus, the application of the statute sometimes can result in some interesting disparities and perceived unequal treatment. For example, a firm may be headquartered in Oregon and have all of its plants in Oregon except one, which is located in another state, and the goods offered pursuant to the solicitation might be from the out-of-state plant. Those goods would not qualify for the Oregon Preference Law.

See also the reciprocal preference requirements of ORS 279.029(2) and (3). The Oregon Department of Administrative Services maintains a list of states providing for in-state preference.

30.100 **Rejection of Individual Bids or Proposals**

1. **General**

This section applies to rejections, in whole or in part, of individual bids or proposals. In accordance with ORS 279.035, the City may reject in whole or in part, any bid not in compliance with all prescribed bidding procedures and requirements and may reject for good cause any bid or proposal upon a written finding of the City that it is in the public interest to do so. No bid shall be considered unless the bid security, properly executed, has been submitted with the bid as required by the bid documents.

2. Reasons for Rejection

Reasons for rejecting a bid include but are not limited to:

- a. The bidder has not prequalified under ORS 279.039, or has been disqualified under ORS 279.037;
- b. The bidder has been declared ineligible by the Commissioner of the Bureau of Labor and Industries under ORS 279.361;
- c. The bid is non-responsive, that is, it does not conform in all material respects to bid documents or requirements, including all prescribed public procurement procedures and requirements;
- d. The supply, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the bid documents or permissible alternates or other acceptability criteria set forth in the bid documents;
- e. The bidder is not capable of satisfying the terms and conditions of the public contract in a timely manner due to financial incapacity, inability to obtain bonding, loss of license, or other objective cause;
- f. The bidder within the last 5 years has been found, in a civil, criminal, or administrative proceeding, to have committed fraud, misrepresentation, price-rigging, unlawful anti-competitive conduct, or similar behavior;
- g. The bidder has been determined responsible (i.e., adjudicated by a court, or as determined in writing by the City agency in the case of a public contract) for more than one breach of a public or private contract or contracts in the last 3 calendar years before the scheduled date of the bid opening;
- h. The bid security has not been submitted or properly executed as required by the bid documents;
- i. The bidder has not met the emerging small business, disadvantaged business, minority business and women business enterprise requirements, if any, established by the City, and has not made a good faith effort in accordance with ORS 200.075 and 279.059 to comply with the requirements prior to the time bids are opened;
- j. The bidder failed to certify in accordance with section 4 of this rule; or
- k. Other circumstances of the particular bid, proposal, or bidder indicate that acceptance of the bid would impair the integrity of the selection process or result in an imprudent contract by the City.

3. Form of Business Entity

For purposes of this rule the corporate or business form of bidders shall be subject to scrutiny, so that previously disqualified bidders, or their officers and directors, may not by

subterfuge, change of apparent ownership, or other adjustments in formal appearance, avoid application of this rule or of the disqualification provisions of ORS 279.037 to 279.045.

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

30.102 **Rejection of All Bids or Proposals**

1. Bid Rejection

All bids or proposals may be rejected for good cause upon a written finding by the City that it is in the public interest to do so. Notification of rejection of all bids or proposals, along with the good cause justification and finding of public interest shall be sent to all that submitted a bid.

2. Rejection Criteria

Reasons for rejecting all bids or proposals include but are not limited to finding that:

- a. Due to the content of or error in the bid documents, including its terms, conditions, or specifications, the solicitation process unnecessarily restricted competition for the public contract;
- b. The price, quality, or performance presented by the lowest or best responsible bidder is, in the City's opinion, too costly or of insufficient quality to justify acceptance of the bid or proposal;
- c. Misconduct, error, or ambiguous or misleading provisions in the bid documents threaten the fairness and integrity of the competitive process; or
- d. Causes other than legitimate market forces threaten the integrity of the competitive procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the bid documents.

30.104 **Protest of Award**

1. Purpose

The purpose of this rule is to require adversely affected or aggrieved bidders or proposers on the City's solicitation to exhaust all avenues of administrative review and relief before seeking judicial review of the City's contractor selection or contract award decision.

2. Notice of Award

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

- b. Unsuccessful bidders or proposers will generally not be notified that a contract has been awarded. AR 30.135(2).

3. Right to Protest

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

4. Authority to Resolve Protests

The City Manager, or designee, shall have the authority to settle or resolve a written protest submitted under section (2) of this rule.

5. Decision

If the protest is not settled or resolved by mutual agreement, the City Manager, or designee, shall promptly issue a written decision on the protest. Judicial review of this decision will be available where provided for in statute.

30.105 Negotiations with Lowest Responsive, Responsible Bidder; All Bids Exceed Cost Estimates

1. If a project is competitively bid and all responsive bids from responsible bidders exceed the City's cost estimate, the City, in accordance with rules adopted by the City may negotiate with the lowest responsive, responsible bidder, prior to awarding the contract, in order to solicit value engineering and other options to attempt to bring the project within the City's cost estimates.
2. A negotiation with the lowest responsive, responsible bidder pursuant to this paragraph shall not result in the award of the contract to that bidder if the scope of the project is significantly changed from the original bid proposal.
3. Notwithstanding any other provision of law, the records of a bidder used in contract negotiation pursuant to this paragraph are not subject to public inspection until after the negotiated contract has been awarded or the negotiation process has been terminated.

30.110 Bidder Disqualification

1. Definitions. As used in this rule:
 - a. "Disqualification" means the debarment, exclusion or suspension of a person from the right to submit bids or proposals in response to the City's solicitations for a reasonable, specified period of time named in the order of disqualification. A contractor or vendor so debarred, excluded or suspended is disqualified.

- b. "Person" means an individual, partnership or corporation. Disqualification attaches to and follows the individual, so that an individual who is a partner in a partnership or an officer or principal in a corporation which is disqualified may not reform the business entity as a way of avoiding the disqualification.

