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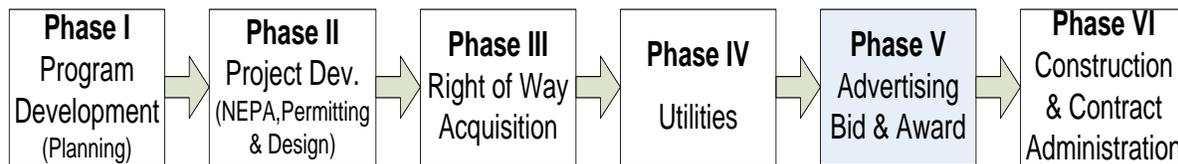
SECTION C

CERTIFIED PROJECTS

Chapter 15 Advertising, Bid and Award Procedures

This chapter specifies how local public agencies (LPAs) may operate under a Master Certification Agreement with ODOT and use FHWA approved processes to their procedures to advertise, bid and award **construction contracts** for federal-aid projects.

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). [See Section C, Chapter 11.](#)



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 public agency (LPA) or by ODOT. Advertising, bid and award is the responsibility of the certified LPA as identified in the Master Certification Agreement. The approving authority, as identified in the Master Certification Agreement and the [Approval Matrix](#), must approve the plans and specifications, and a professional engineer licensed in the State of Oregon must seal and date the plans and specifications.

LPAs 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 LPA project, there may be additional eligibility requirements such as special contract language or specifications. This special contract language may cover additional reporting requirements for the LPA 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 LPA must have in place the appropriate project management structure, certified inspectors, authorities, and quality control program.

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

- Advertising – the LPA complies with appropriate federal and state advertising and award laws;
- Agreements – a Master Certification Agreement between ODOT and the LPA is in effect, as well as a project agreement; and
- Funds – the LPA must have sufficient funds for the project or have other special interests in the project. LPA must receive ODOT approval to use donations or in-kind assets to meet its match obligations. The federal funds are reimbursed to the LPA as defined in the Master Certification Agreement. For additional funding program information, refer to [Section A Chapter 3 – FHWA Funding Programs](#).
- Demonstrate knowledge of DBE Program requirements.

C. ROLES AND RESPONSIBILITIES

1. LPA

A certified LPA 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 NEPA environmental document is approved by ODOT and FHWA;
- the project’s right of way has been certified by ODOT;
- the utility certification is completed;
- all appropriate Disadvantaged Business Enterprise (DBE) goals have been established (see [Section C, Chapter 8, Civil Rights- DBE](#), for further details);
- construction funds have been authorized by FHWA and ODOT; and
- the [Regional Local Agency Liaison](#) has provided a federal-aid number and authorization to proceed with advertisement of the project.

a. Applicable Law

The certified LPA 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 ([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;
- Lobbying Prohibition ([49 CFR 20](#));
- Suspension and Debarment USDOT Order 4200.5E 03-15-2010 (replaces revoked 49 CFR 29);

And selected Title 23 requirements:

- Competitive bidding requirements [23 USC 112](#);
- Preconstruction Activities [23 CFR 630](#);
- Required Contract Provisions, Form FHWA-1273, [23 CFR 633](#);
- Buy America requirements [23 CFR 635.410 \(Section C, Chapter 11, PS&E; Chapter 16, Construction and Contract Administration\)](#);

State statutes apply to the extent that **they do not conflict** with federal laws and regulations, ORS 279A.030. State laws include ORS chapters 279A and 279C. [OAR](#) 137-047, 731-005, 731-007, and 734-010.

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.

FHWA's [Contract Administration Core Curriculum Participant's Manual and Reference Guide](#) (FHWA Core Curriculum Guide) contains additional details regarding federal requirements.

b. Standard Specifications

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

2. ODOT

ODOT will engage in a collaborative review process to ensure that the LPA's documented processes comply with federal and state law. The [Regional Local Agency Liaison](#) will perform review of PS&E and coordinate with ODOT's Procurement Office (OPO) for review of Ad, Bid & Award. If the LPA does not have its own documented procedures, the LPA 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 LPA 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
4. bonding
5. requests from bidders and bidding procedures
6. bid documents and bid opening
7. bid responsiveness
8. DBE responsiveness
9. cost analysis
10. bid rejection (individual and reject all)
11. bid protests
12. contract award
13. execution of contract
14. submittal of award data
15. record retention

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

The following sections of this chapter outline specific procedures and related laws for each of the numbered activities listed above.

D. PROCEDURES

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

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 bidder. [23 USC 112](#) and ORS 279C.335. Exceptions to competitive bidding require approval. ORS 279C.335(2).

