

PORTLAND DEVELOPMENT COMMISSION
Portland, Oregon

**ACTING IN ITS CAPACITY AS
LOCAL CONTRACT REVIEW BOARD**

RESOLUTION NO. 6801

**ADOPT REVISED LOCAL CONTRACT
REVIEW BOARD ADMINISTRATIVE RULES**

WHEREAS, Resolution No. 3550 designated the governing body of the Portland Development Commission (the "Commission") as the Local Contract Review Board (the "Board") for the Commission pursuant to state law;

WHEREAS, the Board has adopted Local Contract Review Board Administrative Rules (the "Rules") to govern the Commission's procurement and public contracting and amended those Rules most recently on April 12, 2006 by Resolution No. 6394; and

WHEREAS, modifications to the Rules are necessary to (1) update the Rules due to changes to ORS Chapters 279A, 279B, and 279C ; (2) provide clarity by rewording some provisions; and (3) make various changes to bring the Rules in line with current policy and preferred practices not addressed during the last amendment effective on April 12, 2006.

NOW, THEREFORE, BE IT RESOLVED that that the Board, acting as the Commission's Local Contract Review Board, hereby adopts the Local Contract Review Board Administrative Rules, attached hereto as Exhibit A, replacing any prior versions of these rules; and

BE IT FURTHER RESOLVED that that this resolution shall become effective thirty days from the date of its adoption.

Adopted by the Portland Development Commission on May 26, 2010.

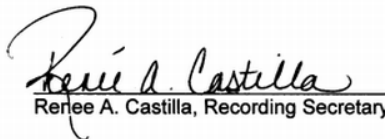

Renee A. Castilla, Recording Secretary

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Part 1: Generally Applicable Rules

I. SCOPE

- A. Authority.** Pursuant to ORS 279A.065, 279A.070 and Commission Resolution No. 3550, adopted April 8, 1987, the Portland Development Commission Board of Commissioners is installed as a Local Contract Review Board (“Board”). The Board adopts the Portland Development Commission Local Contract Review Board Rules (“LCRBs”) and their amendments to establish contracting procedures for the Portland Development Commission.
- B. Attorney General’s Model Public Contract Rules Inapplicable.** The model rules adopted by the Oregon Attorney General do not apply to the Commission except for those model rules that are specifically referenced and adopted in the body of these Rules but may be used as supplemental rules if needed to address circumstances not provided for by these Rules.
- C. Federal Requirements.** The Commission may be subject to certain contracting requirements when a particular contract is financed in part or wholly with federal funds. Those requirements are not reiterated in these Rules. A conflict between these Rules and a federal requirement will be resolved in favor of the federal requirement.
- D. Adoption and Amendment Procedures.** The Board will adopt any amendments to these Rules by resolution of the Board following a hearing at which members of the public have the opportunity to appear and submit comments and protests. Unless otherwise provided for in these Rules, notice of the hearing for a proposed amendment to these Rules shall be advertised at least once in a publication in general circulation in the Portland metropolitan area at least seven (7) Days prior to the hearing.
- E. Review of Rules.** The Executive Director will designate appropriate staff to review and promulgate necessary changes to the rules following each Oregon state legislative session pursuant to Part 1, Section VI, Subsection B, Item 4 below.
- F. Interpretation; Definitions.** These Rules are intended to comply with and fully implement all provisions and authority granted to local contracting agencies under the Public Contracting Code and shall be interpreted broadly, in favor of the Commission’s contracting powers. All capitalized terms in the Rules are defined within and shall be given the meanings set forth in Part 1 Section II, Definitions.

II. DEFINITIONS

- A. **Addendum or Addenda:** A written document issued by the Commission to add, modify or delete, make a material change in, or to provide a general explanation of the Solicitation Document.
- B. **Alternative Contracting Methods:** A method of constructing a public improvement, for which price is not the only relevant criterion in the selection of an otherwise qualified general Contractor including, but not limited to the Design/Build method and the CM/GC method of a Public Improvement Contract.
- C. **Amendment:** A written document to modify or change a Contract and executed by all parties to the Contract.
- D. **Bid:** A binding written offer to provide Goods and Services or to construct a Public Improvement as described in a Solicitation Document, based on a stipulated lump sum, alternate items and/or unit prices.
- E. **Bidder:** An entity that submits a Bid in response to Solicitation or an Invitation to Bid.
- F. **Bid Documents:** The Solicitation Documents that set forth requirements for submitting a Bid.
- G. **Board:** The Portland Development Commission Board of Commissioners, Local Contract Review Board.
- H. **Change Order:** A written statement signed by the Commission and the Contractor prior to the Contractor's performance of certain Work, stating their agreement upon all or part of the following, subject to particular terms and conditions of the Contract: (a) a described change in the Work, if any; (b) the amount of the total adjustment in the original Contract Price, if any; (c) the extent of the total adjustment in the Work performance period; and (d) any changes to the drawings and technical specifications, or other changes to the Contract , if any.
- I. **Closing:** The date and time after which Bids, Proposals, Statements of Qualifications or other Solicitation Responses will not be received. The Closing date and time shall be specified in the Solicitation Documents.

- J. Commission:** The Portland Development Commission, the duly designated urban renewal agency of the City of Portland, a political subdivision of the State of Oregon.
- K. Construction Change Field Directive:** A written order given by the Commission to a Contractor directing a change in the Work or performance period and stating a proposed adjustment or methodology in adjustment to the Contract.
- L. Construction Manager/General Contractor (or CM/GC):** A Public Improvement Contract in which the general Contractor, among other things, undertakes design phase involvement and constructability reviews, performs value engineering, schedules estimating and subcontracting services, establishes a guaranteed maximum price to complete the Contract Work, acts as general Contractor coordinates and manages the building process provides general Contractor expertise, and acts as a member of the project team along with the Commission, architect/engineers and other consultants.
- M. Contract:** The written agreement that sets forth rights and obligations of the parties with respect to a particular transaction, including, but not limited to all general and special conditions, drawings, specifications, price terms and legal requirements.
- N. Contract Award:** The decision to offer a Contract to an Offeror or Bidder.
- O. Contract Price:** The total amount paid or to be paid under a Contract including any approved Bid alternates, unit Bid prices, fully executed Change Orders, Contract Amendments and/or any, Construction Change Field Directives.
- P. Contractor:** The Entity awarded a Contract.
- Q. Days:** Calendar days unless otherwise specified by these Rules.
- R. Debarment:** A debarment pursuant to ORS 279B.130 or a disqualification pursuant to ORS 279C.440, 279C.445 and 279C.450 and these Rules.
- S. Design-Build Contract:** A Public Improvement Contract in which the general Contractor also provides or obtains specified design services, participates on the project team with the Commission, and manages both design and construction. In this form of Contract, a single entity provides

the Commission with all of the services necessary to both design and construct the project.

- T. Developer Services Agreement:** An agreement pursuant to which the developer retains a Contractor to provide development and coordination services, which may include, without limitation, the selection and delivery of design, engineering and construction services for a redevelopment project, pursuant to ORS Chapter 457.
- U. Disqualification:** The elimination of an Offer from consideration for a particular award on grounds of non-responsiveness or failure to meet the Standards of Responsibility.
- V. Electronic Advertisement:** The advertisement for Offers available over the internet via the world wide web.
- W. Emergency:** Circumstances that could not have been reasonably foreseen that create a substantial risk of loss, damage, interruption of services or threat to the public health or safety that requires prompt execution of a contract to remedy the condition.
- X. Energy Savings Performance Contract or ESPC:** An ESPC is a Public Contract, including a Design/Build Contract, between the Commission and a qualified energy service company for the identification, evaluation, recommendation, design and construction of energy conservation measures that guarantee energy savings or performance.
- Y. Entity:** A natural person capable of being legally bound, sole proprietorship, corporation, partnership, limited liability company or partnership, limited partnership, profit or nonprofit unincorporated association, business trust, two or more persons having a joint or common economic interest, or any other person with legal capacity to contract, or a government or governmental subdivision.
- Z. Executive Director:** The Executive Director of the Commission and his or her designees.
- AA. Findings:** Justification for the Board or Executive Director's conclusion that may include, but is not limited to, information regarding operation, budget and financial data; public benefits; cost savings; competition in public contracts; value engineering; specialized expertise needed; public safety; market conditions; technical complexity; and funding sources.
- BB. Flexible Services Contract:** A Contract for services, including Personal Services Contract that has repetitive requirements on an as-needed basis.

- CC. Goods:** Any item or combination of supplies, equipment, materials or other personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto.
- DD. Invitation to Bid or ITB:** Solicitation Document inviting a formal competitive sealed Bid which may result in award of one or more Contracts.
- EE. Notice:** Any notice that is required to be given by these Rules shall be in writing and delivered to an Offeror by first-class mail and facsimile. Any such notice shall be deemed to have been given on the date sent via facsimile to the facsimile number provided to the Commission within an Offer. If no facsimile number is provided to the Commission, notice shall be deemed given on the date it is sent via first-class mail and properly posted.
- FF. Offer:** A Bid, Proposal, or Quotation, as applicable.
- GG. Offeror:** An Entity that offers to enter into a Contract by submitting a Bid, Quote or Proposal to the Commission.
- HH. Personal Services Contract:** A Contract for specialized skills, knowledge or unique resources in the application of highly-technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment. Such services include, but are not limited to, the services of architects, engineers, surveyors, attorneys, auditors and other licensed professionals, artists, designers, computer programmers, performers, consultants and property managers. When it is not clear if the required service qualifies as a Personal Service as outlined in this paragraph, the Purchasing Manager shall have the authority to make the final determination.
- II. Price Agreement:** A public Contract for the procurement of Goods or Services at a set price with no guarantee of a minimum or maximum purchase; or an initial order or minimum purchase combined with a continuing Contractor obligation to provide Goods or Services in which the contracting agency does not guarantee a minimum or maximum additional purchase.
- JJ. Procurement:** The act of purchasing, leasing, renting or otherwise acquiring goods or services including each function and procedure undertaken or required to be undertaken by Commission to enter into a Contract, administer a Contract and obtain performance of a Contract under these rules.

- KK. Proposal:** A competitive Offer, binding on the Proposer and submitted in response to a written Request For Proposals or Request For Qualifications.
- LL. Proposer:** An entity that submits a Proposal in response to a Request For Proposal or Request for Qualification.
- MM. Public Contract:** Any agreement for the sale or other disposal, or a purchase, lease, rental or other acquisition, by the Commission of personal property, Services, including Personal Services, Public Improvements, Public Works, minor alterations, or ordinary repair or maintenance necessary to preserve a Public Improvement and which is not exempt from the application of these Rules.
- NN. Public Contracting Code:** The provisions of ORS Chapters 279A, 279B, and 279C and referenced statutory requirements therein.
- OO. Public Improvement Contract:** A Contract for construction, reconstruction or major renovation on real property by or for the Commission, but does not include Emergency Work, minor alteration, ordinary repair or maintenance necessary in order to preserve a public improvement, or Contracts for which no funds of the Commission are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection.
- PP. Public Works Contract:** A Contract, for but not limited to the construction of roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the construction or reconstruction or renovation of privately owned property which is leased by a public agency.
- QQ. Purchasing Manager:** The Professional Services Manager or other designee of the Executive Director granted the authority to implement these Rules.
- RR. Qualified Pool:** See Flexible Services Contract.
- SS. Quotation or Quote:** A price or Proposal offered in response to small or intermediate oral or written Solicitation by the Commission for the award of a Contract that is not publicly advertised.
- TT. Release Date:** The date upon which Solicitation Documents are first available to potential Offerors/Bidders.

- UU. Request For Proposal (RFP):** A Solicitation inviting Proposals from Offerors.
- VV. Request for Information or Request for Interest (RFI):** A written request for submission of information or interest. A RFI may be used as a preliminary document to obtain information useful in preparation of a Request for Proposal.
- WW. Request for Qualification (RFQ):** A written request for submission of a statement of qualifications. An RFQ may be used as a preliminary document to obtain information useful in the preparation of a Request for Proposal and may also be used as a Solicitation for services that will be the subject of a Flexible Service Contract. If an RFQ is used as the Solicitation method for which a Flexible Service Contract will be utilized, it shall include all of the provisions that would otherwise be included within the applicable Solicitation.
- XX. Resident Bidder:** A Bidder that has paid unemployment taxes or income taxes in Oregon during the twelve (12) calendar months immediately proceeding submission of the Bid, has a business address in Oregon, and has stated in the Bid whether the Bidder is a Resident Bidder under ORS 279A.120.
- YY. Responsible Bidder, Proposer or Offeror:** A Bidder, Proposer or Offeror who has not been debarred or disqualified by the Commission, has made a Responsive Offer and meets the Standard of Responsibility. Additionally, if the Contract is for a public improvement, a Bidder, Proposer or Offeror shall not be on the list created by Construction Contractors Board under ORS 701.227 nor on the Federal Debarred list, if applicable.
- ZZ. Responsive Offer:** An Offer, (also Bid or Proposal) that conforms in all material respects with the procedures and requirements of the Solicitation Documents and all requirements of the Public Contracting Code and these Rules.
- AAA. Rules:** The rules of the Local Contract Review Board of the Portland Development Commission.
- BBB. Services:** All labor and services other than Personal Services (including construction and trade services).
- CCC. Sole Source Contract:** A Contract between the Commission and a sole vendor of Goods or Services or public improvements, as applicable.

DDD. Solicitation: Any oral or written invitation to one or more potential Contractor(s) to submit a Bid, Proposal, Quote, Statement of Qualifications or letter of interest to the Commission with respect to a proposed project, procurement or other contracting opportunity. The word “Solicitation” also refers to the process by which the Commission requests, receives and evaluates potential Contractors and awards Contracts that are subject to these Rules.

EEE. Solicitation Documents: All written materials issued by the Commission for a Solicitation, including, but not limited to advertisements, instructions to Bidders or Proposers, Addenda, the Contract terms, Invitations to Bid, Request For Proposals, Requests for Quotations and includes all documents incorporated by reference.

FFF. Special Procurement: Any class Special Procurement or Contract specific Special Procurement for the purpose of entering into a series of Contracts over time or on a one time basis for the acquisition of a specified class of goods or services to include cooperative procurements as set forth in ORS 279A.200.

