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DEPARTMENT OF ADMINISTRATIVE SERVICES

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RULES:

125-055-0005, 125-055-0010, 125-055-0037, 125-055-0040

AMEND: 125-055-0005

REPEAL: Temporary 125-055-0005 from DAS 2-2019

RULE TITLE: Definitions

NOTICE FILED DATE: 01/21/2020

RULE SUMMARY: Implementing HB 494 (2019).

RULE TEXT:

As used in OAR 125-055-0005 to 125-055-0045:

- (1) "Agency" means a public agency, as defined in ORS 279.835(5).
- (2) "Community Rehabilitation Program" (CRP) means a nonprofit organization for Individuals with Disabilities providing or facilitating one or more of the following services to Individuals with Disabilities, enabling them to maximize their opportunities for employment:
 - (a) Medical, psychiatric, psychological, social, and vocational services;
 - (b) Physical, occupational and recreational therapy;
 - (c) Speech, language, and hearing therapy;
 - (d) Assessment for determining eligibility and vocational rehabilitation needs;
 - (e) Job development, placement, and retention services;
 - (f) Psychosocial rehabilitation services;
 - (g) Supported employment services;
 - (h) Services to family members, if necessary, to enable the applicant or eligible individual to achieve an employment outcome; and
 - (i) Personal assistance services.
- (3) "Competitive Employment" means work performed by an individual in the competitive labor market on a full-time basis with no more than reasonable accommodation (as required by the Americans with Disabilities Act, 42 USC §§12101 to 12213) for which the individual is compensated within the range of customary wages and levels of benefits

paid in the community for the same or similar work performed by individuals who are not disabled.

(4) "Contract" means any written obligation between a QRF and an Agency established through the QRF Program, excluding any Purchase Orders and Work Orders employing workers who will not be displaced by Purchase Order or Work Order completion, expiration, or termination. "Contract" also excludes a Purchase Order or Work Order for which an immediate replacement is not contemplated or required by the Agency. "Contract" includes:

(a) Price Agreements, which are established between a QRF and the Department to enable Agencies to purchase QRF products and services using Department approved ordering instruments.

(b) When a QRF service engagement has not been ordered under a Price Agreement between a QRF and the Department, any QRF engagement specific to an Agency established for prescribed services, between that Agency and a QRF provider through the QRF program.

(5) "Department" means the Oregon Department of Administrative Services.

(6) "Individual with a Disability," or "Individuals with Disabilities" as defined in ORS 279.835(4), means a person or people who experience a residual, limiting condition resulting from an injury, disease or congenital defect, which affects the person's functional capabilities (including but not limited to mobility, communication, self-care, self-direction, work tolerance, or work skills) such that the person relies on specialized employment services to find and keep employment.

(7) "Price" means the cost to Agencies of the products and services procured through the QRF Program, as determined under OAR 125-055-0030.

(8) "Procurement List" means a listing of those QRFs currently qualified under OAR 125-055-0015 to participate in the QRF Program and includes, as required by ORS 279.850(1), a list of the products and services offered by QRFs and determined by the Department, under OAR 125-055-0020, to be suitable for purchase by Agencies.

(9) "Qualified Rehabilitation Facility (QRF)" means an organization operating as a CRP:

(a) That is organized under the laws of the United States or of this state to provide training or employment in this state for Individuals with Disabilities, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;

(b) That complies with any applicable occupational health and safety standard required by the laws of the United States or of this state; and

(c) That employs Individuals with Disabilities in the manufacture of products or in the provision of services for external customers, whether or not the products or services are procured under ORS 279.835 to 279.855, for not less than:

(A) 75 percent of the work hours of the QRF's direct labor during a fiscal year that begins on or before June 30, 2019.

(B) 65 percent of the work hours of the QRF's direct labor during a fiscal year that begins on or after July 1, 2019, and before June 30, 2021.

(C) 60 percent of the work hours of the QRF's direct labor or the direct labor ratio required by the federal program established by the Javits-Wagner O'Day Act or any successor federal program, whichever is lower, during a fiscal year that begins on or after July 1, 2021. If the federal ratio established under 41 USC §8501 is amended to state a direct labor percentage that is lower than the percentage prescribed by ORS 279.835(6)(c)(C), the Department will initiate rulemaking to consider the application of ORS 279.835(6)(c)(C) to the QRF Program.

(10) "QRF Program" means the program created by ORS 279.835 to 279.855.