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

1. Pre-Advertising Requirements

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

- **Project Prospectus** – The project prospectus must be completed by the certified LPA 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 LPA 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 six weeks prior to advertisement, and construction funds must have been authorized by FHWA and ODOT. **NOTE: LPAs should allow six weeks for obligation of 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. Contingencies 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. [Section C, Chapter 8, Civil Rights- DBE, OJT & EEO](#) in this *LAG Manual*, addresses additional Civil Rights details.
- **Right of Way Clearance** – The project’s right of way processes must have been certified by ODOT Right of Way. Refer to [Section B, Chapter 6, Right of Way](#) for further information.
- **Utility Certification** – All appropriate utility documents shall be submitted to ODOT’s State Utility Liaison prior to PS&E either as the documents are generated or as a packet with the PS&E electronically. See [Section C, Chapter 13 Utility and Railroad Programs](#) in this *LAG Manual* for additional details.
- **Environmental Clearance and Permits** – ODOT must have received the environmental clearance and permits. See [Section C, Chapter 6, Environmental Processes/Permits](#) 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 Transportation Program Office when ODOT requests FHWA to authorize the funds. After FHWA has authorized the construction funding, ODOT’s Transportation Program Office, through the Regional Local Agency Liaison shall issue written approval to the certified LPA to proceed with advertising the project for bids.

2. Prequalification

As noted in FHWA's [2006 Guide](#) pages 120-124, FHWA recommends certified LPAs prequalify prime contractors. ODOT requires that certified LPAs use prequalified prime contractors as part of the certification program. LPAs can use ODOT's list of prequalified prime contractors.

Certified LPAs may use their own prequalification process of prospective bidders, as approved by ODOT. In the event that a LPA does not have an ODOT approved process in place, the LPA must use ODOT's list of prequalified prime contractors.

If a contractor is prequalified with ODOT, then that contractor is rebuttably presumed qualified with any other public agency for the same kind of work. ORS 279C.435.

Note, if the certified LPA decides to prequalify prospective bidders, the LPA shall have written procedures for mandatory prequalification by using one of the following methods:

- The LPA may use its own procedures and the LPA'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; [OAR 731-005-0450](#), [OAR 734, Division 10](#), and ODOT's procedures and form concerning prequalification of prime contractors.

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\(a\) and \(b\)](#).

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\(c\)](#).

3. Solicitation Documents and Project Specifications

The certified LPA 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\(h\)](#). See OPL web site for additional information.

Per ORS 279C.365 all contracting agency's solicitation documents (which may include separately bound bid booklet) for a public improvement contract shall include:

- The option for the contracting agency to 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;

[23 CFR 635.110\(b\) and \(c\)](#) state that contractors need not be licensed at time of bid letting but must obtain required license by contract execution; and

Residence requirements as found in ORS 279A.120 are in conflict with [23CFR635.110](#) and [23CFR635.112](#) and must not be used in certified LPA projects.

All contracts shall specify the minimum percentage of work that a contractor must perform with its own organization. This percentage shall not be less than 30 percent of the total original contract price excluding any identified specialty items. [23 CFR 635.116\(a\)](#).

a. Plans, Specifications and Engineer’s Estimate

The LPA 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 LPA to control the project. [23 CFR 630, Subpart B](#). See [Section C, Chapter 11, PS&E](#) for further information.

FHWA discourages disclosure of the Engineer’s Estimate. ODOT policy requires that the Engineer’s Estimate be kept strictly confidential. The certified LPA shall ensure that the Engineer’s Estimate for a particular project is not published. Placing a cost range in the project advertisement for each project is preferable. 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](#) page 97.

c. Addenda

After the LPA has obtained proper approvals, the LPA may change a solicitation document only by issuing written addenda. The solicitation document shall specify how the LPA will provide notice of addenda and how the LPA will make the addenda available. The LPA shall issue addenda within a reasonable time to allow prospective bidders to consider the addenda in preparing their bids.

The LPA must submit addenda requests to ODOT’s [Regional 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 bid documents. The Regional Local Agency Liaison will then coordinate with FHWA or OPL for final approval as needed.

FHWA must also 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 LPA will ensure that all potential bidders will receive the approved addendum as expeditiously as possible. [23CFR 635.112\(c\)](#) [OAR 137-049-0250](#).

For changes that are not major, the certified LPA may be requested to submit copies of addenda to the [Regional Local Agency Liaison](#).

d. Clarification, Request for Change

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. [OAR 137-049-0260\(1\)\(2\)](#).

e. Solicitation Protest

A prospective bidder may file a protest with the LPA 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. [OAR 137-049-0260](#).

