

**METRO**  
**LOCAL CONTRACT REVIEW BOARD**  
**ADMINISTRATIVE RULES**

Effective January 1, 2024

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**METRO  
LOCAL CONTRACT REVIEW BOARD  
ADMINISTRATIVE RULES**

**DIVISION 5 - INTRODUCTION**

**05-0100 Content and Source of Rules**

(1) These Metro Local Contract Review Board Administrative Rules (these “Administrative Rules”) implement ORS Chapters 279, 279A, 279B and 279C, the Oregon Public Contracting Code, referred to in this document as “the State Code.” These Administrative Rules are rules of procedure for public contracting as required under ORS 279A.065. These Administrative Rules consist of the following divisions:

(a) Division 10, Definitions, was compiled from definitions from Model Rules Divisions 46, 47, 48 and 49 and the former Metro Contract Policies Code.

(b) Division 46 implements ORS chapter 279A, General Provisions. Division 46 applies to all public contracting conducted under these Administrative Rules.

(c) Division 47 implements ORS chapter 279B, Public Procurements. Division 47 applies to Procurement of Goods and Services.

(d) Division 48 implements ORS chapter 279C, Public Improvements and Related Contracts. Division 48 applies to the Procurement of architectural, engineering, land surveying and related services Contracts.

(e) Division 49 implements ORS chapter 279C, Public Improvements and Related Contracts. Division 49 applies to the Procurement of construction services and Public Improvements.

(2) The primary source documents for these Administrative Rules are the State Code, the Oregon Attorney General’s Model Public Contract Rules (the “Model Rules”), and the former Metro Contract Policies Code. To create these Administrative Rules, the Model Rules have been revised to meet the particular requirements of Metro. For ease of reference, these Administrative Rules will maintain the same division numbering system as the Model Rules.

**05-0120 Policy**

Metro shall conduct public contracting to further the following policies, and policies set forth in ORS Chapters 279, 279A, 279B and 279C, as those chapters may be amended, and these Administrative Rules. A sound and responsive public contracting system should:

(1) Simplify, clarify and modernize procurement practices so that they reflect the market place and industry standards.

(2) Instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government.

(3) Promote efficient use of federal, state and local government resources, maximizing the economic investment in public contracting within this state.

- (4) Clearly identify rules and policies that implement each of the socioeconomic programs that overlay public contracting and accompany the expenditure of public funds mandated by the legislature or Local Contract Review Board.
- (5) Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement. In public procurement, as set out in ORS chapter 279B, meaningful competition may be obtained by evaluation of performance factors and other aspects of service and product quality, as well as pricing, in arriving at best value.
- (6) Provide a public contracting structure that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competitive Bidding as the standard for Public Improvement Contracts unless otherwise exempted.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.015 & ORS 279A.065

**METRO  
LOCAL CONTRACT REVIEW BOARD  
ADMINISTRATIVE RULES**

**DIVISION 10 - DEFINITIONS**

**10-0000 Definitions**

Unless the context of a specifically applicable definition in the State Code requires otherwise, capitalized terms used in these Administrative Rules have the meaning set forth in the division of the Administrative Rules in which they appear, and if not defined there, the meaning set forth in these Division 10 rules, and if not defined here, the meaning set forth in the State Code. The following terms, when capitalized in these Administrative Rules, have the meaning given below:

**Addendum or Addenda.** An addition to, deletion from, a material change in, or general interest explanation of a Solicitation Document.

**Administering Contracting Agency.** A contracting agency described in ORS 279A.200(1)(a), and for Interstate Cooperative Procurements includes the entities specified in ORS 279A.220(4).

**Administrative Rules.** These Metro Public Contract Review Board Administrative Rules.

**Advantageous.** In Metro's best interests, as assessed according to the judgment of Metro.

**Affected Person or Affected Offeror.** A Person whose ability to participate in a Procurement is adversely affected by a decision of Metro.

**Bid.** A Written response to an Invitation to Bid.

**Bidder.** A Person who submits a Bid in response to an Invitation to Bid.

**Closing.** The date and time specified in a Solicitation Document as the deadline for submitting Offers.

**Competitive Quote.** A quote made in response to Request for Quote issued pursuant to Rule 49-0160.

**Competitive Range.** The number of Proposers with whom Metro will conduct Discussions or negotiate if Metro intends to conduct discussions or negotiations in accordance with Rule 47-0261 or Rule 49-0650.

**Concession Services Agreement.** A contract that authorizes and requires a private entity or individual to promote or sell, for its own business purposes, specified types of Goods or Services from a site within a building or upon lands owned or operated by Metro and under which the concessionaire makes payments to Metro based, at least in part, on the concessionaire's revenue from sales. The term "concession agreement" does not include an agreement which is merely a flat-fee or per-foot rental, lease, license, permit or other arrangement for the use of public property.

**Conduct Disqualification.** A Disqualification pursuant to ORS 279C.440 and Rule 49-0370, or Debarment pursuant to Rule 47-0575.

**Contract.** A Public Contract, as such term is defined in ORS 279A.010.

**Contract Price.** As the context requires, the maximum payments that Metro will or may incur under a Contract, including bonuses, incentives and contingency amounts, if the Contractor fully performs under the Contract.

**Contractor.** The Person, including a Consultant as defined in Administrative Rule 48-0110(1), with whom Metro executes a Contract.



**Days.** Calendar days, including weekdays, weekends and holidays, beginning at midnight and ending at midnight twenty-four hours later, unless otherwise specified by these Administrative Rules or the Solicitation Document.

**Descriptive Literature.** Informational materials concerning available products or services submitted by Offerors in response to a Solicitation Document.

**Disqualification.** The preclusion of a Person from contracting with Metro after Notice and hearing pursuant to Rule 46-0210 or ORS 279C.440 and Rule 49-0370.

**Electronic.** Any means of transmission of information by electronic device, including but not limited to electronic mail.

**Electronic Advertisement.** Notice of Metro's Solicitation Document, or Request for Qualifications (RFQ) or information, or a request for price quotations, available over the Internet via Metro's Electronic Procurement System.

**Electronic Offer.** A response to a Solicitation Document or a request for price quotations submitted to Metro via Metro's Electronic Procurement System.

**Electronic Procurement System.** An information system that Persons may access through the Internet or that Persons may otherwise remotely access through a computer, that enables Persons to send Electronic Offers and Metro to post Electronic Advertisements, receive Electronic Offers, and conduct other activities related to Metro Procurements.

**Emergency.** Circumstances that could not have been reasonably foreseen, that create a substantial risk of loss, damage, interruption of services or threat to property, public health, welfare or safety, and that require prompt execution of a Contract to remedy the condition.

**Emerging Small Business.** A business concern described in ORS 200.005(3) and 200.005(4) and certified as such with the State of Oregon pursuant to ORS 200.055.

**Foreign Contractor.** A Contractor that is not domiciled in or registered to do business in the State of Oregon. See Rule 49-0490.

**Goods.** Supplies, equipment, or materials, and any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, and combinations of any of the items identified in this definition.

**Goods and Services/Goods or Services.** Any combination of any of the items identified in the definitions of "Goods" and "Services".

**Intermediate Procurement.** A sourcing method authorized by Rule 47-0270, Rule 48-0210 and Rule 49-0160.

**Intermediate Proposal.** A response to an Intermediate Request for Proposals.

**Intermediate Request for Proposals.** An Intermediate Procurement method that requests potential Contractors submit proposals for providing goods or services described in the request. See Rule 47-0270 and Rule 48-0210.

**Invitation to Bid or ITB.** The Solicitation Document issued to invite Offers from prospective Contractors under either ORS 279B.055 or 279C.335. As used herein, an "Invitation to Bid" or "ITB" has previously been referred to at Metro as a "Request for Bid" or an "RFB".

**Local Contract Review Board.** The Metro Council acting as the Local Contract Review Board pursuant to ORS 279A.060; also referred to as "Board."

**Nonresident Bidder.** A Bidder described in ORS 279A.120(1)(a).

**Offer.** A Written response to a Solicitation Document.

**Offeror.** A Person that submits an Offer; a Bidder or a Proposer.

**Opening.** The date, time and place announced in the Solicitation Document for the opening of Bids or Proposals. Competitive, sealed Bids shall be opened publically in accordance with ORS 279B.055(5)(a)

**Original Contract.** As defined in ORS 279A.200(1)(f), the initial Contract or Price Agreement solicited and awarded during a Cooperative Procurement by an Administering Contracting Agency.

**Person.** An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation or any other legal or commercial entity who has the legal capacity to enter into a Contract.

**Personal Services.** As used in division 46 of these Administrative Rules, the services performed under a Personal Services Contract governed by Metro's Personal Services Contracting Rules or pursuant to ORS 279A.055. "Personal Services" as used in Division 48 and Division 49 of these Administrative Rules (and as used in Division 46 when applicable to Division 48 or Division 49) has the meaning set forth in ORS 279C.100.

**Personal Services Contracting Rules.** The Metro administrative procedures that apply to the Procurement of Personal Services Contracts.

**Price Agreement.** A Public Contract for the Procurement of Goods or Services at a set price with: (a) no guarantee of a minimum or maximum purchase; or (b) an initial order or minimum purchase combined with a continuing Contractor obligation to provide Goods and Services in which Metro does not guarantee a minimum or maximum additional purchase.

**Price Quote.** A quote made in response to Request for Quote issued pursuant to Rule 47-0270.

**Procurement.** As defined in ORS 279A.010, the act of purchasing, leasing, renting or otherwise acquiring goods or services as well as the act of contracting for a Public Improvement. "Procurement" includes each function and procedure undertaken or required to be undertaken by Metro to enter into a Public Contract, administer a Public Contract and obtain the performance of a Public Contract under the State Code.

**Procurement Officer.** The Metro Director of Finances and Regulatory Services, or the Procurement Manager as his/her delegate.

**Product Sample.** The exact Goods, or a representative portion of the exact Goods requested by a Solicitation Document.

**Proposal.** A Written response to a Request for Proposals.

**Proposer.** A Person who submits a Proposal in response to Metro's Request for Proposals.

**Public Improvement.** As defined in ORS 279A.010, a project for construction, reconstruction or major renovation on real property by or for Metro. "Public Improvement" does not include projects for which no funds of Metro are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or Emergency work, minor alteration, ordinary repair or maintenance necessary to preserve a Public Improvement.

**Public Works.** Public Works as defined in ORS 279C.800(5).

**Purchasing Contracting Agency.** A contracting agency described in ORS 279A.200(1)(h).

**Qualified Nonprofit Agency for Individuals with Disabilities.** A nonprofit organization whose purpose provide training or employment for individuals with disabilities and which:

- (1) Meets the definition given in ORS 279.835(6); and
- (2) Is currently listed by the Oregon Department of Administrative Services (DAS) as a source of products or services suitable for procurement by public agencies .

**Request for Proposals or RFP.** A Solicitation Document calling for Proposals.

**Request for Qualifications or RFQu.** A Written document issued by Metro to which Contractors respond in Writing by describing their experience with and qualifications for the Services or Architectural, Engineering or Land Surveying Services, or Related Services, described in the document.

**Request for Quotes or RFQ.** An Intermediate Procurement method that requests Price Quotes for Goods or Services (see Rule 47-0270) or Competitive Quotes for Public Improvements (see Rule 49-0160).

**Responsible.** Meeting the standards set forth in Administrative Rule 47-0640 or 49-0390(2), and not debarred or disqualified by Metro under Administrative Rule 47-0575 or 49-0370.

**Responsive.** Having the characteristic of substantial compliance in all material respects with applicable Solicitation requirements.

**Services.** Services other than “Personal Services” designated under ORS 279A.055 and covered in the Personal Services Contracting Manual.

**Sign, Signed or Signature.** Any Written mark, word or symbol attached to or logically associated with a document and executed or adopted by a Person with the intent to be bound.

**Small Procurement.** A sourcing method authorized by Rule 47-0265.

**Solicitation.** A request by Metro for prospective Contractors to submit Offers.

**Solicitation Document.** An Invitation to Bid, Request for Proposals, Request for Quotes, Intermediate Request for Proposals or other document issued to invite Offers from prospective Contractors pursuant to ORS Chapter 279B or 279C. The following are not Solicitation Documents if they do not invite Offers from prospective Contractors: a Request for Qualifications, a prequalification of Bidders, a request for information, or a request for product prequalification.

**Specifications.** A description of the physical or functional characteristics, or of the nature of a supply, Services or construction item, including any requirement for inspecting, testing or preparing a supply, Services or construction item for delivery and quantities or qualities of materials to be furnished under a Contract. Specifications generally will state the result to be obtained and may, on occasion, describe the method and manner of doing the work to be performed.

**State Code.** The Oregon Public Contracting Code ORS chapters 279, 279A, 279B and 279C.

**Unauthorized Purchase.** The Procurement made without following the requirements set forth in the State Code or these Rules or without delegated authority. See Rule 46-0200.

**Writing or Written.** Conventional paper documents, whether handwritten, typewritten or printed, in contrast to spoken words. It also includes electronic transmissions when required by applicable law or permitted by a Solicitation Document or Contract.

Source: The State Code, Attorney General Model Rules, Former Metro Contract Policies

**METRO  
LOCAL CONTRACT REVIEW BOARD  
ADMINISTRATIVE RULES**

**DIVISION 46 - GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTING**

**46-0100     Application; Federal Law Supremacy**

(1) If a conflict arises between these Division 46 rules and rules in Divisions 47, 48 and 49, the rules in Divisions 47, 48 and 49 take precedence over these Division 46 rules.

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.030 & ORS 279A.065

**46-0130     Application of the State Code and Administrative Rules; Exceptions**

(1) Except as set forth in this section, Metro shall exercise all procurement authority related to Public Contracting in accordance with the State Code and these Administrative Rules.

(2) Metro has specifically opted out of the Oregon Department of Justice Model Rules for Public Contracting and has elected to exercise its own contracting authority by adopting these Administrative Rules pursuant to ORS 279A.065. Except for those portions of the Oregon Department of Justice Model Rules for Public Contracting pertaining to the Procurement of Construction Manager/General Contractor Services under ORS 279A.065(3), (where the State Code provides that Metro is not permitted to opt out) the Oregon Department of Justice Model Rules for Public Contracting do not apply to Metro.

(3) Other than the Division 48 Administrative Rules that apply to Architectural, Engineering and Surveying Services and Related Services, contracts or classes of contracts for Personal Services designated as such by the Metro Local Contract Review Board are not subject to Divisions 46, 47, and 49 of these Administrative Rules.

(4) These Administrative Rules do not apply to Contracts or classes of Contracts described in ORS 279A.025(2) to which the State Code, ORS Chapters 279A, 279B and 279C, do not apply. Contracts that are exempt from competitive Bidding under the State Code, including but not limited to the following, retain that exemption regardless of any provisions of these Administrative Rules:

(a) Contracts between Metro and:

- A. Another "Contracting Agency" as defined by ORS 279A.010;
- B. The Oregon Health and Science University;
- C. The Oregon State Bar;
- D. A governmental body of another state;

- E. The federal government;
- F. An American Indian tribe or an agency of an American Indian tribe;
- G. A nation, or a governmental body in a nation, other than the United States; or
- H. An intergovernmental entity formed between or among governmental bodies of this or another state, the federal government, an American Indian tribe or an agency of an American Indian tribe, a nation other than the United States or a governmental body in a nation other than the United States.

(b) Contracts pursuant to 10 U.S.C. § 381 (relating to law enforcement equipment suitable for counter-drug activities through the Department of Defense), the Electronic Government Act of 2002 (relating to automated data processing equipment, including firmware, software, supplies, support equipment, and services from federal supply schedules), or other federal law that Metro Council determines are similar to those Acts in effectuating or promoting transfers of property to Metro;

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

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

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

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

D. Banking, money management or other predominantly financial transactions of Metro that, by their character, cannot practically be established under competitive contractor selection procedures, based upon findings of the Purchasing Administrator.

(d) Grants, defined as follows:

A. An agreement under which:

(i) Metro receives moneys, property or other assistance, including, but not limited to, federal assistance that is characterized by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities, or other assets;

(ii) The assistance received by Metro is from a grantor for the purpose of supporting or stimulating a program or activity of Metro; and

(iii) No substantial involvement by the grantor is anticipated in the program or activity other than involvements associated with monitoring compliance with grant conditions.

B. An agreement under which:

(i) Metro provides moneys, property or other assistance, including by not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets;

(ii) The assistance is provided to a recipient for the purpose of supporting or stimulating a program or activity of the recipient; and

(iii) No substantial involvement by Metro is anticipated in the program or activity of the recipient other than involvement associated with monitoring compliance with the grant conditions.

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

(f) Transfer, sale or disposal of personal property;

(g) Sole source expenditures when rates are set by law or ordinance for purposes of these rules concerning source selection;

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

(i) Revenue Generating Contracts, defined as agreements whose primary purpose is generating revenue for Metro and are typically awarded to the offeror proposing the most Advantageous or highest monetary return to Metro. The Metro Council may designate a particular Contract as a revenue-generating Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.050, ORS 279A.055, ORS 279A.065 & ORS 279A.180

#### **46-0140 Solicitation Document Templates; Contract Forms and Contract Templates; Contract Administrator Accountability**

(1) The Procurement Officer will make available to all Metro departments Solicitation Document templates, Contract forms, and Contract templates. Metro departments and staff shall use approved Solicitation Document templates, Contract forms or Contract templates.

(2) All Solicitation Document templates, Contract forms, and Contract templates must be in a form preapproved by the Metro Attorney. The Metro Attorney may exempt from required use a Solicitation Document template, Contract form, or Contract template, subject to any conditions the Metro Attorney may impose on the continued use of the exempted and approved Solicitation Document template, Contract form or Contract template.

(3) Metro must identify the staff employee who will oversee such specific Contract, or specifically identified Contracts, or a specifically identified category of Contracts. Such staff employee will be designated as the "Contract Administrator" for the Contract or Contracts. The Contract Administrator is responsible for reading and understanding all advice and recommendations given with respect to the Contract and Procurement. As used herein, "advice and recommendations" means material advice and recommendations from the Office of Metro Attorney or the Procurement Office with respect to a specific Contract and amendments to the Contract, or a Procurement that resulted in the Contract. Material advice or recommendations are communications that address: (i) subject matter that modifies or influences the meaning, performance, administration, or means of enforcement of a Contract; or (ii) the allocation of significant liabilities or risk under a Contract.

Stat. Auth.: ORS 279A.065, OL 2015, ch 646 (HB 2375)

Stats. Implemented: OL 2015, ch 646 (HB 2375)

#### **46-0200 Unauthorized Purchases**

(1) The Procurement Officer may approve claims for payment arising from Unauthorized Purchases or may refer such claims to the Chief Operating Officer for approval.

(2) Prior to processing a request for approval of payment of an Unauthorized Purchase, the Procurement Officer shall require the following information:

- (a) Description of the Goods or Services furnished as a result of the Unauthorized Purchase;
- (b) A detailed statement of facts relating to the unauthorized purchase, including the name and position of the person who made the unauthorized purchase and an explanation of the reason Metro Procurement requirements were not followed;
- (c) Documentation that the amount claimed by the Contractor is fair and reasonable;
- (d) Copies of all invoices and other documents pertinent to the transaction;
- (e) Verification that the Goods or Services have been received and accepted by Metro;
- (f) A statement of the steps taken or planned to prevent recurrence of such Unauthorized Purchase.

#### **46-0210 Discrimination; Disqualification**

(1) Metro shall include in each Solicitation Document a requirement that Offerors certify in their Offers, in a form prescribed by Metro:

(a) That the Offeror has not discriminated, and will not discriminate, against a subcontractor in the awarding of a subcontract because the subcontractor is certified under ORS 200.055 as a disadvantaged business enterprise, a minority-owned business, a woman-owned business, an emerging small business, or a business that a service-disabled veteran owns; and

(b) That the Offeror will not, in the performance of the Contract, discriminate based on race, religion, color, sex, marital status, familial status, national origin, age, mental or physical disability, sexual orientation, gender identity or source of income.

(2) **Disqualification.**

(a) Metro may disqualify a Person from consideration of award of Metro Contracts under ORS 200.065(5), or suspend a Person's right to bid on or participate in any Public Contract pursuant to ORS 200.075(1) after providing the Person with notice and a reasonable opportunity to be heard in accordance with this section.

(b) As provided in ORS 200.065 and 200.075 Metro may disqualify or suspend a Person's right to submit an Offer or to participate in a Contract (e.g. act as a subcontractor) as follows:

A. Metro may disqualify a Person upon finding that the Person engaged in any of the activities made unlawful by ORS 200.065(1) or (2), or if the Person has been disqualified by another public entity pursuant to ORS 200.065.

B. Metro may suspend a Person upon finding that the Person engaged in any of the acts prohibited by ORS 200.075(a) through (c).

(c) Metro may disqualify or suspend a Person's right to submit Offers or participate in Public Contracts only for the length of time permitted by ORS 200.065 or ORS 200.075, as applicable.

(d) Metro shall notify the Person in Writing of a proposed Disqualification pursuant to this section, served personally or by registered or certified mail, return receipt requested. This notice must:

- A. State that Metro intends to disqualify or suspend the Person;
- B. Set forth the reasons for the Disqualification;
- C. Include a statement of the Person's right to a hearing if requested in Writing within the time stated in the notice and that if Metro does not receive the Person's Written request for a hearing within the time stated, the Person will have waived its right to a hearing;
- D. Include a statement that the hearing will be conducted pursuant to ORS 200.065 and 200.075;
- E. Include a reference to the particular sections of the statutes and rules involved;
- F. State the proposed Disqualification period; and
- G. State that the Person may be represented by legal counsel.

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

(f) Metro shall notify the Person in Writing of its Disqualification, served personally or by registered or certified mail, return receipt requested. The notice must contain:

- A. The effective date and period of Disqualification;
- B. The grounds for Disqualification; and
- C. A statement of the Person's appeal rights and applicable appeal deadlines.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 200.065, ORS 200.075, ORS 279A.065, ORS 279A.105 & ORS 279A.110

## **Contract Preferences**

### **46-0300 Preference for Oregon Goods and Services**

(1) **Tiebreaker Preference and award When Offers Are Identical.** Under ORS 279A.120, when Metro receives Offers identical in price, fitness, availability and quality, and chooses to award a Contract, Metro shall award the Contract based on the following order of precedence:

(a) Metro shall award the Contract to the Offeror among those submitting identical Offers who is offering Goods or Services, or both, that are manufactured, produced or to be performed in Oregon.

(b) If two or more Offerors submit identical Offers, and they all offer Goods or Services, or both, that are manufactured, produced or to be performed in Oregon, Metro shall award the Contract by drawing lots among the identical Offers. Metro shall provide the Offerors who submitted the identical Offers notice of the date, time and location of the drawing of lots and an opportunity for these Offerors to be present when the lots are drawn.

(c) If Metro receives identical Offers, and none of the identical Offers offer Goods or Services, or both, that are manufactured, produced or to be performed in Oregon, then Metro shall award the Contract by drawing lots among the identical Offers. Metro shall provide to the Offerors who submitted



the identical Offers notice of the date, time and location of the drawing of lots and an opportunity for these Offerors to be present when the lots are drawn.

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

(a) Bids received in response to an Invitation to Bid are identical in price, fitness, availability and quality if the Bids are Responsive, and offer the Goods or Services, or both, described in the Invitation to Bid at the same price.

(b) Proposals received in response to a Request for Proposals are identical in price, fitness, availability and quality if they are Responsive and achieve equal scores when scored in accordance with the evaluation criteria set forth in the Request for Proposals.

(c) Offers received in response to a Special Procurement conducted under ORS 279B.085 are identical in price, fitness, availability and quality if, after completing the contracting procedure approved by the Local Contract Review Board, Metro determines, in Writing, that two or more Offers are equally Advantageous to Metro.

(d) Offers received in response to an Intermediate Procurement conducted pursuant to ORS 279B.070 are identical if the Offers equally best serve the interests of Metro in accordance with ORS 279B.070(4).

(3) **Determining if Goods or Services are Manufactured or Produced in Oregon.** In applying section (1) of this Rule, Metro shall determine whether a Contract is predominantly for Goods or Services and then use the predominant purpose to determine if the Goods or Services are manufactured, produced, or performed in Oregon. Metro may request, either in a Solicitation Document, following Closing, or at any other time Metro determines is appropriate, any information Metro may need to determine if the Goods or Services are manufactured or produced in Oregon. Metro may use any reasonable criteria to determine if Goods or Services are manufactured, produced, or performed in Oregon, provided that the criteria reasonably relate to that determination, and provided that Metro applies those criteria equally to each Offer.

(4) **Procedure for Drawing Lots.** When this Rule calls for the drawing of lots, Metro shall draw lots by a procedure that affords each Offeror subject to the drawing a substantially equal probability of selection and that does not allow the person making the selection the opportunity to manipulate the drawing of lots to increase the probability of selecting one Offeror over another.

(5) **Discretionary Preference and award.** Under ORS 279A.128, Metro may provide, in a Solicitation Document for Goods or Services a specified percentage preference of not more than ten percent for Goods fabricated or processed entirely in Oregon or Services performed entirely in Oregon. For competitive Proposals, the preference percentage allowed under this section will be added to the total overall Proposal score. If more than one Offeror qualifies for the preference, Metro may give a further preference to a qualifying Offeror that resides in or is headquartered in Oregon. Metro may establish a preference percentage higher than ten percent by Written order that finds good cause to establish the higher percentage and which explains Metro's reasons and evidence for finding good cause to establish a higher percentage. Metro may not apply the preferences described in this section in a Procurement for Emergency work, minor alterations, ordinary repairs or maintenance of public improvements, or construction work that is described in ORS 297C.320.

Stat. Auth.: ORS 279A.065; OL 2011, ch 237

Stats. Implemented: ORS 279A.065; ORS 279A.120 & ORS 279A.128; OL 2011, ch 237

#### **46-0310 Reciprocal Preferences**

When evaluating Bids pursuant to Administrative Rule 47-0255, 47-0257 or 49-0390 and applying the reciprocal preference provided under ORS 279A.120(2)(b) Metro may rely on the list prepared and maintained by the Oregon Department of Administrative Services pursuant to ORS 279A.120(4) to determine (i) whether the Nonresident Bidder's state gives preference to in-state bidders and (ii) the amount of such preference.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.120

#### **46-0320 Preference for Recycled Materials**

(1) In comparing Goods from two or more Offerors, if at least one Offeror offers Goods manufactured from Recycled Materials, and at least one Offeror does not, Metro shall select the Offeror offering Goods manufactured from Recycled Materials if each of the conditions specified in ORS 279A.125(2) exists. When making the determination under ORS 279A.125(2)(d), Metro shall consider the costs of the Goods following any adjustments Metro makes to the price of the Goods after evaluation pursuant to Administrative Rule 46-0310.

(2) The determination of whether Goods are manufactured from Recycled Materials must be made in accordance with standards established by Metro.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.125

### **Cooperative Procurement**

#### **46-0400 Authority for Cooperative Procurements**

(1) Metro may participate in, sponsor, conduct or administer Joint Cooperative Procurements, Permissive Cooperative Procurements and Interstate Cooperative Procurements in accordance with ORS 279A.200 through 279A.225.

(2) Metro shall determine in Writing whether the Solicitation and award process for an Original Contract arising out of a Cooperative Procurement is substantially equivalent to those identified in ORS 279B.055, 279B.060 or 279B.085, consistent with ORS 279A.200(2).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.205

#### **46-0410 Responsibilities of Administering Contracting Agencies and Purchasing Contracting Agencies**

(1) If Metro is an Administering Contracting Agency of a Cooperative Procurement, Metro may establish the conditions under which Persons may participate in the Cooperative Procurement administered by Metro. Such conditions may include, without limitation, whether each Person who participates in the Cooperative Procurement must pay administrative fees to Metro, whether each Person must enter into a Written agreement with Metro, and any other matters related to the administration of the Cooperative Procurement and the resulting Original Contract. When acting as an Administering Contracting Agency Metro may, but is not required to, include provisions in the

Solicitation Document for a Cooperative Procurement and advertise the Solicitation Document in a manner to assist Purchasing Contracting Agencies' compliance with State Code.

(2) If Metro, acting as a Purchasing Contracting Agency, enters into a Contract based on a Cooperative Procurement, Metro shall comply with State Code and these Administrative Rules, including without limitation those sections of the State Code and these Administrative Rules that govern:

- (a) The extent to which Metro, as a Purchasing Contracting Agency, may participate in the Cooperative Procurement;
- (b) The advertisement of the Solicitation Document related to the Cooperative Procurement; and
- (c) Public notice of Metro's intent, as a Purchasing Contracting Agency, to establish Contracts based on a Cooperative Procurement.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.205

#### **46-0420 Joint Cooperative Procurements**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.210

#### **46-0430 Permissive Cooperative Procurements**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.215

#### **46-0440 Advertisements of Intent to Establish Contracts through a Permissive Cooperative Procurement**

(1) For purposes of determining whether Metro, acting as a Purchasing Contracting Agency, must give notice of intent to establish a Contract through a Permissive Cooperative Procurement as required by ORS 279A.215(2)(a), the estimated amount of the Procurement will exceed \$250,000 if:

- (a) Metro's Contract arising out of the Permissive Cooperative Procurement expressly provides that Metro will make payments over the term of the Contract that will, in aggregate, exceed \$250,000, whether or not the total amount or value of the payments is expressly stated;
- (b) Metro's Contract arising out of the Permissive Cooperative Procurement expressly provides for payment, whether in a fixed amount or up to a stated maximum amount, that exceeds \$250,000; or
- (c) At the time Metro enters into the Contract, Metro reasonably contemplates, based on historical or other data available to Metro, that the total payments it will make for Goods or Services, or both, under the Contract will, in aggregate, exceed \$250,000 over the anticipated duration of the Contract.

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.215

#### **46-0450 Interstate Cooperative Procurements**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.220

#### **46-0460 Advertisements of Interstate Cooperative Procurements**

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

(a) The Administering Contracting Agency;

(b) The Purchasing Contracting Agency;

(c) The Cooperative Procurement Group, or a member of the Cooperative Procurement Group, of which the Purchasing Contracting Agency is a member; or

(d) Another Purchasing Contracting Agency that is subject to the State Code, so long as such advertisement would, if given by the Purchasing Contracting Agency, comply with ORS 279B.055(4) or ORS 279B.060(4) with respect to the Purchasing Contracting Agency.

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.220

#### **46-0470 Protests and Disputes**

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

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.225

#### **46-0480 Contract Amendments**

Metro, acting as a Purchasing Contracting Agency, may amend a Contract entered into pursuant to a Cooperative Procurement as set forth in Administrative Rule 47-0800.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

**METRO  
LOCAL CONTRACT REVIEW BOARD  
ADMINISTRATIVE RULES**

**DIVISION 47 - PUBLIC PROCUREMENTS FOR GOODS OR SERVICES**

**General Provisions**

**47-0000     Application**

These Division 47 rules implement ORS Chapter 279B, Public Procurements and apply to the Procurement of Goods and Services. These Division 47 rules are not applicable to the procurement of Personal Services Contracts. Procurements of Personal Services are governed by Metro's Personal Services Contracting Rules. These Division 47 rules are also not applicable to procurements of Public Improvements, which are governed by ORS Chapter 279C and procured in accordance with the rules set forth in Division 49.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.015

**Source Selection**

**47-0250     Methods of Source Selection**

(1) Metro may award a Contract for Goods and Services using any method authorized by State Code or these Administrative Rules. Such different methods are called methods of "source selection." Source selection methods include Cooperative Procurements, competitive Bids, competitive Proposals and small, Intermediate, sole-source, Emergency and special procurements.

(2) State law requires Metro to use the Services of Qualified Nonprofit Agency for Individuals with Disabilities in certain instances. When required, Metro must use a Qualified Nonprofit Agency for Individuals with Disabilities pursuant to ORS 279 before proceeding with a purchase through other methods of source selection.

(3) The methods of contractor selection must conform to the procedures identified in these Administrative Rules. The Procurement Officer is authorized, but not required, to waive any nonconformity with the rules of contractor selection if the Procurement Officer determines that the defect was minor and likely would not have had an effect on the outcome of the selection process.

**47-0255     Competitive Bidding**

(1) **Generally.** Metro may procure Goods or Services by competitive sealed Bids as set forth in ORS 279B.055 and these Administrative Rules. Metro may issue a request for information, a request for interest or other preliminary documents to obtain information useful in the preparation of an Invitation to Bid. An Invitation to Bid is used to initiate a Bidding Solicitation, awarded by low cost only, and must contain the information required by ORS 279B.055(2) and by section (2) of this Rule. Metro shall provide public notice of the competitive Bid Solicitation as set forth below in Administrative Rule 47-0300.

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

(a) General Information.

A. Notice of any pre-Offer conference as follows:

- (i) The time, date and location of any pre-Offer conference;
- (ii) Whether attendance at the conference will be mandatory or voluntary; and
- (iii) A provision that provides that statements made by Metro's representatives at the conference are not binding upon Metro unless confirmed by Written Addenda.

B. The form and instructions for submission of Bids and any other special information, e.g., whether Bids may be submitted by Electronic means (See Administrative Rule 47-0330 for required provisions of Electronic Bids);

C. The time, date and place of Opening;

D. The office where the Solicitation Document may be reviewed;

E. A statement that each Bidder must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120(1);

F. Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See Administrative Rule 46-0210(2)); and

G. How Metro will notify Bidders of Addenda and how Metro will make Addenda available (See Administrative Rule 47-0430).

(b) Metro's Need to Purchase. The character of the Goods or Services Metro is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.055, Metro's description of its need to purchase must:

A. Identify the scope of the work to be performed under the resulting Contract, if Metro awards one;

B. Outline the anticipated duties of the Contractor under any resulting Contract;

C. Establish the expectations for the Contractor's performance of any resulting Contract;  
and

D. Unless Metro for Good Cause (as defined below in Section (3) of this Rule) specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that Metro is purchasing.

(c) Bidding and Evaluation Process.

- A. The anticipated Solicitation schedule, deadlines, protest process, and evaluation process;
  - B. Metro shall set forth objective evaluation criteria in the Solicitation Document in accordance with the requirements of ORS 279B.055(6)(a). Evaluation criteria need not be precise predictors of actual future costs, but to the extent possible, the evaluation factors must be reasonable estimates of actual future costs based on information Metro has available concerning future use; and
  - C. If Metro intends to award Contracts to more than one Bidder pursuant to Administrative Rule 47-0600(4)(c), Metro shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will award.
- (d) Applicable preferences pursuant to ORS 279B.055(6)(b).
  - (e) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
  - (f) All contractual terms and conditions in the form of Contract provisions Metro determines are applicable to the Procurement. As required by State Code, the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:
    - A. Metro's reduction or withholding of payment under the Contract;
    - B. Metro's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the statement of work or to meet the performance standards established by the resulting Contract; and
    - C. Metro's rights, which Metro may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available under the resulting Contract or applicable law.
- (3) **Good Cause.** For the purposes of this Rule, "Good Cause" means a reasonable explanation for not requiring Contractor to meet the highest standards, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of Metro. Metro shall document in the Procurement file the basis for the determination of Good Cause for specification otherwise. Metro will have Good Cause to specify otherwise under the following circumstances:
- (a) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;
  - (b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the Goods or Services will be compatible with or will operate efficiently or effectively with components, equipment, parts, Services or information technology including hardware, Services or software with which the Goods or Services will be used, integrated, or coordinated;
  - (c) The circumstances of the industry or business that provides the Goods or Services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, scientific developments, that a reliable highest prevalent standard does not exist or has not been developed; and
  - (d) Any other circumstances in which Metro's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs Metro's practical need for the highest prevalent standard in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract.



#### **47-0257 Multistep Competitive Bidding**

(1) **Generally.** Metro may procure Goods or Services by using multistep competitive Bidding under ORS 279B.055(12).