GGG. Standards of Responsibility: An Offeror meets the Standards of Responsibility if the Offeror has:

1. Available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to indicate the capability of the Offeror to meet all contractual responsibilities;
2. A satisfactory record of performance. The Purchasing Manager shall document the record of performance of an Offeror if the Purchasing Manager finds the Offeror non-responsible under this paragraph;
3. A satisfactory record of integrity. The Purchasing Manager shall document the record of integrity of an Offeror if the Purchasing Manager finds the Offeror non-responsible under this paragraph;
4. Qualified legally to Contract with the Commission;
5. Supplied all necessary information in connection with the inquiry concerning responsibility. If an Offeror fails to promptly supply information requested by the Purchasing Manager concerning responsibility, the Purchasing Manager shall base the determination of responsibility upon any available information or may find the Offeror non-responsible;

6. Not been Debarred by the Commission;
7. Has complied with requirements as set forth in the Solicitation Documents, including all prescribed procedures and special requirements relating to, among other things, completion of minority, women and emerging small business outreach and compliance forms and making good faith efforts as prescribed in ORS 200.045(3) concerning small business enterprises; and
8. Has complied with all other Standards of Responsibility as set forth in these Rules

The Purchasing Manager may investigate any Offeror so that previously Debarred Entities or their officers, directors, or principal owners may not, by subterfuge, change of ownership, or other adjustments in formal appearance, avoid application of this Rule or of the Debarment provision of these Rules.

HHH. Statement of Work: All provisions of a Public Contract that specifically describe the Work to be performed or services to be provided by either the Contractor, subcontractor, or Commission as may be applicable to include any related deliverables, drawings, technical specifications or deadlines.

III. Surplus Personal Property: For the purposes of these Rules, personal property that is deemed surplus, obsolete or no longer needed by the Commission.

JJJ. Technical Assistance Agreement: An agreement with a non-profit organization to provide technical assistance.

KKK. Work: Furnishing all materials, labor, equipment, services, subcontracts and/or incidentals according to the Statement of Work and Solicitation Documents necessary to successfully complete or carry out all the duties and obligations as set forth in the Contract.

LLL. Work Order: A written document that authorizes a purchase from an operative Contract.

III. EXEMPTIONS

A. Competitive Solicitation General Rule. All public Contracts shall be based upon competitive Bids or Proposal to foster competition except for Contracts exempt pursuant to ORS279A.025 or otherwise exempted under these Rules.

B. Exempt Classes. The following Contracts are exempt from competitive bidding:

1. Contracts made with other public agencies or the federal government;
2. Contracts made with not-for-profit agencies providing employment opportunities for disabled individuals;
3. Personal Services Contracts (see Part 3);
4. Insurance and employee benefits Contracts;
5. Contracts for repair, maintenance, improvement or protection of property obtained by the Director of Veterans' Affairs;
6. Contracts for price regulated items, utilities, telecommunication and other like services;
7. Contracts for copyrighted materials;
8. Advertising Contracts;
9. Investment Contracts;
10. Sale of used personal property;
11. Contract Amendments, Change Orders and/or Construction Change Field Directives;
12. Technical Assistance Agreements;
13. Sole Source Contracts (see Part 1);
14. Acquisition or disposition of real property or interest in real property;
15. Surplus Personal Property;
16. Developer Service Agreements;
17. Contracts for licenses and maintenance of computer hardware, software and related telecommunications products (including cable, video and television products);
18. Contract renewals (see Part 1 or Part 3);

19. Contracts for arts and entertainment, including Contracts for any theatrical or musical performance or for the production of a Work of art, music or literature.
20. Contracts for professional or expert witnesses or consultants to provide services to existing or potential litigation;
21. Emergency Contracts (see Part 1 or Part 3)
22. Contracts, agreements or other documents entered into, issued or established in connection with incurring debt of a public body, making of program loans or investment of funds by a public body;
23. Energy Savings Performance Contracts (see Part 5);
24. Grants; and
25. Contracts for Outside Legal Counsel.

C. Exemption Procedures.

- 1. Board Exemptions.** The Board may order a particular Contract or a class of Contracts exempt from competitive solicitation requirements where such Contract or Contracts are not otherwise exempted by these Rules. A request for an exemption shall contain the following:
 - a. The nature of the project or type of procurement;
 - b. Estimated cost of the project or anticipated value of procurement;
 - c. Findings to support the substantial cost savings anticipated by the exemption from competitive solicitation;
 - d. Findings to support the reason that an exemption would be unlikely to encourage favoritism or diminish competition for the public Contract;
 - e. Proposed Alternative Contracting Methods to be employed if any; and
 - f. The estimated date by which it would be necessary to award the Contract(s).

In making a determination regarding an exemption, the Board may consider the type, cost, amount of the contract, number of persons available to Bid, and such other factors as it may deem appropriate.

See Part 4, Section II, Subsection B, Item 2 for public hearing requirements related to Public Improvement Contracts.

2. **Executive Director Exemptions.** The Executive Director may order a particular Contract that does not exceed the Executive Director's delegated expenditure authority exempt from competitive solicitation requirements where such Contract or Contracts are not otherwise exempted by these Rules. A request for an exemption should contain the same information set forth at Part 1, Section III, Subsection C. Items 1(a) through 1(f). See Part 4, Section II Subsection B Subsection 2 for exemption limits and public hearing requirements related to Public Improvement Contracts.
3. **Contracts Available from a Sole Source.** Goods, Services and public improvements that are available from only one source may be purchased through direct negotiation without competitive Solicitation.
 - a. **Method of Selection and Record of Determination.** The Purchasing Manager shall make a written record of the facts that support the determination that the product or Service or improvement is only available from a single source and that alternative products, Services or improvements would be unsatisfactory for the Commission's needs. Purchasing Manager shall approve a Sole Source selection in amounts not exceeding \$100,000. The Executive Director shall approve a Sole Source selection in amounts that exceed \$100,000 within his/her expenditure authority.
 - b. **Notice.** At least three (3) business Days before making a sole source procurement for which the Contract Price will exceed \$100,000 except for Public Improvement Contracts, the Purchasing Manager shall publish notice of the procurement that: (i) identifies the Goods or Services sought, (ii) requests statements of interest from vendors who are qualified to provide the desired Goods or Services, and (iii) states that if no responses are received from qualified vendors within the time period specified in the notice, the Purchasing Manager will proceed with a sole source procurement.
4. **Emergency Exemptions.** The Board or Executive Director may exempt any Contract otherwise subject to competitive bidding requirements upon written findings that substantiate that an Emergency exists as set forth in ORS279B.085 or ORS 279C.335 and describe the method used for the selection of the particular Contractor. If the Contract amount exceeds the Executive Director's expenditure

authority, the Board shall approve the expenditure in advance or be requested to ratify the Contract either at a special Commission meeting or at the next regularly scheduled Commission meeting.

- a. **Emergency Contract Scope.** Although no dollar limitation applies to Emergency Contracts, the scope of the Contract shall be limited to the Work that is necessary and appropriate to remedy the conditions creating the Emergency as described in the declaration.
- b. **Emergency Contract Modification.** Emergency Contracts may be modified by Amendment, Change Order or Construction Change Field Directive to address conditions described in the original declaration.
- c. **Excusing Bonds.** The Emergency declarations may also state that the Commission waives the requirements for furnishing a performance bond and payment bond for the Emergency Contract. After making the declaration those bonding requirements are excused, see special requirements for Public Improvement Contracts Part 4, Section II, Subsection B.

5. Renewals. Contracts that are being renewed or extended in accordance with their terms are not considered to be newly issued Contracts and are not subject to competitive procurement procedures. The Board may authorize any Contract renewal or extension. The Executive Director may authorize extensions and Contract renewals provided that the aggregate amount of the Contract, including any extension or renewal does not exceed the Executive Director's expenditure authority.

IV. SPECIAL PROCUREMENTS

- A. General.** The following Class Special Procurement or Contract-Specific Special Procurements are subject to the procedures described below:
- B. Board Discretion.** The following Classes of Special Procurement are exempt from competitive bidding. Contracts may be awarded by direct appointment or any method which the Purchasing Manager determines in writing to be the most advantageous of the Commission:
 1. Purchase of Goods and Services administered by other state or local public agency cooperative procurements or price agreements pursuant to the terms of such agreements as provided in ORS 279A.200;

2. Temporary extensions of an expiring and non-renewable price agreement or cooperative procurement Contracts as may be established by the Board; and,
3. Purchase of Goods or Services under federal General Services Administration (GSA) Price Agreements established between the federally approved vendors pursuant to established GSA guidelines.

C. Special Procurement Exemption Procedures.

1. **Board Special Procurement.** The Board may deem a particular Contract or class of Contracts a Special Procurement and may award by direct appointment or any method which the Board deems in the best interest of the Commission. A request for an exemption should contain the following:
 - a. The nature of the project or type of procurement;
 - b. Estimated cost of the anticipated value of procurement;
 - c. Findings to support the substantial cost savings anticipated by the exemption from competitive solicitation or substantially promote the public interest in a manner that could not practicably be realized with competitive solicitation;
 - d. Findings to support the reason that the special procurement would be unlikely to encourage favoritism or diminish competition for the public Contract; and,
 - e. Proposed alternate Contracting methods, if any.

Prior to adoption of findings and award of a Special Procurement, the Commission shall publish a public notice at in at least one newspaper of general circulation in the area where the special procurement is to be performed. In making a final determination regarding a Special Procurement, the Board may consider the type, cost, amount of the Contract, number of persons available to Bid, and such other factors as it may deem appropriate.

2. **Executive Director Special Procurements.** The Executive Director may deem a particular Contract or a class of Contracts a Special Procurement and may award by direct appointment or any method which the Executive Director deems in the best interest of the Commission, where such Contract or Contracts do not exceed the Executive Director's delegated authority. A request for a Special

Procurement exemption shall follow the procedures outlined in Item 1 above.

V. RESERVED FOR FUTURE USE

VI. CONTRACTING AUTHORITIES AND RESPONSIBILITIES

A. Powers Reserved to the Board.

- 1. Contract Review Board Authority.** The Board reserves to itself the exercise of all of the duties and authority of a contract review board under the Public Contracting Code, including, but not limited to, the power and authority to:
 - a. Hear Debarment and pre-qualification appeals;
 - b. Create and exempt a particular Contract or class of Contracts under ORS 279A.025 and special procurements under ORS 279B.085; and, approve exemptions from competitive bidding for Public Improvement Contracts under ORS 279C.335, ORS279B.075 and ORS 279B.080; and
 - c. Adopt any amendments to the Rules pursuant to Part 3 below.
- 2. Contract Award.** The Board reserves to itself the authority to approve the award of all Public Contracts for which the Contract Price exceeds the expenditure authority of the Executive Director. The expenditure authority limits apply to the aggregate of the initial Contract plus any Amendment or subsequent Change Order.
- 3. Amendment of Rules.** All amendments to these Rules shall be made by resolution of the Board following a hearing at which members of the public have the opportunity to appear and submit comments and protests. Notice of the hearing for a proposed amendment to these Rules shall be advertised at least once in a publication in general circulation in the Portland metropolitan area at least seven (7) Days prior to the hearing.

B. Authority and Responsibility of Executive Director and Purchasing Manager.

- 1. General Authority.** The Executive Director is authorized to take all action that s/he deems necessary or convenient to implement these Rules except for those powers and authorities expressly reserved to the Board. Without limiting the generality of the foregoing, and subject to

these Rules, the Purchasing Manager shall determine the manner in which Contractors for particular Contracts shall be selected, issue all Solicitation Documents, hear all protests, and cause to be executed, on behalf of the Commission, all duly awarded Contracts.

- 2. Executive Director Regulations.** The Executive Director may develop Contract and Solicitation forms and promulgate administrative rules, procedures and delegation orders under these Rules. The Executive Director shall establish practices and procedures that:
 - a. Do not encourage favoritism or substantially diminish competition;
 - b. Allow the Commission to take advantage of the cost-saving benefits of alternative contracting methods and practices;
 - c. Give preference to Goods and Services that have been manufactured or produced in the State of Oregon if price, fitness, availability and quality are otherwise equal; and
 - d. Give preference to Goods that are certified to be made from recycled products when such Goods are available, can be substituted for non-recycled products without a loss in quality, and the cost of Goods made from recycled products is not significantly more than the cost of Goods made from non-recycled products.
- 3. Contract Oversight and Contract Award.** The Purchasing Manager shall oversee all public contracting activities of the Commission and shall have the authority and responsibility to award all contracts on behalf of PDC, subject to the approval of the Board for contracts exceeding the Executive Director's expenditure authority. This includes Personal Services Contracts and Public Improvement Contracts.
- 4. Mandatory Review and Rule Amendment.** The Executive Director shall designate appropriate staff to review and recommend necessary changes to the Rules following each session of the Oregon state legislature and may, from time to time, recommend other amendments to the Rules. All amendments to the Rules will be promulgated by the Board.
- 5. Delegation and Expenditure Authority of Executive Director.** The Board has delegated to the Executive Director authority to enter into Contracts; negotiate, modify, extend and reinstate Contracts; approve

Amendments, Change Orders and Construction Change Field Directives and take other actions to enact these Rules within the expenditure authority limits. The Executive Director may further delegated limited expenditure authority and the authority to enter, modify, amend, Change Order, Construction Change Field Directive and take other actions consistent with these Rules to Commission staff. The Board of Commissioners shall approve all public Contracts for an amount that exceeds the expenditure authority of the Executive Director. The above expenditure authority limits apply to the aggregate of the initial Contract as amended or as increased by subsequent Amendment, Change order and/or Construction Change Field Directive.

