

OFFICE OF THE SECRETARY OF STATE

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ARCHIVES DIVISION

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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 731
DEPARTMENT OF TRANSPORTATION

FILED

03/30/2022 4:44 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Public Contract Rules, Highway and Bridge Projects

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 04/21/2022 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

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Filed By:
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Rules Coordinator

NEED FOR THE RULE(S)

- Repeal rule no longer needed.
- Update language to clarify on which public improvement contracts the 731-005 rules apply.
- Housekeeping items including: removal of unnecessary capitalization; update statute or rule references; update OPO's authority to resolve protests.
- Repeal OAR 731-007-0260 (Disclosure and Substitution of First-Tier Subcontractors) and adopt DOJ Model Rule 137-049-0360 First-Tier Subcontractors; Disclosure and Substitution) which is more up-to-date with statute and serves ODOT's needs.
- Repeal OAR 731-007-0240 (Mandatory Provisions) and adopt DOJ Model Rule 137-049-0200 (Solicitation Documents; Required Provisions; Assignment or Transfer).
- Repeal rules that are obsolete.
- Repeal ODOT's Alternative Contracting Methods section (OAR 731-007-0350 through 731-007-0400) and adopt DOJ Model Rules for Alternative Contracting Methods (OAR 137-049-0600 through 137-049-0690).
- Add ODOT director's authority to exempt public improvements from competitive bidding.
- Update statute and rule references throughout the division.
- Repeal and renumber contract administration rules to OAR chapter 734 division 10.
- Retitle rules and amend language to align with terminology used in statute.
- Align roles and responsibilities with regard to prequalification.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

OAR chapter 137 division 49, OAR chapter 731 division 5, Oregon 2018 Standard Specifications, OAR chapter 734 division 10

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

The changes to these rules are housekeeping in nature and will not have any negative impact on racial equity.

FISCAL AND ECONOMIC IMPACT:

See statements below.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) The changes in the rules are for primarily housekeeping purposes to improve accuracy and clarity of rules. ODOT is electing to adopt portions of DOJ Model Rules for Alternative Contracting Methods and repealing obsolete rules.

(2)(a), (b) and (c) No cost of compliance effect; no changes in procedures and no other cost increases.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Small businesses were not involved in the development of these changes as there is no impact for small businesses.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

These rule changes are primarily housekeeping in nature and input from and advisory committee was not needed.

RULES PROPOSED:

731-005-0400, 731-005-0410, 731-005-0420, 731-005-0430, 731-005-0470, 731-005-0505, 731-005-0510, 731-005-0520, 731-005-0580, 731-005-0600, 731-005-0690, 731-005-0710, 731-007-0225, 731-007-0250, 731-007-0260, 731-007-0340, 731-007-0520, 731-007-0530

REPEAL: 731-005-0400

RULE SUMMARY: This rule is being repealed as it is outdated.

CHANGES TO RULE:

~~731-005-0400~~

~~Repealed Rules~~

~~As required by OR Laws 2003, Chapter 794, Section 334, OARs 731-005-0001 through 731-005-0365 are repealed effective March 1, 2005. The repealed rules will continue to apply to the solicitation of Public Contracts first advertised, but if not advertised then entered into, before March 1, 2005.~~

~~Statutory/Other Authority: ORS 184.616, 184.619, 279A.050, 279A.065~~

~~Statutes/Other Implemented: ORS 279C.300 & Sec. 334 & 336, Ch. 794, OL 2003~~

AMEND: 731-005-0410

RULE SUMMARY: This rule is being amended to establish a new effective date.

CHANGES TO RULE:

731-005-0410

Effective Date 1

OAR 731-005-04010 through 731-005-07970 as amended become effective on ~~January~~March 1, 2010~~22~~ and apply to Public Improvement Contracts first advertised, but if not advertised then entered into, on or after ~~January~~March 1, 2010~~22~~.

Statutory/Other Authority: ~~ORS 184.616~~, 184.619, 279A.050, 279A.065

Statutes/Other Implemented: ORS 279A.005 & Sec. 335 & 337, Ch. 794, OL 2003

AMEND: 731-005-0420

RULE SUMMARY: This rule is being amended to clarify applicability.

CHANGES TO RULE:

731-005-0420

~~Scope-Applicability ¶~~

~~OAR 731-005-040~~10 through ~~731-005-079~~70 apply to all ~~Highway Division Public Improvement Contracts (not exempted by 279C.335)~~ entered into by the Department of Transportation under the authority of ORS ~~279A.050(3)~~. These rules are adopted in ~~place of~~ Construction Contracts, in addition to the requirements set forth in OAR chapter 731, division 7, and the definitions therein. In the event of ambiguity, the more specific requirements of the rules in division 7 take precedence over the Attorney General Model Rules required under ORS 279A.065(1) and as allowed by ORS 279A.065(5) more general requirements of the division 5 rules. All other Public Improvement Contracts are governed by OAR chapter 731, division 149, and are exempt from these OAR chapter 731, division 5 and division 7 rules.

~~Statutory/Other Authority: ORS 184.616, 184.619, 279A.050, 279A.065~~

~~Statutes/Other Implemented: ORS 279A, 279C~~

AMEND: 731-005-0430

RULE SUMMARY: This has been updated for housekeeping and updated citations.

CHANGES TO RULE:

731-005-0430

Definitions

All capitalized terms have the meanings set forth below, unless otherwise defined in the chapter 731, division 005 rules.

- (1) Addendum or Addenda: An addition or deletion to, a material change in, or general interest explanation of the Solicitation Document. Addenda shall be labeled as such and distributed to all interested entities in accordance with these rules.
- (2) Bid: A competitive Offer, binding on the Bidder and submitted in response to an Invitation to Bid (ITB).
- (a) Lump Sum Bid: A Bid that is the total completed project price;
- (b) Unit Price Bid: A Bid that provides unit prices based upon estimated quantities.
- (3) Bidder: An Entity that submits a Bid in response to an Invitation to Bid.
- (4) Closing: The date and time announced in the Solicitation Document as the deadline for submitting Offers.
- (5) Certified Firm: A company that possess one or more current, valid certification(s) from the Oregon Certification Office for Business Inclusion and Diversity.
- (6) Competitive Range: The number of Proposers within a given scoring range ODOT will negotiate with if ODOT intends to negotiate in accordance with OAR 731-005-0650. The Competitive Range must be stated in the Solicitation Document, but will be decreased if the number of Proposers that submit Proposals is less than the specified number, or may be increased by ODOT in accordance with OAR 731-005-0650.
- (7) Conduct Disqualification: A Disqualification pursuant to ORS 279C.440.
- (8) Contract: The Written agreement, resulting from the Solicitation Document that defines the Work to be completed and sets forth the rights and obligations of the parties.
- (9) Contract Amount: Sum of the amounts computed by multiplying the Bid item quantities by the unit price in the schedule of Contract prices of the Contract as awarded.
- (10) Contract Price: The total of the awarded Bid or Proposal amount, including any approved alternates, and any fully executed change orders or amendments.
- (11) Contract Review Authority: The Director of the Oregon Department of Transportation.
- (12) Contractor: The Entity awarded the Contract in response to the Solicitation Document.
- (13) DAS: Oregon Department of Administrative Services.
- (14) Days: Calendar days unless otherwise specified by these rules.
- (15) DBE Disqualification: A Disqualification pursuant to ORS 200.065, 200.075 or 279A.110.
- (16) Descriptive Literature: The Offeror's materials submitted to provide information concerning the products and/or services available in response to the Solicitation Document.
- (17) Disqualification: The preclusion of an Entity from contracting with ODOT for a period of time. Disqualification may be a Conduct Disqualification as defined above, performance disqualification for failure to meet standards listed in OAR 734-010-0290(4), DBE Disqualification or disqualification for lack of specific demonstrated experience (special prequalification as described in OAR 731-007-0030520(2)). ODOT is authorized to disqualify an Entity in accordance with OAR 731-005-0710.
- (18) Electronic Advertisement: ODOT's Solicitation Document, or other document inviting participation in ODOT's procurements made available over the Internet via:
 - (a) The World Wide Web or some other Internet protocol; or
 - (b) ODOT's Electronic Procurement System.
- (19) Electronic Data Interchange Operating Agreement or EDI Operating Agreement: A series of standards that provide computer to computer exchange of business documents between organizations over telephone lines or computer networks. An EDI document is a document that has been transmitted pursuant to an EDI Operating Agreement.
- (20) Electronic Offer: A response to ODOT's Solicitation Document submitted to ODOT via:
 - (a) The World Wide Web or some other Internet protocol; or
 - (b) ODOT's Electronic Procurement System.
- (21) Electronic Procurement System or Electronic Procurement: An information system that persons may access through the Internet using the World Wide Web or some other Internet protocol or that persons may otherwise remotely access using a computer, that enables persons to send Electronic Offers and ODOT to post Electronic Advertisements, receive Electronic Offers, and conduct other activities related to a procurement.
- (22) Emergency: Circumstances that could not have been reasonably foreseen, and that create a substantial risk of loss, damage, interruption of services, or threat to public health or safety with regard to a public improvement.