(2) **Phased Process.** Multistep competitive Bidding is a phased Procurement process that seeks information or unpriced submittals in the first phase combined with regular competitive Bidding, inviting Bidders who submitted technically eligible submittals in the first phase to submit competitive sealed Bids in the second phase. The Contract must be awarded to the lowest Responsible Bidder.

(3) **Public Notice.** When Metro uses multistep competitive Bidding, Metro shall give public notice for the first phase in accordance with Administrative Rule 47-0300. Public notice is not required for the second phase. However, Metro shall give Notice of the second phase to all Bidders, inform Bidders of the right to protest Addenda issued after the initial Closing under Administrative Rule 47-0430, and inform Bidders excluded from the second phase of the right, if any, to protest their exclusion under Administrative Rule 47-0720.

(4) **Procedures Generally.** In addition to the procedures set forth in Administrative Rule 47-0300 through 47-0490, Metro shall employ the procedures set forth in this Rule for multistep competitive Bidding and in the Invitation to Bid.

#### **(5) Procedure for Phase One of Multistep Competitive Bidding.**

(a) **Form.** Metro shall initiate multistep Bidding by issuing an Invitation to Bid in the form and manner required for competitive sealed Bids except as provided in this Rule. In addition to the requirements set forth Administrative Rule 47-0255(2), the multistep Invitation to Bid must state:

A. That the Solicitation is a multistep competitive Bid Procurement and describe the process Metro will use to conduct the Procurement;

B. That Metro requests unpriced submittals and that Metro will consider price Bids only in the second phase and only from those Bidders whose unpriced submittals are found eligible in the first phase;

C. Whether Bidders must submit price Bids at the same time as unpriced submittals and, if so, that Bidders must submit the price Bids in a separate sealed envelope;

D. The criteria to be used in the evaluation of unpriced submittals.

(b) **Evaluation.** Metro shall evaluate unpriced submittals in accordance with the criteria set forth in the Invitation to Bid.

#### **(6) Procedure for Phase Two of Multistep competitive Bidding.**

(c) After the completion of phase one, if Metro does not cancel the Solicitation, Metro shall invite each eligible Bidder to submit a price Bid.

(d) Metro shall conduct phase two as any other competitive sealed Bid Procurement except:

A. As specifically set forth in this Rule or the Invitation to Bid; and

B. No public notice need be given of the invitation to submit price Bids because such notice was previously given.

#### **47-0260 Competitive Proposals**

(1) **Generally.** Metro may procure Goods or Services by competitive Proposals as set forth in ORS 279B.060. Metro shall use a Request for Proposals to initiate a competitive Proposal Solicitation. The Request for Proposals must contain the information required by ORS 279B.060(2) and by section (2) of this Administrative Rule. Metro shall provide public notice of the Request for Proposals as set forth in Administrative Rule 47-0300.

(2) **Request for Proposals.** In addition to the provisions required by ORS 279B.060(2), the Request for Proposals must include the following:

(a) **General Information.**

A. Notice of any pre-Offer conference as follows:

(i) The time, date and location of any pre-Offer conference;

(ii) Whether attendance at the conference will be mandatory or voluntary; and

(iii) A provision that provides that statements made by Metro's representatives at the conference are not binding on Metro unless confirmed by Written Addenda.

B. The form and instructions for submission of Proposals and any other special information, e.g., whether Proposals may be submitted by Electronic means. (See Administrative Rule 47-0330 for required provisions of Electronic Proposals);

C. The office where the Solicitation Document may be reviewed;

D. Proposer's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See Administrative Rule 46-0210(2)); and

E. How Metro will notify Proposers of Addenda and how Metro will make Addenda available. (See Administrative Rule 47-0430).

(b) **Metro's Need to Purchase.** The character of the Goods or Services Metro is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.060(2)(c), Metro's description of its need to purchase must:

A. Identify the scope of the work to be performed under the resulting Contract, if Metro awards one;

B. Outline the anticipated duties of the Contractor under any resulting Contract;

C. Establish the expectations for the Contractor's performance of any resulting Contract; and

D. Unless the Contractor under any resulting Contract will provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services that are subject to ORS 279C.100 to 279C.125, or Metro for Good Cause specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that Metro is purchasing.

(c) **Proposal and Evaluation Process.**

- A. The anticipated Solicitation schedule, deadlines, protest process, and evaluation process;
  - B. Metro shall set forth selection criteria in the Solicitation Document in accordance with the requirements of ORS 279B.060(3)(e). Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, the criteria will:
    - (i) Afford Metro the ability to compare the Proposals and Proposers, applying the same standards of comparison to all Proposers;
    - (ii) Rationally reflect Proposers' abilities to perform the resulting Contract in compliance with the Contract's requirements; and
    - (iii) Permit Metro to determine the relative pricing offered by the Proposers, and to reasonably estimate the costs to Metro of entering into a Contract based on each Proposal, considering information available to Metro and subject to the understanding that the actual Contract costs may vary as a result of the statement of work ultimately negotiated or the quantity of Goods or Services for which Metro contracts.
  - C. If Metro's Solicitation process calls for Metro to establish a Competitive Range, Metro shall generally describe, in the Solicitation Document, the criteria or parameters Metro will apply to determine the Competitive Range. Metro, however, subsequently may determine or adjust the number of Proposers in the Competitive Range in accordance with Administrative Rule 47-0261(6).
  - (d) Applicable Preferences, including those described in ORS 279A.120, 279A.125(2) and 282.210.
  - (e) The Proposers' certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
  - (f) All contractual terms and conditions Metro determines are applicable to the Procurement. Metro's determination of contractual terms and conditions that are applicable to the Procurement may take into consideration, as authorized by ORS 279B.060(3), those contractual terms and conditions Metro will not include in the Request for Proposals because Metro either will reserve them for negotiation, or will request Proposers to offer or suggest those terms or conditions. (See Administrative Rule 47-0260(3)).
  - (g) As required by ORS 279B.060(2)(h), the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:
    - A. Metro's reduction or withholding of payment under the Contract;
    - B. Metro's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the scope of work or to meet the performance standards established by the resulting Contract; and
    - C. Metro's rights, which Metro may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available under the resulting Contract or applicable law.
- (3) **Applicable Terms.** Metro may include the applicable contractual terms and conditions in the form of Contract provisions, or legal concepts to be included in the resulting Contract. Further, Metro may specify that it will include or use Proposer's terms and conditions that have been pre-negotiated under Administrative Rule 47-0550(3), but Metro may only include or use a Proposer's pre-negotiated terms

and conditions in the resulting Contract to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. Metro may not agree to any Proposer's terms and conditions that were expressly rejected in a Solicitation protest under Administrative Rule 47-0420.

(4) **For multiple award Contracts.** Metro may enter into Contracts with different terms and conditions with each Contractor to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. Metro may not agree to any Proposer's terms and conditions that were expressly rejected in a Solicitation protest under Administrative Rule 47-0420.

(5) **Good Cause.** For the purposes of this Rule, "Good Cause" means a reasonable explanation for not requiring Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services under the Contract, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of Metro. Metro shall document in the Procurement file the basis for the determination of Good Cause for specifying otherwise. Metro will have Good Cause to specify otherwise when Metro determines:

(h) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;

(i) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the Goods or Services will be compatible with, or will operate efficiently or effectively with, associated information technology, hardware, software, components, equipment, parts, or on-going Services with which the Goods or Services will be used, integrated, or coordinated;

(j) The circumstances of the industry or business that provides the Goods or Services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, or scientific developments, that a reliable highest prevalent standard does not exist or has not been developed;

(k) That other circumstances exist in which Metro's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs Metro's practical need for the highest standard prevalent in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060, OL 2015, ch 325 (HB 2716)

#### **47-0261 Multi-tiered and Multistep Proposals**

(1) **Generally.** Metro may use one or more, or any combination, of the methods of contractor selection set forth in ORS 279B.060(7), 279B.060(8) and these Administrative Rules to procure Goods or Services. In addition to the procedures set forth in Administrative Rules 47-0300 through 47-0490 for methods of contractor selection, Metro may provide for a multi-tiered or multistep selection process that permits award to the highest ranked Proposer at any tier or step, calls for the establishment of a Competitive Range, or permits either serial or competitive simultaneous discussions or negotiations with one or more Proposers.

(2) Multi-tiered and multistep competitions may use any combination or series of Proposals, discussions, negotiations, demonstrations, offers, or other means of soliciting information from Proposers that bear on the selection of a Contractor or Contractors. In multi-tiered and multistep

competitions, Metro may use these means of soliciting information from prospective Proposers and Proposers in any sequence or order, as determined in the discretion of Metro, including, but not limited to, processes that embrace:

- (a) The evaluation of Proposals only, including the evaluation of serial Proposals (a series of more than one Proposal from each Proposer that remains eligible in the competition at the particular tier of the competition);
  - (b) The use of Proposals in connection with discussions with Proposers that lead to best and final Offers;
  - (c) The use of Proposals in connection with serial negotiations with Proposers that lead to best and final Offers or to the award of a Contract;
  - (d) The use of Proposals in connection with competitive negotiations with Proposers that lead to best and final Offers or to the award of a Contracts; and
  - (e) The use of Proposals in multi-tiered competition designed to identify, at each stage of the competition, a class of Proposers that fall within a Competitive Range of Proposers that have a reasonable chance of being determined the most Advantageous Proposer or, in multiple-award situations, a reasonable chance of being determined an awardee of a Public Contract.
- (3) When Metro's Request for Proposals prescribes a multi-tiered or multistep contractor selection process, Metro nevertheless may, at the completion of any stage in the competition and on determining the most Advantageous Proposer (or, in multiple-award situations, on determining the awardees of the Public Contracts), award a Contract (or Contracts) and conclude the Procurement without proceeding to subsequent stages. Metro also may, at any time, cancel the Procurement when the cancellation or rejection is in the best interest of Metro in accordance with ORS 279B.100.
- (4) **Exclusion Protest.** Metro may provide, before the notice of intent to award, an opportunity for a Proposer to protest exclusion from the Competitive Range or from subsequent phases of multi-tiered or multistep competitive Proposals as set forth in Administrative Rule 47-0720.
- (5) **Award Protest.** Metro shall provide an opportunity to protest its intent to award a Contract pursuant to ORS 279B.410 and Administrative Rule 47-0740. An Affected Offeror may protest, for any of the bases set forth in Administrative Rule 47-0720(2), its exclusion from the Competitive Range or from any phase of a multi-tiered or multistep competitive Proposal process, or may protest an Addenda issued following initial Closing, if Metro did not previously provide Proposers the opportunity to protest the exclusion or Addenda. The failure to protest will be considered the Proposer's failure to pursue an administrative remedy made available to the Proposer by Metro.
- (6) **Competitive Range.** When Metro's Solicitation process conducted under ORS 279B.060(8) calls for Metro to establish a Competitive Range at any stage in the Procurement process, Metro may do so as follows:

(a) **Determining Competitive Range.**

A. Metro may establish a Competitive Range after evaluating all Responsive Proposals in accordance with the evaluation criteria in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria in the Request for Proposals, Metro may determine and rank the Proposers in the Competitive Range. Notwithstanding the foregoing, however, in instances in which Metro determines that a single Proposer has a reasonable chance of being determined the most Advantageous Proposer, Metro need not determine or rank Proposers in the Competitive Range. In addition,

notwithstanding the foregoing, Metro may establish a Competitive Range of all Proposers to enter into discussions to correct deficiencies in Proposals.

B. Metro may establish the number of Proposers in the Competitive Range in light of whether Metro's evaluation of Proposals identifies a number of Proposers who have a reasonable chance of being determined the most Advantageous Proposer, or whether the evaluation establishes a natural break in the scores of Proposers that indicates that a particular number of Proposers are closely competitive or have a reasonable chance of being determined the most Advantageous Proposer.

(b) **Protesting Competitive Range.** Metro must provide Written notice to all Proposers identifying Proposers in the Competitive Range. Metro may provide an opportunity for Proposers excluded from the Competitive Range to protest Metro's evaluation and determination of the Competitive Range in accordance with Administrative Rule 47-0720.

(7) **Discussions.** Metro may initiate oral or Written discussions with all "eligible Proposers" on subject matter within the general scope of the Request for Proposals. In conducting discussions, Metro:

(a) Shall treat all eligible Proposers fairly and may not favor any eligible Proposer over another;

(b) May disclose other eligible Proposers' Proposals or discussions only in accordance with ORS 279B.060(8)(b) or (c);

(c) May adjust the evaluation of a Proposal as a result of discussions. The conditions, terms, or price of the Proposal may be changed during the course of the discussions provided the changes are within the scope of the Request for Proposals.

(d) At any time during the time allowed for discussions, Metro may:

A. Continue discussions with a particular eligible Proposer;

B. Terminate discussions with a particular eligible Proposer and continue discussions with other eligible Proposers; or

C. Conclude discussions with all remaining eligible Proposers and provide, to the then-eligible Proposers, notice requesting best and final Offers.

(8) **Negotiations.** Metro may commence serial negotiations with the highest-ranked eligible Proposer or commence simultaneous negotiations with all eligible Proposers. Metro may negotiate:

(a) The statement of work;

(b) The Contract Price as it is affected by negotiating the statement of work and other terms and conditions authorized for negotiation in the Request for Proposals or Addenda thereto; and

(c) Any other terms and conditions reasonably related to those authorized for negotiation in the Request for Proposals or Addenda thereto. Proposers may not submit for negotiation, and Metro may not accept, alternative terms and conditions that are not reasonably related to those authorized for negotiation in the Request for Proposals or any Addenda.

(9) **Terminating Negotiations.** At any time during discussions or negotiations Metro conducts under this Rule, Metro may terminate discussions or negotiations with the highest-ranked Proposer, or the eligible Proposer with whom it is currently discussing or negotiating, if Metro reasonably believes that:

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

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

(c) **Continuing Serial Negotiations.** If Metro is conducting serial negotiations and Metro terminates negotiations with an eligible Proposer, Metro may then commence negotiations with the next highest scoring eligible Proposer, and continue the sequential process until Metro has either:

A. Determined to award the Contract to the eligible Proposer with whom it is currently discussing or negotiating; or

B. Decided to cancel the Procurement under ORS 279B.100.

(d) **Competitive Simultaneous Negotiations.** If Metro chooses to conduct competitive negotiations, Metro may negotiate simultaneously with competing eligible Proposers. Metro:

A. Shall treat all eligible Proposers fairly and may not favor any eligible Proposer over another; and

B. May disclose other eligible Proposers' Proposals or the substance of negotiations with other eligible Proposers only if Metro notifies all of the eligible Proposers with whom Metro will engage in negotiations of Metro's intent to disclose before engaging in negotiations with any eligible Proposer.

(e) Any oral modification of a Proposal resulting from negotiations must be reduced to Writing.

(10) **Best and Final Offers.** If Metro requires best and final Offers, Metro must establish a common date and time by which eligible Proposers must submit best and final Offers. If Metro is dissatisfied with the best and final Offers, Metro may make a determination that it is in Metro's best interest to conduct additional discussions, negotiations or change Metro's requirements and require another submission of best and final Offers. Metro must inform all eligible Proposers that if they do not submit notice of withdrawal or another best and final Offer, their immediately previous Offers will be considered their best and final Offers. Metro shall evaluate Offers as modified by the best and final Offers. Metro shall conduct the evaluations as described in Administrative Rule 47-0600. Metro may not modify evaluation factors or their relative importance after the date and time that best and final Offers are due.

(11) **Multistep Competitive Proposals.** Metro may procure Goods or Services by using multistep competitive Proposals under ORS 279B.060(8)(b)(g). Multistep competitive Proposals is a phased Procurement process that seeks necessary information or unpriced technical Proposals in the first phase and, in the second phase, invites Proposers who submitted technically qualified Proposals to submit competitive price Proposals on the technical Proposals. Metro must award the Contract to the Responsible Proposer submitting the most Advantageous Proposal in accordance with the terms of the Solicitation Document applicable to the second phase.

(a) **Public Notice.** When Metro uses multistep competitive Proposals, Metro shall give public notice for the first phase in accordance with Administrative Rule 47-0300. Public notice is not required for the second phase. However, Metro shall give notice of the subsequent phases to all Proposers and inform any Proposers excluded from the second phase of the right, if any, to protest exclusion under Administrative Rule 47-0720.

(b) **Procedure for Phase One of Multistep competitive Proposals.** Metro may initiate a multistep competitive Proposals Procurement by issuing a Request for Proposals in the form and manner required for competitive Proposals except as provided in this Rule. In addition to the requirements required for competitive Proposals, the multistep Request for Proposals must state:

- A. That unpriced technical Proposals are requested;
- B. That the Solicitation is a multistep competitive Proposal Procurement and that, in the second phase, priced Proposals will be accepted only from those Proposers whose unpriced technical Proposals are found qualified in the first phase;
- C. The criteria for the evaluation of unpriced technical Proposals; and
- D. That the Goods or Services being procured must be furnished generally in accordance with the Proposer's technical Proposal as found to be finally qualified and must meet the requirements of the Request for Proposals.

(c) **Addenda to the Request for Proposals.** After receipt of unpriced technical Proposals, Addenda to the Request for Proposals must be distributed only to Proposers who submitted unpriced technical Proposals.

(d) **Receipt and Handling of Unpriced Technical Proposals.** Unpriced technical Proposals need not be opened publicly.

(e) **Evaluation of Unpriced Technical Proposals.** Unpriced technical Proposals will be evaluated solely in accordance with the criteria set forth in the Request for Proposals.

(f) **Discussion of Unpriced Technical Proposals.** Metro may seek clarification of a technical Proposal of any Proposer who submits a qualified, or potentially qualified technical Proposal. During the course of such discussions, Metro may not disclose any information derived from one unpriced technical Proposal to any other Proposer.

(g) **Methods of Contractor Selection for Phase One.** In conducting phase one, Metro may employ any combination of the methods of contractor selection that call for the establishment of a Competitive Range or include discussions, negotiations, or best and final Offers as set forth in this Rule.

(h) **Procedure for Subsequent Phases.** On the completion of phase one, Metro shall invite each qualified Proposer to submit price Proposals. Metro shall conduct phase two as any other competitive Proposal Procurement except as set forth in this Rule.

(i) No public notice need be given of the request to submit price Proposals because such notice was previously given.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

#### **47-0265 Small Procurements**

(1) **Generally.** For Procurements of Goods or Services less than or equal to \$25,000, Metro may award a Contract as a Small Procurement pursuant to ORS 279B.065 and in accordance with this Administrative Rule. State Code prohibits a Procurement from being artificially divided or fragmented so as to constitute a Small Procurement under this section.

(2) **Methods Available.** Metro may choose any method of selecting such Contractors, including, but not limited to, offering and directly awarding the Contract to only one firm or conducting a competition for the Contract. However, if the Goods or Services are available from a Qualified Nonprofit Agency for Individuals with Disabilities, they must be purchased as provided under Oregon law.



(3) **Amendments.** Metro may amend a Contract awarded as a Small Procurement in accordance with Administrative Rule 47-0800, but the cumulative amendments may not increase the total Contract Price to a sum that exceeds the higher dollar amount of \$25,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Any amendment that causes Contract to exceed the foregoing limits will be treated as an Unauthorized Purchase and shall be subject to the requirements of Rule 46-0200.

Stat. Auth.: ORS 279A.065 & ORS 279B.065

Stats. Implemented: ORS 279B.065

#### **47-0270 Intermediate Procurements**

(1) **Generally; Price Quotes or Intermediate Proposals.** For Procurements of Goods or Services greater than \$25,000 and less than or equal to \$250,000, pursuant to ORS 279B.070 Metro may award a Contract as an Intermediate Procurement after seeking three Written Intermediate Proposals or Price Quotes. Notwithstanding the foregoing, if the Goods or Services are available from a Qualified Nonprofit Agency for Individuals with Disabilities, they must be purchased as provided under Oregon law.

(a) State Code prohibits a Procurement from being artificially divided or fragmented so as to constitute a Intermediate Procurement under this section.

(b) The Intermediate Request for Proposal and the Request for Quotes are both Written solicitation processes. If three Written Price Quotes or Intermediate Proposals are not reasonably available or Metro concluded that a Written Intermediate solicitation process will not result in a robust, competitive procurement, Metro may proceed with an oral procurement method. Metro shall keep records of the sources of the Quotes or Intermediate Proposals received.

(c) Metro uses an Electronic Procurement System as a primary tool for contacting potential Contractors. In the event a potential contractor is not registered on Metro's Electronic Procurement System, Metro may email or otherwise directly distribute the Solicitation document to such potential contractor.

(2) **Negotiations.** Metro may negotiate with a prospective Contractor who offers to provide Goods or Services in response to an Intermediate Procurement to clarify its Price Quote or Intermediate Proposal or to effect modifications that will make the Offer more Advantageous to Metro.

(3) **Award.** If a Contract is to be awarded, Metro shall award the Contract to the responsive, Responsible Offeror who provides the lowest Price Quote, or if criteria other than price are to be considered, whose Intermediate Proposal is the highest scoring. Metro may consider other criteria, in addition to price, in making the award: experience, expertise, product functionality, suitability for a particular purpose, equity, sustainability, and Contractor Responsibility under ORS 279B.110. For Intermediate Request for Proposals, Metro may choose to establish an evaluation committee with various experts from within and outside Metro. For Intermediate Proposals there is no required minimum number of evaluators on the panel. The Procurement Officer must approve the composition of any evaluation committee.

(4) **Amendments.** Metro may amend a Contract awarded as an Intermediate Procurement in accordance with Administrative Rule 47-0800, but the cumulative amendments may not increase the total Contract Price to a sum that exceeds the higher dollar amount of \$250,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Any amendment that causes Contract to exceed the foregoing limits will be treated as an Unauthorized Purchase and shall be subject to the requirements of Rule 46-0200.

(5) **BOLI Applicability.** For Intermediate Contracts for minor alterations, ordinary repair or maintenance necessary to preserve a public improvement, where applicable Metro shall comply with the prevailing wage provisions of ORS 279C.800 to 279C.870. For Intermediate Contracts that involve Public Works, as defined in ORS 279C.800, Metro shall provide notification of award to BOLI as required by ORS 279C.835.

Stat. Auth.: ORS 279A.065 & ORS 279B.070

Stats. Implemented: ORS 279B.070

#### **47-0275 Sole-Source Procurements**

(1) **Generally.** In accordance with ORS 279B.075, Metro may award a Contract without competition as a sole-source Procurement when it is determined that the Goods or Services, or class of Goods or Services, are available from only one source. Such determination must be made by the Procurement Officer for Procurements under \$250,000. For all other Procurements the determination must be made by the Metro Local Contract Review Board. The determination must be made based on Written findings that include, where applicable, findings:

(a) Based on a brief description of the Contract or Contracts to be covered including volume of contemplated future purchases;

(b) Based on a description of the Goods or Services to be purchased; That current market research supports the determination that the Goods or Services are available from only one seller or source;

(c) That the efficient utilization of existing Goods or Services requires the acquisition of compatible Goods or Services;

(d) 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;

(e) That the required product is data processing equipment which will be used for research where there are requirements for exchange of software and data with other research establishments;

(f) That the Goods or Services are for use in a pilot or an experimental project; or

(g) Other findings that support the conclusion that the Goods or Services are available from only one source.

(2) **Public Notice.** For sole-source Contracts in excess of \$50,000, Metro shall give public notice of its determination that the Goods or Services or class of Goods or Services are available from only one source. Such notice must be published in a manner similar to public notice of competitive Bids under ORS 279B.055(4) and Administrative Rule 47-0300. The public notice must describe the Goods or Services to be acquired by a sole-source Procurement, identify the prospective Contractor and include the date, time and place that protests are due. Metro shall give Affected Persons at least seven (7) Days

from the date of the notice of the determination that the Goods or Services are available from only one source to protest the sole source determination.

(3) **Protest.** An Affected Person may protest Metro's determination that the Goods or Services or class of Goods or Services are available from only one source in accordance with Administrative Rule 47-0710.

Stat. Auth.: ORS 279A.065 & ORS 279B.075

Stats. Implemented: ORS 279B.075

#### **47-0280 Emergency Procurements**

(1) Metro may award a Contract as an Emergency Procurement without the use of competitive Bidding or competitive Proposals when the requirements of ORS 279B.080 and this Administrative Rule are met.

(2) Metro shall document the nature of the Emergency and describe the method used for the selection of the particular Contractor. Metro shall encourage competition for Emergency Procurements to the extent reasonable under the circumstances.

(3) The authority to declare an Emergency and authorize an Emergency Procurement is as follows:

(a) The Procurement Officer or designee may declare the existence of an Emergency and authorize Metro or any of its departments to enter into an Emergency Procurement Contract under \$250,000.

(b) The director of a department may declare the existence of an Emergency and authorize that department to enter into an Emergency Procurement Contract under \$250,000 only if the Procurement Officer or person to whom the powers of the Procurement Officer have been delegated, is not available when the Procurement needs to be made.

(c) The Chief Operating Officer may declare the existence of an Emergency and authorize Emergency Procurement Contracts that exceed \$250,000.

(4) All documentation of Emergency Procurements must be sent to the Procurement Officer for record keeping purposes.

(5) After the award of an Emergency Procurement Contract, Metro shall execute a Written Contract with the Contractor as soon as possible, and in no event later than sixty (60) Days after the award.

(6) All Emergency Procurement Contracts, whether or not Signed by the Contractor, will be deemed to contain a termination for convenience clause permitting Metro to immediately terminate the Contract at its discretion and, unless the Contract was void, Metro shall pay the Contractor only for work performed prior to the date of termination plus the Contractor's unavoidable costs incurred as a result of the termination. In no event will Metro pay for anticipated lost profits or consequential damages as a result of the termination.

(7) In accordance with ORS 279B.080(2), for an Emergency Procurement of construction services that are not Public Improvements, Metro shall ensure competition for a Contract for the Emergency work that is reasonable and appropriate under the Emergency circumstances. In conducting the Procurement, Metro shall set a Solicitation time period that Metro determines to be reasonable under the Emergency circumstances and may issue Written or oral requests for Offers or make direct appointments without competition in case of extreme necessity.

#### **47-0285 Special Procurements**

(1) **Generally.** Metro may award a Contract as a Special Procurement pursuant to the requirements of this Administrative Rule and ORS 279B.085. Special Procurements allow Metro to enter into a series of Contracts over time pursuant to the authorization provided in regard to the Special Procurement and without necessarily following the requirements for Intermediate Procurement or formal competitive Bids or Proposals.

(2) As used in this Rule and Rules 47-0288, 47-0700 and 47-0730:

(a) “Special Procurement” means, unless the context requires otherwise, a Class Special Procurement, a Contract-Specific Special Procurement or both. A Special Procurement allows Metro to custom-design any contracting approach it determines will meet its procurement needs.

(b) “Class Special Procurement” means a contracting procedure that differs from the procedures described in these rules and is for the purpose of entering into a series of Contracts over time for the acquisition of a specified class of Goods or Services.

(c) “Contract-Specific Special Procurement” means a contracting procedure that differs from the procedures described in these rules and is for the purpose of entering into a single Contract or a number of related Contracts for the acquisition of specified Goods or Services on a one-time basis or for a single project.

(3) The Local Contract Review Board may approve a Special Procurement if it finds that the use of a Special Procurement complies with the requirements set forth in ORS 279B.085(4).

(4) **Public Notice.** Metro shall give public notice of the Local Contract Review Board's approval of a Special Procurement in the same manner as public notice of competitive Bids under ORS 279B.055(4) and Administrative Rule 47-0300. The public notice must describe the Goods or Services or class of Goods or Services to be acquired through the Special Procurement. Metro shall give Affected Persons at least seven (7) Days from the date of the notice of approval of the Special Procurement to protest the Special Procurement. When a Class Special Procurement has been approved, additional future procurements that fall within the class may be awarded according to the terms of the original Special Procurement, without a new request for, notice of, and approval of the Special Procurement.

(5) **Protest.** An Affected Person may protest the request for approval of a Special Procurement in accordance with ORS 279B.400 and Administrative Rule 47-0700.

#### **47-0288 Special Procurements Authorized by Rule**

The Local Contract Review Board declares the following as Class Special Procurements:

(1) **Manufacturer Direct Supplies.** Metro may purchase Goods directly from a manufacturer if the cost from the manufacturer is the same or less than the cost the manufacturer charges to its distributor(s).

- (2) **Advertisements.** Metro may directly purchase media advertising, including print (e.g. newspaper), broadcast (e.g. television, radio), display (e.g. billboard), internet (e.g. web based publications) and other electronic media formats.
- (3) **Intellectual Property (Periodicals, Books, Proprietary Software Licenses, Art, and Other Products of the Creative Process).** Metro may directly purchase intellectual property (including, but not be limited to, periodicals, books, proprietary software licenses, reference materials, audio and visual media, and other products of the creative process) when the product is protected under intellectual property law (e.g. copyright, patent). If there is more than one source of the intellectual property, and the product is not being purchased directly from the creator or other original source, every attempt should be made to establish a competitive selection process to achieve the greatest economy.
- (4) **Financial Products.** Metro may directly purchase financial products such as bond insurance, surety bonds for Metro bond reserves and liquidity facilities such as letters of lines of credit. Metro may pay fees associated with such transactions, including, but not limited to, registrar, paying agent, and escrow agent fees and fees associated with outstanding debt issues.
- (5) **Employee Benefits Contracts.** Metro may purchase employee benefit insurance, and other taxable employee benefits, without a competitive Solicitation process, regardless of dollar amount.
- (6) **Insurance Contracts.** Contracts for insurance may be awarded directly to an insurer after Metro obtains Proposals from an insurance consultant. The insurance consultant will be selected in accordance with the applicable procedures set forth in the Personal Services Contracting Rules. Among the services to be provided by the consultant is the securing of competitive Proposals from insurance carriers for all coverages for which the insurance consultant is given responsibility and advice to Metro about the costs and benefits of the various Proposals. Metro may then negotiate or enter into the insurance Contract that appears most Advantageous to Metro without advertisement or issuance of its own Request for Proposals.
- (7) **Used Personal Property or Equipment.** Metro may directly purchase used personal property and equipment. Used property and used equipment is property or equipment that has been placed in use by a previous owner or user for a period of time, and which is recognized in the relevant trade or industry, if there is one, as qualifying the personal property or equipment as “used”.
- (8) **Hazardous Material Removal and Oil Clean-up.** Metro may enter into a Public Contract without competitive Solicitation when ordered to clean up oil or other hazardous waste pursuant to the authority granted the Oregon Department of Environmental Quality under ORS Chapter 466, and such DEQ order necessitates the prompt establishment and performance of the Contract in order to comply with the statutes regarding spill or release of oil or hazardous materials. Metro shall not contract pursuant to this section in the absence of an order from DEQ to clean up a site with a time limitation that would not permit hiring a Contractor under the usual, required Procurement processes.
- (9) **Rating Agency Contracts.** Metro may purchase the services of Moody’s Investors Service, Standard and Poor’s, or similar rating agencies without competitive Solicitation.
- (10) **Information Technology (Software and Hardware Maintenance, Licenses, Subscriptions and Upgrades).** Metro may directly enter into a Contract or renew existing Contracts for information technology (including hardware or software maintenance, licenses, subscriptions, and upgrades) where the maintenance, upgrades, subscriptions and licenses are either available from only one source or, if available from more than one source, are obtained from Metro’s current provider in order to utilize the pre-existing knowledge of the provider regarding the specifics of Metro’s information technology system. Metro shall document in the Procurement file the facts that justify either that maintenance,

license(s), subscriptions and upgrades were available from only one source or, if from more than one source, that obtaining such Goods and Services from the current vendor is most Advantageous to Metro.

(11) **Equipment Maintenance, Repair and Overhaul.** Metro may directly award a Contract for equipment maintenance, repair and/or overhaul if:

(a) Service and/or parts required are unknown, and the cost cannot be determined without extensive preliminary dismantling or testing;

(b) Service and/or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source; or

(c) Services and/or parts must be acquired from the provider of the equipment and/or software being maintained in order to be compatible, preserve warranties, provide the best possible service, or conform to other similar agreements being provided by the same provider for maximizing economy and/or servicing functions.

(12) **Price-regulated Goods and Services, utilities and utility related services.** Metro may directly purchase, without a competitive Solicitation process, goods, services, repair, equipment and/or maintenance work, where the rate or price for such Goods and Services is established by federal, state, or local regulatory authority or when the Services can be provided only by a specific utility.

(13) **Goods, Services or Equipment Required by a Federal or State Grant Agreement.** Metro may directly purchase, without a competitive Solicitation process, Goods, Services or equipment when they are required in the federal or state grant agreement to be purchased from a specific source or when a specific brand name is required and no competition is otherwise available.

(14) **Membership Dues.** Metro may directly purchase, without a competitive Solicitation process, dues or memberships in professional or community organizations for the benefit of Metro.

(15) **Services Related to Legal Advice.** Metro may directly enter into a Contract, without a competitive Solicitation process, Services related to the provision of legal advice to Metro.

(16) **Seminar, Training Registration and Conference Fees.** Metro may directly purchase, without a competitive Solicitation process, seminar registrations and training session fees for attendance at seminars, conferences and training courses hosted by outside entities.

(17) **Event Sponsorship Agreements.** Metro may directly pay to sponsor an event, whether or not Metro receives Goods or Services in return for its payment.

(18) **Sponsorship Agreements.** Sponsorship Agreements, under which Metro receives a gift or donation in exchange for recognition of the donor, may be awarded in any manner which Metro deems appropriate to meet its needs, including by direct award.

(19) **Contractor Provided Funding.** Metro may directly award contracts for Goods or Services to a Contractor who provides substantial materials or a substantial portion of the funding for a project.

(20) **Maintenance and Training Services from the Contractor Supplying Goods.** Metro may directly purchase, without a competitive Solicitation process, maintenance or training services directly from a Contractor from whom Metro has previously acquired Goods and the services or training is directly related to such Goods.

(21) **Nonprofit Partnerships.** Metro may directly award Contracts for Goods and Services when the Contractor is a not-for-profit organization and where both parties share in the decision making process work together to define a scope of work, contribute resources, share responsibilities, and accept risk and benefits according to a mutually agreed upon arrangement.

(22) **Zoos and Animal Conservation Organizations.** Metro may directly award Contracts for Goods and Services when the contractor is (a) a not-for-profit entity and (b) a zoo or other organization dedicated to the study, conservation, or care of zoo animals.

(23) **Concession Services Agreements.**

(a) **Small Concessions.** Small Concessions are Concession Services Agreements to sell or promote food, beverages, merchandise or Services, including but not limited to performances and entertainment, to the public for which the concessionaire's projected annual gross revenues are estimated to be \$500,000 or less. Small Concessions shall be awarded based on any method determined by Metro to provide an opportunity to all persons desiring to operate a concession, including without limitation, by direct award, private negotiation, or using a competitive process.

(b) **Major Concessions.** Major Concessions are Concessions Services Agreements to sell or promote food, beverages, merchandise or Services, including but not limited to performances and entertainment, to the public for which the concessionaire's projected annual gross revenues under the Contract are estimated to exceed \$500,000 annually. Major Concessions shall be awarded using a Request for Proposals under these Rules.

(24) **Animals and Animal Transportation.** Contracts for the acquisition or transport of animals may be awarded in any manner which Metro deems appropriate to meet Metro's needs, including by direct award.

(25) **Perishables (e.g. Medication, Food, Plants, Chemicals and Laboratory Supplies).** Metro may directly purchase, without a competitive Solicitation process, perishables, including (without limitation) animal medication, animal food, human food, plants, chemicals and laboratory supplies upon the department's determination that the quality of the desired perishable item is of greater importance than the cost. However if longevity is not an issue and multiple sources exist, standard Procurement practices shall be utilized to the extent possible.

(26) **Items for Resale.** Metro may directly purchase, without a competitive Solicitation process, Goods and Services being purchased for resale (including, without limitation, Zoo gift shop retail inventory and food for resale). This Special Procurement category applies to Goods and Services that are specifically for resale as opposed to internal use or consumption.

