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# SECTION C

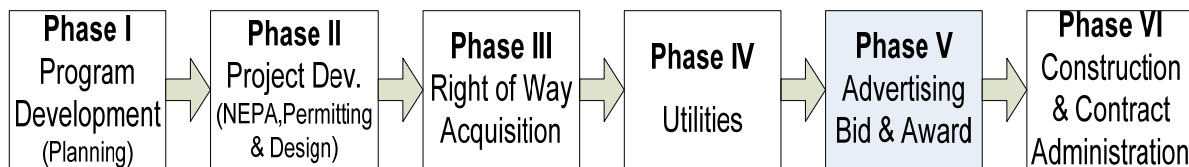
# CERTIFIED PROJECTS

## Chapter 15 Advertising, Bid and Award Procedures

This chapter specifies how local agencies may operate under a certification agreement with ODOT and use their own procedures to advertise, bid and award construction contracts for federal-aid projects on Non-NHS (National Highway System) routes.

Additional information related to the advertising, bid and award process for personal services; architectural and engineering; and non-architectural and engineering contracts; is available in Section C, Chapter 12, Consultant Selection of this *LAG Manual*.

In the sequence of project development, advertising, bid and award generally occurs in Phase V, after the completion of plans, specifications, and estimates (PS&E).



### A. OVERVIEW

The PS&E documents are used to advertise, bid and award the contract. Federal-aid projects must be advertised by either a certified local agency or by ODOT for non certified agencies.

Advertising, bid and award is the responsibility of the certified local agency as identified in the master certification agreement. The approving authority, as identified in the certification agreement, must approve the plans and specifications, and a professional engineer licensed in the State of Oregon must seal and date the plans and specifications.

Local agencies wanting ODOT to administer construction contracts for their federal-aid projects should refer to Chapter 15, Advertising, Bid and Award, in Section B of this *LAG Manual*.

NOTE: If any special Federal funds are used on a local agency project, there may be additional eligibility requirements such as special contract language or specification. This special contract language may cover additional reporting requirements for the local agency and the contractor

### B. BECOMING CERTIFIED FOR ADVERTISING, BID AND AWARD

As indicated in the Introduction to Section C, Chapter 1, in order to become certified, a local agency must have in place the appropriate project management structure, certified inspectors, authorities, and quality control program.

Local agencies may be certified to let contracts for their projects provided they meet the following requirements:

- advertising – the local agency complies with appropriate federal and state advertising and award laws;
- agreements – a certification agreement between ODOT and the local agency is in effect, as well as a project agreement; and
- funds – the local agency is participating in the cost of the project or has other special interests in the project.

## **C. ROLES AND RESPONSIBILITIES**

### **1. Local Agency**

A certified local agency may advertise the project upon completion of the following activities:

- the project is included in the current STIP;
- PS&E has been reviewed by ODOT;
- the environmental document is approved by ODOT and FHWA;
- the project's right of way has been certified;
- the utility certification is completed;
- all appropriate Disadvantaged Business Enterprise (DBE) goals have been established (see Section B, Chapter 7, Civil Rights- DBE, for further details);
- construction funds have been authorized by FHWA and ODOT; and
- the local agency has obtained a federal-aid number from the ODOT [Regional Local Agency Liaison](#).

#### **a. Applicable Law**

The local agency shall maintain procedures that follow all appropriate laws, regulations and other requirements applicable to Non-NHS Projects including but not limited to:

All non-Title 23 requirements such as:

- [National Environmental Policy Act](#) (NEPA) and other environmental laws and requirements (Section C, Chapter 6, Environmental Process/Permits);
- [Uniform Relocation Assistance Act](#) (Section C, Chapter 7, Right of Way);
- [Civil Rights Act of 1964](#) and other Civil Rights laws and requirements including the DBE Program (Section B, Chapter 7, Civil Rights- DBE; Chapter 8, Civil Rights- EEO/OJT; Section A, Chapter 7, Title VI Program);
- [Davis Bacon Act](#) and other labor laws and requirements, [Oregon Bureau of Labor and Industries \(BOLI\)](#) laws (Chapter 16, Construction and Contract Administration in Sections B and C);
- Common Rule ([49 CFR 18](#)) with respect to procurement; and
- Brooks Act ([40 USC 1102](#)).

And selected Title 23 requirements:

- competitive bidding requirements;

- Buy America requirements - FHWA shall approve all properly supported requested waivers [23 CFR 635.410](#) (Section C, Chapter 16, Construction and Contract Administration); and
- [Manual on Uniform Traffic Control Devices](#).

FHWA's [Contract Administration Core Curriculum Participant's Manual and Reference Guide](#) (FHWA Guide) contains additional details regarding federal requirements. State statutes apply to the extent that they do not conflict with federal laws and regulations.

## **b. Standard Specifications**

A certified local agency shall follow [Oregon Standard Specifications for Construction](#), APWA Oregon Chapter, current edition, or the local agency's own standard specifications that meet all federal and state requirements. ODOT shall review the local agency's standard specifications for construction.

## **2. ODOT**

ODOT will engage in a collaborative review process to ensure that the local agency's documented processes comply with federal and state law. Local Liaison will perform review of PS&E and coordinate with OPO for review of Ad, Bid & Award. If the local agency does not have its own documented procedures, the local agency shall be subject to the model rules adopted by the Attorney General per [ORS 279A.065\(4\)](#). In order to achieve and maintain certification in advertising and award, the local agency will need to revise any processes that do not meet federal requirements. Such processes include:

1. approval to advertise;
2. advertising Non-NHS projects;
3. prequalification (optional);
4. bonding;
5. requests from bidders and bidding procedures;
6. bid documents and bid opening;
7. bid evaluation;
8. contract award;
9. execution of contract;
10. submittal of award data and
11. record retention.

The certified local agency shall notify ODOT in advance of any change to the local agency's advertising and award rules, processes, and procedures. ODOT will provide program training, oversight and support to the local agency.

The following sections of this chapter outline specific procedures and related laws for each of the above items listed 1-11.

## **D. PROCEDURES**

The [OPO](#) will monitor local agency compliance with the following eleven process points for advertising, bid and award procedures.

### **1. Pre-Advertising Requirements**

#### **REQUIREMENTS**

Once ODOT has received the items listed below and FHWA has authorized construction funds for the project, then ODOT's Local Agency Liaison will provide the local agency notice to begin advertisement. As noted previously, a project can only be advertised *after* the local agency has completed all of the following items.

- **Project Prospectus** – The project prospectus must be completed by the certified local agency and signed by FHWA.
- **Intergovernmental Project Agreement** – An intergovernmental project agreement and any amendments, shall be signed by all parties, shall be in effect, and the local agency must have obtained a contract number from ODOT's [Regional Local Agency Liaison](#).
- **PS&E Financial Spreadsheet** – The PS&E Financial Spreadsheet shall be received by ODOT's Highway Finance, Program and Funding Services Manager, at least four weeks prior to advertisement, and construction funds must have been authorized by FHWA and ODOT. **NOTE: Local agencies should allow six weeks for FHWA to process and then obligate the construction funds.**
- **PS&E** – The plans and specifications shall be approved and include all of the items needed in the Bidding Documents.
- The **Engineer's Estimate** shall include a detailed breakdown of all estimated construction costs, both federally participating and nonparticipating costs. In addition to the contract items, the Estimate shall include estimated construction engineering and administration costs, anticipated items not part of the contract or engineering, and an amount for contingencies which cannot exceed 3.5% per FHWA direction.
- **DBE, OJT & EEO Requirements** – All appropriate civil rights goals have been assigned to the project by ODOT's Office of Civil Rights. Chapter 7, Civil Rights- DBE in this *LAG Manual*, addresses additional Civil Right's details.
- **Right of Way Clearance** – The project's right of way processes must have been certified by ODOT Right of Way. Refer to Section C, Chapter 7, Right of Way for further information.
- **Environmental Clearance and Permits** – ODOT must have received the environmental clearance and permits. See Section C, Chapter 6, Environmental Processes for more details.

