

OFFICE OF THE SECRETARY OF STATE

LAVONNE GRIFFIN-VALADE
SECRETARY OF STATE

CHERYL MYERS
DEPUTY SECRETARY OF STATE
AND TRIBAL LIAISON



ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 731
DEPARTMENT OF TRANSPORTATION

FILED
02/28/2024 3:10 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: General provisions related to Public Improvement Contracts for Construction Services

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 03/21/2024 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.

CONTACT: Guy Britnell
503-930-5090
guy.a.britnell@odot.oregon.gov

355 Capitol Street NE
Salem, OR 97301

Filed By:
Lauri Kunze
Rules Coordinator

NEED FOR THE RULE(S)

- Removes language that conflicts with ODOT's adoption of DOJ Model Rules for Alternative Contracting Methods;
- Adds language that clarifies ODOT's adoption of DOJ Model Rules for Alternative Contracting Methods;
- Adds a definition of Alternative Contracting Delivery and Selection Methods and clarifies applicability; and
- Adds a definition of Exempted Selection Method.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

None

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

No impact anticipated. The amendments proposed in this rulemaking are largely procedural and housekeeping related.

FISCAL AND ECONOMIC IMPACT:

None

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).

None

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

Small businesses were not involved in the development of these rules.

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

These amendments are largely housekeeping in nature.

RULES PROPOSED:

731-005-0410, 731-005-0420, 731-005-0430, 731-005-0440, 731-005-0460, 731-005-0470, 731-005-0490, 731-005-0500, 731-005-0505, 731-005-0510, 731-005-0520, 731-005-0530, 731-005-0540, 731-005-0550, 731-005-0560, 731-005-0590, 731-005-0600, 731-005-0620, 731-005-0650, 731-005-0660, 731-005-0670, 731-005-0690, 731-005-0700, 731-005-0710, 731-005-0740, 731-005-0760, 731-005-0770, 731-005-0800, 731-007-0200, 731-007-0210, 731-007-0220, 731-007-0225, 731-007-0230, 731-007-0240, 731-007-0250, 731-007-0260, 731-007-0340, 731-007-0350, 731-007-0360, 731-007-0370, 731-007-0380, 731-007-0390, 731-007-0400, 731-007-0500, 731-007-0510, 731-007-0520, 731-007-0530, 731-007-0540, 731-007-0560, 731-007-0570, 731-149-0010

REPEAL: 731-005-0410

RULE SUMMARY: Prescribing effective date for Rule.

CHANGES TO RULE:

~~731-005-0410~~

~~Effective Date ¶~~

~~OAR 731-005-0410 through 731-005-0770 as amended become effective on March 1, 2022 and apply to Public Improvement Contracts first advertised, but if not advertised then entered into, on or after March 1, 2022.~~

~~Statutory/Other Authority: 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: Relating to the applicability of the rules in this section.

CHANGES TO RULE:

731-005-0420

Applicability ¶

(1) OAR 731-005-0410 through 731-005-0770 apply to Highway 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, unless an exemption to use an Alternative Contracting Delivery and Selection Method has been granted in accordance with 279C.335. Highway Construction Contracts delivered through an Alternative Contracting Delivery and Selection Method are subject to (2) below. ¶

(2) Alternative Contracting Delivery and Selection Methods: OAR 137-049-0610 through 137-049-0690 related to Alternative Contracting Methods for Public Improvement Contracts are adopted to apply to Highway Construction Contracts subject to an Alternative Contracting Delivery and Selection Method exemption. Per ORS 279C.337, construction manager/general contractor services shall be procured in accordance with the model rules the more general requirements of the division 5 rules. Attorney General adopts under ORS 279A.065 (3) as may be updated from time to time (see OAR 137-049-0690 et al); therefore, OAR 137-049-0610 through 137-049-0690 applicable to procurements of construction manager/general contractor services adopted pursuant to ORS 279A.065(3) and ORS 279C.337(1), are directly applicable to the Oregon Department of Transportation and are not separately adopted herein. ¶

(3) All other ODOT Public Improvement Contracts not included in (1) or (2) above are governed by OAR chapter 731, division 149, and are exempt from these OAR chapter 731, division 5 and division 7 rules. ¶

(4) The Oregon Department of Transportation adopts DOJ Model Rule 137-049-0360 First-Tier Subcontractors: Disclosure and Substitution.

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

Statutes/Other Implemented: ORS 279A, 279C

RULE SUMMARY: Relating to the definition of terms used in this section of the rules.

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) Alternative Contracting Delivery and Selection Method: A delivery method other than the conventional method of design-bid-build, such as variations of Design/Build, CM/GC, ID/IQ and similar and forms of contracting. The use of an Alternative Contracting Method is an exception to ORS 279C.300 and is subject to the exemption process as set forth in ORS 279C.335 and OAR 137-049-0620 and related rules.

(3) 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.

~~(34) Bidder: An Entity that submits a Bid in response to an ITB.~~

~~(45) Closing: The date and time announced in the Solicitation Document as the deadline for submitting Offers.~~

~~(56) 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 731-007-0520(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~~ Exempted Selection Method: A selection method other than the Low Bid method, such as cost plus multiparameter (time, qualifications, approach, and/or means and methods) and other similar forms of selection. Use of an Exempted Selection Method does not result in an Alternative Contracting Delivery Method. The use over telephone lines and printed in another location, of an Exempted Selection Method is an exception to ORS 279C.300 and is subject to the exemption process as set forth in ORS 279C.335.¶

(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.¶

(27) 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.¶

(28) 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.¶

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

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

~~(31) Offeror: A Bidder or Proposer as applicable.¶~~

(31) Offeror: A Bidder.¶

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

(33) 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.¶

(34) 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.¶

~~(35) Proposal: A competitive Offer, binding on the Proposer and submitted in response to a Request for Proposals.¶~~

~~(36) Proposer: An Entity that submits a Proposal in response to a Request for Proposals.¶~~

~~(37) 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.¶~~

~~(38) 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.¶~~

~~(40) 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.¶~~

~~(41) 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.¶~~

~~(42) 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.¶~~

~~(43) 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.¶~~

(44) 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.¶¶

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

(463) 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.¶¶

(474) 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.¶¶

(485) 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.¶¶

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

(5047) 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: 731-005-0440

RULE SUMMARY: Relating to the method used to procure Public Improvements.

