

**CONTRACTING
(Chapter 3)**

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INTRODUCTION

Like all public agencies, Oregon special districts are required to comply with public contracting laws when purchasing goods and services, and for construction projects.

Public entities need to adopt rules that are consistent with Oregon's public contracting laws. They may adopt all or part of the Model Public Contracting Rules as the contracting rules for that entity. They also may expressly decline to adopt the Model Rules, and adopt their own rules. The Model Rules will apply, by default, to any public entity that has adopted no contracting rules. Whether a contracting agency adopts the Model Rules affirmatively or adopts its own rules, the agency must review any changes to statute or the Model Rules to determine if the agency's rules likewise need to be updated or modified.

The public contracting statutes require all public bodies to procure public contracts through a competitive bid process, with some exceptions and permitted exemptions. Local governments are given much flexibility with their contracting processes, particularly in the procurement of goods and services. However, in most cases this latitude is not available unless the governing body expressly adopts rules that grant and define the district's authority in certain areas. For example, local contracting agencies need to adopt rules that address the following:

- Contracts or classes of contracts that are exempt from competitive bidding;
- Dollar limits for contracts subject to "informal bidding requirements," rather than formal ones;
- Definition of "personal services" and procedures for granting personal services contracts;
- Use of sole-source procurements;
- Delegation of authority for decision-making in the award of public contracts;
- Procedures for pre-qualifying bidders; and
- Procedures for disposal of surplus property.

This chapter is designed to provide a basic understanding of the laws as they pertain to special districts, and instructions for implementing them. This chapter is intended as an informational tool only. It should not be used as a substitute for assistance of qualified legal counsel.

APPLICABLE LAWS AND RULES

Chapter 279 governs public contracting, and is divided into three subparts, as follows:

- ORS 279A (General Provisions – applies to all public contracts)

- ORS 279B (Public Procurement – applies to the purchase of goods and routine services (“procurements”) and, for state agencies, to the purchase of personal services)
- ORS 279C (Public Improvements – applies to contracts for construction, reconstruction, or major renovation of real property by or for a public agency. Also applies to contracts for services with contracts for architectural, engineering, photogrammetric mapping, transportation planning or land surveying and related services.)

For any public contract, a special district need look either to ORS 279A and 279B (for procurements), or ORS 279A and 279C (for public improvements). Similarly, the Model Public Contracting Rules are found in Oregon Administrative Rules Chapter 137, as follows:

- Division 46 – General Provisions (apply to all public contracts)
- Division 47 – Public Procurements for Goods and Services (implements ORS 279B)
- Division 48 – Consultant Selection: Architectural, Engineering and Land Surveying and Related Services Contracts (may adopt own rules of procedure as provided in ORS 279A.065(a).)
- Division 49 – General Provisions Related to Public Contracts for Construction Services (implements ORS 279C)

A copy of the Model Rules, and useful commentary, is available by contacting:

Model Public Contract Rules Manual

Department of Justice

Administrative Services

550 Justice Building

Salem, Oregon 97310

Phone: 503.378.4400

https://www.doj.state.or.us/wp-content/uploads/2017/06/publications_orderform.pdf

CONTRACTING AUTHORITY: LOCAL CONTRACT REVIEW BOARD

ORS 279A.060 provides that if the governing body of a local contracting agency takes no action to provide otherwise, the governing body is the LCRB. The roles of the LCRB are to:

- Adopt certain rules for public contracting;
- Establish rules for carrying out its public contracting duties;
- Grant exemptions from competitive bidding;
- Hold hearings on exemptions, when necessary; and
- Hear and decide appeals of disqualified bidders.

Delegation of Authority

Some portions of ORS Chapter 279 require certain authority to be exercised by the LCRB. This authority cannot be delegated because it is expressly granted in the Code. However, some portions of ORS Chapter 279 assign responsibility to the “contracting agency,” which means the district’s Board of Directors unless the Board delegates this authority to someone else.

Through ORS 279A.075, certain administrative contracting responsibilities may be delegated to others, usually a district manager or purchasing officer. Therefore, every contracting agency should consider adopting a rule to this effect.

Finally, it is important to note that only the district’s Board of Directors may contractually bind the district, though it may be able to delegate the authority to approve such contracts.

Therefore, the district should adopt a policy that establishes the types of contracts, or value of contracts, that the designee is authorized to approve, and which contracts must go to the Board of Directors for approval.

THE BIDDING REQUIREMENTS: EXCEPTIONS AND EXEMPTIONS

Unless an exemption is declared, most contracts for purchases other than personal services contracts are awarded through a competitive, sealed bidding process, or competitive sealed proposal process and contracts are awarded to the lowest responsive, responsible bidder.

- **Responsive Bid**
A bid or proposal that substantially complies with the invitation to bid or request for proposals and the requirements of the law.
- **Lowest Responsible Bidder**
The lowest bidder who (A) has substantially complied with all prescribed public contracting procedures and requirements; (B) Has met the standards set forth in ORS 279B.110 or 279C.375; (C) Has not been debarred or disqualified by the contracting agency under ORS 279B.130 or 279C.440; and (D) If the advertised contract is a public improvement contract, is not on the list created by the Construction Contractors Board under ORS 701.227.

Exceptions Provided by Statute

The following types of contracts relevant to special districts are not required to be competitively bid, according to ORS 279A.025:

- Contracts for the purchase and sale of real estate. (Instead, see ORS Chapters 273 and 276);
- Personal services contracts. (Rules are required.) A contract that calls for specialized skills, knowledge and resources in the application of highly technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment.
- Contracts made with other contracting agencies or the federal government.

- Agreements authorized under ORS 190 or by a statute or ordinance or other authority for establishing agreements between or among governmental bodies.
- Grants.

An agreement under which a contracting agency receives moneys, property or other assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, from a grantor for the purpose of supporting or stimulating a program or activity of the contracting agency in which no substantial involvement by the grantor is anticipated.

An agreement under which a contracting agency provides moneys, property or other assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, to a recipient for the purpose of supporting or stimulating a program or activity of the recipient in which no substantial involvement by the contracting agency is anticipated.

Grant **does not include** a public contract for a public improvement, for public works, as defined in ORS 279C.800, or for emergency work, minor alterations or ordinary repair and maintenance necessary to preserve a public improvement, when under the public contract a contracting agency pays moneys that the contracting agency received under a grant.

- Contracts made with qualified nonprofit agencies providing employment opportunities for disabled individuals.
- Service contracts for health insurance entered into by the State Department of Health and Human Services.
- Contracts for professional or expert witnesses in litigation.
- Sole-source expenditures when rates are set by law or ordinance for purposes of source selection.
- Procurements from an Oregon Corrections Enterprises program.
- Energy saving performance contracts.

A public contract between a contracting agency and a qualified energy service company for the identification, evaluation, recommendation, design and construction of energy conservation measures, including a design-build contract, that guarantees energy savings or performance.

- Contracts entered into pursuant to the incurring of debt or investment of funds by the public body.
- Contracts for employee benefit plans.

- Emergency Contracts. ORS 279B.080 allows the “head of a contracting agency” (i.e., the Board) or someone delegated this authority in writing, to make or authorize others to make emergency procurements of goods or services in an emergency. The emergency and the methods used to procure the goods or services must be documented. An emergency is defined as circumstances that could not have been reasonably foreseen that create a substantial risk of loss, damage, interruption of services or threat to the public health or safety that requires prompt execution of a contract to remedy the condition.

For an emergency procurement of construction services that are not public improvements, the contracting agency shall ensure competition for a contract for the emergency work that is reasonable and appropriate under the emergency circumstances. In conducting the procurement, the contracting agency shall set a solicitation time period that the contracting agency determines to be reasonable under the emergency circumstances and may issue written or oral requests for offers or make direct appointments without competition in cases of extreme necessity.

Note: Although no rules are specifically required to declare the emergency or to act under emergency conditions, if the authority to act in an emergency is to be delegated by the Board, this must be done in writing. Thus, it is advisable to have the district’s public contracting rules specify who is authorized to enter into emergency contracts, and under what conditions.

- Contracts between fire departments for fire protection equipment, if the following requirements are met:
 - The recipient makes a written request for the equipment;
 - The equipment is surplus to or unusable by the transferor;
 - The total fair market value of the equipment received does not exceed \$50,000 per calendar year;
 - The transferor holds a public hearing, with 14 days’ written notice published in a newspaper of general statewide circulation; and
 - The transferor makes written findings that the contract is in the public interest.