(23) Entity: A natural person capable of being legally bound, sole proprietorship, limited liability company, corporation, partnership, limited liability partnership, limited partnership, profit and nonprofit unincorporated association, business trust, two or more persons having a joint or common economic interest, or any other person with legal capacity to contract, or a government or governmental subdivision.¶

(24) Facsimile: A document that has been transmitted to and received by ODOT in a format that is capable of being received via a device commonly known as a Facsimile machine (e.g. a Facsimile Bid). A Facsimile machine allows hard copy documents (Written, typed or drawn material) to be sent over telephone lines and printed in another location.¶

(25) Highway Construction Contract. A Public Improvement Contract governed by OAR 731, divisions 5 and 7, and that is approved by the Oregon Transportation Commission in the Statewide Transportation Improvement Program. ¶

(26) Invitation to Bid or ITB: A notice to Contractors disseminating information pertaining to bidding of Public Improvement projects including availability of Solicitation Documents.¶

(267) Non-Resident Contractor: A Contractor that is not domiciled in or registered to do business in the State of Oregon. See OAR 731-005-0750.¶

(278) Non-Road Diesel Equipment: Equipment used in the course of performing a public improvement contract, powered by a compression ignition diesel engine of 25 horsepower or more that is not designed primarily to propel a motor vehicle on public highways.¶

(289) ODOT: The Oregon Department of Transportation.¶

(2930) Offer: A Bid or Proposal as applicable.¶

(301) Offeror: A Bidder or Proposer as applicable.¶

(312) Opening: The date, time and place announced in the Solicitation Document for the public Opening of Written sealed Offers or Electronic Offers.¶

(323) Product Sample: A representative specimen of the item offered by the Offeror in response to the Solicitation Document. Unless otherwise provided in the Solicitation Document, the Product Sample shall be the exact product or a representative portion of that product offered by the Offeror.¶

(334) Project Site: The geographic dimensions of the real property, not including any improvements or fixtures, on which the Work is to be performed, including designated contiguous staging areas.¶

(345) Proposal: A competitive Offer, binding on the Proposer and submitted in response to a Request for Proposals. ~~See Offer.~~¶

(356) Proposer: An Entity that submits a Proposal in response to a Request for Proposals. ~~See Offeror.~~¶

(367) Public Improvement: Projects relating to maintenance or construction of highways, bridges, parks or other transportation facilities by or for ODOT. "Public improvement" does not include emergency Work, minor alteration, ordinary repair or maintenance necessary in order to preserve a Public Improvement.¶

(378) Region Construction Contract: Public Improvement Contract not governed by OAR chapter 731, divisions 5 and 7. Region Construction Contracts are governed by chapter 731, division 149. Region Construction Contracts also include procurements in support of Highway Construction Contracts. ¶

(39) Request for Proposals or RFP: A Solicitation Document calling for Proposals.¶

(3840) Responsible Offeror (also, Responsible Bidder or Responsible Proposer, as applicable): Is an Entity that has submitted an Offer and meets the standards set forth in OAR 731-005-0670(1)(c)(H) and that has not been disqualified by ODOT under OAR 731-005-0710.¶

(3941) Responsive Offer (also, Responsive Bid or Responsive Proposal, as applicable): An Offer that substantially complies with applicable solicitation procedures and requirements and the Solicitation Document.¶

(402) Signed or Signature: Any mark, word or symbol executed or adopted by an Entity evidencing intent to be bound, which may include electronic or digital signature.¶

(413) Solicitation Document: Documents that define the procurement of a Public Improvement project including but not limited to Bid or Proposal booklet, plans, Specifications, requirements, provisions and includes all documents incorporated by reference.¶

(424) Specification: Any description of the physical or functional characteristics, or of the nature of a supply, service or construction item, including any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery and the quantities or qualities of materials to be furnished under the Contract. Specifications generally will state the result to be obtained and may, on occasion, describe the method and manner of doing the Work to be performed.¶

(435) Tie Offers: Tie Offers shall have the meaning set forth in OAR 731-005-0660.¶

(446) Tier 4 Exhaust Emission Standard: The Tier 4 compression ignition diesel engine emission standard established by the United States Environmental Protection Agency in 40 CFR 89.112.¶

(457) Verified Diesel Oxidation Catalyst: A diesel oxidation catalyst verified by the United States Environmental Protection Agency under 40 CFR 89.112 for Non-Road Diesel Equipment.¶

(468) Verified Diesel Particulate Filter: A diesel particulate filter verified by the United States Environmental

Protection Agency under 40 CFR 89.112 for Non-Road Diesel Equipment.¶

(479) Work: The furnishing of all materials, equipment, labor, and incidentals necessary ~~to~~for the successfully ~~complete~~ion of any individual item or the entire Contract and for the successful completion of all duties and obligations imposed by the Contract.¶

(4850) Written or Writing: Conventional paper documents either manuscript or printed, in contrast to spoken words. It includes electronic transmissions if the Solicitation Document or Contract permits.

Statutory/Other Authority: ORS 184.619, 279A.050, 279A.065

Statutes/Other Implemented: ORS 279A, 279C

AMEND: 731-005-0470

RULE SUMMARY: This rule is being amended to correct statutory reference.