(27) **Third Party Payroll Services.** Metro may directly contract for third party payroll services including, but not limited to, timekeeping and payroll services, unemployment coverage, workers compensation coverage, payment of health care contributions, retirement contributions and other related services.

## **Procurement Process**

### **47-0300 Public Notice of Solicitation Documents for Formal Procurements**

(1) **Notice of Solicitation Documents.** Metro shall provide public notice of every formal Solicitation in accordance with subsection (2) of this Rule. Metro may give additional notice using any method it determines appropriate to foster and promote competition, including:

(a) Mailing or emailing notice of the availability of the Solicitation Document to Persons that have expressed an interest in Metro's Procurements;

(b) Publishing the advertisement for Offers in newspapers or other publications of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as Metro may determine; or

(c) **Placing Notice on Metro's Internet Web site.**

(2) **Required Advertising.** Metro shall advertise every notice of a formal Solicitation as follows:

(a) Metro shall publish the advertisement for formal Offers in accordance with the requirements of ORS 279B.055(4)(a) and (b) and ORS 279B.060(5); or

(b) Because Metro finds that it would be cost effective to Electronically post notice of Solicitations, Metro will publish advertisements for formal Offers on Electronic Procurement System.

(3) **Content of Advertisement.** All advertisements for formal Offers must set forth:

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

(b) A general description of the Goods or Services to be acquired;

(c) The interval between the first date of notice of the Solicitation Document given in accordance with subsection (2) above and Closing, which may not be less than fourteen (14) Days for an Invitation to Bid and twenty-one (21) Days for a Request for Proposals, unless Metro determines that a shorter interval is in the public's interest, and that a shorter interval will not substantially affect competition. However, in no event may the interval between the first date of notice of the Solicitation Document given in accordance with subsection (2) above and Closing be less than seven (7) Days as set forth in ORS 279B.055(4)(f). Metro shall document the specific reasons for the shorter public notice period in the Procurement file;

(d) The date that Persons must file applications for prequalification if prequalification is a requirement and the class of Goods or Services is one for which Persons must be prequalified;

(e) The office where Contract terms, conditions and Specifications may be reviewed;

(f) The name, title and address of the individual authorized by Metro to receive Offers;

(g) For formal ITB's, the scheduled Opening; and

(h) Any other information Metro deems appropriate.

(4) **Fees.** Metro may charge a fee or require a deposit for the Solicitation Document.

(5) **Notice of Addenda.** Metro shall provide potential Offerors notice of any Addenda to a Solicitation Document in accordance with Administrative Rule 47-0430.

Stat. Auth.: ORS 279A.065, ORS 279B.055 & ORS 279B.060

Stats. Implemented: ORS 279B.055 & ORS 279B.060

#### **47-0310 Bids and Proposals are Offers**

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

(a) In competitive Bids and competitive Proposals, the Offer is always a "Firm Offer," i.e. the Offer shall be held open by the Offeror for Metro's acceptance for the period specified in Administrative Rule 47-0480. Metro may elect to accept the Offer at any time during the specified period, and Metro's award of the Contract constitutes acceptance of the Offer and binds the Offeror to the Contract.



(b) Notwithstanding the fact that a competitive Proposal is a "Firm Offer" for the period specified in Administrative Rule 47-0480, Metro may elect to discuss or negotiate certain contractual provisions, as identified in these rules or in the Solicitation Document, with the Proposer. Where negotiation is permitted by the rules or the Solicitation Document, Proposers are obligated to negotiate in good faith and only on those terms or conditions that the rules or the Solicitation Document have reserved for negotiation.

(2) **Contingent Offers.** Except to the extent the Proposer is authorized to propose certain terms and conditions pursuant to Administrative Rule 47-0261, a Proposer may not make its Offer contingent upon Metro's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

(3) **Offeror's Acknowledgment.** By Signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits Proposers to propose alternative terms or conditions under Administrative Rule 47-0261, the Offeror's Offer is deemed to have accepted (i) any nonnegotiable terms and conditions and (ii) any proposed terms and conditions offered for negotiation upon and to the extent accepted by Metro in Writing.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065, ORS 279B.055 & ORS 279B.60

#### **47-0330 Electronic Procurement**

(1) **Electronic Procurement Authorized.** Metro may conduct all phases of a Procurement, including without limitation the posting of Electronic Advertisements and the receipt of Electronic Offers, by Electronic methods if and to the extent Metro specifies in a Solicitation Document, a Request for Quotes, or any other Written instructions on how to participate in the Procurement.

(2) Metro shall open an Electronic Offer in accordance with Electronic security measures in effect at Metro at the time of its receipt of the Electronic Offer. Unless Metro provides procedures for the secure receipt of Electronic Offers, the Person submitting the Electronic Offer assumes the risk of premature disclosure due to submission in unsealed form.

(3) Metro's use of Electronic Signatures must be consistent with applicable statutes and rules. Metro may limit the use of Electronic methods of conducting a Procurement as Advantageous to Metro.

(4) If Metro determines that Bid or Proposal security is or will be required, Metro should not authorize Electronic Offers unless Metro has another method for receipt of such security.

(5) **Rules Governing Electronic Procurements.** Metro shall conduct all portions of an Electronic Procurement in accordance with these Division 47 Administrative rules, unless otherwise set forth in this Rule.

(6) **Preliminary Matters.** As a condition of participation in an Electronic Procurement Metro may require potential Contractors to register with Metro before the date and time on which Metro will first accept Offers, to agree to the terms, conditions, or other requirements of a Solicitation Document, or to agree to terms and conditions governing the Procurement, such as procedures that Metro may use to attribute, authenticate or verify the accuracy of an Electronic Offer, or the actions that constitute an Electronic Signature.

(7) **Offer Process.** Metro may specify that Persons must submit an Electronic Offer by a particular date and time, or that Persons may submit multiple Electronic Offers during a period of time established in the Electronic Advertisement. When Metro specifies that Persons may submit multiple Electronic Offers during a specified period of time, Metro must designate a time and date on which Persons may begin to submit Electronic Offers, and a time and date after which Persons may no longer submit Electronic Offers. The date and time after which Persons may no longer submit Electronic Offers need not be specified by a particular date and time, but may be specified by a description of the conditions that, when they occur, will establish the date and time after which Persons may no longer submit Electronic Offers. When Metro will accept Electronic Offers for a period of time, then at the designated date and time that Metro will first receive Electronic Offers, Metro must begin to accept real time Electronic Offers on Metro's Electronic Procurement System, and must continue to accept Electronic Offers in accordance with section (8)(b) of this Rule until the date and time specified by Metro, after which Metro will no longer accept Electronic Offers.

(8) **Receipt of Electronic Offers.**

(a) When Metro conducts an Electronic Procurement that provides that all Electronic Offers must be submitted by a particular date and time, Metro shall receive the Electronic Offers in accordance with these Administrative Rules.

(b) When Metro specifies that Persons may submit multiple Electronic Offers during a period of time, Metro shall accept Electronic Offers, and Persons may submit Electronic Offers, in accordance with the following:

A. Following receipt of the first Electronic Offer after the day and time Metro first receives Electronic Offers Metro shall post on Metro's Electronic Procurement System, and updated on a real time basis, the lowest Electronic Offer price or the highest ranking Electronic Offer. At any time before the date and time after which Metro will no longer receive Electronic Offers, a Person may revise its Electronic Offer, except that a Person may not lower its price unless that price is below the then lowest Electronic Offer.

B. A Person may not increase the price set forth in an Electronic Offer after the day and time that Metro first accepts Electronic Offers.

C. A Person may withdraw an Electronic Offer only in compliance with these Administrative Rules.

(9) **Failure of the E-Procurement System.** In the event of a failure of Metro's Electronic Procurement System that interferes with the ability of Persons to submit Electronic Offers, protest or to otherwise participate in the Procurement, Metro may cancel the Procurement in accordance with Administrative Rule 47-0660, or may extend the date and time for receipt of Electronic Offers by providing notice of the extension immediately after the Electronic Procurement System becomes available.

Stat. Auth.: ORS 279A.065 & ORS 279B.055

Stats. Implemented: ORS 279A.065

## **Bid and Proposal Preparation**

### **47-0400 Offer Preparation**

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

Offer prior to Closing in accordance with the requirements for submitting an Offer set forth in the Solicitation Document.

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

(3) **Documents.** An Offeror shall provide Metro with all documents and Descriptive Literature required by the Solicitation Document. If the Solicitation Document instructs Offerors not to include documents or literature, such as warranty provisions, Metro is entitled to disregard those documents in determining whether the Offer is responsive to Metro's request.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

#### **47-0410 Offer Submission**

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

(2) **Identification of Offers.**

(a) To ensure proper identification and handling, Offers must be submitted in a sealed envelope appropriately marked or in the envelope provided by Metro, whichever is applicable. If Metro permits Electronic Offers in the Solicitation Document, the Offeror may submit and identify Electronic Offers in accordance with these Administrative Rules and the instructions set forth in the Solicitation Document.

(b) Metro is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.

(3) **Receipt of Offers.** The Offeror is responsible for ensuring Metro receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer. Offers not so received are late as provided in Administrative Rule 47-0460 and must be returned unopened.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

#### **47-0420 Pre-Offer Conferences**

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

(2) **Required Attendance.** Metro may require attendance at the pre-Offer conference as a condition for making an Offer.

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

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

(5) **Agency Announcement.** Metro must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with Administrative Rule 47-0255(2) or 47-0260(2).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

#### **47-0430 Addenda to Solicitation Document**

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

(2) **Notice and Distribution.** Metro may notify prospective Offerors of Addenda in a manner intended to foster competition and to make prospective Offerors aware of the Addenda. The Solicitation Document must specify how Metro will provide notice of Addenda and how Metro will make the Addenda available before Closing, and at each subsequent step or tier of evaluation if Metro will engage in a multistep competitive Bidding process in accordance with Administrative Rule 47-0257, or a multi-tiered or multistep competitive Proposal process in accordance with Administrative Rule 47-0261.

(3) **Timelines; Extensions.**

(a) Metro shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. Metro may extend the Closing if Metro determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent justified by a countervailing public interest, Metro may not issue Addenda related to an Invitation to Bid or a Request for Proposal less than 72 hours before the Closing unless the Addenda also extends the Closing.

(b) Notwithstanding subsection (3)(a) of this Rule, Addenda that modifies the evaluation criteria, selection process or procedure for any tier of competition under a multistep competitive Bid or a multi-tiered or multistep competitive Proposal issued in accordance with ORS 279B.060(6)(d) and Administrative Rule 47-0261 must be issued no fewer than five (5) Days before the beginning of that tier or step of competition, unless Metro determines that a shorter period is sufficient to allow Offerors to prepare for that tier or step of competition. Metro shall document the factors it considered in making that determination, which may include, without limitation, the scope of the changes to the Solicitation Document, the location of the remaining eligible Proposers, or whether shortening the period between issuing an Addenda and the beginning of the next tier or step of competition favors or disfavors any particular Proposer or Proposers.

(4) **Request for Change or Protest.** Unless a different deadline is set forth in the Addenda, an Offeror may submit a Written request for change or protest to the Addenda, as provided in Administrative Rule 47-0730, by the close of Metro's next business day after issuance of the Addenda, or up to the last day allowed to submit a request for change or protest under Administrative Rule 47-0730, whichever date is later. If the date established in the previous sentence falls after the deadline for receiving protests to the Solicitation Document in accordance with Administrative Rule 47-0730, then Metro may consider an Offeror's request for change or protest to the Addenda only, and Metro may not consider a request for change or protest to matters not added or modified by the Addenda. Notwithstanding any provision of this section (4), Metro is not required to provide a protest period for Addenda issued after initial Closing during a multi-tier or multistep Procurement process conducted pursuant to ORS 279B.055 or ORS 279B.060.

Stat. Auth.: ORS 279A.065 & ORS 279B.060

Stats. Implemented: ORS 279B.060

#### **47-0440 Pre-Closing Modification or Withdrawal of Offers**

(1) **Modifications.** An Offeror may modify its Offer in Writing prior to the Closing. An Offeror must prepare and submit any modification to its Offer to Metro in accordance with Administrative Rule 47-0400 and 47-0410, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror must mark the submitted modification as follows:

- (a) Bid (or Proposal) Modification; and
- (b) Solicitation number (or other identification as specified in the Solicitation Document).

(2) **Withdrawals.**

(a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, Signed by an authorized representative of the Offeror, delivered to the individual and location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by Metro prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in person prior to the Closing, upon presentation of appropriate identification and evidence of authority satisfactory to Metro.

(b) Metro may release an unopened Offer withdrawn under subsection (2)(a) of this Rule to the Offeror or its authorized representative, after voiding any date and time stamp mark.

(c) The Offeror must mark the Written request to withdraw an Offer as follows:

- A. Bid (or Proposal) Withdrawal; and
- B. Solicitation number (or other identification as specified in the Solicitation Document).

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

Stat. Auth.: ORS 279A.065 & ORS 279B.055

Stats. Implemented: ORS 279B.055

#### **47-0450 Receipt, Opening, and Recording of Bids and Proposals; Confidentiality of Formal Offers**

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

(2) **Opening and Recording of Bids.** Metro shall publicly open Bids, including any modifications made pursuant to Administrative Rule 47-0440(1). To the extent practicable, Metro will read aloud the name of each Bidder, and such other information as Metro considers appropriate. However, Metro may withhold from disclosure information in accordance with ORS 279B.055(5)(c) and ORS 279B.060(6). In the case of voluminous Bids, Metro may elect not to read Offers aloud and will only disclose the name of each Bidder.

(3) **Availability.** After Opening, Offers will be available for public inspection except for those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.345(2); ORS 646.461 to 646.475.

(a) To the extent such designation is not in accordance with applicable law, Metro will make those portions available for public inspection. The Offeror must separate information designated as confidential from other non-confidential information at the time of submitting its Offer.

(b) Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and will be publicly available regardless of an Offeror's designation to the contrary. Metro may determine the appropriate charge to be paid for copies made pursuant to public records requests and may request payment for such copies before they are released.

(c) Notwithstanding anything contrary above, Metro is not required to disclose the contents of Proposals until after Metro posts a notice of intent to award pursuant to Administrative Rule 47-0610.

Stat. Auth.: ORS 279A.065 & ORS 279B.055

Stats. Implemented: ORS 279B.055

#### **47-0460 Late Offers, Late Withdrawals and Late Modifications**

(1) **Any Offer received after Closing is late.** An Offeror's request for withdrawal or modification of an Offer received after Closing is late. Metro may not consider late Offers, withdrawals or modifications except as permitted in Administrative Rule 47-0470 or 47-0261.

(2) For manual submissions of Offers, the Metro Regional Center reception desk time clock will be the clock of record and the date and time imprint of that clock on an Offer will determine the timeliness of the submission. Late manual submissions must be returned to the Offeror unopened with a copy of the envelope containing the Metro's time stamp on the Offer retained for the Procurement file.

(3) For Electronic submissions, when permitted, the time shown by Metro as to the date of arrival of the Electronic submission will determine the timeliness of the submission. Late Electronic submissions will be deleted from Metro's files, returned Electronically to the Offeror and the time of the submission and the time of return must be documented in the Procurement file.

(4) Failure to properly return or dispose of a late submission does not mean an Offer or submission arrived on time.

Stat. Auth.: ORS 279A.065 & ORS 279B.055

Stats. Implemented: ORS 279B.055

#### **47-0470 Mistakes**

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

(2) **Treatment of Mistakes.** Metro may not allow an Offeror to correct or withdraw an Offer for an error in judgment. If Metro discovers certain mistakes in an Offer after Closing, but before award of the Contract, Metro may take the following action:

(a) Metro may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:

A. Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;

B. Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and

C. Acknowledge receipt of an Addenda to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addenda and intended to be bound by its terms; or the Addenda involved did not affect price, quality or delivery.

(b) Metro may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms Metro's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example, a missing unit price may be established by dividing the total price for the units by the quantity of units for that item, or a missing or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). Unit prices will prevail over extended prices in the event of a discrepancy between extended prices and unit prices.

(c) Metro may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:

A. The nature of the error;

B. That the error is not a minor informality under this subsection or an error in judgment;

C. That the error cannot be corrected or waived under subsection (b) of this section;

D. That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;

E. That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;

F. That the Offeror will suffer substantial detriment if Metro does not grant the Offeror permission to withdraw the Offer;

G. That Metro's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on Metro or the public it represents; and

H. That the Offeror promptly gave notice of the claimed error to Metro.

(d) The criteria in subsection (2)(c) of this Rule will determine whether Metro will permit an Offeror to withdraw its Offer after Closing. These criteria also will apply to the question of whether Metro will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to Metro based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by Metro, whether by award to the next lowest Responsive and Responsible Bidder or the most Advantageous Responsive and Responsible Proposer, or by resort to a new Solicitation.

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

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

(5) **Written Determination.** All decisions to permit the correction or withdrawal of Offers, or to cancel an award or a Contract based on mistakes, must be supported by a Written determination by Metro that states the reasons for the action taken.

Stat. Auth.: ORS 279A.065 & ORS 279B.055

Stats. Implemented: ORS 279B.055

#### **47-0480 Time for Acceptance**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

#### **47-0490 Extension of Time for Acceptance of Offer**

Metro may request, orally or in Writing, that Offerors extend, in Writing, the time during which Metro may consider their Offer(s). If an Offeror agrees to such extension, the Bid or Proposal will continue as a Firm Offer, irrevocable, valid and binding on the Offeror for the agreed-upon extension period. An extension may occur after the expiration of the initial Offer period.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

### **Qualifications and Duties**

#### **47-0500 Responsibility of Bidders and Proposers**

(1) Before awarding a Contract Metro shall determine that the Bidder submitting the lowest Bid or Proposer submitting the most Advantageous Proposal is Responsible. Metro shall use the standards set forth in ORS 279B.110 and Administrative Rule 47-0640(1)(c)(F) to determine if a Bidder or Proposer is Responsible. In the event Metro determines a Bidder or Proposer is not Responsible it shall prepare a Written determination of non-Responsibility as required by ORS 279B.110 and reject the Offer.

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.110



#### **47-0525 Qualified Products Lists**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.115

#### **47-0550 Prequalification of Prospective Offerors; Pre-negotiation of Contract Terms and Conditions**

(1) Metro may prequalify prospective Offerors to submit Bids or Proposals for Public Contracts to provide particular types of Goods or Services pursuant to ORS 279B.120 and ORS 279B.125.

(2) When Metro permits or requires prequalification of Offerors, Metro shall prepare a prequalification application setting forth the criteria and qualifications for prequalification. Upon receipt of a prequalification application, Metro shall investigate the prospective Offeror as necessary to determine whether the prospective Offeror is qualified. The determination must be made in less than thirty (30) Days, if practicable, if the prospective Offeror requests an early decision to allow the prospective Offeror as much time as possible to prepare a Offer for a Contract that has been advertised. In making its determination, Metro shall consider only the applicable standards of Responsibility listed in Administrative Rule 47-0640(1)(c)(F). Metro shall promptly notify the prospective Offeror whether the prospective Offeror is qualified.

(3) Notwithstanding the prohibition against revocation of prequalification in ORS 279B.120(3), Metro may determine that a prequalified Offeror is not Responsible prior to Contract award.

(4) Metro may pre-negotiate some or all Contract terms and conditions including prospective Proposer Contract forms such as license agreements, maintenance and support agreements or similar documents for use in future Procurements. Such pre-negotiation of Contract terms and conditions (including prospective Proposer forms) may be part of the prequalification process of a Proposer in section (1) or the pre-negotiation may be a separate process and not part of a prequalification process. Unless required as part of the prequalification process, the failure of Metro and the prospective Proposer to reach agreement on pre-negotiated Contract terms and conditions does not prohibit the prospective Proposer from responding to Procurements. Metro may agree to different pre-negotiated Contract terms and conditions with different prospective Proposers. When Metro has pre-negotiated different terms and conditions with Proposers or when permitted, Proposers offer different terms and conditions, Metro may consider the terms and conditions in the Proposal evaluation process.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.015, ORS 279B.120

#### **47-0575 Debarment of Prospective Offerors**

(1) **Generally.** Metro may debar prospective Offerors from consideration for Metro Contracts for a period up to three years for the reasons listed in ORS 279A.110 or ORS 279B.130(2). Metro shall comply with the notice and hearing provisions after providing notice and the opportunity for hearing as set forth in this Rule and ORS 279B.130.

(2) **Notice of Intent to Debar.** Metro may notify the Person in Writing of a proposed debarment personally or by registered or certified mail, return receipt requested. This notice must:

- (a) State that Metro intends to debar the Person;
- (b) Set forth the reasons for the debarment;

(c) Include a statement that the Person has a right to appeal the notice of intent to debar and have a hearing in accordance with Administrative Rule 47-0760 and a statement of the time within which an appeal must be filed;

(d) Include a reference to the particular sections of the statutes and rules involved;

(e) State that the Person may be represented by legal counsel at the hearing.

(3) **Appeal and Hearing.** Appeal of the notice and hearing on the appeal must be in accordance with the provisions of Administrative Rule 47-0760.

(4) **Responsibility.** Notwithstanding the limitation on the term for debarment in ORS 279B.130(1)(b), Metro may determine that a previously debarred Offeror is not Responsible prior to Contract award.

(5) **Imputed Knowledge.** Metro may attribute improper conduct of a Person or its affiliate or affiliates having a contract with a prospective Offeror to the prospective Offeror for purposes of debarment where the impropriety occurred in connection with the Person's duty for or on behalf of, or with the knowledge, approval, or acquiescence of, the prospective Offeror.

(6) **Limited Participation.** Metro may allow a debarred Person to participate in Solicitations and Contracts on a limited basis during the debarment period upon Written determination that participation is Advantageous to Metro. The determination must specify the factors on which it is based and define the extent of the limits imposed.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.130

## **Offer Evaluation and Award**

### **47-0600 Offer Evaluation and award**

(1) **Evaluation.** Metro shall evaluate Offers only as set forth in the Solicitation Document, pursuant to ORS 279B.055(6)(a) and ORS 279B.060(6)(b), and in accordance with applicable law. Metro may not evaluate Offers using any other requirement or criterion.

(a) **Evaluation of Bids; Preferences.**

A. **Nonresident Bidders.** In determining the lowest Responsive Bid, Metro shall apply the reciprocal preference set forth in ORS 279A.120(2)(b) and Administrative Rule 46-0310 for Nonresident Bidders.

B. **Public Printing.** Metro shall, for the purpose of evaluating Bids, apply the public printing preference set forth in ORS 282.210.

C. **Award When Bids are Identical.** If Metro determines that two or more Bids are identical under Administrative Rule 46-0300, Metro shall award a Contract in accordance with the procedures set forth in Administrative Rule 46-0300.

**(b) Evaluation of Proposals.**

A. **Award When Proposals are Identical.** If Metro determines that two or more Proposals are identical under Administrative Rule 46-0300, Metro shall award a Contract in accordance with the procedures set forth in Administrative Rule 46-0300.

B. **Public Printing.** Metro shall for the purpose of evaluating Proposals apply the public printing preference set forth in ORS 282.210.

(c) **Recycled Materials.** When procuring Goods, Metro shall give preference for recycled materials as set forth in ORS 279A.125 and Administrative Rule 46-0320.

**(2) Clarification of Bids or Proposals.** After Opening, Metro may conduct discussions with apparent Responsive Offerors for the purpose of clarification to assure full understanding of the Bids or Proposals. All Bids or Proposals, in Metro's sole discretion, needing clarification must be accorded such an opportunity. Metro shall document clarification of any Offer in the Procurement file.

**(3) Negotiations.**

(a) **Bids.** Metro may not negotiate with any Bidder. After award of the Contract Metro and Contractor may only modify the Contract in accordance with Administrative Rule 47-0800.

(b) **Proposals.** Metro may conduct discussions or negotiate with Proposers only in accordance with ORS 279B.060(6)(b) and Administrative Rule 47-0261. After award of the Contract, Metro and Contractor may only modify the Contract in accordance with Administrative Rule 47-0800.

**(4) Award.**

(a) **General.** If awarded, Metro shall award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the most Advantageous, Responsive Proposal. Metro may award by item, groups of items or the entire Offer provided such award is consistent with the Solicitation Document and in the public interest.

(b) **Multiple Items.** An Invitation to Bid or Request for Proposals may call for pricing of multiple items of similar or related type with award based on individual line item, group total of certain items, a "market basket" of items representative of Metro's expected purchases, or grand total of all items.

**(c) Multiple Awards -- Bids.**

A. Notwithstanding subsection (4)(a) of this Rule, Metro may award multiple Contracts under an Invitation to Bid in accordance with the criteria set forth in the Invitation to Bid. 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 and skills. A notice to prospective Bidders that multiple Contracts may be awarded for any Invitation to Bid may not preclude Metro from awarding a single Contract for such Invitation to Bid.

B. If an Invitation to Bid permits the award of multiple Contracts, Metro shall specify in the Invitation to Bid the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services.

**(d) Multiple Awards -- Proposals.**

A. Notwithstanding subsection (4)(a) of this Rule, Metro may award multiple Contracts under a Request for Proposals in accordance with the criteria set forth in the Request for Proposals. A multiple award may be made if award to two or more Proposers of similar Goods or Services is necessary for adequate availability, delivery, service or product compatibility. A notice to prospective

Proposers that multiple Contracts may be awarded for any Request for Proposals may not preclude Metro from awarding a single Contract for such Request for Proposals.

B. If a Request for Proposals permits the award of multiple Contracts, Metro shall specify in the Request for Proposals the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services, which may include consideration and evaluation of the Contract terms and conditions agreed to by the Contractors.

(e) **Partial awards.** If after evaluation of Offers, Metro determines that an acceptable Offer has been received for only parts of the requirements of the Solicitation Document:

A. Metro may award a Contract for the parts of the Solicitation Document for which acceptable Offers have been received; or

B. Metro may reject all Offers and may issue a new Solicitation Document on the same or revised terms, conditions and Specifications.

(f) **All or None Offers.** Metro may award all or none Offers if the evaluation shows an all or none award to be the lowest cost for Bids or the most Advantageous for Proposals of those submitted.

Stat. Auth.: ORS 279A.065 & ORS 279B.060

Stats. Implemented: ORS 279B.055 & ORS 279B.060

#### **47-0610 Notice of Intent to award**

(1) **Notice of Intent to award.** Metro shall provide Written notice of its intent to award to all Bidders and Proposers pursuant to ORS 279B.135 at least seven (7) Days before the award of a Contract, unless Metro determines that circumstances justify prompt execution of the Contract, in which case Metro may provide a shorter notice period. Metro shall document the specific reasons for the shorter notice period in the Procurement file. A Written notice of intent to award is not required for Contracts awarded as a Small Procurement, an Intermediate Procurement, a sole-source Procurement, an Emergency Procurement or a Special Procurement authorized under Rule 47-0288.

(2) **Finality.** Metro's award may not be final until the later of the following:

(a) The expiration of the protest period provided pursuant to Administrative Rule 47-0740; or

(b) Metro provides Written responses to all timely-filed protests denying the protests and affirming the award.

Stat. Auth.: ORS 279A.065 & ORS 279B.135

Stats. Implemented: ORS 279B.135

#### **47-0620 Documentation of award**

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

(2) **Contents of Award Record.** Metro's record must include:

(a) **For Bids:** Bids, the completed Bid tabulation sheet, and Written justification for any rejection of lower Bids.

(b) **For Proposals:** Proposals, the completed evaluation of the Proposals, Written justification for any rejection of higher scoring Proposals, and if Metro permitted negotiations in accordance with

Administrative Rule 47-0261, Written documentation of the content of any discussions, negotiations, best and final Offers, or any other procedures Metro used to select a Proposer.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

#### **47-0630 Availability of Award Decisions**

(1) **Contract Documents.** To the extent required by the Solicitation Document, Metro shall deliver to the successful Offeror a Contract, Signed purchase order, Price Agreement, or other contractual documents as applicable.

(2) **Availability of Award Decisions.** A Person may obtain tabulations of awarded Bids or evaluation summaries of Proposals for a minimal charge, in person or by submitting to Metro a Written request accompanied by payment. The requesting Person shall provide the Solicitation Document number and, if documents must be mailed, enclose a self-addressed, stamped envelope. In addition, Metro may make available tabulations of Bids and Proposals through the Electronic Procurement System of Metro, email, or Metro's website.

(3) **Availability of Procurement Files.** After issuance of the notice of intent to award, Metro shall make Procurement files available in accordance with applicable law. Metro may withhold from disclosure the public materials included in a Proposal that are exempt or conditionally exempt from disclosure under ORS 192.345 or ORS 192.502 including trade secrets, as defined in ORS 192.345 and information submitted to a public body in confidence, as described in ORS 192.502.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.055 & ORS 279B.060

#### **47-0640 Rejection of an Offer**

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

(a) Metro may reject any Offer when Metro determines that rejection is in the best interest of Metro, as set forth in ORS 279B.100.

(b) Metro shall reject an Offer upon Metro's finding that the Offer:

A. Is contingent on Metro's acceptance of terms and conditions (including Specifications) that materially differ from the Solicitation Document;

B. Takes exception to terms and conditions (including Specifications) set forth in the Solicitation Document;

C. Attempts to prevent public disclosure of matters in contravention of the terms and conditions of the Solicitation Document or in contravention of applicable law;

D. Offers Goods or Services that fail to meet the Specifications of the Solicitation Document;

E. Is late;

F. Is not in substantial compliance with the Solicitation Document;

G. Is not in substantial compliance with all prescribed public Procurement procedures; or

H. Fails to comply with any applicable equity in contracting programs adopted pursuant to Metro's Equity in Contracting Administrative Rules.

- (c) Metro shall reject an Offer upon Metro's finding that the Offeror:
- A. Has not been prequalified under ORS 279B.120 and Metro required mandatory prequalification;
  - B. Has been debarred as set forth in ORS 279B.130;
  - C. Has not met the requirements of ORS 279A.105 regarding subcontracting to COBID Certified Businesses, if required by the Solicitation Document;
  - D. Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;
  - E. Has failed to provide the certification of non-discrimination required under ORS 279A.110(4); or
  - F. Is non-Responsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before awarding a Contract, Metro must have information that indicates that the Offeror meets the applicable standards of Responsibility. To be a Responsible Offeror, Metro must determine, under ORS 279B.110, that the Offeror:
    - (i) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to meet all contractual responsibilities;
    - (ii) Has completed previous contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that to the extent the costs associated with and time available to perform a previous contract were within the Offeror's control, the Offeror stayed within the time and budget allotted for the procurement and otherwise performed the Contract in a satisfactory manner. Metro should carefully scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in Contract performance. In reviewing the Offeror's performance, Metro should determine whether the Offeror's deficient performance was expressly excused under the terms of the Contract, or whether the Offeror took appropriate corrective action. Metro may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. Metro shall make its basis for determining an Offeror non-Responsible under this subparagraph part of the Procurement file as required by ORS 279B.110(2)(b);
    - (iii) Has a satisfactory record of integrity. An Offeror may lack integrity if Metro determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to Metro. Metro may find an Offeror non-Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for debarment under ORS 279B.130 may be used to determine an Offeror's integrity. Metro may find an Offeror non-responsible based on previous convictions of offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the Offeror's performance of a contract or subcontract. Metro shall make its basis for determining that an Offeror is non-Responsible under this subparagraph part of the Procurement file as required by ORS 279B.110(2)(c);
    - (iv) Is legally qualified to contract with Metro. Metro may determine that an Offeror is not legally qualified if (a) the Offeror is unable to warrant that it has all required licenses, insurance

and/or registrations or (b) the Offeror is not legally authorized to do business in the State of Oregon. Provided, however, in no event shall these Rules require Metro investigate, enforce or opine as to which licenses law might apply or otherwise interpret licensing rules specifically enforced by other governing agencies;

(v) Has attested in Writing that the Offeror complied with the tax laws of this state and of political subdivisions of this state; and

(vi) Has supplied all necessary information in connection with the inquiry concerning Responsibility. If the Offeror fails to promptly supply information requested by Metro concerning Responsibility, Metro shall base the determination of Responsibility on any available information, or may find the Offeror non-Responsible.

(2) For the purposes of subparagraph (1)(c)F(v) of this Rule:

(a) The period for which the Offeror must attest that it complied with the applicable tax laws must extend no fewer than six years into the past from the date of the Closing.

(b) Tax laws include, but are not limited to, ORS 305.620, ORS chapters 316, 317 and 318, any tax provisions imposed by a political subdivision that apply to the Offeror or to the performance of the Contract, and any rules and regulations that implement or enforce those tax laws.

(c) Metro may exercise discretion in determining whether a particular form of attesting to compliance with the tax laws is “credible and convenient” under ORS 279B.110(2)(e), taking into consideration the circumstances in which the attestation is made and the consequences of making a false attestation. Therefore, Metro may accept forms of attestation that range from a notarized statement to a less formal document that records the Offeror’s attestation. However, Metro may not accept the certificate of compliance with tax laws required by ORS 305.385 unless that certificate embraces, in addition to the tax laws described in ORS 305.380, the tax laws of political subdivisions.

(3) **Form of Business Entity.** For purposes of this Rule, Metro may investigate any Person submitting an Offer. The investigation may include that Person’s officers, directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this Rule or to apply the debarment provisions of ORS 279B.130.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100, ORS 279B.110, OL 2015, ch 454 (SB 491), OL 2015, ch 539 (SB 675)

#### **47-0650 Rejection of All Offers**

(1) **Rejection.** Metro may reject all Offers as set forth in ORS 279B.100. Metro may notify all Offerors of the rejection of all Offers, along with the reasons for rejection of all Offers.

(2) **Criteria.** Metro may reject all Offers based upon the following criteria:

(a) The content of or an error in the Solicitation Document, or the Procurement process unnecessarily restricted competition for the Contract;

(b) The price, quality or performance presented by the Offerors are too costly or of insufficient quality to justify acceptance of any Offer;

(c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;

(d) Causes other than legitimate market forces threaten the integrity of the competitive process. These causes may include, without limitation, those that tend to limit competition, such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the Solicitation Document;

(e) Metro cancels the Procurement or Solicitation in accordance with Administrative Rule 47-0660; or

(f) Any other circumstance indicating that awarding the Contract would not be in the public interest.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

#### **47-0660 Cancellation, Rejection, Delay or Suspension of a Procurement or Solicitation**

(1) **Cancellation in the Public Interest.** Any Solicitation or Procurement may be canceled, or any or all Bids or Proposals may be rejected in whole or in part, when the cancellation or rejection is in the best interest of Metro, as determined by Metro. Any Solicitation or Procurement described in a Solicitation may be delayed or suspended when the delay or suspension is in the best interest of Metro, as determined by Metro. The reasons for the cancellation or rejection will be made part of the Procurement file. Metro may not be liable to any Bidder, Proposer or other Affected Persons for any loss or expense caused by or resulting from the cancellation or rejection of a Solicitation, Bid, Proposal or award.

(2) **Notice of Cancellation Before Closing.** If Metro cancels a Procurement or Solicitation prior to Closing, Metro shall provide Written notice of cancellation in the same manner that Metro initially provided notice of the Solicitation. Such notice of cancellation must:

(a) Identify the Solicitation Document;

(b) Briefly explain the reason for cancellation; and

(c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.

(3) **Notice of Cancellation After Closing.** If Metro cancels a Procurement or Solicitation after Closing, Metro shall provide Written notice of cancellation to all Offerors who submitted Offers.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

#### **47-0670 Disposition of Offers if Procurement or Solicitation Canceled**

(1) **Prior to Opening.** If Metro cancels a Procurement or Solicitation prior to Opening, Metro shall return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, Metro shall open the Offer to determine the source and then return it to the Offeror. For Electronic Offers, Metro shall delete the Offers from Metro's Electronic Procurement System or information technology system.