Note: These requirements apply even if the recipient fire department takes the equipment at no cost.

Exceptions for Contracts of Certain Dollar Amounts

These exemptions are embodied in ORS 279B.065 and ORS 279B.070, with some modifications. They do not apply to public improvements, which are addressed in ORS Chapter 279C.

Small Procurement

A “small procurement” is defined in ORS 279B.065 as “any procurement of goods or services not exceeding \$10,000.” Such contracts may be awarded in any manner provided for in the contracting agency’s rules as being “practical or convenient” by the contracting agency, including direct selection. The rules also may provide for the degree to which the value of such a contract may be amended and still fall within this exception.

Intermediate Procurement

An “intermediate procurement” is defined in ORS 279B.070 as “any procurement of goods or services exceeding \$10,000 but not exceeding \$150,000.” When seeking to award such a contract, the agency must obtain at least three informally solicited quotes from prospective contractors. The contract must be awarded to the offer whose quote or proposal will “best serve the interests of the contracting agency, taking into account price as well as other considerations.” Rules adopted by the contracting agency may provide for the degree to which the value of the contract may be amended to still fall within the exception.

For procurements in excess of \$150,000, formal bidding processes (i.e., advertisement, ITB/RFP, competitive process) must be followed, unless an exemption is taken by the procedures described below.

A contracting agency can amend an intermediate procurement beyond the \$150,000 limit in accordance with OAR 137-047-0800 provided the cumulative amendments do not increase the total contract price greater than twenty-five percent (25%).

Exemptions by the Local Contract Review Board (“Special Procurement”)

There are two types of special procurements described in ORS 279B.085: A “class special procurement,” which includes an entire class of contracts, and a “contract-specific special procurement,” which includes only one contract.

Class special procurements are for the purpose of entering into a series of contracts over time for the acquisition of a specified class of goods or services.

Contract-specific special procurements are for the purpose of entering into a single contract or a number of related contracts for the acquisition of specified goods and services on a one-time basis or for a single project.

To use this process, a written request for the special procurement must be made to the LCRB, which describes the proposed contracting procedure, the goods or services or the class of goods or services to be acquired through the special procurement and the circumstances that justify the use of a special procurement. A special procurement qualifies if it will:

- Be unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts; and

- Result in substantial cost savings to the contracting agency or to the public; or
- Otherwise substantially promote the public interest in a manner that could not practically be realized by complying with the requirements that are applicable under ORS 279B.055 or 279B.060, 279B.065 or 279B.070 or under any other adopted rules.

A contracting agency shall give public notice of the LCRB's approval of a Special Procurement in accordance with ORS 279B.055(4) and OAR 137-047-0300. The public notice shall describe the goods or services or class of goods or services to be acquired through the special procurement. The contracting agency shall give such public notice of the approval of a special procurement at least seven (7) days before award of the contract.

In addition, once the special procurement is authorized by the LCRB, the contract may be awarded to the offer or “whose offer the contracting agency determines in writing to be the most advantageous to the contracting agency.” If the approval is for a class special procurement, contracts within that class may be awarded, in perpetuity, without further approvals or bidding.

Note: These provisions do not apply to public improvements, which are discussed in ORS Chapter 279C.

SOLE-SOURCE PROCUREMENTS

ORS 279B.075 permits a contracting agency to award a contract for goods or services without competition when the LCRB, or a person designated in writing by the LCRB, determines in writing, according to adopted rules, that the goods or services, or class of goods or services, are available from only one source.

The determination of a sole source must be based on written findings that *may* include:

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

Note: the statute *requires* findings to be adopted, but provides a list of justifications that *may* be included in the findings. It is not clear whether this means that the LCRB only may base its decision on the options listed, or whether it may base its decision on some reason not on the list. Until this ambiguity is addressed, it is recommended that the rules adopted by the public

entity for sole-source procurements require the findings to, at minimum, include at least one of the criteria listed in the statute.

To the extent reasonably practical, the contracting agency must negotiate with the sole source to obtain advantageous contract terms.

SUBCONTRACTING TO EMERGING SMALL BUSINESSES OR BUSINESSES OWNED OR CONTROLLED BY DISABLED VETERANS

A contracting agency may require a contractor to subcontract some part of a contract to, or to obtain materials to be used in performing the contract from, a business enterprise that is certified under ORS 200.055 as an emerging small business or a business enterprise that is owned or controlled by a disabled veteran, as defined in ORS 408.225.

A contracting agency may require a contractor to subcontract some part of a contract to, or to obtain materials to be used in performing the contract from, a business enterprise that is certified under ORS 200.055 as an emerging small business and that, as identified by the contracting agency, is located in or draws the business enterprise's workforce from economically distressed areas, as designated by the Oregon Business Development Department.

A contracting agency may require that a public contract be awarded to a responsible bidder, as defined in ORS 200.005, who the contracting agency determines has made good faith efforts as prescribed in ORS 200.045 (3). For purposes of this subsection, "responsible bidder" includes a responsible proposer that has made good faith efforts as prescribed in ORS 200.045(3).

CONTRACTS WITH QUALIFIED NON-PROFIT AGENCIES PROVIDING EMPLOYMENT OPPORTUNITIES FOR DISABLED INDIVIDUALS

ORS 279A.025(l)(4) requires a local contracting agency to check the list of qualified products maintained by the Department of Administrative Services before procuring any product or service. If the product or service needed is listed, and if it is of the appropriate specifications and is available when needed by the public agency, the contracting agency *must* obtain the product or service from the qualified non-profit agency. Such contracts may not be competitively bid.

QUALIFIED PRODUCTS LIST

A contracting agency may develop and maintain a qualified products list when the testing or examination of goods before initiating a procurement is necessary or desirable to best satisfy requirements of the contracting agency.

In developing a qualified products list, a contracting agency must give public notice, in accordance with ORS 279B.055(4), of the opportunity for potential contractors, sellers or suppliers to submit goods for testing and examination to determine their acceptability for inclusion on the list and may solicit in writing representative groups of potential contractors, sellers or suppliers to submit goods for the testing and examination. Any potential contractor,

seller or supplier, even though not solicited, may offer its goods for consideration.

Inclusion of goods on a qualified products list must be based on the results of tests or examinations. Notwithstanding public records rules, a contracting agency may make the test or examination results public in a manner that protects the identity of the potential contractor, seller or supplier that offered the goods for testing or examination, including by using only numerical designations. Furthermore, a contracting agency may keep confidential trade secrets, test data and similar information provided by a potential contractor, seller or supplier if so requested in writing by the potential contractor, seller or supplier.

The inclusion of goods on a qualified products list is not the same thing as prequalification of prospective contractors, even if they sell or supply the goods on the qualified products list.

PREQUALIFICATION OF BIDDERS

Districts have the option of prequalifying all bidders for a particular contract or type of contract.

ORS 279B.120 provides that the method of submitting prequalification applications, information required in order to be prequalified, and the forms to be used for submitting prequalification information, are determined by the contracting agency, unless otherwise prescribed by rules adopted by the LCRB.

Within 30 days of receipt of an application for prequalification (or sooner if the applicant requests it sooner, and it is practicable to do so), the contracting agency must notify the prospective bidder whether the bidder meets the standards of responsibility in ORS 279B.110(2); whether the bidder is qualified to compete for the type or nature of the contract or class of contracts; and the period of time the prequalification is in effect. If the contracting agency denies prequalification, it must state which standard(s) of responsibility were not met, or the bidder will be deemed to be prequalified. The notice also must state the applicant's right to a hearing. If the applicant is not prequalified, the applicant may demand a hearing within 3 business days after receipt of the notice that prequalification was denied.

If the contracting agency subsequently determines that the prequalified bidder is not qualified, the agency must issue reasonable notice to the bidder that the bidder is no longer qualified, or that the contracting agency has modified the prequalification, and the notice must state the reasons for the revocation or modification of prequalification. Again, the notice must state the applicant's right to a hearing, and the applicant may demand a hearing within 3 days of receipt of the notice. A revocation or revision does not apply to contracts that have already been advertised.

DISBARRMENT OF BIDDERS

After providing the bidder with notice and a reasonable opportunity to be heard, a district may disqualify a bidder from bidding on district contracts for a period of up to three years, for the following reasons:

- Conviction of a criminal offense in obtaining, or attempting to obtain or perform a public or private contract or subcontract.
- Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously, and directly affects the prospective bidder's or proposer's responsibility as a contractor.
- Conviction under state or federal anti-trust statutes.
- Violation of a contract provision, and debarment for such violation was listed in the contract terms and conditions as a potential penalty. A violation may include but is not limited to a failure to perform the terms of a contract or an unsatisfactory performance, provided the failure is not caused by acts beyond the control of the contractor.
- The prospective bidder or proposer does not carry workers' compensation or unemployment insurance as required by law.