CHANGES TO RULE:

731-005-0440

Competitive Procurement ¶

(1) Generally. In accordance with ORS 279C.300, ODOT shall procure its Public Improvements by an ITB or RFP except as otherwise allowed or required in ORS 279A.025, 279A.100, 279A.105, 279A.120(2), 279A.125, 279C.335, or 282.210.¶

~~(2) It is the policy of the State of Oregon to encourage open and impartial competition in public contracting. ODOT must make every effort to construct Public Improvements at the least cost to ODOT.¶~~

(2) Exempted Selection Method. ORS Chapter 279C requires a competitive bidding process for Highway Construction Contracts unless a statutory exception applies, a class of Contracts has been exempted or an individual Contract has been exempted in accordance with ORS 279C.335 and any applicable DAS rules. If Agency has received an Exemption from competitive bidding in accordance with ORS 279C.335, Agency shall procure that Public Improvement in accordance with the approved Exempted Selection Method as set forth in the Exemption Order and its Findings in lieu of the requirements set forth in OAR 731-005-0650 OAR 731-005-0659. The Exempted Selection Method requirements set forth in this Division 5 is not applicable to selection and delivery of Alternative Contracting projects, which is governed by 731-005-0420(2).¶

(a) OAR Chapter 731, Division 7 Prequalification requirements and any associated OAR Chapter 731, Division 5 rules implementing Prequalification requirements do not apply to projects procured pursuant to an Exempted Selection Method.¶

(b) Post-Project Evaluation. In accordance with ORS 279C.355, ODOT shall complete the required post-project evaluation of public improvement projects not contracted by competitive bidding.¶

(3) Federal Provisions. If federal funds are involved, in accordance with ORS 279A.030, federal laws, rules and regulations shall govern the provisions of these rules in the event of conflict.

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

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

AMEND: 731-005-0460

RULE SUMMARY: Regarding an Entity's eligibility to bid on a construction or landscape Contract.

CHANGES TO RULE:

731-005-0460

Eligibility to Bid or Propose on Construction or Landscape Contracts ¶

(1) Construction Contracts. ODOT shall not consider an Entity's Offer to do Work as a Contractor, as defined in ORS 701.005(2), unless the Entity has a current, valid certificate of registration issued by the Construction Contractors Board. Registration is not a requirement of bidding on federal funded projects.¶

(2) Landscape Contracts. ODOT shall not consider an Entity's Offer to do Work as a landscape Contractor as defined in ORS 671.520(2), unless the Entity has a current, valid landscape Contractor's license issued pursuant to ORS 671.560 by the State Landscape Contractors Board. Registration is not a requirement of bidding on federal funded projects.¶

(3) Noncomplying Entities. ODOT shall deem an Offer received from an Entity that fails to comply with this rule nonresponsive and shall reject the Offer, unless contrary to federal law.

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

Statutes/Other Implemented: ORS 279C.365, 671.530, 701.055

AMEND: 731-005-0470

RULE SUMMARY: Relating to what is required to be included in Solicitation Documents.

CHANGES TO RULE:

731-005-0470

Solicitation Method Documents ¶¶

(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 a 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 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 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 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 Documents shall include the following:¶¶

(a) General Information:¶¶

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

(i) The time, date and location of any pre-Offer Bid 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.¶¶

(Ab) 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;¶¶

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

(Ad) Instructions and information concerning submission requirements including the address of the office to which Offer Bids must be delivered and any other special information, e.g., whether Offer Bids 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);¶¶

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

(Af) The time and date of Closing after which ODOT will not accept Offer Bids, which time shall be not less than five 5 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:00 p.m. on Friday; for timing issues relating to Addenda see OAR 731-005-0580(3);¶¶

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

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

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

(Jj) 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 Bid will be received or considered by

ODOT unless the Offer Bid contains a statement by the Offeror Bid 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;"¶

(Kk) If the Work so requires, a statement that ODOT will not receive or consider an Offer Bid from a Person when the Person Bidder that 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;¶

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

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

(bo) 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 Process:¶

(A) A statement that ODOT may reject any Offer statement that the contracting agency may reject a Bid that does not in compliance with all prescribed solicitation bidd public contracting 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 the contracting agency may reject for good cause any or all Offer bids 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) As applicable, the advertisement must comply the domestic preference (Buy America) requirements set forth in ORS 279C.303; and¶

(g) If designated a Community Benefit 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 RFP, 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 RFP 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 range; and¶

(D) Reference to statutory preference for materials and supplies manufactured from recycled materials under ORS 279A.125.the advertisement must contain the requirements set forth in ORS 279C.308 and OAR 731-005-0900.¶

(2) 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;¶

(d3) Terms and Conditions. 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:¶

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

(Bb) 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;¶

(Cc) 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;¶

(Dd) 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);¶

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

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

(Gg) 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);¶

(Hh) Hours of labor in compliance with ORS 279C.520 and 279C.540;¶

(Ii) Environmental and natural resources regulations (ORS 279C.525);¶

(Jj) Payment for medical care and providing workers' compensation (ORS 279C.530);¶

(Kk) Maximum hours and overtime (ORS 279C.540);¶

(L) Claims for overtime (ORS 279C.545);¶

(Mm) Prevailing wage rates (ORS 279C.800 to 279C.870);¶

(Nn) Retainage (ORS 279C.550 through 279C.570);¶

(Oo) Prompt payment policy (ORS 279C.570);¶

(Pp) Contractor's relations with subcontractors (ORS 279C.580);¶

(Qq) Notice of claim (ORS 279C.605);¶

(Rr) 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);¶

(Ss) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385;¶

(Tt) 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);¶

(Uu) 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 701.06~~ (as applicable) before the subcontractors commence Work under the Contract; ~~and~~¶

(Vv) 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.¶

(ew) As applicable, comply with the requirements set forth in ORS 279C.303 regarding domestic preference (Buy America);¶

(x) For any designated Community Benefit Contracts, the contractual provisions required by ORS 279C.308 and OAR 731-005-0900;¶

(y) 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;_¶

(fz) 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; ~~and~~¶

(aa) As applicable, provisions that meet the requirements of ORS 279C.533 for apprenticeship employment, aspirational targets, and outreach, recruitment and retention planning.

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: 731-005-0490

RULE SUMMARY: Relating to Offers to enter into a Contract.