2. Grounds for Disqualification

As provided in ORS 279.037, the following are grounds for bidder disqualification:

- a. The person does not have sufficient financial ability to perform the contract. If a bond is required to ensure performance of a contract, evidence that the person can acquire a surety bond in the amount and type required shall be sufficient to establish financial ability;
- b. The person does not have equipment available to perform the contract;
- c. The person does not have key personnel available of sufficient experience to perform the contract; or
- d. The person has repeatedly breached contractual obligations to public and private contracting agencies.

3. Prohibited conduct. As provided in ORS 200.075, the following are grounds for suspension of a bidder's, proposer's contractor's or subcontractor's right to bid, propose or participate in a public contract.

- a. If the person has entered into any agreement representing that a disadvantaged, minority, women or emerging small business enterprise, certified pursuant to ORS 200.055, will be performing or supplying materials under a public improvement contract without the knowledge and consent of the certified enterprise;
- b. If the person exercises management and decision making control over the internal operations, as defined by ORS 200.075(1)(b), of any certified disadvantaged, minority, women or emerging small business enterprise;
- c. If the person uses a disadvantaged, minority, women or emerging small business enterprise to perform contracting services or provide supplies under a public improvement contract to meet an established DBE/MBE/WBE/ESB goal, when the enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the contract.

4. Investigation

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

5. Trade Secret

Any information voluntarily submitted by a bidder or prospective bidder pursuant to an investigation under subsection (2) of this section or in a prequalification statement required by ORS 279.039 or in a prequalification request submitted pursuant to ORS 279.041 shall be deemed a trade secret pursuant to ORS 192.501(2) to 192.505 if requested by the person submitting the information.

6. Notice of Disqualification

The bidder or prospective bidder will be notified in writing by personal service or certified mail of the City's decision to disqualify the person from bidding with the City. The notice shall contain:

- a. The effective date of the disqualification and the effective period of disqualification;
- b. The grounds for disqualification from bidding; and
- c. A statement of the contractor's appeal rights and applicable appeal deadlines.

7. **Appeal of Disqualification**

If a contractor wishes to appeal the City's decision to disqualify, the contractor must notify the City in writing within three (3) business days after receipt of the notification, as provided in ORS 279.043. The City shall mail its notice to the contractor by Certified Mail - Return Receipt Requested, if not personally served.

30.115 Cancellation of Invitations to Bid

1. **Cancellation in the Public Interest**

An invitation to bid may be canceled, in whole or in part, and all bids may be rejected when it is in the public interest as determined by the City. The reasons therefore shall be made part of the bid file.

2. **Notice of Cancellation**

When an invitation to bid is canceled prior to bid opening, notice of cancellation shall be sent to all known holders of bid documents. When an invitation to bid is canceled after bid opening, notice shall be sent to those bidders who submitted a bid. The notice of cancellation shall:

- a. Identify the invitation to bid;
- b. Briefly explain the reason for cancellation; and
- c. Where appropriate, explain that an opportunity will be given to compete on any resolicitation. (ORS 279.035)

30.120 Disposition of Bids or Proposals if Bid Canceled

1. **Prior to Bid Opening**

When an invitation for bids is canceled prior to bid opening, all bids received will be returned to bidders unopened, if submitted in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the bid will be opened to determine the source and then returned to sender.

2. **After Bid Opening**

When all bids are rejected, the bids received shall be retained and become part of the City's permanent file.

30.125 Documentation of Award

1. **Basis of Award**

Following award, a record showing the basis for determining the successful bidder shall be made a part of the bid file.

2. Contents of Award Record

The record shall consist of:

- a. Completed bid tabulation sheet; or
- b. Completed proposal evaluations; and
- c. Written justification of any rejection of lower bids; or
- d. Written explanation for any rejection of proposals for failing to meet mandatory requirements of the Request for Proposals.

30.130 Foreign Contractor (ORS 279.021)

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

30.135 Availability of Award Decisions - Contract Retention

1. Contract Documents

A signed purchase order, price agreement, or contract document, as applicable, shall be sent to the successful bidder.

2. Notification to Unsuccessful Bidders

Unsuccessful bidders need not be notified. Tabulations of awarded bids may be obtained for a nominal charge in person or by submitting to the City a written request stating the bid number and a self-addressed, stamped envelope.

3. Availability of Bid Files

Completed bid files shall be available for public review at the City. All original bid files are retained by the respective department.

4. Copies from Bid Files

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

5. Contract Retention.

All purchasing related documents should be retained according to City retention schedules. When the City authorizes submission of bids or proposals by electronic data interchange, a hard copy shall be created for bid file.

30.140 Performance Security

1. Public Improvements Contract

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

2. Other Public Contracts

The City may require performance security for other public contracts. Such requirements shall be stated in the bid documents.

3. Contracts Under \$10,000

Performance bonds for a contract under \$10,000 shall be utilized only in critical circumstances, so as not to discourage competition.

4. Requirement for Surety Bond

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

5. Time for Submission

Upon request by the City, the apparent successful bidder must furnish the required performance bond within 10 days. Prompt submittal of the performance bond is required to ensure timely project initiation. Failure to furnish the bond prior to the deadline shall result in rejection of the bid and forfeiture of bid security and award to the next lowest responsible bidder or next highest-scoring proposer.

30.145 Right to Audit Records

1. Records Maintenance; Access

Contractors and subcontractors shall maintain all fiscal records relating to public contracts in accordance with generally accepted accounting principles. In addition, contractors and subcontractors shall maintain any other records necessary to clearly document (i) their performance and (ii) any claims arising from or relating to their performance under a public contract. Contractors and subcontractors shall make all records pertaining to their performance and any claims under a public contract accessible to the City at reasonable times and places, regardless whether litigation has been filed as to such claims.

2. Audit of Cost or Pricing Data

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

3. Contract Audit

The City shall be entitled to inspect, examine, copy and audit the books and records of a contractor or any subcontractor under any contract or subcontract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three (3) years from the

date of final payment under the prime contract and by the subcontractor for a period of three (3) years from the date of final payment under the subcontract, or until the conclusion of any audit, controversy or litigation arising out of or related to the contract, whichever date is later, unless a shorter period is otherwise authorized in writing.