STATUTORY/OTHER AUTHORITY: ORS 279.845(1), 184.340

STATUTES/OTHER IMPLEMENTED: ORS 279A.025(4), 279.835 - 279.855

AMEND: 125-055-0010

REPEAL: Temporary 125-055-0010 from DAS 2-2019

RULE TITLE: Policy

NOTICE FILED DATE: 01/21/2020

RULE SUMMARY: Implementing HB 494 (2019).

RULE TEXT:

(1) As required by ORS 279.850(1), Agencies that intend to procure a product or service that is listed on the Procurement List must procure that product or service, at the Price determined by the Department, from a QRF if the product or service is of specifications appropriate to the Agency's procurement needs and is available within the time required by the Agency.

(a) Agencies must not develop specifications that inhibit or tend to discourage Public Contracting with QRF providers for the acquisition of QRF-produced products or services.

(b) Agencies must not enter into lease agreements or other agreements to purposely eliminate the possibility of that Agency entering into an agreement with a QRF provider.

(2) It is the policy of the Department to assist QRFs by administering a program to:

(a) Identify contracting opportunities in the public sector for QRFs;

(b) Ensure that QRFs meet the standards set forth in the QRF Program; and

(c) Assist and facilitate Agencies in entering into contracts with QRFs for the provision of products and services thereby promoting the requirements of ORS 279.835 to 279.855.

(3) In administering the QRF Program, the Department, Agencies and QRFs must keep in mind the purpose of the law: to encourage and assist Individuals with Disabilities to achieve maximum personal independence in their communities through productive, gainful employment by assuring an expanded and constant market for QRF products and services.

(4) In promoting the policy of this section and ORS 279.850(2), the State Chief Procurement Officer (CPO) may appoint uncompensated volunteer members to serve on an advisory council to make recommendations to the CPO concerning the facilitation and administration of the QRF Program. The CPO's authority to appoint advisory council members includes the authority to remove and replace members in the CPO's sole discretion. Meetings of the advisory council are not subject to the public meetings law (ORS 192.610 to 192.710). However, the Department will post notice of the times and places of meetings of the advisory council on a website maintained by the Department. The Department reserves the right to change the meeting time and place after the posting of the meeting notice.

STATUTORY/OTHER AUTHORITY: ORS 279.845(1), 184.340

STATUTES/OTHER IMPLEMENTED: ORS 279A.025(4), 279.835 - 279.855

ADOPT: 125-055-0037

REPEAL: Temporary 125-055-0037 from DAS 2-2019

RULE TITLE: QRF Contract Termination and Successor Contractor Requirements

NOTICE FILED DATE: 01/21/2020

RULE SUMMARY: Implementing HB 494 (2019).

RULE TEXT:

(1) If an Agency, or a QRF terminates, or for any reason does not renew a QRF Contract, for the same janitorial, grounds maintenance or security services, and a new Contract will be put into place to replace or substantially replace the former contract, the Agency must make and document its good faith effort to determine the capability and interest of any other QRF providers suitable for providing the specific service required. A replacement Contract for janitorial, grounds maintenance or security services shall be considered a successor Contract when:

(a) the services to be provided under the replacement Contract will meet the same definition of one of the three categories of services (defined below) as that of the services provided under the former Contract; and

(b) the same Agency that was a party to the former Contract will be a party to the succeeding Contract.

(c) The definitions of the categories of services include:

(A) Janitorial Services means duties that are performed to maintain the cleanliness of a facility.

(B) Grounds Maintenance Services means activities necessary for the upkeep of lands for appearance, safety and to promote the healthy growth of desired plants.

(C) Security Services means activities to protect an Agency's assets and personnel from a variety of hazards by employing preventative measures.

(2) For the purposes of this section (1), an Agency may not cease to constitute the same Agency by resorting to a superficial name change or artificial reorganization to evade the requirements of ORS 279.853(1) or of this rule.

(3) When a QRF is identified as able to meet the previously contracted requirements of the Agency, a new Contract with the successor QRF Contractor shall mandate that the successor Contractor offer employment to the Individuals with Disabilities employed, at the time of the Contract termination or nonrenewal for 28 hours per week or more, to perform the terminated or non-renewed services Contract. Employment must be offered in good faith and without subterfuge or artificial impediments to the hiring of the individuals displaced by the end of the Contract.

(4) When the successor Contractor is a QRF provider, Individuals with Disabilities employed, at the time of the Contract termination or non-renewal for 28 hours per week or more, must be offered employment at wages equal to or better than the wages received under the terminated or non-renewed services Contract. Individuals with Disabilities, whose work schedule at the time of the Contract termination or non-renewal is 28 hours per week or more, must also be offered health benefits at least as beneficial to the individual as earned by the individual under the terminated or non-renewed services Contract.