Disqualification decisions must be in writing and mailed or otherwise furnished to the disqualified person. The decision must state the reasons for disqualification and inform the bidder of their right to appeal.

Any person who wishes to appeal the debarment must, within three business days after receipt of the disqualification notice, notify the district of the appeal. Upon receipt of the notice, the district must immediately notify the LCRB, which conducts the appeal hearing.

PREFERENCE FOR OREGON PRODUCTS AND SERVICES

A "resident bidder" is a bidder that does business in Oregon – i.e., has paid unemployment taxes or income taxes in Oregon during the 12 calendar months immediately preceding submission of the bid and has a business address in Oregon. Bidders who do not meet these criteria are "non-resident bidders."

All things being equal—including price, fitness, availability and quality—districts must "prefer" goods or services that have been manufactured or produced in Oregon. This is done by adding to the non-resident bidder's bid a percentage equal to the preference, if any, given to the bidder in the state where the bidder resides.

When contracts in excess of \$10,000 are awarded to a non-resident bidder – i.e., a contractor who is not located or registered to do business in Oregon—the contractor is required to report the total contract price, terms of payment, length of the contract and any other information required by the Oregon Department of Revenue. Districts must be satisfied that this requirement has been met before they issue a final payment on a contract. This can be done by requesting a copy of the required notice.

For public improvement contracts, bid documents must require bidders to state whether they are resident bidders, and indicate the percentage amount that a bid will be increased for non-resident bidders.

On or before January 1 of each year, the Oregon Department of Administrative Services is required to publish a list of states that give preference to in-state bidders, with the percent increase applied in each state. The contracting agency that relies on this document in its bidding process cannot be held liable to any bidder when determining the lowest responsible bidder.

OAR 137-046-0300 of the Model Public Contracting Rules provides procedures for determining if goods are manufactured in Oregon, determining whether bids are identical, and drawing lots to select the winning bid when bids are identical.

PERSONAL SERVICES CONTRACTS

For non-state agencies (such as special districts), “personal services” are whatever the governing body decides they will be, by rule or legislative act. [See ORS 279A.055.] ORS 279A.070 permits a local contracting agency to adopt rules governing personal services contracts, and requires them to create procedures for screening and selection. Typical examples of personal services contracts are those with accountants, attorneys, consultants, physicians, artists, architects and engineers, and land surveyors (procured under ORS 279C.105 or 279C.110). Routine types of services typically based on price, such as janitorial, food service, or maintenance contracts, may also be included in the definition of “personal services.”

Note: The Attorney General’s Model Public Contracting Rules for personal services contracts expressly do not apply to local contracting agencies. Thus, there are no “default” rules for personal services contracts. A district that legally wants to enter into personal services contracts, must adopt rules for doing so, or may not enter into these kinds of contracts. See sample Personal Services Contract policy at end of chapter.

Architects, Engineers, Photogrammetric Mapping, Transportation Planning and Land Surveying Services

Under ORS 279C.105, each contracting agency authorized (by its own rules) to enter into personal services contracts with architects, engineers, photogrammetric mapping, transportation planning and land surveying services, must adopt procedures for screening and selection under ORS 279C.110 and ORS 279C.120. ORS 279C.110(3) states that procedures for the selection of these “consultants” are “within the sole discretion of the contracting agency and may be adjusted to accommodate the contracting agency’s scope, schedule and objectives for a particular project if the estimated cost for service does not exceed \$250,000,” including providing for the direct appointment (without competition) if the value of the project does not exceed \$100,000.

Note: The requirement to establish a dollar limit for direct appointment of a contractor does NOT apply to other types of personal services contracts.) This statute also permits a

contracting agency to establish procedures for breaking a tie, and permits negotiation of such things as scope of services, compensation, and contract conditions. Furthermore, ORS 279C.115 permits direct appointment of such consultants if the contract is a continuation of an existing contract, and other conditions are satisfied.

Chapter 137, Division 48 of the Model Rules deals with selection of these kinds of consultants. It's important to note that, although under ORS 279A.065(4), the Model Rules will apply automatically to a district that has not adopted its own contracting rules, the provisions relating to architects, engineers, photogrammetric mapping, transportation services and land surveying services will *not* automatically apply.

Public improvement projects expected to exceed \$900,000, with at least 10 percent of the contract amount coming from state funds are required to use qualification-based selection ("QBS") procedures when selecting architects, engineers, photogrammetric mapping, transportation planning and land surveying services. Essentially, this means that the agency must solicit proposals from such professionals only on the basis of qualifications for the job, and may negotiate price only after it has made its qualification-based selection. If the agency and the selected contractor cannot agree on a price for the services, the agency is free to terminate the negotiations and move on to the next qualified candidate. [ORS 279C.110(6).]

Note: QBS is not unique to state contracting. Many projects receiving federal funds may require a QBS process as well. Federal laws and regulations will "trump" state law when the two conflict. Therefore, if a special district is receiving federal funds, it must carefully review the terms of the grant or loan to ensure compliance with this and other requirements.

PURCHASING THROUGH THE STATE OF OREGON

Districts can purchase certain supplies and equipment through the State Department of Administrative Services without going through the bid process. The State Department of Administrative Services is authorized to acquire, warehouse and distribute surplus property to all eligible governmental units and certain nonprofit organizations.

To obtain information contact the Department of Administrative Services:

1225 Ferry St. SE
Salem, Oregon 97310
503.378.4642

SALE OF SURPLUS PROPERTY

Under ORS 279A.185, local contracting agencies may dispose of surplus property in accordance with adopted rules. These rules will determine how the contracting agency will dispose of surplus property, including exempting such contracts from competitive bidding if desired.

Note: The Model Public Contracting Rules do not address disposition of surplus property, so no rule will apply by default if a contracting agency does not adopt its own rules. If no rules are

adopted, the contracting agency has *no* authority to dispose of surplus property except through the bidding processes provided by statute. Thus, it is advisable to adopt rules addressing disposition of surplus property. See sample Surplus Property Disposal policy at the end of this chapter.

COOPERATIVE PROCUREMENTS

A contracting agency may participate in, sponsor, conduct or administer a joint cooperative procurement or interstate cooperative procurement of goods and services, but not public improvements.

Joint Cooperative Procurements

A joint cooperative procurement is a cooperative procurement in which the participating contracting agencies or the cooperative procurement group and the agencies' or groups' contract requirements for price agreements are identified.

A joint cooperative procurement is valid only if:

- The original solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in statutes for procurements of goods and services, special procurements, or public improvement contracts;
- The original solicitation and the original contract or price agreement identifies the participating group or individual agencies, and specifies the estimated contract requirements; and
- No material change is made in the terms, conditions or prices of the contract between the contractor and the purchasing contracting agency from the terms, conditions and prices of the original contract between the contractor and the administering contracting agency.

A joint cooperative procurement may not be a permissive cooperative procurement.

Permissive Cooperative Procurements

A permissive cooperative procurement is a cooperative procurement in which the participating agencies are not identified. In other words, it may be subsequently used by other parties who are not known at the time the contract is entered into.

A contracting agency may establish a contract or price agreement through a permissive cooperative procurement only if:

- The original solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in statutes relating to procurement of goods and services.

- “Substantially equivalent” means that the solicitation and award process: (1) Calls for award of a contract on the basis of a lowest responsible bidder or a lowest and best bidder determination in the case of competitive bids, or on the basis of a determination of the proposer whose proposal is most advantageous based on evaluation factors set forth in the request for proposals in the case of competitive proposals; (2) Does not permit the application of any geographic preference that is more favorable to bidders or proposers who reside in the jurisdiction or locality favored by the preference than the preferences provided in ORS 279A.120 (2); and (3) Uses reasonably clear and precise specifications that promote suitability for the purposes intended and that reasonably encourage competition.
- The administering contracting agency’s solicitation and the original contract allow other contracting agencies to establish contracts or price agreements under the terms, conditions and prices of the original contract;
- The contractor agrees to extend the terms, conditions and prices of the original contract to the purchasing contracting agency; and
- No material change is made in the terms, conditions or prices of the contract or price agreement between the contractor and the purchasing contracting agency from the terms, conditions and prices of the original contract between the contractor and the administering contracting agency.