*NOTE: Violation of any of the requirements may jeopardize all or part of the project's eligibility for federal funding. In addition, no project shall be advertised for bids, nor shall any project work be undertaken, and no materials shall be purchased on any federal-aid project prior to authorization to proceed from ODOT or FHWA. Violation of this requirement will result in the project being ineligible for federal funding. Emergency relief projects may be the only exception to this requirement, see Section A, Chapter 3 in the LAG Manual for further details.*

The federal-aid number shall be assigned by ODOT's Highway Program Office when ODOT requests FHWA to authorize the funds. After FHWA has authorized the construction funding, ODOT's Highway Program Office, shall issue written approval to the certified local agency to proceed with advertising the project for bids.

## 2. Advertising for Federally Funded Non-NHS Projects

### a. Requirements

If a certified local agency chooses to use the procedures adopted by the local agency's Local Contract Review Board for advertising Non-NHS Projects, such procedures shall comply with all state and federal laws including the following. The local agency will use its own processes, as approved by OPO, to advertise a project pursuant to [ORS 279C.360](#).

- **Three-Week Minimum Period of Advertisement** - The certified local agency shall advertise for a minimum of a three-week period prior to the opening of bids. The three-week advertisement period begins when the advertisement is published.

*Larger/Complex Projects* – Projects with cost estimates of \$10 million or more, or extremely complex projects, may have an advertisement period greater than three weeks (six weeks or more may not be excessive) to permit prospective bidders adequate time to prepare a responsive bid proposal. For major or specialty work, consideration may be given to advertising regionally to attract a larger number of qualified bidders. For further guidance please refer to ODOT's [Roadway Bulletin RD07-06\(b\)](#) Also for more complex projects, scheduling a pre-bid meeting to address prospective contractors' concerns and questions is considered good industry practice. If a pre-bid meeting is scheduled, a minimum of a four-week advertisement is recommended. This allows time for a pre-bid meeting and subsequent amendments to be prepared and distributed prior to bid opening, if necessary. ODOT recommends that the pre-bid meeting be mandatory. [23 CFR 635.112](#)

*Shorter Advertisement Period* – If the certified local agency wants an advertising period of less than three weeks, the local agency shall document in the project file the reason for the shorter advertisement period. The local agency shall submit written request to ODOT's [Regional Local Agency Liaison](#) for approval by OPL. ODOT's approval should be shown on the documentation. Typically, shorter advertising periods are approved only for emergency correction of roadways or bridges. [23 CFR 635.112\(b\)](#)

- **Publication in Newspaper** – The advertisement must be published at least once in a minimum of one newspaper, of general circulation in the area where the contract is to be performed and in as many additional issues and publications as the contracting agency may determine. The local agency's Local Contract Review Board may authorize advertisements to be published electronically instead of in a newspaper of general circulation if the Board determines that electronic advertisements are likely to be cost-effective. [ORS 279C.360](#)

- **Publication in Trade Journal** – If the contract has an estimated cost in excess of \$125,000, the advertisement must be published in at least one trade newspaper of general statewide circulation such as *The Daily Journal of Commerce*. The local agency’s Local Contract Review Board may require an advertisement to be published more than once or in one or more additional publications. [ORS 279C.360](#)
- **Advertisement Content ([ORS 279C.360](#))** – All advertisements for public improvement contracts must state:
  - the public improvement project;
  - the office where the specifications for the project may be reviewed;
  - the date that prequalification applications must be filed under [ORS 279C.430](#) and the class or classes of work for which bidders must be pre-qualified if prequalification is a requirement;
  - the date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement;
  - the name and title of the person designated for receipt of bids;
  - the date, time and place that the contracting agency will publicly open the bids; and
  - whether the contract is for a “public work” subject to [ORS 279C.800 to 279C.870](#) or the [Davis-Bacon Act](#);
- **Solicitation Documents ([ORS 279C.365](#))** – All contracting agency’s solicitation documents for a public improvement contract shall, at a minimum, include:
  - that each bid must identify whether the bidder is a resident bidder, as defined in [ORS 279A.120](#);
  - that the contracting agency may reject any bid not in compliance with all prescribed public contracting procedures and requirements and may reject for good cause all bids upon a finding of the agency that it is in the public interest to do so;
  - information addressing whether a contractor or subcontractor must be licensed under [ORS 468A.720](#); and
  - that a bid for a public improvement contract may not be received or considered by the contracting agency unless the bidder is licensed by the [Construction Contractors Board](#) or the [State Landscape Contractors Board](#).
- **Addenda** – The local agency must submit addenda requests to ODOT’s Local Agency Liaison for any addenda that contain a major change to the approved plans or specifications during the advertising period *before* transmitting the addendum to the individual contractors holding the plans, specifications, and bid document data. The Liaison will then coordinate with OPL for final approval. Minor addenda need not receive prior approval but should be identified by the local agency at the time of or prior to requesting ODOT approval. The local agency shall provide assurance that all bidders have received all issued addenda. [23 CFR 635.112\(c\)](#)

*After* the local agency has obtained proper approvals, the local agency may change a solicitation document only by issuing written addenda. The local agency shall notify prospective bidders of addenda consistent with the standards set forth by the Notice. The

solicitation document shall specify how the local agency will provide notice of addenda and how the local agency will make the addenda available. The local agency shall issue addenda within a reasonable time to allow prospective bidders to consider the addenda in preparing their bids.

FHWA shall approve addenda for “major changes” in scope and all changes to project limits. Major change means a change that will significantly affect the federal funds of the project or alter the scope of work. The certified local agency will ensure that all potential bidders will receive the approved addendum as expeditiously as possible. [23 CFR 635.112\(c\)](#); [23 CFR 635.102](#)

- **Nondiscriminatory Procedures** – The certified local agency’s advertising policies shall afford nondiscriminatory bidding procedures to all qualified bidders regardless of national, state or local boundaries and without regard to race, color, religion, sex, national origin, age, or handicap. [23 CFR 635.112\(d\)](#)

No local agency shall bid in competition or enter into a subcontract with private contractors. [23 CFR 635.112\(e\)](#)

Pursuant to [ORS 279C.390](#), certain contracts or classes of contracts may be exempted from particular bid security requirements and particular requirements that good and sufficient bonds be furnished to ensure performance of the contract and payment of obligations incurred in the performance.

If any provisions or policies operate contrary to federal requirements including [Title VI of the Civil Rights Act of 1964](#), and prevent responsible, qualified bidders from submitting bids, then such provisions or policies shall not be applicable to federal-aid projects. [23 CFR 635.112\(d\)](#) Refer to Section A, Chapter 7, Title VI for additional details.

*Title VI* – The certified local agency shall comply with the standard U.S. Department of Transportation (USDOT) Title VI Assurances by including language in the advertisement (solicitation for bids) substantially as follows:

The [certified local agency] in accordance with Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. 2000d to 2000-4 and Title 49, Code of Federal Regulations, Department of Transportation, subtitle A, Office of the Secretary, Part 21, nondiscrimination in federally assisted programs of the Department of Transportation issued pursuant to such Act, hereby notifies all bidders that it will affirmatively insure that in any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, color or national origin in consideration for an award.

- If a DBE goal applies to the project, the certified local agency shall include in the advertisement the following statements:
  - The DBE goal percentage per project.
  - “This project is subject to the DBE policy statement as cited in 49 CFR 26.”