CHANGES TO RULE:

731-005-0470

Solicitation Methods ¶

(1) Policy. It is the policy of the State of Oregon to encourage open and impartial competition in public contracting. ODOT may establish Competition by comparing price, product and service quality, product performance, and an ~~Entity Person~~'s ability to perform, technical competence and ability to make timely deliveries. ODOT must make every effort to construct Public Improvements at the least cost to ODOT.¶

(2) Solicitation Methods. ODOT may encourage meaningful competition through a variety of solicitation methods. ODOT shall choose the solicitation method that is most likely to encourage Offers representing optimal value to ODOT:¶

(a) ODOT may use an ~~Invitation to Bid~~ ITB if ODOT believes it will receive optimal value by selecting the lowest priced Offer that meets the technical requirements of ODOT's Specifications;¶

(b) ODOT may use an ~~Request for Proposal~~ RFP if ODOT believes it will receive optimal value:¶

(A) By selecting an Offer using both price and non-price related factors; or¶

(B) By selecting an Offer using both price and non-price related factors and permitting negotiations pursuant to OAR 731-005-0650.¶

(c) ODOT may permit negotiations under an ~~Request for Proposal~~ RFP pursuant to OAR 731-005-0650 if:¶

(A) ODOT intends to consider alternative terms and conditions to reduce Agency cost or enhance the value of the product or service requested; or¶

(B) ODOT finds negotiation is required to effect a successful procurement (e.g. the Specifications are complex and ODOT expects numerous queries as to the proper interpretation of the Specification; the Work requires a high level of technical or managerial competence that cannot be defined adequately in the Specifications; or ODOT believes negotiations are necessary to gauge the Proposer's understanding of complex Specifications).¶

(3) Solicitation Documents. The Solicitation Document shall include the following:¶

(a) General Information:¶

(A) Notice of any pre-Offer conference as follows:¶

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

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

(iii) That statements made by ODOT's representatives at the conference are not binding upon ODOT unless confirmed by Written Addendum.¶

(B) The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be prequalified if prequalification is a requirement;¶

(C) The name and title of the authorized Agency person designated for receipt of Offers and contact person (if different);¶

(D) Instructions and information concerning submission requirements including the address of the office to which Offers must be delivered and any other special information, e.g., whether Offers may be submitted by Facsimile, Electronic Data Interchange or Electronic Procurement (See OAR 731-005-0500, 731-005-0505 and 731-005-0510 for required provisions for Facsimile, Electronic Data Interchange or Electronic Procurement);¶

(E) The time, date and place of Opening;¶

(F) The time and date of Closing after which ODOT will not accept Offers, which time shall be not less than five Days after the date of the last publication of the advertisement. The interval between the date of issuance of the Solicitation Document and a Closing should not be less than 14 Days for an ITB and not less than 30 Days for an RFP unless ODOT finds a shorter interval is in the public's interest. If ODOT is issuing an ITB that may result in a Contract for a Public Improvement with a value in excess of \$75,000, ODOT shall not designate a time of Closing that falls when ODOT is closed to the public or after 12 noon on Friday; for timing issues relating to Addenda see OAR 731-005-0580(3);¶

(G) The form and submission of Offers and any information required therein, including Bid or Proposal security, if any;¶

(H) The office where the plans and Specifications for the Work or goods may be reviewed;¶

(I) A statement that each Offeror to an ITB or RFP must identify whether the Bidder or Proposer is a "~~Resident bidder~~," as defined in ORS 279A.120;¶

(J) If the Contract resulting from a Solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 276a), a statement that no Offer will be received or considered by ODOT unless the Offer contains a statement by the Offeror as a part of its Offer that "Contractor agrees to be

bound by and will comply with the provisions of ORS 279C.830 or 40 U.S.C. 276a;"¶

(K) If the Work so requires, a statement that ODOT will not receive or consider an Offer from an Entity Person when the Entity Person is not registered with the Construction Contractors Board or is not licensed by the State Landscape Contractors Board as required by ORS 671.530;¶

(L) Whether a Contractor or a subcontractor under the Contract must be licensed for asbestos abatement by the Department of Environmental Quality under ORS 468A.720;¶

(M) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110. (See OAR 731-005-0670(3)); and¶

(N) How ODOT will notify Offerors of Addenda and how ODOT will make Addenda available. See OAR 731-005-0580.¶

(b) Agency Need. The character of the Work or goods ODOT is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements;¶

(c) Evaluation ~~p~~Process:¶

(A) A statement that ODOT may reject any Offer not in compliance with all prescribed solicitation bidding procedures and requirements and other applicable laws, including the requirement to demonstrate the Bidder's responsibility under ORS 279C.375(3)(b), and that ODOT may reject for good cause any or all Offers after finding that doing so is in the public interest;¶

(B) The anticipated solicitation schedule, deadlines, protest process, and evaluation process, if any;¶

(C) Evaluation criteria, including the relative value applicable to each criterion, that ODOT will use to determine the Responsible Bidder with the lowest Responsive Bid or the Responsible Proposer with the best Responsive Proposal and the evaluation criteria ODOT will use to determine acceptability of any Work or goods to be purchased:¶

(i) If Contract award is to be based upon low Bid, ODOT shall set forth objective evaluation criteria in the Solicitation Document. Examples of such criteria that may be used in determining low Bid include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, ownership or life-cycle cost formulas, performance history on other private and public Contracts, experience of key personnel, adequacy of equipment and physical plant, financial wherewithal, sources of supply, references and warranty provisions. Evaluation criteria need not be precise predictors of actual future costs. However, to the extent possible, such evaluation factors shall be reasonable estimates based upon information ODOT has available concerning future use;¶

(ii) If the Solicitation Document is an Request for Proposal ~~FP~~, ODOT shall set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include, but are not limited to, price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references and warranty provisions. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates based on information available to ODOT; or¶

(iii) If the Solicitation Document is a Request For Proposal ~~FP~~ and ODOT is willing to negotiate terms and conditions of the Contract, ODOT must identify the specific terms and conditions in the Solicitation Document that are subject to negotiation and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions ODOT has identified as authorized for negotiation. ODOT must describe the evaluation and negotiation process in accordance with OAR 731-005-0650, including the Competitive Rrange; and¶

(D) Reference to statutory preference for materials and supplies manufactured from recycled materials under ORS 279A.125.¶

(d) Terms and eConditions. ODOT shall include all Contract terms and conditions, including warranties and bonding requirements, ODOT considers necessary. Without limiting the preceding sentence, ODOT must include all applicable Contract provisions required by ORS 279C.500 through 279C.870 as follows:¶

(A) Payment of all EntitiePersons furnishing labor or material, contributions to Industrial Accident Fund, liens and withholding taxes (ORS 279C.505);¶

(B) If the Contract is for a Public Improvement, a condition that the Contractor shall demonstrate it has established a drug-testing program for its employees;¶

(C) If the Contract calls for demolition Work described in ORS 279C.510, a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;¶

(D) If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective (ORS 279C.510);¶