30.150 **Right to Inspect Plant**

1. Time for Inspection

The City may, at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor who is related to the performance of any contract awarded.

2. Access to Plant or Place of Business'

As a condition of bidding, bidders agree that the City may enter a contractor's or subcontractor's plant or place of business during normal business hours for the following purposes:

- a. Inspect and/or test supplies or services for acceptance by the City pursuant to the terms of the bid; or
- b. Investigate in connection with a bidder's application, a minority business certification, or bidder qualification.

3. Contractual Provisions

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

4. Procedures for Trial Use and Testing

The City may establish operational procedures governing the testing and trial use of equipment, materials, and the application of resulting information and data to specifications or procurements.

5. Conduct of Inspections

a. Inspectors

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

b. Location

When an inspection is made in the plant or place of business of a contractor or subcontractor, such contractor or subcontractor shall provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

c. Time of Testing or Inspection

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

6. Inspection of Construction Projects

On-site inspection of construction shall be performed in accordance with the terms of the contract.

30.155 Contract Cancellation Procedures

1. Grounds for Cancellation

A contract may be canceled by the City for any violation of the provisions of the contract. Such provisions generally include, but are not limited to:

- a. Standard terms and conditions included in all contracts;
- b. Product or service specifications;
- c. Delivery or completion requirements; or
- d. Contracted pricing and price escalation/de-escalation clauses.

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

3. The City shall provide the contractor written notice of the grounds for cancellation or termination and of its intention to cancel the contract or terminate the contractor's performance. If the contractor provided a performance and payment bond, the surety shall also be provided with a copy of the notice of contract cancellation or contractor termination. The notice shall include the effective date of the intended cancellation or termination, the grounds for cancellation or termination and notice of the amount of time (if any) in which the agency will permit the contractor to correct the failure to perform. The public contract may provide contract cancellation or contractor termination procedures that are different from or in addition to, those provided in this rule.

4. If the contractor has provided ad performance and payment bond, the agency may afford the contractor's surety the opportunity, upon the surety's receipt of a contractor termination notice, to provide a substitute contractor to complete performance of the contract. Performance by the substitute contractor shall be rendered pursuant to all material provisions of the original contract, including the provisions of the performance and payment bond. Such substitute performance does not involve the award of a new public contract and shall not be subject to the competitive procurement provisions of ORS 279.005 to 279.111.

AR 40.000 PUBLIC IMPROVEMENT CONTRACTS

40.001 Application

In addition to the requirements set forth in Section 30 of these rules the following rules apply to public improvement contracts. The requirements in Section 40 are intended to be complementary

to those in Section 30, with the rules in Section 40 supplementing the Section 30 requirements, where necessary, to meet the City's needs when administering contracts for public improvements.

40.005 **Competitive Bidding**

Public improvement contracts, shall be awarded by the City with the competitive procurement process, to the lowest responsible bidder as defined by statute unless otherwise exempt under ORS 279.015, 279.053, or 279.056.

40.010 **Public Notice**

1. Trade Newspaper Advertisement

In addition to the requirements of AR ~~30.015~~125-310-012, public improvements having an estimated cost in excess of ~~\$50,000~~\$75,000 shall be advertised for bids in at least one trade newspaper of general state-wide circulation.

2. In addition to the requirements of ORS 279.025, 468A.760 and AR 137-30.015(2)(b)(10), when the City requests bids for a public works project, it shall first determine whether the project requires a contractor licensed under ORS 468A.720 to work with asbestos or asbestos-containing material. The City shall include in the bid advertisement a statement whether performance of the contract requires a contractor licensed to do asbestos abatement work under ORS 468A.720.

3. Prevailing Wage Rate Notice

If the following conditions apply, the City shall include in the public notice a statement that the bidder shall comply with the requirements of the prevailing wage law in ORS 279.348 to 279.365:

- a. The bid must be for public works as defined in ORS 279.348(3) which includes construction, reconstruction, major renovation or painting of roads, highways, buildings, structures and improvements of all types which are carried on or contracted by the City to serve the public interest but do not include the reconstruction or renovation of privately owned property which is leased by the City;
- b. The solicitation is for a public improvement that is being constructed, reconstructed or renovated for use by the City under a lease-purchase agreement or under any other agreement whereby ultimate state ownership is contemplated or expected (ORS 276.971); and
- c. The contract price for the project exceeds ~~\$10,000~~\$25,000; and
- d. The project is not regulated under the Davis-Bacon Act (40 USC 276a). (ORS 279.357)

40.015 **Bid Evaluation and Award**

- 1. General. A public improvement contract, if awarded, is to be awarded to the lowest, responsive and responsible bidder or the best, responsive and responsible proposer. (See AR 30.090.)
- 2. Special requirements. The solicitation documents shall set forth any special requirements and criteria that will be used to determine the lowest, responsive and responsible bidder or best, responsive and responsible proposer. No bid or proposal shall be evaluated for any