(2) **After Opening.** If Metro rejects all Offers or otherwise cancels a Procurement after Opening, Metro will retain all such Offers as part of Metro's Solicitation file. If a Request for Proposals is



cancelled after Proposals are received, Metro may return a Proposal to the Proposer that submitted it. Metro shall keep a list of returned Proposals in the Solicitation file.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

## **Remedies**

### **47-0700 Protests and Judicial Review of Special Procurements**

(1) **Purpose.** An Affected Person may protest the Local Contract Review Board's approval of a Special Procurement. Pursuant to ORS 279B.400(1), before seeking judicial review of the approval of a Special Procurement, an Affected Person must file a Written protest with the Procurement Officer and exhaust all administrative remedies.

(2) **Delivery.** Notwithstanding the requirements for filing a writ of review under ORS Chapter 34 pursuant to ORS 279B.400(4)(a), an Affected Person must deliver a Written protest to the Procurement Officer within seven (7) Days after the first date of public notice of Metro's approval of a Special Procurement, unless a different protest period is provided in the public notice of the approval of a Special Procurement. Metro may not consider a protest submitted after the timeline established for submitting such protest under this Rule.

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

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

(4) **Required Metro Response.** Metro shall take the following actions, as appropriate:

- (a) Inform the Affected Person in Writing if the protest was not timely filed;
- (b) Inform the Affected Person if it failed to meet the requirements of section (3) of this Rule and the reasons for that failure;
- (c) If the protest was timely filed and provides the information required by section (3), issue a decision in Writing and provide that decision to the Affected Person within a reasonable period of time;
- (d) If Metro denies the protest, inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contract Review Board.

(5) **Optional Metro Response.** In addition to the requirements set forth above in section (4), Metro may do any of the following:

- (a) Agree with the protest and take any corrective action necessary;
- (b) Issue a Written response to the protest and provide that decision to the Affected Person;
- (c) Refer the protest and any response from the Procurement Officer to the Local Contract Review Board for decision;
- (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.

(6) **Judicial Review.** An Affected Person may seek judicial review of the Procurement Officer's final decision (or if referred to the Local Contract Review Board by the Procurement Officer, the Board's final decision) denying a protest of the approval of a Special Procurement in accordance with ORS 279B.400. Judicial review is not available if the protest denial is withdrawn by Metro.

Stat. Auth.: ORS 279A.065 & ORS 279B.400

Stats. Implemented: ORS 279B.400

#### **47-0710 Protests and Judicial Review of Sole-Source Procurements**

(1) **Purpose.** For sole-source Procurements requiring public notice, an Affected Person may protest the determination of the Procurement Officer or the Board under Administrative Rule 47-0275 that the Goods or Services or class of Goods or Services are available from only one source. Pursuant to ORS 279B.420(3)(f), before seeking judicial review, an Affected Person must file a Written protest with the Procurement Officer and exhaust all administrative remedies.

(2) **Delivery.** Unless otherwise specified in the public notice of the sole-source Procurement, an Affected Person must deliver a Written protest to the Procurement Officer within seven (7) Days after the first date Metro posts public notice that it will make a sole source purchase. The Procurement Officer may not consider a protest submitted after the timeline established for submitting such protest under this Rule or such different time period as may be provided in the Notice of Intent to make a Sole Source purchase.

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

- (a) A detailed statement of the legal and factual grounds for the protest;
- (b) Evidence or supporting documentation that supports the grounds on which the protest is based;
- (c) A description of the resulting harm to the Affected Person; and
- (d) The relief requested.

(4) **Required Metro Response.** Metro shall take the following actions, as appropriate:

- (a) Inform the Affected Person in Writing if the protest was not timely filed;
- (b) Inform the Affected Person if it failed to meet the requirements of set forth above in section (3) of this Rule and the reasons for that failure;
- (c) If the protest was timely filed and provides the information required by section (3) of this Rule, issue a decision in Writing and provide that decision to the Affected Person within a reasonable period of time;
- (d) If Metro denies the protest, inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contracting Board.

(5) **Optional Metro Response.** In addition to the requirements of subsection (4), Metro may do any of the following:

- (a) Agree with the protest and take any corrective action necessary;
- (b) Issue a Written response to the protest and provide that decision to the Affected Person;
- (c) Refer the protest and any response from the Procurement Officer to the Local Contract Review Board for decision;

(d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.

(6) **Judicial Review.** An Affected Person may not seek judicial review of Metro's approval of a Sole Source Procurement unless it has complied fully with the protest requirements of this Rule and received a final decision denying the protest either from the Procurement Officer of the Local Contract Review Board if referred to the Board by the Procurement Officer. Judicial review of the sole-source Procurement protest will be in accordance with ORS 279B.420. Judicial review is not available if Metro elects not to make a Sole Source Procurement.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.075

#### **47-0720 Protests and Judicial Review of Multi-tiered and Multistep Solicitations**

(1) **Purpose.** An Affected Offeror may protest exclusion from the Competitive Range or from subsequent tiers or steps of a Solicitation in accordance with the applicable Solicitation Document. When such a protest is permitted by the Solicitation Document, then pursuant to ORS 279B.420(3)(f), before seeking judicial review, an Affected Offeror must file a Written protest with Metro and exhaust all administrative remedies.

(2) **Basis for Protest.** An Affected Offeror may protest its exclusion from a tier or step of competition only if:

- (a) The Affected Offeror is Responsible and submitted a Responsive Offer;
- (b) Metro made a mistake that, if corrected, would have made the Affected Person eligible to participate in the next stage of the Procurement;
- (c) In the case of a Request for Proposals, the exercise of judgment used by the evaluation committee members in scoring Written Proposals and oral interviews, including the use of outside expertise, was biased or not exercised in good faith. The unbiased, good faith judgment of Evaluation is not grounds for protest. The unbiased, good faith judgment of evaluation committee members will not be a basis for sustaining a protest.

(3) **Delivery.** Unless otherwise specified in the Solicitation Document, an Affected Offeror must deliver a Written protest to the Procurement Officer within seven (7) Days after issuance of the notice of the Competitive Range or notice of subsequent tiers or steps.

(4) **Content of Protest.** The Affected Offeror's protest must be in Writing and must include the following information:

- (a) Sufficient information to identify the errors that led to the Affected Person's exclusion from the Competitive Range or from subsequent stages of a Procurement;
- (b) A detailed statement of all the legal and factual grounds for the protest;
- (c) Evidence or supporting documentation that supports the grounds on which the protest is based;
- (d) A description of the resulting harm to the Affected Person; and
- (e) The relief requested.

(5) **Required Metro Response.** Metro shall take the following actions, as appropriate:

- (a) Inform the Affected Offeror in Writing if the protest was not timely filed;
  - (b) Inform the Affected Offeror if it failed to meet the requirements set forth above in section (4) of this Rule and the reasons for that failure;
  - (c) If the protest was timely filed and provides the information required by section (4) of this Rule, issue a decision in Writing and provide that decision to the Affected Offeror within a reasonable period of time.
  - (d) If Metro denies the protest, inform the Affected Offeror if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contracting Board.
- (6) **Optional Metro Response.** In addition to the requirements of subsection (5) of this Rule, the Procurement Officer may do any of the following:
- (a) Agree with the protest and take any corrective action necessary;
  - (b) Issue a Written response to the protest and provide that decision to the Affected Person;
  - (c) Refer the protest and any response by the Procurement Officer to the Local Contract Review Board for decision; or
  - (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.
- (7) **Judicial Review.** Judicial review of Metro's decision relating to a multi-tiered or multistep Solicitation protest must be in accordance with ORS 279B.420. An Affected Person may not seek judicial review unless it has complied fully with the protest requirements of this Rule and has exercised all administrative appeal rights. Judicial review is not available if Metro elects not to make a Procurement.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

#### **47-0730 Protests and Judicial Review of Solicitations**

- (1) **Purpose.** A prospective Offeror may protest the Procurement process or the Solicitation Document for a Contract solicited under ORS 279B.055, 279B.060 and 279B.085 as set forth in ORS 279B.405(2). Pursuant to ORS 279B.405(3), before seeking judicial review, a prospective Offeror must file a Written protest with Metro and exhaust all administrative remedies.
- (2) **Delivery.** Unless otherwise specified in the Solicitation Document, a prospective Offeror must deliver a Written protest to the Procurement Officer within seven (7) Days after a Solicitation Document is first advertised. Metro may not consider a protest submitted after the timeline established for submitting such protest under this Rule or such different time period as may be provided in the Solicitation Document. A Written Protest of any Addenda must be submitted by the close of the next business day after issuance of the Addenda.
- (3) **Content of Protest.** In addition to the information required by ORS 279B.405(4), a prospective Offeror's Written protest shall include a statement of the desired changes to the Procurement process or the Solicitation Document that the prospective Offeror believes will remedy the conditions upon which the prospective Offeror based its protest.
- (4) **Required Metro Response.** Metro shall take the following actions, as appropriate:
  - (a) Inform the Affected Person in Writing if the protest was not timely filed;

(b) Inform the Affected Person if it failed to meet the requirements of set forth above in section (3) of this Rule and the reasons for that failure;

(c) If the protest was timely filed and provides the information required by section (3) of this Rule, issue a decision in Writing and provide that decision to the Affected Person no less than three (3) business days before Offers are due, unless a Written determination is made by Metro that circumstances exist that require a shorter time limit;

(d) If Metro denies the protest, inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contracting Board. When the decision is final, the Affected Person must seek judicial review before the Opening of Bids, Proposals or Offers.

(5) **Optional Metro Response.** In addition to the requirements of subsection (4), Metro may do any of the following:

(a) Agree with the protest and take any corrective action necessary;

(b) Issue a Written response to the protest and provide that decision to the Affected Person;

(c) Refer the protest and any response by the Procurement Officer to the Local Contract Review Board for decision;

(d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest, including without limitation, extending Closing if Metro determines an extension is necessary to consider the protest and to issue an Addenda to the Solicitation Document.

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

(7) **Judicial Review.** Judicial review of Metro's decision relating to a Solicitation protest must be in accordance with ORS 279B.405. An Affected Person may not seek judicial review unless it has complied fully with the protest requirements of this section and exercised all administrative appeal rights. Judicial review is not available if Metro withdraws the Solicitation Document that was the subject of the protest.

Stat. Auth.: ORS 279A.065 & ORS 279B.405

Stats. Implemented: ORS 279B.405

#### **47-0740 Protests and Judicial Review of Contract Award**

(1) **Generally.** An Offeror may protest the award of a Contract, or the intent to award of a Contract, whichever occurs first, only if the conditions set forth in ORS 279B.410(1) are satisfied. In the case of a Request for Proposals, disagreement with the judgment exercised in scoring by evaluators is not a basis for protest.

(2) **Exhaustion of Remedies.** An Offeror must file a Written protest with the Purchasing Officer and exhaust all administrative remedies before seeking judicial review of Metro's Contract award decision.

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

(4) **Content of Protest.** An Offeror's Written protest shall include the following information:

(a) Sufficient information to identify the award that is the subject of the protest;

(b) A detailed statement of all the legal and factual grounds for the protest (see section (1) of this Rule);

(c) Evidence or supporting documentation that supports the grounds on which the protest is based;

(d) A description of the resulting harm to the Affected Person; and

(e) The relief requested.

(5) **Required Metro Response.** Metro shall take the following actions, as appropriate:

(a) Inform the Affected Person in Writing if the protest was not timely filed;

(b) Inform the Affected Person if it failed to meet the content requirements set forth above in section (4) of this Rule the reasons for that failure;

(c) If the protest was timely filed and provides the information required by ORS 279B.410(2), issue a decision in Writing and provide that decision to the Affected Person within a reasonable time of the receipt of the protest;

(d) If Metro denies the protest, inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contract Review Board.

(6) **Optional Metro Response.** In addition to the requirements of section (5) above, Metro may do any of the following:

(a) Agree with the protest and issue a revised Notice of Intent to award or take any other corrective action that may be necessary to ensure that the Contract is awarded to the appropriate Offeror;

(b) Issue a Written response to the protest and provide that decision to the Affected Person;

(c) Refer the protest and any response by the Procurement Officer to the Local Contract Review Board for decision;

(d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.

(7) **Judicial Review.** Judicial review of Metro's decision relating to a Contract award must be in accordance with ORS 279B.415 and this Rule. An Affected Person may not seek judicial review of a Contract award unless it has complied fully with the protest requirements of this section. Judicial review is not available if Metro elects not to make an award.

Stat. Auth.: ORS 279A.065 & ORS 279B.410

Stats. Implemented: ORS 279B.410 & ORS 279B.415

#### **47-0745 Protests and Judicial Review of Qualified Products List Decisions**

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

(2) **Delivery.** Unless otherwise stated in Metro's notice to prospective Offerors of the opportunity to submit Goods for inclusion on the qualified products list, a prospective Offeror must deliver a Written

protest to Metro within seven (7) Days after issuance of Metro's decision to exclude the prospective Offeror's Goods from the qualified products list.

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

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

(5) **Judicial Review.** Judicial review of Metro's decision relating to a qualified products list protest must be in accordance with ORS 279B.420.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.115

#### **47-0750 Judicial Review of Other Violations**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.420

#### **47-0760 Review of Prequalification and Debarment Decisions**

(1) Review of Metro's prequalification and debarment decisions is as set forth in ORS 279B.425.

(2) The Local Contract Review Board hereby delegates its authority to the Chief Operating Officer for the purposes of receiving notice that a Person has appealed. Upon receipt of the notice the Chief Operating Officer may notify the Person appealing of a time and place of a hearing designed to consider the appeal within thirty (30) Days or a date mutually agreed upon by both parties.

(3) The Local Contract Review Board delegates its authority to conduct a hearing to the Chief Operating Officer. The Chief Operating Officer may subdelegate the authority to conduct a hearing to any person the Chief Operating Officer deems appropriate, including the Procurement Officer.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.425

#### **47-0800 Amendments to Contracts and Price Agreements**

(1) **Generally.** Metro may amend a Contract reasonably related to the scope of work under the original Contract without additional competition.

(2) **Contract Increases.** Contract amendments for additional Goods and Services are allowed under the following circumstances, without any additional approvals:

(a) The original Contract was issued following a competitive Solicitation or alternative process (e.g. as a Special Procurement or Sole Source Procurement) and unit prices or additive alternates were

provided that established the cost basis for the additional Goods or Services and a binding obligation exists on the parties covering the terms and conditions of the additional work;

(b) The original Contract was issued pursuant to a declaration of Emergency, in accordance with Rule 47-0280;

(c) The additional Goods or Services are required by reason of existing or new laws, rules, regulations or ordinances of federal, state or local agencies, that affect performance of the original Contract;

(d) The amendment resolves a bona fide dispute with the Contractor and is within the general scope of the original Contract; or

(e) The aggregate increase resulting from all amendments to the Contract does not exceed twenty-five percent (25%) of the original Contract price. Escalation clauses agreed to in the original Contract (e.g. COLA increases) are excluded from the 25% calculation.

(3) **Limits on Contract Increases; Authority.** If the circumstances set forth in section (2) of this Rule are not applicable, Metro may nonetheless amend a Contract for additional Goods and Services if the amendment is Advantageous to Metro. For Contracts that exceed \$250,000, such a determination shall be made by the Chief Operating Officer prior to authorization of delivery of goods or performance of the services. All Contract Amendments processed under this section (3) shall be treated as an Unauthorized Purchase in accordance with Rule 46-0200.

(4) **Renegotiated Contract.** Metro may renegotiate the terms and conditions of a Contract without additional competition and amend a Contract if it is Advantageous subject to the following conditions:

(a) The Goods or Services to be provided under the amended Contract are the same as the Goods or Services to be provided under the unamended Contract; and

(b) Metro determines that, with all things considered, the amended Contract is at least as favorable to Metro as the unamended Contract; and

(c) The amended Contract does not have a total term greater than allowed in the Solicitation Documents, if any, or if no Solicitation Documents, as described in the sole source notice or the approved Special Procurement, if any, after combining the initial and extended terms. For example, a one-year Contract described as renewable each year for up to four additional years, may be renegotiated as a two to five-year Contract, but not beyond a total of five years.

If the circumstances set forth in section (4) of this Rule are not applicable, Metro may nonetheless amend and renegotiate the terms of the Contract if the amendment is Advantageous to Metro and the amendment is approved by the Local Contract Review Board.

(5) **Small or Intermediate Contracts.** Metro may amend a Contract awarded as a small or Intermediate Procurement pursuant Rule 47-0265 for Small Procurements or Rule 47-0270 for Intermediate Procurements.

(6) **Emergency Contracts.** Metro may amend a Contract awarded as an Emergency Procurement if the Emergency justification for entering into the Contract still exists, and the amendment is necessary to address the continuing Emergency.

(7) **Price Agreements.** Metro may amend or terminate a Price Agreement as follows:

(a) As permitted by the Price Agreement;

(b) As permitted by this Rule;



(c) Metro fails to receive funding, appropriations, limitations, allotments or other expenditure authority, including the continuation of program operating authority sufficient, as determined in the discretion of Metro, to sustain purchases at the levels contemplated at the time of contracting;

(d) Any change in law or program termination that makes purchases under the price agreement no longer authorized or appropriate for Metro's use; or

(e) As otherwise permitted by applicable law.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279B.140

#### **47-0820 Records Maintenance; Right to Audit Records**

(1) Contractors and subcontractors shall maintain all fiscal records relating to a Contract executed with Metro in accordance with generally accepted accounting principles. In addition, Contractors and subcontractors shall maintain any other records necessary to clearly document:

(a) Contract performance, including, but not limited to, compliance with plans and specifications, compliance with fair contracting and employment programs, compliance with Oregon law on payment of wages and accelerated payment provisions, and any and all requirements imposed on the Contractor or subcontractor under the Contract or subcontract;

(b) Any claims arising from or relating to their performance under a Contract;

(c) Any cost and pricing data; and,

(d) Payment to suppliers and subcontractors.

(2) Such records must be maintained for a period of six years from the date of final completion of the Contract or until the conclusion of any audit, controversy or litigation arising out of or related to a Contract, whichever is longer.

(3) Contractors and subcontractors shall make all their records available to Metro (and its authorized representatives, including but not limited to the staff of any Metro department and the Metro Auditor) within the boundaries of the Metro region, at reasonable times and places regardless of whether litigation has been filed on any claims. If the records are not made available within the boundaries of Metro, the Contractor or subcontractor shall pay all costs for Metro employees, and any necessary consultants hired by Metro, including travel, per diem costs, salary, and any other expenses incurred by Metro in sending its employees or consultants to examine, audit, inspect, and copy those records. If the Contractor elects to have such records outside these boundaries, the costs paid by the Contractor to Metro for inspection, auditing, examining and copying those records are not recoverable costs in any legal proceeding.

(4) Metro and its authorized representatives (including but not limited to the staff of any Metro department and the Metro Auditor) are entitled to inspect, examine, copy and audit the books and records of any Contractor or subcontractor upon request by Metro for any reason, including any documents that may be placed in escrow according to any Contract requirements. The records that may be inspected and copied include financial documents of the Contractor, including tax returns and financial statements. Metro will keep such documents confidential to the extent permitted by Oregon law, subject to subsection 5 below.

- (5) Contractors and subcontractors shall disclose the records requested by Metro and agree to their admission as evidence in any proceeding between the parties, including, but not limited to a court proceeding, arbitration, mediation or other alternative dispute resolution process.
- (6) In the event that the records disclose that Metro is owed money or establishes that any portion of any claim made against Metro is not warranted, the Contractor or subcontractor shall pay all costs incurred by Metro in conducting the audit and inspection. Such costs may be withheld from any sum due or that becomes due to the Contractor by Metro.
- (7) Failure of the Contractor or subcontractor to keep or disclose records as required may result in disqualification as a Bidder or Proposer for future Metro Contracts or may result in a finding that the Contractor or subcontractor is not a Responsible Bidder or Proposer.

**METRO  
LOCAL CONTRACT REVIEW BOARD  
ADMINISTRATIVE RULES**

**DIVISION 48 - CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING, PHOTOGRAMMETRIC  
MAPPING, TRANSPORTATION PLANNING, LAND SURVEYING AND RELATED SERVICES CONTRACTS**

**48-0100     Application**

These Division 48 Rules implement ORS 279C and apply to the screening and selection of Architects, Engineers, Photogrammetrists, Transportation Planners, Land Surveyors and providers of Related Services. These Rules set forth the procedures through which Metro will select consultants to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services.

Stat. Auth.: ORS 279A.065; ORS 279A.070  
Stats. Implemented: ORS 279A.065

**48-0110     Definitions**

The definitions for this Division 48 are found in Division 10, except the following definitions apply only to this Division 48:

- (1) **"Consultant"** means an Architect, Engineer, Photogrammetrist, Transportation Planner, Land Surveyor or provider of Related Services, as those terms are defined in ORS 279C.100. A Consultant includes a business entity that employs Architects, Engineers, Photogrammetrists, Transportation Planners, Land Surveyors or providers of Related Services, or any combination of the foregoing.
- (2) **"Estimated Fee"** means Metro's reasonably projected fee to be paid for a Consultant's services under the anticipated Contract, excluding all anticipated reimbursable or other non-professional fee expenses. The Estimated Fee is used solely to determine the applicable Contract Solicitation method and is distinct from the total amount payable under the Contract.
- (3) **"Formal Selection Procedure"** means the Consultant selection method provided for under Rule 48-0220.
- (4) **"Intermediate Selection Procedure"** means the Consultant selection method provided for under Rule 48-0210.
- (5) **"Price Agreement,"** for purposes of this Division 48, is limited to mean an agreement related to the procurement of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services, under agreed-upon terms and conditions, including, but not limited to terms and conditions of later work orders or task orders for Project-specific Services, and which may include Consultant compensation information, with:
  - (a) No guarantee of a minimum or maximum purchase; or
  - (b) An initial work order, task order or minimum purchase, combined with a continuing Consultant obligation to provide Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services in which Metro does not guarantee a minimum or maximum additional purchase.

(6) **"Project"** means all components of Metro's planned undertaking that give rise to the need for a Consultant's Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services under a Contract.

(7) **"Proposer"** means a Consultant who submits a Proposal to Metro in response to a Request for Proposals.

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

(9) **"Transportation Planning Services"** are defined in ORS 279C.100. Transportation Planning Services include only Project-specific transportation planning involved in the preparation of categorical exclusions, environmental assessments, environmental impact statements and other documents required for compliance with the National Environmental Policy Act, 42 USC 4321 et. seq. Transportation Planning Services do not include transportation planning for corridor plans, transportation system plans, interchange area management plans, refinement plans and other transportation plans not directly associated with an individual Project that will require compliance with the National Environmental Policy Act, 42 USC 4321 et. seq. Transportation Planning Services also do not include transportation planning for Projects not subject to the National Environmental Policy Act, 42 USC 4321 et. seq.

Stat. Auth.: ORS 279A.065, ORS 279A.070

Stats. Implemented: ORS 279A.065

#### **48-0120 List of Pre-Qualified Consultants; Performance Record**

(1) Metro may conduct Request for Qualifications process to compile a list of Consultants who are interested in providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services. The RFQu will request prospective Consultants provide Metro with statements of qualifications and related performance information. Metro may use this information to create a list of pre-qualified Consultants.

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

(3) Metro shall keep a record of all Contracts and will make these records available to the public consistent with the requirements of the Oregon Public Records Law (ORS 192.410 to 192.505).

Stat. Auth.: ORS 279A.065(6)(a); ORS 279A.070; Or. Laws 2011, chapter 458; and Or. Laws 2013, chapter 522

Stats. Implemented: ORS 279A.065; ORS 279C.110; Or. Laws 2011, chapter 458; and Or. Laws 2013, chapter 522

**48-0130 Applicable Selection Procedures; Pricing Information; Disclosure of Proposals; Conflicts of Interest**

(1) When selecting the most qualified Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Metro shall follow the applicable selection procedure under either Administrative Rule 48-0200 (Direct Appointment Procedure), 48-0210 (Intermediate Selection Procedure) or 48-0220 (Formal Selection Procedure). When selecting a Consultant under this section(1), Metro may solicit or use pricing policies and pricing Proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, to determine a Consultant's compensation **only after** Metro has selected the most qualified Consultant in accordance with the applicable selection procedure.

(2) The restriction on Metro's Solicitation or use of pricing policies, pricing Proposals or other pricing information does not apply to selection procedures used by Metro to select a Consultant when (a) the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services for the Project do not exceed \$100,000 (b) the Consultant will be performing Related Services or (c) in an Emergency.

(3) Metro is not required to follow the selection procedures in section (1) of this Rule, when Metro has established Price Agreements with more than one Consultant and is selecting a single Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services under an individual work order or task order. Provided, however, the criteria and procedures Metro uses to select a single Consultant, when Metro has established Price Agreements with more than one Consultant, must meet the requirements of Administrative Rule 48-0270 (Price Agreements).

(4) For purposes of these Division 48 Rules, a "mixed" Contract is one requiring the Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services and also provide other Services or other related Goods under the Contract. Metro's classification of a procurement that will involve a "mixed" Contract will be determined by the predominant purpose of the Contract. Metro will determine the predominant purpose of the Contract by determining which of the Services involves the majority of the total Estimated Fee to be paid under the Contract. If the majority of the total Estimated Fee to be paid under the Contract is for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Metro shall comply with the requirements of ORS 279C.110 and Administrative Rule 48-0130(1). If majority of the total Estimated Fee to be paid under the Contract is for Related Services, Metro shall comply with the requirements of ORS 279C.120 and Administrative Rule 48-0130(2). If the majority of the total Estimated Fee to be paid under the Contract is for some other Services or Goods under the Public Contracting State Code, Metro shall comply with the applicable provisions of the Public Contracting State Code and Divisions 46, 47 and 49 of these Rules that match the predominant purpose of the Contract.

(5) Consistent with the requirements of ORS 279C.107 and the remaining requirements of ORS 279C.100, 279C.105 and 279C.110 through 279C.125, subsections (a) through (c) apply to Proposals received by Metro for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services:

(a) For purposes of Proposals received by Metro under Administrative Rule 48-0200 (Direct Appointment Procedure), a formal notice of intent to award is not required. As a result, while Metro may make Proposals under 48-0200 (Direct Appointment Procedure) open for public inspection following Metro's decision to begin Contract negotiations with the selected Consultant, 48-0200

Proposals are not required to be open for public inspection until after Metro has executed a Contract with the selected Consultant.

(b) In the limited circumstances permitted by ORS 279C.110, 279C.115 and 279C.120, where Metro is conducting discussions or negotiations with Proposers who submit Proposals that Metro has determined to be closely competitive or to have a reasonable chance of being selected for award, Metro may open Proposals so as to avoid disclosure of Proposal contents to competing Proposers, consistent with the requirements of ORS 279C.107. Otherwise, Metro may open Proposals in such a way as to avoid disclosure of the contents until after Metro executes a Contract with the selected Consultant. If Metro determines that it is in the best interest of Metro to do so, Metro may make Proposals available for public inspection following Metro's issuance of a notice of intent to award a Contract to a Consultant; and

(c) Disclosure of Proposals and Proposal information is otherwise governed by ORS 279C.107.

(6) As required by ORS 279C.307, pertaining to requirements to ensure the objectivity and independence of providers of certain Personal Services which are procured under ORS chapter 279C, Metro may not:

(a) Procure the Personal Services identified in ORS 279C.307 from a Contractor or an affiliate of a Contractor who is a party to the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the Personal Services; or

(b) Procure the Personal Services identified in ORS 279C.307 through the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the Personal Services.

(7) The requirements of ORS 279C.307 and section (6) of this Rule apply in the following circumstances, except as provided in section (8) of this Rule:

(a) Metro requires the Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Public Contract or performance under a Public Contract that is subject to ORS chapter 279C. A Public Contract that is "subject to ORS chapter 279C" includes a Public Contract for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, a Public Contract for Related Services or a Public Contract for construction services under ORS chapter 279C.

(b) The Procurements of Personal Services subject to the restrictions of ORS 279C.307 include, but are not limited to, the following:

A. Procurements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, which involve overseeing or monitoring the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C;

B. Procurements for commissioning services, which involve monitoring, inspecting, evaluating or otherwise overseeing the performance of a Contractor providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C;

C. Procurements for project management services, which involve administration, management, monitoring, inspecting, evaluating compliance with or otherwise overseeing the performance of a Contractor providing Architectural, Engineering, Photogrammetric Mapping,

Transportation Planning or Land Surveying Services, construction services subject to ORS chapter 279C, commissioning services or other Related Services for a Project;

D. Procurements for special inspections and testing services, which involve inspecting, testing or otherwise overseeing the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C; and

E. Procurements for other Related Services or Personal Services, which involve administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing the Public Contracts described in section (7)(a) of this Rule.

(8) The restrictions of ORS 279C.307 do not apply in the following circumstances, except as further specified below:

(a) To Metro's Procurement of both design services and construction services through a single "Design-Build" Procurement, as that term is defined in Administrative Rule 49-0610. Such a Design-Build Procurement includes a Procurement under an Energy Savings Performance Contract, as defined in ORS 279A.010. Provided, however, the restrictions of ORS 279C.307 do apply to Metro's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Design-Build Contract or performance under such a Contract resulting from a Design-Build Procurement; and

(b) To Metro's Procurement of both pre-construction services and construction services through a single Procurement of Construction Manager/General Contractor Services, as that term is defined in ORS 279C.332(3). Provided, however, the restrictions of ORS 279C.307 do apply to Metro's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Construction Manager/General Contractor Services Contract or performance under such a Contract resulting from a Procurement of Construction Manager/General Contractor Services.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279A.065, 279C.100-279C.125, OL 2009, ch. 880, sec. 11, OL 2011, ch 458

## **Selection Procedures**

### **48-0200 Direct Appointment Procedure**

(1) Metro may enter into a Contract directly with a Consultant without following the selection procedures set forth elsewhere in these Rules if:

- (a) **Emergency.** Metro finds that an Emergency exists;
- (b) **Small Estimated Fee.** The Estimated Fee to be paid under the Contract does not exceed \$25,000;
- (c) **Pre-Qualified Consultant.** The Consultant has been pre-qualified pursuant to Metro's process described in Rule 48-0120 and the Estimated Fee to be paid under the Contract does not exceed \$100,000; or
- (d) **Continuation of Project.** Where the Contract meets the following requirements:

A. The services consist of or are related to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services that have been substantially described, planned or otherwise previously studied in an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services rendered under the earlier Contract;

B. Metro used either the formal selection procedure under Administrative Rule 48-0220 (Formal Selection Procedure) or the Intermediate selection procedure applicable to selection of the Consultant at the time of original selection to select the Consultant for the earlier Contract.

(2) Metro may select a Consultant for a Contract awarded under (1)(a), (1)(b), or (1)(d) above from the following sources:

- (a) Metro's current list of pre-qualified Consultants created under Administrative Rule 48-0120;
- (b) A list of Consultants from another public jurisdiction; or
- (c) Consultants offering the required Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services that Metro reasonably can identify under the circumstances.

(3) Metro shall direct negotiations with a Consultant selected under this Rule toward obtaining Written agreement on:

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

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279C.110 & 279C.115, OL 2011, ch 458

#### **48-0210 Intermediate Selection Procedure**

(1) Metro may use the Intermediate Selection Procedure described in this Rule to obtain a Contract if the Estimated Fee is expected not to exceed \$250,000.

(2) When using the Intermediate Selection Procedure on the basis of qualifications alone or, for Related Services, on the basis of price and qualifications Metro shall:

(a) Create a written Intermediate Request for Proposals that includes at a minimum the following:

A. A description of the Project for which a Consultant's Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services are needed and a description of the Architectural, Engineering, Photogrammetric Mapping, Transportation



Planning, or Land Surveying Services or Related Services that will be required under the resulting Contract;

- B. The anticipated Contract performance schedule;
- C. Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including construction services;
- D. The date and time Intermediate Proposals are due and other directions for submitting Intermediate Proposals;
- E. Criteria upon which the most qualified Consultant will be selected. Selection criteria may include, but are not limited to, the following:
  - (i) The amount and type of resources and number of experienced staff the Consultant has committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the Intermediate Request for Proposals within the applicable time limits, including the current and projected workloads of such staff and the proportion of time such staff would have available for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services;
  - (ii) Proposed management techniques for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the Intermediate Request for Proposals;
  - (iii) A Consultant's capability, experience and past performance history and record in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services, including but not limited to quality of work, ability to meet schedules, cost control methods and Contract administration practices;
  - (iv) A Consultant's approach to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the Intermediate Request for Proposals and design philosophy, if applicable;
  - (v) A Consultant's geographic proximity to and familiarity with the physical location of the Project;
  - (vi) Volume of work, if any, previously awarded to a Consultant, with the objective of effecting equitable distribution of Contracts among qualified Consultants, provided such distribution does not violate the principle of selecting the most qualified Consultant for the type of professional services required;
  - (vii) A Consultant's ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses; and
  - (viii) If Metro is selecting a Consultant to provide Related Services, pricing policies and pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead.
- F. A Statement that Proposers responding to the Intermediate Request for Proposals do so solely at their expense, and Metro is not responsible for any Proposer expenses associated with the Intermediate Request for Proposals;
  - (b) Provide the Intermediate Request for Proposals to a minimum of three (3) prospective Consultants. In accordance with Metro's Equity in Contracting Administrative Rules, Departments must

also complete a COBID search and, if available, one Minority-owned business, one Women-owned business, one Emerging Small Business and one Service-disabled Veteran business must be solicited.

(c) Review and rank all Intermediate Proposals received according to the criteria set forth in the Intermediate Request for Proposals.

(3) When using the Intermediate Selection Procedure for Related Services on the basis of price Proposals and other pricing information Metro will also include pricing criteria upon which the highest ranked Consultant will be selected. Pricing criteria may include, but are not limited to, the total price for the Related Services described in the Intermediate Request for Proposals, Consultant pricing policies and other pricing information such as the Consultant's estimated number of staff hours needed to perform the Related Services described in the Intermediate Request for Proposals, expenses, hourly rates and overhead.

(4) If Metro does not cancel the Intermediate Request for Proposals after it reviews the Intermediate Proposals and ranks each Intermediate Proposal, Metro will begin negotiating a Contract with the highest ranked Consultant. Metro will direct Contract negotiations toward obtaining written agreement on the following:

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

(5) Metro shall, either orally or in Writing, formally terminate negotiations with the highest ranked Intermediate Proposer, if Metro and the proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. Metro may thereafter negotiate with the second ranked Intermediate Proposer, and if necessary, with the third ranked proposer, until negotiations result in a Contract. If negotiations with any of the top three (3) Intermediate Proposers do not result in a Contract within a reasonable amount of time, Metro may end the particular intermediate Solicitation and thereafter may proceed with a new intermediate Solicitation under this Rule or proceed with a formal Solicitation under Administrative Rule 48-0220 (Formal Selection Procedure).

(6) Metro must terminate the Intermediate Selection Procedure and proceed with the formal selection procedure under Administrative Rule 48-0220 if the scope of the anticipated Contract is revised during negotiations so that the Estimated Fee will exceed \$250,000.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279C.110, OL 2011, ch 458

#### **48-0220 Formal Selection Procedure**

(1) **General.** Metro shall use the formal selection procedure described in this Rule to select a Consultant if the Consultant cannot be selected under either 48-0200 (Direct Appointment Procedure) or under 48-0210 (Intermediate Selection Procedure). The formal selection procedure described in this Rule may otherwise be used at Metro's discretion.

(2) **Advertisement.** When using the formal selection procedure Metro shall obtain Contracts through public advertisement of RFPs, or Requests for Qualifications followed by RFPs. Advertisement of each RFP and RFQu must be in accordance with the requirements of Rule 47-0300.

(a) Metro shall publish the advertisement within a reasonable time before the deadline for the Proposal submission or response to the RFQu or RFP, but in no event fewer than fourteen (14) Days before the Closing date set forth in the RFQu or RFP.

(b) Metro shall include a brief description of the following items in the advertisement.

- A. The Project;
- B. A description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services Metro seeks;
- C. How and where Consultants may obtain a copy of the RFQu or RFP; and
- D. The deadline for submitting a Proposal or response to the RFQu or RFP.