(E) Payment of claims by public officers (ORS 279C.515);¶

(F) Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515;¶

- (G) ~~Entity~~ A Person's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279C.515);¶
- (H) Hours of labor in compliance with ORS 279C.520 and 279C.540;¶
- (I) Environmental and natural resources regulations (ORS 279C.525);¶
- (J) Payment for medical care and providing workers' compensation (ORS 279C.530);¶
- (K) Maximum hours and overtime (ORS 279C.540);¶
- (L) Claims for overtime (ORS 279C.545);¶
- (M) Prevailing wage rates (ORS 279C.800 to 279C.870);¶
- (N) Retainage (ORS 279C.550 through 279C.570);¶
- (O) Prompt payment policy (ORS 279C.570);¶
- (P) Contractor's relations with subcontractors (ORS 279C.580);¶
- (Q) Notice of claim (ORS 279C.605);¶
- (R) With respect to state Agencies, provisions regarding use of recovered resources and recycled materials and to the extent economically feasible, use of recycled paper and PETE products (ORS 279A.150 and 279A.155);¶
- (S) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385;¶
- (T) A Contract provision substantially as follows: "All employers, including Contractor, that employ subject workers who work under this Contract in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530);¶
- (U) Contractor's certification that all subcontractors performing Work described in ORS 701.005 (i.e., construction Work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055~~6~~ before the subcontractors commence Work under the Contract; and¶
- (V) Price escalation and de-escalation Contract Provision relating to steel materials. As used in this paragraph, "steel material" includes any steel products used for and permanently incorporated in the construction, reconstruction or major renovation of a road or highway. "Escalation and de-escalation" relate to and shall be applied to the raw steel in the steel materials listed in the Contract Provision.¶
- (e) If federal funds are involved, the federal laws, rules and regulations applicable to the fund requirements shall govern in the event they conflict with a provision required by ORS 279A.120 to 279A.155;¶
- (f) Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, transfer rights, or delegate duties under the Contract, either in whole or in part, without ODOT's prior Written consent. Unless otherwise agreed by ODOT in Writing, such consent shall not relieve the Contractor of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If ODOT consents in Writing to an assignment, sale, disposal or transfer of the Contractor's rights or delegation of Contractor's duties, the Contractor and its surety, if any, shall remain liable to ODOT for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless ODOT otherwise agrees in Writing.
- Statutory/Other Authority: ORS 184.619, 279A.050, 279A.065
- Statutes/Other Implemented: ORS 279A.030, 279A.120, 279C.300, 279C.345, 279C.365, 279C.375, 279C.390, 279C.500 - 279C.870, 305.385, 701.005, 701.055

AMEND: 731-005-0505

RULE SUMMARY: This rule is amended for housekeeping and plain language.

CHANGES TO RULE:

731-005-0505

Electronic Procurement ¶¶

- (1) General. ODOT may utilize Electronic Advertisement of Public Improvement Contracts in accordance with ORS 279C.360, provided that advertisements of such Contracts with an estimated Contract Price in excess of \$125,000 are also published in a trade newspaper of general statewide circulation. ODOT may post notices of intent to award electronically as provided by ORS 279C.410.¶¶
- (2) Alternative Procedures. In the event that ODOT desires to direct or permit the submission and receipt of Offers for a Public Improvement Contract by electronic means, as allowed under ORS 279C.365, it shall first promulgate supporting procedures substantially in conformance with OAR chapter 731 division 5, taking into account ORS Chapter 279C requirements for Written Bids, opening Bids publicly, Bid security, first-tier subcontractor disclosure and inclusion of prevailing wage rates.¶¶
- (3) Interpretation. Nothing in this rule shall be construed as prohibiting ODOT from making procurement documents for Public Improvement Contracts available in electronic format as well as in hard copy when Bids are to be submitted only in hard copy.¶¶
- (4) Electronic Procurement Authorized:¶¶
- (a) ODOT may conduct all phases of a Procurement, including without limitation the posting of Electronic Advertisements and the receipt of Electronic Offers, by electronic methods if and to the extent ODOT specifies in a Solicitation Document, or any other Written instructions on how to participate in the Procurement;¶¶
- (b) ODOT shall open an Electronic Offer in accordance with electronic security measures in effect at ODOT at the time of its receipt of the Electronic Offer. Unless ODOT provides procedures for the secure receipt of Electronic Offers, the Person submitting the Electronic Offer assumes the risk of premature disclosure due to submission in unsealed form;¶¶
- (c) ODOT's use of electronic or digital Signatures shall be consistent with applicable statutes and rules. ODOT may limit the use of electronic methods of conducting a procurement as advantageous to the contracting agency;¶¶
- (d) If ODOT determines that Bid or Proposal security is or will be required, ODOT shall not authorize Electronic Offers unless it has established methods for receipt of such security.¶¶
- (5) Rules Governing Electronic Procurements. ODOT shall conduct all portions of an Electronic Procurement in accordance with OAR chapter 731 division 5, unless otherwise set forth in this rule.¶¶
- (6) Preliminary Matters. As a condition of participation in an eElectronic Procurement ODOT may require potential Contractors to:¶¶
- (a) Register with ODOT before the date and time on which ODOT will first accept Offers;¶¶
- (b) Agree to the terms, conditions, or other requirements of a Solicitation Document; or¶¶
- (c) Agree to terms and conditions governing the procurement, such as procedures that ODOT may use to attribute, authenticate or verify the accuracy of an Electronic Offer, or the actions that constitute an electronic or digital Signature.¶¶
- (7) Offer Process. ODOT may specify that persons must submit an Electronic Offer by a particular date and time.¶¶
- (8) Receipt of Electronic Offers:¶¶
- (a) If ODOT permits Electronic Offers in the Solicitation Document, the Offeror may submit Electronic Offers in accordance with the Solicitation Document. ODOT shall not consider Facsimile or Electronic Offers unless authorized by the Solicitation Document;¶¶
- (b) When ODOT conducts an eElectronic pProcurement that provides that all Electronic Offers must be submitted by a particular date and time, ODOT shall receive the Electronic Offers in accordance with OAR chapter 731 division 5;¶¶
- (c) A person may withdraw an Electronic Offer at any time prior to the specified date and time in accordance with sSolicitation dDocuments.¶¶
- (9) Failure of the Electronic Procurement System. In the event of a failure of ODOT's Electronic Procurement System that interferes with the ability of Persons to submit Electronic Offers, protest or to otherwise participate in the procurement, the contracting agency may cancel the procurement in accordance with OAR 731-005-0730, or may extend the date and time for receipt of Electronic Offers by providing notice of the extension immediately after the Electronic Procurement System becomes available.
- Statutory/Other Authority: ~~ORS 184.616~~, 184.691, 279A.065
Statutes/Other Implemented: ORS 279A.065, ORS 279C.365

AMEND: 731-005-0510

RULE SUMMARY: This rule is amended for housekeeping purposes.

CHANGES TO RULE:

731-005-0510

Use of Electronic Data Interchange ¶

- (1) Agency Authorization. ODOT may authorize Offerors to submit EDI Offers. If ODOT determines that Bid or Proposal security is or will be required, ODOT should not authorize EDI Offers unless ODOT has a method for receipt of such security. Prior to authorizing EDI Offers, ODOT must:¶
- (a) Establish administrative procedures and controls for receiving, identifying, recording, and safeguarding EDI Offers, to ensure timely delivery of the Offers to the Opening location and to preserve the "sealed" requirement of competitive procurement;¶
 - (b) Determine whether ODOT's procedures, controls, equipment and personnel are capable of receiving the size and volume of anticipated EDI Offers within a short period of time; and¶
 - (c) Make available to interested vendors an EDI "trading partner" or operating agreement ("~~EDI Operating Agreement~~").¶
- (2) EDI Operating Agreement. An EDI Operating Agreement must address the basic legal issues required to formalize an EDI relationship. The EDI Operating Agreement shall include the following:¶
- (a) Selection of EDI standards and methods of communication;¶
 - (b) Allocation of responsibilities for ensuring that the equipment, software and services are operated and maintained effectively;¶
 - (c) Procedures for making system changes that ~~may impair the ability~~ consider the impact of ~~on~~ the parties' ability to communicate;¶
 - (d) Required security and authentication procedures and services;¶
 - (e) The method for establishing receipt of Offers and for evidencing the Offeror is bound to its Offer;¶
 - (f) The need, {if any}, for maintaining confidentiality;¶
 - (g) The allocation of liabilities for failure to meet requirements under the EDI Operating Agreement;¶
 - (h) Methods for resolving any disputes under the EDI Operating Agreement; and¶
 - (i) Document backup and replacement procedures.¶
- (3) Provisions to ~~Be~~ included in Solicitation. In addition to all other requirements, if ODOT authorizes an EDI Offer, ODOT will include in the Solicitation Document provisions substantially similar to the following:¶
- (a) An EDI Offer, as used in this solicitation, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by ODOT in accordance with the EDI Operating Agreement between ODOT and Offeror.¶
 - (b) An Offeror may submit an EDI Offer in response to this solicitation provided the Offeror has an effective EDI Operating Agreement with ODOT. The EDI Offer must ~~arrive at the place and by the time~~ be received as specified in the Solicitation Document.¶
 - (c) An Offeror must Sign its EDI Offer in accordance with the EDI Operating Agreement between ODOT and the Offeror.¶
 - (d) ODOT reserves the right to award the Contract based solely on the EDI Offer. Unless otherwise provided under the EDI Operating Agreement, the Offeror shall promptly submit conformed Signed documents upon ODOT's request.¶
 - (e) Unless otherwise expressly agreed upon under the EDI Operating Agreement, ODOT is not responsible for any failure attributable to the transmission or receipt of the EDI Offer including, but not limited to the following:¶
- (A) Receipt of garbled or incomplete documents.¶
 - (B) Availability or condition of the receiving equipment.¶
 - (C) Incompatibility between the sending and receiving equipment.¶
 - (D) Delay in transmission or receipt of documents.¶
 - (E) Failure of the Offeror to properly identify the Offer documents.¶
 - (F) Illegibility of Offer documents.¶
 - (G) Security and confidentiality of data.