- “The DBE is subject to commercially useful function (CUF) requirements.”
- “When a DBE participation goal has been assigned on a contract, the contractor and subcontractor must comply with the commercially useful function (CUF) provisions. The CUF provisions require that the DBE actually perform, manage, and supervise all assigned responsibilities. Where on-the-job training (OJT) participation goals have been assigned, the contractor must comply with the relevant special provision requirements. Additionally, the contractor and subcontractor are subject to contract wage and equal employment opportunity (EEO) work force composition requirements contained in the affirmative action special provisions of each contract. 23 USC 140 EEO requirements.”
- “All bidders are notified that the DBE will be afforded full opportunity to submit bids in response to invitations to participate in any contract entered into pursuant to this advertisement. In consideration for an award, persons or firms will not be discriminated against because of race, age, color, sex, religion, national origin, mental or physical handicap, political affiliation, or marital status.”

See Section B Chapter 7 DBE and Chapter 8 EEO/OJT for more information.

- \*The following statement must also be included in the advertisement for bids:

ALL PROJECTS HAVE MINIMUM WAGE RATE REQUIREMENTS. FEDERALLY-FUNDED PROJECTS, EXCEPT LOCAL ROAD AND RURAL MINOR COLLECTOR PROJECTS, ARE SUBJECT TO THE "GENERAL WAGE DETERMINATION ISSUED UNDER THE DAVIS-BACON AND RELATED ACTS FROM THE U.S. SECRETARY OF LABOR", UNLESS A HIGHER WAGE RATE AND FRINGE BENEFITS ARE REQUIRED ACCORDING TO ORS 279C.838, AS PROVIDED IN THE OREGON BUREAU OF LABOR AND INDUSTRIES (BOLI) PUBLICATION TITLED "PREVAILING WAGE RATES FOR PUBLIC WORKS CONTRACTS IN OREGON SUBJECT TO BOTH THE STATE PWR AND FEDERAL DAVIS-BACON ACT" "DETERMINATIONS" AND BOLI'S "PREVAILING WAGE RATES FOR PUBLIC WORKS CONTRACTS IN OREGON SUBJECT TO BOTH THE STATE PWR AND FEDERAL. DAVIS-BACON ACT" WAGE ARE AVAILABLE ON THE WEB AT [Oregon Boli Wages](#) STATE-FUNDED PROJECTS AND FEDERALLY-FUNDED LOCAL ROAD AND RURAL MINOR COLLECTOR PROJECTS ARE SUBJECT TO BOLI'S "PREVAILING WAGE RATES FOR PUBLIC WORKS CONTRACTS IN. OREGON".

As indicated in ORS 279C.830 the prevailing wage rates may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates and by providing adequate information about how to access the rates.

Further, state law requires that when a public works project is subject to the Davis-Bacon Act, and a public agency fails to include either:

- the state and federal prevailing rates of wage in the specifications for the contract; or

- information showing which prevailing rate of wage is higher in the specifications,

then, the public agency will be liable to each affected worker for any unpaid difference between the applicable higher rate of wage and the lower rate of wage. The public agency will also be liable for an additional amount equal to the amount of unpaid wages due under this section, as liquidated damages. ORS 279C.855

For additional information regarding the new prevailing wage rate laws, see – [ORS279C.830, ORS 279C.838, ORS279C.855, ORS 279C.825 and ORS 279C.836](#)

- **Proof of Advertisement** – The local agency is responsible to ensure that proof of advertisement shall be retained in the project file.

## b. Required in Bid Documents

- **Items Required for Responsive Bid** – The certified local agency shall clearly identify in the bidding documents those requirements which the bidder must assure are complied with to make the bid responsive. If the bidder fails to comply with these identified bidding requirements, such failure shall make the bid non-responsive and not eligible for award consideration. [23 CFR 635.112\(h\)](#)
- **Non-Collusion Provision** – Certified local agencies must include a non-collusion provision in the bidding documents substantially as follows:

Each bidder shall file a statement executed by, or on behalf of the person, firm, association, or corporation submitting the bid certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action, in restraint of free competitive bidding in connection with the submitted bid. Failure to submit the executed statement as part of the bidding documents will make the bid non-responsive and not eligible for award consideration. [23 CFR 635.112\(f\)](#)

1. The certified local agency will provide the required form for the statement to each prospective bidder.
2. The statement shall either be in the form of an affidavit executed and sworn to by the bidder before a person who is authorized by law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

- **Congressional Lobbying Prohibited with Federal-Aid Funds** – The certified local agency shall include the lobbying certification requirement pursuant to [49 CFR part 20](#) and the requirements of [49 CFR part 29](#) regarding suspension and debarment certification in the bidding documents. [23 CFR 635.112\(g\)](#)
- **Plans Specifications and Estimates** – The local agency shall ensure that project specific specifications and plans are developed. Specifications and plans shall describe the location and design features and the construction requirements in sufficient detail to allow for

accurate bids, to facilitate the construction, and to enable the local agency to control the project. [23 CFR 630, Subpart B](#) See Section C, Chapter 11, PS&E for further information.

The local agency shall ensure that the specifications/contract includes but is not limited to the following:

1. On all projects, contracts for projects shall specify the minimum percentage of work that a contractor must perform with its own organization. This percentage shall be not less than 30 percent of the total original contract price excluding any identified specialty items. [23 CFR 635.116\(a\)](#).
2. The requirement of a performance bond and a payment bond in a sum equal to the contract price and in bond forms that have been approved by ODOT. [ORS 279C.380](#) Further details regarding bonds follow later in this chapter of the *LAG Manual*.

### c. Considerations

#### Engineers Estimate

FHWA discourages disclosure of the Engineer's Estimate. It is recommended that the Engineer's Estimate be kept strictly confidential until the low bidder has executed the contract documents. The certified local agency shall ensure that the Engineer's Estimate for a particular project is not published. If a contracting agency does publicize the estimate, the information must be made available to all bidders. Placing a cost range in the project advertisement for each project is acceptable. The purpose of the range is to provide information to bidders regarding bonding requirements. FHWA's [Contract Administration Core Curriculum Participant's Manual and Reference Guide, 2006](#) (*2006 Guide*) on page 96.

### 3. Prequalification (Optional)

As noted in FHWA's [2006 Guide](#) pages 120-124, FHWA recommends certified local agencies prequalify prime contractors. Certified local agencies may use their own approved prequalification process of prospective bidders, as approved by ODOT. In the event that a local agency does not have an ODOT approved process in place, the local agency can use ODOT's approval of a contractor's prequalification.

Note, if the certified local agency decides to prequalify prospective bidders, the local agency shall have written procedures for mandatory prequalification, joint ventures, and special prequalification by using one of the following methods:

- the local agency may use its own procedures and the local agency's Local Contract Review Board shall adopt such procedures and a contractor prequalification form for prime contractors [ORS 279C.430](#) or use the Attorney General Model Rules [OAR 137-049-0220; 137-049-0370](#);

- utilize ODOT's Prequalification Procedures specified in the [Oregon Standard Specifications for Construction](#), APWA Oregon Chapter, current edition; or
- [OAR 731-005-0450](#), [OAR 734, Division 10](#), and ODOT's [procedures and form concerning prequalification of prime contractors](#).

#### **a. Prequalification Requirements**

If the local agency adopts their own procedures through a Local Contract Review Board, the procedures shall comply with all state and federal laws and specifically address the following items.

- The qualification must as a minimum consist of bond capability as required by state law and compliance with licensing requirements of state law. The local agency may include additional requirements. [ORS 279C.375 and 279C.430](#)

If a contractor is prequalified with ODOT to perform contracts, then that contractor is presumed qualified with any other public agency for the same kind of work. [ORS 279C.435](#) FHWA suggests that each prequalified contractor be required to update their information annually. FHWA's [2006 Guide](#) page A-46.