A purchasing contracting agency must provide public notice of intent to establish a contract or price agreement through a permissive cooperative procurement if the estimated amount of the procurement exceeds \$250,000. OAR 137-046-0440 provides procedures for determining when the procurement will exceed \$250,000, which may be helpful to special districts as well.

The notice of intent must include:

- A description of the procurement;
- An estimated amount of the procurement;
- The name of the administering contracting agency; and
- A time, place and date by which comments must be submitted to the purchasing contracting agency regarding the intent to establish a contract or price agreement through a permissive cooperative procurement.

The notice must be given in the same manner as provided in ORS 279B.055 (4)(b) and (c), relating to competitive sealed bidding for goods and services.

Unless otherwise specified in the agency's rules, the purchasing contracting agency must give public notice at least seven days before the deadline for submitting comments regarding the intent to establish a contract or price agreement through a permissive cooperative agreement.

If required to provide notice, the purchasing contracting agency must provide vendors who would otherwise be prospective bidders or proposers on the contract or price agreement, if the procurement were competitively bid, an opportunity to comment. Vendors must submit comments within seven days after the notice of intent is published.

If comments on the permissive cooperative procurement are received, the purchasing contracting agency must make a written determination that establishing a contract or price agreement through a permissive cooperative procurement is in the best interest of the purchasing contracting agency before establishing a contract or price agreement, and must provide a copy of the written determination to any vendor who submitted comments.

Interstate Cooperative Procurements

Interstate cooperative procurement is a permissive cooperative procurement in which the administering contracting agency is authorized to enter into public contracts, and in which one or more of the participating agencies are located outside of Oregon.

A contracting agency may establish a contract or price agreement through an interstate cooperative procurement only if:

- The administering contracting agency's solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified statutes relating to procurement of goods and services;
- The administering contracting agency's solicitation and the original contract allow other governmental bodies to establish contracts or price agreements under the terms, conditions and prices of the original contract; and
- The administering contracting agency permits the contractor to extend the use of the terms, conditions and prices of the original contract to the purchasing contracting agency.

In addition to these requirements:

- The purchasing contracting agency, or the cooperative procurement group, of which the purchasing contracting agency is a member, must be listed in the solicitation of the administering contracting agency as a party that may establish contracts or price agreements under the terms, conditions and prices of the original contract, and the solicitation must be advertised in Oregon; *or*

- The purchasing contracting agency, or the cooperative procurement group of which the purchasing contracting agency is a member, must advertise a notice of intent to establish a contract or price agreement through an interstate cooperative procurement.

The notice of intent must include:

- A description of the procurement.
- An estimated amount of the procurement.
- The name of the administering contracting agency.
- A time, place and date by which comments must be submitted to the purchasing contracting agency regarding the intent to establish a contract or price agreement through an interstate cooperative procurement.

Public notice of the intent to establish a contract or price agreement through an interstate cooperative procurement must be given in the same manner as provided in ORS 279B.055 (4)(b) and (c).

Unless otherwise specified in its adopted rules, the purchasing contracting agency must give public notice at least seven days before the deadline for submission of comments regarding the intent to establish a contract or price agreement through an interstate cooperative procurement.

If required to provide such notice of intent, the purchasing contracting agency must provide vendors who would otherwise be prospective bidders or proposers if the procurement were competitively procured under ORS chapter 279B, an opportunity to comment on the intent to establish a contract or price agreement through an interstate cooperative procurement. Vendors must submit comments within seven days after the notice of intent is published.

If the purchasing contracting agency receives comments, the agency must make a written determination that establishing a contract or price agreement through an interstate cooperative procurement is in the best interest of the purchasing contracting agency before it may establish a contract or price agreement through the interstate cooperative procurement. It then must provide a copy of the written determination to any vendor who submitted comments.

For an interstate cooperative procurement, an administering contracting agency may be any governmental body, domestic or foreign, authorized under its laws, rules or regulations to enter into contracts for the procurement of goods and services for use by a governmental body.

PROTESTS AND DISPUTES

A protest regarding the procurement process, the contents of solicitation documents or the award or proposed award of any original contract may only be directed to the administering

contracting agency. The protest must be in accordance with the provisions of ORS 279B.400 to 279B.425.

A protest regarding the use of a cooperative procurement by a purchasing contracting agency after the execution of an original contract may only be directed to the purchasing contracting agency. The protest must be in accordance with the provisions of ORS 279B.400 to 279B.425 and is limited in scope to the purchasing contracting agency's authority to enter into a cooperative procurement contract.

PUBLIC PROCUREMENTS: ADVERTISING; NOTICE; AWARD OF CONTRACT

The process for advertising a bid or proposal now depends on what is being purchased. Therefore, the following section describes only the processes for advertising for procurement of goods and services. The processes for advertising for public improvements are addressed later in this chapter.

The contracting agency may choose whether to proceed using an invitation to bid ("ITB") (ORS 279B.055), or a request for proposals ("RFP") (ORS 279B.060). This requirement does not apply to public contracts for small procurements, intermediate procurements, emergency procurements or special procurements.

As a general rule, ITBs are likely to be most useful when the item to be procured is not particularly unique, and price will be paramount in making the award decision. RFPs may be most useful when something other than price is important to the procurement of the good or service, such as unique qualifications and experience of the proposer, or when the approach to providing the good or service can vary, and the contracting agency is open to creative solutions.

Another important factor to consider is that either process may be used to award multiple public contracts for goods or services when specified in the solicitation document. The statute does not elaborate on whether the "multiple contracts" must be for the same goods and services, or even related to each other. However, OAR 137-047-0600(4)(c) and (d) state as follows:

Multiple Awards shall not be made if a single Award will meet the Contracting Agency's needs, including but not limited to adequate availability, delivery, service, or product compatibility. A multiple Award may be made if Award to two or more Bidders of similar Goods or Services is necessary for adequate availability, delivery, service or product compatibility. Multiple awards may not be made for the purpose of dividing the Procurement into multiple solicitations, or to allow for user preference unrelated to utility or economy. A notice to prospective Bidders that multiple Contracts may be Awarded for any (solicitation) shall not preclude the Contracting Agency from Awarding a single Contract for such (solicitation). If the (solicitation) permits the Award of multiple Contracts, the Contracting Agency shall specify in the (solicitation) the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services."

Although no rules are specifically required for special districts to use these two types of solicitation, a district would be prudent to adopt the Model Rules relating to these processes, or similar rules of its own, to ensure fair competition in public contracting.

PUBLIC IMPROVEMENT CONTRACTS

A public improvement is “a project for construction, reconstruction or major renovation on real property by or for a contracting agency.” Public improvements do not include emergency work, minor alterations, or ordinary repair and maintenance needed to preserve the public improvement.

The definition also specifically excludes projects for which no funds of a contracting agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspections are excluded. This clearly addresses situations such as whether a public entity may receive a donation of construction services, or whether it must put contracts out to bid when they are being entirely funded by a private source, as in a public-private partnership agreement.

Contracts for construction projects that are not public improvements must be competitively bid like a public procurement of goods and services under ORS 279B (ORS 279C.320). However, other aspects of laws that apply to public improvements – such as payment of prevailing wage – may apply.

As a reminder, ORS 279C applies to public improvements only. The entirety of OAR Chapter 137, Section 49, applies to public contracts for construction services. ORS Chapter 279A applies to all public contracts, therefore, it also applies to public improvement contracts.

Minor Alterations, Ordinary Repair or Maintenance

These types of projects are not included in the definition of “public improvement.” They may be awarded according to the processes for obtaining goods and services under ORS 279B.

BOLI Filing

On an annual basis, districts must prepare and file with the Commissioner of the Bureau of Labor and Industries (BOLI) a list of every public improvement that the district plans to fund in the upcoming budget year. For each project, the district must indicate whether it intends to do the work itself, or hire a private contractor.

If the district intends to do its own work on a project estimated to cost over \$125,000, it must show that the decision to perform the construction using district personnel and equipment is the least cost to the district.

The information must be filed 30 days prior to adoption of the district’s budget and should include a description of the improvement and an estimate of the total on-site construction costs.

Current law requires that public agencies awarding public works contracts pay a fee to BOLI to cover the costs of surveys, administration, and education relating to prevailing wage laws. The fee is 0.1% of each contract, with a minimum of \$250 and a maximum of \$7,500.