VII. POLICY AND PROGRAM COMPLIANCE

- A. **General.** All Offerors shall comply with the policy and program requirements as set forth in the Solicitation Document to include but not limited to Commission, City of Portland and other requirements.
- B. **Business and Workforce Equity Policy.** All Bidders and Proposers shall comply with the Commission's Business and Workforce Equity Policy as set forth in the Solicitation Document, including the Business Equity Program, Workforce Equity Program and the City of Portland's EEO Certification for all contracts.
- C. **Green Building Policy.** When applicable, bidders and proposers shall comply with the City of Portland Green Building Policy adopted by City Council on April 27, 2005 (Resolution No. 36310).
- D. **Recycling Program.** All Bidders and Proposers shall comply with the policy of the State of Oregon to improve environmental quality by procurement of products made through recycled materials and recycling of waste materials as set forth in ORS 279B.025, ORS 279B.225, ORS 279B.280

VIII. FEASIBILITY AND COST ANALYSIS

- A. **Feasibility Determination.** Before conducting a Procurement for Services (other than construction and related services not subject to ORS Chapter 279B) with an estimated Contract Price that exceeds \$250,000, the Purchasing Manager shall conduct an analysis to determine if it is feasible to use the Commission's own personnel or resources to perform the same services. The Purchasing Manager may determine that it is not feasible if the Purchasing Manager finds that:

1. The Commission lacks the specialized capabilities, experience or technical or other expertise necessary to perform the services. In making this finding, the Purchasing Manager shall compare the Commission's capability, experience or expertise in the field most closely involved in performing the services with a potential contractor's capability, experience or expertise in the same or a similar field; or
 2. Special circumstances require the Commission to procure the services by contract. Special circumstances include, but are not limited to, the following:
 - a. The terms under which the Commission receives a grant or other funds for use in the Procurement require the Commission to obtain services through an independent contractor;
 - b. Other state or federal law requires the Commission to procure services through an independent contractor;
 - c. The Procurement is for services that are incidental to a contract for purchasing or leasing real or personal property, including service and maintenance agreements for equipment that is leased or rented;
 - d. The Commission cannot accomplish policy, administrative or legal goals, including but not limited to avoiding conflicts of interest or ensuring independent or unbiased findings in cases when using the Commission's existing personnel or persons the Commission could hire through a regular or ordinary process would not be suitable;
 - e. The Procurement is for services to which the provisions of ORS 279B.080 (emergency procurements) apply;
 - f. The Procurement is for services, the need for which is so urgent, temporary or occasional that attempting to perform the services with the Commission's own personnel or resources would cause a delay that would frustrate the purpose for obtaining the services; or
 - g. The services the Commission intends to procure will be completed within six months after the date on which the contract for the services is executed.
- B. Effect of Feasibility Determination.** If the Purchasing Manager reasonably determines, in accordance with Part 1, Section VIII, Subsection A that it is not feasible to use the Commission's own personnel or resources to perform the services, the Commission may proceed with

Procurement for the services in accordance with these Rules and applicable law. Otherwise, the Purchasing Manager shall conduct a cost analysis of the services in accordance with Part 1, Section VIII, Subsection C below, and the Commission may proceed with the Procurement only if permitted under Part 1, Section VIII, Subsection D below. In either case, the Purchasing Manager shall prepare a document containing the findings and feasibility determination, which shall be retained in the Commission's procurement file.

- C. Cost Analysis.** If a cost analysis of the services is required under Part 1, Section III, Subsection B, the Purchasing Manager shall conduct a cost analysis of the services as follows:
1. The Purchasing Manager shall first estimate the Commission's cost of performing the services with the Commission's own personnel and resources, including:
 - a. Salary or wage and benefit costs for Commission employees who are directly involved in performing the services, including employees who inspect, supervise or monitor the performance of the services;
 - b. Material costs, including costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies;
 - c. Costs incurred in planning for, training for, starting up, implementing, transporting and delivering the services and costs related to stopping and dismantling a project or operation because the Commission intends to procure a limited quantity of services or procure the services within a defined or limited period of time.
 - d. Miscellaneous costs related to performing the services. The Purchasing Manager shall not include in the cost analysis the Commission's indirect overhead costs for existing salaries or wages and benefits for administrators or for rent, equipment, utilities and materials except to the extent that the costs are attributable solely to performing the services and would not exist unless the Commission performs the services.
 2. After estimating the Commission's cost, the Purchasing Manager shall estimate the cost a potential contractor would incur in performing the services. The Purchasing Manager may estimate a contractor's potential costs by any reasonable means, including, but not limited to, past bids or current information provided by contractors performing the same or similar services. In the absence of information that can be

reasonably and simply obtained without the expenditure of undue time and expense, the Purchasing Manager may employ percentage markups for overhead and profit. No matter the method, the Purchasing Manager's estimate must include the following estimated costs:

- a. Average or actual salary or wage and benefit costs for contractors and employees who:
 - i. Work in the industry or business most closely involved in performing the services that the contracting agency intends to procure; and
 - ii. Would be necessary and directly involved in performing the services or who would inspect, supervise or monitor the performance of the services;
- b. Material costs, including costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies; and
- c. Miscellaneous costs related to performing the services, including but not limited to reasonably foreseeable fluctuations in the costs for the items identified in this subsection over the expected duration of the procurement.

D. Effect of Cost Analysis. Subject to the exceptions below, if the Purchasing Manager, based on the cost analysis conducted in accordance with Part 1, Section VIII, Subsection C above, determines that the estimated cost to the Commission of using the Commission's own personnel and resources to perform the services exceeds the estimated cost to the Commission of conducting the Procurement, the Commission may proceed with the Procurement in accordance with these Rules and applicable law. Otherwise the Commission may not proceed with the Procurement based on a cost analysis, except as described below. In either case, the Purchasing Manager shall prepare a document containing the cost analysis, which shall be retained in the Commission's procurement file.

- 1. Even if the Purchasing Manager's estimate of the Commission's cost of performing the services with the Commission's own personnel and resources exceeds the Purchasing Manager's estimate of a potential contractor's cost of performing the services, the Commission may not proceed with the Procurement if the sole reason the Commission's estimated cost exceeds the potential contractor's estimated cost is because the Commission's salary or wage and benefit costs for the

Commission's employees, as estimated in Part 1, Section VIII, Subsection C(1)(a) above, is greater than the average or actual salary or wage and benefits costs for contractors and employees, as estimated in Part 1, Section VIII, Subsection C(2)(a) above.

2. Even if the Purchasing Manager's estimate of the Commission's cost of performing the services with the Commission's own personnel is lower than the Purchasing Manager's estimate of a potential contractor's cost of performing the services, the Commission may proceed with the Procurement if at the time the Commission intends to conduct the Procurement, the Commission lacks personnel and resources that are necessary to perform the services within the time in which the services are required. If the Commission conducts a Procurement under the conditions described in this paragraph, the Purchasing Manager shall:
 - a. Keep a record of the cost analysis and findings that the Purchasing Manager makes for each Procurement the Commission conducts under this Part 1, Section VIII, Subsection D(2), along with the basis for the Purchasing Manager's decision to proceed with the Procurement; and
 - b. Collect and provide copies of the records described in Part 1, Section VIII, Subsection D(2)(a) each calendar quarter to the Board.

Part 2: Public Contracts

I. SCOPE

A. Examples.

1. Public Contracts include, but are not limited to, the following:
 - a. Contracts for the purchase of Goods, equipment, supplies, or materials;
 - b. Public Improvement Contracts generally and further outlined in Part 4 Public Improvement Contracts;
 - c. Alternative Contracts generally and further outlined in Part 5 Alternative Contracts;
 - d. Service Contracts for which the Work has traditionally been performed by Contractors selected primarily on the basis of price as opposed to unique professional qualifications; and
 - e. Contracts with a temporary staffing agency to supply labor, which is of a type that can generally be done by any skilled Worker.

II. SOLICITATION PROCEDURES FOR PUBLIC CONTRACTS

- A. Generally.** It is the policy of the Commission and the State of Oregon to encourage public contracting that supports competition, impartiality and cost savings to the public.
- B. Division of Contracts.** No procurement or Public Contract may be artificially divided into parts or phases for the purpose of avoiding any of these Rules.
- C. Record of Selection Method.** The Purchasing Manager shall keep a written record of the method used to award every Public Contract over \$5,000.00 and the basis of the award.
- D. Cooperative Procurements.** The Purchasing Manager may purchase Goods and Services under joint and permissive cooperative procurements as provided in ORS Chapter 279A. When procuring Goods or Services using advertised Invitations to Bid or a Request For Proposals, the Purchasing Manager shall consider whether the Solicitation should provide a basis for permissive cooperative procurements by other contracting agencies.

- E. Determining Appropriate Solicitation Procedure.** To determine the correct solicitation procedure to follow, the Purchasing Manager shall:
1. Estimate the total amount of the Contract, including any anticipated or potential Amendments, Change orders and/or Construction Change Field Directives; and
 2. Utilize the solicitation procedure that encompasses the anticipated expenditure level. If an original Contract does not exceed the informal Contract limit, but it is anticipated that Amendments increasing the value of the Contract to greater than the limit will be negotiated, the selection of a Contractor to perform such Work shall be guided by the process appropriate for the anticipated expenditure level.
 3. The Executive Director may exempt individual Small and Intermediate Procurements upon written findings as provided in Part 1, Section III, Subsection C, Item 2.
- F. Procedures for Small Procurement not exceeding \$5,000.** Contracts for which the estimated Contract Price does not exceed \$5,000 may be awarded pursuant to the following Solicitation method:
1. Solicitation is not required, although it is encouraged.
 2. If an original Contract does not exceed \$5,000, but it is anticipated that Amendments or Change Orders increasing the value of the Contract will be negotiated, the selection of a Contractor to perform such Work shall be guided by the appropriate process for the anticipated expenditure level.
- G. Procedures for Intermediate Procurement between \$5,000 and \$100,000.** Contracts for which the estimated Contract Price is above \$5,000 and does not exceed \$100,000 may be awarded using one of the following two informal Solicitation methods.
1. \$5,000 - \$25,000: Verbal or written solicitation to a minimum of three (3) viable firms. A written record of all firms solicited and Quotes received shall be maintained. If three (3) Quotes are not available, a lesser number will suffice, provided that a written record is made of the effort to obtain the Quote.
 2. \$25,001 - \$100,000: Solicitation to a minimum of three viable firms based on written requirements or scope of Work. The response to the solicitation shall be in writing. A written record of all firms solicited and Quotes received shall be maintained. If three Quotes are not

available, a lesser number will suffice, provided that a written record is made of the effort to obtain the Quotes.

H. Procedures for Public Contracts greater than \$100,000. Contracts for which the estimated Contract Price above \$100,000 may be awarded pursuant to the following Solicitation method:

1. Time, Manner and Place of Advertisement for Bids.

- a. An advertisement for Bids shall be published at least once in at least one newspaper of general circulation in the Portland area and in additional publications as the Purchasing Manager may determine to be necessary or desirable to encourage competition and participation;
- b. The last publication date of the advertisement in any publication shall be at least five (5) Days prior to any Bid closing and two (2) Days prior to any pre-solicitation conference; and
- c. A copy of each Bid notice shall be posted on the Commission web site and hard copy shall be made available upon request.
- d. If the Purchasing Manager determines that electronic advertisement is likely to be cost-effective, nothing in these Rules shall be deemed to prevent the Commission from satisfying the advertisement requirements by publishing an advertisement electronically.

2. Content of Advertisement. The advertisement shall provide the following information to prospective Bidders:

- a. The date and time after which bids will not be received. If the Solicitation is for a Public Improvement with an estimated Contract price of more than \$100,000, the Solicitation closing shall be on a Tuesday, Wednesday or Thursday between 2 p.m. and 5 p.m. unless the Solicitation is for the construction of highways, bridges or other transportation facilities;
- b. The time, date and place that prequalification applications shall be filed in accordance with these Rules and the class or classes of Work for which Bidders shall be prequalified, if prequalification is a requirement;
- c. The character of the Work to be done, the Services to be provided or the material or thing to be purchased;

- d. Policy and program compliance to include Disparity Program requirements, if any;
 - e. The date, time and place of the pre-solicitation conference, if any;
 - f. The manner in which copies of the Solicitation Documents may be obtained and the address of the office where the specifications may be reviewed or obtained;
 - g. The name and title of the person designated for receipt of bids;
 - h. The address where offers shall be submitted; and
 - i. The date, time and place that the Commission will publicly open the bids.
- 3. Bid Documents.** The Bid Documents shall provide sufficient information for prospective Bidders to allow them to evaluate their interest and qualifications to supply the specified goods or services, and to determine a Bid price. Prior to the submittal date, Bidders shall have the opportunity to review all Commission background documents as described and in the manner as set forth in the Bid documents.
- a. Contents. The Bid documents, at a minimum, shall include the following:
 - i. The date and time after which bids will not be received and the place at which the Bids may be submitted;
 - ii. The date that prequalification applications shall be filed under ORS 279B.120 and the class or classes of Work for which Bidders shall be prequalified, if prequalification is a requirement;
 - iii. A description of the goods or services desired, specifications and drawings, delivery or performance schedule, inspection and acceptance requirements, and overall scope of Work;
 - iv. Policy and program compliance requirements to include Disparity Program, Green Buildings Policy or other requirements, if any;
 - v. The last day to submit a request for clarifications, substitutions and protest to the Solicitation Documents, if any;

- vi. Special evaluation criteria, if any;
- vii. The date, time and place of the pre-Bid conference, if any;
- viii. A statement that the Commission may in its discretion reject any Bid that does not substantially comply with all prescribed public procurement procedures and requirements;
- ix. A statement that the Commission may reject for good cause any or all bids upon the Commission's finding that it is in the public interest to do so;
- x. A statement that the Bid shall contain a statement indicating whether the Bidder is a "Resident Bidder," as defined in ORS 279A.120;
- xi. A statement that the Commission shall give preference to goods that are certified to be made from recycled materials in accordance with ORS 279A.125 if any;
- xii. The address of the office where the specifications of the Work, material or things may be reviewed or obtained;
- xiii. The name and title of the person designated for receipt of Bids and the date, time and place for receipt of bids and time and location of the public Opening of Bids if any;
- xiv. Bid security requirements, if any;
- xv. Contract provisions, terms and conditions to be tendered to successful Bidder;
- xvi. A statement that the Bidder is required to certify that the Bidder has not discriminated or will not discriminate against minority, women or emerging small business enterprises in obtaining any required subcontracts as set forth in ORS 279A.110;
- xvii. A statement that the Bidder shall provide a valid City of Portland Business license, Construction Contractors Board (CCB) or other license as may be required, and that the Bidder must meet the requirements of an "Independent Contractor" per ORS 670.600; and,

- xviii. If a multi-year Contract, a provision that makes the Contract subject to appropriation of funds and allows the Commission to modify, amend or terminate without prejudice.
- b. Compliance with Terms and Conditions.
 - i. Bidders are responsible for noting and abiding by the terms and conditions included in the Bid Documents and any Addenda, and these Rules.
 - ii. By signing and submitting the Bid Proposal form, the Bidder is acknowledging acceptance of and the intent to abide by the terms and conditions of the Bid documents and form of Contract agreement to be entered into.
- c. Deposit for Bid Documents. The Commission may require a deposit or charge for reasonable costs for Bid Documents and mailing. A deposit may also be required when, in the judgment of the Purchasing Manager, it is necessary to encourage the return of detailed plans, specifications or other supporting information used by potential Bidders in preparing the Bid.