- requirement or criterion that is not disclosed in the solicitation documents or city regulation.
3. Bid Evaluation and Award. The evaluation format for competitive bid pricing can be lump sum, unit price, or a combination of the two.
 - a. Lump sum. If the bid form includes a lump sum base bid, plus additive or deductive alternates, the total bid price, for the purpose of comparing bids, shall be the total sum computed from adding or deducting alternates, as selected by the City, to the base bid. If the bid form requires a lump sum bid, without additive or deductive alternates, or if the City has selected no additive or deductive alternates for award, bids shall be compared on the basis of lump sum prices, or lump sum base bid prices, as applicable.
 - b. Unit price. If the bid includes unit prices and extensions for estimated quantities, the total bid price, for the purpose of comparing bids, will be the total sum computed from multiplying estimated quantities by the unit prices entered on the bid form by the bidder, with due adjustments being made for additive or deductive alternates, if any, selected for award. Note: In case of a conflict between a unit price and the corresponding extended amount, the unit price shall govern, as provided in AR 30.075(2)(b).
 - c. Combination lump sum and unit price. The City shall select a combination of factors for purposes of bid evaluation and contract award and use the methods described in (a.) and (b.) to compute and compare bids.
 4. Proposal Evaluation and Award. If an alternate selection method is approved by the City's public contract review authority pursuant to ORS 279.015(2) for use in procuring a public improvement, proposals will be evaluated to determine which proposer offers the best solution to the City in accordance with the evaluation criteria set forth in the solicitation documents and in the City's rules. Only the criteria that are set forth in the solicitation documents and in the City's rules shall be applied. The solicitation evaluation criteria shall be as objective as possible. Examples of solicitation evaluation criteria include, but are not limited to, cost, quality, relevant experience, service, performance history on other private and public contracts, experience and availability of key personnel, adequacy of equipment and physical plant, financial wherewithal, sources of supply, and references. Evaluation factors need not be precise predictors of actual future costs and performance; but, to the extent possible, such evaluation factors shall:
 - a. Be reasonable estimates based on information available to the City;
 - b. Treat all proposals equitably;
 - c. Recognize that public policy requires acquisitions and public improvements to be accomplished at the least cost. ORS 279.023(1).
 5. Restrictions. Nothing in this section shall be deemed to permit contract award to a proposer offering a higher quality solution than that required in the solicitation documents if such proposer is not also the best, responsive and responsible proposer as determined under section (4.) of this rule.
 6. Negotiations. The City may negotiate with the apparent best, responsive and responsible proposer, but only to establish the details of contract performance (e.g., to reach agreement on project scheduling or on a final guaranteed maximum price where the City

is procuring the services of a construction manager/general contractor). Negotiations between the City and the best, responsive and responsible proposer shall not change the material requirements of the solicitation document nor any material contractual terms and conditions.

7. No assignment or transfer of contract rights. A contractor shall not assign, sell, or transfer rights, nor delegate responsibilities, under a public contract, either in whole or in part, without first obtaining the City's prior written consent. Such written consent shall not relieve a contractor of any obligations under a public contract, and any transferee shall be considered the agent of the contractor and bound to abide by all provisions of the public contract. Except in the event of a notation, if the City consents in writing to an assignment, sale, or transfer of the contractor's rights and responsibilities, the contractor shall remain ultimately liable to the City for complete performance of the public contract as if no such assignment, sale, or transfer had occurred.

40.020 **Contract Cancellation Procedures**

1. Termination Due to Circumstances Beyond the Control of the Contractor (ORS 279.324, 279.326, 279.328, 279.330, 279.332)

- a. Reasons for Termination

The City may, in its sole discretion, by written order or upon written request from the contractor, terminate the contract or a portion thereof if any of the following occur:

- (1) The contractor is prevented from completing the work for reasons beyond the control of the City;
- (2) Completion of the project is beyond the control of the contractor;
- (3) Or for any reason considered by the City to be in the public interest (other than a labor dispute or reason of any third party judicial proceeding relating to the work other than a suit or action filed in regards to a labor dispute). These reasons may include, but are not necessarily limited to, non-availability of materials, phenomenon of nature of catastrophic proportions or intensity, executive orders of the President related to national defense, congressional or state acts related to funding.
- (4) Any third party judicial proceeding relating to the work other than a suit or action filed in regards to a labor dispute; and
- (5) If the circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the public works.

- b. Payment when Contract is Terminated

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

- c. Responsibility for Completed Work if Contract Terminated

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

2. Termination of Contract for Default (ORS 279.333)

a. Declaration of default. The City may, after giving the contractor or the surety seven (7) days written notice and an opportunity to cure deficient performance, terminate the contractor's performance for any reasonable cause, including but not limited to those set forth in subsection 2(a)(1) to (6) of this rule. Upon such termination, the City may immediately take possession of the premises and of all materials, tools and appliances thereon as well as all other materials, whether on the premises or not, on which the contractor has received partial payment. The agency may finish the work by whatever method it may deem expedient;

- (1). If the contractor should persistently or repeatedly refuse to or fail to supply an adequate number properly skilled workers or proper materials for the efficient execution of the project, or;
- (2) If the contractor should fail to make prompt payment to subcontractors for material or labor, or persistently disregard laws, ordinances or the instruction of the City, or otherwise be guilty of a substantial violation of any provision of the contract; or
- (3) If the Contractor should voluntarily or involuntarily seek protection under the U.S. Bankruptcy Code and its Debtor in Possession or Trustee for the estate fails to assume the contract within a reasonable time; or
- (4) If the contractor should make a general assignment for the benefit of the contractor's creditors; or
- (5) If a receiver should be appointed on account of the contractors' insolvency; or
- (6) If the contractor is otherwise in material breach of any part of the contract.

b. Required Response to Declaration of Default

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

c. Expense of Completion

The expense incurred by the City shall be as determined and certified by the City.

c. Substitution of contractor.

As provided in AR 30.155(4), termination of the contractor and substitution of another contractor to complete the work does not constitute the award of a new public contract and shall not be subject to the provisions of ORS 279.005 to 279.111.

e. Refusal to Perform

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

f. Remedies are Cumulative

The City may, at its discretion, avail itself of any or all of the above rights or remedies without prejudice or preclude the City from subsequently invoking any other right or remedy set forth above or elsewhere in the contract.

40.025 Retainage (ORS 279.420, 279.435)

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 5 percent of the value of completed work except if the contract work is 50 percent completed and the work is progressing satisfactorily, the retainage may be reduced or eliminated on the remaining progress payments. Any reduction or elimination of retainage shall be allowed only upon written application of the contractor, which application shall include written approval of the contractor's surety; except that when the contract work is 97-1/2 percent completed, the City may without application by the contractor, reduce the retained amount to 100 percent of the value of the contract work remaining to be done. If retainage has been reduced or eliminated, the City reserves the right in protecting its interests to reinstate at any time retainage from further progress payments.