Filings should be made with the Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon Street #1045, Portland, Oregon 97232. Forms are available for providing this information (WH-118 and WH-119); they can be found in the back of every PWR rate book and on BOLI's website at www.oregon.gov/BOLI. ORS 279C.305; OAR 839-025-0008

Prevailing Wage

For "public works" of \$50,000 or more, the prevailing wage rate must be paid by all contractors and subcontractors. "Public work" is defined substantially similarly to "public improvement." Public works includes, but is not limited to:

- Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting which is carried on or contracted for by a public agency to serve the public interest;
- A project for the construction, reconstruction, major renovation or painting of a privately-owned road, highway, building structure or improvement of any type that uses funds of a private entity and \$750,000 or more funds of a public agency; or
- A project for the construction of a privately-owned road, highway, building structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.

Prevailing wages on public works is addressed in ORS 279C.800 through 279C.870, and are enforced by the Bureau of Labor and Industries (BOLI).

Compliance with prevailing wage requirements is the responsibility of the contractor or subcontractor. However, public agencies are required to include this requirement in both the solicitation document and the ensuing contract. When the prevailing wage rates are available electronically or are accessible on the Internet, the rates may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates and by providing adequate information about how to access the rates.

If a public agency is required to include state and federal prevailing wage rates in the bid specifications, they must also include information showing which prevailing wage rate is higher for workers in each trade or occupation in each locality (ORS 279C.815(2)(a)).

Public agencies also are required to notify BOLI – on forms provided by BOLI – within 30 days of awarding a contract subject to prevailing wage. Subcontractor disclosure forms must be included. (ORS 279C.835.)

EXEMPTIONS FROM COMPETITIVE BIDDING

Exemptions from competitive bidding for public improvement contracts include:

Contracts under \$5,000;

Contracts between \$5,000 and \$100,000 (or \$50,000 for transportation projects) if the process for obtaining competitive quotes for intermediate procurements (see ORS 279B.070) are followed;

Contracts with qualified non-profit agencies providing employment for the disabled;

Contracts or a class of public improvement contracts for which an exemption has been adopted after making findings that doing so is unlikely to encourage favoritism in the awarding of public improvement contracts or substantially diminish competition, and that the awarding of public improvement contracts under the exemption will result in substantial cost savings to the public agency. A public hearing is required for an exemption for a public improvement contract.

In making findings for a class exemption for public improvement contracts the contracting agency must clearly identify characteristics of the class, using some combination of project descriptions, locations, time periods, contract values, or other factors that the class has in common. Classes may not be identified solely based on their funding source (such as "all grant-funded projects").

- Certain projects for the Department of Veterans Affairs under ORS 407.135 and 407.145(1).

An exemption of a public improvement contract requires a public hearing. Notification of the public hearing shall be published in at least one trade newspaper of general statewide circulation a minimum of 14 days before the hearing. The notice shall state that the public hearing is for the purpose of taking comments on the contracting agency's draft findings for an exemption from the competitive bidding requirement. (ORS 279C.335(5)(c).

"IN-HOUSE" PROJECTS

It is a common misconception that public entities are required to contract out public improvement contracts. They're not. If a special district has qualified personnel who can complete the improvement, it may use them, provided the following requirements are met:

- If the cost of the work exceeds \$5,000, the district must adopt and apply a cost accounting system that complies with the model cost accounting guidelines developed by the Oregon Department of Administrative Services.

- If the project is estimated to cost more than \$125,000, the district must demonstrate that doing the work itself is the least costly alternative. To this end, the district must prepare adequate plans and specifications and the estimated unit cost of each classification of work. The estimated cost must include a reasonable allowance for the cost, including investment cost, of any equipment used. In this context, “adequate” plans and specifications are those “sufficient to control the performance of the work and to assure satisfactory quality of construction by the public district personnel.”
- Districts must keep an accurate account of the costs of performing the work, including all engineering and administration expenses and costs, including investment costs, of any equipment used.
- The above rules do not apply to improvements for the distribution or transmission of electric power.

ADVERTISEMENTS

Advertisements for bids must be published at least once in a newspaper of general circulation in the area where the contract is to be performed. The LCRB may, by rule or order, authorize advertisements for public improvement contracts to be published electronically instead of in a newspaper of general circulation, if the LCRB determines that doing so is likely to be cost-effective.

However, if the contract has an estimated cost in excess of \$125,000, the advertisement *must* be published in a trade journal or newspaper of statewide circulation. The LCRB may, by rule, require an advertisement to be published more than once or in one or more additional publications.

At minimum, all advertisements for public bids must contain the following information:

- A description of the project;
- The office where the specifications for the work, material or things may be reviewed.
- If the contract requires prequalification of bidders, a date must be specified under which all prequalification applications must be filed and the class or classes of work for which bidders must be prequalified.
- The date and time by which all bids must be received in order to be eligible for the project. The date and time must not be set less than five days from the date the advertisement is published, and may permit bidders to submit bids by electronic means.
- The name and title of the person who is to receive the bids.
- The date, time and place that the district will publicly open the bids.

- If the contract is for a public works project subject to ORS 279C.800 to 279C.870 or the Davis Bacon Act (40 U.S.C. 3141 et. seq.) [prevailing wage laws].

SOLICITATION DOCUMENTS

A contracting agency preparing solicitation documents for a public improvement contract shall, at a minimum, include:

- A description of the project.
- The office where the specifications for the work, material or things may be reviewed.
- If the contract requires prequalification of bidders, the date when all prequalification applications must be filed and the class or classes of work for which bidders must be pre-qualified.
- The date and time by which all bids must be received in order to be eligible for the project. The date and time must not be set less than five days from the date the advertisement is published.
- The name and title of the person who is to receive the bids.
- The date, time and place that the district will publicly open the bids.
- A statement that if the contract is for a public works project subject to ORS 279C.800 to 279C.850, the federal prevailing wage rates under the Davis Bacon Act (40 U.S.C. 3141 et. seq.) or both the state and federal prevailing wage rates, no bid will be received or considered unless the bid contains a statement by the bidder that ORS 279C.838 or 279C.840 or USC 3141 et. seq. will be complied with. [prevailing wage laws].
- A statement that each bid must identify whether the bidder is a resident bidder, as defined in ORS 279A.120.
- A statement that the public contracting agency may reject any bid not in compliance with all public bidding procedures and requirements, and may reject for good cause any or all bids upon a finding that it is in the public interest to do so.
- Information addressing whether a contractor or subcontractor must be licensed under ORS 468A.720 (asbestos removal).
- A statement that no bid for a construction contract shall be received or considered by the public contracting district unless the bidder is registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board as required by ORS 671.530.
- Bid or proposal security requirements, if any.
- The method by which the district will provide addenda to the Solicitation Document.

SOLE SOURCE PRODUCTS

According to ORS 279C.345, specifications for a public improvement contract may not expressly or implicitly require any product by brand name or make, nor the product of any particular manufacturer or seller, unless the LCRB has adopted an exemption to permit this. The exemption must be based on findings that:

- It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts, or substantially diminish competition for public improvement contracts;
- The specification of the product would result in substantial cost savings to the contracting agency;
- There is only one manufacturer or seller of the product of the quality required; or
- Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment and supplies.

BID OPENING

All bids submitted to the district must comply with all requirements of the Invitation to Bid, and also must be:

- In writing.
- Filed with the person designated by the district to receive the bids.
- Opened publicly by the contracting agency at the specific time designated in the advertisement for the bid.
- Filed for public inspection after they have been opened.
- Attached to a surety bond, cashier's check, or certified check for bid security unless the contract has been exempted from the requirement. Such security must not exceed 10 percent of the amount bid for the contract.

DISCLOSURE OF SUBCONTRACTORS

Within two working hours after the date and time of the deadline when bids are due to a contracting agency for a public improvement contract of more than \$100,000, a "responsive" bidder must disclose its first-tier subcontractors. The disclosure must be provided for each first-tier subcontractor who will be furnishing labor, or labor and materials, in connection with the contract and whose contract value is equal to or greater than 5 percent of the total project bid, or \$15,000, whichever is larger; or \$350,000, regardless of the percentage of the total bid.

The contracting agency shall designate a deadline for submission of bids that has a date on a Tuesday, Wednesday, or Thursday and a time between 2 p.m. and 5 p.m. except for public

improvement projects for maintenance or construction of highways, bridges or other transportation facilities.

The disclosure of the first-tier sub-contractors must include the name of each subcontractor, the category of work that each subcontractor will perform and the dollar value of each subcontract.