(3) **Request for Qualifications Procedure.** Metro may use the Request for Qualifications procedure to evaluate potential Consultants and establish a short list of qualified Consultants to whom Metro may issue an RFP for some or all of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFQu.

(c) Metro shall include the following, at a minimum, in each RFQu:

- A. A brief description of the Project for which Metro is seeking a Consultant;
- B. A description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services Metro seeks for the Project;
- C. Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including but not limited to construction services;
- D. The deadline for submitting a response to the RFQu;
- E. A description of required Consultant qualifications for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services Metro seeks;
- F. The RFQu evaluation criteria, including weights, points or other classifications applicable to each criterion;
- G. A statement whether or not Metro will hold a pre-qualification meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFQu and if a pre-qualification meeting will be held, the location of the meeting and whether or not attendance is mandatory; and
- H. A statement that Consultants responding to the RFQu do so solely at their expense, and that Metro is not responsible for any Consultant expenses associated with the RFQu.

(d) Metro may include a request for any or all of the following in each RFQu:

- A. A statement describing Consultants' general qualifications and related performance information;

B. A description of Consultants' specific qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQu including Consultants' committed resources and recent, current and projected workloads;

C. A list of similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services and references concerning past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration;

D. A copy of all records, if any, of Consultants' performance under Contracts with any other Contracting Agency;

E. The number of Consultants' experienced staff available to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFQu, including such personnel's specific qualifications and experience and an estimate of the proportion of time that such personnel would spend on those services;

F. Consultants' approaches to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFQu and design philosophy, if applicable;

G. Consultants' geographic proximity to and familiarity with the physical location of the Project;

H. Consultants' Ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;

I. If Metro is selecting a Consultant to provide Related Services, Consultants' pricing policies and pricing proposals or other pricing information, including the number of hours estimated for the services required, expenses, hourly rates and overhead;

J. Consultants' ability to assist Metro in complying with the energy technology requirements of ORS 279C.527 and 279C.528; and

K. Any other information Metro deems reasonably necessary to evaluate Consultants' qualifications.

(e) RFQu Evaluation Committee. Metro shall establish an RFQu evaluation committee of at least three (3) individuals to review, score and rank the responding Consultants according to the Solicitation criteria. Metro may appoint to the evaluation committee Metro employees or employees of other public entities with experience in Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Related Services, construction services or public contracting. Metro may include on the evaluation committee private practitioners of architecture, engineering, photogrammetry, transportation planning, land surveying or related professions. Metro may designate one member of the evaluation committee as the evaluation committee chairperson.

(f) Metro may use any reasonable screening or evaluation method to establish a short list of qualified Consultants, including but not limited to, the following:

- A. Requiring Consultants responding to an RFQu to achieve a threshold score before qualifying for placement on the short list;
- B. Placing a pre-determined number of the highest scoring Consultants on a short list;
- C. Placing on a short list only those Consultants with certain essential qualifications or experience, whose practice is limited to a particular subject area, or who practice in a particular geographic locale or region, provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFQu.

(g) After the evaluation committee reviews, scores and ranks the responding Consultants, Metro shall establish a short list of at least three (3) qualified Consultants, if feasible; provided however, if four (4) or fewer Consultants responded to the RFQu or if fewer than three (3) Consultants fail to meet Metro's minimum requirements, then:

- A. Metro may establish a short list of fewer than three (3) qualified Consultants; or
- B. Metro may cancel the RFQu and issue an RFP.

(h) No Consultant will be eligible for placement on Metro's short list established under subsection (3)(d) of this Rule if Consultant or any of Consultant's principals, partners or associates are members of Metro's RFQu evaluation committee.

(i) Except when the RFQu is cancelled, Metro shall provide a copy of the subsequent RFP to each Consultant on the short list.

(4) **Formal Selection of Consultants through Request for Proposals.** Metro shall use the procedure described below when issuing an RFP for a Contract described in section (1) of this Rule.

(j) **RFP Required Contents.** When using the formal selection procedure Metro shall include at least the following in each RFP, whether or not the RFP is preceded by an RFQu:

A. General background information, including a description of the Project and the specific Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services sought for the Project, the estimated time period during which the Project is to be completed, and the estimated time period in which the specific Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services sought will be performed;

B. The RFP evaluation process and criteria which will be used to select the most qualified Proposer, including the weights, number of points or other classifications applicable to each criterion. If Metro does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value. Evaluation criteria may include, but are not limited to, the following:

(i) Proposers' availability and capability to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP;

(ii) Experience of Proposers' key staff persons in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services on comparable projects;

(iii) The amount and type of resources, and number of experienced staff persons Proposers have available to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP;

(iv) The recent, current and projected workloads of the staff and resources referenced in this Section;

(v) The proportion of time Proposers estimate that the staff referenced in this Section would spend on the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP;

(vi) Proposers' demonstrated ability to successfully complete similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services on time and within budget, including whether or not there is a record of satisfactory performance under Rule 48-0120 (List of Interested Consultants; Performance Record);

(vii) References and recommendations from past clients;

(viii) Proposers' performance history in meeting deadlines, submitting accurate estimates, producing high quality work, meeting financial obligations, price and cost data from previous projects, cost controls and contract administration;

(ix) Status and quality of any required license or certification;

(x) Proposers' knowledge and understanding of the Project and Architectural, Engineering and Land Surveying Services or Related Services described in the RFP as shown in Proposers' approaches to staffing and scheduling needs for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services and proposed solutions to any perceived design and constructability issues;

(xi) Results from interviews, if conducted;

(xii) Design philosophy, if applicable, and approach to the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP;

(xiii) If Metro is selecting a Consultant to provide Related Services, pricing policies and pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead; and

(xiv) Any other criteria that Metro deems relevant to the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP, including, where the nature and budget of the Project so warrant, a design competition between competing Proposers. Provided, however, these additional criteria cannot include pricing policies, pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, when the sole purpose or predominant purpose of the RFP is to obtain Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services.

C. The RFP shall include at a minimum the following provisions:

(i) The date and time Proposals are due, and the delivery location for Proposals;

(ii) Reservation of the right to seek clarifications of each Proposal;

(iii) Reservation of the right to negotiate a final Contract that is in the best interest of Metro;

(iv) Reservation of the right to reject any or all Proposals and reservation of the right to cancel the RFP at any time if doing either would be in the public interest as determined by Metro;

(v) A statement that Proposers responding to the RFP do so solely at their expense, and Metro is not responsible for any Proposer expenses associated with the RFP;

(vi) A statement directing Proposers to the protest procedures set forth in these Division 48 Rules;

(vii) Special Contract requirements, including but not limited to MBE, WBE, ESB and SDV participation goals or good faith efforts with respect to MBE, WBE, ESB and SDV participation, and federal requirements when federal funds are involved;

(viii) A statement whether or not Metro will hold a pre-Proposal meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP and if a pre-Proposal meeting will be held, the location of the meeting and whether or not attendance is mandatory;

(ix) A request for any other information Metro deems reasonably necessary to permit Metro to evaluate, rank and select the most qualified Proposer to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP; and

(x) A sample form of Contract.

(k) **RFP Contents for Related Services Selections Based on Price.** When using the formal selection procedure Metro may also include evaluation price criteria including, but not limited to, the total price for the Related Services described in the RFP, Consultant pricing policies, and other pricing information such as the Consultant's estimated number of staff hours needed to perform the Related Services described in the RFP, expenses, hourly rates and overhead.

(5) **RFP Evaluation Committee.** Metro shall establish a committee of at least three (3) individuals to review, score and rank Proposals according to the evaluation criteria set forth in the RFP. If the RFP has followed an RFQu, Metro may include the same members who served on the RFQu evaluation committee. Metro may appoint to the evaluation committee Metro employees or employees of other public agencies with experience in Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying, Related Services, construction services or Public Contracting. At least one (1) member of the evaluation committee must be Metro employee. Metro may include on the evaluation committee private practitioners of architecture, engineering, land surveying or related professions. Metro shall designate one (1) of its employees who also is a member of the evaluation committee as the evaluation committee chairperson. No Proposer will be eligible for award of the Contract under the RFP if Proposer or any of Proposer's principals, partners or associates are members of Metro's RFP evaluation committee for the Contract. If the RFP provides for the possibility of Proposer interviews, the evaluation committee may elect to interview Proposers if the evaluation committee considers it necessary or desirable. If the evaluation committee conducts interviews, it shall award weights, points or other classifications indicated in the RFP for the anticipated interview. The evaluation committee shall provide to Metro the results of the scoring and ranking for each Proposer.

(6) **Initial Negotiations.** If Metro does not cancel the RFP after it receives the results of the scoring and ranking for each Proposer, Metro will begin negotiating a Contract with the highest ranked Proposer. Metro shall direct negotiations toward obtaining written agreement on:

(a) The Consultant's performance obligations and performance schedule;

(b) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to Metro as determined solely by Metro, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services;

(c) Any other provisions Metro believes to be in Metro's best interest to negotiate:

(7) **Subsequent Negotiations.** Metro shall, either orally or in writing, formally terminate negotiations with the highest ranked Proposer if Metro and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. Metro may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, and so on, in accordance with section (6) of this Rule, until negotiations result in a Contract. If negotiations with any Proposer do not result in a Contract within a reasonable amount of time, Metro may end the particular formal Solicitation. Nothing in this Rule precludes Metro from proceeding with a new formal Solicitation for the same Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP that failed to result in a Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.110, 279C.527, OL 2015, ch 565 (HB 3303)

#### **48-0230 Ties Among Proposers**

(1) If Metro is selecting a Consultant on the basis of qualifications alone and determines after the ranking of proposals that two or more Consultants are equally qualified, Metro may select a candidate through any process that Metro believes will result in the best value for Metro taking into account the scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services. Provided, however, the tie breaking process established by Metro under this section (1) cannot be based on the Consultant's pricing policies, pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead. The process must be designed to instill public confidence through ethical and fair dealing, honesty and good faith on the part of Metro and Proposers and shall protect the integrity of the Public Contracting process. Once a tie is broken, Metro and the selected Consultant shall proceed with negotiations under Administrative Rule 48-0210(3) or 48-0220(4)(c), as applicable.

(2) If Metro is selecting a Consultant on the basis of price alone, or on the basis of price and qualifications, and determines after the ranking of proposers that two or more Consultants are identical in terms of price or are identical in terms of price and qualifications, then Metro shall follow the procedure set forth in Administrative Rule 46-0300 (Preferences for Oregon Goods and Services), to select the Consultant.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279C.110, OL 2011, ch 458



#### **48-0240 Protest Procedures**

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

(2) **Protest of Consultant Selection.** For formal Requests for Proposals, Metro shall provide to all Proposers a notice of intent to award the Contract to the highest ranked Proposer. A Proposer who claims to have been adversely affected or aggrieved by the selection of the highest ranked Proposer may submit a written protest of the selection to Metro no later than seven (7) Days after the date of the selection notice unless a different deadline is indicated in the RFP. A Proposer submitting a protest must claim that the protesting Proposer is the highest ranked Proposer because the Proposals of all higher ranked Consultants failed to meet the requirements of the RFP. Metro may not consider any protest that is submitted after the submission deadline.

(3) **Decision.** Metro shall resolve all timely submitted protests within a reasonable time following Metro's receipt of the protest and once resolved, shall promptly issue a Written decision on the protest to the Proposer who submitted the protest.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279A.065 & 279C.110, OL 2011, ch 458

#### **48-0250 Solicitation Cancellation, Delay or Suspension; Rejection of All Proposals or Responses; Consultant Responsibility For Costs**

Metro may cancel, delay or suspend a Solicitation, RFQu or other preliminary Procurement document, whether related to a Direct Appointment Procedure (Administrative Rule 48-0200), the Intermediate Selection Procedure (Administrative Rule 48-0210), and the Formal Selection Procedure (Administrative Rule 48-0220), or reject all Proposals, responses to RFQs, responses to other preliminary Procurement documents, or any combination of the foregoing, if Metro believes it is in the public interest to do so. In the event of any such cancellation, delay, suspension or rejection, Metro is not liable to any Proposer for any loss or expense caused by or resulting from any such cancellation, delay, suspension or rejection. Consultants responding to either Solicitations, RFQs or other preliminary Procurement documents are responsible for all costs they may incur in connection with submitting Proposals, responses to RFQs or responses to other preliminary Procurement documents.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065, 279C.110

#### **48-0270 Price Agreements**

(1) Metro may establish Price Agreements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services, when Metro cannot determine the precise quantities of those Services that Metro will require over a specified time period.

(2) When establishing Price Agreements under this Rule, Metro shall select no fewer than three (3) Consultants, when feasible. The selection procedures for establishing Price Agreements shall be in accordance with Administrative Rule 48-0130(1) or 48-0130(2), as applicable. Metro may select a single Consultant, when a Price Agreement is awarded to obtain services for a specific Project or a closely-related group of Projects.

(3) In addition to any other applicable Solicitation requirements set forth in these Division 48 Rules, Solicitation materials and the terms and conditions for a Price Agreement for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services must:

(a) Include a scope of services, menu of services, a specification for services or a similar description of the nature, general scope, complexity and purpose of the Procurement that will reasonably enable a prospective Proposer to decide whether to submit a Proposal;

(b) Specify whether Metro intends to award a Price Agreement to one (1) Consultant or to multiple Consultants. If Metro will award a Price Agreement to more than one (1) Consultant, the Solicitation document and Price Agreement shall describe the criteria and procedures Metro will use to select a Consultant for each individual work order or task order. Subject to the requirements of ORS 279C.110, the criteria and procedures to assign work orders or task orders that only involve or predominantly involve Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying services are at Metro's sole discretion; provided, however, in circumstances where a direct contract is not permitted under Administrative Rule 48-0200, the selection criteria cannot be based on pricing policies, pricing proposals or other pricing information, including the number of hours proposed for the Services required, expenses, hourly rates and overhead. In accordance with Administrative Rule 48-0130(2) applicable to Related Services procurements, the selection criteria and procedures may be based solely on the qualifications of the Consultants, solely on pricing information, or a combination of both qualifications and pricing information. Pricing information may include the number of hours proposed for the Related Services required, expenses, hourly rates, overhead and other price factors. Work order or task order assignment procedures under Price Agreements may include direct appointments, subject to the requirements of Administrative Rule 48-0200; and

(c) Specify the maximum 5-year term for assigning Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services under the Price Agreement.

(4) All Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services assigned under a Price Agreement require a written work order or task order issued by Metro. Any work orders or task orders assigned under a Price Agreement must include, at a minimum, the following:

(a) The Consultant's performance obligations and performance schedule;

(b) The payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services required under the work order or task order that is fair and reasonable to Metro, as determined solely by Metro, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services;

(c) Language that incorporates all applicable terms and conditions of the Price Agreement into the work order or task order; and

- (d) Any other provisions Metro believes to be in Metro's best interest.

Stat. Auth.: ORS 279A.065 & OL 2011, ch 458

Stats. Implemented: ORS 279A.065, 279C.110, 279C.120 & OL 2011, ch 458

## **Post-Selection Considerations**

### **48-0300 Prohibited Payment Methodology; Purchase Restrictions**

(1) Except as otherwise allowed by law, a Contracting Agency shall not enter into any Contract which includes compensation provisions that expressly provide for payment of:

- (a) Consultant's costs under the Contract plus a percentage of those costs; or
- (b) A percentage of the Project construction costs or total Project costs.

(2) Except as otherwise allowed by law, a Contracting Agency shall not enter into any Contract in which:

(a) The compensation paid under the Contract is solely based on or limited to the Consultant's hourly rates for the Consultant's personnel working on the Project and reimbursable expenses incurred during the performance of work on the Project (sometimes referred to as a "time and materials" Contract); and

(b) The Contract does not include a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract.

(3) Except in cases of Emergency or in the particular instances noted in the subsections below, Metro shall not purchase any building materials, supplies or equipment for any building, structure or facility constructed by or for Metro from any Consultant under a Contract with Metro to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services, for the building, structure or facility. This prohibition does not apply if either of the following circumstances exists:

(a) The Consultant is providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services under a Contract with Metro to perform Design-Build services or Energy Savings Performance Contract services (see Administrative Rule 49-0670 and 49-0680); or

(b) That portion of the Contract relating to the acquisition of building materials, supplies or equipment was awarded to the Consultant pursuant to applicable law governing the award of such a Contract.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279A.065, OL 2011, ch 458

### **48-0310 Expired or Terminated Contracts; Reinstatement**

(1) If Metro enters into a Contract for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services and that Contract subsequently

expires or is terminated, Metro may proceed as follows, subject to the requirements of subsection (2) of this Rule:

(a) **Expired Contracts.** If the Contract has expired as the result of Project delay caused by Metro or caused by any other occurrence outside the reasonable control of Metro or the Consultant, and if no more than one (1) year has passed since the Contract expiration date, Metro may amend the Contract to extend the Contract expiration date, revise the description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services required under the Contract to reflect any material alteration of the Project made as a result of the delay, and revise the applicable performance schedule. Beginning on the effective date of the amendment, Metro and the Consultant shall continue performance under the Contract as amended; or

(b) **Terminated Contracts.** If Metro or both parties to the Contract have terminated the Contract for any reason and if no more than one (1) year has passed since the Contract termination date, then Metro may enter into a new Contract with the same Consultant to perform the remaining Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services not completed under the original Contract, or to perform any remaining Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services not completed under the Contract as adjusted to reflect a material alteration of the Project.

(2) Metro may proceed under either subsection (1)(a) or subsection (1)(a) of this Rule only after making written findings that amending the existing Contract or entering into a new Contract with the Consultant will:

(a) Promote efficient use of public funds and resources and result in substantial cost savings to Metro;

(b) Protect the integrity of the Public Contracting process and the competitive nature of the Procurement process by not encouraging favoritism or substantially diminishing competition in the award of Contracts; and

(c) Result in a Contract that is still within the scope of the original Procurement document.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279A.065 & 279C.110, OL 2011, ch 458

#### **48-0320 Contract Amendments**

(1) Metro may amend any Contract if Metro, in its sole discretion, determines that the amendment is within the scope services contemplated under the Solicitation and that the amendment would not materially impact the field of competition for the services described in the Solicitation. In making this determination, Metro shall consider potential alternative methods of procuring the services contemplated under the proposed amendment. An amendment would not materially impact the field of competition for the services described in the Solicitation Document, if Metro reasonably believes that the number of Proposers would not significantly increase if the Solicitation were re-issued to include the additional services.

(2) Amendments are required to document price and schedule changes agreed upon between the parties.

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

(4) All amendments to Contracts must be in Writing, must be Signed by an authorized representative of the Consultant and Metro.

(5) For a Contract under \$25,000 awarded under Rule 48-0200(1)(b) (Direct Appointment Procedure), Metro may authorize increases resulting from amendments to such Contract provided that the total of all such increases does not exceed \$25,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Any amendment that causes Contract to exceed the foregoing limits shall be (a) submitted to the Chief Procurement Officer for approval prior to the authorization of the additional work and (b) treated as Unauthorized Purchase in accordance with Rule 46-0200.

(6) For a Contract directly awarded to a pre-qualified Consultant under Rule 48-0200(1)(c) (Direct Appointment Procedure), Metro may authorize increases resulting from amendments to such Contract provided that the total of all such increases does not exceed \$100,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Any amendment that causes Contract to exceed the foregoing limits shall be (a) submitted to the Chief Procurement Officer for approval prior to the authorization of the additional work and (b) treated as an Unauthorized Purchase in accordance with Rule 46-0200.

(7) For a Contract awarded under Rule 48-0210 (Intermediate Selection Procedure), Metro may authorize increases resulting from amendments to such Contract provided that the total of all such increases does not exceed \$250,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Any amendment that causes Contract to exceed the foregoing limits shall be (a) submitted to the Chief Procurement Officer for approval prior to the authorization of the additional work and (b) treated as an Unauthorized Purchase in accordance with Rule 46-0200.

(8) For a Contract awarded under Rules 48-0220 (Formal Selection Procedure) Metro may authorize increases resulting from amendments to such Contract provided that the total of all such increases does not exceed one hundred twenty-five percent (125%) of the original Contract Price. Increases in excess of the 125% limit shall be (a) submitted to the Chief Operating Officer for approval prior to the authorization of the additional work and (b) treated as an Unauthorized Purchase in accordance with Rule 46-0200.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279A.065, 279C.110, OL 2011, ch 458

**METRO  
LOCAL CONTRACT REVIEW BOARD  
ADMINISTRATIVE RULES**

**DIVISION 49 - GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTS  
FOR CONSTRUCTION SERVICES**

**49-0100    Application**

These Division 49 Rules address matters covered in ORS Chapter 279C and apply to Public Improvement Contracts as well as, where identified, Public Contracts for ordinary construction that are not Public Improvements. Contracts for minor alteration, ordinary repair or maintenance of Public Improvements or Price Agreements, as well as other Contracts for construction services that are not defined as a Public Improvement under Division 10 of these Rules, are to be awarded and executed pursuant to Division 47 of these Rules and ORS 279B and not this Division 49.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279A.065

**49-0110    Policies**

In addition to the general State Code policies set forth in ORS 279A.015, the ORS 279C.300 policy on competition and the ORS 279C.305 policy on least-cost for Public Improvements apply to these Division 49 Rules.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.300 & 279C.305

**49-0130    Competitive Bidding Requirement**

Metro shall solicit Bids for Public Improvement Contracts by Invitation to Bid ("ITB"), except as otherwise allowed or required pursuant to ORS 279C.335 on Competitive Bidding exceptions and exemptions, ORS 279A.030 on federal law overrides, or ORS 279A.100 on affirmative action. See Rules 49-0600 to 49-0690 regarding the use of Alternative Contracting Methods and the process for obtaining an exemption from Competitive Bidding requirements.

Stat. Auth.: ORS 279A.065  
Stats. Implemented: ORS 279C.335

**49-0140    Contracts for Construction Other Than Public Improvements**

(1) **Procurement Under ORS Chapter 279B.** Pursuant to ORS 279C.320, Public Contracts for construction services that are not Public Improvement Contracts may be procured and amended as general trade Services under the provisions of ORS Chapter 279B rather than under the provisions of ORS Chapter 279C and these Division 49 Rules. In accordance with ORS 279A.010, Contracts for emergency work, minor alternation, ordinary repair or maintenance necessary to preserve a Public Improvements are not Public Improvement Contracts.

(2) **Application of ORS Chapter 279C.** Notwithstanding the forgoing, Public Contracts for construction services that are not Public Improvement Contracts, and are therefore procured under ORS 279B are nonetheless subject to the non-procurement provisions of ORS Chapter 279C and these Division 49 Rules may still be applicable. See, for example, particular statutes on Disqualification (ORS 279C.440, 445, 450); Legal Actions (ORS 279C.460 and 465); Required Contract Conditions (ORS 279C.505, 515, 520, 530); Hours of Labor (ORS 279C.540, 545); Retainage (ORS 279C.550, 560 and 565); Subcontracts (ORS 279C.580); Action on Payment Bonds (ORS 279C.600, 605, 610, 615, 620, 625); Termination (ORS 279C.650, 660, 670); and all of the Prevailing Wage Rates requirements (ORS 279C.800 through 870) for Public Works Contracts.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.320

#### **49-0150 Emergency Contracts; Bidding and Bonding Exemptions**

(1) **Emergency Declaration.** Metro may declare that Emergency circumstances exist that require prompt execution of a Public Contract for Emergency construction or repair work pursuant to the procedures in Rules 47-0280 and 47-0800(4).

(2) **Excusing Bonds.** If the circumstances in ORS 279C.380(4) are met, the Emergency declaration may also state that Metro waives the requirement of furnishing a performance bond and payment bond for the Emergency Contract. After making such an Emergency declaration, those bonding requirements are excused for the procurement. However, an Emergency declaration does not affect the separate Public Works bond requirement for the benefit of the Bureau of Labor and Industries (BOLI) in enforcing prevailing wage rate and overtime payment requirements. In addition, nothing herein prevents Metro from subsequently requesting such bonds from the Contractor after work begins.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.080, 279C.320, 279C.380

#### **49-0160 Intermediate Procurements; Competitive Quotes and Amendments**

(1) **General.** As provided for under ORS 279C.412 and 279C.414, Public Improvement Contracts estimated by Metro not to exceed \$100,000 may be awarded in accordance with intermediate level procurement procedures for Competitive Quotes established by this Rule. A Procurement may not be artificially divided or fragmented so as to constitute an Intermediate Procurement under this Rule in order to circumvent Competitive Bidding requirements.

(2) **Written Competitive Quotes.** Requests for Competitive Quotes for a Public Improvement project anticipated to exceed \$25,000 must be in Writing. Metro must seek at least three (3) Competitive Quotes and otherwise comply with Metro's Equity in Contracting Administrative Rules. The Request for Competitive Quotes must include the selection criteria to be utilized in selecting a Contractor and, if the criteria are not of equal value, their relative value or ranking. The criteria may be limited to price or some combination of price, experience, specific expertise, availability, project understanding, Contractor capacity, Responsibility and similar factors. Written requests must include the Bureau of Labor and Industries (BOLI) provisions regarding the prevailing wage, if the estimated cost exceeds \$50,000. Written Request for Competitive Quotes must also include the following:

- (a) A complete description of the proposed work.

- (b) Location and deadline for submittal of Competitive Quotes.
  - (c) The prevailing wage provisions of ORS 279C.800 to 279C.870, when applicable.
  - (d) The performance bond, payment bond and BOLI Public Works bond requirements of ORS 279C.380 and 279C.830, when applicable.
  - (e) The Contractor registration requirements of ORS 701.
  - (f) Any other law applicable to such a Contract.
- (3) **Award.** Metro shall award the Contract to the prospective Contractor whose Competitive Quote will best serve the interests of Metro, taking into account the announced selection criteria. If award is not made to the Contractor offering the lowest price, Metro shall make a Written record of the basis for award.
- (4) **BOLI Notification.** Metro shall provide notification of award to BOLI as required by ORS 279C.835.
- (5) **Price Increases and Amendments.** Intermediate level Public Improvement Contracts obtained by Competitive Quotes may be increased in accordance with Administrative Rule 49-0910, provided that the cumulative amendments may not increase the total Contract Price to a sum that exceeds the higher dollar amount of \$100,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.412 and ORS 279C.414.

## Formal Procurement Rules

### **49-0200 Solicitation Documents; Required provisions; Assignment or Transfer**

- (1) **Solicitation Document.** Pursuant to ORS 279C.365 and this Rule, the Solicitation Document must include the following:
- (a) General Information:
    - A. Identification of the Public Improvement project, including the character of the work, and applicable plans, Specifications and other Contract documents;
    - B. Notice of any pre-Offer conference as follows:
      - (i) The time, date and location of any pre-Offer conference;
      - (ii) Whether attendance at the conference will be mandatory or voluntary; and
      - (iii) That statements made by Metro's representatives at the conference are not binding upon Metro unless confirmed by Written Addenda.
    - C. The deadline for submitting mandatory prequalification applications and the class or classes of work for which Offerors must be prequalified if prequalification is a requirement;
    - D. The name and title of the authorized Metro representative designated for receipt of Offers and contract representative (if different);
    - E. Instructions and information concerning the form and submission of Offers, including the address of the office to which Offers must be delivered, any Bid or Proposal security requirements, and



any other required information or special information, e.g., whether Offers may be submitted by Electronic means (See Rule 49-0310 regarding Electronic Procurement);

F. The time and date of Closing after which Metro will not accept Offers, which time cannot be less than five (5) Days after the date of the last publication of the advertisement. Although a minimum of five (5) Days is prescribed, Metro will elect to use at least a fourteen (14) Day Solicitation period when feasible. If Metro is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, the time of Closing must be consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and Rule 49-0360;

G. The time, date and place of Opening;

H. The office where the Specifications for the work may be reviewed;

I. A statement that each Bidder to an ITB must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120;

J. If the Contract resulting from a Solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148), a statement that no Offer will be received or considered by Metro unless the Offer contains a statement by the Offeror as a part of its Offer that "Contractor agrees to be bound by and will comply with the provisions of ORS 279C.838, 279C.840 or 40 U.S.C. 3141 to 3148."

K. A statement that Metro will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as specified in Rule 49-0230;

L. Whether a Contractor or a Subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;

M. Contractor's certification of nondiscrimination in obtaining required Subcontractors in accordance with ORS 279A.110(4). (See Rule 49-0440(3));

N. How Metro will notify Offerors of Addenda and how Metro will make Addenda available (See Rule 49-0250); and

O. When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in Rule 49-0360.

(b) The Solicitation Document must also contain the following information about the evaluation process:

A. A statement that Metro may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, including the requirement to demonstrate the Bidder's responsibility under ORS 279C.375(3)(b), and may reject for good cause all Offers after finding that doing so is in the public interest;

B. The anticipated Solicitation schedule, deadlines, protest process and evaluation process, if any;

C. Evaluation criteria, including the relative value applicable to each criterion, that Metro will use to determine the Responsible Bidder with the lowest Responsive Bid (where award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of competitive Proposals is authorized under ORS 279C.335 and Rule 49-0620), along with the process Metro will use to determine acceptability of the work;

(i) If the Solicitation Document is an Invitation to Bid, Metro shall set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, and ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors must be objective, reasonable estimates based upon information Metro has available concerning future use;

(ii) If the Solicitation Document is a Request for Proposals, Metro shall refer to the additional requirements of Rule 49-0650; and

(c) **Contract provisions.** The Solicitation Document must include all Contract terms and conditions, including warranties, insurance and bonding requirements, that Metro considers appropriate for the Public Improvement project. The Solicitation Document must also include all applicable Contract provisions required by Oregon law, including :

A. Prompt payment to all Persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279C.505(1));

B. A demonstration that an employee drug testing program is in place (ORS 279C.505(2));

C. If the Contract calls for demolition work described in ORS 279C.510(1), a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;

D. If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective (ORS 279C.510(2));

E. Payment of claims by public officers (ORS 279C.515(1));

F. Contractor and first-tier Subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515(2), including the rate of interest;

G. A Person's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279C.515(3));

H. Hours of labor in compliance with ORS 279C.520;

I. Environmental and natural resources regulations (ORS 279C.525);

J. Payment for medical care and attention to employees (ORS 279C.530(1));

K. A Contract provision substantially as follows: "All employers, including Contractor, that employ subject workers who work under this Contract in the State of Oregon shall comply with ORS 656.017 and provide the required workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530(2));

L. Maximum hours, holidays and overtime (ORS 279C.540);

M. Time limitation on claims for overtime (ORS 279C.545);

N. Prevailing wage rates (ORS 279C.800 to 279C.870);

O. Fee paid to BOLI (ORS 279C.830);

P. BOLI Public Works bond (ORS 279C.830(2));

- Q. Retainage (ORS 279C.550 to 279C.570);
- R. Prompt payment policy, progress payments, rate of interest (ORS 279C.570);
- S. Contractor's relations with Subcontractors (ORS 279C.580);
- T. Notice of claim (ORS 279C.605);
- U. Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385; and
- V. Contractor's certification that all Subcontractors performing work described in ORS 701.005(2) (i.e., construction work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS Chapter 701 or 671, respectively before the Subcontractors commence work under the Contract.

(2) **Assignment or Transfer Restricted.** Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, or transfer rights, or delegate duties under the Contract, either in whole or in part, without Metro's prior Written consent. Unless otherwise agreed by Metro in Writing, such consent does not relieve the Contractor of any obligations under the Contract. Any assignee or transferee is considered the agent of the Contractor and is bound to abide by all provisions of the Contract. If Metro consents in Writing to an assignment, sale, disposal or transfer of the Contractor's rights or delegation of Contractor's duties, the Contractor and its surety, if any, remain liable to Metro for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless Metro otherwise agrees in Writing.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.110, 279A.120, 279C.365, 279C.370, 279C.390, 279C.505 - 580, 279C.605, 305.385, 468A.720, 701.005 & 701.055

#### **49-0210 Solicitation notice and Advertising Requirements; Posting**

(1) **Notice and Distribution Fee.** Metro shall furnish "notice" as set forth below in subsections (a) through (c), to a number of Persons sufficient for the purpose of fostering and promoting competition. The notice must indicate where, when, how and for how long the Solicitation Document may be obtained and generally describe the Public Improvement project or work. The notice may contain any other appropriate information. Metro may charge a fee or require a deposit for the Solicitation Document. Metro may furnish notice using any method determined to foster and promote competition, including, without limitation:

- (a) Placing notice on an Electronic Procurement System; or
- (b) Mailing notice of the availability of Solicitation Documents to Persons that have expressed an interest in Metro's Procurements; or
- (c) Placing notice on Metro's Internet Web site.

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

- (a) Unless Metro publishes by Electronic Advertisement as permitted by Section 2(b) below, Metro shall publish the advertisement for Offers at least once in at least one newspaper of general

circulation in the area where the Contract is to be performed and in as many additional issues and publications as Metro may determine to be necessary or desirable to foster and promote competition.

(b) Metro finds it cost effective to Electronically post notice of Solicitations. Metro may therefore publish advertisements for formal Offers on its Electronic Procurement System.

(c) In addition to Metro's publications under subsection (a) and (b) above, Metro shall also publish an advertisement for Bids or Proposals in at least one trade newspaper of general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000.

(d) All advertisements for Bids or Proposals must set forth:

- A. The Public Improvement project;
- B. The office where Contract terms, conditions and Specifications may be reviewed;
- C. The date that Persons must file applications for prequalification under ORS 279C.340, if prequalification is a requirement, and the class or classes of work for which Persons must be prequalified;
- D. The date of mandatory pre-offer meeting, if applicable;
- E. The scheduled Closing, which must not be less than five (5) Days after the date of the last publication of the advertisement;
- F. The name, title and address of Metro representative authorized to receive Offers;
- G. The scheduled Opening; and
- H. If applicable, that the Contract is for a Public Works subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.360 & 200.035

#### **49-0220 Prequalification of Offerors**

(1) **Mandatory Prequalification.** Pursuant to ORS 279C.430 and this Rule, Metro may require mandatory prequalification of Offerors for Contracts to construct Public Improvements or to perform Public Works. Metro must indicate in the Solicitation Document if it will require mandatory prequalification. Mandatory prequalification is when Metro conditions a Person's submission of an Offer upon the Person's prequalification. Metro may not consider an Offer from a Person that is not prequalified if Metro required prequalification. Applications for Prequalification must be submitted to Metro in accordance with the deadlines provided in the Solicitation Document.

(2) **Prequalification Presumed.** If a an Offeror is currently Prequalified by either the Oregon Department of Transportation or the Oregon Department of Administrative Services to perform Contracts, the Bidder is rebuttably presumed qualified to perform the same work for Metro upon submission of proof of such Prequalification. If a Bidder submits proof of Prequalification, then the Bidder is rebuttably presumed qualified under ORS 279C.435. Nothing contained in this section waives Metro's requirements for Prequalification, Metro's authority to require additional information or detail, or prior approval as otherwise set forth in this Rule.

(3) **Standards for Prequalification.** To qualify, a Bidder must demonstrate to Metro's satisfaction, that they are a Responsible Bidder based on criteria set forth in ORS 279C.375 (3)(b) and Rule 49-0390. If

Metro determines the Bidder is qualified, notification shall be sent stating the Bidder's qualified Bidding limits, classes of work and the validity period of the Bidder's prequalification.

(4) **Notice of Denial; Appeal.** If a Person fails to prequalify for a mandatory prequalification, Metro shall notify the Person, specify the reasons for denying prequalification, and inform the Person of the Person's right to a hearing under ORS 279C.445 and 279C.450. The Procurement Officer shall conduct the hearing and has the authority of the Local Contract Review Board as provided in ORS 279C.450. The Procurement Officer may adopt rules of procedure for the hearing. The appeal shall be conducted and decided within thirty (30) Days of Metro's issuance of the non-qualification notice or a date mutually agreed upon by both parties.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.430 & 279C.435

#### **49-0230 Eligibility to Bid or Propose; Registration or License**

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

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, 671.530 & 701.055

#### **49-0240 Pre-Offer Conferences**

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

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

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

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

(5) **Announcement.** Metro must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with Rule 49-0200(1)(a)(B).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365 & 279C.370

#### **49-0250 Addenda to Solicitation Documents**

(1) **Issuance; Receipt.** Metro may change a Solicitation Document for Bids or Proposals only by Written Addenda. An Offeror shall provide Written acknowledgement of receipt of all issued Addendas with its Offer, unless Metro otherwise specifies in the Addenda or in the Solicitation Document.