2. Alternatives to Cash Retainage

In lieu of cash retainage to be held by the City, the contractor may select one of the following options:

a. Deposit of Securities

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

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

- (1) Bills, certificates, notes or bonds of the United States.
- (2) Other obligations of the United States or its agencies.
- (3) Obligations of any corporation wholly owned by the Federal Government.
- (4) Indebtedness of the Federal National Mortgage Association.
- (5) Time certificates of deposit or savings account passbooks issued by a commercial bank, savings and loan association, or mutual savings bank, duly authorized to do business in Oregon.
- (6) Corporation bonds rated A or better by a recognized rating service.
- (7) General obligation bonds of the State of Oregon or any political subdivision thereof.
- (8) General obligation improvement warrants issued pursuant to ORS 287.502.
- (9) Irrevocable letters of credit from a bank doing business in Oregon.

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

b. **Deposit in Interest-Bearing Accounts**

Upon written request of the contractor, the City shall deposit any amounts withheld as retainage in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the City. Interest earned on such account shall accrue to the contractor.

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

3. **Recovery of Costs**

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

40.030 Progress Payments (ORS 279.435)

1. **Request for Progress Payments**

At a regular time each month, the contractor shall, if required by the contract documents, submit to the City a request for payment based upon an estimate of the amount of work completed and of the value of acceptable material to be incorporated in the completed

work which has been delivered and acceptably stored. Upon verification and approval of the City, the sum of these values will be referred to the "value of completed work." With these estimates as a base, a progress payment will be made to the contractor, which progress payment shall be equal to the value of completed work, less such amounts as may have been previously paid, less such other amounts as may be deductible or as may be owing and due to the City for any cause, and less an amount to be retained in protection of the City's interests.

2. Progress Payments Do Not Mean Acceptance of Work

Progress payments shall not be construed as an acceptance or approval of any part of the work covered thereby, and they shall in no manner relieve the contractor of responsibility for defective workmanship or material.

3. Estimates for Progress Payments

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

40.035 **Final Inspection (ORS 279.435(7))**

1. Notification of Completion

When the contractor determines that all construction work on the project has been completed, the contractor shall so notify the City in writing. The City shall make an inspection of the project and project records within 15 days of receiving said notice. If, at such inspection, all construction provided for and ordered under the contract is complete and satisfactory to the City, and all certifications, bills, forms and documents have been submitted properly, such inspection shall constitute the final inspection.

2. Instructions to Complete the Work

If, however, at any inspection, any work in whole or in part is found unsatisfactory, or it is found that all certifications, bills, forms and documents have not been submitted properly, the City shall within 15 days provide instructions to the contractor on outstanding requirements to complete the project. At such time as the contractor determines full compliance with, and the execution of such instructions, the contractor shall notify the City in writing. The City shall make another inspection within 15 days after such notice and this inspection shall constitute the final inspection provided construction work has been completed satisfactorily.

3. Acknowledgment of Acceptance

Upon satisfactory completion of all work required under the contract, the City should acknowledge acceptance of the work in writing.

40.040 **Final Estimate and Final Payment (ORS 279.435)**

1. Submission of Final Estimate

As soon as practicable after final inspection of the work under the contract, if unit prices were applicable, the City shall prepare a final estimate of the quantities of the various classes of work performed. Following a determination of the total amount due the

contractor, and following final acceptance of the work by the City, final payment shall be made to the contractor.

2. Set-off of Prior Payments

All prior partial estimates and payments shall be subject to correction in the final estimate and payment.

3. Interest

Beginning 30 days after the date of final acceptance of the project by the City, the City shall pay to the contractor interest at the rate established by State statute on any money due and payable to the contractor. ORS 279.435(7)

40.045 Claims for Unpaid Labor or Supplies

1. Right of Action

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

2. Notice of Claim

a. To initiate a claim against the contractor's bond, a person should file a Notice of Claim in the form and manner attached as Exhibit A. Such notice must be given to the contractor and the City Purchasing Specialist.

b. Any notice of claim should include the following information:

- (1) Name and address of the claimant;
- (2) Name of prime contractor;
- (3) Title of project and contract date;
- (4) Name of the City;
- (5) Name of bonding company (may be obtained from City); and
- (6) Name of contractor or subcontractor to whom labor or material supplied.

3. Response to Notice of Claim

Upon receipt of such Notice of Claim, the City shall:

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

4. Referral to Surety Company

If the contract has been completed and all funds disbursed to the prime contractor, all claims shall be referred to the surety company for resolution. The City shall not arrange

for second payments directly to subcontractors or suppliers for work already paid for by the City.

5. Discretionary Payment of Claim

If the contract is still in force, the City may, in accordance with ORS 279.314, pay a valid claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due to the contractor under the contract.

6. Liability of Claim

If the City chooses to make such a payment as provided in ORS 279.314, the contractor or the contractor's surety shall not be relieved from obligation with respect to any unpaid claims.

40.050 **Evaluation in the Absence of Competitive Bidding**

1. Upon completion of a final payment for any public improvement contract in excess of \$100,000 for which the City did not use the competitive bidding process, the City shall prepare and deliver to the LCRB an evaluation of the project.

2. That evaluation shall include but not be limited to the following matters:

- actual project cost as compared with original estimates
- amount of any guaranteed maximum price
- number of project changes orders issued by the City with amounts
- narrative description of successes and failures during the design, engineering and construction of the project.
- an objective assessment of the use of the alternative contracting process as compared to the findings required by ORS 279.015.

3. Evaluations required by this section shall be made available for public inspection, and completed with 30 days of the date the City accepts the public improvement project.

40.045

EXHIBIT A

To: (insert name of the public body)

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

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

DATED this ____ day of _____, 19__.

By

(Claimant's name and title)

AR 50.000 WAIVER OF SECURITY BID AND PERFORMANCE BOND

(Also see AR 30.035)

50.010 Bid Security Requirements

The City may, in its discretion, waive the bid security requirements of ORS 279.027 for contracts other than those for public improvements. (In its discretion, the City may accept blanket bid bonds.)