The LPA 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 LPA that circumstances exist that require a shorter time limit.

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 LPA are located reviews the protest decision.

If judicial review is sought, the LPA may not proceed with contract execution unless the LPA determines that there is a compelling governmental interest in proceeding or that the goods and services are urgently needed. If the LPA makes such a determination, the LPA 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 LPA and the public from costs associated with delay in contract performance.

f. Cancellation

A LPA may cancel a solicitation for good cause if the LPA finds that cancellation is in the public interest. A copy of the cancellation shall be sent to ODOT's [Regional Local Agency Liaison](#). For compliance review purposes, the LPA's cancellation procedures should include the following items:

- Cancellation of solicitation at any time prior to signing contract;
- Finding that cancellation is in the public interest and is documented;
- Notice of cancellation; and
- Process for disposition of bids if solicitation canceled prior to and after opening bids;

If the project contains a DBE goal, the LPA must also notify the Small Business/ DBE Program Analyst in ODOT's Office of Civil Rights of the cancellation.

4. Advertisement Process

a. Advertising for Federally Funded Non-NHS Projects

LPAs must receive approval through the Local Agency Liaison to advertise from FHWA prior to advertising.

If a certified LPA chooses to use the procedures adopted by the LPA's Local Contract Review Board for advertising Non-NHS Projects, such procedures shall comply with all state and federal laws including the following. [23 CFR 635.112](#), ORS 279C.360.

The certified LPA shall advertise for a minimum of three-weeks prior to the opening of bids. The three week advertisement period begins when the advertisement is published. [23 CFR 635.112](#)

b. 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 to permit prospective bidders adequate time to prepare a responsive bid proposal. 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.

c. Publication in Newspaper / Trade Journal

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. 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*. Internet advertising is supplemental to print advertising. See FHWA core curriculum for more information. [ORS 279C.360](#).

d. Nondiscriminatory Procedures

The certified LPA'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\(d\)](#).

e. Proof of Advertisement

The LPA is responsible to ensure that proof of advertisement shall be retained in the project file.

5. Advertisement Content

a. ORS 279C.360

*Local Agency Guidelines – Section C Chapter 15
May 2014*

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Per 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 prequalified 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
- That the contract is for a “public work” subject to ORS 279C.800 to 279C.870 or the [Davis-Bacon Act](#); ODOT ad states “All projects have minimum wage rate requirements.”

b. Buy America

While not a requirement, ODOT recommends notifying bidders of Buy America Requirements in the advertisement. ODOT ad states “All federal aid projects have Buy America requirements per [23 CFR 635.410](#).”

c. Title VI

The certified LPA shall comply with the standard U.S. Department of Transportation (USDOT) Title VI Assurances by including language in the advertisement.
Sample ODOT language:

“The Oregon Department of Transportation is an Equal Opportunity and Affirmative Action Employer.”

“The policy of the Oregon Department of Transportation is to provide equal opportunity for participation in its contracting activities to all persons and firms in compliance with applicable Federal and State laws, rules and regulations.”

d. DBE

The certified LPA shall include the DBE goal percentage per project, even if the goal is 0%.
Example: “This project contains a 0% DBE goal.”

e. Prequalification

Information regarding prequalification is required in ad.

f. Percentage of Work

ODOT includes statement requiring the prime contractor to perform at least 30% of the original contract amount. Example: “All projects require the contractor’s own organization to perform at least 30% of the awarded contract amount.”

g. Mandatory Pre-bid Conference

If the LPA is requiring a mandatory pre-bid conference, the advertisement must include the date, time and location as well as the fact that the pre-bid conference is mandatory. For more information, refer to an ODOT sample Ad.

6. 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. Oregon state statute also indicates that bids must be “opened publicly” by the contracting agency immediately after the deadline for submission of bids. After having been opened, the bids must be made available for public inspection.

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\(a\)](#), ORS 279C.365(2)(c).

The LPA 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.