CHANGES TO RULE:

731-005-0490

~~Bids or Proposals~~ Are Offers ¶

(1) Offer and Acceptance. ~~The Bid or Proposal is the Bidder's or Proposis the Bidder's~~ Offer to enter into a Contract. The Offer is a "Firm Offer," i.e., the Offer shall be held open by the Offeror for ODOT's acceptance for the period specified in OAR 731-005-0630. ODOT's award of the Contract constitutes acceptance of the Offer and binds the Offeror to the Contract.¶

(2) Responsive Offer. ODOT may award a Contract only to a Responsible Offeror with a Responsive Offer.¶

(3) Contingent Offers. Except to the extent the Offeror is authorized to propose certain terms and conditions pursuant to OAR 731-005-0470 and 731-005-0650, an Offeror shall not make its Offer contingent upon ODOT's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.¶

(4) Offeror's Acknowledgement. By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. ~~If the Request for Proposal permits proposal of alternative terms under OAR 731-005-0470(2), the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by ODOT in Writing.~~

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

Statutes/Other Implemented: ORS 279C.375, 279C.395, 279C.440

REPEAL: 731-005-0500

RULE SUMMARY: Relating to procedures to submit Offers via Facsimile.

CHANGES TO RULE:

~~731-005-0500~~

~~Facsimile Bids and Proposals~~

~~(1) Agency Authorization. ODOT may authorize Offerors to submit Facsimile Offers. If ODOT determines that Bid or Proposal security is or will be required, ODOT should not authorize Facsimile Offers unless ODOT has another method for receipt of such security. Prior to authorization ODOT must determine whether ODOT's equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time and establish administrative procedures and controls.¶¶~~

~~(a) For receiving, identifying, recording, and safeguarding Facsimile Offers; and¶¶~~

~~(b) To ensure timely delivery of Offers to the location of Opening and to preserve the "sealed" requirement of competitive procurement.¶¶~~

~~(2) Provisions to Be Included in Solicitation Document. In addition to all other requirements, if ODOT authorizes a Facsimile Offer, ODOT will include in the Solicitation Document provisions substantially similar to the following:¶¶~~

~~(a) A Facsimile 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 via a Facsimile machine.¶¶~~

~~(b) Offerors may submit Facsimile Offers in response to this solicitation. The entire response must arrive at the place and by the time specified in this Solicitation Document.¶¶~~

~~(c) Offerors must Sign their Facsimile Offers.¶¶~~

~~(d) ODOT reserves the right to award the Contract solely on the Facsimile Offer. However, upon ODOT's request the apparently successful Offeror shall promptly submit its complete original Signed Offer.¶¶~~

~~(e) The telephone number or numbers to which the Facsimile Offers may be submitted.¶¶~~

~~(f) ODOT is not responsible for any failure attributable to the transmission or receipt of the Facsimile Offer including, but not limited to the following:¶¶~~

~~(A) Receipt of garbled or incomplete documents.¶¶~~

~~(B) Availability or condition of the receiving Facsimile machine.¶¶~~

~~(C) Incompatibility between the sending and receiving Facsimile machine.¶¶~~

~~(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 279C.365~~

AMEND: 731-005-0505

RULE SUMMARY: Relating to the process of conducting a procurement via electronic means.

CHANGES TO RULE:

731-005-0505

Electronic Procurement ¶¶

(1) General. ODOT may use Electronic Advertisement of ~~Public Improvement~~ Highway Construction 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~~ Highway Construction 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 Electronic 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 Electronic Procurement 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 Solicitation Documents.¶¶

(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 184.6919~~, 279A.065

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

AMEND: 731-005-0510

RULE SUMMARY: Relating to the process of submitting Electronic Data Interchange Offers.

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.¶¶

(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 consider the impact 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 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 184.619, 279A.050, 279A.065

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

AMEND: 731-005-0520

RULE SUMMARY: Relating to ODOT's notice and advertising requirements.

CHANGES TO RULE:

731-005-0520

Notice and Advertising Requirements; Posting ¶¶

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

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

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

(c) Placing 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 ~~Person~~Bidders must file applications for prequalification if prequalification is a requirement and the class or classes of Work for which ~~Person~~Bidders 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~~contact 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) Equity Notice. ODOT shall provide timely notice of all solicitations to the Director for Diversity, Equity and Inclusion, Governor's Office, in accordance with contract price stated in ORS 200.035.

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

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

AMEND: 731-005-0530

RULE SUMMARY: Relating to the process of preparing and submitting an Offer.

CHANGES TO RULE:

731-005-0530

Offer Preparation ¶

(1) Instructions. An Offeror shall submit and Sign its Offer in accordance with the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document.¶

(2) Forms. An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.¶

(3) Documents. An Offeror shall provide ODOT with all documents and Descriptive Literature required under the Solicitation Document.¶

(4) ~~Facsimile~~, EDI or Electronic Submissions. If the Solicitation Document permitted ~~Facsimile~~, EDI or Electronic Offers under OAR 731-005-0470(3)(a)(D), an Offeror may submit its Offer by ~~Facsimile~~, EDI or Electronic submissions. ODOT shall not consider ~~Facsimile~~, EDI or Electronic Offers unless authorized by the Solicitation Document.

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

Statutes/Other Implemented: ORS 279C.365

AMEND: 731-005-0540

RULE SUMMARY: Relating to the submission of Offers by Offerors.

CHANGES TO RULE:

731-005-0540

Offeror Submissions ¶

(1) Product Samples and Descriptive Literature. ODOT may require Product Samples or Descriptive Literature if it is necessary or desirable to evaluate the quality, features or characteristics of the offered items. ODOT will dispose of Product Samples, or return or make available for return Product Samples to the Offeror in accordance with the Solicitation Document.¶

(2) Identification of Offers:¶

(a) To ensure proper identification and handling, Offers shall be submitted in a sealed envelope appropriately marked ~~or in the envelope provided by ODOT, whichever is applicable~~. If ODOT permits Facsimile or Electronic Offers in the Solicitation Document, the Offeror may submit and identify Facsimile or Electronic Offers in accordance with the Solicitation Document;¶

(b) ODOT is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.¶

(3) Receipt of Offers. The Offeror is responsible for ensuring ODOT receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

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

Statutes/Other Implemented: ORS 279C.365

AMEND: 731-005-0550

RULE SUMMARY: Relating to the Bid security process should ODOT require Bid security.