50.020 Contracts Under \$10,000

The City may, in its discretion, waive the bid security requirements of ORS 279.027 and performance bond requirements of ORS 279.029 if the amount of the contract for the public improvement is less than \$10,000.

50.030 Emerging Small Business Contracts Under \$100,000

1. The City may, in its discretion, pursuant to ORS 279.033 and this rule, waive the bid security requirements of ORS 279.027 and the performance bond requirements of ORS 279.029 when the public improvement project:
 - a. Has estimated direct construction costs not exceeding \$100,000;
 - b. Is being undertaken through a program where the bidders are drawn exclusively from a list of certified Emerging Small Businesses maintained by the Advocate for Minority, Women and Emerging Small Business; and
 - c. The City has been provided funds by the legislature for the purpose of assisting Emerging Small Businesses.
2. The City may waive bid security requirements and/or the performance bond requirements pursuant to this rule under the following conditions:
 - a. There exists an emerging small business account or like source of funds containing an unexpended and unobligated balance;
 - b. The City has authority to encumber and make payments from the account; and
 - c. The City encumbers an amount in the account to cover the total cost of each project wherein the bid security and/or the performance bond is waived.

AR 60.000 PROPERTY DISPOSITION

60.005 Surplus Personal Property

1. Personal property owned by the City may be disposed of only after being declared surplus by the City Manager or designee. The method of disposal will be determined based on condition, value, and/or use.
2. Personal property may be declared surplus by the City Manager or designee if it is scheduled for replacement in an adopted budget or it is no longer necessary to provide City services.

60.010 Auction Sales of Personal Property

Personal property may be sold at auction if the City Manager or designee determines that the auction contemplated will probably result in a higher net return than if the property were sold by competitive written bid.

60.015 Sales of Personal Property

The City may sell personal property, including recyclable or reclaimed materials, without competitive bidding if it has determined that a negotiated sale will result in increased net revenue and the following conditions are complied with:

1. When the current market value per item is deemed to be less than \$1,000, the City may establish a selling price, schedule and advertise a sale date, and sell to the first qualified buyer meeting the sale terms; or
2. When the current value per item is deemed to exceed \$1,000, the personal property must be offered for competitive written bid and be advertised in accordance with ORS 279.025, or be offered for sale at public auction in accordance with AR 60.010. If no bids are received or if a determination is made that the market value of the property exceeds the offer of the highest responsible bidder, all bids may be rejected and the City may negotiate a sale subject to the following conditions:
 - a. An appraisal of the market value of the property is obtained and documented and the negotiated sale price exceeds the market value; or
 - b. The sale amount exceeds the highest bid received through the bidding or auction process.

60.020 Liquidation Sales of Personal Property

The City may sell personal property through a commercially recognized third party liquidator if the City has determined that a liquidation sale will result in increased net revenue and the selection of the liquidator was conducted, as a minimum, by the competitive request-for-proposal process governed by rule AR 10.110.

60.025 Donations of Personal Property

1. The City may transfer personal property, including recyclable or reclaimed materials, without remuneration or only nominal remuneration without competitive bids to the following activities:
 - a. Another public agency;

- b. Any sheltered workshop, work activity center or group care home which operates under contract or agreement with, or grant from, any state agency and which is certified to receive federal surplus property; or
 - c. Any recognized non-profit activity that is certified to receive federal surplus property.
2. The City may donate or sell, without competitive bids, surplus personal property to recognized private non-profit social or health service activities, subject to the following conditions:
- a. A determination has been made that the property is not needed for other public purposes;
 - b. If the property has a current market value of \$250 or more, the donation or sale shall:
 - (1) Be approved by the City Manager or designee; and
 - (2) Be documented by the City to be clearly in the public interest.
 - c. The City determines this is the most efficient and cost-effective method for disposing of the property.
3. The City shall maintain a record of all transfers, donations, or sales authorized by sections (1) and (2) of this rule.

60.030 Trade of Personal Property

The City may trade personal property owned by the City to other government agencies or to other vendors provided that the following conditions apply:

- 1. Trades to other government agencies are exempt from public bidding by AR 10.010(a); however, such trades must be approved by the City Manager.
- 2. Trades of personal property with parties other than government agencies must proceed as follows:
 - a. The market value of both the item to be traded and the item requested must be documented.
 - b. The proposal to trade an item for another item must be made available to an adequate number of potential vendors to encourage competition.
 - c. Such trades must be approved by the City Manager.

AR 70.000 PERSONAL SERVICES CONTRACT

70.010 Personal Services Contracts

- 1. Personal service contracts are not, according to the definition of "public contract" in ORS 279.011(5), subject to the competitive bidding provisions of ORS Chapter 279. Pursuant to ORS 279.051(2), this rule describes a method for distinguishing between personal service contracts and public contracts, particularly service contracts, and provides examples of contracts or classes of contracts that are or are not personal service contracts.