Statutory/Other Authority: ~~ORS 184.616~~, 184.619, 279A.050, 279A.065

Statutes/Other Implemented: ORS 279A.065, 279C.365

AMEND: 731-005-0520

RULE SUMMARY: This rule is being amended for housekeeping purposes.

CHANGES TO RULE:

731-005-0520

Notice and Advertising Requirements; Posting ¶¶

(1) Notice and Distribution Fee. ODOT shall furnish ~~N~~notice as set forth in subsections (a) through (c) of this section, to a number of ~~entitie~~Persons sufficient for the purpose of fostering and promoting competition. The ~~N~~notice shall indicate where, when, how, and for how long the Solicitation Document may be obtained and generally describe the Work. The ~~N~~notice may contain any other appropriate information. ODOT may charge a fee or require a deposit for the Solicitation Document. ODOT may furnish ~~N~~notice using any method determined to foster and promote competition, including:¶¶

(a) Mailing ~~N~~notice of the availability of Solicitation ~~D~~documents ("~~Notice~~") to ~~Entitie~~Persons that have expressed an interest in ODOT's procurements;¶¶

(b) Placing ~~N~~notice on ODOT's Electronic Procurement System; or¶¶

(c) Placing ~~N~~notice on ODOT's internet web site.¶¶

(2) Advertising. Pursuant to ORS 279C.360 and this rule, ODOT shall advertise every Solicitation for competitive Bids or competitive Proposals for a Public Improvement Contract, unless ODOT has exempted the Solicitation from the advertisement requirement as part of a competitive Bidding exemption under ORS 279C.335:¶¶

(a) Unless ODOT publishes by Electronic Advertisement as permitted under subsection (b) of this section, ODOT shall publish the advertisement for Offers at least once in at least one newspaper of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as ODOT may determine to be necessary or desirable to foster and promote competition;¶¶

(b) ODOT may publish by Electronic Advertisement;¶¶

(c) In addition to ODOT's publication required under subsection (a) or (b) of this section, ODOT shall also publish an advertisement for Offers in at least one trade newspaper of general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000;¶¶

(d) All advertisements for Offers shall set forth:¶¶

(A) The Public Improvement project;¶¶

(B) The scheduled Closing, that shall not be less than five Days after the date of the last publication of the advertisement or in the case of electronic advertisement, the scheduled closing shall not be less than five Days after the date ODOT uploads and posts the electronic advertisement to be viewable by the public;¶¶

(C) The date that ~~Entitie~~Persons must file applications for prequalification if prequalification is a requirement and the class or classes of Work for which ~~Entitie~~Persons must be prequalified;¶¶

(D) The nature of the Work to be performed or the goods to be purchased;¶¶

(E) The office where the Solicitation Documents may be reviewed;¶¶

(F) The name, title and address of ODOT person authorized to receive Offers;¶¶

(G) The scheduled Opening; and¶¶

(H) If applicable, that the Contract is for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 276(a)).¶¶

(3) ~~Certification Office for Business Inclusion and Diversity~~Equity Notice. ODOT shall provide timely notice of all solicitations to the ~~Advocate for Business Inclusion and Diversity~~ if the estimated ~~CDirector for Diversity, Equity and Inclusion, Governor's Office, in accordance with contract P~~price exceeds \$10,000 ~~stated in ORS 200.035.~~

Statutory/Other Authority: ORS 184.619, 279A.050, 279A.065

Statutes/Other Implemented: ORS 200.035, 279C.360

AMEND: 731-005-0580

RULE SUMMARY: This rule is being amended for housekeeping purposes.

CHANGES TO RULE:

731-005-0580

Addenda to a Solicitation Document ¶¶

(1) Issuance; Receipt. ODOT may change a Solicitation Document only by Written Addenda.¶

(2) Notice and Distribution. ODOT shall notify prospective Offerors of Addenda consistent with the standards of notice set forth in OAR 731-005-0520(1). The Solicitation Document shall specify how ODOT will provide notice of Addenda and how ODOT will make the Addenda available (see as required by OAR 731-005-0470(3)(a)(N)). For example, "Agency will not mail notice of Addenda, but will publish notice of any Addenda on Agency's WEB site. Addenda may be downloaded off ODOT's WEB site. Offerors should check ODOT's WEB site weekly until the week of Closing and daily the week of the Closing."¶

(3) Timelines; Extensions. ODOT shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. ODOT should extend the Closing if ODOT determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by public interest, ODOT shall not issue Addenda less than 48 hours before the Closing unless the Addendum also extends the Closing.¶

(4) Request for Change or Protest. Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum as provided in OAR 731-005-0570(2) through (5), within 24 hours following issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under OAR 731-005-0570, whichever date is later. ODOT shall consider only an Offeror's request for change or protest to the Addendum; ODOT shall not consider a request for change or protest to matters not added or modified by the Addendum.

Statutory/Other Authority: ~~ORS 184.616~~, 184.619, 279A.050, 279A.065

Statutes/Other Implemented: ORS 279A.065, 279C.395

AMEND: 731-005-0600

RULE SUMMARY: This rule is being amended for housekeeping purposes.

CHANGES TO RULE:

731-005-0600

Receipt, Opening, and Recording of Offers ¶¶

(1) Receipt. ODOT shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt, or provide a self-time-stamping device for use by Offerors for these purposes. ODOT shall not open the Bid or Proposal Price Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If ODOT inadvertently opens a Bid or Proposal Price Offer or a modification prior to the Opening, ODOT shall return the Bid or Proposal Price or modification to its secure and confidential state until Opening. ODOT shall document the resealing for the procurement file (e.g. "Contracting Agency inadvertently opened the Offer due to improper identification of the Offer").¶¶

(2) Opening and recording. ODOT shall publicly open Bid or Proposal Price Offers including any modifications made to the Offer pursuant to OAR 731-005-0590. To the extent practicable, ODOT shall read aloud the name of each Bidder or Price Proposer, the total of each Bid or Proposal Price, and such other information as ODOT considers appropriate. In the case of ~~Requests for Proposal~~ RFPs, if the Solicitation Document so provides, ODOT will not read Offers aloud.¶¶

(3) Availability. After Opening, ODOT shall make Bids available for public inspection. Proposals are not subject to disclosure until after notice of intent to award is issued as specified in ORS 279C.410. In any event, ODOT may withhold from disclosure those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.501, 345(2); 646.461 to 646.475. To the extent ODOT determines such designation is not in accordance with applicable law, ODOT shall make those portions available for public inspection. The Offeror shall separate information designated as confidential from other non-confidential information at the time of submitting its Offer. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and shall be publicly available regardless of an Offeror's designation to the contrary.