(5) When the Agency determines and is able to document that there is not a QRF capable of performing the Contract, the Agency must contractually require the non-QRF successor Contractor to offer employment to all of the employees working 28 hours per week or more, at the time of the Contract termination or non-renewal, excluding supervisory and managerial personnel, regardless of their disability status. The wages offered by the successor Contractor must be equal to or better than the wages received under the terminated or non-renewed services Contract and the health benefits offered by the successor Contractor must be at least as beneficial to the individual as earned by the individual under the terminated or non-renewed services Contract.

(6) The original QRF Contractor shall cooperate with the successor Contractor to facilitate a smooth transition for employees choosing to accept the employment offer of the successor Contractor.

(7) The successor Contract shall require the successor Contractor, for a period of 90 days after entering into the successor Contract, to offer employment to all employees transitioning from the QRF provider to the successor Contractor, regardless of QRF status. The successor Contractor may subject individuals to that company's established hiring procedures and may require the individuals to complete a probationary period to demonstrate that they meet the

qualifications the successor Contractor applies to new hires.

STATUTORY/OTHER AUTHORITY: ORS 184.340, 279.845(1)

STATUTES/OTHER IMPLEMENTED: ORS 279A.025(4), 279.835-279.855, SB494 (2019)

AMEND: 125-055-0040

REPEAL: Temporary 125-055-0040 from DAS 2-2019

RULE TITLE: General Provisions

NOTICE FILED DATE: 01/21/2020

RULE SUMMARY: Implementing HB 494 (2019).

RULE TEXT:

(1) Contracting Authority. The Department and other Agencies must contract directly with a QRF for a Contract to qualify for the exception from the competitive procurement requirement in ORS 279A.025 for Contracts under the QRF Program. Contracts between multiple Agencies and a QRF satisfy this requirement that the Agencies must contract directly with a QRF.

(2) Contract Disputes. Contract performance issues and disputes arising out of Contracts entered into under the QRF Program, such as disputes concerning timely delivery of products or performance of services or compliance with specifications, must be resolved exclusively between the QRF and the Agency that is a party to the Contract, and will not be resolved by the Department (except where the Department is a party to the Contract with the QRF).

(3) Temporary Services for State Agencies. In each Contract for the provision of temporary services entered into by a state agency under the QRF Program, the QRF must monitor the prior and current work assignments of its employees who work under the Contract to ensure that no employee performs services for the state in excess of a total of 1,040 hours in a 12-month period. A QRF temporary service provider must obtain a written statement from the employee attesting to the total hours worked as a temporary employee for any state agency during the last 12 months. A state agency filling behind an employee on approved leave may continue beyond 1,040 hours in a 12-month period only when the temporary employee replaces a single employee on approved leave. The temporary appointment may not exceed the period of the approved leave.

(4) Competitive Public Contract Bidding by a QRF. If a QRF submits, to any Agency, a competitive bid, proposal, quote or other offer in a competitive procurement for a public Contract that is not subject to ORS 279.850(1)(c), then regardless of whether the offer was accepted, that QRF may not, at any time during the initial term of the Contract for which the QRF submitted a competitive offer, make any claim to the Agency that instituted the procurement for the Contract that the product or service that was the subject of the offer should have been subject to the requirements of the QRF Program.

(5) Selecting a QRF Provider. If only one QRF provider has been deemed suitable by DAS to provide a needed product or service, the Agency must contract with that provider. In cases where more than one QRF provider has been determined suitable for an Agency's needs, an Agency may choose one of several methods to select a QRF provider.

(a) An Agency with knowledge of a QRF's performance, reputation or other factors, and a desire to contract with that QRF provider, may enter into a Contract with the selected QRF, subject to DAS price determination without a competitive solicitation process. Agencies are encouraged to retain successful QRF providers whenever possible to support the purpose of the program described in ORS 279.840 and to avoid disrupting employment of Individuals with Disabilities.

(b) An Agency may conduct a competitive procurement for a product or service between or among two or more QRFs under ORS 279.850(1)(c). The Agency may grant comparative evaluation points, percentages, or values in conducting the substantial equivalent of a request-for-proposals competition. Since the Price Determination is made by DAS after a QRF has been selected and after scope, specifications, terms and conditions have been negotiated between Agency and the chosen QRF, price may not be considered in the evaluation process as a QRF is not able to bind itself to any set Price due to the Price determination requirement under ORS 279.850(1) and OAR 125-055-0030(6). Evaluative factors that may be considered include:

(A) References from past or current customers;

(B) Experience fulfilling similar Contracts;

(C) Equipment and other resources as may be used to fulfill the statement of work;

(D) Wages, health care benefits, alternative dispute resolution services, and pension or other retirement arrangements that are better, in the aggregate, than the average wages, health care benefits, alternative dispute resolution services, and pension or other retirement arrangements that private employers provide to employees performing the same or similar job duties in the relevant industry in the county in which the selected QRF will deliver the products or perform the services. The value for any criteria related to compliance with all applicable local ordinances and resolutions that govern labor standards, and wages, health care, etc., may not exceed fifteen (15) percent of the total available criteria being considered for this competitive procurement process.