CHANGES TO RULE:

731-005-0550

~~Bid or Proposal Security~~ ¶

(1) Security Amount. If ODOT requires Bid security, it shall be 10% of the Offeror's Bid. ~~If ODOT requires Proposal security, it shall be in an amount that ODOT determines to be reasonably necessary or prudent to protect the interests of ODOT, and such amount shall be stated in the Solicitation Document.~~ ODOT shall not use Bid ~~or Proposal~~ security to discourage competition. ODOT shall clearly state any Bid ~~or Proposal~~ security requirements in its Solicitation Document. The Offeror shall forfeit Bid ~~or Proposal~~ security after Award if the Offeror fails to execute the Contract and promptly return it with any required performance bond, payment bond and any required proof of insurance. See ORS 279C.365(5) and 279C.385.¶

(2) Requirement for Bid Security ~~(Optional for Proposals)~~. Unless ODOT has otherwise exempted a solicitation or class of solicitations from Bid security pursuant to ORS 279C.390, ODOT shall require Bid security for its solicitation of Bids for Public Improvements. This requirement applies only to ~~Public Improvement~~ Highway Construction Contracts with a value, estimated by ODOT, of more than \$50,000. See ORS 279C.365(6). ODOT may require Bid security even if it has exempted a class of solicitations from Bid security. ~~ODOT may, at its option, require Proposal security that serves the same function with respect to Proposals that Bid security serves with respect to Bids. See ORS 279C.365(5) and 279C.400(5).~~¶

(3) Form of Bid ~~or Proposal~~ Security. ODOT may accept only the following forms of Bid ~~or Proposal~~ Security:¶

(a) A surety bond from a surety company authorized to do business in the State of Oregon. If a surety bond is submitted, ODOT's standard Bid ~~or Proposal~~ bond form must be used, which is included with the Bid ~~or Proposal~~ booklet. The original bond must be submitted with the surety company's seal affixed, or in the case of an Electronic Offer, an electronic version of the bid bond may be submitted.¶

(b) An irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or¶

(c) A cashier's check or Offeror's certified check made out to the Oregon Department of Transportation.¶

(4) Return of Security. ODOT shall return or release the Bid ~~or Proposal~~ security of all unsuccessful Offerors after a Contract has been fully executed and all required bonds and insurance have been provided, or after all Offers have been rejected. ODOT may return the Bid ~~or Proposal~~ security of unsuccessful Offerors prior to Award if the return does not prejudice Contract Award and the security of at least the Bidders with the three lowest Bids, ~~or the Proposers with the three highest scoring Proposals~~, is retained pending execution of a Contract.

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

Statutes/Other Implemented: ORS 279C.365, 279C.380, 279C.385, 279C.390, ~~and~~ 279C.400

AMEND: 731-005-0560

RULE SUMMARY: Relating to the pre-Bid conference process should ODOT hold a pre-Bid conference.

CHANGES TO RULE:

731-005-0560

Pre-~~Offer~~Bid Conferences ¶¶

- (1) Purpose. ODOT may hold pre-~~Offer~~Bid conferences with prospective Offerors prior to Closing, to explain the procurement requirements, obtain information, or to conduct site inspections.¶¶
 - (2) Required Attendance. ODOT may require attendance at the pre-~~Offer~~Bid conference as a condition for making an Offer.¶¶
 - (3) Scheduled Time. If ODOT holds a pre-~~Offer~~Bid conference, it shall be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference.¶¶
 - (4) Statements Not Binding. Statements made by ODOT's representative at the pre-~~Offer~~Bid conference do not change the Solicitation Document unless ODOT confirms such statements with a Written Addendum to the Solicitation Document.¶¶
 - (5) Agency Announcement. ODOT must set forth notice of any pre-~~Offer~~Bid conference in the Solicitation Document in accordance with OAR 731-005-0470(3)(a)(A).
- Statutory/Other Authority: ORS ~~184.616~~, 184.619, 279A.050, 279A.065
Statutes/Other Implemented: ORS 279C.365

AMEND: 731-005-0590

RULE SUMMARY: Relating to the process of modifying or withdrawing Offers prior to the Closing.

CHANGES TO RULE:

731-005-0590

Pre-Opening Modification or Withdrawal of Offers ¶¶

(1) Electronic Offers: Modifications or Withdrawals of Electronic Offers. Offeror may modify or withdraw an offer prior to closing time as instructed in the Solicitation documents. The most recent Offer will be the final Offer.¶¶

(2) Paper Offers:¶¶

(a) Modifications: An Offeror may modify its Offer in Writing prior to the Closing. An Offeror shall prepare and submit any modification to its Offer to ODOT in accordance with OAR 731-005-0530 and 731-005-0540, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:¶¶

(A) Bid ~~(or Proposal)~~ Modification; and¶¶

(B) Solicitation Number (or Other Identification as specified in the Solicitation Document).¶¶

(b) Withdrawals:¶¶

(A) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, including the Offeror's Bid ~~or Proposal~~ document number if one has been assigned, Signed by an individual who is authorized to sign the Offer, delivered to the location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by ODOT prior to the Closing. Proof of authorization to sign the Offer must accompany the withdrawal request. The Offeror or authorized representative of the Offeror may also withdraw its Offer in person prior to the Closing, upon presentation of appropriate identification and satisfactory evidence of authority;¶¶

(B) ODOT may release an unopened Offer, withdrawn under paragraph (A) of this subsection, to the Offeror or its authorized representative, after voiding any date and time stamp mark;¶¶

(C) The Offeror shall mark the Written request to withdraw an Offer as follows:¶¶

(i) Bid ~~(or Proposal)~~ Withdrawal; and¶¶

(ii) Solicitation Number (or Other Identification as specified in the Solicitation Document).¶¶

(3) Documentation. ODOT shall include all documents relating to the modification or withdrawal of Offers in the appropriate solicitation file.

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

Statutes/Other Implemented: ORS 279A.065, 279C.360, 279C.365, 279C.375, 279C.395

AMEND: 731-005-0600

RULE SUMMARY: Relating to the receipt, opening, and recording of Offers.

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 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.~~¶¶

(3) Availability. After Opening, ODOT shall make Bids available for public inspection. 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 192.345(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: 731-005-0620

RULE SUMMARY: Relating to the process of addressing mistakes in Offers.