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

7. Bid Responsiveness Review

The LPA must verify proper submission of all required bid documents by the lowest bidder. The bid review provides the foundation for substantiating the contract award or rejection of bids. Proper bid review will help ensure proper and effective use of funds. The certified LPA shall review and certify the bids as being complete and responsive to ensure good competition and the receipt of the lowest possible price. ODOT will use this information to support authorization of federal-aid funds to the certified LPA.

a. Bid Content Sufficiency

The bid meets all the terms of the solicitation. [23 CFR 635.113\(c\)\(1\)](#).

b. Bid Figures

The bid figures have been verified for accuracy. [23 CFR 635.114](#).

c. Revisions

If there have been revisions by addendum, the contractor must use the correct bid sheets and the bidder must comply with all identified requirements in the bid document. [23 CFR 635.112](#) and ORS 279C.370.

d. Bid Security

Bid security must be received as discussed previously in Section D. Procedures, subsection 3. Solicitation Document, subsection I. Bonds.

e. Pre-Bid Meeting

If a mandatory pre-bid meeting was held, the contractor's attendance must be verified.

f. Subcontractor Disclosure Form

The subcontractor disclosure form has been submitted with the required information within the required filing time deadline. ORS 279C.370.

Failure to provide the name, category of work and dollar value of each subcontractor that meets contract value inclusion limits shall result in bid rejection. The LPA shall consider the bid of any contractor that does not submit a subcontractor disclosure to the LPA to be a non-responsive bid and may not award the contract to the contractor. A LPA is not required to determine the accuracy or the completeness of the subcontractor disclosure. ORS 279C.370(3).

g. Prequalification

the contractor is pre-qualified in the required class or classes of work. ORS 279C.370.

h. Bid Signature

The bid document has been signed by the contractor's authorized personnel. ORS 279C.375.

i. Licenses and Registrations

1. Bidder Registered with the Secretary of State Corporate Division

The contractor's name is registered and active with the Oregon Secretary of State's [Corporation Division](#). The contractor need not be registered at time of **bid letting** but must be registered prior to **execution** of a contract.

2. Bidder Licensed with the Construction Contractor's Board

The contractor must be licensed with [Construction Contractor's Board](#) (CCB), and the CCB number must not have expired. The contractor need not be licensed at time of **bid letting** but must be licensed prior to **execution** of the contract. ORS 279C.375(3)(a) and ORS 701.227.

3. Bidder Licensed with the Landscape Contractor's Board

If it is a landscape project, the contractor must be licensed with the [Landscape Contractors Board](#) prior to **execution** of the contract by the LPA. ORS 671.520(2), ORS 671.530, and ORS 671.560.

j. Verify that Contractor is not on Ineligible Lists:

1. [Bureau of Labor and Industries list of Ineligible Contractors](#)
2. [Construction Contractors Board list of Contractors Not Qualified](#)
3. [Federal Excluded Parties List](#)
System for Award Management (SAM)

k. Disadvantaged Business Enterprise (DBE) Requirements

Contractor must submit DBE Commitment and Certification and Utilization Form (Form number 734-2785) with bid.

Even if DBE goal is 0%, bidder must sign and date the form to be responsive. When the DBE goal is 0% and the bidder has failed to submit, sign and date the form, the LPA must find the bidder non-responsive.

When the DBE goal is greater than 0%, the LPA must send this form from all bidders to the ODOT DBE Program Manager as soon as possible for evaluation and approval.

DBEs listed by the bidder for participation in the contract must be certified as eligible DBEs as of the time of bid opening. See [Section C, Chapter 8, Civil Rights- DBE](#) for more specific information regarding DBE form submission and review requirements.

l. Responsible Bidder under State Statute

Pursuant to ORS 279C.375(3) the LPA shall determine whether the bidder has met the standards or responsibility. 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.

m. Bidder Determined 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](#) pages 127-8.*

If the low bid is found to be non-responsive or the bidder is not responsible, the LPA shall notify the [Regional Local Agency Liaison](#) and obtain proper concurrences from ODOT and FHWA before awarding to the next lowest bidder. [23 CFR 635.114\(f\)](#).

A record of these items must be maintained for justification of award or rejection. The LPA should also document the bidder responsiveness of the low bidder for inclusion in the project file. [23 CFR 635.114](#).

n. Disqualification

With proper notice to the bidder(s), a LPA may disqualify bidder(s) from receiving an award in accordance with ORS 279C.440. Bidders may appeal disqualification, ORS 279C.445. If the LPA determines that the lowest bidder is not qualified, it shall document those findings prior to awarding the bid to the next-lowest responsible bidder.

8. Bid Price Analysis

a. Bid Verification and Correction

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. All LPAs must have a bid analysis process approved by ODOT which adopts ODOT Bid Analysis Policy for certified LPAs.

ODOT Bid Analysis Policy for certified LPAs

Title 23 CFR 635.114(a) requires that Federal-aid contracts be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting the criteria for responsibility. This requirement applies to all Federal-aid highway construction projects. FHWA has stressed that estimates should be accurate and credible, based on realistic current data, and that they are kept confidential. Furthermore, there should be written procedures for justifying the award of a contract, or rejection of the bids, when the low bid appears excessive or rejection is being considered for other reasons.