Statutory/Other Authority: ORS 184.619, 279A.050, 279A.065

Statutes/Other Implemented: ORS 279C.365, 279C.410

AMEND: 731-005-0690

RULE SUMMARY: This rule is being amended for housekeeping purposes.

CHANGES TO RULE:

731-005-0690

Protest of Contractor Selection, Contract Award ¶¶

(1) Purpose. An adversely affected Offeror must exhaust all avenues of administrative review and relief before seeking judicial review of ODOT's Contractor selection or Contract award decision.¶¶

(2) Notice of Intent to Award. Unless otherwise provided in the Solicitation Document, ODOT shall provide ~~¶~~Notice of the i~~n~~tent to a~~n~~ Award on the ODOT web site. ODOT's award shall not be final until the later of the following:¶¶

(a) Three working days after the date of the notice, unless the Solicitation Document provided a different period for protest; or¶¶

(b) ODOT provides a Written response to all timely-filed protests that denies the protest and affirms the award.¶¶

(3) Notice of Competitive Range. Unless otherwise provided in the RFP, ODOT shall provide Written notice to all Proposers of ODOT's determination of the Proposers included in the Competitive Range. ODOT's notice of the Proposers included in the Competitive Range shall not be final until the later of the following:¶¶

(a) Ten Days after the date of the notice, unless otherwise provided therein; or¶¶

(b) Until ODOT provides a Written response to all timely-filed protests that denies the protest and affirms the notice of the Proposers included in the Competitive Range.¶¶

(4) Right to Protest Award.¶¶

(a) An adversely affected Offeror may submit to ODOT a Written protest of ODOT's Notice of Intent to Award ~~Bid~~ within three working days after issuance of the Notice of Intent to Award ~~Bid~~, unless a different protest period is provided under the Solicitation Document.¶¶

(b) The Offeror's protest must specify the grounds upon which the protest is based.¶¶

(c) An Offeror is adversely affected only if the Offeror is one of the three apparent low Bidders on an ~~Invitation to Bid~~ TB or three highest scoring Proposers in the case of an RFP.¶¶

(d) ODOT shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document.¶¶

(5) Right to Protest Competitive Range.¶¶

(a) An adversely affected Proposer may submit to ODOT a Written protest of ODOT's decision to exclude the Proposer from the Competitive Range within seven Days after issuance of the notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document.¶¶

(b) The Proposer's protest shall be in Writing and must specify the grounds upon which the protest is based.¶¶

(c) A Proposer is adversely affected only if the Proposer is responsible and submitted a Responsive Proposal and is eligible for inclusion in the Competitive Range i.e., the protesting Proposer must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Proposers are removed from consideration, and that those ineligible Proposers are ineligible for inclusion in the Competitive Range because:¶¶

(A) Their Proposals were not responsive; or¶¶

(B) ODOT committed a substantial violation of a provision in the RFP or of an applicable procurement statute or administrative rule, and the protesting Proposer was unfairly evaluated and would have, but for such substantial violation, been included in Competitive Range.¶¶

(d) ODOT shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest ODOT's decision to not increase the Competitive Range above the Competitive Range set forth in the RFP.¶¶

(6) Authority to Resolve Protests. The ODOT ~~Highway Division Administrator~~ Chief Procurement Officer, or designee, has the authority to settle or resolve a Written protest submitted in accordance with the requirements of this rule.¶¶

(7) Decision. If a protest is not settled, the ODOT ~~Highway Division Administrator~~ Chief Procurement Officer or designee, shall promptly issue a Written decision on the protest. Judicial review of this decision will be available if provided by statute.¶¶

(8) Contract Execution. The successful Offeror shall promptly execute the Contract after the award is final. ODOT shall execute the Contract only after it has obtained all applicable required documents and approvals.

Statutory/Other Authority: ORS 184.619, 279A.050, 279A.065

Statutes/Other Implemented: ORS 279C.375, 279C.385, 279C.460

RULE SUMMARY: This rule is being amended for housekeeping purposes.

CHANGES TO RULE:

731-005-0710

Disqualification of an Entity ¶¶

(1) Authority. ODOT may disqualify an Entity from consideration of award of ODOT's Contracts after providing the Entity with notice and a reasonable opportunity to be heard in accordance with section (3) of this rule.¶¶

(a) Standards for Conduct Disqualification. As provided in ORS 279C.440, ODOT may disqualify an Entity for:¶¶

(A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private Contract or subcontract, or in the performance of such Contract or subcontract;¶¶

(B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the Entity's responsibility as a Contractor;¶¶

(C) Conviction under state or federal antitrust statutes; or¶¶

(D) Violation of a public or private Contract provision that is regarded by ODOT to be so serious as to justify Disqualification under ~~OAR 734-010-0340~~ORS 279C.440(2)(d).¶¶

(E) The Entity does not carry workers' compensation or unemployment insurance in compliance with statutory and contractual requirements.¶¶

(b) Standards for DBE Disqualification. As provided in ORS 200.065, 200.075 or 279A.110, ODOT may disqualify an Entity's right to submit an Offer or to participate in a Contract (e.g. subcontractors) as follows:¶¶

(A) For a DBE Disqualification under ORS 200.065, ODOT may disqualify an Entity upon finding that:¶¶

(i) The Entity fraudulently obtained or retained or attempted to obtain or retain or aided another person to fraudulently obtain or retain certification as a disadvantaged business enterprise, a minority-owned business, a woman-owned business, a business that a service-disabled veteran owns, or an emerging small business;¶¶

(ii) The Entity knowingly made a false claim that any person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit; or¶¶

(iii) The Entity has been disqualified by another Agency pursuant to ORS 200.065.¶¶

(B) For a DBE Disqualification under ORS 200.075, ODOT may disqualify an Entity upon finding that:¶¶

(i) The Entity has entered into an agreement representing that a disadvantaged business enterprise, a minority-owned business, a woman-owned business, a business that a service-disabled veteran owns, or an emerging small business, ~~certified pursuant to ORS 200.055 ("Certified Enterprise"),~~ will perform services or supply materials under a ~~Public Improvement~~ Contract without the knowledge and consent of the ~~Certified Enterprise~~;¶¶

(ii) The Entity exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any ~~Certified Enterprise~~;¶¶

(iii) The Entity uses a disadvantaged business enterprise ("DBE"), a minority-owned business ("MBE"), a woman-owned business ("WBE"), a business that a service-disabled veteran owns, or an emerging small business ("ESB") to perform services under a Contract or to provide supplies under a ~~Public Improvement~~ Contract to meet an established DBE/MBE/WBE/ESB goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(4), in performing its obligations under the Contract; or¶¶

(iv) If an Entity is ~~Disqualified~~ for a DBE Disqualification under ORS 200.075, ODOT shall not permit such Entity to participate in ODOT's Contracts.¶¶

(C) For a DBE Disqualification under ORS 279A.110, ODOT may disqualify an Entity if ODOT finds that the Entity discriminated against a disadvantaged business enterprise, a minority-owned business, a woman-owned business, a business that a service-disabled veteran owns, or an emerging small business in awarding a subcontract under a prior Contract with ODOT.¶¶