4. Addenda to Bid Documents.

- a. Form Changes to Bid Documents shall be made by written Addenda. The Bidder shall acknowledge, in writing, receipt of all Addenda issued, on the Bid form or separately by letter, prior to the Bid opening.
- b. Distribution. Addenda shall be sent by mail, fax or e-mail to every prospective Bidder on file with the Commission who has obtained the Bid Documents from the Commission.
- c. Timeliness. Addenda shall be issued at least seventy-two (72) hours prior to Bid opening, unless otherwise stated in the Bid Documents or subsequent Addenda.

5. Bidder Prequalification. The Purchasing Manager may require prequalification of Bidders as a prerequisite to submitting a Bid.

- a. If prequalification is required, such information shall be contained in the Bid notice;
- b. The Bid documents shall provide prospective Bidders with information on the standards and process for prequalification;

- c. Within the timeframes set forth in the Solicitation Documents, but no later than five (5) Days prior to Closing, the Purchasing Manager shall provide Notice of the decision to qualify or deny prequalification to an applicant stating the reason for the action taken and the right to appeal the decision; and
- d. Appeals of denial of prequalification decisions will be conducted in the same manner as appeals of disqualification procedures.

6. Bid Security.

- a. Bid Security. Bid security not to exceed ten percent (10%) of the base Bid(s) or total of all extended quantities of unit prices may be required by the Purchasing Manager for public Contracts. Bid security may be in the form of a surety bond, cashier's check, certified check, or irrevocable letter of credit.
- b. Return of Bid Security. Upon the execution of the Contract and bond by the successful Bidder, each Bidder's Bid security shall be returned. The Bidder who is awarded a Contract and who, within the schedule set forth in the Bid Documents, fails to enter into a Contract shall forfeit the Bid security that accompanied the successful Bid. Any forfeit Bid security shall be considered as liquidated damages and not a penalty for failure of the Bidder to execute the Contract.

7. Brand Name Products. Specifications for Contracts shall not expressly or implicitly require any product by one brand name or mark, nor the product of one particular manufacturer or seller except for the following reasons:

- a. It is unlikely that such exemption will encourage favoritism in the awarding of public Contracts or substantially diminish competition for public Contracts;
- b. The specification of a product by brand name or mark, or the product of a particular manufacturer or seller, would result in substantial cost savings to the Commission;
- c. There is only one manufacturer or seller of the product of the quality required; or
- d. Efficient utilization or maintenance of existing equipment, supplies or products requires the purchase of one particular manufacturer.

- 8. Pre-Bid Conferences.** The Purchasing Manager may hold a pre-Bid conference to answer questions regarding the project, explain procurement requirements, conduct site inspections or assist prospective Bidders in meeting Disparity Program requirements.
- a. **Announcement.** The time and place of the conference shall be announced to all prospective Bidders in the Bid notice and Bid Documents. The pre-Bid conference shall be held no sooner than two (2) Days after the last publication of the Bid notice advertisement, but sufficiently before Bid closing to allow consideration of the conference results in preparing bids.
 - b. **Attendance.** The Purchasing Manager may require mandatory attendance at the pre-Bid conference as a condition for bidding. Such requirement shall be included in the Bid notice and in the Bid Documents. A list of attendees shall be documented in the Bid file.
 - c. **Addenda.** Statements at the pre-Bid conference shall not change the Bid Documents unless confirmed to all prospective Bidders by means of a written Addendum to the Bid Documents.
- 9. Record of Potential Offerors.** A record shall be maintained and made available to the public for review that identifies all persons and entities that receive Solicitation Documents from the Commission.

10. Manner of Bid.

- a. **Documents.** Completed Bid forms and documents as specified or provided in the Bid package furnished to Bidders shall be typed or prepared in ink and signed by an authorized representative of the Bidder. Alterations or erasures shall be initialed in ink by the person signing the Bid.
- b. **Bid Samples and Descriptive Literature.** Product samples, specifications or other descriptive information or literature may be required of each Bidder in order to evaluate required characteristics of the items Bid. Submission requirements and information on returning items shall be included in the Bid Documents.
- c. **Identification of Bids.** To ensure proper identification and special handling, Bids should be submitted to the address listed in the Bid notice in a sealed envelope appropriately marked with the name of the Bidder, the Bid number, the name of the project being Bid, and the date and time of the Bid closing. The Commission shall not be

responsible for the proper identification and handling of a Bid not in conformance with these requirements.

- d. Receipt of Bid. It is the Bidder's responsibility to ensure that the Bid is received by the Commission prior to the stated Bid closing.

11. Modification of Bids and Withdrawal of Bids.

- a. Modifications. A Bid once submitted may be modified in writing by the Bidder prior to the time and date set for Bid closing. Any modifications shall be prepared on the company letterhead, signed by an authorized representative of the Bidder, and state that the new document supersedes or modifies the prior Bid. It is the Bidder's responsibility to ensure that the modification is received by the Commission prior to the date and time established for Bid closing. The modification should be delivered in an envelope that is clearly marked with the Bidder's name, the Bid number, the project name, date and time of Bid closing, and identified as a "Bid Modification."
- b. Withdrawals Prior to Bid Closing.
 - i. Bids may be withdrawn by written notification on company letterhead signed by an authorized representative of the Bidder and received prior to the date and time established for the Bid closing. It is the Bidder's responsibility to ensure that the withdrawal is delivered to the Commission in an envelope that is clearly marked with the Bidder's name, the Bid number, the project name, date and time of Bid closing, and identified as "Bid Withdrawal."
 - ii. Withdrawn bids shall be returned to the Bidder unopened.

12. Protest of Bid Solicitation Documents.

- a. Time for Submission of Protest. Protests of the terms, conditions and other contents of the Bid Solicitation Documents shall only be considered when presented to the Purchasing Manager in writing in accordance with the following timelines.
 - i. For public Contracts, five (5) Days prior to Bid closing or other timeline as may otherwise be stated in the Solicitation Documents; and

- ii. Protests not asserted or not properly asserted within these timelines shall be deemed waived by the protester.
- b. Basis for Protest. A protest shall include a detailed statement of the legal and factual grounds for the protest; a description of the resulting prejudice to the protesting Bidder; and a statement of form of relief requested or any proposed changes to the Bid Documents.
- c. Identification of Protest. It is the Bidder's responsibility to ensure that the protest is received by the Commission within the stated timelines. The protest should be delivered in an envelope, directed to the Purchasing Manager that is clearly marked with the Bidder's name, the Bid number, the project name, date and time of Bid closing, and identified as a "Bid Document Protest." Faxed protests will not be accepted.
- d. Delay of Bid Closing. If the Commission receives a protest from a Bidder in accordance with this section, the Purchasing Manager may in his or her discretion extend the date of Bid closing if the Purchasing Manager determines an extension is necessary to consider the protest and, if necessary, to issue Addenda to the Bid Documents or otherwise cancel the solicitation.

13. Request for Clarification or Propose Substitution. Prior to the deadline for submitting a protest above, or at such other time as the Bid Documents may otherwise specify, a Bidder may request that the Purchasing Manager clarify any provision of the Bid Documents or may propose a substitution. The clarification to a Bidder, whether orally or in writing, does not change the Bid Documents and is not binding on the Commission unless the Commission amends the Bid Documents by Addenda. Failure to timely request clarification or submit a request for substitution shall be deemed a waiver of the request.

14. Receipt, Closing, and Recording of Bids.

- a. Receipt. Upon receipt by the Commission, each Bid and modification shall be time stamped or marked by hand, not opened, and shall be stored in a secure place until Bid closing. If Bids or modifications are opened inadvertently or are opened prior to the time and date set for Bid closing, the bids shall be resealed and stored for opening at the correct time. When this occurs, documentation of this procedure shall be placed in the Bid file.

- b. **Opening and Recording.** Bids and modifications shall be opened publicly, immediately after the deadline for the submission of Bids and in the place designated by the Bid Documents. The Purchasing Manager shall designate representatives who will determine and declare the precise time of day for purposes of establishing the Bid submittal deadline and the opening of each timely received Bid, read aloud the Bid price, and record Bid prices on a Bid tabulation sheet.
- c. **Availability.** The opened bids shall be available for public inspection subject to the need of the Commission to evaluate such bids prior to Notice of Intent to Award, except to the extent the Bidder designates trade secrets or other proprietary data to be confidential. Commission legal counsel shall verify and determine that the confidential information claimed to be exempt is in fact exempt from disclosure under the Oregon Public Records Law. Material so designated shall accompany the Bid and shall be readily separable from the Bid in order to facilitate public inspection of the non-confidential portion of the Bid. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment shall be publicly available regardless of any designation to the contrary.

15. Late Bids, Late Withdrawals, and Late Modifications. A Bid received after the Bid submittal deadline is late. Any request for Bid withdrawal or modification received after the Bid submittal deadline is late. A late Bid, late Bid modification, or late Bid withdrawal shall not be considered and shall be returned to the Bidder unopened unless the Commission in its discretion determines that the late submittal or withdrawal increases competition, does not prejudice any Bidder, does not compromise the integrity of the competitive bidding system or is in the best interest of the Commission.

16. Mistakes in Bids.

- a. **General.** Clarification or withdrawal of a Bid because of an inadvertent, nonjudgmental mistake in the Bid requires careful consideration to protect the integrity of the competitive bidding system and to ensure fairness. Except as provided in this Rule, if the mistake is attributable to an error in judgment, the Bid may not be corrected. Bid correction or withdrawal by reason of a nonjudgmental mistake is permissible but only to the extent it is not contrary to the interest of the Commission or does not prejudice other Bidders.

b. Mistakes Discovered Before Bid Closing. Mistakes discovered before Bid closing may be corrected as provided above.

c. Mistakes Discovered After Bid Closing but Before Award.

i. Minor Informalities.

(a) Definition. Minor informalities are matters of form rather than substance or insignificant mistakes that can be waived or corrected without prejudice to other Bidders or the Commission.

(b) Examples. Minor informalities include, but are not limited to, a Bidder's failure to return the required number of signed Bid Documents; failure to sign in the designated block so long the Bid Documents otherwise evidence an intent to be bound; clerical, transposition or written figure discrepancy with numbers price; or, failure to acknowledge receipt of an Addendum to the Bid Documents if it is clear that the Bidder received the Addendum and intended to be bound by its terms or if the Addendum did not affect price, quantity, quality, or delivery time.

(c) Not Included. Minor informalities do not include mistakes that affect price, quantity, quality, delivery, or contractual conditions except in the case of informalities involving a mathematical discrepancy between unit price and extended price; the unit price shall govern.

(d) Procedure. If the Commission discovers a minor informality after opening but before award, the Commission may in its discretion correct or waive the minor informality if it is in its interest to do so and may request a written clarification from a Bidder or make other determinations.

ii. Mistakes Where Intended Bid is Not Evident. The Purchasing Manager may reject a Bid in which a mistake is clearly evident on the face of the Bid form, and the intended Bid is not clearly evident or cannot be substantiated from accompanying documents or objectively verified through other means.

17. Time for Consideration of Bids. Bids shall be valid for the number of Days specified in the Bid Documents unless otherwise mutually agreed to in writing for an extended period.

18. Extension of Time for Consideration of Bids. Notwithstanding item 17 above, after opening the bids, the Purchasing Manager may request in writing that the Bidders extend the time during which the Commission may accept their bids.

19. Cancellation of Invitation to Bid.

- a. Cancellation in the Public Interest. An invitation to Bid may be cancelled, wholly or in part, when it is determined by the Purchasing Manager to be in the public interest to do so. The reasons for cancellation shall be documented and be made part of the Bid file.
- b. Notice of Cancellation. When an invitation to Bid is cancelled prior to Bid opening, a written notice of cancellation shall be sent to all holders of Bid Documents. All Bids received shall be returned to Bidders unopened.

20. Rejection of All Bids. All Bids may be rejected after Bid opening when it is determined by the Purchasing Manager to be in the public interest to do so. If the time for consideration of Bids has expired without a Bid award, all Bids shall automatically be rejected, unless an extension of time has been mutually agreed upon in writing between the Commission and the apparent low Bidder. In the event all Bids are rejected, all Bids received shall become part of the Bid file and the Bid bonds, if any, shall be returned. In any case where competitive Bids are required and all Bids are rejected, and the proposed project is not abandoned, new Bids may be called for as in the first instance.

21. Negotiation with Bidders.

- a. General. There shall be no negotiations with any Bidder prior to Solicitation closing. Prior to award of Contract, the Commission may negotiate with a Proposer or Bidder to clarify its Quote, Bid or Proposal or to effect modifications that will make the Quote, Bid or Proposal acceptable or more advantageous to the Commission or as set forth in this Section.
- b. All Bids Exceeding Cost Estimates. If all responsive Offers from Responsible Bidders as the result of a Solicitation exceed the project cost estimate, the Commission may negotiate with the lowest Responsible Bidder prior to award of the Contract to solicit value engineering and other options to bring the cost within the project cost estimate, provided the scope of Work is not substantially changed from the original Solicitation. .