SUBSTITUTION OF FIRST-TIER SUBCONTRACTOR

A contractor whose bid is accepted may substitute a first-tier subcontractor that was not disclosed by submitting the name of the new subcontractor and the reason for the substitution in writing to the contracting agency. Substitutions of first-tier subcontractors are permitted in the following circumstances:

- When the disclosed subcontractor fails or refuses to execute a written contract after having had a reasonable opportunity to do so.
- When the disclosed subcontractor becomes bankrupt or insolvent.
- When the disclosed subcontractor fails or refuses to perform the subcontract.
- When the disclosed subcontractor fails or refuses to meet the bond requirements of the contractor that had been identified prior to the bid submittal.
- When the contractor demonstrates to the public contracting agency that the subcontractor was disclosed as the result of an inadvertent clerical error.
- When the disclosed subcontractor does not hold a license from the Construction Contractors Board, and is required to be licensed by the board.
- When the contractor determines that the work performed by the disclosed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications or that the subcontractor is substantially delaying or disrupting the progress of the work.
- When the disclosed subcontractor is ineligible to work on a public improvement pursuant to the applicable statutory provisions.
- When the substitution is for good cause. The Construction Contractors Board defines “good cause” in OAR 812-002-0325 as follows: “Good cause” includes but is not limited to the financial instability of a subcontractor. The definition of "good cause" must reflect the least-cost policy for public improvements established in ORS 279C.305.
- When the substitution is reasonably based on the contract alternates chosen by the contracting agency.

After bids are opened, the subcontractor disclosures must be made available for public inspection.

NON-RESIDENT BIDDERS

When determining the low bidder, the district must add a percentage increase on the bids of nonresidents equal to the percent, if any, of the preference given to that bidder in the state in which the bidder resides. A “resident bidder” means a bidder that has paid unemployment taxes or income taxes in this state during the 12 calendar months immediately preceding submission of the bid and has a business address in this state. Each year the Oregon State Department of Administrative Services publishes a list of states that give preference to in-state bidders, with the percent increase applied in each state.

REJECTION OF BIDS

The district may reject any bid not in compliance with all public bidding procedures and requirements. The district also may reject all bids for good cause if it makes written findings showing that it is in the public interest to do so. If all of the bids are rejected and the contract is not abandoned, the district may call for new bids.

NEGOTIATION WITH LOWEST BIDDER

As a general rule, the district may not negotiate with the low bidder in a public improvement contract. However, according to ORS 279C.340, if all bids exceed the district’s estimate of what the contract will cost, the district may, according to its adopted rules, negotiate with the lowest responsive, responsible bidder prior to awarding the contract, in order to attempt to bring the price within the district’s estimate. However, the negotiation may not result in a significant change in the scope of work. Bidder records used in negotiating the contract are not subject to public inspection until after the contract has been awarded or the negotiation process terminated.

AWARDING THE CONTRACT

The general rule in awarding public contracts is that they must be awarded to the *responsible* bidder who submits the lowest *responsive* bid or proposal. An unresponsive bid from a responsible bidder must be rejected. Similarly, a responsive bid must be rejected if the bidder is determined to be not responsible.

“Responsive Bid”

ORS 279B.005(1)(e) defines “responsive bid” or “responsive proposal” as a bid or proposal that substantially complies with the invitation to bid or request for proposals, and all prescribed procurement procedures and requirements.

“Responsible Bidder”

ORS 279B.110 defines responsibility of bidders and proposers. In determining whether a bidder or proposer has met the standards of responsibility, the contracting agency must consider whether a bidder or proposer:

- Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain the resources and expertise, necessary to meet all contractual responsibilities;
- Has completed previous contracts of a similar nature with a satisfactory record of performance. For purposes of this paragraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the bidder's or proposer's control, the bidder or proposer stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. The contracting agency must document the bidder's or proposer's record of performance if the contracting agency finds under this paragraph that the bidder or proposer is not responsible.
- Has a satisfactory record of integrity. The contracting agency in evaluating the bidder's or proposer's record of integrity may consider, among other things, whether the bidder or proposer has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the bidder's or proposer's performance of a contract or subcontract. The contracting agency must document the bidder's or pro-poser's record of integrity if the contracting agency finds under this paragraph that the bidder or proposer is not responsible.
- Is legally qualified to contract with the contracting agency.
- Has supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder or proposer fails to promptly supply information concerning responsibility that the contracting agency requests, the contracting agency must determine the bidder's or proposer's responsibility based upon available information or may find that the bidder or proposer is not responsible; and
- Was not debarred by the contracting agency under ORS 279B.130. The contracting agency must prepare a written determination of non-responsibility if the bidder or proposer does not meet the standards of responsibility.

After a contracting agency has opened and determined that the contracting agency will award a public improvement contract, the contracting agency shall award the contract to the lowest responsible bidder.

Notice of Intent to Award Contract

At least seven days before awarding a public contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency shall issue to each bidder or post electronically or otherwise, a note of the contracting agency's intent to award a contract. This subsection does not apply to a contract to which competitive bidding does not apply under ORS 279C.335(1)(c) or (d). The notice and the

manner in which the notice is posted or issued must conform to rules adopted under ORS 279A.065.

In determining the lowest responsible bidder, the contracting agency shall:

- Check the list created by the Construction Contractors Board under ORS 701.227 for bidders who are not qualified to hold a public improvement contract.
- Determine whether the bidder is responsible. A responsible bidder must demonstrate to the contracting agency that the bidder:
 - Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or has the ability to obtain the resources and expertise necessary to meet all contractual requirements.
 - Holds current licenses that businesses or service professionals operating in the state must hold in order to undertake or perform the work specified in the contract.
 - Is covered by liability insurance and other insurance in amounts the contracting agency requires in the solicitation documents
 - Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407 or has elected coverage under ORS 656.128.
 - Has made the disclosure required under ORS 279C.370.
 - Completed previous contracts of a similar nature with a satisfactory record of performance. For purposes of this subparagraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the bidder's control, the bidder stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. The contracting agency shall document the bidder's record of performance if the contracting agency finds under this subparagraph that the bidder is not responsible.
 - Has a satisfactory record of integrity. The contracting agency in evaluating the bidder's record of integrity may consider, among other things, whether the bidder has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the bidder's performance of a contract or a subcontract. The contracting agency must document the bidder's record of integrity if the contracting agency finds under this subparagraph that the bidder is not responsible.
 - Is legally qualified to contract with the contracting agency.

- Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder fails to promptly supply information concerning responsibility that the contracting agency requests, the contracting agency must determine the bidder's responsibility based on available information, or may find that the bidder is not responsible.
- Document the contracting agency's compliance with the requirements of paragraphs (a) and (b) of this subsection by completing a Responsibility Determination Form (see below).
- Submit the Responsibility Determination Form, with any attachments, to the Construction Contractors Board within 30 days after the date the contracting agency awards the contract.

The Successful Bidder Shall:

- Promptly execute a formal contract; and
- Execute and deliver to the contracting agency a performance bond and a payment bond when required by ORS 279C.380. This requirement is for public improvement contracts that exceed \$100,000 or \$50,000 for highways, bridges and other transportation contracts.

PERFORMANCE AND PAYMENTS BONDS

Performance Bonds

Performance bonds are for the protection of the contracting agency that awarded the contract and any public agency or agencies for whose benefit the contract was awarded. The contracting agency may also require a performance bond and payment bond on a class of public improvement projects that have been exempted by the LCRB.

The performance bond must be in an amount equal to the full contract price. A contracting agency may waive the requirement of a performance bond and permit the successful bidder to submit a cashier's check or certified check in lieu of all or a portion of the required performance bond.

Each performance bond and each payment bond must be executed solely by a surety company or companies holding a certificate of authority to transact surety business in Oregon. The performance and payment bonds must be payable to the contracting agency or to the public agency or agencies for whose benefit the contract was awarded and be in a form approved by the contracting agency.

Performance and payment bonds may be excused in cases of an emergency, or when the interest or property of the contracting agency would suffer material injury or delay or other cause. A declaration of the emergency must be made in accordance with ORS 279A.065.

A local contract review board can exempt certain contracts or classes of contracts from all or a portion of the requirement that good and sufficient bonds be furnished to ensure performance of the contract and payment of obligations incurred in the performance of the contract.

Payment Bonds

Payment bonds ensure that laborers, subcontractors and suppliers on the project are paid in the event the contractor doesn't pay them what is owed. Requiring a payment bond protects the district by enabling unpaid persons to bring a claim against the bond, rather than pursuing a claim against the district as the owner of the project. The amount of the payment bond must be equal to the full contract price.