(2) Notice of Intent to Disqualify. ODOT shall notify the Entity in Writing of a proposed Disqualification under subsection (1) above, personally or by registered or certified mail, return receipt requested. This notice shall:¶¶

(a) State that ODOT intends to disqualify the Entity;¶¶

(b) Set forth the reasons for the Disqualification;¶¶

(c) Include a statement of the Entity's right to a hearing if requested in Writing within the time stated in the notice and that if ODOT does not receive the Entity's Written request for a hearing within the time stated, the Entity shall have waived its right to a hearing;¶¶

(d) Include a statement of the authority and jurisdiction under which the hearing will be held;¶¶

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

(f) State the proposed Disqualification period; and¶¶

(g) State that the Entity may be represented by legal counsel.¶¶

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

(4) Notice of Disqualification. ODOT will notify the Entity in Writing of its Disqualification under subsection (1) above, personally or by registered or certified mail, return receipt requested. The notice shall contain:¶

(a) The effective date and period of Disqualification;¶

(b) The grounds for Disqualification; and¶

(c) A statement of the Entity's appeal rights and applicable appeal deadlines. For a Conduct Disqualification or a DBE Disqualification under ORS 279A.110, the Disqualified Entity must notify ODOT in Writing within three business days after receipt of ODOT's notice of Disqualification if the Entity intends to appeal ODOT's decision. Statutory/Other Authority: ORS 184.619, 279A.050, 279A.065

Statutes/Other Implemented: ORS 200.065, 200.075, 279A.110, 279C.440, 279C.445, 279C.450

ADOPT: 731-007-0225

RULE SUMMARY: Adopting definitions rule.

CHANGES TO RULE:

731-007-0225

Definitions

The following definitions apply to terms used in OAR 731-007-0220 to 731-007-0570. Other capitalized terms used in these rules are defined in the Public Procurement Code: ORS 279A, 279B and 279C, the DOJ Model Rules, and in OAR chapter 731, division 5.

(1) Applicant: The person submitting a contractor's prequalification application to ODOT.

(2) DOJ Model Rules: The rules in OAR chapter 137 written and adopted by the Department of Justice for state contracting agencies.

(3) Highway Construction Contract: A Public Improvement Contract governed by OAR chapter 731, divisions 5 and 7, and that is approved by the Oregon Transportation Commission in the Statewide Transportation Improvement Program.

(4) ODOT: The Oregon Department of Transportation.

(5) OPO: The ODOT Procurement Office.

(6) Region Construction Contract: A Public Improvement Contract not governed by OAR chapter 731, divisions 5 and 7. Region Construction Contracts are governed by chapter 731, division 149. Region Construction Contracts also include procurements in support of Highway Construction Contracts.

(7) Revise and Reissue: Actions taken by the OPO Construction Contracts Manager when ODOT has reasonable cause to believe that there has been a substantial change in conditions of a prequalified person and that the person is no longer qualified or is less qualified and ODOT provides reasonable notice to the prequalified person.

(8) Revocation: An action taken by ODOT terminating a contractor's prequalification and ability to bid.

(9) Suspension: An action taken by ODOT to suspend a contractor's prequalification for a specified period of time as prescribed by ODOT procedure.

Statutory/Other Authority: ORS 184.619, 279A.050, 279A.065

Statutes/Other Implemented: ORS 279A, 279B, 279C, OAR 731, division 5

AMEND: 731-007-0250

RULE SUMMARY: Updating rule to reflect ODOT's bid and proposal evaluation criteria and point to the Director of Transportation's authority to exempt competitive bidding requirements.

CHANGES TO RULE:

731-007-0250

Bid or Proposal Evaluation Criteria ¶¶

(1) General. A Public Improvement Contract, if awarded, shall be awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal, provided that such Entity is not listed by the Construction Contractors Board as disqualified to hold a Contract for a Public Improvement. See OAR 731-005-0650; and ~~Rules~~OAR 731-007-0340 for Alternative Contracting Methods ~~at OAR 731-007-0360 to 731-007-0400.~~¶¶

(2) Bid Evaluation Criteria. Invitations to Bid may solicit lump-sum Offers, unit-price Offers, or a combination of the two:¶¶

(a) If the ITB requires a lump-sum Bid, without additive or deductive alternates, or if ODOT elects not to award additive or deductive alternates, Bids shall be compared on the basis of lump-sum prices, or lump-sum base Bid prices, as applicable. If the ITB calls for a lump-sum base Bid, plus additive or deductive alternates, the Solicitation Documents shall provide the criteria for selection; and¶¶

(b) If the Bid includes unit pricing for estimated quantities, the total Bid price shall be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by ODOT, for the purpose of comparing Bids. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price shall govern. See OAR 731-005-0620(2)(b).¶¶

(3) Proposal Evaluation Criteria. If ~~DA~~the Director of Transportation has exempted the procurement of a Public Improvement from the competitive bidding requirements of ORS 279C.335(1), and has authorized ~~ODOT to~~the use of an Alternative Contracting Method under ORS 279C.335(3), ODOT shall set forth the evaluation criteria in the Solicitation Documents if they differ from those in division 5 (or the Specifications). ~~See OAR 731-007-0390, and as required by OAR 137-049-0650 and~~ ORS 279C.335(2) and (3).

Statutory/Other Authority: ~~ORS 184.616,~~ 184.619, 279A.050, 279A.065

Statutes/Other Implemented: ORS 279A.065, 279C.335

CHANGES TO RULE:

731-007-0260

~~Disclosure and Substitution of First-Tier Subcontractors~~ First-Tier Subcontractors; Disclosure and Substitution ¶

(1) ~~Required Disclosure. Within two working hours of the Bid Closing on an ITB for a Public Improvement having a Bid price exceeding \$100,000, a Bidder shall submit to ODOT a disclosure form as described by this rule. The disclosure form shall identify any first-tier subcontractors (those Entities that would be contracting directly with the prime Contractor) that will be furnishing labor or labor and materials on the Contract, if awarded, whose subcontract value would be equal to or greater than:~~¶

~~(a) Five percent of the total Contract Bid, but at least \$15,000; or~~¶

~~(b) \$350,000 regardless of the percentage of the total Bid.~~¶

~~(2) Disclosure Deadline and Bid Opening. For each Bid Proposal or ITB to which this rule applies, ODOT shall:~~¶

~~(a) Receive bids until the time identified as Closing time and at the location described in the ITB and immediately thereafter publicly open the bids;~~¶

~~(b) Set the Bid Opening at the time and place identified in the ITB; and~~¶

~~(c) Consider for Contract award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed by the Agency.~~¶

~~(3) Bidder Instructions and Disclosure Form. For the purposes of this rule, ODOT in its solicitation shall:~~¶

~~(a) Prescribe the disclosure form that must be utilized; and~~¶

~~(b) Provide instructions in a notice substantially similar to the following:~~¶

~~(A) "Instructions for First-Tier Subcontractor Disclosure. Bidders are required to disclose information about certain first-tier subcontractors (see ORS 279C.370). Specifically, when the Bid of a first-tier subcontractor is greater than or equal to:~~¶

~~(i) 5% of the project Bid, but at least \$15,000; or~~¶

~~(ii) \$350,000 regardless of the percentage, you must disclose the following information about that subcontract within two (2) working hours of Bid Closing:~~¶

~~(aa) The subcontractor's name;~~¶

~~(bb) The category of work the subcontractor will be performing; and~~¶

~~(cc) The dollar value of the subcontract.~~¶

~~(B) If you will not be using any subcontractors that are subject to the above disclosure requirements, you are required to indicate "NONE" on the accompanying form.~~¶