(2) **Notice and Distribution.** Metro shall notify prospective Offerors of Addendas consistent with the standards of notice set forth in Rule 49-0210(1). The Solicitation Document must specify how Metro will provide notice of Addendas and how Metro will make the Addendas available (see, Rule 49-0200(1)(a)(N)).

(3) **Timelines; Extensions.** Metro shall issue Addendas within a reasonable time to allow prospective Offerors to consider the Addendas in preparing their Offers. Metro may extend the Closing if Metro determines prospective Offerors need additional time to review and respond to an Addenda. Except to the extent required by public interest, Metro will not issue an Addenda to an Invitation to Bid or Request for Proposal less than 72 hours before the Closing unless such Addenda also extends the Closing.

(4) **Request for Change or Protest to Addenda.** Unless a different deadline is set forth in the Addenda, an Offeror may submit a Written request for change or protest to an Addenda by the close of Metro's next business day after issuance of the Addenda, or up to the last Day allowed to submit a request for change or protest under Rule 49-0260, whichever date is later. Metro shall consider only an Offeror's request for change or protest to the Addenda. Metro shall not consider a request for change or protest to matters not added or modified by the Addenda.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.395 & 279A.065

#### **49-0260 Request for Clarification or Change; Solicitation Protests**

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

(2) **Request for Change to Specifications or Contract Terms.**

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

**(b) Content of Request for Change.**

A. An Offeror's Written request for change must include a statement of the requested change(s) to the Contract terms and conditions or Specifications, together with the reason for the requested change.

B. An Offeror shall mark its request for change as follows:

- (i) "Request for Change to Specifications or Contract Terms"; and
- (ii) Solicitation Document number.

**(3) Protest and Judicial Review of Solicitation Documents and Solicitation Processes.**

(a) **Purpose.** A prospective Offeror may protest the Solicitation process or the Solicitation Document for a Contract solicited pursuant to competitive sealed ITB process or through an alternative contracting process.

(b) **Delivery.** Written protest regarding a Solicitation Document or the Public Improvement procurement process must be provided to the Procurement Officer within seven (7) Days after a Solicitation Document is advertised, unless the Solicitation Document requires a shorter period of time. Metro shall not consider a protest submitted after the timeline established for submitting such protest under this Rule.

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

- A. Sufficient information to identify the portion or portions of the Solicitation Document that are being protested or the Solicitation process or processes that are the subject of the protest;
- B. A detailed statement of the legal and factual grounds for the protest;
- C. Evidence or supporting documentation that supports the grounds on which the protest is based;
- D. A description of the resulting harm to the Affected Person; and
- E. The relief requested or a statement of the desired changes to the Contract terms and conditions, including any Specifications.

(d) **Required Metro Response.**

- A. Metro shall inform the Affected Person in Writing if the protest was not timely filed;
- B. Metro shall inform the Affected Person if it failed to meet the requirements set forth above in subsection (c) of this Rule and the reasons for that failure;
- C. If the protest was timely filed and provides the information required by subsection (c), Metro shall issue a decision in Writing and provide that decision to the Affected Person no less than three days before Offers are due, unless a Written determination is made by Metro that circumstances exist that require a shorter time limit.
- D. If Metro denies the protest, it shall inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contract Review Board.

(e) **Optional Metro Response.** In addition to the requirements of subsection (d), Metro may do any or all of the following:

- A. Agree with the protest and make any necessary corrections to the Solicitation Document or Procurement process;

- B. Issue a Written response to the protest and provide that decision to the Affected Person;
- C. Refer the protest and any response to the Local Contract Review Board; or
- D. Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest, including without limitation, (i) extending Closing if Metro determines an extension is necessary to consider the protest and to issue an Addenda to the Solicitation Document or (ii) canceling the Solicitation under Rule 49-0270.

(f) **Judicial Review.** An Affected Person may not seek judicial review of Metro's final decision regarding its protest of the contents of a Solicitation Document or the Solicitation process unless it has timely and fully complied with the Protest requirements of this Rule and has exhausted all avenues of appeal provided by Metro. Judicial review is not available if Metro withdraws the Solicitation Document that was the subject of the protest.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.345 & 279C.365

#### **49-0270 Cancellation, Delay or Suspension of Solicitation Document**

(1) **Cancellation in the Public Interest.** At any time prior to executing a Contract, Metro may cancel a Solicitation for good cause if Metro finds that cancellation is in the public interest. Metro's reasons for cancellation shall be made part of the Solicitation file.

(2) **Delay or Suspension.** Any Solicitation may be delayed or suspended in whole, or in part, when the delay or suspension is in the best interest of Metro as determined by Metro.

(3) **Costs.** Metro is not liable to any Offeror for costs, expenses or losses caused by the cancellation, delay, or suspension of a Solicitation.

(4) **Notice of Cancellation.** If Metro cancels a Solicitation prior to Opening, Metro shall provide notice of cancellation in accordance with Rule 49-0210(1). Such notice of cancellation must:

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

(5) **Disposition of Offers.**

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

(b) **After Offer Opening.** If Metro cancels a Solicitation after Offer Opening or if Metro rejects all Offers, Metro will retain all such Offers as part of Metro's Solicitation file. If a Request for Proposals is cancelled after Proposals are received, Metro may return a Proposal to the Proposer that submitted it. Metro shall keep a list of returned Proposals in the Solicitation file.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.395



#### **49-0280 Bid and Proposal Offer Submissions**

- (1) **Offer and Acceptance.** The Bid or Proposal is the Bidder's or Proposer's Offer to enter into a Contract. In competitive Bidding and competitive Proposals, the Offer is always a "Firm Offer," i.e., the Offer is held open by the Offeror for Metro's acceptance for the period specified in Rule 49-0410, unless otherwise specified in the Solicitation Document. Metro may elect to accept the Offer at any time during the specified period, and Metro's award of the Contract to a Bidder constitutes acceptance of the Offer.
- (2) **Negotiation.** A competitive Proposal is a "Firm Offer" for the specified period referenced above in Section (1), but Metro may nonetheless elect to discuss or negotiate certain contractual provisions, as identified in these Rules or in the Solicitation Document with the Proposer. Where negotiation is permitted by the Rules or the Solicitation Document, Proposers are bound to negotiate in good faith and only on those terms and the Rules or the Solicitation Document has reserved for negotiation.
- (3) **Responsive Offer.** Metro may award a Contract only to a Responsible Offeror with a Responsive Offer.
- (4) **Contingent Offers.** Except to the extent that an Offeror is authorized to propose certain terms and conditions pursuant to Rule 49-0650, an Offeror cannot make an Offer contingent upon Metro's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.
- (5) **Offeror's Acknowledgement.** By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits the proposal of alternative terms under Rule 49-0650, the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by Metro in Writing.
- (6) **Instructions.** An Offeror shall submit and Sign its Offer in accordance with the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document.
- (7) **Forms.** An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.
- (8) **Documents.** An Offeror shall provide Metro with all documents and Descriptive Literature required under the Solicitation Document.
- (9) **Electronic Submissions.** If Metro permits Electronic Offers in the Solicitation Document, the Offeror may submit Electronic Offers in accordance with the Solicitation Document. Metro may not consider Electronic Offers unless authorized by the Solicitation Document.
- (10) **Product Samples and Descriptive Literature.** Metro may require Product Samples or Descriptive Literature if it is necessary or desirable to evaluate the quality, features, or characteristics of the offered items. Metro will dispose of Product Samples or return or make available for return Product Samples to the Offeror in accordance with the Solicitation Document.
- (11) **Identification of Offers.** To ensure proper identification and handling, Offers must be submitted in a sealed envelope appropriately marked or in the envelope provided by Metro, whichever is applicable. Metro is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365 & 279C.375

#### **49-0290 Bid or Proposal Security**

(1) **Security Amount.** If Metro requires Bid or Proposal security, it may not be more than ten percent (10%) or less than five percent (5%) of the Offeror's Bid or Proposal, consisting of the base Bid or Proposal together with all additive alternates. Metro may not use Bid or Proposal security to discourage competition. Metro must clearly state any Bid or Proposal security requirements in its Solicitation Document. The Offeror shall forfeit Bid or Proposal security after award if the Offeror fails to execute the Contract or otherwise fails to promptly return the Contract with any required performance bond, payment bond, BOLI Public Works bond, or any required proof of insurance. See ORS 279C.365(5), ORS 279C.385, and ORS 279C.830.

(2) **Requirement for Bid Security (Optional for Proposals).** Unless Metro has otherwise exempted a Solicitation or class of Solicitations from Bid security pursuant to ORS 279C.390, Metro must require Bid security for its Solicitation of Bids for Public Improvements. This requirement applies only to Public Improvement Contracts with a value, estimated by Metro, of more than \$100,000. Metro may require Bid security even if it has exempted a class of Solicitations from Bid security. Metro may also require Proposal security in RFPs. See ORS 279C.400(5).

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

(a) A surety bond, Signed by the surety's authorized Attorney in Fact, from a company authorized to do business in the State of Oregon and that is duly listed in the United States Treasury list as published in the Federal Register, or which is otherwise approved by the Metro Attorney. The A Power of Attorney for the Attorney in Fact shall be submitted; or

(b) A Signed irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or

(c) A cashier's check or Offeror's certified check.

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, 279C.385 & 279C.390

#### **49-0310          Electronic Procurement**

- (1) **General.** Metro may utilize Electronic Advertisement of Public Improvement Contracts in accordance with ORS 279C.360(1) and Rule 49-0210, provided that advertisement of such Contracts with an estimated Contract Price in excess of \$125,000 must also be published in a trade newspaper of general statewide circulation. Metro may post notices of intent to award Electronically as provided by ORS 279C.410(7).
- (2) **Alternative Procedures.** In the event that Metro desires to direct or permit the submission and receipt of Offers for a Public Improvement Contract by Electronic means, as allowed under ORS 279C.365(1)(d), it shall first adopt supporting procedures substantially in conformance with Rule 47-0330 (Electronic Procurement under ORS Chapter 279B), taking into account ORS Chapter 279C requirements for Written Bids, Opening Bids publicly, Bid security, first-tier Subcontractor disclosure and inclusion of prevailing wage rates.
- (3) **Interpretation.** Nothing in this Rule shall be construed as prohibiting Metro from making procurement documents for Public Improvement Contracts available in Electronic format as well as in hard copy when Bids are to be submitted only in hard copy. See ORS 279C.365(2).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365

#### **49-0320          Pre-Closing Modification or Withdrawal of Offers**

- (1) **Modifications.** Once submitted, Bids or Proposals may only be modified in Writing prior to the time and date set for Bid or Proposal Closing. An Offeror shall prepare and submit any modification to its Offer to Metro in accordance with Rule 49-0280, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:
- (a) Bid (or Proposal) Modification; and
  - (b) Solicitation number.
- (2) **Withdrawals.**
- (a) An Offeror may withdraw its Offer by Written notice, Signed by an authorized representative of the Offeror, delivered to the location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by Metro prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in Person prior to the Closing, upon presentation of appropriate identification and satisfactory evidence of authority.
  - (b) Metro may release an unopened Offer withdrawn under subsection (2)(a) to the Offeror or its authorized representative, after voiding any date and time stamp mark.
  - (c) The Offeror shall mark the Written request to withdraw an Offer as follows:
    - A. Bid (or Proposal) Withdrawal; and
    - B. Solicitation number.
- (3) **Documentation.** Metro shall include all documents relating to the modification or withdrawal of Offers in the appropriate Solicitation file.

(4) **Late Requests for Modification or Withdrawal.** Any request for modification or withdrawal of a Bid or Proposal made after the time for Bid or Proposal Closing is late as provided by Rule 49-0340. Any late submission will be returned to the Bidder or Proposer unopened. If any late submission is opened inadvertently, the procedure provided by Rule 49-0330 applies, except the submission will be returned to the sender.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.360, 279C.365, 279C.375 & 279C.395

#### **49-0330 Receipt, Opening and Recording of Offers; Confidentiality of Offers**

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

(2) **Opening and Recording.** Metro shall publicly open Bids, including any modifications made to the Bid, pursuant to Rule 49-0320 and to the extent practicable, Metro shall read aloud the name of each Bidder, the Bid price(s), and such other information as Metro considers appropriate. In the case of voluminous Bids, Metro may elect not to read the Bids aloud.

(3) **Availability.** After Opening, Metro shall make Bids available for public inspection, but pursuant to ORS 279C.410 Proposals are not required to be available for public inspection until after notice of intent to award is issued. In any event Metro may withhold from disclosure those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with the Oregon Public Records Law, ORS 192.410 et seq. To facilitate public inspection of the non-confidential portion of the Bid or Proposal, an Offeror must designate and separate from the remainder of the Offer, as confidential, any material it deems confidential. Application of the Oregon Public Records Law ORS 192.410 et seq. determines if the information designated as confidential and claimed to be exempt is in fact exempt from disclosure. To the extent Metro determines such designation is not in accordance with applicable law, Metro will make those portions available for public inspection. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and shall be publicly available regardless of an Offeror's designation to the contrary. Copies of public records will be made available upon payment of Metro's charges.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, 279C.375 & 279C.395

#### **49-0340 Late Bids, Late Withdrawals and Late Modifications**

(1) Any Bid or Proposal received after Closing is late. An Offeror's request for withdrawal or modification of a Bid or Proposal received after Closing is late. Metro shall not consider late Bids or Proposals, withdrawals or modifications except as permitted in Rule 49-0350 or 49-0390. Failure by Metro to properly return or dispose of a late submission does not mean an Offer or submission arrived on time.

(2) For manual submissions of Offers, Metro's time clock shall be the clock of record and the date and time imprint of that clock on an Offer shall determine the timeliness of the submission. Late manual submissions will be returned to the Offeror unopened with a copy of the envelope containing Metro's time stamp on the Offer retained for the Solicitation file.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, 279C.375 & 279C.395

#### **49-0350 Mistakes**

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

(2) **Treatment of Mistakes.** Metro will not allow a Bidder or Proposer to correct or withdraw an Offer for an error in judgment. Mistakes that constitute a minor informality may be waived or corrected. Mistakes that constitute clerical errors may be corrected or withdrawn in Metro's discretion pursuant to this Rule.

(3) **Notification and Verification.** If Metro believes the Offer contains a mistake, Metro shall notify the Offeror, identify the apparent mistake, and request that the Offeror verify the Offer in Writing, or by Electronic transmission within one business day after notification.

(a) If the Offeror fails to respond within one business day after notification of the apparent mistake, Metro shall consider the Offer as submitted unless the amount of the Offer is so far out of line with the amounts of other Bids received, or with the amount estimated by Metro, or there are other indications of error so clear, as to reasonably justify the conclusion or that acceptance of the Offer would be unfair to the Offeror or to other bona fide Offerors, in which case Metro is entitled to reject the Offer. Metro may extend the time for response for good cause shown.

(b) If the Offeror verifies its Offer, Metro must consider the Offer as originally submitted. However, in fairness to other Offerors, verification does not preclude Metro from rejecting the Offer if it is clear that a mistake has been made and Metro determines the intended Offer is not evident.

(4) **Minor Informality.** Metro may waive, or permit a Bidder or Proposer to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:

(a) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;

(b) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and

(c) Acknowledge receipt of an Addenda to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addenda and intended to be bound by its terms; or the Addenda involved did not affect price, quality or delivery.

(5) **Clerical Errors.** Metro may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms Metro's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes,

errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example a missing unit price may be established by dividing the total price for the units by the quantity of units for that item or a missing, or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). Unit prices prevail over extended prices in the event of a discrepancy between extended prices and unit prices.

(a) Metro may permit a Bidder or Proposer to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:

- A. The nature of the error;
- B. That the error is not a minor informality under this subsection or an error in judgment;
- C. That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;
- D. That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;
- E. That the Offeror will suffer substantial detriment if Metro does not grant the Offeror permission to withdraw the Offer;
- F. That Metro's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on Metro or the public it represents; and
- G. That the Offeror promptly gave notice of the claimed error to Metro.

(b) The criteria in Section (5)(a) of this Rule is relevant in determining whether Metro will permit an Bidder or Proposer to withdraw its Offer after Closing. These criteria also shall apply to the question of whether Metro will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to Metro based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by Metro, whether by award to the next lowest Responsive and Responsible Bidder or the best Responsive and Responsible Proposer, or by resort to a new Solicitation.

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

(7) **Identification of Mistakes after award.** The procedures and criteria set forth above are Offeror's only opportunity to correct mistakes or withdraw Offers because of a mistake. Following award, an Offeror is bound by its Offer, and may withdraw its Offer or rescind a Contract entered into pursuant to this Division 49 only to the extent permitted by applicable law.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375 & 279C.395

#### **49-0360 First-Tier Subcontractors; Disclosure and Substitution**

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

or labor and materials on the Contract, and if awarded, whose subcontract value would be equal to or greater than:

- (a) Five percent (5%) of the total Contract Price, but at least \$15,000; or
- (b) \$350,000, regardless of the percentage of the total Contract Price.

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

- (a) Set the Bid Closing on a Tuesday, Wednesday or Thursday, and at a time between 2 p.m. and 5 p.m., and provided that the two-hour disclosure deadline described by this Rule would not then fall on a legal holiday;
- (b) Open Bids publicly immediately after the Bid Closing; and
- (c) Consider for Contract award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed in the Solicitation Document.

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

- (a) Prescribe the disclosure form that must be utilized, substantially in the form set forth in ORS 279C.370(2); and
- (b) Provide instructions in a notice substantially similar to the following:

“Instructions for First-Tier Subcontractor Disclosure

Bidders are required to disclose information about certain first-tier subcontractors when the Contract value for a Public Improvement is greater than \$100,000 (see ORS 279C.370). Specifically, when the Contract amount of a first-tier subcontractor furnishing labor or labor and materials would be greater than or equal to: (i) 5% of the project Bid, but at least \$15,000; or (ii) \$350,000 regardless of the percentage, the Bidder must disclose the following information about that subcontract either in its Bid submission, or within two hours after Bid Closing:

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

If the Bidder will not be using any subcontractors that are subject to the above disclosure requirements, the Bidder is required to indicate "NONE" on the accompanying form.

METRO MUST REJECT A BID AS NONRESPONSIVE IF THE BIDDER FAILS TO SUBMIT THE DISCLOSURE FORM WITH THIS INFORMATION BY THE STATED DEADLINE (see Rule 49-0360)."

(4) **Submission.** A Bidder shall submit the disclosure form required by this Rule either in its Bid submission, or within two working hours after Bid Closing in the manner specified by the ITB.

(5) **Responsiveness.** Compliance with the disclosure and submittal requirements of ORS 279C.370 and this Rule is a matter of Responsiveness. Bids that are submitted by Bid Closing, but for which the

disclosure submittal has not been made by the specified deadline, are not Responsive and shall not be considered for Contract award.

(6) **Metro Role.** Metro shall obtain, and make available for public inspection, the disclosure forms required by ORS 279C.370 and this Rule. Metro shall also provide copies of disclosure forms to the Bureau of Labor and Industries as required by ORS 279C.835. Metro is not required to determine the accuracy or completeness of the information provided on disclosure forms.

(7) **Substitution.** Substitution of affected first-tier subcontractors may be made only in accordance with ORS 279C.585, the Solicitation Document, and the Contract. Metro will accept Written submissions filed under that statute as public records. Aside from issues involving inadvertent clerical error under ORS 279C.585, Metro does not have a statutory role or duty to review, approve or resolve disputes concerning such substitutions. See ORS 279C.590 regarding complaints to the Construction Contractors Board on improper substitution.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.370, 279C.585, 279C.590 & 279C.835

#### **49-0370 Disqualification of Persons**

(1) **Authority.** Metro may disqualify a Person from consideration of award of Metro's Contracts after providing the Person with notice and a reasonable opportunity to be heard in accordance with this Rule.

(2) **Standards for Conduct Disqualification.** As provided in ORS 279C.440, Metro may disqualify a Person for:

(a) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.

(b) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the Person's responsibility as a contractor.

(c) Conviction under state or federal antitrust statutes.

(d) Violation of a contract provision that is regarded by Metro to be so serious as to justify Conduct Disqualification. A violation under this subsection (d) may include but is not limited to material failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a Person's failure to perform or unsatisfactory performance caused by acts beyond the Person's control is not a basis for Disqualification.

(e) Failure to carry workers' compensation or unemployment insurance as required by statute.

(f) Violation of ORS 279A.110 (discrimination in subcontracting) or violation of ORS 200.065 or ORS 200.075 (fraudulent and prohibited conduct related to COBID certification).

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

(a) State that Metro intends to disqualify the Person;

(b) Set forth the reasons for the Disqualification;



(c) Include a statement of the Person's right to a hearing if requested in Writing within the time stated in the notice and that if Metro does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived its right to a hearing;

(d) Include a statement of the authority under which the hearing will be held;

(e) Include a reference to the particular sections of the statutes and rules involved;

(f) State the proposed Disqualification period; and

(g) State that the Person may be represented by legal counsel.

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

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

(a) The effective date and period of Disqualification;

(b) The grounds for Disqualification; and

(c) A statement of the Person's appeal rights and applicable appeal deadlines. For a Conduct Disqualification or a Disqualification under ORS 279A.110, the disqualified Person must notify Metro in Writing within three (3) business Days after receipt of Metro's notice of Disqualification if the Person intends to appeal Metro's decision.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 200.065, 200.075, 279A.110, 279C.440, 279C.445, 279C.450, OL 2015, ch 565 (HB 3303)

#### **49-0380 Bid or Proposal Evaluation Criteria**

(1) **General.** A Public Improvement Contract, if awarded, must be awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. (See Rule 49-0390, and Rules for Alternative Contracting Methods at 49-0600 to 49-0690.)

(2) **Bid Evaluation Criteria.** Invitations to Bid may solicit lump-sum Offers, with or without alternates, unit-price Offers, or any combination.

(a) **Lump Sum.** If the ITB requires a lump-sum Bid without additive or deductive alternates, Bids must be compared on the basis of lump-sum base Bid prices. If the ITB calls for a lump-sum base Bid plus additive or deductive alternates, the total Bid price must be calculated and compared by adding to or deducting from the base Bid those alternates selected by Metro, which selection is at Metro's sole discretion.

(b) **Unit Price.** If the Bid includes unit pricing for estimated quantities, without additive or deductive alternates, the total Bid price must be calculated and compared by multiplying the estimated quantities by the unit prices submitted by the Bidder. If the Bid includes unit pricing for estimated quantities, plus additive or deductive alternates, the total Bid price must be calculated and compared by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by Metro, which selection is at Metro's sole discretion. Metro shall specify within the Solicitation Document the estimated quantity of the Procurement to be used for

determination of the low Bidder. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price governs. (See Rule 49-0350(2)(b).)

(3) **Proposal Evaluation Criteria.** If the Local Contract Review Board has exempted a Public Improvement from the Competitive Bidding requirements of ORS 279C.335(1), and has directed the use of an Alternative Contracting Method under ORS 279C.335(3) and ORS 279C.337, evaluation criteria shall be set forth in the Solicitation Documents. (See Rule 49-0640, ORS 279C.335 and 279C.405.)

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279C.335, OL 2011, ch 458

#### **49-0390 Offer Evaluation and award; Determination of Responsibility**

(1) **General.** If awarded, Metro shall award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the best, Responsive Proposal, provided that such Person is not listed by the Construction Contractors Board as disqualified to hold a Public Improvement Contract (ORS 279C.375(3)(a)) or is ineligible for award as a nonresident education service district (ORS 279C.325). Metro may award by item, groups of items or the entire Offer provided such award is consistent with the Solicitation Document and in the public interest. Where award is based on competitive Bids, ORS 279C.375(5) permits multiple Contract awards when specified in the ITB.

(2) **Determination of Responsibility.** Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before awarding a Contract, Metro must have information that indicates that the Offeror meets the standards of responsibility set forth in ORS 279C.375(3)(b). To be a Responsible Offeror, Metro must determine that the Offeror:

(a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to meet all contractual responsibilities;

(b) Has completed previous Contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that to the extent the costs associated with and time available to perform a previous Contract were within the Offeror's control, the Offeror stayed within the time and budget allotted for the procurement and otherwise performed the Contract in a satisfactory manner. An Offeror's record of Contract performance should be carefully scrutinized if the Offeror is or recently has been materially deficient in Contract performance. In reviewing the Offeror's performance, Metro should determine whether the Offeror's deficient performance was expressly excused under the terms of the Contract, or whether the Offeror took appropriate corrective action. Metro may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. Metro shall make its basis for determining an Offeror not Responsible under this subsection part of the Solicitation file;

(c) Has a satisfactory record of integrity. An Offeror may lack integrity if Metro determines the Offeror demonstrates a lack of business ethics such as violating state environmental laws or making false certifications to Metro. Metro may find an Offeror is not Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Conduct Disqualification under Rule 49-0370 may be used to determine an Offeror's integrity. Metro may find an Offeror is not Responsible based on previous convictions of offenses related to obtaining or attempting to obtain a contract or

subcontract or in connection with the Offeror's performance of a contract or subcontract. Metro shall make its basis for determining that an Offeror is not Responsible under this subsection part of the Procurement file;

(d) Is legally qualified to contract with Metro;

(e) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by Metro concerning responsibility, Metro shall base the determination of responsibility on any available information, or may find the Offeror not Responsible.

(3) **Documenting Agency Determinations.** Metro shall document its compliance with ORS 279C.375(3) and the above sections of this Rule on a Responsibility Determination Form substantially as set forth in ORS 279.375(3)(c), and file that form with the Construction Contractors Board within thirty (30) Days after Contract award.

(4) **Metro Evaluation.** Metro shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law..

(5) **Offeror Submissions.**

(a) Metro may require an Offeror to submit Product Samples, Descriptive Literature, technical data, or other material and may also require any of the following prior to award:

- A. Demonstration, inspection or testing of a product prior to award for characteristics such as compatibility, quality or workmanship;
- B. Examination of such elements as appearance or finish; or
- C. Other examinations to determine whether the product conforms to Specifications.

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

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

(c) **Nonresident Bidders.** In determining the lowest Responsive Bid, Metro shall, in accordance with Rule 46-0310, add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.

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

(7) **Evaluation of Proposals.** See Rule 49-0650 regarding rules applicable to Requests for Proposals.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335, 279C.365, 279C.375, 279C.395, OL 2015, ch 454 (SB 491)

#### **49-0395 Notice of Intent to award**

(1) **Notice.** At least seven (7) Days before the award of a Public Improvement Contract, Metro shall issue to each Bidder (pursuant to ORS 279C.375(2)) and each Proposer (pursuant to ORS 279C.410(7)), or post Electronically or otherwise, a notice of Metro's intent to award the Contract. This notice requirement does not apply to contracts excepted or exempted from Competitive Bidding under ORS 279C.335(1)(c) or (d), including, without limitation, an award of a small Public Improvement Contract (under \$25,000) or an award of an intermediate Public Improvement Contract based off of Competitive Quotes.

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

(3) **Finalizing award.** Metro's award shall not be final until the later of the following three (3) dates:

(a) Seven (7) Days after the date of notice of intent to award, unless the Solicitation Document provided a different period for protest of Contract award. For purposes of this subsection, the Day on which the notice is posted from which the seven (7) Days or other time period begins to run is not included, but the last Day of the period is included; or

(b) The Day Metro provides a Written response to all timely-filed protests that denies the protest and affirms the award; or

(c) Upon concluding any administrative appeal pursuant to Rule 49-0450 if the Procurement Officer decides to permit an appeal.

(4) **Prior notice Impractical.** Posting of notice of intent to award is not required when Metro determines that it is impractical due to unusual time constraints in making prompt award for its immediate procurement needs, documents the Procurement file as to the reasons for that determination, and posts notice of that action as soon as reasonably practical.

Stat. Auth,: ORS 279A.065

Stats. Implemented: ORS 279C.375

#### **49-0400 Documentation of Award; Availability of Award Decisions**

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

(2) **Contents of Award Record for Bids.** Metro's record must include:

(a) All submitted Bids;

(b) Completed Bid tabulation sheet; and

(c) Written justification for any rejection of lower Bids.

(3) **Contents of Award Record for Proposals.** Where the use of Requests for Proposals is authorized as set forth in Rule 49-0650, Metro's record must include:

(a) All submitted Proposals;

(b) The completed evaluation of the Proposals;

(c) Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and

(d) If Metro permitted negotiations in accordance with Rule 49-0650, Metro's completed evaluation of the initial Proposals and Metro's completed evaluation of final Proposals.

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

(5) **Bid Tabulations and award Summaries.** Upon request of any Person, Metro shall provide tabulations of awarded Bids or evaluation summaries of Proposals. Metro may charge a nominal charge which may be payable in advance. Requests must contain the Solicitation Document number and, if requested, be accompanied by a self-addressed, stamped envelope. Metro may also provide tabulations of Bids and Proposals awarded on Metro's Website or on Metro's Electronic Procurement System.

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365 & 279C.375

#### **49-0410 Time for Acceptance; Extension**

(1) **Time for Offer Acceptance.** An Offeror's Bid, or Proposal submitted as a Firm Offer (see Rule 49-0280), is irrevocable, valid and binding on the Offeror for not less than thirty (30) Days from Closing unless otherwise specified in the Solicitation Document.

(2) **Extension of Acceptance Time.** Metro may request, orally or in Writing, that Offerors extend, in Writing, the time during which Metro may consider and accept their Offer(s). If an Offeror agrees to such extension, the Offer shall continue as a Firm Offer, irrevocable, valid and binding on the Offeror for the agreed-upon extension period. The extension agreement may occur after the 30-Day time period referenced above in section (1) of this Rule.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375

#### **49-0420 Negotiation With Bidders Prohibited**

(1) **Bids.** Except as permitted by ORS 279C.340 and Rule 49-0430, Metro shall not negotiate with any Bidder prior to Contract award. After award of the Contract, Metro and Contractor may modify the resulting Contract only by change order or amendment to the Contract in accordance with 49-0910.

(2) **Requests for Proposals.** Metro may conduct discussions or negotiations with Proposers only in accordance with the requirements of Rule 49-0650.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.340 & 279C.375

#### **49-0430    Negotiation When Bids Exceed Cost Estimate**

- (1) **Generally.** In accordance with ORS 279C.340, if all Responsive Bids from Responsible Bidders on a competitively Bid project exceed Metro's Cost Estimate, prior to Contract award Metro may negotiate Value Engineering and Other Options with the Responsible Bidder submitting the lowest, Responsive Bid in an attempt to bring the Project within Metro's Cost Estimate. The subcontractor disclosure and substitution requirements of Rule 49-0360 do not apply to negotiations under this Rule.
- (2) **Definitions.** The following definitions apply to this Rule:
- (a) "Cost Estimate" means Metro's most recent pre-Bid, good faith assessment of anticipated Contract costs, consisting either of an estimate of an architect, engineer or other qualified professional, or confidential cost calculation work sheets, where available, and otherwise consisting of formal planning or budgetary documents.
  - (b) "Other Options" means those items generally considered appropriate for negotiation in the RFP process, relating to the details of Contract performance as specified in Rule 49-0650, but excluding any material requirements previously announced in the Solicitation process that would likely affect the field of competition.
  - (c) "Project" means a Public Improvement.
  - (d) "Value Engineering" means the identification of alternative methods, materials or systems which provide for comparable function at reduced initial or life-time cost. It includes proposed changes to the plans, Specifications, or other Contract requirements which may be made, consistent with industry practice, under the original Contract by mutual agreement in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the Public Improvement. Cost savings include those resulting from life cycle costing, which may either increase or decrease absolute costs over varying time periods.
- (3) **Rejection of Bids.** In determining whether all Responsive Bids from Responsible Bidders exceed the Cost Estimate, only those Bids that have been formally rejected, or Bids from Bidders who have been formally disqualified by Metro, will be excluded from consideration.
- (4) **Scope of Negotiations.** Metro shall not proceed with Contract award if the scope of the Project is significantly changed from the original ITB. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other Bidders would have been expected by Metro to participate in the Bidding process had the change been made during the Solicitation process rather than during negotiation. This Rule shall not be construed to prohibit resolicitation of trade subcontracts.
- (5) **Discontinuing Negotiations.** Metro may discontinue negotiations at any time, and shall do so if it appears to Metro that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to rebid any portion of the project, or to obtain subcontractor pricing information upon request, is considered a lack of good faith.
- (6) **Limitation.** Negotiations may be undertaken only with the lowest Responsive, Responsible Bidder pursuant to ORS 279C.340. That statute does not provide any additional authority to further negotiate with Bidders next in line for Contract award.
- (7) **Public Records.** To the extent that a Bidder's records used in Contract negotiations are public records, they are exempt from disclosure until after the negotiated Contract has been awarded or the

negotiation process has been terminated, at which time they are subject to disclosure pursuant to the provisions of the Oregon Public Records Law, ORS 192.410 to 192.505.

Stat. Auth.: ORS 279C.340 & 279A.065

Stats. Implemented: ORS 279C.340

#### **49-0440 Rejection of Offers**

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

(a) Metro may reject any Offer upon finding that accepting the Offer may impair the integrity of the Procurement process or that rejecting the Offer is in the public interest. An example of rejection in the public interest is Metro's determination that any of the unit Bid prices are significantly unbalanced to Metro's potential detriment.

(b) Metro may reject an Offer upon Metro's finding that the Offer:

A. Is contingent on Metro's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;

B. Takes exception to terms and conditions (including Specifications);

C. Attempts to prevent public disclosure of matters in contravention of the terms and conditions of Solicitation Document or in contravention of applicable law;

D. Offers work that fails to meet the Specifications of the Solicitation Document;

E. Is late;

F. Is not in substantial compliance with the Solicitation Documents;

G. Is not in substantial compliance with all prescribed public Solicitation procedures;

H. Omits, or is unclear as to, the price;

I. Requires a delivery date different from that required by the Solicitation Document;

(c) Metro shall reject an Offer upon Metro's finding that the Offeror:

A. Has not been prequalified under ORS 279C.430 and Metro required mandatory prequalification;

B. Has been Disqualified;

C. Has been declared ineligible under ORS 279C.860 by the Commissioner of Bureau of Labor and Industries and the Contract is for a Public Work;

D. Is listed as not qualified by the Construction Contractors Board, if the Contract is for a Public Improvement;

E. Has not met the requirements of ORS 279A.105 if required by the Solicitation Document;

F. Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;

G. Has failed to provide the certification required under section (3) of this Rule;

H. Has failed to substantially comply with Subcontractor Equity Program requirements (See Metro's Equity in Contracting Administrative Rules);

I. Is not Responsible. See Rule 49-0390(2) regarding Metro determination that the Offeror has met statutory standards of responsibility.

(2) **Form of Business.** For purposes of this Rule, Metro may investigate any Person submitting an Offer. The investigation may include that Person's officers, Directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this Rule or to apply the Disqualification provisions of ORS 279C.440 to 279C.450 and Rule 49-0370.

(3) **Certification of Non-Discrimination.** The Offeror shall certify and deliver to Metro Written certification, as part of the Offer, that the Offeror has not discriminated and will not discriminate against any disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business, or business that a service-disabled veteran owns, in obtaining any required subcontracts. Failure to do so shall be grounds for Disqualification.