CHANGES TO RULE:

731-005-0620

Mistakes ¶¶

(1) General. To protect the integrity of the competitive solicitation process and to assure fair treatment of Offerors, ODOT shall carefully consider whether to permit waiver, correction or withdrawal for certain mistakes.¶¶

(2) Agency Treatment of Mistakes. ODOT shall not allow an Offeror to correct or withdraw an Offer for an error in judgment. If ODOT discovers certain mistakes in an Offer after Opening, but before award of the Contract, ODOT may take the following action:¶¶

(a) ODOT may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:¶¶

(A) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;¶¶

(B) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and¶¶

(b) ODOT may correct a clerical error if the intended Offer and the error are evident on the face of the Offer, or other documents submitted with the Offer, and the Offeror confirms ODOT's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example, a missing unit price may be established by dividing the total price for the units by the quantity of units for that item or a missing, or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). In the event of a discrepancy, unit prices shall prevail over extended prices.¶¶

(c) ODOT may permit an Offeror to withdraw an Offer based on other errors only if the Offeror shows by clear and convincing evidence to the satisfaction of ODOT:¶¶

(A) The nature of the error on the face of the Offer or documents submitted with the Offer, pursuant to the solicitation requirements; and¶¶

(B) That the error is not a judgment error, minor informality or clerical error.¶¶

(3) Rejection for Mistakes. ODOT shall reject any Offer in which a mistake is evident on the face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents submitted with the Offer, pursuant to solicitation requirements.

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

Statutes/Other Implemented: ORS 279C.375, 279C.395

AMEND: 731-005-0650

RULE SUMMARY: Relating to the evaluation and award of Offers.

CHANGES TO RULE:

731-005-0650

Offer Evaluation and Award ¶¶

(1) General. ~~¶A Highway Construction Contract, if awarded, ODOT shall be award the Contracted to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the best, Responsive Proposal. ODOT may award by item, groups of items or the entire Offer provided such aw, provided that such Entity is not listed by the Construction Contractors Board is consistent with the Solicitation Document and in the public interest.¶¶~~

~~¶(2) Agency Evaluation disqualified to hold a Contract for a Public Improvement. ODOT shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. ODOT shall not evaluate an Offer using any other requirement or criterion.¶¶~~

~~¶(3) Offeror Submissions.¶¶~~

~~¶(a) ODOT may require an Offeror to submit This OAR 731-005-0650 does not apply to product samples, descriptive literature, technical data, or other material and may also require any of the following prior to award: jects procured pursuant to an Exempted Selection Method. ¶¶~~

~~¶(A) Demonstration, inspection or testing of a product prior to award for characteristics such as quality or workmanship;¶¶~~

~~¶(B) Examination of such elements as appearance, finish, taste, or feel; or¶¶~~

~~¶(C) Other examinations to determine whether the product conforms to Specifications.¶¶~~

~~¶(b) ODOT shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. ODOT shall reject an Offer providing any product that does not meet the Solicitation Document requirements. ODOT's rejection of an Offer because it offers nonconforming Work or goods is not Disqualification and is not appealable under ORS 279C.445.¶¶~~

~~¶(4) Evaluation of Bids. ODOT shall use only objective criteria to evaluate Bids as set forth in the ITB. ODOT shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid. In determining the lowest Responsive Bid, ODOT shall add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides unless prohibited by federal requirements. ODOT shall not negotiate scope of Work or other terms or conditions under an Invitation to Bid process.¶¶~~

~~¶(5) Evaluation of Proposals.¶¶~~

~~¶(a) ODOT shall only evaluate Proposals in accordance with criteria set forth in the RFP and applicable law.~~

~~¶ODOT 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 evaluate Proposals to determine the Responsible Proposer submitting the best Responsive Proposal. ODOT may seek information from a Proposer only to clarify the Proposer's Proposal. Such clarification shall not vary, contradict or supplement the Proposal. ODOT shall not seek clarification of a nonresponsive Proposal. A Proposer must submit Written and Signed clarifications and such clarifications become parbe 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 mathe Proposer's Proposal. Unless ODOT permitted negotiation in accordance with OAR 731-005-0470 in its Request for Proposals, ODOT may only negotiate:¶¶~~

~~¶(A) The statement of Work, including schedule, and¶¶~~

~~¶(B) The Contract Price as it is affected by negotiating the statement of Work.¶¶~~

~~¶(b) If ODOT permitted negotiation in the Request for Proposals in accordance with OAR 731-005-0470, ODOT shall evaluate Proposals and may negotiate as follows: matical 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).¶¶~~

~~¶(A) If the Solicitation Document provided that negotiation may occur at Agency's discretion, ODOT may forego negotiations and evaluate all Proposals in accordance with subsection (a) of this section;¶¶~~

~~¶(B) Unless the solicitation is canceled, after the Opening ODOT will evaluate all Proposals in accordance with the evaluation criteria. After evaluation of all Proposals in accordance with the criteria set forth in the Request for~~

Proposals, ODOT will determine the Proposers in the Competitive Range. ODOT may increase the Competitive Range if ODOT's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number greater than the initial Competitive Range;¶

(C) ODOT shall establish a negotiation team tailored for the solicitation. ODOT's team may include but is not limited to legal, technical and negotiating personnel; Offer or Submissions.¶

(a) ODOT may require an Offeror to submit product samples, descriptive literature, technical data, or other material and may also require any of the following prior to award:¶

(A) Demonstration, inspection or testing of a product prior to award for characteristics such as quality or workmanship;¶

(B) In addition to the statement of Work Examination of such elements as appearance, including schedule, and the Contract Price as it is affected by negotiating the statement of Work, ODOT shall only negotiate other terms and conditions expressly authorized for negotiation under the Request for Proposals. A Proposer shall only submit alternative terms and conditions to the terms and conditions ODOT expressly authorized for negotiation under the Request for Proposal; ish, taste, or feel; or¶

(C) Other examinations to determine whether the product conforms to Specifications.¶

(E) ODOT shall provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not evaluate product acceptability only in accordance within the Competitive Range may protest ODOT's evaluation and determination of the Competitive Range in accordance with OAR 731-005-0690. All Proposals are open for public inspection subject to the Oregon Public Records Law;¶