~~ODOT MUST REJECT THE BID(S) OF A BIDDER WHO, IF REQUIRED TO SUBMIT THIS DISCLOSURE FORM, FAILS TO SUBMIT THE DISCLOSURE FORM WITH THE REQUESTED INFORMATION BY THE STATED DEADLINE. (See OAR 731-007-0270).~~¶

~~(4) To determine disclosure requirements, ODOT recommends that you disclose subcontract information for any subcontractor as follows:~~¶

~~(a) Determine the lowest possible Bid. That will be the base Bid amount less all alternate deductive Bid amounts (exclusive of any options that can only be exercised after Bid award).~~¶

~~(b) Provide the required disclosure information for any first-tier subcontractor whose potential Contract services (i.e., subcontractor's base Bid amount plus all alternate additive Bid amounts, exclusive of any options that can only be exercised after Contract award) are greater than or equal to:~~¶

~~(i) 5% of the lowest Bid amount, but at least \$15,000; or~~¶

~~(ii) \$350,000, regardless of the percentage. Total all possible Work for each subcontractor in making this determination (e.g., if a subcontractor will provide \$15,000 worth of services on the base Bid and \$40,000 on an additive alternate, then the potential amount of subcontractor's services is \$55,000. Assuming that \$55,000 exceeds 5% of the lowest Bid, provide the disclosure for both the \$15,000 services and the \$40,000 services).~~¶

~~(5) For determination of compliance with the disclosure requirements, ODOT will use the total Bid amount submitted by the contractor as verified by ODOT."~~¶

~~(6) Submission. A Bidder shall submit the disclosure form required by this rule within two working hours of Bid Closing in the manner specified by the ITB.~~¶

~~(7) Late Submission. Compliance with the disclosure and submittal requirements of ORS 279C.370 and this rule is a matter of Responsiveness. Bids that are submitted by Bid Closing, but for which the separate disclosure submittal has not been made by the specified deadline, are not Responsive and shall not be considered for Contract award.~~¶

~~(8) Substitution. Substitution of affected first-tier subcontractors shall be made only in accordance with ORS~~

~~279C.585. ODOT does not have a statutory role or duty to review, approve or resolve disputes concerning such~~
~~sThe Oregon Department of Transportation adopts DOJ Model Rule 137-049-0360 First-Tier Subcontractors;~~
~~Disclosure and Substitutions. However, ODOT is not precluded from making related inquiries or investigating~~
~~complaints in order to enforce Contract provisions that require compliance generally with laws, rules and~~
~~regulations.~~

Statutory/Other Authority: ~~ORS 184.616, 184.619, 279A.050, 279A.065~~

Statutes/Other Implemented: ORS 279C.370, ORS 279C.585, ORS 279C.590, ORS 279C.835

AMEND: 731-007-0340

RULE SUMMARY: Amending ODOT's rule to adopt DOJ Model Rule.

CHANGES TO RULE:

731-007-0340

Alternative Contracting Methods--~~Purpose~~ ¶

~~These rules are intended to provide guidance regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as referenced in ORS 279C.335(3)(a). Those methods include, but are not limited to, Design/Build and A plus B forms of contracting.~~
(1) The Oregon Department of Transportation adopts OAR 137-049-0600 through 137-049-0690, the Department of Justice Model Rules, General Provisions Related to Public Contracts for Construction Services, Alternative Contracting Methods.¶

(2) ODOT's Highway Construction Public Improvement Contracts that use an alternative contracting method are also subject to chapter 731 divisions 5 and 7.

Statutory/Other Authority: ~~ORS 184.616, 184.619,~~ 279A.050, 279A.065

Statutes/Other Implemented: ~~ORS 279A.06C.335,~~ 279C.3357, 279C.380(2)

AMEND: 731-007-0520

RULE SUMMARY: This rule is amended for housekeeping purposes.

CHANGES TO RULE:

731-007-0520

Prequalification for Bidding ¶

(1) As provided in ORS 279C.430, ODOT requires that all bidders on Highway Construction Contracts be prequalified within the appropriate class(es) of work contained in the current prequalification application adopted by ODOT.¶

(2) Contractor special prequalification may be required in addition to the mandatory prequalification in subsection (1) when the elements of a particular ~~p~~Public ~~i~~mprovement project require specialized knowledge or expertise. When contractor special prequalification is required, notice of the request for contractor special prequalification will be advertised through ODOT's electronic procurement system, and in at least one trade newspaper of general statewide circulation.¶

(3) Subsection (1) of this rule does not apply to ~~p~~Public ~~i~~mprovement ~~e~~Contracts with a value, estimated by ODOT, of less than \$100,000; however, ODOT may require a contractor special prequalification under subsection (2) even where there is no mandatory prequalification.¶

(4) Subsection (1) of this rule does not apply to Region Construction Contracts.

Statutory/Other Authority: ~~ORS 184.616~~, 184.619, 279A.050, 279A.065, 279C.430

Statutes/Other Implemented: ORS 279C.430

AMEND: 731-007-0530

RULE SUMMARY: This rule is being amended for housekeeping purposes.

CHANGES TO RULE:

731-007-0530

Conditions of Prequalification ¶¶

- (1) Applicants must be prequalified in the class(es) of work designated in the special provisions for the specific project on which the applicant desires to bid.¶¶
- (2) Prequalification applications must be received at ODOT's address shown in the prequalification application at least 10 calendar days before the bid opening in which the applicant wishes to participate.¶¶
- (3) If an applicant fails to complete the application as required or fails to submit the filing fee, ODOT will return the material submitted. Any changes or additional information required by ODOT must be submitted and signed by a person authorized to sign the original application. The changes and additional information must be attested to by a sworn affidavit. The applicant may send a new application that includes the changes or additional information required by ODOT.¶¶
- (4) The date on which all required information has been received by OPO will be considered the receipt date of the prequalification application.¶¶
- (5) Each member of a joint venture must be prequalified, with at least one of the joint venture members prequalified in each of the project's designated class(es) of work as defined in section (1) of this rule. A joint venture may be required to submit a joint venture agreement prior to award of the contract.¶¶
- (6) Subcontractors are not required to be, but may be prequalified.¶¶
- (7) All applicants desiring to prequalify shall:¶¶
 - (a) Complete and submit the prequalification application, in accordance with the directions contained therein, setting forth their qualifications to satisfactorily carry out the work to be performed, and¶¶
 - (b) Submit a filing fee in accordance with ORS 200.055(7) and as described in ODOT's prequalification application instructions. The filing fee must be submitted with the completed prequalification application to ODOT's address shown in the prequalification application.¶¶
- (8) Applicants must renew their prequalifications and pay the prescribed filing fee as directed by ODOT's prequalification application procedures.¶¶
- (9) Applicants shall update their prequalification application with ODOT when information changes. Any change to an applicant's prequalification application must be received at ODOT's address shown in the prequalification application at least 10 days prior to bid opening if that information affects the bid submitted. Any changes requested by the applicant must be submitted and signed by a person authorized to sign the original application. The changes must be attested to by sworn affidavit. There is no charge to update an existing prequalification for minor changes such as changing an address, company name, or adding or deleting class(es) of work. Major changes must be submitted by a new prequalification application.¶¶
- (10) Sections (1) through (9) of this rule also apply to applicants who use ODOT's prequalification system to prequalify for local agency projects.

Statutory/Other Authority: ~~ORS 184.616~~, 184.619, 279A.050, 279A.065, 279C.430

Statutes/Other Implemented: ORS 279C.430