- c. No Bids Received. If no Quote, Bid or Proposal are received as the result of a Solicitation, the Commission may negotiate and enter into a Contract with one entity, provided the scope of Work is not substantially changed from the original Solicitation.
- d. Negotiation Disclosure. Notwithstanding any other provision of law, the records of a Bidder used in Contract negotiation under this section that are exempt or conditionally exempt from disclosure under ORS 192.501 or 192.502, are not subject to public inspection until after the negotiated Contract has been awarded or the negotiation process has been terminated

22. Bid Evaluation and Award.

- a. General. The Contract, if awarded, shall be awarded to the lowest responsive and Responsible Bidder who has substantially complied with the Bid Documents, these Rules and all other prescribed public bidding rules and procedures. The Commission may award by item, groups of items, or the entire Bid provided such award is consistent with the Bid Documents and in the public interest. The Purchasing Manager reserves the right to waive any informality in a Bid; reject any Bid not in substantial compliance with the Bid Documents; reject any Bid not in compliance with these Rules or state statute regarding public contracting; or reject all bids pursuant to ORS 279C.395 and these Rules.
- b. Bid Tabulation Sheet. The Purchasing Manager shall ensure that a written record is produced that indicates how each Bid responds to the criteria set forth in the Bid Documents. The Bid tabulation sheet shall be made available upon request for public review after the Commission has evaluated all bids.
- c. Special Requirements to Determine Responsiveness.
 - i. General. The Bid Documents shall set forth any special requirements and criteria that will be used to determine which Bidders are responsive Bidders.
 - ii. Review of Unit Bid Prices. Unit Bid prices or Bid alternatives will be reviewed for unbalanced pricing or Bid loading.
 - iii. Considerations for Establishing Special Requirements. Any special requirements need not be precise predictors of actual

future costs, but to the extent possible such requirements shall:

- (a) Be reasonable estimates based upon information the Commission has available concerning future use; and
- (b) Treat all bids equitably.

iv. Special Requirements. Examples of special requirements include, but are not limited to, transportation costs, volume weighing, trade-in allowance, depreciation allowances, cartage penalties and ownership or life cycle cost formulas.

d. Product or Service Acceptability.

i. The Bid Document shall set forth the criteria to be used in determining product or service acceptability. The Purchasing Manager may require the submission of 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 or service prior to award for such characteristics as quality of Workmanship;

(b) Examination of such elements as appearance, finish, taste, or feel; or

(c) Other examinations to determine whether the product or service conforms to the Bid Document.

ii. The acceptability evaluation is conducted only to determine that a Bid is responsive to the Bid Document. A Bidder's product or service that does not meet the minimum requirements may be rejected in the Commission's discretion. Product or service rejections are not considered Bidder disqualifications and are not grounds for appeal under state law.

e. Determination of Lowest Responsible Bidder. Following determination of responsiveness and product or service acceptability as set forth above, the bids shall be evaluated to determine the lowest Responsible Bidder. The lowest Responsible Bidder is the lowest Bidder who is not on the list established by the

Construction Contractors Board pursuant to ORS 701.227 and who has:

- i. Substantially complied with the Bid Document, these Rules and all prescribed public bidding procedures and requirements;
- ii. Met the Standards of Responsibility. In determining if a prospective Bidder has met the Standards of Responsibility, the Commission shall consider whether the Bidder has:
 - (a) Made available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to indicate the capability of the prospective Bidder to meet all contractual responsibilities;
 - (b) A satisfactory record of performance. The Purchasing Manager shall document the record of performance of a prospective Bidder if a finding is made that the prospective Bidder is not responsible under this subsection;
 - (c) A satisfactory record of integrity. The Purchasing Manager shall document the record of integrity of a prospective Bidder if a finding is made that the prospective Bidder is not responsible under this subsection;
 - (d) Qualified legally to Contract with the Commission; and
 - (e) Supplied all necessary information in connection with the inquiry concerning responsibility.
- f. If a prospective Bidder fails to promptly supply information requested by the Commission concerning responsibility, the Purchasing Manager shall base the determination of responsibility upon any available information, or may make a finding that the prospective Bidder is not responsible;
 - i. Not been disqualified by the Commission pursuant to ORS 279C.440 and these Rules; and
 - ii. In the case of a nonresident Bidder, the Purchasing Manager shall add a percentage increase to the Bid equal to the

percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides. For the purposes of administering this section, the Commission shall rely on information published annually by the Oregon Department of Administrative Services.

- g. Notice of Intent to Award. At least seven (7) Days before award of a public Contract unless the Commission has determined that this is impracticable and provided a shorter timeframe in the Solicitation Documents, the Purchasing Manager shall provide written notice to all Bidders of the Commission's intent to award the Contract. The notice of award shall not be final until the later of the following:
 - i. Seven (7) Day after the date of the notice, unless otherwise provided in the Solicitation Documents; or
 - ii. Until the Purchasing Manager provides a written response to all timely filed protests, if any, that denies the protest and affirms the award; or, until any appeal of the Purchasing Manager's decision regarding a protest has been reviewed by the Executive Director.

- h. Low Tie Bids. Low tie bids are bids from responsive and Responsible Bidder that are identical in price, fitness, availability and quality and that meet all the requirements and criteria set forth in Bid Document. Low tie bids shall be awarded as follows:
 - i. The Purchasing Manager shall prefer goods or services that have been manufactured or produced in this state pursuant to ORS 279A.120; or if still tied
 - ii. The Purchasing Manager shall then prefer the Bidder whose principal offices or headquarters are located in Oregon; or if still tied
 - iii. The Purchasing Manager shall then prefer the Bidder whose principal offices or headquarters are located in Multnomah, Washington, or Clackamas County; or if still tied
 - iv. The Purchasing Manager shall then prefer the Bidder whose principal offices or headquarters are located in the City of Portland; or if still tied

- v. Award shall be made by drawing lots among the remaining Bidder. Such Bidder shall be given notice and an opportunity to be present when the lots are drawn.
- vi. If none of the tied Bidder is located in Oregon, award of the Contract shall be made by drawing lots. Such Bidder shall be given notice and an opportunity to be present when the lots are drawn.
- i. Availability of Award Decisions. Tabulations of awarded bids may be obtained from the Purchasing Manager in person or upon written request specifying the Bid number or project name. Tabulations will be made available upon request.
- j. Documentation of Award. Following award, a record showing the basis for determining the successful Bidder shall be made a part of the file, including the completed Bid tabulation sheet and written justification for any rejection of lower Bidder or higher scored Proposers.
- k. Availability. The opened Bids shall be available for public inspection subject to the need of the Commission to evaluate such Bids prior to Notice of Intent to Award, except to the extent the Bidder designates trade secrets or other proprietary data to be confidential. Commission legal counsel shall determine that the information claimed to exempt is in fact exempt from disclosure under the Oregon Public Records Law.

23. Rejection of Individual Bids.

- a. General. The Purchasing Manager may reject wholly or in part, any Bid not in substantial compliance with all prescribed solicitation procedures and requirements, and may reject for good cause any Bid upon a written finding by the Purchasing Manager that it is in the public interest to do so.
- b. Reasons for Rejection. The Purchasing Manager may in his or her discretion reject any Bid wholly or in part upon a written finding that:
 - i. The Bidder has not prequalified under or is disqualified under these Rules;
 - ii. The Bidder is not currently registered with the Construction Contractors Board (CCB) or otherwise licensed as required;

- iii. The Commissioner of the Bureau of Labor and Industries has declared the Bidder ineligible under ORS 701.227;
- iv. The Bid is nonresponsive, i.e., the Bid does not conform in all material respects to the Bid Documents, including all prescribed procedures and special requirements including without limitation satisfactory completion of MWESB outreach and compliance forms completion;
- v. The Bid takes exception to the specifications or other terms and conditions, or is contingent upon the Commission's acceptance of different or additional specifications or terms and conditions;
- vi. The supply, service or construction item offered is unacceptable due to failure to meet the requirements of the Bid Documents;
- vii. The Bidder is nonresponsible, i.e., has not satisfied or is not capable of satisfying the Standards of Responsibility;
- viii. A court of competent jurisdiction has determined or the Commission or other agency has determined in writing that the Bidder has committed or engaged in fraud, misrepresentation, price-rigging, unlawful anti-competitive conduct or similar behavior within five years of submitting the Bid;
- ix. A court of competent jurisdiction has determined or the Commission or other agency has determined in writing that the Bidder is responsible for more than one breach of a public or private Contract within three years of submitting the Bid;
- x. The Bid security, if required, has not been submitted or properly signed as provided in the Bid Documents;
- xi. The Bidder has not met the Disparity Program requirements, if any, and has not made a good faith effort in accordance with the Contract solicitation requirements, ORS 279A.100 and these Rules;
- xii. The Bidder has failed to provide the nondiscrimination certification;

- xiii. Other circumstances relevant to the Bid, or Bidder, indicate that acceptance of the Bid may impair the integrity of the selection process or result in an imprudent Contract; or
 - xiv. The Bidder has not met other Policy and Program compliance requirements as set forth in the Contract Solicitation Documents or these Rules.
- c. Form of Business Entity. For purposes of this Rule, the Purchasing Manager may investigate any Bidder submitting a Bid so that previously disqualified Bidders or their officers and directors, or principal owners may not, by subterfuge, change of ownership, or other adjustments in formal appearance, avoid application of this Rule or of the disqualification provision of these Rules.

24. Bidder Disqualification

- a. General. The Commission may in its discretion disqualify a prospective Bidder from consideration for award of the Commission's Contracts for the reasons listed below after providing the prospective Bidder with notice and a reasonable opportunity to be heard. The disqualification shall not be for more than three (3) years.
- b. Reasons for Disqualification. A prospective Bidder may be disqualified from consideration for award of the Commission's Contracts for any of the following reasons:
 - i. Conviction for the commission of a criminal offense in obtaining or attempting to obtain a public or private Contract or subcontract, or in the performance of such Contract or subcontract;
 - ii. Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the prospective Bidder's responsibility as a Contractor;
 - iii. Conviction under state or federal antitrust statutes; or
 - iv. Violation of a Contract provision that is regarded by the Commission to be so serious as to justify disqualification. A

violation may include, but is not limited to, a failure to perform the terms of a Contract or an unsatisfactory performance in accordance with the terms of the Contract. However, a failure to perform or an unsatisfactory performance caused by acts beyond the control of the Contractor may not be considered to be a basis for disqualification.

- c. The failure to disqualify a Bidder for any of the above reasons shall not in any way impair or waive the Purchasing Manager's right to reject a Bid for the same reasons listed in item 23 above.
- d. Disqualification Decision. The Commission shall issue a written decision to disqualify a prospective Bidder and shall provide the decision to the prospective Bidder immediately. The decision shall:
 - i. State the reasons for the action taken; and
 - ii. Inform the prospective Bidder of the right to appeal to the decision under ORS 279A.445.
- e. Appeal of Disqualification. Any prospective Bidder who wishes to appeal disqualification as a Bidder shall, within three (3) business Days after receipt of notice of disqualification, notify the Commission that the prospective Bidder appeals the disqualification. Immediately upon receipt of such notice of appeal, the Board shall be notified.
- f. Disqualification Appeal Procedure. The procedure for appeal from a disqualification shall be in accordance with ORS 279C.450 as follows:
 - i. Promptly upon receipt of notice of appeal, the Commission shall notify the appellant of the time and place of the hearing;
 - ii. The Board shall conduct the hearing and decide the appeal within thirty (30) Days after receiving notice of the appeal from the Commission;
 - iii. In the hearing, the Board shall consider de novo the notice of disqualification, the reasons listed for disqualification, and any evidence provided by the parties;

- iv. The Board shall set forth in writing the reasons for the decision;
- v. The Board may allocate the Board's costs for the hearing between the appellant and the Commission. The allocation shall be based upon facts found by the Board and stated in the Board's decision. If the Board does not allocate costs, the costs shall be paid by the losing party; and
- vi. The decision of the Board may be reviewed only upon a petition in the circuit court of Multnomah County filed within fifteen (15) Days after the date of the decision.

25. Protest of Contract Selection.

- a. Time. Any Bidder who has submitted a Bid to the Commission and who is adversely affected by the Commission's Contract award to another Bidder has seven (7) Days after issuance of the notice of intent to award the Contract, unless a different protest period is provided in the Solicitation Documents, to submit a written protest of the award to the Commission. The Commission shall not consider a protest submitted after the time period established in this Rule or such different period as provided in the Bid Documents.
- b. Grounds for Protest. The Bidder's written protest shall specify the grounds upon which the protest is based. A Bidder is adversely affected only if the Bidder is eligible for award of the Contract and is next in line for award, i.e., the protesting Bidder shall claim that all lower Bidders or higher scored Proposers are ineligible for award because their offers were nonresponsive or that the Commission committed a material violation of a provision in the Bid Documents or of an applicable statute, and that the protesting Bidder was adversely affected.
- c. Protests not asserted or not properly asserted under the requirements of Item a and b above shall be deemed waived by the protester.
- d. Authority to Resolve Protests. The Purchasing Manager has the authority to settle or resolve a written protest submitted in accordance with the requirements of this Rule.
- e. Decision. If a protest is not settled, the Purchasing Manager shall issue a written decision on the protest.

- f. **Appeal of Decision.** An appeal of the decision by the Purchasing Manager shall be submitted to the Executive Director. The appeal shall be in writing and shall be received by the Commission within seven (7) Days of the issuance of the decision. The appeal shall identify the award in question and specifically outline the reason for the appeal. The written decision of the Executive Director regarding an appeal is final. Judicial review of this decision will be available to the extent provided by statute. The Bidder shall exhaust all avenues of administrative review before pursuing judicial review.

26. Contract Award.

- a. **Prompt Execution of Contract.** Upon notice of Contract award, the successful Bidder shall promptly execute the Contract and furnish insurance and bond information as may be required within fourteen (14) Days or other schedule as set forth in the Solicitation Documents. Failure to execute the Contract or to provide the required insurance and bond information within the required timelines may result in the rejection of the Bid and award the Contract to the next lowest responsive and Responsible Bidder, and, at the Commission's discretion, the Bidder shall forfeit its Bid security.
- b. **Non-Resident Contractor.** If the Contract Price exceeds \$10,000, and the Contractor is a non-resident Contractor as defined in Part 1, 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, length of Contract and such other information as the Department of Revenue may require before final payment can be received on the Contract. A copy of the report shall be forwarded to the Commission. The Commission shall satisfy itself that the above requirements have been complied with before it issues final payment.
- c. **Payment and Performance Bonds.**
 - i. **Public Contracts.** The Commission may require payment and performance bonds for public Contracts. Such requirements shall be expressly set forth in the Bid Documents. However, the Commission shall not use such requirements to discourage competition.

- ii. **Time for Submission.** Upon the Commission's request, the apparent successful Bidder shall furnish required payment and performance bonds within fourteen (14) Days unless another schedule as set forth in the Solicitation Documents. If the Bidder fails to furnish the documents within the specified period, the Commission may reject the Bid and award the Contract to the next lowest responsive and Responsible Bidder, and, at the Commission's discretion, the Bidder shall forfeit its Bid security.