(F) After the protest period provided criteria disclosed in the Solicitation Document to determine that a product in accordance with paragraph (5)(b)(E) of this rule expires, or after ODOT has provided a final response to any protest, whichever date is later, ODOT may begin negotiating with Proposers in the Competitive Range. ODOT's negotiation team shall not favor any particular Proposer. ODOT may negotiate Contract Price, designated teptable. ODOT shall reject an Offer providing any product that does not meet the Solicitation Document requirements. ODOT's rejection of an Offer because it offers terms and conditions and the statement of Work, including schedule. However, ODOT may only negotiate Contract Price to the extent the Proposer would not be excluded from the Competitive Range based on ODOT's evaluation criteria set forth in the Solicitation Document. ODOT may only negotiate an alternative term or condition submitted by a Proposer if the alternative term or condition is reasonably related to the term or condition ODOT authorized as negotiable. ODOT shall not negotiate any other terms or conditions set forth in the Request for Proposals;¶

(G) ODOT may evaluate Offers negotiated with Proposers nonconforming Work or goods is not Disqualification and is not appealable under ORS 279C.445.¶

(4) Evaluation of Bids. ODOT shall use only objective criteria to evaluate Bids as set forth in the ITB. ODOT shall evaluate Bids to determine which Responsible Offeror offers in the Competitive Range at any time during the negotiation process to determine if ODOT will:¶

(i) Continue negotiating with a particular Proposer;¶

(ii) Terminate negotiations with a particular Proposer and continue negotiating with other Proposers in the Competitive Range; or¶

(iii) Conclude negotiations with all remaining Proposers in the Competitive Range lowest Responsive Bid. In determining the lowest Responsive Bid, ODOT shall add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, in accordance with paragraph (5)(b)(H) of this rule.¶

(H) ODOT may terminate negotiations with a Proposer in the Competitive Range at any time. If ODOT does not cancel, of the preference given to that Bidder in the solicitation at the conclusion of ODOT's negotiation with all remaining Proposers in the Competitive Range, ODOT shall score the Proposals in the Competitive Range based upon the evaluation criteria in the Request for Proposals;¶

(I) ODOT shall provide Written notice of intent to award the Contract to all Proposers in the Competitive Range. An unsuccessful Proposer may protest ODOT's evaluation and determination of the Competitive Range in accordance with OAR 731-005-0690; and¶

(J) Nothing in section (5) of this rule shall restrict or prohibit ODOT from canceling the solicitation at any time in accordance with OAR 731-005-0720 state in which the Bidder resides unless prohibited by federal requirements. ODOT shall not negotiate scope of Work or other terms or conditions under an Invitation to Bid process.

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

Statutes/Other Implemented: ORS 279C.300, 279C.335, 279C.365, 279C.375, 279C.395

AMEND: 731-005-0660

RULE SUMMARY: Relating to the process used in the instance of Tie Offers.

CHANGES TO RULE:

731-005-0660

Tie Offers ¶

(1) Definition. Tie Offers are low tie Responsive Bids from Responsible Bidders ~~or high tie Responsive Proposals from Responsible Proposers that are identical in price, fitness, availability and quality.~~ ¶

~~(2) Award. If, ¶~~

(2) Award. If a Contract arising out of Tie Offers is awarded, ODOT shall award the Contract based on the following order of precedence: ¶

(a) For projects not involving federal funds ODOT shall prefer the Offer of the Offeror whose principal offices or headquarters are located in Oregon; ¶

(b) If a Tie Offer remains after ODOT applies subsection (a) of this section, ODOT shall award the Contract by drawing lots among any tied Oregon Offerors if no federal funds are a part of the project. Such Offerors shall be given notice and an opportunity to be present when the lots are drawn; or ¶

(c) If a Tie Offer remains after ODOT applies subsection (b) of this section and none of the tied Offerors are located in Oregon or the project has federal funding, ODOT shall award the Contract by drawing lots among any tied Offerors. Such Offerors shall be given notice and an opportunity to be present when the lots are drawn.

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

Statutes/Other Implemented: ORS 279A.120, 279C.375

AMEND: 731-005-0670

RULE SUMMARY: Relating to the conditions that may lead ODOT to reject an Offer.

CHANGES TO RULE:

731-005-0670

Rejection of an Offer ¶¶

(1) Rejection of an Offer.¶¶

(a) ODOT may reject any Offer upon finding that to accept the Offer may impair the integrity of the procurement process or that rejecting the Offer is in the public interest.¶¶

(b) ODOT shall reject an Offer upon ODOT's finding that the Offer:¶¶

(A) Is contingent upon ODOT's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;¶¶

(B) Takes exception to terms and conditions (including Specifications);¶¶

(C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of Solicitation Document or in contravention of applicable law;¶¶

(D) Offers Work or goods that fail to meet the Specifications of the Solicitation Document;¶¶

(E) Is late;¶¶

(F) Is not in substantial compliance with the Solicitation Documents; or¶¶

(G) Is not in substantial compliance with all prescribed public solicitation procedures.¶¶

(c) ODOT shall reject an Offer upon ODOT's finding that the Offeror:¶¶

(A) Has not been prequalified under ORS 279C.430 and ODOT required mandatory prequalification; as required as set forth in OAR Chapter 731, Division 7, the Offeror's prequalification application is not received at ODOT's address shown in the prequalification application at least 10 days prior to bid opening, the Offeror is not prequalified in the class(es) of work designated in the special provisions, or the Offeror's prequalification is not otherwise approved by ODOT; ¶¶

(B) Has been Disqualified;¶¶

(C) Has been declared ineligible under ORS 279C.860 by the Commissioner of Bureau of Labor and Industries has declared and the Contract is for a Public Work;¶¶

(D) Is listed as not qualified by the Construction Contractors Board;¶¶

(E) Has not met the requirements of ORS 279A.105 if required by the Solicitation Document;¶¶

(F) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;¶¶

(G) Has failed to provide the certification required under section (3) of this rule; or¶¶

(H) Is nonresponsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. ~~ODOT uses a prequalification process as described in OAR Chapter 731 Division 7 to determine if a Contractor is responsible.~~ Before awarding a Contract, ODOT must have information that indicates that the Offeror meets the applicable standards of responsibility. To be a Responsible Offeror, ODOT must determine that the Offeror:¶¶

(i) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to demonstrate the capability of the Offeror to meet all contractual responsibilities;¶¶