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

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

(a) The content of or an error in the Solicitation Document, or the Solicitation process unnecessarily restricted competition for the Contract;

(b) The price, quality or performance presented by the Offerors is too costly or of insufficient quality to justify acceptance of the Offer;

(c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;

(d) Causes other than legitimate market forces threaten the integrity of the competitive Procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct and inadvertent or intentional errors in the Solicitation Document;

(e) Metro cancels the Solicitation in accordance with Rule 49-0270; or

(f) Any other circumstance indicating that awarding the Contract would not be in the public interest.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.105, 279A.110, 279C.375, 279C.380, 279C.395, OL 2015, ch 325 (HB 2716), OL 2015, ch 565 (HB 3303)



#### **49-0450 Protest of Contractor Selection**

(1) **Right to Protest award.** An adversely aggrieved or Affected Offeror (or a trade association acting on his behalf as permitted under ORS 279C.460) may protest the award or the notice of intent to award a Contract, whichever occurs first, resulting from a competitive Bid or competitive Proposal if:

(a) The adversely aggrieved or Affected Offeror is eligible (i.e. next in line) for award of the Contract if the protest is successful; and

(b) The reason for the protest is that:

A. All other Offers are nonresponsive;

B. Metro failed to conduct the evaluation of Proposals in accordance with the criteria or processes described in the Solicitation Document;

C. Metro abused its discretion in rejecting the adversely aggrieved or Affected Offeror's Bid or Proposal as nonresponsive; or

D. Metro's evaluation of Offers or Metro's subsequent determination of award is otherwise in violation of these Rules, ORS Chapter 279C or ORS Chapter 279A.

#### **(2) Method of Protest.**

(a) **Time.** A Written protest of the notice of intent to award or award itself must be provided to Metro within seven (7) Days after Metro posts a notice that it will make a Contract award, or the Contract is awarded, whichever occurs first, unless the Solicitation Document specified a shorter period of time. Metro shall not consider a protest submitted after the timeline established for submitting such protest under this Rule or such different time period as may be provided in the Solicitation Document

(b) **Contents.** The protest must include the following information.

A. Sufficient information to identify the Contract or notice of intent to award that is the subject of the protest;

B. A detailed statement of all the legal and factual grounds for the protest;

C. Evidence or supporting documentation that supports the grounds on which the protest is based;

D. A description of the resulting harm to the Offeror submitting the protest; and

E. The relief requested.

#### **(3) Required Metro Response.** Metro shall take the following actions, as appropriate:

(a) Metro shall inform protesting Offeror in Writing if the protest was not timely filed.

(b) Metro shall inform protesting Offeror if it failed to meet the requirements of section (2)(b) of this Rule, and the reasons for that failure.

(c) If the protest was timely filed and provides the required information, Metro shall issue a decision in Writing and provide that decision to the protesting Offeror within a reasonable time of the receipt of the protest.

(d) If Metro denies the protest, it shall inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contract Review Board.

(4) **Optional Metro Response.** In addition to the requirements set forth above in section (3), Metro may do any of the following:

- (a) Agree with the protest and issue a revised notice of intent to award or take any other corrective action that may be necessary to ensure that the Contract is awarded to the appropriate Offeror;
- (b) Issue a Written response to the protest and provide that decision to the protesting Offeror.
- (c) Refer the protest and any response from the Procurement Officer to the Local Contract Review Board for decision;
- (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.

(5) **Judicial Review.** A protesting Offeror may not seek judicial review of the Procurement Officer's final decision (or if referred to the Local Contract Review Board by the Procurement Officer, the Board's final decision) unless it timely and fully has complied with the protest requirements of this Rule and has exhausted all administrative avenues of appeal provided by Metro.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375, 279C.380, 279C.385 & 279C.460

#### **49-0455 Protests of Other Violations**

(1) **Right to Protest.** Protests of any violation of ORS Chapter 279C, for which no administrative remedy is otherwise provided by these Rules, are subject to this Rule 49-0455. An Affected Person can file a protest under this Rule only if a Contract is about to be awarded or has been awarded and:

- (a) An alleged violation of ORS 279C has occurred in the Solicitation process and the violation has resulted or will result in the unlawful award of a Contract or the unlawful failure to award the Contract;
- (b) The alleged violation deprived the Affected Person of the award of the Contract or the opportunity to compete for the award of the Contract;
- (c) The Affected Person would have been a Responsible Bidder, Proposer or Offeror qualified to receive the award of the Contract; and
- (d) The Affected Person gave Written notice to Metro describing the alleged violation no later than seven (7) Days after the date on which the alleged violation occurred and in no event more than seven (7) Days after the date of the execution of the Contract.

(2) **Method of Protest.**

(a) **Time.** The Procurement Officer shall not consider a protest submitted after the timeline established for submitting such protest under this Rule and shall not consider a protest under this section if a right to protest is elsewhere provided by these Rules.

(b) **Contents.** The protest must include the following information:

- A. Sufficient information to identify the Solicitation that is the subject of the protest;
- B. A detailed statement of the alleged violation and all the legal and factual grounds for the protest;
- C. Evidence or supporting documentation that supports the grounds on which the protest is based;
- D. A description of the resulting harm to the Affected Person; and
- E. The relief requested.

(3) **Required Metro Response.** Metro shall take the following actions, as appropriate:

- (a) Metro shall inform the Affected Person in Writing if the protest was not timely filed;
- (b) Metro shall inform the Affected Person if it failed to meet the requirements of Section 2(b) above and the reasons for that failure;
- (c) If the protest was timely filed and provides the information required by Section 2(b) above, Metro shall issue a decision in Writing and provide that decision to the Affected Person within a reasonable time of the receipt of the protest.

(d) If Metro denies the protest, it shall inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Council Review Board.

(4) **Optional Metro Response.** In addition to the requirements of section (3) above, Metro may take any or all of the following actions:

- (a) Agree with the protest and take any corrective action necessary;
- (b) Issue a Written response to the protest and provide that decision to the Affected Person;
- (c) Refer the protest and any response by the Procurement Officer to the Local Contract Review Board for decision; or
- (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.

(5) **Judicial Review.** An Affected Person may not seek judicial review of the Procurement Officer's final decision (or if referred to the Local Contract Review Board by the Procurement Officer, the Board's final decision) unless it has timely and fully complied with the protest requirements of this Rule and has exhausted all administrative avenues of appeal provided by Metro.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375, 279C.380, 279C.385 & 279C.460

#### **49-0460 Performance and Payment Security; Waiver**

(1) **Public Improvement Contracts.** Unless the required performance bond is waived under ORS 279C.380(1)(a), excused in cases of Emergency under ORS 279C.380(4), or unless Metro's Local Contract Review Board exempts a Contract or classes of contracts from the required performance bond and payment bond pursuant to ORS 279C.390, the Contractor shall execute and deliver to Metro a performance bond and a payment bond each in a sum equal to the Contract Price for all Public Improvement Contracts. This requirement applies only to Public Improvement Contracts with a value, estimated by Metro, of more than \$100,000. See ORS 279C.380(5). The requirement for the BOLI Public

Works payment bond under ORS 279C.830 may only be waived as provided in ORS 279C.836 (4), (7) and (8). See Rule 49-0815 regarding the separate requirement for a Public Works bond.

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

(3) **Requirement for Surety Bond.** Metro will accept only a performance bond and payment bond furnished by a surety company authorized to do business in Oregon and who is duly listed in the United States Treasury List as published in the Federal Register or is otherwise approved by the Metro Attorney each in the amount of 100 percent (100%) of the Contract Price unless otherwise specified in the Solicitation Document or such substitute security as approved by the Metro Attorney's office. The surety bond must be Signed by the surety's Attorney in Fact, and have attached the Power of Attorney for the Attorney in Fact.

(4) **Time for Submission.** The apparent successful Offeror must promptly furnish the required performance and payment security within ten (10) Days after notification by Metro. If the Offeror fails to furnish all security bonds as requested, Metro may reject the Offer and award the Contract to the Responsible Bidder with the next lowest Responsive Bid or the Responsible Proposer with the next highest-scoring Responsive Proposal, and, at Metro's discretion, the Offeror shall forfeit its Bid or Proposal security.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375, 279C.380 & 279C.390

#### **49-0470 Substitute Contractor**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, 279C.370, 279C.375, 279C.380 & 279C.390

#### **49-0490 Foreign Contractor**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.120

## **Alternative Contracting Methods**

### **49-0600 Purpose**

Rules 49-0600 to 49-0690 are intended to provide guidance regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as may be directed by the Local Contract Review Board under ORS 279C.335. Those methods include, but are not limited to: Design-Build, Energy Savings Performance Contract (ESPC) and the Construction Manager/General Contractor(CM/GC) forms of contracting. As to ESPC contracting, Rules 49-0600 to 49-0690 implement the requirements of ORS 279C.335 pertaining to the adoption of rules governing the procedures for entering into ESPCs. As to contracting for CM/CG Services requiring an exemption from Competitive Bidding under ORS 279C.335(2), Rules 49-0600 to 49-0690 include mandatory and optional procurement provisions pursuant to the requirements of ORS 279C.337.

Stat. Auth.: ORS 279C.335, 279A.065 & 351.086

Stats. Implemented: ORS 279C.335, 279C.337, 279A.065 & 351.086

### **49-0610 Definitions for Alternative Contracting Methods**

The following definitions apply to Rules 49-0600 to 49-0690, unless the context requires otherwise:

- (1) "Affiliate" has the meaning set forth in ORS 279C.332(1).
- (2) "Alternative Contracting Methods" means innovative techniques for procuring or performing Public Improvement Contracts, utilizing processes other than the traditional Design-Bid-Build method (with award based solely on price, in which a final design is issued with formal Bid documents, construction work is obtained by sealed Bid awarded to the lowest Responsive, Responsible Bidder, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design-Build contracting, CM/GC forms of contracting and ESPCs, which are specifically addressed in Rules 49-0600 to 49-0690, as well as other developing techniques such as general "performance contracting" and "cost plus time" contracting, for which procedural requirements are identified under Rules 49-0600 to 49-0690.
- (3) "Construction Manager/General Contractor" or "CM/GC" has the meaning set forth in ORS 279C.332(2).
- (4) "Construction Manager/General Contractor Method" or "CM/GC Method" means the Alternative Contracting Method which involves Metro's selection of a CM/GC to perform CM/GC Services for a project or projects. The CM/GC Method generally involves a form of Procurement that results in a Public Improvement Contract for a Construction Manager/General Contractor to undertake project team involvement with design development; constructability reviews; value engineering, scheduling, estimating and subcontracting services; establish a Guaranteed Maximum Price to complete the Contract work; act as General Contractor; hold all subcontracts, self-perform portions of the work as may be allowed by Metro under the CM/GC Contract; coordinate and manage the building process; provide general Contractor expertise; and act as a member of the project team along with Metro department staff, architects, engineers and other consultants. CM/GC also refers to a Contractor under this form of Contract, sometimes known as the "Construction Manager at Risk."
- (5) "Construction Manager/General Contractor Services" or "CM/GC Services" has the meaning set forth in ORS 279C.332(3).

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

(7) “Early Work” means construction services, construction materials and other work authorized by the parties to be performed under the CM/GC Contract in advance of the establishment of the GMP, fixed price or other maximum, not-to-exceed price for the project. Permissible Early Work shall be limited to early procurement of materials and supplies, early release of bid or proposal packages for site development and related activities, and any other advance work related to important components of the project for which performance prior to establishment of the GMP will materially and positively affect the development or completion of the project.

(8) “Energy Conservation Measures” or “ECMs” (also known as “energy efficiency measures”) means, as used in ESPC Procurement, any equipment, fixture or furnishing to be added to or used in an existing building or structure, and any repair, alteration or improvement to an existing building or structure that is designed to reduce energy consumption and related costs, including those costs related to electrical energy, thermal energy, water consumption, waste disposal, and future contract-labor costs and materials costs associated with maintenance of the building or structure. For purposes of Rules 49-0600 to 49-0690, use of either or both of the terms “building” or “structure” shall be deemed to include existing energy, water and waste disposal systems connected or related to or otherwise used for the building or structure when such system(s) are included in the project, either as part of the project together with the building or structure, or when such system(s) are the focus of the project. Maintenance services are not Energy Conservation Measures, for purposes of Rules 49-0600 to 49-0690.

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

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

(11) “General Conditions work” or “GC work” means a general grouping of project work required to support construction operations on the project that is not included within the Contractor’s overhead or fee.

(12) “Guaranteed Maximum Price” or “GMP” has the meaning set forth in ORS 279C.332(4), pertaining to procurements for CM/GC Services. For Alternative Contracting Methods other than the CM/GC Method, “Guaranteed Maximum Price” or “GMP” means the total maximum price provided to Metro by the Contractor and accepted by Metro that includes all reimbursable costs and fees for completion of the Contract work and any particularly identified contingency amounts, as defined by the Public Improvement Contract.

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

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

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

(16) "Savings" has the meaning set forth in ORS 279C.337(4), pertaining to CM/GC Services Procurements. For other Alternative Contracting Methods, "Savings" means a positive difference between a Guaranteed Maximum Price or other maximum not-to-exceed price set forth in a Public Improvement Contract and the actual cost of the Contractor's performance of the Contract work payable by Metro under the terms of the Contract, including costs for which Metro reimburses a Contractor and fees, profits or other payments the Contractor earns.

(17) "Technical Energy Audit" means, as used in ESPC Procurement, the initial phase of Personal Services to be performed by an ESCO that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to Metro of the ESCO's findings during this initial phase of the work. The term "Technical Energy Audit" can also refer to the report provided by the ESCO at the conclusion of this phase of the work.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.332, 279C.335 & 279A.065

#### **49-0620 Use of Alternative Contracting Methods**

(1) **Competitive Bidding Exemptions.** ORS Chapter 279C requires a Competitive Bidding process for Public Improvement Contracts unless a statutory exception applies, a class of Contracts has been exempted from the Competitive Bidding process, or an individual Contract has been exempted from the Competitive Bidding process in accordance with ORS 279C.335 and any applicable Metro Rules. Use of Alternative Contracting Methods may be directed by the Local Contract Review Board as an exception to the prescribed public contracting practices in Oregon, and their use shall be justified in accordance with

the State Code and Rules 49-0600 to 49-0690. See Rule 49-0630 regarding required findings and restrictions on exemptions from the Competitive Bidding requirement under ORS 279C.335.

(2) **Energy Savings Performance Contracts.** Unlike other Alternative Contracting Methods covered by Rules 49-0600 to 49-0690, ESPCs are exempted from the Competitive Bidding requirements for Public Improvement Contracts pursuant to ORS 279C.335(1)(f) upon compliance with the procedures set forth in Rule 49-0600 to 49-0690 related to the solicitation, negotiation, and contracting for ESPC work. If those procedures are not followed, an ESPC procurement may still be exempted from Competitive Bidding requirements by following the general exemption procedures within ORS 279C.335 and Rules 49-0620 (1) and 49-0630.

(3) **Post-Project Evaluation.** ORS 279C.355 requires that Metro prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 when Metro does not use Competitive Bidding. The purpose of this evaluation is to determine whether it was actually in Metro's best interest to use an Alternative Contracting Method instead of Competitive Bidding. The evaluation must be delivered to Metro's Local Contract Review Board within thirty (30) Days of the date Metro "accepts" the Public Improvement project, which event is typically defined in the Contract. In the absence of a Contract definition, acceptance of the Project occurs on the later of the date of final payment or the date of final completion of the Contract work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:

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

Stat. Auth.: ORS 279C.335 & 279A.065

Stats. Implemented: ORS 279C.335, 279A.065, 279C.355 & 351.086

#### **49-0630 Findings, Notice and Hearing**

(1) **Cost Savings Factors.** When findings are required under ORS 279C.335 to exempt a Contract or class of Contracts from Competitive Bidding requirements, the "substantial cost savings" criterion at ORS 279C.335(2)(b) requires consideration of the type, cost, amount of the Contract, number of Entities available to Bid, and "such other factors as may be deemed appropriate." If a particular factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts then such factor need not be addressed other than to state that the factor has no application.

(2) **Required Information.** The statutory definition of "findings" at ORS 279C.330(2), which applies to exemptions from Competitive Bidding under ORS 279C.335, means the justification for Metro's conclusion regarding the factors listed in both ORS 279C.335(2)(a) and 279C.335(2)(b) or, in the alternative, both ORS 279C.335(2)(a) and 279C.335(2)(c).

(3) **Addressing Cost Savings.** Accordingly, when the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the "substantial cost savings and other substantial benefits" requirement of ORS 279C.335(2)(b) may be addressed by a combination of:



(a) Specified findings that address the factors and other information specifically identified by statute, including, but not limited to, an analysis or reasonable forecast of present and future cost savings and other substantial benefits; and

(b) Additional findings that address industry practices, surveys, trends, past experiences, evaluations of completed projects required by ORS 279C.355 and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable, such findings shall relate back to the specific characteristics of the project or projects at issue in the exemption request.

(c) As an alternative to the "substantial cost savings and other substantial benefits" requirement where an Alternative Contracting Method has not been previously used, Metro may make a finding that identifies the project as a "pilot project" under ORS 279C.335(2)(c). Nevertheless, Metro must still make the findings required in ORS 279C.335(2)(a).

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

(5) **Description.** Findings supporting a Competitive Bidding exemption must describe with specificity the Alternative Contracting Method to be used in lieu of Competitive Bidding, including (but not limited to) whether a one-step (Request for Proposals) or two-step (beginning with a Request for Qualifications, followed by a request for Proposals) solicitation process will be utilized. The findings may also describe anticipated characteristics or features of the resulting Public Improvement Contract. However, such description in the findings is not binding upon Metro. The parameters of the Public Improvement Contract are those characteristics or specifics that are announced in the Solicitation Document.

(6) **Class Exemptions.** In making the findings supporting a class exemption, Metro shall clearly identify the "class" with respect to its defining characteristics, pursuant to the requirements of ORS 279C.335(3), as indicated below:

(a) The class cannot be based on a single characteristic or factor, so that Metro directly or indirectly creates a class (e.g., using the CM/GC Method for all Metro construction projects, unidentified future construction projects of a particular work category, or all construction projects from a particular funding source such as the sale of bonds); and

(b) The class must include a combination of factors to be defined by Metro through characteristics that reasonably relate to the exemption criteria, and must reflect a detailed evaluation of those characteristics so that the class is defined in a limited way that effectively meets Metro's objectives while allowing for impartial and open competition and protecting the integrity of the exemption process (i.e., a series of renovation projects that involve renovations for a common purpose, require completion on a related schedule to avoid unnecessary disruption of operations, share common characteristics such as historic building considerations, presence of asbestos or other hazardous substances, or the presence of staff during construction, or otherwise possess characteristics that meet the requirements).

(7) **Public Hearing.** Before final adoption of findings exempting a Public Improvement Contract or class of Contracts from the requirement of Competitive Bidding, notice must be given and a public hearing held by the Local Contract Review Board as follows:

(a) Notification of the public hearing must be published in at least one trade newspaper of general statewide circulation a minimum of fourteen (14) Days before the hearing.

(b) The notice must state that the public hearing is for the purpose of taking comments on Metro's draft findings for an Exemption from the Competitive Bidding requirement. The notice must state that at the hearing, after an opportunity for receipt of comments, the Board will consider adoption of the draft findings and approval of the proposed Alternative Contracting Method. At the time of the notice, copies of the draft findings must be made available to the public.

(c) At the public hearing, the Board shall offer an opportunity for any interested party to appear and present comment before considering and adopting the findings.

(d) If Metro is required to act promptly due to circumstances beyond Metro's control that do not constitute an Emergency, notification of the public hearing may be published simultaneously with Metro's Solicitation of contractors for the alternative public contracting method, as long as responses to the Solicitation are due at least five (5) Days after the hearing and approval of the findings.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335 & 279A.065

#### **49-0640 Competitive Proposals; Procedure**

Metro may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS 279C.330 to 279C.337, ORS 279C.400 to 279C.410 and Rule 49-0600 to 49-0690, unless other applicable statutes control Metro's use of competitive Proposals for Public Improvement Contracts. Also see the subdivision of these Rules entitled "Formal Procurement Rules," 49-0200 to 49-0480. For ESPCs, the following RFP process as further specified in 49-0645, 49-0650, 49-0660 and 49-0680 must be utilized if Metro desires the Procurement process to be exempt from the Competitive Bidding requirements of ORS 279C.335. The RFP process for the Alternative Contracting Methods identified in Rule 49-0600 to 49-0690 includes the following steps:

(1) **Proposal Evaluation.** Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. For ESPC Proposal evaluations, Metro may provide in the RFP that qualifications-based evaluation factors will outweigh Metro's consideration of price-related factors, due to the fact that prices for the major components of the work to be performed during the ESPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors should:

(a) Be reasonable estimates based on information available to Metro;

(b) Treat all Proposals equitably; and

(c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to Metro. See ORS 279C.305.

(2) **Evaluation Factors.**

(a) In basic negotiated construction contracting, where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial

capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, sustainability, its efforts to promote diversity in the construction trades in order to reach all of Metro's residents, and other related matters that could affect the cost or quality of the work.

(b) In CM/GC contracting, in addition to (a) above, those factors may also include the ability to respond to the technical complexity or unique character of the project, analyze and propose solutions or approaches to complex project problems, analyze and propose value engineering options, analyze and propose energy efficiency measures or alternative energy options, coordinate multiple disciplines on the project, effectively utilize the time available to commence and complete the improvement, and related matters that could affect the cost or quality.

(c) In Design-Build contracting, in addition to (a) and (b) above, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience and related matters that could affect the cost or quality.

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

### **(3) Contract Negotiations.**

(a) Contract terms may be negotiated to the extent allowed by the RFP and Rule 49-0600 to 49-0690, provided that the general work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See Rule 49-0650. Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that could affect the cost or quality of the work.

(b) For the CM/GC Method, terms that may be negotiated also include the specific scope of pre-construction services, the GC work, any Early Work and other construction work to be performed by the CM/GC, and any other terms that Metro has identified as being subject to negotiation, consistent with the requirements of Rule 49-0690. In ESPC contracting, terms that may be negotiated also include the

scope of preliminary design of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the work, the scope of Personal Services and work to be performed by the ESCO during the Project Development Plan phase of the work, the detailed provisions of the Energy Savings Guarantee to be provided by the ESCO and scope of work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the work, consistent with the requirements of Rule 49-0680.

Stat. Auth.: ORS 279C.335 & 279A.065

Stats. Implemented: ORS 279C.335, 279A.065 & 351.086

#### **49-0645 Requests for Qualifications (RFQ)**

As provided by ORS 279C.405(1), Metro may utilize Requests for Qualifications to obtain information useful in the preparation or distribution of a Request for Proposals. When using an RFQ as the first step in a two-step solicitation process, in which distribution of an RFP will be limited to the firms identified as most qualified through their submitted statements of qualification, Metro shall first advertise and provide notice of the RFQ in the same manner in which RFPs are advertised, specifically stating that RFPs will be distributed only to the firms selected in the RFQ process. Metro shall also provide within the RFQ a protest provision substantially the same as that described in Rule 49-0450(5) regarding protests of the Competitive Range. After the RFQ process is completed, Metro may distribute RFPs to the selected firms without further advertisement of the solicitation.

Stat. Auth.: ORS 279C.405, 279A.065

Stats. Implemented: ORS 279C.405

#### **49-0650 Requests for Proposals ("RFP")**

(1) **Generally.** When authorized or required by an Exemption granted under Rules 49-0620 and 49-0630, Metro may award a Public Improvement Contract by competitive Proposals. A Contract awarded under this section may be amended only in accordance with Rule 49-0910. Metro may issue a request for information, a request for interest, a Request for Qualifications or other preliminary documents to obtain information useful in the preparation or distribution of a Request for Proposals. If a Contract is awarded, Metro shall award it to the Responsible Proposer whose Proposal is determined in Writing to be the most Advantageous to Metro 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.

(2) Competitive Proposals are subject to the following requirements of Competitive Bidding (for the purposes of applying the requirements listed below to competitive Proposals, when used in the sections listed "Bids" includes Proposals, and "Bid documents" and "Invitation to Bid" include Requests for Proposals):

- (a) Advertisement under Rule 49-0210;
- (b) Requirements for Solicitation Documents under Rule 49-0200;
- (c) Disqualification due to a Construction Contractors Board listing under Rule 49-0370;
- (d) Contract execution and bonding requirements under Rules 49-0390 and 49-0460;

- (e) Determination of responsibility under Rule 49-0390;
  - (f) Rejection of Bids under Rule 49-0440; and
  - (g) Disqualification and prequalification under Rules 49-0370 and 49-0220.
- (3) Competitive Proposals are not subject to the following requirements of Competitive Bidding:
- (a) First-tier subcontractor disclosure under Rule 49-0360; and
  - (b) Reciprocal preference under Rule 46-0310.
- (4) When award of a Public Improvement Contract advertised by the issuance of a Request for Proposals may be made without negotiation, Metro may require Proposal security that serves the same function with respect to Proposals as Bid security serves with respect to Bids as follows:
- (a) Proposal security may be required in a form and amount as may be determined to be reasonably necessary or prudent to protect the interests of Metro.
  - (b) Proposal security will be retained if a Proposer who is awarded a Contract fails to promptly and properly execute the Contract and provide any required bonds or insurance.
  - (c) Proposal security will be returned to all Proposers upon the execution of the Contract, or earlier in the selection process.
- (5) **Receipt of Proposals.** For each Request for Proposals, Metro shall prepare a list of Proposals submitted. Notwithstanding the public records law, ORS 192.410 to 192.505, 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. Notwithstanding any requirement to make Proposals open to public inspection after issuance of the notice of intent to award a Contract, Metro may withhold from disclosure to the public trade secrets, as defined in ORS 192.345, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a Proposal.
- (6) **Solicitation Documents.** In addition to the Solicitation Document requirements of Rule 49-0200, this Rule applies to the requirements for RFPs. RFP Solicitation Documents must conform to the following standards:
- (a) Selection criteria must be set forth in the Solicitation Document. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references, warranty provisions, sustainability, its efforts to diversify its workforce in order to reach all of Metro's citizens, and other related matters that could affect the cost or quality of the work. See Rule 49-0640. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors must be reasonable estimates based on information available to Metro. Subject to ORS 279C.410(4), the Solicitation Document may provide for discussions with Proposers to be conducted for the purpose of Proposal evaluation prior to award or prior to establishing any Competitive Range;
  - (b) When Metro is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, Metro shall identify the specific terms and conditions in or provisions of the Solicitation Document that are subject to negotiation or discussion and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions Metro

has identified as authorized for negotiation. Metro shall describe the evaluation, discussion and negotiation processes, including how Metro will establish the Competitive Range, if any;

(c) The anticipated size of any Competitive Range must be stated in the Solicitation Document, but may be decreased if the number of Proposers that submit Responsive Proposals is less than the specified number, or may be increased as provided in Rule 49-0650 (8)(a)(B);

(d) When Metro intends to award Contracts to more than one Proposer, Metro shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will award. Metro shall also include the criteria it will use to determine how Metro will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular Contractor to provide Personal Services or work from those Contractors awarded Contracts.

**(7) Evaluation of Proposals.**

(a) **Evaluation.** Metro shall evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. Metro shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.

A. Clarifications. In evaluating Proposals, Metro may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer shall submit Written clarifications and such clarifications shall become part of the Proposer's Proposal.

B. Limited Negotiation. If Metro did not permit negotiation in its RFP, Metro may, nonetheless, negotiate with the highest-ranked Proposer, but may then only negotiate the:

(i) Statement of work; and

(ii) Contract Price as it is affected by negotiating the statement of work. The process for discussions or negotiations that is outlined and explained in subsections (9)(b) and (10) of this Rule does not apply to this limited negotiation.

(b) **Discussions; Negotiations.** If Metro permitted discussions or negotiations in the RFP, Metro shall evaluate Proposals and establish the Competitive Range, and may then conduct discussions and negotiations in accordance with this Rule.

A. If the Solicitation Document provided that discussions or negotiations may occur at Metro's discretion, Metro may forego discussions and negotiations and evaluate all Proposals in accordance with this Rule.

B. If Metro proceeds with discussions or negotiations, Metro shall establish a negotiation team tailored for the acquisition. Metro's team may include legal, technical, auditing and negotiating personnel.

(c) **Cancellation.** Nothing in this Rule restricts or prohibits Metro from canceling the Solicitation at any time.

**(8) Competitive Range; Protest; award.**

**(a) Determining Competitive Range.**

A. After Opening the Proposals Metro will evaluate the Proposals in accordance with the evaluation criteria set forth in the RFP. After evaluation of all Proposals in accordance with the criteria set forth in the RFP, Metro will rank the Proposers based on Metro's scoring and determine the Competitive Range.

B. Metro may increase the number of Proposers in the Competitive Range if Metro's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the best Proposer after Metro's evaluation of revised Proposals submitted in accordance with the process described in this Rule.

(b) **Protesting Competitive Range.** Metro shall provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest Metro's evaluation and determination of the Competitive Range in accordance with Rule 49-0450.

(c) **Intent to award; Discuss or Negotiate.** After the protest period provided in accordance with these Rules expires, or after Metro has provided a final response to any protest, whichever date is later, Metro may either:

A. Provide Written notice to all Proposers in the Competitive Range of its intent to award the Contract to the highest-ranked Proposer in the Competitive Range.

(i) An unsuccessful Proposer may protest Metro's intent to award in accordance with Rule 49-0450.

(ii) After the protest period provided in accordance with Rule 49-0450 expires, or after Metro has provided a final response to any protest, whichever date is later, Metro shall commence final Contract negotiations with the highest-ranked Proposer in the Competitive Range; or

A. Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them, and, following such discussions and receipt and evaluation of revised Proposals, conduct negotiations with the Proposers in the Competitive Range.

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

(a) **Initiating Discussions.** Metro shall initiate oral or Written discussions with all of the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP that Metro identified in the RFP as the subject of discussions. Metro may conduct discussions for the following purposes:

A. Informing Proposers of deficiencies in their initial Proposals;

B. Notifying Proposers of parts of their Proposals for which Metro would like additional information; and

C. Otherwise allowing Proposers to develop revised Proposals that will allow Metro to obtain the best Proposal based on the requirements and evaluation criteria set forth in the RFP.

(b) **Conducting Discussions.** Metro may conduct discussions with each Proposer in the Competitive Range necessary to fulfill the purposes of this section, but need not conduct the same amount of discussions with each Proposer. Metro may terminate discussions with any Proposer in the Competitive Range at any time. However, Metro shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with Metro before Metro notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.

A. In conducting discussions, Metro:

(i) Shall treat all Proposers fairly and shall not favor any Proposer over another;

- (ii) Shall not discuss other Proposers' Proposals;
- (iii) Shall not suggest specific revisions that a Proposer should make to its Proposal, and shall not otherwise direct the Proposer to make any specific revisions to its Proposal.

B. At any time during the time allowed for discussions, Metro may:

- (i) Continue discussions with a particular Proposer;
- (ii) Terminate discussions with a particular Proposer and continue discussions with other Proposers in the Competitive Range; or
- (iii) Conclude discussions with all remaining Proposers in the Competitive Range and provide notice to the Proposers in the Competitive Range to submit revised Proposals.

(c) **Revised Proposals.** If Metro does not cancel the Solicitation at the conclusion of Metro's discussions with all remaining Proposers in the Competitive Range, Metro shall give all remaining Proposers in the Competitive Range notice of the date and time by which they must submit revised Proposals. This notice constitutes Metro's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in Metro's notice.

A. Upon receipt of the revised Proposals, Metro shall evaluate the revised Proposals based upon the evaluation criteria set forth in the RFP, and rank the revised Proposals based on Metro's scoring.

B. Metro may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the RFP.

(d) **Intent to award; Protest.** Metro shall provide Written notice to all Proposers in the Competitive Range of Metro's intent to award the Contract. An unsuccessful Proposer may protest Metro's intent to award in accordance with Rule 49-0450. After the protest period provided in accordance with that Rule expires, or after Metro has provided a final response to any protest, whichever date is later, Metro shall commence final Contract negotiations.

#### (10) **Negotiations.**

(a) **Initiating Negotiations.** Metro may commence negotiations with the highest-ranked Proposer in the Competitive Range following the:

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

(b) **Conducting Negotiations.** Metro may negotiate:

- A. The statement of work;
- B. The Contract Price as it is affected by negotiating the statement of work; and
- C. Any other terms and conditions reasonably related to those expressly authorized for negotiation in the RFP. Accordingly, Proposers shall not submit, and Metro shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the RFP.

(c) **Continuing Negotiations.** If Metro terminates negotiations with a Proposer, Metro may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this Rule until Metro has:



A. Determined to award the Contract to the Proposer with whom it is currently negotiating;  
or

B. Completed one round of negotiations with all Proposers in the Competitive Range, unless Metro provided for more than one round of discussions or negotiations in the RFP, in which case Metro may proceed with any authorized further rounds of discussions or negotiations.

(d) **Terminating Discussions or Negotiations.** At any time during discussions or negotiations conducted in accordance with this Rule, Metro may terminate discussions or negotiations with the Proposer with whom it is currently conducting discussions or negotiations if Metro reasonably believes that:

A. The Proposer is not discussing or negotiating in good faith; or

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.400 - 279C.410

#### **49-0660 RFP Pricing Mechanisms**

(1) An RFP may result in a Contract with a lump-sum Contract Price or a fixed Contract Price, as in the case of Competitive Bidding. Alternatively, a cost reimbursement Contract may be negotiated.

(2) Economic incentives or disincentives may be included to reflect stated Metro purposes related to time of completion, safety or other Public Contracting objectives, including but not limited to total least cost mechanisms such as life cycle costing.

(3) A Guaranteed Maximum Price may be used as the pricing mechanism for CM/GC Services Contracts (or other Alternative Contracting Methods) where a total Contract Price is provided in the design phase in order to assist Metro in determining whether the project scope is within Metro's budget, and allowing for design changes during preliminary design rather than after final design services have been completed.

(a) If this collaborative process is successful, the Contractor shall propose a final GMP, which may be accepted by Metro and included within the Contract.

(b) If this collaborative process is not successful, and no mutually agreeable resolution on the GMP can be achieved with the Contractor, then Metro shall terminate the Contract. Metro may then proceed to negotiate a new Contract (and GMP) with the firm that was next ranked in the original selection process, or employ other means for continuing the project under ORS Chapter 279C.

(4) When cost reimbursement Contracts are utilized, regardless of whether a GMP is included, Metro shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335

## **49-0670 Design-Build Contracts**

(1) **General.** The Design-Build form of contracting, as defined in Rule 49-0610(3), has technical complexities that are not readily apparent. Metro may use this contracting method only with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to use the Design-Build process, Metro must be able to reasonably anticipate the following types of benefits:

(a) Obtaining, through a Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;

(b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;

(c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims;

(d) Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased projects); or

(e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.

(2) **Authority.** Metro may utilize the Design-Build form of contracting only in accordance with the requirements of these Rules 49-0600 to 49-0690. See particularly 49-0620 on "Use of Alternative Contracting Methods" and 49-0680 pertaining to ESPCs.

(3) **Selection.** Design-Build selection criteria may include those factors set forth above in Rule 49-0640(2)(a), (b) and (c).

(4) **QBS Inapplicable.** Because the value of construction work predominates the Design-Build form of contracting, the qualifications based selection (QBS) process required by ORS 279C.110 is not applicable.

(5) **Licensing.** If a Design-Build Contractor is not an Oregon licensed design professional, Metro shall require that the Design-Build Contractor disclose in its Written Offer that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(2)(g) regarding the offer of architectural services, and 672.060(11) regarding the offer of engineering services that are appurtenant to construction work.

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

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

(a) **Design Services.** The level or type of design services required must be clearly defined within the Procurement documents and Contract, along with a description of the level or type of design services previously performed for the project. The Personal Services and work to be performed must be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.

(b) **Professional Liability.** The Contract must clearly identify the liability of design professionals with respect to the Design-Build Contractor and Metro, as well as requirements for professional liability insurance.

(c) **Risk Allocation.** The Contract must clearly identify the extent to which Metro requires an express indemnification from the Design-Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty work claims.

(d) **Warranties.** The Contract must clearly identify any express warranties made to Metro regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.