The LPA should analyze the bids for responsiveness and errors and identify all mathematical and/or materially unbalanced bid items. This analysis should result in an Engineers Recommendation of Award to either award to the lowest responsive bid by a responsible ODOT/LPA Prequalified bidder or rebid the project with additional recommendations for adjustments and revisions to the project documents or reject the project in its entirety. If the LPA determines that it will not award to the lowest, responsive bidder, it must contact ODOT immediately and provide written justification for their decision. **ODOT and FHWA must concur in the LPA's rejection of bids.**

b. Bid Tabulations

The LPA shall prepare a tabulation of bids showing:

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

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

c. Conformance with Engineer's Estimate

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

d. Other considerations

Some additional metrics to review during the Bid Analysis include but are not limited to the;

- 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.

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

e. 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 LPA must define the criteria for rejection of all bids and comply with [ORS 279C.395](#). Any LPA 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 LPA 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.

NOTE: "Award" means approval of award by the appropriate authorities. For instance, with ODOT it is the Highway Division Administrator or the Oregon Transportation Commission. "Execution" of a contract occurs after the contract "award" is approved. There is a period of time for the contractor to obtain 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.

9. Contract Award Requirements

a. DBE Responsiveness

The LPA must receive approval from ODOT OCR regarding DBE responsiveness prior to issuing notice of intent (NOI) to award.

b. Notice of Intent to Award

At least seven days prior to contract award, unless the LPA determines that seven days is impractical, the LPA 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.

Please refer to the Office of Civil Rights (Chapter 8) for required submittals.

Please note that if the low bidder was found non-responsive to the DBE goal requirements, and has requested administration reconsideration through OCR, the LPA must postpone sending the notice of intent to award letter to the apparent awardee until the completion of, and the final decision from, the administrative hearing.

Bidders may appeal the award pursuant to procedures specified in ORS 279C.460.

c. 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 LPA 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. For example specifications, see section 00130 of the [ODOT Standard Specifications](#) for timelines.

d. Letter of Award

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

10. Post Award

a. Contract Execution

LPAs shall not execute a contract with any contractor who is not registered or licensed in accordance with state and federal laws. Additionally, contractors must comply with the following requirements for insurance, bonds, and payment of a Prevailing Wage Rate (PWR) fee to the Bureau of Labor and Industries (BOLI).

b. Insurance

Prior to the execution of the contract, the LPA 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 LPA 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.

Prior to Notice to Proceed, the contractor shall provide insurance certificates to the LPA for commercial general liability, automobile, worker's compensation, and any other required insurance. ORS 701.073.

Please refer to the Office of Civil Rights (Chapter 8) for required submittals.

c. Bonds

Bond requirements as outlined in [Chapter 11 Appendix 1, PS&E Checklist, Section D](#).

d. Payment of PWR Fee to BOLI

As required by state law, the 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 fee requirement applies to 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 determine the PWR fee amount. The maximum fee is \$7,500, and the minimum fee is \$250. If the contract amount is less than \$250,000, the \$250 minimum fee applies. If the contract amount is over \$7,500,000, the \$7,500 maximum fee applies. ORS 279C.825.

11. Required Submittals

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

a. Post-Bid Final Estimate Financial Spreadsheet and Tabulation of Bids

The [Regional Local Agency Liaison](#) will forward it to ODOT’s Highway Program Office. The Highway Program Office will forward the Post-Bid Final Estimate Financial Spreadsheet to FHWA.

b. Engineer’s estimate

c. Award letter to the contractor

d. Subcontractor Solicitation and Utilization Report (as applicable)

Refer to the Civil Rights Tracking Procedures for additional information. The Tracking Procedures are located at [Chapter 8, Civil Rights \(DBE\) in Section C](#) of this *LAG Manual*. Any questions should be directed to the [Regional Local Agency Liaison](#).

<p><i>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.</i></p>
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12. Record Retention

For records retention requirements, refer to the Code of Federal Regulations, Title 48: Federal Acquisition Regulations System, Part 4 – Administrative Matters, Subpart 4.8 – Government Contract Files, Section 4.805 – Storage, Handling, and disposal of contract files. 48 CFR, Section 4.805. Current regulations require retention of construction contracts for 6 years and 3 months after final payment.

The documents listed in the regulations should be retained by the LPA. The LPA should develop a process for records retention that complies with the federal and state records retention regulations.

The LPA 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.

13. Right to Audit Records

The LPA 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 LPA's Master Certification Agreement.