- Prime contractors may be required to submit a special prequalification in addition to the standard prequalification. Special prequalification may be used to determine if the prime contractor has the experience, knowledge, and capability to perform the highly specialized work on the project. It is recommended that the use of a special prequalification requirement be infrequent and limited to projects that are unique in character, and, in which, the local agency may have a limited amount of expertise or experience. [ORS 279C.375\(2\)\(b\)](#), [ORS 279C.430](#).
- No procedures or requirements for qualifications or licensing of contractors may operate to restrict competition, prevent submission of a bid, or prohibit consideration of a bid submitted by any responsible contractor, whether resident or nonresident of the state. [23 CFR 635.110\(a & b\)](#)

No contractor shall be required to obtain a license before submitting a bid or before the bid may be considered for award of a contract, except that a [State Construction Contractors Board](#) license may be required upon award of a contract. [23 CFR 635.110\(c\)](#) Note, after the contract award is approved, the contractors have a period of time to obtain bonds and certificates, then all parties sign and the contract is executed.

*NOTE: “Award” means approval of award by the appropriate authorities. For instance, with ODOT it is the Deputy Director or the Oregon Transportation Commission. “Execution” of a contract occurs after the contract “award” is approved- there is a period of time when the contractors obtain their bonds and insurance certificates. When everything is in order, all parties sign or “execute” the contract. In the case of ODOT, on a federally funded project, ODOT generally gives the contractor up to the time of “executing” (signing) the contract to supply ODOT with the Oregon Construction Contractors Board (CCB) license, landscape license or Secretary of State Business Registry.*

- Prequalification of contractors shall be required as a condition for submission of a bid or award of contract only if the period between the date of issuing a call for bids and the date of opening of bids affords sufficient time to enable a bidder to obtain the required prequalification rating. [23 CFR 635.110\(c\)](#)
- For all FHWA funded projects, bidding opportunities on a nondiscriminatory basis shall be afforded to all qualified bidders regardless of state boundaries, race, color, national origin, sex, religion, age or handicap. [23 CFR 635.112\(d\)](#)
- No bidder shall be disqualified or prevented from competitive bidding because it secured a bond or insurance policy from any surety or insurer located outside of Oregon as long as the surety or insurer is authorized to do business in Oregon. [23 CFR 635.110](#)

#### **b. Prequalification Considerations**

In developing their procedures, the local agency may also choose to consider the following:

- The evaluation of capability should include consideration of experience, personnel, equipment, financial resources, and performance record; the information should be sufficient to enable the bidder to obtain the required qualification rating prior to the contract award. See FHWA’s [2006 Guide](#) pages 120-124.
- The instructions for completing the work experience section of the prequalification form should require that the firm identify all projects for which it was the prime contractor and those on which it worked as a subcontractor during at least the past two years as well as the contracting agency for those projects. Also, the contracting agency should describe the penalties for making false statements in the prequalification process. See FHWA’s [2006 Guide](#), *Guidelines on Preparing Engineer’s Estimate, Bid Reviews and Evaluation*, page A-87.

#### **c. Prequalification Forms**

Local agencies may use a template similar to [ODOT’s Prequalification Form](#) in the local agency’s prequalification process.

*NOTE: All public entities awarding public improvement contracts to the lowest responsible bidder must complete and submit a Responsible Bidder Determination form to the [State Construction Contractors Board](#) within 30 days of the award.*

## 4. Bonding

### a. Bonding Requirements

Qualification must, as a minimum, consist of bonding capability as required by state law and compliance with licensing requirements of state law. The local agency may include additional requirements.

#### 1. Bid Security

Public improvement contracts with a value estimated by the contracting agency of more than \$100,000 or, in the case of contracts for highways, bridges and other transportation projects, more than \$50,000 the bidders shall submit bid security with the bids unless the contract for which a bid is submitted has been exempted from this requirement under [ORS 279C.365\(5\)](#).

In order for a bid to be considered responsive each bid must include bid security and such security may not exceed 10 percent of the amount bid for the contract. [ORS 279C.365\(4\)](#) and [ORS 279C.365\(5\)](#)

More details regarding bid security are available in the Bid Documents and Bid Opening section of this chapter.

#### 2. Successful Bidders

Pursuant to [ORS 279C.380](#), successful bidders of public improvement contracts with a value estimated by the local agency of more than \$100,000, or in the case of contracts for highways, bridges and other transportation projects more than \$50,000, shall promptly execute and deliver to the contracting agency the following bonds:

- **A performance bond** in an amount equal to the full contract price conditioned on the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. The local agency shall require that ODOT be included as an obligee in the contractor's performance bond for the project. A contracting agency may waive the requirement of a performance bond. A contracting agency may permit the successful bidder to submit a cashier's check or certified check in lieu of all or a portion of the required performance bond.
- **A payment bond** in an amount equal to the full contract price, solely for the protection of claimants under [ORS 279C.600](#).

#### 3. Public Works Bond

Prior to starting work on a contract or subcontract for a public works project, a contractor or subcontractor shall file with the [Construction Contractor's Board](#) a public works bond with a corporate surety authorized to do business in this state in the amount of \$30,000. [ORS 279C.836](#)

The bond must provide that the contractor or subcontractor will pay claims ordered by the Bureau of Labor and Industries to workers performing labor upon public works projects. The bond must be a continuing obligation, and the surety's liability for the aggregate of claims that may be payable from the bond may not exceed the penal sum of the bond. Refer to [ORS](#)

[279C.836](#) for additional details such as cancellation of the public works bond and exceptions to this bond requirement.

#### **4. Surety Authorized in Oregon**

[ORS 279C.380](#) also requires that each performance bond and each payment bond must be executed solely by a surety company or companies holding a certificate of authority to transact surety business in Oregon. However, no bidder shall be disqualified or prevented from competitive bidding because it secured a bond or insurance policy from any surety or insurer located outside of Oregon as long as the surety or insurer is authorized to do business in Oregon. [23 CFR 635.110](#)

In addition, the bonds may not constitute the surety obligation of an individual or individuals. The performance and payment bonds must be payable to the local agency or to the public agency or agencies for whose benefit the contract was awarded, as specified in the solicitation documents, and shall be in a form approved by the local agency and ODOT. [ORS 279C.380](#)

Refer to [ORS 279C.380](#) for additional details regarding public improvement contracts to a firm providing both construction management and general contractor services, and exceptions to these bonding requirements in cases of emergency.

### **BONDING CONSIDERATIONS**

ODOT recommends that the local agency use standardized bond forms, which have been approved by the Oregon Department of Justice, or use ODOT's bid bond, performance bond, or payment bond forms. Contact the [Regional Local Agency Liaison](#) for ODOT's bond forms.

The local agency may, in lieu of a bid bond accept cashier's check, certified check, or irrevocable letter of credit issued by an insured institution. [ORS 706.008](#) See [ORS 279C.365\(4\)](#) regarding bid security, and [ORS 279C.380\(1\)\(a\)](#) for performance and payment security. Note, a letter of credit is not an option for performance and payment security.

ODOT suggests the local agency's procedures outline a process for returning checks or letter of credit to contractor. [ORS 279C.385](#) and [ORS 279C.390](#).

The performance bond should not be canceled nor released until substantial completion and inspection to ensure correction of any performance related defects. Performance Bonds issued in the State of Oregon contain a one year maintenance provision. If maintenance related issues arise during the one year period, local agency should contact contractor for correction of issue. If the issue is not corrected and contractor is not responsive, local agency should contact the performance bond carrier for a claim under the maintenance provision.

## **5. Insurance**

### **a. Indemnification**

The local agency's contract must have contract language that indemnifies the State of Oregon, Oregon Transportation Commission and its members, and Department of Transportation, its officers and employees. The indemnification must encompass all claims,

suits or actions of whatsoever nature arising from the contractor's performance of the obligations under its contract with Agency.