(e) **Incentives.** The Contract must clearly identify any economic incentives and disincentives, the specific criteria that apply and their relationship to other financial elements of the Contract.

(f) **Honoraria.** If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the solicitation process on the basis that Metro is benefited from such deliverables.

Stat. Auth.: ORS 279C.335 & 279A.065

Stats. Implemented: ORS 279C.335, 279A.065, 279C.110 & 351.086

#### **49-0680 Energy Savings Performance Contracts (ESPC)**

(1) **Generally.** Rules 49-0600 to 49-0690 include a limited, efficient method for Metro to enter into ESPCs outside the Competitive Bidding requirements of ORS 279C.335 for existing buildings or structures, but not for new construction. See ORS 279C.335(1)(f). If Metro chooses not to utilize the ESPC Procurement method provided for by Rules 49-0600 to 49-0690, Metro may still enter into an ESPC by complying with the Competitive Bidding exemption process set forth in ORS 279C.335, or by otherwise complying with the Procurement requirements of these Rules.

(2) **ESPC Contracting Method.** The ESPC form of contracting, as defined in Rule 49-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for Metro, as well as the additional technical complexities associated with a Design-Build Contract. Metro may only utilize the ESPC contracting method with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the ESPC contracting process, Metro must be able to reasonably anticipate one or more of the following types of benefits:

(a) Obtaining, through an ESCO, the following types of integrated Personal Services and work: facility profiling, energy baseline studies, ECMs, Technical Energy Audits, project development planning, engineering design, plan preparation, cost estimating, life cycle costing, construction administration, project management, construction, quality control, operations and maintenance staff training, commissioning services, M & V services and required documentation as a fully integrated function with a single point of responsibility;

- (b) Obtaining, through an ESCO, an Energy Savings Guarantee;
  - (c) Integrating the Technical Energy Audit phase and the Project Development Plan phase into the design and construction phase of work on the project;
  - (d) Reducing the risk of design flaws, misunderstandings and conflicts inherent in the construction process, through the integration of ESPC Personal Services and work;
  - (e) Obtaining innovative design solutions through the collaboration of the members of the ESCO integrated ESPC team;
  - (f) Integrating cost-effective ECMs into an existing building or structure, so that the ECMs pay for themselves through savings realized over the useful life of the ECMs;
  - (g) Preliminary design, development, implementation and an Energy Savings Guarantee of ECMs into an existing building or structure through an ESPC, as a distinct part of a major remodel of that building or structure that is being performed under a separate remodeling Contract; and
  - (h) Satisfying local energy efficiency design criteria or requirements.
- (3) **Authority.** Should Metro desire to pursue an exemption from the Competitive Bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086), it shall utilize the ESPC form of contracting only in accordance with the requirements of Rules 49-0600 to 49-0690.
- (4) **No Findings Required.** No findings are required for an ESPC to be exempt from the Competitive Bidding process for Public Improvement Contracts pursuant to 279C.335, unless Metro chooses not to comply with the ESPC contracting procedures set forth in Rules 49-0600 to 49-0690.
- (5) **Selection.** ESPC selection criteria may include those factors set forth above in Rule 49-0640(2)(a), (b), (c) and (d). Since the Energy Savings Guarantee is such a fundamental component in the ESPC contracting process, Proposers must disclose in their Proposals the identity of any Person providing (directly or indirectly) any Energy Savings Guarantee that may be offered by the successful ESCO during the course of the performance of the ESPC, along with any financial statements and related information pertaining to any such Person.
- (6) **QBS Inapplicable.** Because the value of construction work predominates in the ESPC method of contracting, the qualifications based selection (QBS) process required by ORS 279C.110 is not applicable.
- (7) **Licensing.** If the ESCO is not an Oregon licensed design professional, Metro shall require that the ESCO disclose in the ESPC that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and ORS 672.060(11) regarding the offer of engineering services that are appurtenant to construction work.
- (8) **Performance Security.** At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the ESCO must provide a performance bond and a payment bond, each for 100% of the full Contract Price, including the construction work and design and related Personal Services specified in the ESPC Design-Build Contract, pursuant to ORS 279C.380(1)(a). For ESPC Design-Build Contracts, these "design and related services" include conventional design services, commissioning services, training services for Metro's operations and maintenance staff, and any similar Personal Services provided by the ESCO under the ESPC Design-Build Contract prior to final completion of construction. M & V services, and any Personal Services or work associated with the ESCO's Energy Savings Guarantee are not included in these "design and related services." Nevertheless, Metro may

require that the ESCO provide performance security for M & V services and any Personal Services or work associated with the ESCO's Energy Savings Guarantee, if Metro so provides in the RFP.

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

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

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

B. The various phases of the ESCO's work will include the following:

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

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

(iii) A third phase of the work that constitutes a Design-Build Contract, during which the ESCO completes any plans and Specifications required to implement the ECMs that have been agreed to by the parties to the ESPC, and the ESCO performs all construction, commissioning, construction administration and related Personal Services or work to actually construct the project; and

(iv) A final phase of the work, whereby the ESCO, independently or in cooperation with an independent consultant hired by Metro, performs M & V services to ensure that the Energy Savings Guarantee identified by the ESCO in the earlier phases of the work and agreed to by the parties has actually been achieved.

(b) **Design-Build Contracting Requirements in ESPCs.** At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, Metro shall conform its Design-Build contracting practices to the Design-Build contracting requirements set forth in Rule 040-0560(7) above.

(c) **Pricing Alternatives.** Metro may utilize one of the following pricing alternatives in an ESPC:

A. A fixed price for each phase of the Personal Services and work to be provided by the ESCO;

B. A cost reimbursement pricing mechanism, with a maximum not-to-exceed price or a GMP; or

C. A combination of a fixed fee for certain components of the Personal Services to be performed, a cost reimbursement pricing mechanism for the construction work to be performed with a GMP, a single or annual fixed fee for M & V services to be performed for an identified time period after final completion of the construction work, and a single or annual Energy Savings Guarantee fixed fee payable for an identified time period after final completion of the construction work that is conditioned on certain energy savings being achieved at the facility by the ECMs that have been implemented by the ESCO during the project (in the event an annual M & V services fee and annual Energy Savings Guarantee fee is utilized by the parties, the parties may provide in the Design-Build Contract that, at the sole option of Metro, the ESCO's M & V services may be terminated prior to the completion of the M &

V/Energy Savings Guarantee period and Metro's future obligation to pay the M & V services fee and Energy Savings Guarantee fee will likewise be terminated, under terms agreed to by the parties).

(d) **Permitted ESPC Scope of work.** The scope of work under the ESPC is restricted to implementation and installation of ECMs, as well as other work on building systems or building components that are directly related to the ECMs, and that, as an integrated unit, will pay for themselves over the useful life of the ECMs installed. The permitted scope of work for ESPCs resulting from a Solicitation under these Rules 49-0600 to 49-0690 does not include maintenance services for the project facility.

Stat. Auth.: ORS 279C.335 & 279A.065

Stats. Implemented: ORS 279C.335, 279A.065, 279C.110 & 351.086

#### **49-0690 Construction Manager/General Contractor Services ("CM/GC Services")**

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

(a) **Time Savings.** With the CM/GC Method, the Public Improvement has significant schedule ramifications, such that concurrent design and construction are necessary in order to meet critical deadlines and shorten the overall duration of construction. Metro may consider operational and financial data that show significant savings or increased opportunities for generating revenue as a result of early completion, as well as less disruption to public facilities as a result of shortened construction periods;

(b) **Cost Savings.** With the CM/GC Method, early CM/GC input during the design process is expected to contribute to significant cost savings. Metro may consider value engineering, building systems analysis, life cycle costing analysis and construction planning that lead to cost savings. Metro shall specify any special factors influencing this analysis, including high rates of inflation, market uncertainty due to material and labor fluctuations or scarcities, and the need for specialized construction expertise due to technical challenges; or

(c) **Technical Complexity.** With the CM/GC Method, the Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between Metro, design professionals, any Metro project management or technical consultants and the CM/GC, in which the CM/GC will assist in addressing specific project challenges through pre-construction Personal Services. Metro may consider the need for CM/GC input on issues such as operations of the facility during construction, tenant occupancy, public safety, delivery of an early budget or GMP, financing, historic preservation, difficult remodeling projects, and projects requiring complex phasing or highly coordinated scheduling.

(2) **Authority.** Metro may use the CM/GC form of contracting only in accordance with the requirements of these Division 49 Rules and ORS 279C.337, when a Competitive Bidding exemption is approved. See particularly Rule 49-0600 on "Purpose" and 49-0620 on "Use of Alternative Contracting Methods."

(3) **Selection.** CM/GC selection criteria may include those factors set forth above in Rule 49-0640(2)(b).

(4) **Basis for Payment.** The CM/GC process adds specified construction manager Personal Services to traditional design-bid-build general contractor work, requiring full Contract performance within a negotiated GMP, fixed Contract Price or other maximum Contract Price. For a GMP pricing method, the basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for construction work and Personal Services rendered, which together shall not exceed the GMP. See GMP definition at Rule 49-0610 and Pricing Mechanisms at Rule 49-0660.

(5) **Contract Requirements.** Metro shall conform its CM/GC contracting practices to the following requirements:

(a) **Nature of the Initial CM/GC Services Contract Document.** A Solicitation for CM/GC Services is a Procurement for a Public Improvement, since the scope of the Procurement includes not only pre-construction Personal Services to be performed by the CM/GC, but also construction work that is expected to result in a completed Public Improvement. In the traditional CM/GC Services contracting approach, the text of the resulting CM/GC Services Contract will include comprehensive contract provisions that will not only fully govern the relationship between Metro and the CM/GC for the pre-construction Personal Services, but will also include the general contract provisions that will control the CM/GC's providing of the construction work necessary to complete the project (with any remaining necessary construction-related contract provisions being added through Early Work amendments to the Contract, the GMP amendment to the Contract or, if necessary, a conventional amendment to the Contract). The traditional CM/GC Services contracting approach, however, also contemplates that Metro will only authorize the CM/GC to perform the pre-construction Personal Services when the Contract is first executed unless construction work is specifically included in the initial CM/GC Contract. Under this approach, the construction phase or phases of the CM/GC Services project are not yet authorized and the Contract only becomes a Public Improvement Contract once the parties amend the Contract, through an Early Work or a GMP amendment, to authorize the construction of a portion of the project or the entire project. See also Oregon Administrative Rule 839-025-0020, regarding the Bureau of Labor and Industries' determination of when a Contract for CM/GC Services becomes a "public works" Contract for purposes of paying prevailing wage rates for construction work under the CM/GC Contract.

(b) **Setting the GMP, Fixed Contract Price or Other Maximum Contract Price.** The GMP, fixed Contract Price or other maximum Contract Price must be set at an identified time consistent with industry practice and project conditions and after supporting information reasonably considered necessary to its use has been developed, which will normally take place by the end of the design development phase of the project. The supporting information for the GMP must define with particularity both what Personal Services and construction work are included and excluded from the GMP, fixed Contract Price or other maximum Contract Price. A set of project drawings and Specifications shall be produced establishing the scope of construction work contemplated by the GMP, fixed Contract Price or other maximum Contract Price.

(c) **Adjustments to the GMP, Fixed Contract Price or Other Maximum Contract Price.** The Contract must clearly identify the standards or factors under which changes or additional construction work will be considered outside of the work scope that warrants an increase in the GMP, fixed Contract

Price or other maximum Contract Price, as well as criteria for decreasing the GMP, fixed Contract Price or other maximum Contract Price. The GMP, fixed Contract Price or other maximum Contract Price shall not be increased without a concomitant increase to the scope of the work defined at the establishment of the GMP, fixed Contract Price or other maximum Contract Price or most recent amendment to the GMP, fixed Contract Price or other maximum Contract Price. An increase to the scope of the work may take the form of conventional additions to the project scope, as well as corrections to the Contract terms and conditions, additions to insurance coverage required by Metro and other changes to the work.

(d) **Cost Savings.** The Contract must clearly identify the disposition of any Cost Savings resulting from completion of the work below the GMP, fixed Contract Price or other maximum Contract Price; that is, under what circumstances, if any, the CM/GC might share in those Cost Savings, or whether the Cost Savings accrue only to Metro's benefit. Unless there is a clearly articulated reason for sharing the Cost Savings set forth in the Contract, the Cost Savings must accrue to Metro.

(e) **Cost Reimbursement.** The Contract must clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, fixed Contract Price or other maximum Contract Price, including any category of GC work costs, and may also incorporate a mutually-agreeable cost-reimbursement standard.

(f) **Audit.** Cost reimbursements must be made subject to final audit adjustment, and the Contract must establish an audit process to ensure that Contract costs are allowable, properly allocated and reasonable.

(g) **Fee.** Compensation for the CM/GC's Personal Services and construction work, where the Contract uses a GMP, will include a fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee shall be expressly defined in the Contract terms and conditions at the time Metro selects the CM/GC. The fee, which may be expressed as either a fixed dollar amount or as a proposed percentage of all reimbursable costs, must be identified during and become an element of the selection process. It must subsequently be expressed as a fixed amount for particular construction work authorized to be performed, when Early Work is added to the Contract through an amendment and when the GMP is established. The CM/GC fee does not include any fee paid to the CM/GC for performing pre-construction services during a separate pre-construction phase.

(h) **Incentives.** The Contract must clearly identify any economic incentives, the specific criteria that apply and their relationship to other financial elements of the Contract (including the GMP, fixed Contract Price or other maximum Contract Price).

(i) **Controlled Insurance Programs.** For projects where an owner-controlled or contractor-controlled insurance program is permitted under ORS 737.602, the Contract must clearly identify whether an owner-controlled or contractor-controlled insurance program is anticipated or allowable. If so, the Contract must clearly identify (1) anticipated cost savings from reduced premiums, claims reductions and other factors, (2) the allocation of cost savings, and (3) safety responsibilities, incentives or both safety responsibilities and incentives.

(j) **Early Work.** The RFP must clearly identify, whenever feasible, the circumstances under which any Early Work may be authorized and undertaken for compensation prior to establishing the GMP, fixed Contract Price or other maximum Contract Price.

(k) **Subcontractor Selection.** Subcontracts under the Contract are not Public Contracts within the meaning of the State Code. However, the Contract must include provisions that clearly meet the



requirements of ORS 279C.337(3) and other Metro requirements. Within the scope of 279C.337(3), the CM/GC's subcontractor selection process must meet the following parameters:

A. Absent a Written justification prepared by the CM/GC and approved by Metro as more particularly provided for in this section, the CM/GC's Subcontractor selection process must be "competitive," meaning that the process should include publicly-advertised subcontractor solicitations and be based on a low-bid competitive method, a low-quote competitive method for contracts in a specified dollar range agreeable to Metro, or a method whereby both price and qualifications of the subcontractors are evaluated in a competitive environment, consistent with the RFP and Contract requirements;

B. When the Subcontractor selection process for a particular work package will not be "competitive" as provided for in this section, the process must meet the following requirements:

(i) The CM/GC must prepare and submit a Written justification to Metro, explaining the project circumstances that support a non-competitive Subcontractor selection process for a particular work package, including, but not limited to, Emergency circumstances, the CM/GC's need to utilize a key Subcontractor member of the CM/GC's project team consistent with the CM/GC's project Proposal, the need to meet other specified Contract requirements, the continuation or expansion of an existing Subcontractor agreement that was awarded through a "competitive process" along with facts supporting the continuation or expansion of the Subcontractor agreement, or a "sole source" justification;

(ii) For a "sole source" selection of a subcontractor to proceed, Metro must evaluate the Written justification provided by the CM/GC and must find that critical project efficiencies require utilization of labor, services or materials from one subcontractor; that technical compatibility issues on the project require labor, services or materials from one subcontractor; that particular labor, services or materials are needed as part of an experimental or pilot project or as part of an experimental or pilot aspect of the project; or that other project circumstances exist to support the conclusion that the labor, services or materials are available from only one subcontractor;

(iii) The CM/GC must provide an independent cost estimate for the work package that will be subject to the non-competitive process, if required by Metro;

(iv) The CM/GC must fully respond to any questions or comments submitted to the CM/GC by Metro; and

(v) Metro must approve the CM/GC's use of the non-competitive Subcontractor selection process prior to the CM/GC's pursuit of the non-competitive process.

C. A competitive selection process may be preceded by a publicly advertised subcontractor pre-qualification process, with only those subcontractors meeting the pre-qualification requirements being invited to participate in the later competitive process through which the CM/GC will select the subcontractor to perform the construction work described in the selection process;

D. If the CM/GC or an Affiliate or subsidiary of the CM/GC will be included in the subcontractor selection process to perform particular construction work on the project, the CM/GC must disclose that fact in the selection process documents and announcements. The Contract must also identify the conditions, processes and procedures the CM/GC will utilize in that competitive process in order to make the process impartial, competitive and fair, including but not limited to objective, independent review and opening of bids or proposals for the elements of work involved, by a representative of Metro or another independent third party.

(l) **Subcontractor Approvals and Protests.** The Contract must establish whether Metro must approve subcontract awards, and to what extent, if any, Metro will resolve or be involved in the resolution of protests of the CM/GC's selection of subcontractors and suppliers. The procedures and reporting mechanisms related to the resolution of subcontractor and supplier protests must be established in the Contract with certainty, including the CM/GC's roles and responsibilities in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, Metro must retain the right to monitor the subcontracting process in order to protect Metro's interests and to confirm the CM/GC's compliance with the Contract and with applicable statutes, Rules and other legal requirements.

(m) **CM/GC Self-Performance or Performance by CM/GC Affiliates or Subsidiaries Without Competition.** Consistent with the requirements of ORS 279C.337(3)(c), the Contract must establish the conditions under which the CM/GC or an Affiliate or subsidiary of the CM/GC may perform elements of the construction work without competition from subcontractors, including, for example, job-site GC work. Other than for GC work, in order for the CM/GC or an Affiliate or subsidiary of the CM/GC to perform elements of the construction work without competition from subcontractors, the CM/GC must provide, or must have included in the CM/GC's RFP Proposal to perform CM/GC Services for the project, a detailed proposal for performance of the work by the CM/GC or an Affiliate or subsidiary of the CM/GC. If required by Metro, the CM/GC's proposal to perform the construction work must be supported by at least one independent cost estimate prior to the work being included in the Contract.

(n) **Unsuccessful Subcontractor Briefing.** ORS 279C.337(3)(e) is designed to allow a subcontractor who was not selected by the CM/GC to perform a particular element of the construction work to obtain specific information from the CM/GC, and meet with the CM/GC to discuss the subcontractor qualification and selection process involved and the CM/GC's subcontractor selection decisions, in order to better understand why the subcontractor was not successful in being selected to perform the particular element of the work and to improve the subcontractor's substantive qualifications or the subcontractor's methods in competing for elements of the work for the particular project involved, or for future projects. The briefing meetings may be held with individual subcontractors or, if the subcontractors agree, in groups of subcontractors, with those groups established by bid package or other designation agreed to by Metro and the CM/GC. Nevertheless, the CM/GC is not obligated to provide this briefing opportunity unless the CM/GC receives a Written request from a subcontractor to discuss the subcontractor qualification and selection process involved. Unless Metro and the CM/GC agree on a different schedule, the CM/GC Contract should include provisions:

A. Allowing a subcontractor sixty (60) Days from the CM/GC's notice of award of a subcontract for a particular work package to request, in Writing, a post-selection meeting with the CM/GC under this section; and

B. Requiring the CM/GC to set a meeting with the subcontractor under this section within forty-five (45) Days of the subcontractor's Written request.

(o) **Performance and Payment Bonds.** Provided no construction work is included with the pre-construction services to be performed under the initial form of the CM/GC Contract, no performance bond or payment bond is required to be provided by the CM/GC at the time of Contract signing, consistent with ORS 279C.380. Once construction work is included in the Contract and authorized by Metro to be performed by the CM/GC, however, the CM/GC must provide a performance bond and payment bond each in the full amount of any Early Work to be performed by the CM/GC, or the full amount of the GMP, fixed Contract Price or other maximum Contract Price, as applicable. Furthermore, in the event additional Early Work is added to the CM/GC Contract after the initial Early Work or in the

event an amendment to the CM/GC Contract is made so that the GMP, fixed Contract Price or other maximum Contract Price must be increased, the performance bond and the payment bond must each be increased in an amount equal to the additional Early Work or the increased GMP, fixed Contract Price or other maximum Contract Price.

(p) **Independent Review of CM/GC Performance; Conflicts of Interest.** If Metro requires independent review, monitoring, inspection or other oversight of a CM/GC's performance of pre-construction Personal Services, construction work or both pre-construction Personal Services and construction work, Metro must obtain those independent review services from a Contractor independent of the CM/GC, the CM/GC's Affiliates and the CM/GC's Subcontractors, pursuant to the requirements of ORS 279C.307. However, ORS 279C.307 does not prohibit the following:

A. The CM/GC's performing both pre-construction Personal Services and construction work that are included within the definition of CM/GC Services, consistent with ORS 279C.307(2); or

B. The CM/GC's performing internal quality control services, quality assurance services or other internal peer review of CM/GC work product that is intended to confirm the CM/GC's performance of the CM/GC Contract according to its terms.

(q) **Socio-Economic Programs.** The Contract must clearly identify conditions relating to any required socio-economic programs, including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and Metro.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335, 279C.337 & 279C.380(2)

#### **49-0695 Post Project Evaluation**

(1) In accordance with ORS 279C.355 and Rule 49-0620, upon completion of and final payment for any Public Improvement Contract, or class of Public Improvement Contracts in excess of \$100,000 for which Metro did not use the Competitive Bidding process, Metro shall prepare and deliver to the Local Contract Review Board an evaluation of the Public Improvement Contract or the class of Public Improvement Contracts.

(2) The evaluation must include but is not limited to the following matters:

(a) The actual project cost as compared with original project estimates;

(b) The amount of any guaranteed maximum price;

(c) The number of project change orders issued;

(d) A narrative description of successes and failures during the design, engineering and construction of the project;

(e) An objective assessment of the use of the alternative contracting process as compared to the findings prepared to support the use of the alternative contracting process.

## Contract provisions

### **49-0800 Required Contract Clauses**

Metro shall include in all Solicitation Documents for Public Improvement Contracts all of the ORS Chapter 279C required Contract clauses, as set forth in the checklist contained in Rule 49-0200(1)(c) regarding Solicitation Documents. The following series of rules provides further guidance regarding particular Public Contract provisions.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 297C.505 - 279C.545 & 279C.800 - 279C.870

### **49-0810 Waiver of Delay Damages Against Public Policy**

No provision may be placed in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from Metro's unreasonable delay in performing the Contract. However, Contract provisions requiring notice of delay, providing for alternative dispute resolution such as arbitration (where allowable) or mediation, providing other procedures for settling contract disputes, or providing for reasonable liquidated damages, are permissible.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.315

### **49-0815 BOLI Public Works Bond**

Pursuant to ORS 279C.830(2), the Specifications for every Public Works Contract must contain a provision stating that the Contractor and every subcontractor must have a Public Works bond filed with the Construction Contractors Board before starting work on the project, unless otherwise exempt. This bond is in addition to performance bond and payment bond requirements.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.830

### **49-0820 Retainage**

(1) **Withholding of Retainage.** Metro may not retain an amount in excess of five percent (5%) of the Contract Price for work completed. If the Contractor has performed at least 50 percent (50%) of the Contract work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written approval, Metro may, in its discretion, reduce or eliminate retainage on any remaining progress payments. Metro shall respond in Writing to all such applications within a reasonable time. When the Contract work is 97 ½ percent (97.5%) completed, Metro may, at its discretion and without application by the Contractor, reduce the retained amount to 100 percent (100%) of the value of the remaining unperformed Contract work. If retainage has been reduced or eliminated, Metro reserves the right in protecting its interests to reinstate at any time retainage from further progress payments. Retainage will be included in the final payment of the Contract Price.

(2) **Form of Retainage.** Unless Metro finds in Writing that accepting a bond or instrument described in subsection (a) or (b) below poses an extraordinary risk that is not typically associated with the bond or instrument, Metro, in lieu of withholding moneys from payment, may accept from the Contractor:

(a) Bonds, securities or other instruments that are deposited and accepted as provided in Section (4)(a) of this Rule; or

(b) A surety bond deposited as provided in Section (4)(b) of this Rule.

(3) **Deposit in interest-bearing accounts.** Upon request of the Contractor, Metro shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of Metro. Earnings on such account accrue to the Contractor. Metro may determine the account into which the retainage is placed.

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

(a) Deposit of bonds, securities or other instruments:

A. The Contractor may deposit bonds, securities or other instruments with Metro or in any bank or trust company to be held for the benefit of Metro. If Metro accepts the deposit, Metro shall reduce the cash retainage by an amount equal to the value of the bonds and securities. This reduction in retainage will be made in the progress payments made subsequent to the time the Contractor deposits the bonds and securities;

B. Bonds, securities or other instruments deposited or acquired in lieu of cash retainage must be of a character approved by the Metro Chief Financial Officer, which may include, without limitation:

(i) Bills, certificates, notes or bonds of the United States.

(ii) Other obligations of the United States or agencies of the United States.

(iii) Obligations of a corporation wholly owned by the Federal Government.

(iv) Indebtedness of the Federal National Mortgage Association.

(v) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.

(vi) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

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

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

(5) **Recovery of Costs.** If Metro incurs additional costs as a result of the exercise of any of the options for retainage, Metro may recover such costs from the Contractor by reduction of the final payment. As work on the Contract progresses, Metro shall, upon request, inform the Contractor of all accrued costs.

(6) **Additional Retainage When Certified Payroll Statements Not Filed.** Pursuant to ORS 279C.845(7), if a Contractor is required to file certified payroll statements and fails to do so, Metro shall retain 25 percent (25%) of any amount earned by the Contractor on a Public Works Contract until the Contractor has filed such statements with Metro. Metro shall pay the Contractor the amount retained under this section within fourteen (14) Days after the Contractor files the certified statements, regardless of whether a subcontractor has filed such statements.

Stat. Auth.: ORS 279A.065 & 279C.845

Stats. Implemented: ORS 279C.560, 279C.570 & 701.420

#### **49-0860 Public Works Contracts**

(1) **Generally.** ORS 279C.800 to 279C.870 regulates Public Works Contracts, as defined in ORS 279C.800(6), and requirements for payment of prevailing wage rates. Also see Rules of the Bureau of Labor and Industries (BOLI) at OAR Chapter 839.

(2) **BOLI Notification.** Metro shall provide notification of award to BOLI as required by ORS 279C.835.

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

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

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

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

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

(e) A requirement for filing a public works bond by contractor and every subcontractor, as set forth in ORS 279C.830(2).

(f) A requirement for payment of the prevailing wage rate, as set forth in ORS 279C.830.

A. If no federal funds are being used to fund the work, the wage rates established under ORS 279C.815(2)(a) must be paid.

B. If federal funds are being used to fund the work, the wage rates established under ORS 279C.815(2)(b) must be paid if both state and federal prevailing rates of wage apply, and the Contract and every Subcontract must provide that all workers must be paid the higher of the applicable state or federal prevailing rate of wage.

C. The rates may be incorporated into the Specifications by reference, in compliance with OAR 839-025-0020; or, when the rates are available electronically or by Internet access, the rates may be incorporated into the Specifications by referring to the rates and providing adequate information on how to access them in compliance with OAR 839-025-0020 and OAR 839-025-0035.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.800 - 279C.870, OL 2011, ch 458

#### **49-0870 Specifications; Brand Name Products**

- (1) Specification content is in the sole discretion of Metro, subject to statutory restrictions on the use of brand names.
- (2) Metro may consult with technical experts, suppliers, prospective contractors and representative of the industries with which Metro will Contract. Metro will take reasonable measure to ensure that no Person who prepares or assists in the preparation of Solicitation Documents, Specifications, plans or scope of work (collectively, “documents”), and that no business with which the Person is associated realizes a material competitive advantage that arises from Metro’s use of those documents.
- (3) A “brand name or equal” Specification may be used when it is Advantageous to Metro, because the brand name describes the standard of quality, performance, functionality and other characteristics of the product needed by Metro. Metro’s determination of what constitutes a product that is equal or superior to the product specified is final. Unless otherwise specified, the use of a brand name shall mean “brand name or equal.”
- (4) A “brand name” Specification may be used requiring a Contractor to provide a specific brand when the Procurement Officer, or designee, makes the following findings:
  - (a) The use of a brand name Specification is unlikely to encourage favoritism in the awarding of a Contract or substantially diminish competition for Contracts: or
  - (b) The use of a brand name Specification would result in a substantial cost savings to Metro; or
  - (c) There is only one manufacturer or seller of the product of the quality, performance or functionality required; or
  - (d) Efficient utilization of existing equipment, or supplies requires the acquisition of compatible equipment or supplies.
- (5) Metro's use of a brand name specification is subject to protest and review only as provided in Rule 49-0260(3).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.345

#### **49-0880 Records Maintenance; Right to Audit Records**

- (1) Contractors and Subcontractors shall maintain all fiscal records relating to a Contract executed with Metro in accordance with generally accepted accounting principles. In addition, Contractors and Subcontractors shall maintain any other records necessary to clearly document:
  - (a) Their performance. Performance includes, but is not limited to, compliance with plans and Specifications, compliance with fair contracting and employment programs, compliance with Oregon law on payment of wages and accelerated payment provisions, and any and all requirements imposed on the Contractor or Subcontractor under the Contract or subcontract;
  - (b) Any claims arising from or relating to their performance under a Public Contract;
  - (c) Any cost and pricing data; and,
  - (d) Payment to suppliers and Subcontractors.

(2) Such records shall be maintained for a period of six years from the date of final completion of the Contract or until the conclusion of any audit, controversy or litigation arising out of or related to a Contract, whichever is longer, unless a shorter period of time is authorized in Writing by Metro.

(3) Contractors and Subcontractors shall make all their records available to Metro within the boundaries of the Metro region, at reasonable times and places regardless of whether litigation has been filed on any claims. If the records are not made available within the boundaries of the Metro region, the Contractor or Subcontractor shall pay all costs for Metro employees, and any necessary consultants hired by Metro, including travel, per diem costs, salary, and any other expenses incurred by Metro in sending its employees or consultants to examine, audit, inspect, and copy those records. If the Contractor elects to have such records outside these boundaries, the costs paid by the Contractor to Metro for inspection, auditing, examining and copying those records are not recoverable costs in any legal proceeding.

(4) Metro and its Authorized Representatives shall be entitled to inspect, examine, copy and audit the books and records of any Contractor or Subcontractor upon request by Metro for any reason, including any documents that may be placed in escrow according to any Contract requirements. The records that may be inspected and copied include financial documents of the Contractor, including tax returns and financial statements. Metro will keep such documents confidential to the extent permitted by Oregon law, subject to Subsection 5 below.

(5) Contractors and Subcontractors agree to disclose the records requested by Metro and agree to their admission as evidence in any proceeding between the parties, including, but not limited to a court proceeding, arbitration, mediation or other alternative dispute resolution process.

(6) In the event that the records disclose that Metro is owed money or establishes that any portion of any claim made against Metro is not warranted, the Contractor or Subcontractor shall pay all costs incurred by Metro in conducting the audit and inspection. Such costs may be withheld from any sum due or that becomes due to the Contractor by Metro.

(7) Failure of the Contractor or Subcontractor to keep or disclose records as required may result in a finding that the Contractor or Subcontractor is not a Responsible Bidder or Proposer as provided in Subsection 5.34.610 B.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.030, 279C.375, 279C.380 & 279C.440

#### **49-0890 Metro Payment for Unpaid Labor or Supplies**

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.515



#### **49-0900 Contract Suspension; Termination Procedures**

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

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

(a) **Reasons for termination.** The parties may agree to terminate the Contract or a divisible portion thereof if:

A. Metro suspends work under the Contract for any reason considered to be in the public interest (other than a labor dispute, or any judicial proceeding relating to the work filed to resolve a labor dispute); and

B. Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the work.

(b) **Payment.** When a Contract, or any divisible portion thereof, is terminated pursuant to this subsection (2), Metro will pay the Contractor a reasonable amount of compensation for preparatory work completed, and for costs and expenses arising out of termination (all as defined in the Contract). Metro will also pay for all work completed, based on the Contract Price. Unless the work completed is subject to unit or itemized pricing under the Contract, payment is calculated based on percent of Contract completed (as may be further defined in the Contract). No claim for loss of anticipated profits is allowed.

(c) **Public Interest Termination.** Metro may include in its Contracts terms detailing the circumstances under which the Contractor is entitled to compensation as a matter of right in the event Metro unilaterally terminates the Contract for any reason considered by Metro to be in the public interest.

(d) **Responsibility for Completed work.** Termination of the Contract or a divisible portion thereof pursuant to this Rule does not relieve either the Contractor or its surety of liability for claims arising out of the work performed.

(e) **Remedies Cumulative.** Metro may, at its discretion, avail itself of any or all rights or remedies set forth in these Rules, in the Contract, or available at law or in equity.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.650, 279C.655, 279C.660, 279C.665 & 279C.670

#### **49-0910 Changes to the work and Contract Amendments**

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

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

(b) "Change Order" means a mutually agreed upon change order, or a construction change directive or other Written order issued by Metro or its authorized representatives to the Contractor requiring a change in the work within the general scope of a Public Improvement Contract and issued

under its changes provisions in administering the Contract and, if applicable, adjusting the Contract Price or contract time for the changed work.

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

(3) **Contract Amendments Generally.** Contract Amendments to Public Improvement Contracts are not considered to be new Procurements and an exemption from Competitive Solicitation is not required to add work when:

(a) The work added is within the general scope of the original Contract, or if the work is outside the scope of the original Contract, it can be performed by the Contractor at a cost below what Metro estimates it would cost if a Contract for that work were awarded through Competitive Bidding, Competitive Quotations, or Competitive Proposals. Additional work is "within the general scope of the original Contract" for the purposes of this subsection if the additional work is logically related to the Contract work; prudent Contract management, engineering or construction practices dictate that the additional work ought to be performed in conjunction with the original Contract work; the additional work is located at the same site as the Contract work; and the Contract objectively establishes the prices, or the method of arriving at the price, for the additional work;

(b) The field of competition and Contractor selection would not likely have been affected by the Contract modification. Factors to be considered in making that determination include similarities in work, project site, relative dollar values, differences in risk allocation and whether the original Procurement was accomplished through Competitive Bidding, competitive Proposals, Competitive Quotes, sole source or Emergency Contract;

(c) In the case of a Contract obtained under an Alternative Contracting Method, any additional work was specified or reasonably implied within the findings supporting the Competitive Bidding exemption; and

(d) The Amendment is made consistent with this Rule and other applicable legal requirements.

(4) **Limits on Contract Increases.** Except as otherwise set forth below in subsections (5) and (6), the aggregate increase resulting from all amendments to a Public Improvement Contract shall not exceed twenty-five percent (25%) of the original Contract Price. For Contracts over \$100,000, increases in excess of the 25% limit shall be treated as Unauthorized Purchases in accordance with Rule 46-0200 and submitted to the Procurement Officer to obtain approval by the Chief Operating Officer prior to authorization of performance of the work. Amendments to document the use of additive alternates are not subject to the contract increase limitations set forth in this section, provided the cost for such additive alternates were established through the original solicitation response.

(5) **Small or Intermediate Contracts.** Metro may amend a Public Improvement Contract awarded as a small Procurement Metro in accordance with this Rule, provided that the cumulative amendments may not increase the total Contract Price to a sum that exceeds the higher dollar amount of \$25,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Metro may amend a Contract awarded as an Intermediate Procurement pursuant Rule 49-0160(5). Any

amendment that causes Contract to exceed the foregoing limits will be treated as an Unauthorized Purchase and shall be subject to the requirements of Rule 46-0200.

(6) **Amendment to Settle Bona Fide Dispute.** The limitation set forth above in Section (4) of this Rule is not applicable if the amendment resolves a bona fide dispute with the Contractor and is within the general scope of the original Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065, 279C.335 & 279C.400