(E) Quality assurance procedures, systems, communication and other written plans for fulfilling the statement of work.

(6) An Agency may, under ORS 279.850(2)(b), disqualify a QRF from entering into a QRF agreement with the Agency after providing the QRF notice and a reasonable opportunity to be heard in accordance with subsections (a) and (b) of this section.

(a) The Agency must provide the QRF written notice of a proposed disqualification. The Agency shall deliver the notice by personal service or by registered or certified mail, return receipt requested. The notice must:

(A) State that the Agency intends to disqualify or suspend the QRF under ORS 279.850;

(B) State the reasons for the proposed disqualification;

(C) Include a statement of the QRF's right to a hearing if requested in writing within the time stated in the notice and that if the Agency does not receive the QRF's written request for a hearing within the time stated, the QRF will have waived its right to a hearing;

(D) Include a statement of the authority under which the hearing will be held;

(E) Include a reference to the particular sections of the statutes, rules, and Contract provisions involved;

(F) State the proposed disqualification period; and

(G) State that the QRF may be represented by legal counsel.

(b) Hearing. The Agency shall schedule a hearing in response to the Agency's receipt of the QRF's timely hearing request. Within a reasonable time prior to the hearing, the Agency must notify the QRF of the time and place of the hearing and provide information on the procedures, right of representation, and other rights related to the conduct of the hearing.

(c) Notice of Decision. The Agency must provide written notice of the disqualification determination to the QRF. The Agency shall deliver the notice by personal service or by registered or certified mail, return receipt requested. The notice must contain:

(A) The effective date and period of the disqualification;

(B) The grounds for the disqualification; and

(C) A statement of any QRF appeal rights and applicable appeal deadlines.

(7) For the purposes of ORS 279.850, a record of "repeatedly violating" local ordinances or resolutions that govern labor standards means reliable documentation, supported by substantial evidence, that the QRF violated applicable ordinances or resolutions more than two times within the requisite period. The requisite period under this section either is: (i) within the then-current term of the QRF's agreement with Agency; or (ii) within the previous three years.

(8) For the purposes of ORS 279.850, local ordinances or resolutions that govern labor standards means ordinances or resolutions, duly adopted by a local government body (as defined in ORS 174.116), that regulate employee working conditions. Working conditions consist of employee:

(a) Wage rates or salaries;

(b) Hours of labor, work days, leave, and workplace safety conditions;

(c) Health insurance or health care benefits;

(d) Retirement or pension benefits; and

(e) Dispute resolution procedures.

(9) A QRF must not enter into a public Contract with an Agency under the QRF Program unless the Contract complies with OAR 125-055-0005 to 125-055-0040 and the products or services that are the subject of the Contract are listed on the Procurement List. Any liabilities or expenses that may arise from the establishment of a Contract that violates

this subsection will be those exclusively of the QRF and Agency.

(10) The Department reserves the right to extend any deadline or time within which a QRF or a party to any proceedings under OAR 125-055-0015 to 125-055-0040 must take any action under those rules if the affected party applies in writing for relief to the Department and demonstrates in writing that special circumstances warrant the grant of such relief. For the purpose of this subsection, special circumstances that warrant the grant of relief include emergencies that reasonably can be regarded as imposing an obstacle to the QRF's or party's ability to meet the deadline or achieve the correction of a violation of rules. Special circumstances are circumstances beyond the reasonable control of the individual or organization including, but not limited to, the illness or other incapacity of key officers of the organization seeking relief, emergency reorganizations or replacements of the corporate structure, board of directors or executive officers of the organization, acts of God and comparable practical impediments to an individual's or organization's ability to meet a deadline or achieve the correction of a violation of rules. The grant or denial of relief under this subsection must be determined by the Department official specifically delegated that task. The Department also reserves the right to waive or to permit the correction of minor or technical violations of OAR 125-055-0015 to 125-055-0040.

STATUTORY/OTHER AUTHORITY: ORS 279.845(1), 184.340

STATUTES/OTHER IMPLEMENTED: ORS 279A.025(4), 279.835 - 279.855