27. Execution of Contract and Performance of Work.

- a. **Negotiation.** Upon execution of a Contract, the Commission may, through an Amendment, Change Order or Construction Change Field Directive, negotiate with the successful Contractor regarding the scope, price, schedule and terms of the Contract so long as negotiations do not result in significant changes to the scope of Work in the original Solicitation Documents.
- b. **Performance and Liquidated Damages.** Upon execution of the Contract and issuance of a Notice to Proceed, the successful Contractor shall complete the Work according to the scope, terms and schedule set forth in the Contract. Failure to satisfactorily complete all Work within the specified performance period, or satisfactorily be in compliance with all contract requirements may result in the assessment of liquidated damages, termination, or other penalties as set forth in the Contract.

28. Contract Termination. When a Public Contract is terminated by mutual agreement, provision shall be made for the payment of compensation to the Contractor unless otherwise specifically set forth in the Solicitation Documents. In addition to a reasonable amount of compensation for preparatory Work and for all costs and expenses arising out of termination, the amount to be paid to the Contractor:

- a. Shall be determined on the basis of the Contract price in the case of any fully completed separate item or portion of the Work for which there is a separate or unit Contract price; and
- b. May, with respect to any other Work, be a percent of the Contract price equal to the percentage of the Work completed.

Part 3: Personal Services Contracts

I. SCOPE

A. Generally. Subject only to Part 1 Section I Scope and Section II Definitions the following specific rules shall only apply to Personal Services Contracts.

B. Examples.

1. Personal Services Contracts may include, but are not limited to, the following:
 - a. Contracts for services performed in a professional capacity including services of an accountant, attorney, engineer, information technology consultant, or architect;
 - b. Contracts for services that are specialized, creative and research oriented; and
 - c. Contracts for services as a consultant, construction project manager or project manager.
2. The following Contracts are not Personal Service Contracts and shall follow the general competitive public Contract bidding requirements as provided in Part 2.
 - a. Contracts with a temporary staffing agency to supply labor, which is of a type that can be generally done by any skilled Worker;
 - b. Contracts, even though in a professional capacity, if primarily for equipment, supplies or materials; or
 - c. Contracts for which the Work has traditionally been performed by Contractors selected primarily on the basis of price (i.e., construction services; food services; or other services that do not require specialized skills, knowledge and resources).

II. EXEMPTIONS

A. Generally. It is the Commission's policy to promote competition in Solicitation of Public Services Contracts.

- B. Board Exemptions.** The Board may order a particular Personal Service Contract exempt from competitive solicitation requirements. A request for an exemption shall contain the following:
1. Findings to Support No Favoritism. It is unlikely that such exemption will encourage favoritism in the awarding of the Contract or substantially diminish competition; and
 2. Findings to Support Substantial Cost Savings. The awarding of the Contract pursuant to the exemption will result in substantial cost savings to the Commission; or
 3. Findings to Support Unique Qualifications. The nature or scope of services desired by the Commission requires a specific Contractor with unique qualifications, experience or knowledge otherwise unavailable, such as extensive expertise in a relatively narrow technical area or project.
- C. Executive Director Exemptions.** The Executive Director may order a particular Personal Services Contract that does not exceed the Executive Director's delegated expenditure authority exempt from competitive solicitation requirements. A request for exemption should contain the same information as set forth in Section B above.
- D. Emergency Exemptions.** The Board or Executive Director may exempt any Personal Service Contract otherwise subject to competitive bidding requirements upon written findings that substantiate that an Emergency exists as set forth in ORS279B.085 and describe the method used for the selection of the particular Contractor. If the Contract amount exceeds the Executive Director's expenditure authority, the Board shall approve the expenditure in advance or be requested to ratify the Contract either at a special Commission meeting or at the next regularly scheduled Commission meeting.
- a. Emergency Contract Scope. Although no dollar limitation applies to Emergency Contracts, the scope of the Contract shall be limited to the Work that is necessary and appropriate to remedy the conditions creating the Emergency as described in the declaration.
 - b. Emergency Contract Modification. Emergency Contracts may be modified by Amendment to address conditions described in the original declaration.
- E. Renewals.** Personal Service Contracts that are being renewed or extended in accordance with their terms are not considered to be newly issued

Contracts and are not subject to competitive procurement procedures. The Board may authorize any Contract renewal or extension. The Executive Director may authorize extensions and Contract renewals provided that the aggregate amount of the Contract, including any extension or renewal does not exceed the Executive Director's expenditure authority.

III SOLICITATION PROCEDURES FOR PERSONAL SERVICES CONTRACTS

- A. Determining Appropriate Solicitation Procedure.** To determine what solicitation procedure to follow, the Purchasing Manager shall:
1. Estimate the total amount of the Contract, including any anticipated or potential amendments; and
 2. Utilize the solicitation procedure that is appropriate for the anticipated expenditure level.
- B. Procedures for Personal Services Contracts not exceeding \$5,000.**
1. Solicitation is not required, although it is encouraged.
 2. If an original Contract does not exceed \$5,000, but it is anticipated that Amendments increasing the value of the Contract will be negotiated, the selection of a Contractor to perform such Work shall be guided by the appropriate process for the anticipated expenditure level.
- C. Procedures for Personal Services Contracts between \$5,000 and \$100,000.** Contracts for which the estimated Contract Price does not exceed \$100,000 may be awarded using one of the following two informal Solicitation methods:
1. \$5,000 - \$25,000: Verbal or written solicitation to a minimum of three viable firms. A written record of all firms solicited and Quotes received shall be maintained. If three Quotes are not available, a lesser number will suffice, provided that a written record is made of the effort to obtain the Quote.
 2. \$25,001 - \$100,000: Solicitation to a minimum of three viable firms based on written requirements or scope of Work. The response to the solicitation shall be in writing. A written record of all firms solicited and Quotes received shall be maintained. If three Quotes are not available, a lesser number will suffice, provided that a written record is made of the effort to obtain the Quotes.

D. Procedures for Personal Services Contracts Greater than \$100,000. Contracts for which the estimated Contract Price is more than \$100,000 may be awarded pursuant to the following Solicitation method:

- 1. Solicitation.** Solicitation for Proposals shall follow a formal and structured process designed to permit and encourage competition from a maximum number of participants.
- 2. Request For Proposals.** A written Request For Proposal (RFP) shall be prepared, and provide the following information as appropriate:
 - a. Relevant information on the project;
 - b. An explanation of the professional services to be provided by the Contractor, the agencies and groups or individuals involved, and the timing of project phases and deadlines;
 - c. An outline of the project management structure and the support or resources to be provided by the Commission, if any;
 - d. The manner in which a Proposal and any other required information should be submitted;
 - e. A description of the basis, criteria and process for evaluating the RFP responses;
 - f. Information on Contract requirements;
 - g. Policy and program compliance, including Disparity Program requirements, if any;
 - h. The date, time and location of a pre-Proposal conference, if any, and the date and time by which Proposals shall be received in order to be considered;
 - i. The deadline for clarifications and the final Addendum; and
 - j. The address of the office where Proposals should be delivered, and the name of the person to contact regarding the RFP.
- 3. Request For Qualifications.** A Request For Qualifications (RFQ) may be used to establish a “short-list” of candidates based on submitted qualifications with an RFP to be used for final selection or may be used to select as-needed Flexible Services Contracts. A

written RFQ shall be prepared and shall require information as outlined in the RFP process.

- 4. Distribution.** An announcement of an RFP shall be distributed to Contractors known to the Commission. The announcement should also be distributed to appropriate associations and ESB/MBE/WBE 'clearinghouse' organizations as designated by the Purchasing Manager.
- 5. Advertising.**
 - a. A notice announcing that the Commission is soliciting Proposals shall be placed at least once in at least one newspaper of general circulation in the Portland area. The last publication date of the advertisement in any publication shall be at least five (5) Days prior to the date Proposals shall be received, and two (2) Days prior to any pre-Proposal conference.
 - b. The advertisement shall include as a minimum the following:
 - i. The date and time by which Proposals shall be received in order to be considered;
 - ii. The general character of the services to be provided or the projected scope of Work;
 - iii. The date, time and place of the pre-Proposal conference, if any; and
 - iv. The address of the office where the RFP may be obtained, and the name of a person to contact regarding the RFP.
- 6. Record of Potential Proposers.** A record shall be maintained and made available to the public for review that identifies all persons and entities that receive an RFP.
- 7. Addenda to RFP Documents.** Changes to the RFP documents shall be made by written Addenda and shall be sent by mail, fax or e-mail to every potential Proposer on file.
- 8. Request for Clarifications of RFP Documents.** Prior to the deadline for submitting a protest under item 18 below, or at such other time as the RFP documents may otherwise specify, a Proposer may request that the Purchasing Manager clarify any provision of the RFP documents. The clarification to a Proposer, whether orally or in writing, does not change the RFP documents and is not binding on the

Commission unless the Commission amends the RFP documents by Addenda. Failure to timely request clarification shall be deemed a waiver of the request.

- 9. Pre-Proposal Conference.** The Purchasing Manager may hold a pre-Proposal conference to answer questions regarding the project, explain project requirements, or assist prospective Proposers in meeting Disparity Program requirements.

10. Receipt, Opening, and Availability of Proposals.

- a. Receipt. Upon receipt by the Commission, each Proposal and modification shall be time stamped or marked by hand, not opened, and shall be stored in a secure place until Proposal closing. If Proposals or modifications are opened inadvertently or are opened prior to the time and date set for Proposal closing, the Proposals shall be resealed and stored for opening at the correct time. When this occurs, documentation of this procedure shall be placed in the Proposal file.
- b. Opening. Proposals will be opened after the deadline for the submission of Proposals and evaluated as set forth in the Selection Procedures below or otherwise set forth in the Solicitation Documents.
- c. Availability. Proposals and Proposal evaluations will be available for public review upon request after the Notice of Intent to Award has been issued except to the extent the Proposer designates trade secrets or other proprietary data to be confidential. Commission legal counsel shall verify and determine that the confidential information claimed to be exempt is in fact exempt from disclosure under the Oregon Public Records Law. Material so designated shall accompany the Proposal shall be readily separable from the Bid in order to facilitate public inspection of the non-confidential portion of the Proposal. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment shall be publicly available regardless of any designation to the contrary.

11. Negotiation with Proposers.

- a. General. There shall be no negotiations with any Proposer prior to Solicitation closing. Prior to award of Contract, the Commission may negotiate with a Proposer to clarify the Proposal or to effect

modifications that will make the Proposal acceptable or more advantageous to the Commission or as set forth in this Section.

- b. All Proposals Exceeding Cost Estimates. If all Proposals as the result of a Solicitation exceed the project cost estimate, the Commission may negotiate with the highest ranked Proposer prior to award of the Contract to bring the cost within the project cost estimate, provided the scope of Work is not substantially changed from the original Solicitation. .
- c. No Proposals Received. If no Offers are received as the result of a Solicitation, the Commission may negotiate and enter into a Contract with one entity, provided the scope of Work is not substantially changed from the original Solicitation.

12. Negotiation Disclosure. Notwithstanding any other provision of law, the records of a Proposer used in Contract negotiation under this section that are exempt or conditionally exempt from disclosure under ORS 192.501 or 192.502, are not subject to public inspection until after the negotiated Contract has been awarded or the negotiation process has been terminated

13. Selection Procedures.

- a. General. Selection procedures may vary depending on the nature, complexity, or other circumstances unique to a specific Contract. The chosen selection procedure shall afford all Proposers an equal opportunity to be evaluated and judged according to the same criteria.
- b. Review. A review of Proposals, whether by the Commission or outside parties, shall evaluate the responsiveness of the Proposer to the information requested in the Solicitation or RFP; the proposed Work or product in relation to the needs of the Commission; the qualifications of the Proposer to perform the Work; the resulting cost to the Commission; or other factors as set forth in the Solicitation Documents.
- c. Clarification and Revisions. The Purchasing Manager may seek clarification of a Proposal or Proposals if it is in the Commission's interest to do so. Revision of proposals may be permitted after the submission of proposals and before award for the purpose of obtaining best offers or best and final Offers. The Commission may issue an Addendum after opening of the proposals that modifies the criteria, rating process and procedure for any tier of

competition before the start of the tier to which the addendum applies.

- d. **Rating.** A structured rating formula may be used at the Commission's discretion where specific criteria exist which can be fairly evaluated and compared to established standards. Should such a structured formula be used, the basis for the formula and scoring criteria shall be specified in the Solicitation Documents. Award may be based solely on ranking of Proposals; discussion leading to best offers; best and final offers; serial negotiations; competitive simultaneous negotiations or multiple-tiered competition, or any combination of the above.
- e. **Interview Panel.** An interview panel or advisory committee comprised of Commission staff or outside parties as selected by the Commission may be convened to interview finalists selected as a result of a preliminary review and rating.
- f. **Recommendation.** Following a review, rating, or interview, a written recommendation that contains the ranking of Proposers and a summary of the process undertaken to determine the ranking shall be documented.
- g. **Award Criteria.** The Commission shall award the Contract to the most responsible Proposer whose proposal the Commission determines in writing to be the most advantageous based on the evaluation process and evaluation factors as set forth in the Solicitation Document including the outcome of any negotiations authorized by the RFP.
- h. **Negotiations.** The Commission may negotiate with Proposers based on the requirements as set forth in the Solicitation Documents. Upon selection of the most responsible Proposer, a process of negotiation with that Contractor may be initiated to finalize the fee, terms, and conditions of the Contract. If an irreconcilable problem arises in the process of negotiation, then the process may be repeated with the next highest recommended Proposer.

14. Rejection of Proposals.

- a. **Individual Proposal.** The Purchasing Manager at his or her sole discretion may reject a Proposal if it does not comply with all prescribed RFP procedures and requirements. Minor informalities or mistakes in Proposals may be corrected by the Proposer at the

discretion of the Purchasing Manager without invalidating the Proposal from consideration.

- b. All Proposals. The Purchasing Manager at his or her sole discretion may reject all Proposals when it is in the public interest to do so.

15. Withdrawals of Proposals.

- a. Proposals may be withdrawn by written notification on company letterhead signed by the same person authorized to sign the Proposal and received prior to the date and time established for the Proposal closing. The withdrawal should be delivered in an envelope that is clearly marked with the Proposer's name, the Proposal number, the project name, date and time of closing, and identified as "Proposal Withdrawal."
- b. Withdrawn Proposals shall be returned to the Proposer unopened.