RFPS/COMPETITIVE PROPOSALS

When authorized or required by an exemption granted under ORS 279C.335 after proper findings, a contracting agency may award a public improvement contract by competitive proposals instead of by traditional invitation to bid. A contract awarded under this section may be amended only in accordance with rules adopted by the contracting agency in accordance with ORS 279A065.

With limited exceptions, competitive proposals are subject to the following requirements of competitive bidding:

- Advertisement under ORS 279C.360.
- Requirements for solicitation documents under ORS 279C.365.
- Disqualification due to a Construction Contractors Board listing as described in ORS 279C.375(3)(a).
- Contract execution and bonding requirements under ORS 279C.375 and 279C.380.
- Determination of responsibility under ORS 279C.375 (3)(b).
- Rejection of bids under ORS 279C.395; and
- Disqualification and prequalification under ORS 279C.430, 279C.435 and 279C.440.

However, competitive proposals are not subject to the following requirements of competitive bidding:

- First-tier subcontractor disclosure under ORS 279C.370; and
- Reciprocal preference under ORS 279A.120.

If the award of a public improvement contract advertised by the issuance of an RFP may be made without negotiation, the contracting agency may require proposal security as follows:

- In a form and amount determined to be reasonably necessary or prudent to protect the interests of the contracting agency.
- The contracting agency must retain the proposal security if a proposer who is awarded a contract fails to promptly and properly execute the contract and provide any required bonds or insurance.
- The contracting agency must return the proposal security to all proposers upon the execution of the contract, or earlier in the selection process.

A contracting agency may not be required to award a contract advertised by RFP based on price, but may award the contract to the responsible proposer whose proposal “is determined in writing to be the most advantageous to the contracting agency based on the evaluation factors set forth in the request for proposals and, when applicable, the outcome of any negotiations authorized by the request for proposals.” Other factors may not be used in the evaluation. For each RFP, the contracting agency must prepare a list of proposals received.

Notwithstanding the public records law, proposals may be opened so as to avoid disclosure of contents to competing proposers during, when applicable, the process of negotiation. Proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued.

However, a contracting agency may withhold from disclosure to the public any trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a proposal. The fact that proposals are opened at a public meeting, as defined in ORS 192.610, does not make their contents subject to disclosure, regardless of whether the public body opening the proposals fails to give notice of or provide for an executive session for the purpose of opening proposals.

If an RFP is canceled after proposals are received, the contracting agency may return a proposal to the proposer. The contracting agency must keep a list of returned proposals in the file for the solicitation.

As provided in the RFP, a contracting agency may conduct discussions with proposers who submit proposals that the agency has determined to be closely competitive, or to have a reasonable chance of being selected for award. The discussions may be conducted for the purpose of clarification, to ensure full understanding of, and responsiveness to, the solicitation requirements. The contracting agency must accord proposers fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions of proposals may be permitted after the submission of proposals and before award for the purpose of obtaining best and final offers. In conducting discussions, the contracting agency may not disclose information derived from proposals submitted by competing proposers.

When provided for in the RFP, the contracting agency may employ methods of contractor selection including, but not limited to, award based solely on the ranking of proposals, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower-ranked proposers, or any combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065. When applicable, in any instance in which the contracting agency determines that impasse has been reached in negotiations with a highest ranked proposer, the contracting agency may terminate negotiations with that proposer and commence negotiations with the next highest ranked proposer.

The process for cancellation of RFPs and the rejection of proposals are the same as for ITBs (279C.395).

At least seven days before the award of a public contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency must issue to each proposer or post, electronically or otherwise, a notice of intent to award.

DISQUALIFIED BIDDERS

A contracting agency may disqualify a person from consideration for award of the agency's public improvement contracts and may also petition the Construction Contractor's Board to disqualify a person for reasons listed under ORS 279C.440(2). Under either circumstance, the person must be provided with notice and a reasonable opportunity to be heard.

The contracting agency or the Construction Contractor's Board must issue a written decision to disqualify a person that shall:

- State the reason for the action taken.
- Inform the disqualified person of the appeal right under ORS 279C.445 and 279C.450 if the decision to disqualify was issued by the contracting agency or ORS Chapter 183 if the decision to disqualify was issued by the Construction Contractors Board.
- A copy of the decision must be mailed or otherwise furnished immediately to the disqualified person.

LEGAL REMEDIES

Legal remedies for violations of public contracting laws are provided in the following statutes:

- ORS 279A.225 Protests and disputes regarding cooperative procurements
- ORS 279B.400 Judicial review of approvals of special procurements

- ORS 279B.405 Protests and judicial review of solicitations
- ORS 279B.410 Protests of contract award
- ORS 279B.415 Judicial review of protests of contract award
- ORS 279B.420 Judicial review of other violations
- ORS 279B.425 Review of prequalification and debarment decisions (procurements)
- ORS 279C.350 Appeal of exemption decision
- ORS 279C.450 Appeal of prequalification and disqualification decisions (public improvements)
- ORS 279C.460 Suit by or on behalf of adversely affected bidder or proposer
- ORS 279C.465 Action against successful bidder
- ORS 279C.470 Compensation for contractor when contract declared void

APPENDIX A: PUBLIC CONTRACT LAWS ATTACHMENT

Section I. Licensing and Registration.

The Contractor and all Subcontractors who perform construction Work on the Project must be registered with the Construction Contractors Board pursuant to ORS 701.035 to 701.055.

Any landscape Contractor who performs Work on the Project, as described in ORS 671.502(2), must hold a valid landscape Contractor's license issued under ORS 671.510 to 671.710.

Section II. Payment of Prevailing Rates of Wages.

The Contractor and Subcontractors engaged in the Work shall comply with all applicable requirements of ORS 279C.800 to 279C.870. The Contractor and Subcontractor shall pay to each Worker employed by the Contractor or Subcontractor the prevailing wage established by the Commissioner of the Bureau of Labor and Industries for Worker's trade or occupation. The current prevailing rates of wage are incorporated in the Contract Documents. Prevailing wages are not required to be paid to inmates employed through prison work programs. OR Const. Art. I, Section 41(8).

Pursuant to ORS 279C.825, the public agency shall pay a fee to the Bureau of Labor and Industries equal to one-tenth of one percent of the Contract Price, but not less than \$250 or more than \$7,500. The fee shall be paid at the time the public agency enters into a public works project.

The Contractor is urged to review the applicable statutes prior to commencement of the Work. This requirement to pay the prevailing wage rate will apply to all workers employed on the project by the prime contractor, subcontractors, subcontractors at every tier, and other persons doing or contracting to do the whole or any part of the Work required for the Project. The Contractor shall incorporate this provision in all subcontracts for the Work.

The Contractor and any Subcontractor engaged in the Work shall keep the prevailing wage rates for the Work posted in a conspicuous and accessible place in or about the Work Site. [ORS 279C.840(4)]

The Contractor or the Contractor's surety and every Subcontractor or the Subcontractor's surety shall file certified statements with the Owner in writing in the form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each Worker which the Contractor or the Subcontractor has employed for performance of the Work and further certifying that no Worker employed on the Work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the Contract Documents. A true copy of each certified statement must also be filed with the Commissioner of the Bureau of Labor and Industries. The certified statement must comply with all applicable provisions of ORS 279C.845.

There is no representation on the part of the Owner or the Architect that labor can be obtained at the hourly rates required by this contract. It is the responsibility of the Contractor to inform itself as to local labor conditions and perspective changes or adjustments of wages rates. No increase in the Contract Sum will be allowed or authorized on account of a payment of wage rates in excess of the prevailing wage rates.

Each Subcontract shall include the provisions of this section and wages rates applicable to the Work performed under the Subcontract.

Section III. Contractor Requirements.

Pursuant to ORS 279C.505, the Contractor shall:

- Make payment promptly, as due, to all persons providing to the Contractor labor or material for the Work.
- Pay all contributions or amounts due the Industrial Accident Fund from the Contractor or any Subcontractor incurred in the performance of the Work.
- Not permit any lien or claim to be filed or prosecuted against the public agency on account of any labor or material furnished.
- Pay to the Department of Revenue all sums withheld from employees' wages pursuant to ORS 316.167.

Section IV. Hours of Work; Overtime Pay.