2. The City may, subject to an analysis and determination of appropriateness in accordance with subsection (2)(a) through (c) of this rule, enter into a personal service contract with an independent contractor without competitive bidding under ORS Chapter 279 when the City needs to have a service performed which requires the contractor to exercise a high degree of technical skill or professional judgment and expertise:
 - a. The nature of the tasks to be performed, the needs of the City, and the interests of the public form the basis for distinguishing between personal service contracts and public contracts. Hence, if:
 - (1) The City requires a product or service for which the City has developed or is reasonably able to develop, respectively, adequate design and/or performance specifications; and
 - (2) Selecting a contractor on the basis of lowest price would be likely to meet the City's needs, then the tasks should be performed pursuant to a public contract let in accordance with competitive bidding provisions of ORS Chapter 279. Conversely, if the City is reasonably unable to develop adequate design and/or performance specifications but must instead have the assistance of the contractors training, knowledge, and expertise to develop a scope of work statement and selecting the contractor on the basis of lowest price would be unlikely to meet the City's needs, then the tasks would most appropriately be performed under a personal service contract. Such a personal service contract should be entered into in accordance with the provisions, as the case may be, of ORS 291.021 or 279.712(2). In determining whether the City's needs will be met through award of a personal service contract rather than a public contract, the City should consider whether selecting the contractor on the basis of qualifications rather than lowest price will result in the City obtaining the best value for its money.
 - b. A personal service contract is appropriate where the contract is awarded primarily on the basis of the contractors qualifications, including but not limited to, such criteria as experience, training, knowledge and expertise, technical skill, creativity, artistic ability, performance history, and demonstrated ability to exercise sound professional judgment. Price will be, at most, a secondary criterion for awarding a personal service contract.
 - c. A personal service contract is not appropriate where price is or should be the primary selection criterion. A public contract, in contrast to a personal service contract, will be awarded primarily on the basis of price; criteria such as experience, training, knowledge and expertise, technical skill, creativity, artistic ability, performance history, and demonstrated ability to exercise sound professional judgment, which may be taken into account during the selection process, will be of only secondary importance. Unless otherwise statutorily excepted, a public contract must be awarded based on:
 - (1) Competitive bidding pursuant to ORS 279.015(1); or
 - (2) An alternative competitive process under ORS 279.015(2).
3. Personal service contracts may include, but are not limited to, the following:

- a. Contracts for services performed as an independent contractor in a professional capacity, including but not limited to the services of an accountant; attorney; architectural or land use planning consultant; financial advisor; investment banker; physician or dentist; registered professional engineer; appraiser or surveyor; aerial photographer; timber cruiser; broadcaster; data processing consultant; software consultant and the like.
 - b. Contracts for services as an artist in the performing or fine arts, including but not limited to photographer, filmmaker; painter; weaver; or sculptor.
 - c. Contracts for services of a specialized creative and research oriented noncommercial nature.
 - d. Contracts for services as a consultant.
 - e. Contracts for educational and human custodial care services.
 - f. Contracts for human services in the areas of aging and senior services, mental health services, public health services, emergency medical services (including ambulance and paramedic services to be rendered by third parties), social services, child care services, and temporary shelter services.
4. The following are NOT personal service contracts:
- a. Contracts, even though in a professional capacity, if predominately for a product, e.g., a contract with a landscape architect to design a garden is for personal services, but a contract to design a garden and supply all the shrubs and trees is predominately a tangible product.
 - b. A service contract, including a contract with a temporary service or personnel agency, to supply labor which is of a type that can generally be done by any competent worker, e.g., data entry, key punch, janitorial, security guard, crowd management, crop spraying, laundry, and landscape maintenance service contracts.
 - c. Contracts for trade related activities considered to be labor and material contracts.
 - d. Contracts for services of a trade-related activity, to accomplish routine, continuing, and necessary functions, even though a specific license is required to engage in the activity. Examples are repair and/or maintenance of all types of equipment or structures.

70.020 Screening and Selection Policy for Personal Services Contracts

- 1. It is the City's policy to select as expeditiously as possible the best qualified consultant available. The City has, therefore, established the following selection procedures:
 - a. Formal Selection Procedure

This procedure will be used whenever professional services of the type governed by this rule are required and the estimated fee to the consultant exceeds \$25,000. Exceptions to this procedure are specified under subsection (2) of this section. The City may on smaller projects elect to use the Formal Selection Procedures whenever it determines that it would be prudent and advantageous to do so.

 - (1) Announcement

The City will make at least one public announcement of its need for personal services in an appropriate trade periodical or newspaper of general circulation. The announcement shall include a description of the proposed project, the scope of the services required, project completion dates, and a description of any special requirements, if present. The announcement shall invite qualified prospective contractors to indicate to the requesting department their interest in performing the services required. The announcement will specify a closing date by which the statement must be received by the appropriate department.

(2) Application

Prospective contractors must submit a statement that describes their capabilities, credentials, and performance data sufficient to establish their qualification for the project.

(3) Initial Screening

The Department head or designee shall evaluate the qualifications of all applicants responding to the announcement by the closing date, and select from among the respondents a minimum of three prospective contractors whose statements evidence the highest level of qualification. Should fewer than three statements be received, then each prospective contractor submitting a statement which meets the department's minimum qualifications will be interviewed.

(4) Final Selection Procedure

(a) Interviews

- (i) The Department head or designee will hold discussions with the three finalists selected for initial screening. Applicant capability, experience, and compensation requirements shall determine the department's final selection.

(ii) Award of Contracts

The Department head or designee shall make the final selection and make a recommendation to the Board for award of the contract to the selected consultant.

2. Informal Selection Procedure

- a. This procedure may be used when the estimated fee to the consultant does not exceed \$25,000 or at the Department Head's or designee's discretion, when the project consists of work which has been substantially described, planned, or otherwise previously studied or rendered in an earlier departmental contract, provided that the original selection procedure used for the project was a formal procedure. This procedure shall not be used when the estimated fee to a consultant firm exceeds \$25,000, except by specific written approval of the City Manager or designee.
- b. Selection

The department will contact a minimum of three prospective contractors with which it has had previous successful experience or which are known by the department to be qualified to offer the sought-after services. A projected fee will be requested and a selection made by the Department Head or designee based upon the consultant's capability, experience, project approach, and compensation requirements.

3. Emergency Appointment Procedure

Nothing in this rule shall be inferred to prohibit or otherwise impede the Department Head's or designee's right to make direct consultant appointments when conditions require a prompt action to protect life or property. In such instance, the recommended appointment and a written description of the conditions requiring the use of this appointment procedure shall be submitted by the Department Head or designee to the City Manager or designee for action. The City Manager or designee will determine if an emergency exists, declare the emergency and, when appropriate, approve the appointment.