#### **b. Insurance Requirements**

1. To ensure the contractor can pay for damages, claims and lawsuits, the local agency shall assess the risks associated with the contractor's work and require adequate general liability, automobile liability, and workers compensation coverage. Contact your local agency liaison for the ODOT Project Development Risk Assessment Tool. Completion of this risk assessment and scoring provides ODOT recommended project insurance limits. Based on the outcome of the risk assessment, on a project by project basis, automobile with pollution, builders risk, pollution, pollution with asbestos, pollution with lead, or railroad insurance coverage may also need to be required.
2. The local agency shall require its contractor to list the State of Oregon, Oregon Transportation Commission and its members, and Department of Transportation, its officers and employees, as additional insured in the insurance certificates required of the contractor under the contract. Prior to Notice to Proceed, the contractor shall provide insurance certificates to the local agency for commercial general liability, automobile, and worker's compensation. [ORS 701.105](#).
3. Insurance requirements for projects involving work in an around railroad property are determined by the local railroad involved in the project. For projects in and around railroad property, the maximum dollar amounts of railroad coverage to be reimbursed from federal funds with respect to Railroad Liability coverage is outlined in <http://www.fhwa.dot.gov/legsregs/directives/fapg/cfr0646a.htm>. The local agency should contact the ODOT State Railroad Liaison at (503) 986-3657 for assistance with local railroad insurance requirements.

#### **c. Third Party Beneficiary**

ODOT shall be included as a third party beneficiary in the specifications of the local agency's construction contract for the project, with express authority to enforce the terms and conditions of the contract.

#### **d. Warranty Requirement**

If the local agency's specifications/special provisions require a supplemental warranty bond in connection with a warranty requirement, the local agency shall include ODOT as an obligee in the contractor's supplemental warranty bond.

In addition the local agency shall have the warranty bond and the supplemental warranty performance bond approved by ODOT or use ODOT's form. The supplemental warranty bond should not be canceled nor released until sufficient time has past to ensure payment of any warranty related claims.

## **5. Requests from Bidders and Bidding Procedures**

### **a. Requirements**

#### **1. Competitive Bidding**

Under state and federal law, construction contracts are to be based upon competitive bids and federal law requires the contract to be awarded to the lowest responsible bid [23 USC 112](#) and [ORS 279C.335](#) Exceptions to competitive bidding require approval. [ORS 279C.335\(2\)](#)

Pursuant to [ORS 279C.335](#), projects exempted from competitive bidding require findings-of-fact showing that the exemption will:

- not substantially diminish competition;
- not encourage favoritism in the award; and
- result in substantial cost savings to the agency.

A public hearing is required to receive comments on exemption from competitive bidding. [ORS 279C.335\(5\)\(a\)](#)

Examples of projects that may be exempted include:

- design-build;
- construction manager / general contractor;
- alternative contracting methods where award is based upon other factors besides price, e.g. price and time; price and technical qualifications; technical approach etc.; and
- emergency projects [ORS 279C.335](#).

Certified local agencies may also use additive alternate bidding (aka bid alternates).

The local agency shall make the invitation to bid available to all prospective bidders. Clarification of any provision of the solicitation; request for a change; or protest of the specifications or contract terms and conditions, may be made by a bidder in writing prior to the deadline for submitting requests for changes to the solicitation or protest. Unless otherwise specified in the solicitation document, a bidder must deliver the written request to the local agency within the required time period prior to the closing. The local agency is not required to respond to requests submitted after the established deadline.

## **2. Clarification**

The local agency may respond in writing or orally, however the local agency's response does not change the provisions to the solicitation and is not binding unless the solicitation is amended by addendum. See e.g. [OAR 137-049-0260\(1\)](#) regarding clarification and [OAR 137-049-0250](#) regarding addenda.

## **3. Solicitation Changes**

A bidder's written request for change shall include a statement of the requested change(s) to the contract terms and conditions, including any specifications, together with the reason for the requested change. Such bidders shall mark requests for change as "*Contract Provision Request for Change*" and include the solicitation document number or other identification as specified in the solicitation document. See e.g. [OAR 137-049-0260\(2\)](#) regarding solicitation document changes.

## **4. Protest**

The protest shall include a detailed statement of the legal and factual grounds for the protest, a description of the resulting prejudice to the bidder and a statement of the desired changes to

the contract terms and conditions, including any specifications. The protest shall be marked “*Contract Provision Protest*” and include the solicitation document number or other identification as specified in the solicitation document. [OAR 137-049-0260\(3\)](#)

A prospective bidder may file a protest with the local agency if the prospective bidder believes that the procurement process is contrary to law or that a solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name. If a prospective bidder fails to timely file such a protest, the prospective bidder may not challenge the contract on grounds under this subsection in any future legal or administrative proceeding. The protest must be timely filed and contain the following:

- a. sufficient information to identify the solicitation that is the subject of the protest;
- b. the grounds that demonstrate how the procurement process is contrary to law or how the solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name;
- c. evidence or supporting documentation that supports the grounds on which the protest is based; and
- d. the relief sought.

If any information is missing, the protest may not be considered. See e.g., [OAR 137-049-0260\(3\)](#) regarding protest procedures.

The local agency shall evaluate the protest if it contains all the required information and consider the protest and issue a decision in writing. The decision shall be issued no less than three business days before bids are due, unless a written determination is made by the local agency that circumstances exist that require a shorter time limit.

If the local agency agrees with the bidder's request or protest, in whole or in part, the local agency shall issue an addendum reflecting its determination or cancel the solicitation. If a local agency determines that an extension is necessary to consider the request or protest and issue an addendum, the local agency may extend the closing if necessary. [OAR 137-049-0260\(5\)](#) If the local agency rejects the protest, the local agency shall promptly notify the prospective bidder that the protest is untimely or that the protest failed to meet the protest information requirements and give the reasons for the failure. [OAR 137-049-0260\(4\)](#)

## **5. Protest Judicial Review**

A protest decision is subject to judicial review only if the suit or writ of review is filed before the opening of bids. The circuit court for the county in which the principal offices of the local agency are located would review the protest decision.

If judicial review is sought, the local agency may not proceed with contract execution unless the local agency determines that there is a compelling governmental interest in proceeding or that the goods and services are urgently needed. If the local agency makes such a determination, the local agency shall set forth the reasons for the determination in writing and immediately provide them to the prospective bidder that filed the protest. However, the court may nonetheless stay the performance of the contract and require the bidder seeking the stay

to post a bond in an amount sufficient to protect the local agency and the public from costs associated with delay in contract performance.

## **b. Considerations**

### **1. Cancellation**

A local agency may cancel a solicitation for good cause if the local agency finds that cancellation is in the public interest. For compliance review purposes, the local agency's cancellation procedures should include the following items:

- finding that cancellation is in the public interest and is documented;
- a copy of the cancellation shall be sent to ODOT's [Regional Local Agency Liaison](#);
- notice of cancellation;
- process for disposition of bids if solicitation canceled prior to and after opening bids; and
- cancellation of solicitation at any time prior to signing contract.

If the project contains a DBE goal, the local agency must also notify the [Small Business/ DBE Program Analyst](#) in ODOT's Office of Civil Rights of the cancellation.

The local agency's reasons for cancellation shall be made part of the solicitation file. If the local agency cancels a solicitation prior to opening, the local agency shall provide a notice of cancellation that identifies the solicitation, briefly explains the reason for cancellation; and if appropriate, explains that an opportunity will be given to compete on any resolicitation. The local agency shall also return all bids it received to bidders unopened, provided the bidder submitted its bid in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the local agency shall open the bid to determine the source and then return it to the bidder. If the local agency rejects all bids, the local agency shall retain all such bids as part of the local agency's solicitation file.