16. Late Proposals, Late Withdrawals, and Late Modifications. A Proposal received after the Proposal submittal deadline is late. Any Request For Proposal withdrawal or modification received after the Proposal submittal deadline is late. A late Proposal, late Proposal modification, or late Proposal withdrawal shall not be considered and shall be returned to the Proposer unopened unless the Commission in its discretion determines that the late submittal or withdrawal increases competition, does not prejudice any Proposer, and does not compromise the integrity of the competitive bidding system.

17. Protest of RFP Solicitation Documents.

- a. Time for Submission of Protest. Protests of the terms, conditions and other contents of the Solicitation documents shall only be considered when presented to the Purchasing Manager in writing in accordance with the following timelines.
 - i. Five (5) Days prior to the closing of Proposals or other timeline as set forth in the Contract Solicitation Documents; and
 - ii. Protests not asserted or not properly asserted within these timelines shall be deemed waived by the protester.
- b. Basis for Protest. A protest shall include a detailed statement of the legal and factual grounds for the protest; a description of the

resulting prejudice to the protesting Proposer; and a statement of form of relief requested or any proposed changes to the RFP documents.

- c. Identification of Protest. It is the Proposer's responsibility to ensure that the protest is received by the Commission within the stated timelines. The protest should be delivered in an envelope that is clearly marked with the Proposer's name, the RFP number, the project name, date and time of Proposal closing, and identified as a "RFP Document Protest." Faxed protests will not be accepted.
- d. Delay of RFP Closing. If the Commission receives a protest from a Bidder in accordance with this section, the Purchasing Manager may in his or her discretion extend the date of Proposal closing if the Purchasing Manager determines an extension is necessary to consider the protest and, if necessary, to issue Addenda to the RFP documents.

18. Notice of Intent to Award. Unless otherwise provided in the Solicitation documents, the Purchasing Manager shall provide Notice to all Proposers of the Commission's intent to award the Contract. The award shall not be final until the later of the following:

- a. Seven (7) Days after the date of the notice, unless otherwise provided in the Solicitation Documents; or
- b. Until the Purchasing Manager provides a written response to all timely filed protests, if any, that denies the protest and affirms the award; or, until any appeal of the Purchasing Manager's decision regarding a protest has been reviewed by the Executive Director.

19. Cancellation of RFP.

- a. Cancellation in the Public Interest. An invitation to provide a Proposal may be cancelled, wholly or in part, when it is determined by the Purchasing Manager to be in the public interest to do so. The reasons for cancellation shall be documented and be made part of the Proposal file.
- b. Notice of Cancellation. When an invitation to provide a Proposal is cancelled prior to Proposal closing, a Notice of cancellation shall be sent to all holders of Proposal documents. All Proposals received shall be returned to Proposers unopened.

20. Protest of Contract Selection.

- a. Time. Any Proposer who has submitted a Proposal to the Commission and who is adversely affected by the Commission's Contract award to another Proposer has five (5) Days after issuance of the notice of intent to award the Contract, unless a different protest period is provided under the RFP documents, to submit a written protest of the award to the Commission. The Commission shall not consider a protest submitted after the time period established in this Rule or such different period as provided in the RFP documents.
- b. Grounds for Protest. The Proposer's written protest shall specify the grounds upon which the protest is based. A Proposer is adversely affected only if the Proposer is eligible for award of the Contract and is next in line for award, i.e., the protesting Proposer shall claim that all considered Proposers are ineligible for award because their offers were nonresponsive or that the Commission committed a material violation of a provision in the RFP documents or of an applicable statute, and that the protesting Proposer was adversely affected.
- c. Protests not asserted or not properly asserted under the requirements of a and b above shall be deemed waived by the protester.
- d. Authority to Resolve Protests. The Purchasing Manager has the authority to settle or resolve a written protest submitted in accordance with the requirements of this Rule.
- e. Decision. If a protest is not settled, the Purchasing Manager shall issue a written decision on the protest.
- f. Appeal of Decision. An appeal of the decision by the Purchasing Manager shall be submitted to the Executive Director. The appeal shall be in writing and shall be received by the Commission within seven (7) Days of the issuance of the decision. The appeal shall identify the award in question and specifically outline the reason for the appeal. The decision of the Executive Director regarding an appeal is final. Judicial review of this decision will be available to the extent provided by statute. The Proposer shall exhaust all avenues of administrative review before pursuing judicial review.

21. Contract Award.

- a. Prompt Execution of Contract. Upon notice of Contract award, the successful Proposer shall furnish insurance information within the timelines set forth in the Solicitation Documents. Failure to execute the Contract or to provide the required information within the required timelines may result in the rejection of the Proposal.
- b. Execution of Contract and Performance of Work. Negotiation. Upon execution of a Contract, the Commission may, through an Amendment negotiate with the successful Proposer regarding the scope, price, schedule and terms of the Contract so long as negotiations do not result in significant changes to the scope of Work in the original Solicitation Documents.

22. Contract Termination. When a Personal Service Contract is terminated by mutual agreement, provision shall be made for the payment of compensation to the Contractor unless otherwise specifically set forth in the Solicitation Documents. In addition to a reasonable amount of compensation for preparatory Work and for all costs and expenses arising out of termination, the amount to be paid to the Contractor:

- a. Shall be determined on the basis of the Contract price in the case of any fully completed separate item or portion of the Work for which there is a separate or unit Contract price; and
- b. May, with respect to any other Work, be a percent of the Contract price equal to the percentage of the Work completed.

IV. REINSTATEMENT OF EXPIRED CONTRACTS.

- A. Generally.** Personal Services Contracts may be reinstated once, provided the following requirements of this Section are met.
1. The Contract was not extended or renewed in a timely manner due to unforeseen or unavoidable conditions;
 2. The Contract is reinstated within sixty (60) Days of expiration of the original Contract;
 3. The Purchasing Manager has determined that the Work needs to be completed by the original Contractor after expiration of the Contract and there is no change in the statement of Work and either:

- a. The reinstatement is exclusively for the purpose of permitting completion of the Work or the services with no increase in compensation; or
- b. When the services are of a continuing or repetitive nature which are compensated at an hourly, daily or similar periodic rate, the reinstatement either does not increase the rate of compensation or does not increase the rate of compensation so as to exceed the rate of the increase determined by comparing the Portland, Oregon Metropolitan Area CPI (all items) published immediately prior to the date the original Contract was established with the same index published immediately prior to the date of the reinstatement and extension;
- c. There have been no prior reinstatements;
- d. The original Contract will not be modified except with respect to the time for performance; and
- e. The reinstatement does not raise the aggregate amount of compensation beyond the Executive Director's authority.

Part 4: Public Improvement Contracts

I. SCOPE

A. Generally. In addition to the requirements set forth in Parts 1 and 2 above, the following rules shall apply to Public Improvement Contracts.

B. Examples.

1. Public improvements include, but are not limited to, the following:

- a. Contracts for the construction of structures and infrastructure; the restoration of existing buildings and the restoration, rebuilding, or resurfacing of existing infrastructure; and remodeling or alteration of existing structures or infrastructure;
- b. Contracts for environmental remediation activities involving the abatement or removal of regulated materials;
- c. Contracts for the demolition of building structures; and,
- d. Contracts for the construction or renovation of parks, but not including landscape maintenance.

II. SOLICITATION PROCEDURES FOR PUBLIC IMPROVEMENT CONTRACTS

A. Policy to Construct Public Improvements at the Least Cost. For Public Improvement Contracts, it is the policy of the State of Oregon that public agencies shall make every effort to construct public improvements at the least cost to the public agency.

B. Applicability of Public Contract Solicitation Procedures. Solicitation procedures for a Public Improvement Contract generally adhere to the procedures described in Part 1 Section III (“Exemptions”) and Part 2 Section II (“Solicitation Procedures for Public Contracts”) of the administrative rules, with the following special provisions:

1. **Emergency Contracts.** The waiver of performance bonds and payment bonds as set forth in the Emergency declaration described in Part 1, Section III, Subsection C, Item 4 does not affect the separate Public Work bond requirement for the Bureau of Labor and Industries (BOLI) in enforcing prevailing wage rate and overtime payment requirements.

- 2. Exemption from Competitive Bidding for Public Improvement Contracts.** The Executive Director within the delegated authority may exempt Public Improvement Contracts not to exceed \$100,000 from the competitive bidding process if it makes written findings that satisfy the requirements set forth in Part 1, Section III, Subsection C, Item 2. The Board may exempt Public Improvement Contracts with a value greater than \$100,000 from the competitive bidding process if it makes written findings that satisfy the requirements set forth in Part 1, Section III, Subsection C Item 1 and as set forth in ORS279C.330; and, the Commission shall hold a public hearing before final adoption of the findings, according to the following procedures:
- a. Notification of the public hearing shall be published in at least one trade newspaper of general statewide circulation at least fourteen (14) Days prior to the hearing;
 - b. The notice shall state that the public hearing is for the purpose of taking comments on the Commissions draft findings for an exemption from the competitive bidding requirement. At the time of the notice, copies of the draft findings shall be made available to the public. (See ORS 279C.335 for additional procedural, Emergency and notice/publication options, which are not in any way limited by these Rules);
 - c. At the public hearing, the Commission shall offer an opportunity for any interested party to appear and present comment;
 - d. The Board will consider the findings and may approve the exemption after providing an opportunity for public comment; and
 - e. Pursuant to ORS 279C.355 the Commission will prepare a formal post-project evaluation of public improvement projects in excess of \$100,000 for which the competitive process was not used. The purpose of this evaluation is to determine whether it was actually in the Commission's best interest to use an alternative contracting method. The evaluation shall be delivered to the Board within thirty (30) Days of the date the Commission of receipt of all closeout documents and the Commission issues notice of final acceptance of the project for a single project or the last project in a class of projects. The evaluation shall include but not be limited to the following:

- i. The actual project cost as compared with the original project estimates;
 - ii. The amount of any guaranteed maximum price;
 - iii. The number of project change orders issued by the Commission;
 - iv. A narrative description of successes and failures during design, engineering and construction;
 - v. An objective assessment of the use of the alternative contracting process as compared to the exemption findings as approved by the Board.
- 3. Payment and Performance Bonds.** Unless the Board or Executive Director within his/her delegated authority waive the required payment and performance bonds under ORS 279C.380, or exempts the Contract as an Emergency as set forth in Part 1, Section III, Subsection C, Item 4, or the Board exempts a Contract or classes of Contracts from the required payment and performance bonds, the Contractor shall execute and deliver to the Commission a payment and a performance bond in a sum equal to the Contract Price for all Public Improvement Contracts in excess of \$50,000.
- 4. Contents of Bid Documents.** The Bid Documents shall include the following:
- a. A statement that if the Contract is for a public Work subject to ORS 279C.800 to 279C.870 and/or the Davis Bacon Act (40 U.S.C 276a), no Bid will be received or considered by the Commission unless the Bid contains a statement by the Bidder as a part of its Bid that the applicable statutes and regulations are to be complied with;
 - b. Information addressing whether a Contractor or subcontractor shall be licensed ORS 468A.720 to Work with asbestos-containing materials;
 - c. A statement that no Bid for a construction Contract shall be received or considered by the Commission unless the Bidder is registered with the Construction Contractor's Board, or licensed by the State Landscape Contractor's Board; and

- d. The date, time and place that the Commission will publicly open the Bids and the date, time and place for submission of the first-tier subcontractor information as outlined in ORS 279C.370.

5. Advertisement for Bids.

- a. If the Contract is for a public improvement with an estimated cost in excess of \$125,000, the advertisement for bids shall be published in at least one trade newspaper of general statewide circulation; and
- b. The Solicitation for a public improvement shall state whether the Contract is for a public Work subject to ORS 279C.800 to 279C.870 and/or the Davis Bacon Act (40 U.S.C 276a).

6. Bid Security. Unless exempted from this requirement by the Board according to ORS 279C.390, Bid security not to exceed ten percent (10%) of the base Bid(s) shall be required for Public Improvement Contracts over the informal limit. Bid surety may be in the form of a surety bond, cashier's check, certified check or irrevocable letter of credit.

7. Prequalification. The Commission shall set forth the prequalification process, criteria and timeline to include the general description of the type and nature of the Contract.

8. Protest of Bid Documents. Protests of the terms, conditions, and other contents of the Bid Documents shall only be considered when presented to the Purchasing Manager in writing at least seven (7) Days prior to Bid closing; however, if the time between first advertisement and Bid closing is less than ten (10) Days, protests shall be made within three (3) Days prior to Bid closing.

9. Closing. The deadline for the submission of Bids shall occur on a Tuesday, Wednesday, or Thursday and at a time between 2:00 p.m. and 5:00 p.m., with the exception of public Contracts for maintenance or construction of highways, bridges, or other transportation facilities.

10. Bid Evaluation Criteria. Invitations to Bid may solicit lump sum Offers, unit price Offers or alternative bid item Offers or any combination as set forth in the Solicitation Document.

- a. The Commission shall evaluate lump sum bids as adjusted with or without alternative bid items as set forth in the Solicitation

Document or in the best interest of the Commission for the purposes of comparing bids and determining low bid price.

- b. The Commission shall evaluate unit price bids based on the unit measurement and extended pricing as adjusted with or without alternative bid items as set forth in the Solicitation Document or in the best interest of the Commission for the purposes of comparing bids and determining low bid price. In the event of a mathematical discrepancy between unit price and extended price calculation as submitted by the Bidder, the unit price shall govern.

11. Special Requirements to Determine Responsiveness. For Public Improvement Contracts, such requirements will recognize that it is the policy of the State of Oregon that public agencies shall make every effort to construct public improvements at the least cost to the public agency. Within two Working hours after the date and time of the deadline when the Bids are due, a Bidder shall submit to the Commission a disclosure of the first-tier subcontractors.

12. Determination of Lowest Responsible Bidder. The lowest Responsible Bidder is the lowest Bidder who is not on the list established by the Construction Contractors Board pursuant to ORS 701.227 and, as applicable, is not listed as a Contractor ineligible to receive public Works Contracts by the federal Department of Labor or the state Bureau of Labor and Industries (general Standards of Responsibility, which are also applicable to Public Improvement Contracts, are described in Part 2, Section II, Subsection H, Item 22).