Pursuant to ORS 279C.520 and 279C.540, unless the Contractor is a party to a valid, existing collective bargaining agreement with a labor organization which provides otherwise, no person shall be employed for the Work for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency, or where the public policy absolutely requires and in such cases, except for persons who provide personal services defined in ORS 279A.055, the employee shall be paid at least time and a half pay for:

- All overtime in excess of eight hours a day or 40 hours in any one week when the Work week is five consecutive days, Monday through Friday;
- All overtime in excess of 10 hours a day or 40 hours in any one week when the Work week is four consecutive days, Monday through Friday; and
- All Work performed on Saturday and on any legal holiday specified in ORS 279C.540.

Section V. Contractor's Relations with Subcontractors.

Pursuant to ORS 279A.110, the Contractor shall not discriminate against minority- or woman-owned or emerging small business enterprises in the awarding of subcontracts.

Pursuant to ORS 279C.580, the Contractor shall include in each subcontract for property or services entered into by the Contractor and a first-tier Subcontractor, including a material supplier, for the purpose of performing a construction contract:

- A payment clause that obligates the Contractor to pay the first-tier Subcontractor for satisfactory performance under its subcontract within 10 days out of such amounts as are paid to the Contractor by the Owner under such contract; and
- An interest penalty clause that obligates the Contractor, if payment is not made within 30 days after receipt of payment from the public contracting agency, to pay to the first-tier Subcontractor an interest penalty on amounts due in the case of each payment not made in accordance with the payment clause included in the subcontract pursuant to paragraph (a) of this subsection. A Contractor or first-tier Subcontractor shall not be obligated to pay an interest penalty if the only reason that the Contractor or first-tier Subcontractor did not make payment when payment was due is that the Contractor or first-tier Subcontractor did not receive payment from the public contracting agency or Contractor when payment was due.

The interest penalty shall be:

- For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and
- Computed at the rate specified in ORS 279C.515(2).

The Contractor shall include in each of its subcontracts, for the purpose of performance of such contract condition, a provision requiring the first-tier Subcontractor to include a payment clause and an interest penalty clause conforming to the standards of this section in each of its subcontracts and to require each of its Subcontractors to include such clauses in their subcontracts with each lower-tier Subcontractor or supplier. [ORS 279C.580(4).]

These clauses are not intended to impair the right of a Contractor or a Subcontractor at any tier to negotiate, and to include in the subcontract, provisions that:

- Permit the Contractor or a Subcontractor to retain, in the event of a good faith dispute, an amount not to exceed 150 percent of the amount in dispute from the amount due a Subcontractor under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties consider appropriate to the ability of a Subcontractor to furnish a performance bond and a payment bond;
- Permit the Contractor or Subcontractor to make a determination that part or all of the Subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

- Permit such withholdings without incurring any obligation to pay a late payment interest penalty if:
 - A written notice of any withholding is issued to a subcontractor with a copy to the contracting agency specifying the amount to be withheld and specific causes for the withholding under the terms of the contract, and actions to be taken by the Subcontractor in order to receive payment of the amounts withheld ; and
 - A copy of any notice issued by a Contractor pursuant to sub-subparagraph (i) of this subparagraph has been furnished to the public contracting agency.
[ORS 279C.580(5)(c)]

For purposes of this contract, a “good faith dispute” means a documented dispute concerning:

- Unsatisfactory job progress.
- Defective Work not remedied.
- Third party claims filed or reasonable evidence that claims will be filed.
- Failure to make timely payments for labor, equipment and materials.
- Damage to prime Contractor or Subcontractor.
- Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum. [ORS 279C.580(5)(b)]

Section VI. Payment of Third-Party Claim.

Pursuant to ORS 279C.515(1), the following shall apply to this contract:

- If the Contractor fails, neglects, or refuses to make prompt payment of any Third-Party Claim for Work furnished to the Contractor or a Subcontractor by any person in connection with this Contract when due, the Owner may pay such Third-Party Claim to the person furnishing the Work and charge the amount of the payment against funds due or to become due the Contractor by reason of this Contract. The Owner may make payments by check or warrant naming both the Contractor and the person or entity entitled to payment under ORS 279.314. The payment to a Third-Party Claim in the manner authorized in this subsection will not relieve the Contractor or the Contractor’s surety from the Contractor’s obligations with respect to any unpaid Third-Party Claims.
- If the Contractor or a first-tier Subcontractor fails, neglects, or refuses to make payment to a person furnishing labor or materials in connection with the public contract for a public improvement within 30 days after receipt of payment from the public contracting agency or a Contractor, the Contractor or first-tier Subcontractor shall owe the person the amount due plus interest charges commencing at the end of the 10-day period that payment is due under ORS 279C.580(4) and ending upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279C.580. The rate of interest charged to the Contractor or first-tier Subcontractor on the amount due shall equal three times the discount rate on 90-

day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date that is 30 days after the date when payment was received from the public contracting agency or from the Contractor, but the rate of interest shall not exceed 30 percent. The amount of the interest may not be waived. [ORS 279C.515(2)]

- If the Contractor or a Subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public contract, the person may file a complaint with the Construction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS 279C.580. [ORS 279C.515(4)]

Section VII. Payment for Medical Services.

Pursuant to ORS 279C.530, the Contractor shall promptly, as due, make payment to any person or entity that furnishes medical, surgical, or hospital care or other needed care and attention, incident to sickness or injury, to the employees of the Contractor, of all sums which the Contractor agrees to pay for such services and all moneys which the Contractor collected or deducted from the wages of the Contractor’s employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service.

Payment of a claim in the manner described in this section shall not relieve the Contractor or the Contractor’s surety from obligation with respect to any unpaid claims.

Section VIII. Workers Compensation.

All employers Working under this contract are subject employers that will comply with ORS 656.017 (Workers Compensation), or employers that are exempt under ORS 656.126. [ORS 279C.530]

Section IX. Oregon Products.

Pursuant to ORS 279A.120(2)(a), the Contractor shall use products that have been manufactured in Oregon, provided that price, fitness, availability, and quality are otherwise equal.

Section VX. Recycling Requirements.

Pursuant to ORS 279C.510(1), the Contractor shall salvage or recycle construction and demolition debris if feasible and cost-effective.

Pursuant to ORS 279C.510(2), if any lawn or landscape maintenance is required, Contractor shall compost or mulch yard waste material at an approved site, if feasible and cost-effective.

Except as provided in the Specifications, the Contractor shall use recycled Materials to the extent required by ORS 279A.125.

Section VXI. Reports to Department of Revenue.

If the Contractor is not domiciled or registered to do business in the State of Oregon, and the Contract Price exceeds \$10,000, the Contractor shall submit reports to the Oregon Department of Revenue as required by ORS 279A.120(3).

Section VXII. Drug-Testing Program.

Pursuant to ORS 279C.505(2), it is a condition to this contract that the Contractor shall demonstrate that an employee drug testing program is in place.

Section VXIII. Miscellaneous Provisions.

The Contractor shall not provide or offer to provide, in connection with this contract, any appreciable pecuniary or material benefit to any officer or employee of the Owner in violation of ORS Chapter 244.

The contract may include a provision stating terms of compensation to a contractor when the contract is terminated for reasons considered to be in the public interest.

RESOURCES

Administrative Services Purchasing – Reciprocal Preference Law re Non-resident Bidders:
<http://www.oregon.gov/das/Procurement/Pages/Recippref.aspx>

Attorney General’s Model Public Contracting Rules: OAR Chapter 137, Divisions 46, 47, 48, 49
http://arcweb.sos.state.or.us/pages/rules/oars_100/oar_137/137_046.html
http://arcweb.sos.state.or.us/pages/rules/oars_100/oar_137/137_047.html
http://arcweb.sos.state.or.us/pages/rules/oars_100/oar_137/137_048.html
http://arcweb.sos.state.or.us/pages/rules/oars_100/oar_137/137_049.html

Bureau of Labor and Industries Prevailing Wage Information:
<http://www.oregon.gov/boli/WHD/PWR/Pages/index.aspx>

Construction Contractor’s Board Home Page: <http://www.oregon.gov/CCB/Pages/index.aspx>

Department of Administrative Services Purchasing Home Page:
<http://www.oregon.gov/DAS/EGS/ps/Pages/index.aspx>

Public Contracting Statute (ORS 279):
https://www.oregonlegislature.gov/bills_laws/ors/ors279A.html
https://www.oregonlegislature.gov/bills_laws/ors/ors279B.html
https://www.oregonlegislature.gov/bills_laws/ors/ors279C.html

Sample Policies: SDAO Reference Library/Public Contracting: sdao.com