### **2. Pre-Bid Conference**

For complex projects, it is considered good industry practice for the local agency, or its consultant, to hold pre-bid conferences with prospective bidders prior to the closing. See FHWA's [2006 Guide](#) page 125. A pre-bid conference can provide an opportunity to explain the procurement requirements, obtain information, or to conduct site inspections. Notice of any pre-bid conference must be set forth in the solicitation document; ODOT personnel, such as the [Regional Local Agency Liaison](#) and the [Regional Civil Rights Specialist](#), must be notified of the meeting date. The pre-bid conference may be mandatory as a condition for making a bid and shall be held within a reasonable time after the solicitation document has been issued, but sufficiently before the closing to allow bidders to consider information provided at that conference. If mandatory, the local agency should have a sign-in attendance sheet that is part of the project file. The local agency should document results of the conference in a memo to the attendees. [OAR 731-005-0560](#)

## **6. Bid Documents and Bid Opening**

### **a. Requirements**

#### **1. Bid Contents**

The local agency shall clearly identify in the bidding documents all requirements with which the bidder must comply in order to submit a responsive bid. If the bidder fails to comply with these identified bidding requirements, such bid shall be deemed non-responsive and ineligible for award. [23 CFR 635.112\(h\)](#)

Bidders shall submit and sign their bid documents in accordance with the solicitation document. Any bid corrections prior to bid opening shall be initialed and submitted by the bidder in accordance with the requirements for submitting a bid under the solicitation document. Bidders shall submit their bids on the form(s) provided in the solicitation document, unless the bidders were otherwise instructed in the solicitation document.

For competitive public improvement contracts with an estimated value of more than \$100,000, bidders shall submit to the local agency a first-tier subcontractor disclosure form within two working hours after the date and time of the deadline when bids are due. [ORS 279C.370\(1\)](#) The disclosure of the first-tier subcontractors must include subcontractors that will:

- a. be furnishing labor or will be furnishing labor and materials in connection with the public improvement contract; and
- b. have a contract value that is equal to or greater than five percent of the total project bid or \$15,000, whichever is greater, or \$350,000 regardless of the percentage of the total project bid.

The disclosure must include the name of each subcontractor, the category of work that each subcontractor will perform and the dollar value of each subcontract. The information shall be disclosed using a form similar to the form as required by state statute. [ORS 279C.370\(2\)](#)

The local agency shall consider the bid of any contractor that does not submit a subcontractor disclosure to the local agency to be a non-responsive bid and may not award the contract to the contractor. A local agency is not required to determine the accuracy or the completeness of the subcontractor disclosure. [ORS 279C.370\(3\)](#)

## **2. Bid Security**

For public improvement contracts with a value, estimated by the contracting agency, of more than \$100,000 or, in the case of contracts for highways, bridges and other transportation projects more than \$50,000, the bidders shall submit with the bids or post:

- a surety bond;
- an irrevocable letter of credit issued by an insured institution as defined in [ORS 706.008\(13\)](#);
- a cashier's check; or
- a certified check.

One of the above items shall serve as bid security unless the contract for which a bid is submitted has been exempted from this requirement under [ORS 279C.390](#). The security may not exceed 10 percent of the amount bid for the contract. [ORS 279C.365\(4\)](#) and [ORS 279C.365\(5\)](#)

### 3. Submitted Bids

Pursuant to [ORS 279C.365\(2\)](#), all bids made to the contracting agency under [ORS 279C.335](#) or [ORS 279C.400](#) must be:

- a. in writing;
- b. filed with the person designated for receipt of bids by the contracting agency; and
- c. opened publicly by the contracting agency immediately after the deadline for submission of bids.

### 4. Bid Opening

All bids received in accordance with the terms of the advertisement shall be publicly opened and read aloud either item-by-item or by total amount. [23 CFR 635.113\(a\)](#) FHWA's [2006 Guide](#) page 127. Oregon state statute also indicates that bids must be "opened publicly by the contracting agency immediately after the deadline for submission of bids." [ORS 279C.365\(2\)\(c\)](#) After having been opened, the bids must be made available for public inspection. [ORS 279C.365\(3\)](#)

If any bid received is not read aloud, the name of the bidder and the reason for not reading the bid aloud shall be publicly announced at the letting. [23 CFR 635.113\(a\)](#)

In FHWA's [2006 Guide](#), reasons for not reading a bid include the following issues.

- a. *The bid is non-responsive* – Non-responsive bids may include conditions or qualifications not provided in the specifications. Likewise, non-responsive bids can include bids where the bidder fails to perform any of the following requirements:
  1. sign the bid;
  2. furnish the required bid bond;
  3. include a unit bid price for each item;
  4. include a total amount for the bid;
  5. prepare the bid in ink;
  6. submit a non-collusion affidavit; or
  7. commit to the achievement of the DBE contract goals or demonstrate good faith efforts to do so.
- b. *The bidder has been determined to be not responsible* – A bidder may be deemed not responsible because of past unsatisfactory performance, as evidenced by failure to meet qualification requirements or because of state or federal suspension/debarment action. A determination of non-responsibility should be done prior to receipt of the bids and must be documented in writing.

*NOTE: A **responsive bid** meets all the requirements of the advertisement and proposal, and a **responsible bidder** is one who is physically organized and equipped with the financial wherewithal to undertake and complete the contract. FHWA's [2006 Guide](#) page 127-8*

### 5. Negotiations

Negotiation with contractors, during the period following the opening of bids and before the award of the contract shall not be permitted. [23 CFR 635.113\(a\)](#)

### b. Considerations

Line item bids rather than lump sum bids are preferred in order to make meaningful comparison of the submitted bids with cost estimates.

### **1. Electronic Bidding**

As noted in FHWA's [2006 Guide](#) page 129, "Electronic bidding is the transfer of proposal bid data between the contracting agency and contractors. Electronic bidding can either supplement or replace traditional paper bid documents."

ODOT has implemented electronic bidding for highway and bridge construction contracts. Additional information is available at ODOT's [Procurement Office – Construction Contracting Section](#) website under "[Electronic Bidding.](#)"

## **7. Bid Evaluation**

### **a. Requirements**

#### **1. Bid Verification and Correction**

The local agency shall verify that all required bid documents have been properly submitted and executed by all apparent low bidders. [23 CFR 635.114](#) All bids are reviewed for accuracy, unbalancing of bid items, etc., with tabulations checked and confirmed. Any corrections to the bid tabulations are made if necessary, in accordance with ODOT's [Oregon Standard Specifications for Construction](#), Sections 00120 and 00130.

#### **2. Bid Tabulations**

The local agency shall prepare a tabulation of bids showing the item details for at least the three lowest acceptable bids:

- bid item details for the lowest three acceptable bids and
- the total amounts of all other acceptable bids [23 CFR 635.113](#).

The local agency shall certify the bid tabulations and forward the tabulations to ODOT's [Regional Local Agency Liaison](#).

In the case of a design-build project, local agencies must first contact the [Regional Local Agency Liaison](#) and note that the following requirements apply.

- a. All proposals received must be opened and reviewed in accordance with the terms of the solicitation.
- b. Certified local agencies must use their own procedures, as approved by ODOT, for the following:
  1. the process of handling proposals and information;
  2. the review and evaluation of proposals;
  3. the submission, modification, revision and withdrawal of proposals; and
  4. the announcement of the successful offer.

Refer to [23 CFR Part 636](#), Design-Build Contracting, for additional details.

### **3. Conformance with Engineer's Estimate**

After bid opening, the local agency shall review “the apparent low bid for reasonable conformance with the engineer’s estimated prices.” Bids with any extreme variations from the engineer’s estimate shall be thoroughly evaluated. [23 CFR 635.114\(c\)](#)

If the local agency finds obviously unbalanced bid items, the local agency shall document its decision to award or reject the bid with a written justification and shall notify the [Regional Local Agency Liaison](#). The local agency may award a bid if it is found to be mathematically unbalanced, but not materially unbalanced. [23 CFR 635.114\(d\)](#)

### **4. Bid Analysis**

After tabulation, the local agency must verify proper submission of all required bid documents by the lowest bidder. If the low bid is found to be non-responsive or the bidder is not responsible, the local agency shall notify the [Regional Local Agency Liaison](#) and obtain proper concurrences from ODOT and FHWA before making an award to the next lowest bidder. [23 CFR 635.114\(f\)](#)

The local agency must evaluate the bid for responsiveness. The items for review should include, but may not be limited to, the following. FHWA’s [2006 Guide](#) page A-87

a. Determine Whether the Bid is Responsive.