13. Contract Requirements. In addition to any Commission required conditions, all Public Improvement Contracts shall contain the requirements as set forth in ORS 279C.500 through ORS 279C.545.

14. Prompt Payment of Public Improvement Contractor.

- a. Policy. It is the policy of the Commission that all payments due on a Public Improvement Contract and owed by the Commission shall be paid promptly in accordance with ORS 279.C570.
- b. Amount and Timing of Progress Payments. Notwithstanding any payment withheld as retainage, the Commission shall make progress payments on a Public Improvement Contract monthly as Work progresses. Payments shall be based upon estimates of Work completed that are approved by the Commission.

- c. No Waiver. A progress payment shall not be considered acceptance or approval of any Work or waiver of any defects therein, whether latent or patent.
- d. Interest Due. Interest shall be due to the Contractor on a progress payment the earlier of:
 - i. Thirty (30) Days after receipt of the invoice from the Contractor; or
 - ii. Fifteen (15) Days after the payment is approved by the Commission.
- e. Calculation of Interest. The rate of interest charged to the Commission on the principal amount due shall be three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date that is thirty (30) Days after receipt of the invoice from the Contractor or fifteen (15) Days after the payment is approved by the Commission, whichever is earlier, but the rate of interest shall not exceed 30 percent.
- f. Payment of Interest. The Commission shall automatically pay interest on a progress payment when interest is due. The interest payment shall be added to the principal balance and the Contractor shall not be required to petition, invoice, bill or wait for the interest due.
- g. Incorrect or Disputed Invoices. If an invoice is filled out incorrectly, if required documentation is not submitted, or when there is any defect or impropriety in any submitted invoice or when there is a good faith dispute, the Commission shall so notify the Contractor within fifteen (15) Days of receipt of the invoice stating the reason or reasons the invoice is defective or improper or the reasons for the dispute. A defective or improper invoice, if corrected by the Contractor within seven (7) Days of being notified by the Commission, shall not cause a payment to be made later than specified in subsection d above unless interest is also paid. The Commission shall not be liable for progress payments or interest unless and until the invoice is corrected, the defective or incomplete Work is corrected, or the good faith dispute is resolved.
- h. Retainage. As Work progresses, the Purchasing Manager may reduce the amount of the retainage and the Purchasing Manager

may eliminate retainage on any remaining monthly Contract payments after 50 percent of the Work under the Contract is completed if, in the Purchasing Manager's opinion, such Work is progressing satisfactorily. Elimination or reduction of retainage shall be allowed only upon written application by the Contractor, and the application shall include written approval of the Contractor's surety. However, when the Contract Work is 97.5 percent completed the Purchasing Manager may, at the his/her discretion and without application by the Contractor, reduce the retained amount to 100 percent of the value of the Contract Work remaining to be done. The Purchasing Manager may withhold not more than five percent of a progress payment as retainage.

15. Prevailing Wage Requirements.

- a. Contracts and Contract specifications for public improvements that meet the definition of a public Works project and costs exceed the amount exempted in ORS 279C.810 including all Amendments, Change Orders and Field Directives, shall contain provisions requiring Contractor or subcontractor or other person doing or contracting to do the whole or any part of the Work contemplated, shall comply with state prevailing wage requirements, including the payment of the applicable prevailing wage rates and overtime to Workers in each trade or occupation subject to these requirements, and a prevailing wage rate fee. The Solicitation Documents, bid specifications, or Contract shall incorporate the applicable prevailing wage rates, a provision that a fee is required to be paid to the Bureau of Labor and Industries, a provision that Workers shall be paid not less than the specified minimum hourly rate of wages, a provision that the Contractor and every subcontractor shall have a public Works bond filed with the Contractors Board prior to starting Work unless exempt and that the Contractor will have a provision in all subcontracts requiring the subcontractor to have a public Works bond filed with the Contractors Board before starting Work.
- b. Public improvements regulated under the federal Davis-Bacon Act shall comply with the labor standards provisions set forth by federal prevailing wage regulations.
- c. Public improvements regulated under the federal Davis-Bacon Act and that also meet the definition of public Works shall comply with the requirements of both the Davis-Bacon Act and ORS 279C.800-279C.870. In addition to the above requirements,

contract and contract specifications shall include information showing which prevailing rate of wage is higher as determined by the Commissioner of the Bureau of Labor and Industries.

- d. The PDC Construction Wage Policy was adopted by the PDC Board on January 10, 2007 through Resolution 6424 and subsequently amended on April 11, 2007 through Resolution 6471, on October 10, 2007 through Resolution 6513 and on January 29, 2009 through Resolution 6666. Rates under this Policy are identical to the BOLI published construction rates and include wage, fringe, and overtime rates and apprentice pay.

PDC Construction Wage requirements apply to contracts for environmental remediation and/or demolition work that equal or exceed \$50,000 and that are not subject to BOLI or Davis-Bacon wage rates (previously identified above).

Part 5: Alternative Contracting Methods

I. GENERAL

- A. **Generally.** In addition to the requirements set forth in Parts 1, 2 and 4 above, the following rules shall apply to Alternative Contracting Methods.
- B. **Definition.** Alternative Contracting Methods means innovative Procurement techniques for obtaining Public Improvement Contracts, utilizing processes other than the traditional method of construction services obtained by sealed Bid Awarded to the lowest Responsive, Responsible Bidder. In industry practice, alternative contracting methods include, but are not limited to, variations of Design/Build, Guaranteed Maximum Price (GMP), Cost Plus Fee, and Construction Manager/General Contractor (CM/GC) forms of contracting, Energy Savings Performance Contracts (ESPC) as well as other developing techniques such as performance contracting and cost plus time contracting which are addressed under these Rules.
- C. **Exemption from Competitive Bidding.** Alternative contracting methods are exceptions to customary public contracting processes and therefore each project utilizing alternative contracting methods shall first be exempted from formal solicitation as provided in Part 1, with hearings as provided in Part 4, Section II Subsection B Item 2. If the Commission is required to act promptly due to circumstances beyond the Commission's control that do not constitute an emergency, notification of the public hearing may be published simultaneously with the Commission'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 meeting and approval of the findings.

II. COMPETITIVE NEGOTIATION

- A. **Generally.** The Commission may utilize competitive negotiation, in which Proposal evaluation and award follow established rules for an RFP process, allowing flexibility in both Proposal evaluation and Contract negotiation, but only in accordance with state law and these Rules.
- B. **Evaluation Factors.** Factors in addition to price may be considered in the selection process, but only as set forth in the RFP to include but not limited to firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project

understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that affect cost and quality. Proposal evaluation shall be as objective as possible, recognizing, however, that some subjectivity is unavoidable in such procurements. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall:

1. Be reasonable estimates based on information available to the Commission;
2. Treat all Proposals equitably; and
3. Recognize that public policy requires that public improvements be constructed at the least overall cost to the Commission.

C. Construction Manager/General Contractor Evaluation Factors. In addition to factors as set forth subsection B above include the ability to respond to the technical complexity or unique character of the project, analyze and propose solutions or approaches to complex project problems, coordination of multiple disciplines, the time required to commence and complete the improvement, and related matters that affect cost or quality.

D. Design/Build Evaluation Factors. In addition to factors as set forth in subsection B and C above include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design/builder team experience and related matters which affect cost or quality.

E. Contract Negotiations. Contract terms may be negotiated to the extent allowed by the RFP and these Rules, provided that the general scope of Work 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 Documents.

F. Evaluation of Project Not Contracted by Competitive Bidding. As required under ORS 279C.355 and as further set forth in Part 4, Section II Subsection B 1 (e) the Commission shall prepare and deliver to the Board a formal post-project evaluation of public improvement projects in excess of \$100,000 for which a competitive bidding process was not used.

III. ENERGY SAVING PERFORMANCE CONTRACTS.

- A. General Policy.** The purpose of this Section is to provide guidance concerning the special considerations that may constitute evaluation criteria for special projects and construction methods. In basic negotiated construction contracting, where the only reason for a Request For Proposals is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that affect cost or quality.
- B. Energy Saving Performance Contracts General.**
1. For ESPC Proposal evaluations, the Purchasing Manager may provide in the Request For Proposals that qualifications-based evaluation factors will outweigh the Commission'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 Request For Proposals will likely not be determinable at the time of Proposal evaluation.
 2. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall recognize that public policy requires that Public Improvements be constructed at the least overall cost to the Commission.
- C. Energy Savings Performance Contract Evaluation Factors.**
1. Energy savings performance and alternate construction Contract terms may be negotiated to the extent allowed by the Request For Proposals, provided that the general Work scope remains the same so that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Documents.
 2. In ESPC contracting, it can be anticipated that negotiated terms may also include the scope of preliminary design of ECMs to be evaluated by the parties during the technical Energy audit phase of the Work, the scope of services to be performed by the ESCO during the project development plan phase of the Work, the detailed provisions of the energy savings guarantee to be provided by the ESCO and scope of

Work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the Work.

D. Energy Savings Performance Contract Special Evaluation Factors.

1. In ESPC contracting, in addition to the factors set forth in this Section, special evaluation factors may also include:
 - a. Sample technical energy audits from similar projects;
 - b. Sample M & V (measurement and verification) reports;
 - c. Financial statements and related information of the energy service company ("ESCO") for a time period established in the RFP and financial statements and related information of joint ventures comprising the ESCO;
 - d. 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);
 - e. 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;
 - f. 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;
 - g. The ESCO's team members and consultants to be assigned to the project;
 - h. The ESCO's experience in the energy savings performance contracting field and the ESCO's experience acting as the prime Contractor on previous ESPC projects (as opposed to a sub-Contractor or consultant to a prime ESCO);
 - i. The ESCO's vendor and product neutrality related to the development of energy conservation measures;
 - j. 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;

- k. The ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant);
- l. The ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular project between the Commission;
- m. The ESCO, the ESCO's equipment performance guarantee policies and procedures and the ESCO's energy savings and cost savings guarantee policies and procedures; and,
- n. 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.

Part 6: Debarment

- I. GENERAL.** The Commission may in its discretion disqualify a prospective Contractor from consideration for award of the Commission's Contracts for the reasons listed below after providing the prospective Contractor with notice and a reasonable opportunity to be heard. The Debarment shall not be for a period of more than three years.
- II. REASONS FOR DEBARMENT.** A prospective Contractor may be Debarred from eligibility for consideration for award of the Commission's Contracts for any of the following reasons:
- A. Conviction of a Criminal Offense.** Conviction for the commission of a criminal offense 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 Laws Involving Honesty.** Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the prospective Offerors responsibility as a Contractor;
 - C. Conviction Under Anti-Trust Laws.** Conviction under state or federal anti-trust statutes;
 - D. Violation of Contract Provision.** Violation of a Contract provision that is regarded by the Commission to be so serious as to justify Debarment. A violation may include, but is not limited to a failure to perform the terms of a Contract or an unsatisfactory performance in accordance with the terms of the Contract or failure to comply with any provision of law applicable to the Contractor's performance of the Contract. However, a failure to perform or an unsatisfactory performance caused by acts beyond the control of the Contractor may not be considered to be a basis for Debarment; or
 - E. OTHER.** Any other reasons set forth in ORS 279C.440
- III. NON-WAIVER.** The failure to Debar a Bidder or a Proposer for any of the above reasons shall not in any way impair or waive the Purchasing Manager's right to reject an Offer or Offeror as not responsive or not responsible.

IV. DEBARMENT DECISION. The Commission shall issue a written decision to Debar a prospective Bidder or Proposer and shall provide the decision to the prospective Bidder or Proposer immediately. The decision shall state the reasons for the action taken and inform the prospective Bidder or Proposer of the right to appeal to the decision under these Rules.

A. Appeal of Disqualification. Any prospective Contractor who wishes to appeal Debarment as a Contractor shall, within three (3) business Days after receipt of notice of Debarment, notify the Purchasing Manager that the prospective Contractor appeals the Debarment. Immediately upon receipt of such notice of appeal, the Board shall be notified.

B. Debarment Appeal Procedure. The procedure for appeal from a Debarment pursuant to ORS 279B.130 shall be in accordance with ORS 279B.425 and the procedure for appeal from a Debarment pursuant to ORS 279C.440 through and including 279C.450. Debarment is not subject to ORS Chapter 183 et seq. except where specifically provided herein. The procedure shall be as follows:

1. Promptly upon receipt of notice of appeal, the Commission shall notify the appellant of the time and place of the hearing;
2. The Board shall conduct the hearing and decide the appeal within thirty (30) Days after receiving notice of the appeal from the Purchasing Manager;
3. In the hearing, the Board shall consider de novo the notice of Debarment, the reasons listed for Debarment, and any evidence provided by the parties;
4. The Board shall set forth in writing the reasons for the decision;
5. The Board may allocate the Board's costs for the hearing between the appellant and the Commission. The allocation shall be based upon facts found by the Board and stated in the Board's decision. If the Board does not allocate costs, the costs shall be paid by the losing party; and
6. The decision of the Board may be reviewed only upon a petition in the circuit court of Multnomah County filed within fifteen (15) Days after the date of the decision.

PDC

PORTLAND DEVELOPMENT COMMISSION

Resolution Number 6801

Title:

ADOPT REVISED LOCAL CONTRACT REVIEW BOARD
ADMINISTRATIVE RULES

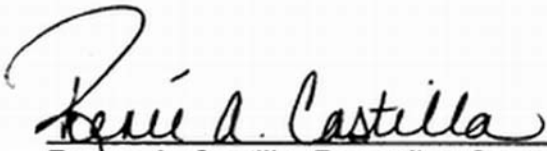
Adopted by the Portland Development Commission on May 12, 2010.

PRESENT FOR VOTE	COMMISSIONERS	VOTE		
		Yea	Nay	Abstain
<input checked="" type="checkbox"/>	Chair Scott Andrews	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	Commissioner Bertha Ferrán	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	Commissioner John Mohlis	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	Commissioner Steven Straus	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	Commissioner Charles Wilhoite	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/> Consent Agenda		<input checked="" type="checkbox"/> Regular Agenda		

Certification

The undersigned hereby certifies that:

The attached resolution is a true and correct copy of the resolution as finally adopted at a Board Meeting of the Portland Development Commission and duly recorded in the official minutes of the meeting.



Renee A. Castilla, Recording Secretary

Date: June 16, 2010