(ii) Has completed previous contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that to the extent the costs associated with and time available to perform a previous contract were within the Offeror's control, the Offeror stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. ODOT should carefully scrutinize an Offeror's record of Contract performance if the Offeror is or recently has been materially deficient in Contract performance. In reviewing the Offeror's performance, ODOT should determine whether the Offeror's deficient performance was expressly excused under the terms of Contract, or whether the Offeror took appropriate corrective action. ODOT may review the Offeror's performance on both private and public Contracts in determining the Offeror's record of Contract performance. ODOT shall make its basis for determining an Offeror nonresponsible under this paragraph part of the solicitation file;¶¶

(iii) Has a satisfactory record of integrity. An Offeror may lack integrity if ODOT determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to ODOT. ODOT may find an Offeror nonresponsible based on the lack of integrity of any Entity having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Entity). ODOT may find an Offeror non-responsible based on previous convictions of offenses related to obtaining or attempting to obtain a Contract or subcontract or in connection with the Offeror's performance of a contract or subcontract. The

standards for Conduct Disqualification under OAR 731-005-0710 may be used to determine an Offeror's integrity. ODOT shall make its basis for determining that an Offeror is nonresponsible under this paragraph part of the solicitation file;¶

(iv) Is legally qualified to Contract with ODOT; and¶

(v) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by ODOT concerning responsibility, ODOT shall base the determination of responsibility upon any available information, or may find the Offeror nonresponsible.¶

(2) Form of Business Entity. For purposes of this rule, ODOT may investigate any Entity submitting an Offer. The investigation may include that Entity's officers, directors, owners, affiliates, or any other Entity acquiring ownership of the Entity to determine application of this rule or to apply the disqualification provisions of ORS 279C.440 to 279C.450 and OAR 731-005-0710.¶

(3) Certification of Non-Discrimination. The Offeror shall certify and deliver to ODOT Written certification, as part of the Offer, that the Offeror has not discriminated against minority, women or emerging small business enterprises or against a business enterprise that is owned or controlled by or that employs a disabled veteran as defined in ORS 408.225 in obtaining any required subcontracts.

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

Statutes/Other Implemented: ORS 279A.105, 279A.110, 279C.375, 279C.395

AMEND: 731-005-0690

RULE SUMMARY: Relating to the process of protesting ODOT's Contractor selection or Contract award decision.

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 Intent to 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 within three working days after issuance of the Notice of Intent to Award, 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 ITB 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.¶¶~~

~~(64) Authority to Resolve Protests. The ODOT Chief Procurement Officer, or designee, has the authority to settle or resolve a Written protest submitted in accordance with the requirements of this rule.¶¶~~

~~(75) Decision. If a protest is not settled, the ODOT 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.¶¶~~

~~(86) 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

AMEND: 731-005-0700

RULE SUMMARY: Relating to negotiations between ODOT and Bidders or Contractors.

CHANGES TO RULE:

731-005-0700

Negotiation with Bidders ¶

~~(1) Bids.~~ ODOT shall not negotiate with any Bidder prior to award of Contract. After award of the Contract, ODOT and Contractor may only modify the Contract as specified in the Contract.¶

~~(2) Requests for Proposals.~~ ODOT may only negotiate with Proposers in accordance with OAR 731-005-0470 and 731-005-0650.

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

Statutes/Other Implemented: ORS 279C.300, 279C.305, 279C.335, 279C.365, 279C.375

AMEND: 731-005-0710

RULE SUMMARY: Relating to the conditions that may lead to ODOT disqualifying an Entity from consideration of award of ODOT's Contracts.

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 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 pursuant to ORS 200.055 certified enterprise, will perform services or supply materials under a 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 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~~ in writing. 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

AMEND: 731-005-0740

RULE SUMMARY: Relating to ODOT's process of documenting the Award.

CHANGES TO RULE:

731-005-0740

Documentation of Award ¶¶

(1) Basis of Award. After award, ODOT shall make a record showing the basis for determining the successful Offeror part of ODOT's solicitation file.¶¶

(2) Contents of Award Record. ODOT's record shall include:¶¶

(a) Bids.¶¶

(A) Completed Bid tabulation sheet; and¶¶

(B) Written justification for any rejection of lower Bids.¶¶

(b) Proposals.¶¶

(A) The completed evaluation of the Proposals;¶¶

(B) Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and¶¶

(C) If ODOT permitted negotiations in accordance with OAR 731-005-0470, ODOT's completed evaluation of the initial Proposals and ODOT's completed evaluation of final Proposals.

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

Statutes/Other Implemented: ORS 279C.430

AMEND: 731-005-0760

RULE SUMMARY: Relating to the availability of Award decisions and documents.

CHANGES TO RULE:

731-005-0760

Availability of Award Decisions ¶

(1) Contract Documents. To the extent required, ODOT shall deliver to the successful Offeror, a Signed ~~purchase order, price agreement, or other~~ Contract document(s), ~~as applicable.~~ ¶

(2) Notification to Unsuccessful Offerors. All contract award information, including tabulations of Bids ~~and Proposals~~ awarded, are available on-line through the ODOT web page. ¶

(3) Availability of Solicitation Files. ODOT shall make completed solicitation files available for public review ~~at ODOT.~~ ¶

(4) Copies from Solicitation Files. Any Entity may obtain copies of material from solicitation files upon payment of a reasonable copying charge through ODOT's public records request procedure.

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

Statutes/Other Implemented: ORS 279C.365

AMEND: 731-005-0770

RULE SUMMARY: Relating to the execution and delivery of performance security.

CHANGES TO RULE:

731-005-0770

Performance Security ¶¶

(1) Public Improvement Contracts. Unless ODOT waives the required performance and payment bonds under ORS 279C.380(4), or the director of the Department of Transportation exempts a Contract or classes of Contracts from the required performance bond pursuant to ORS 279C.390, the Contractor shall execute and deliver to ODOT a performance bond and a payment bond.¶¶

(2) Requirement for Surety Bond. The Contractor shall use ODOT's standard forms that are found in the Contract booklet. The amount of each bond shall be equal to the Contract Amount. The surety company's authorized attorney in fact shall sign the performance bond and the payment bond. The surety company's seal shall be affixed to each bond. A power of attorney for the attorney in fact shall be attached to the bonds in the Contract booklet. Include performance/payment bond number. Bonds cannot be canceled by the Contractor or the surety, nor can they be released by ODOT due to possible claims.¶¶

(3) Time for Submission. The apparent successful Offeror must furnish the performance/payment security as required by the Solicitation Document. If the Offeror fails to furnish the security as requested, ODOT may reject the Offer and award the Contract to the Responsible Bidder with the next lowest Responsive Bid ~~or the Responsible Proposer with the next highest-scoring Responsive Proposal~~, and, at ODOT's discretion, the Offeror shall forfeit its Bid ~~or Proposal~~ security.