1. *Bid* – The bid meets all the terms of the solicitation. [23 CFR 635.113\(c\)\(1\)](#)
2. *Bid Figures* – The bid figures have been verified for accuracy. [23 CFR 635.114](#)
3. *Revisions* – If there were revisions in addendum, then the contractor must have used the correct bid sheets and the bidder must have complied with all identified requirements in the bid document. [23 CFR 635.112](#) and [ORS 279C.370](#)
4. *Subcontractor Disclosure Form* – The subcontractor disclosure form has been submitted with the required information and met the required filing time deadline.
5. *Prequalification* – As applicable, the contractor is pre-qualified in the required class or classes of work. [ORS 279C.370](#)
6. *Bid Signature* – The bid document has been signed by the contractor’s authorized personnel. [ORS 279C.375](#)
7. *Bid Items in Ink* – All of the bid items are in ink, unless otherwise specified in the bid documents.

b. Determine Whether Bidder Meets Standards of Responsibility.

1. *Bidder Registered with the Corporate Division* – The contractor’s name is registered and active with the Oregon Secretary of State’s [Corporate Division](#).

Note, the name must be appropriately registered *prior* to execution of contract.

2. *Bidder Registered with the Construction Contractor's Board* – The contractor must be registered with [Construction Contractor's Board](#) (CCB) & CCB number must not have expired. The contractor must be registered prior to execution of the contract. [ORS 279C.375\(3\)\(a\)](#) and [ORS 701.227](#)
3. *Bidder Registered with the Landscape Contractor's Board* – If it is a landscape project, the contractor must be registered with the [Landscape Contractors Board](#) prior to execution of contract by local agency. [ORS 671.520\(2\)](#), [ORS 671.530](#), and [ORS 671.560](#)
4. *Responsible Bidder with Bureau of Labor and Industries* – Contractor must not have been excluded from bidding by the [Bureau of Labor and Industries](#).
5. *Responsible Bidder with FHWA* – The local agency shall verify that the contractor has not been excluded from bidding by the General Services Administration by checking the publication "[List of Parties Excluded from Federal Procurement and Non-procurement Programs.](#)" [49 CFR 29.140](#)
6. *Responsible Bidder under State Statute* – Pursuant to [ORS 279C.375\(3\)\(a\)](#), the local agency shall determine whether the bidder has met the standards of responsibility by considering whether the bidder has:
  - a. 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 bidder to meet all contractual responsibilities;
  - b. a satisfactory record of performance – the local agency shall document the record of performance of a bidder if the local agency finds the bidder not to be responsible;
  - c. a satisfactory record of integrity – the local agency shall document the record of integrity of a bidder if the local agency finds the bidder not to be responsible;
  - d. qualified legally to contract with the local agency; and
  - e. supplied all necessary information in connection with the inquiry concerning responsibility – if a bidder fails to promptly supply information requested by the local agency concerning responsibility, the local agency shall base the determination of responsibility upon any available information or may find the bidder not to be responsible.
7. *Bid Security Bond* – All security bond requirements must have been met and the surety company submitting the bond must be authorized by the Oregon Department of Consumer and Business Services' [Insurance Division](#). If the contractor fails to furnish the bonds as requested, the local agency shall reject the

bid and award the contract to the responsible bidder with the next lowest responsive bid, if the bid price is still effective. As noted previously, the local agency shall ensure that no bidder is disqualified or prevented from competitive bidding because it secured a bid or insurance policy from any surety or insurer located outside of Oregon as long as the surety or insurer is authorized to do business in Oregon. [23 CFR 635.110\(b\)](#)

8. *Pre-Bid Meeting* – If a mandatory pre-bid meeting was held, the contractor’s attendance must be verified. The meeting attendant should be a representative of the contractor and be employed by bidder and on the contractor payroll.

A record of these items must be maintained in the justification for award or rejection documentation. For compliance review purposes, the local agency should also document the bidder responsiveness of the low bidder for inclusion in the project file. This verifies compliance with state and federal laws for responsiveness of the requirements. [23 CFR 635.114](#)

### **5. Late Bids, Withdrawals, or Modifications**

The local agency shall not consider bids, withdrawals, or modifications not in compliance with the terms of the solicitation. Bids, withdrawals or modifications that are late do not comply with the terms of the solicitation and shall not be considered.

### **6. Rejection of Bids**

Bids may be rejected for not complying with the prescribed process and requirements. [ORS 279C.395](#) and [ORS 279C.365](#) Adequate justification for rejecting any bids must be documented by the local agency. Bidders may also be disqualified pursuant to state statute. [ORS 279C.440](#)

If the bid exceeds the engineer’s estimate by 10 percent prior to the local agency awarding the contract, the local agency must contact the [Regional Local Agency Liaison](#) to ensure availability of federal funding.

### **7. Rejection of All Bids**

Where the lowest bid exceeds the engineer’s estimate by 10 percent or where award of contract is not justified as being in the best interest of the public in accordance with the adopted Local Contract Review Board rules, all bids may be rejected. For further details regarding the engineer’s estimate, see FHWA’s [2006 Guide](#) page A-87.

The local agency must define the criteria for rejection of all bids and comply with [ORS 279C.395](#). Any local agency proposal to reject all bids received for a federal-aid contract shall be submitted to the [Regional Local Agency Liaison](#) who will coordinate with ODOT and FHWA for appropriate concurrence, accompanied by adequate justification. [23 CFR 635.114\(h\)](#)

When all bids are rejected, the documentation in the Project File should include the following items for compliance review purposes:

- reasons for rejection including reference of appropriate local, state or federal law;
- definition of responsible bidder(s);
- specific criteria for rejection;

- written finding for rejecting all bids;
- written approval from authorized local agency official;
- notification to all bidders that all bids were rejected; and
- notification of such rejection to the [Regional Local Agency Liaison](#) and ODOT's Office of Civil Rights.

## **b. Considerations**

### **1. Capability to Perform Work**

If the local agency determines that the lowest bidder is not qualified, it shall document those findings prior to awarding the bid to the next-lowest responsible bidder.

When a local agency does not prequalify prospective bidders, the local agency should afford 10 days after notification for the low bidder to provide evidence of capability to perform the work.

The evaluation of capability should include consideration of experience, personnel, equipment, financial resources, and performance record; the information should be sufficient to enable the bidder to obtain the required qualification rating prior to contract award.

### **2. Bid Analysis**

Beyond the comparison of prices, the bid analysis should include, but is not limited to:

- number of bids;
- distribution or range of the bids;
- identity and geographic location of the bidders;
- urgency of the project;
- unbalancing of bids;
- current market conditions and workloads;
- comparison of bid prices with similar projects in the letting;
- justification for significant bid price differences;
- potential for savings if the project is re-advertised; and
- other factors as warranted.

### **3. Bid Analysis Process**

The bid analysis provides the foundation for substantiating the contract award or rejection of bids. Proper bid analysis will help ensure proper and effective use of funds. The local agency shall review and certify the bids. In this way, the local agency can be assured that there was good competition and the lowest possible price was received. ODOT will use this information to support authorization of federal-aid funds for the local agency. See FHWA's [2006 Guide](#) page 133.

## **8. Award of Contract**

### **a. Requirements**

#### **1. Competitive Award to Low Bidder**

Using the evaluation process previously outlined, the local agency shall award contracts for public improvement projects competitively to the low responsive and responsible bidder. [ORS 279C.375\(1\)](#)

## **2. Notice of Intent to Award**

At least seven days prior to contract award, unless the local agency determines that seven days is impractical, the local agency shall notify each bidder of the contracting agency's intent to award a contract. [ORS 279C.375\(2\)](#) Such notice of intent to award should be documented in the Project File.