4. Responsible Parties' Actions

a. Professional Consultants

- (1) Submit qualifications, credentials, and performance data relating to their capabilities to the appropriate division in response to project announcement.

b. Division/Department

- (1) Determine that the work on a project requires the services of a consultant.
- (2) Announce project as required by this section.
- (3) Request the City Manager's approval of the required actions.
- (4) Determine appropriate selection/appointment procedure.
- (5) Select consultant/candidates as specified under this rule.
- (6) Interview the top candidates and make the final selection.
- (7) Execute contracts and awards to consultants, with the City Manager's prior approval.
- (8) Maintain a file on the selection process.
 - (i) The method and copy of announcement.
 - (ii) The names of firms/individuals and cost estimates considered.
 - (iii) A justification of need for the contract.
 - (iv) The basis for selection.
 - (v) Rationale by which rates were established.
 - (vi) How reasonableness of price was determined.

(vii) A copy of the resulting contract.

c. City Manager

- (1) Approves each project's scope and budget as necessary.
- (2) Makes direct and emergency appointments are required.
- (3) Approves/disapproves Personal Services Contract and all subsequent amendments unless the amount of the contract requires the Board's approval.

80.010 **Emergency Contracts**

1. Pursuant to ORS 279.015(3)(a) and (4), the City Manager or designee may, in the Administrator's or designee's discretion, authorize or let public contracts without competitive bidding if an emergency exists and the emergency consists of circumstances creating a substantial risk of loss, damage, interruption of service, or threat to public health or safety that could not have been reasonably foreseen and requires prompt execution of a contract to remedy the condition.
2. The City Manager or designee must declare the existence of an emergency, which shall authorize the City to enter into an emergency contract with a price under \$25,000 and make detailed written findings describing the emergency conditions necessitating prompt execution of the contract. A copy of the findings together with the amount of the contract and the name of the contractor shall be immediately forwarded by the City Manager to the Board.
3. Any contract awarded under this exemption shall be awarded within 60 days following declaration of the emergency unless an extension is granted pursuant to ORS 279.015(4).

80.012 **Emergency Contracts Under ORS 279.015(2)**

1. The City may enter into a public contract without competitive bidding when circumstances that could not reasonably be anticipated, require prompt establishment and performance of the contract in order to preserve public funds, property, or the uninterrupted provision of government services. In exercising its authority under this class exemption (ORS 279.015(2)), the City shall:
 - a. To the extent reasonable under the circumstances, encourage competition by attempting to make informal solicitations or to obtain informal quotes from potential suppliers of goods or services;
 - b. Make written findings describing the circumstances that require the prompt performance of the contract and of the harm anticipated to result from failing to establish the contract on an expedited basis; and
 - c. Record the measures taken under subsection (a) of this section to encourage competition, the amounts of the quotes or proposals obtained, if any, and the reason for selecting the contractor.
2. The City shall not contract pursuant to the exemption in the absence of a substantial risk of loss, damage, or interruption of services that would occur if contract performance awaited the time necessary, given the complexity of the project, to solicit, receive and analyze bids or proposals.

80.015 **Specific Exemptions**

1. The City may apply to the Board for a ruling under AR 80.020 through 80.050 exempting a particular contract or contracts from competitive bidding requirements of ORS 279.015 that are not otherwise exempted under these rules. The application shall contain the following information:
 - a. The nature of the project;
 - b. Estimated cost of the project;
 - c. A narrative description of the cost savings anticipated by the exemption from competitive bidding and the reasons competitive bidding would be inappropriate;
 - d. Proposed alternative contraction and purchasing practices to be employed; and
 - e. The estimated date by which it would be necessary to let the contract.
2. The Board may require such additional information as it deems necessary to determine whether a specific contract is to be exempt from competitive bidding.
3. Subject to ORS 279.015(5)(b), the Board may exempt certain public contracts or classes of public contracts from the competitive bidding requirements of AR 30.005 upon approval of the following findings:
 - a. It is unlikely that such exemption will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts; and
 - b. The awarding of public contracts pursuant to the exemption will result in substantial cost savings to the City. In making such finding, the Board may consider the type, cost, and amount of the contract, number of persons available to bid, and such other factors as may be deemed appropriate.
4. In granting exemptions pursuant to subsection 3(a) and (b) of this section, the Board shall:
 - a. Where appropriate direct the use of alternate contracting and purchasing practices that take account of market realities and modern or innovative contracting and purchasing methods, which are also consistent with the public policy of encouraging competition.
 - b. Require and approve or disapprove written findings by the City that support the awarding of a particular public contract or class of public contracts, without the competitive requirements of AR 30.005. The findings must show that the exemption of a contract or class of contracts complies with the requirements of subsection 3(a) and (b) of this section.

80.020 **Notice Of Application**

Upon receipt of an application for an exemption ruling under AR 80.015 or AR 20.040, the Chairperson of the Board shall set the matter for public hearing to receive data, views, and arguments and shall cause a notice of intention to adopt an order to be posted in full

public view in the City Hall and shall publish notice of the intention to adopt the order in a newspaper of general circulation at least seven (14) days prior to the hearing. If the exemption relates to a construction contract or public improvement, notification of the hearing shall be made at least 14 days prior to the hearing in at least one trade publication of general statewide circulation.

80.030 **Board Hearing**

The application will be placed on the Board's agenda for the next Board meeting, and, in the exercise of discretion, the Chairperson may also set additional public meetings to receive data, views and arguments.

80.040 **Temporary Rules Exemptions**

In appropriate cases, the Chairperson of the Board may grant a temporary exemption from public bidding pending formal consideration of a specific exemption.

80.050 **Unanimous Consent Calendar**

The Chairperson of the Board may, in the exercise of discretion notify the members of the Board that an application for exemption has been made and that if no objections are received to the exemption from the members of the Board within seven (7) days of the Chairperson's notice the exemption will be considered granted by unanimous consent and the Chairperson may in the exercise of discretion, deem the exemption adopted as a temporary rule. The Board at the next meeting of the Board will place exemptions so adopted on the Board's agenda as a unanimous consent calendar for ratification or adoption as a permanent rule.