## **3. Award**

As noted previously, negotiations prior to award are prohibited. [23 CFR 635.113\(a\)](#)

If the execution date is greater than 60 days from bid opening, the local agency shall advise the [Regional Local Agency Liaison](#) and the Liaison will advise ODOT's Highway Program Office. Pursuant to [OAR 137-049-0410](#), 30 days is standard for time to award, then the execution of contract follows, after all bonding and insurance coverage is in place.

Upon contract award, the local agency shall prepare a Post-Bid Final Estimate Financial Spreadsheet listing contractor's bid prices and final bid tabulations for forwarding to [Regional Local Agency Liaison](#) who will forward it to ODOT's Highway Program Office. The Highway Program Office will forward the Post-Bid Final Estimate Financial Spreadsheet to FHWA.

## **4. Letter of Award**

After award by the local agency, the contractor must be advised of the award in writing.

## **5. Disqualification**

With proper notice to the bidder(s), a local agency may disqualify bidder(s) from receiving an award in accordance with [ORS 279C.440](#).

## **6. Right to Protest Award or Disqualification**

As indicated by [ORS 279C.445](#), bidders shall have an opportunity to appeal disqualification. Bidders may also appeal the award pursuant to procedures specified in [ORS 279C.460](#).

# **9. Execution of Contract**

## **a. Requirements**

Local agencies shall not execute a contract with any contractor who is not registered or licensed in accordance with state and federal laws.

### **1. Insurance**

Prior to the execution of the contract, the local agency shall ensure that contractor has furnished copies of the Certificates of Insurance for the insurance specified in the Standard Specifications and/or Special Provisions. The local agency shall ensure that contractor lists on the Certificate of Insurance as an additional insured the State of Oregon, Oregon Transportation Commission and its members, and Department of Transportation, its officers and employees.

## 2. Contract Requirements

In accordance with [ORS 279C.505](#), the local agency shall ensure that the public improvement contract contains a condition that the contractor shall:

- promptly make payment, as due, to all persons supplying to the contractor labor or material for work specified in the contract;
- pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the contract;
- not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished;
- pay to the Department of Revenue all sums withheld from employees under [ORS 316.167](#); and
- demonstrate that an employee drug-testing program is in place and maintained during the period of the contract.

The local agency prepares the necessary documents and forwards them for execution by the successful bidder and the proper officials of the local agency.

## 10. Submittal of Award Date

### a. Required Information

Before construction begins, the local agency **must** submit the following information to the [Regional Local Agency Liaison](#):

- Post-Bid Final Estimate Financial Spreadsheet and tabulation of bids;
- engineer's estimate;
- award letter to the contractor;\*
- names and addresses of all firms including subcontractors that submit a quote to the successful low bidder. This includes quotes for labor, materials, and supplies;\*
- monthly [Subcontractor's Paid Summary Report](#);\* and
- [DBE Goal Subcontractor/Supplier Solicitation and Utilization Form](#) (as applicable).\*

\*Reference the Civil Rights Tracking Procedures for additional information. The Tracking Procedures are located at the end of Chapter 7, Civil Rights (DBE) in Section B of this *LAG Manual*. Any questions should be directed to the [Regional Local Agency Liaison](#).

*NOTE: Failure to submit the above listed information, before construction begins, will result in a delay of reimbursement for the billed cost until the necessary information is received.*

### b. Payment of Bureau of Labor and Industries (BOLI) Fee

As required by state law, the Prevailing Wage Rate (PWR) fee must be paid by the public agency that awards a public works contract valued at \$50,000 or higher, rather than by the contractor to whom the public works contract is awarded. The PWR maximum fee has increased to \$7,500, and the minimum PWR fee to \$250. The increase is in effect for public works contracts

advertised on or after January 1, 2008 and is calculated at one-tenth of one percent of the contract value. This amount is determined by multiplying the contract value times .001 to get the PWR fee amount. If the amount is less than \$250, then the \$250 minimum is the PWR amount due. If the amount is over \$7,500, then the maximum of \$7,500 is the PWR amount due. [ORS 279C.825](#)

## 11. Record Retention

### a. Requirements

#### 1. Records Maintenance

The local agency shall ensure that the contractors and subcontractors shall maintain all fiscal records relating to contracts in accordance with generally accepted accounting principles. Contractors and subcontractors shall maintain all other records necessary to clearly document their performance and any claims arising from or relating to their performance under the contract.

#### 2. Right to Audit Records and Record Retention

The local agency shall ensure that contractors and subcontractors make all records pertaining to their performance and any claims against the contract accessible to ODOT, FHWA, and the Secretary of State. ODOT, FHWA, Secretary of State Audit Division or designees, shall be entitled to inspect, examine, copy and audit contractor or subcontractor records. Contractor and subcontractor shall maintain the records and keep the records accessible and available at reasonable times and places for a minimum period of six years from the date of final payment under the contract or subcontract or until the conclusion of any audit, controversy or litigation arising out of or related to the contract, whichever date is later, unless a different period is required by law. See the Secretary of State's Retention Schedule; e.g. OAR Chapter 166, [Division 150](#) for counties, [200](#) for cities, and [300](#) for state agencies. For project on or affecting a state facility and bridges, reference local agency's Master Certification Agreement.

### b. Considerations

As noted in FHWA's [2006 Guide](#) pages A-46 through A-61, the following documents and data should be retained for a minimum period of five years after project closeout:

- **basic information concerning each project let for bidding** such as project number, project description (type of work), project location, agency responsible for project supervision and bid and award dates;
- **names and addresses of contractors invited to bid;**
- **list of contractors requesting bid specifications;**
- **date-stamped bid submitted by each contractor**, including bid prices, all line item prices, subcontractors identified who were used to formulate the bid, their addresses, and work performed, suppliers identified, addresses, and the quantity and value of materials or services to be provided by each, identity of all joint venturers and partners involved in or

underwriting the performance of work on the project, mailing envelopes used by bidders to submit bids and a non-collusion affidavit;

- **engineer's estimate covering all work to be performed on the project**, including all line item price estimates, total project estimate, source of cost data used to formulate line item price estimates, and name of person preparing the estimate;
- **memo of all pre-award conferences**, including date and place of conference, identity of all persons present, summary of subject matters discussed, and results of the conference;
- **all documentation relating to the award of the project;**
- **all documentation concerning the source of materials used on the project;**
- **all financial records concerning the project**, including progress reports, all invoices submitted by contractors, all payment records, dates and warrant number of checks issued and all change orders;
- **information and all documentation concerning the expenditure of federal funds in connection with each project**, including each disbursement of federal funds, together with warrant number and dates of checks issued and total amount of federal funds expended; and
- **a list of all pre-qualified bidders** that should be updated annually and provide the following information:
  - a. the name and address of each company;
  - b. the names of all officers and directors of the company;
  - c. the names of all employees authorized to submit bids on behalf of the company;
  - d. the names of the person having final bidding authority and the chief estimator of the company;
  - e. a description of all affiliations between the company or any of its officers or directors with other firms in the road construction industry;
  - f. identification by description, location, and capacity of each production facility or plant (hot mix, surface treatment, portable, stone crushing, etc.) owned or leased and operated by the bidder; and
  - g. any and all computerized correspondence, reports, and documents pertaining to a particular project.

FHWA and ODOT recommend indexing, filing and storing in a manner that will allow ready access and retrieval.

For compliance review purposes, ODOT recommends that local agencies retain the following completed original documents for the successful bidder in the Project File concerning the DBE Program:

- **bidder DBE Information ;**

- **a list of bidders and each bid's total bid amount** with an item-by item breakdown of the bidders for each project (tabulation of bids);
- **the Good Faith Efforts Form** should be retained in the project file if the commitment levels do not meet DBE goals (not required when DBE goal is zero) and any other correspondence prior to or following the bid opening (either internal or external); and
- **all correspondence** between ODOT's Office of Civil Rights and the local agency.