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

Statutes/Other Implemented: ORS 279C.375, 279C.390

RULE SUMMARY: Relating to the implementation of the Clean Diesel Construction Standard.

CHANGES TO RULE:

731-005-0800

Clean Diesel Construction Standard

(1) The Oregon Department of Transportation does not adopt any Oregon Department of Justice Division 049 rule related to diesel engine requirements pursuant to ORS 279C.537. The Oregon Department of Transportation has adopted OAR 731-005-08020 and OAR 731-149-08020 to implement ORS 279C.537.¶

(2) The definitions provided in OAR 731-005-0430 apply to sections (3) through (12) of this rule.¶

(3) For a Public Improvement Contract where the majority of the project site is located within Clackamas, Multnomah, or Washington County, the Public Improvement Contract is subject to the following requirements:¶

(a) For a Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2022 but before January 1, 2025, when the Public Improvement Contract will have an awarded Contract Amount of \$20 million or more, 60 percent of the total Non-Road Diesel Equipment used on the Project Site during the performance of the Public Improvement Contract must meet or exceed United States Environmental Protection Agency Tier 4 Exhaust Emission Standards for non-road compression ignition diesel engines; or if not equipped with a Tier 4 compression ignition diesel engine, must be retrofit with a Verified Diesel Oxidation Catalyst or Verified Diesel Particulate Filter;¶

(b) For a Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2025 but before January 1, 2029, when the Public Improvement Contract will have an awarded Contract Amount of \$15 million or more, 70 percent of the total Non-Road Diesel Equipment used on the Project Site during the performance of the Public Improvement Contract must meet or exceed United States Environmental Protection Agency Tier 4 Exhaust Emission Standards for non-road compression ignition diesel engines; or if not equipped with a Tier 4 compression ignition diesel engine, must be retrofit with a Verified Diesel Oxidation Catalyst or Verified Diesel Particulate Filter;¶

(c) For a Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2029, when the Public Improvement Contract will have an awarded Contract Amount of \$10 million or more, 80 percent of the total Non-Road Diesel Equipment used on the Project Site during the performance of the Public Improvement Contract must meet or exceed United States Environmental Protection Agency Tier 4 Exhaust Emission Standards for non-road compression ignition diesel engines; or if not equipped with a Tier 4 compression ignition diesel engine, must be retrofit with a Verified Diesel Oxidation Catalyst or Verified Diesel Particulate Filter.¶

(4) Notwithstanding the requirements of section (3) of this rule, 80 percent of the total Non-Road Diesel Equipment used on the Project Site during the performance of the Public Improvement Contract must meet or exceed United States Environmental Protection Agency Tier 4 Exhaust Emission Standards for non-road compression ignition diesel engines; or if not equipped with a Tier 4 compression ignition diesel engine, be retrofit with a Verified Diesel Oxidation Catalyst or Verified Diesel Particulate Filter, for the following projects:-¶

(a) The Interstate 5 Rose Quarter Project;-¶

(b) The Interstate 205 Abernethy Bridge Project;-¶

(c) The Interstate 205 Freeway Widening Project;-¶

(d) The State Highway 217 Northbound Project; and¶

(e) The State Highway 217 Southbound Project.¶

(5) The following categories of Non-Road Diesel Equipment are exempt from sections (3) and (4) of this rule:¶

(a) Non-Road Diesel Equipment required for an Emergency, as determined by the Contracting Agency responsible for administering the Public Improvement Contract; and¶

(b) For a Public Improvement Contract with a Solicitation Document advertisement date before January 1, 2029, Non-Road Diesel Equipment owned and operated by a Certified Firm. For a Public Improvement Contract with an advertisement date before January 1, 2029, Non-Road Diesel Equipment that is owned and operated by a Certified Firm, and is otherwise compliant with the requirements of sections (3) and (4) of this rule, may be counted as compliant equipment for purposes of the calculation under section (7).¶

(6) To verify compliance with sections (3) and (4) of this rule, the Contractor must submit all required or necessary data to the Contracting Agency, according to the specifications of the Public Improvement Contract.¶

(7) Contractor compliance with sections (3) and (4) of this rule will be determined by the following calculation:¶

(a) Total pieces of Non-Road Diesel Equipment used on the Project Site = _____¶

(b) Multiply the answer to (7)(a) by the required percentage under sections (3) or (4) of this rule (round to the nearest whole number) = _____¶

(c) Total pieces of Non-Road Diesel Equipment that qualify for an exemption under sections (5)(a) and (5)(b) of this

rule = _____¶

(d) Subtract the number under section (7)(c) from the number under (7)(b) = _____¶

(e) Total pieces of Non-Road Diesel Equipment used on the Project Site that must meet or exceed United States Environmental Protection Agency Tier 4 Exhaust Emission Standards for non-road compression ignition diesel engines; or if not equipped with a Tier 4 compression ignition diesel engine, be retrofit with a Verified Diesel Oxidation Catalyst or Verified Diesel Particulate Filter (equal to 7(d)) = _____¶

(8) For a Public Improvement Contract where the majority of the Project Site is located within Clackamas, Multnomah, or Washington County, the Public Improvement Contract is subject to the following requirements:¶

(a) For a Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2022 but before January 1, 2025, when the Public Improvement Contract will have an awarded Contract Amount of \$20 million or more, and for the Interstate 5 Rose Quarter Project, the Interstate 205 Abernethy Bridge Project, the Interstate 205 Freeway Widening Project, the State Highway 217 Northbound Project, and the State Highway 217 Southbound Project; 50 percent of the total on-road concrete mixer trucks and on-road dump trucks powered by compression ignition diesel engines, used on the Project Site during the performance of the Public Improvement Contract must be powered by a model year 2010 or newer engine;¶

(b) For a Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2025 but before January 1, 2029, when the Public Improvement Contract will have an awarded Contract Amount of \$15 million or more, 75 percent of the total on-road concrete mixer trucks and on-road dump trucks, powered by compression ignition diesel engines, used on the Project Site during the performance of the Public Improvement Contract must be powered by a model year 2010 or newer engine;¶

(c) For a Public Improvement Contract with a Solicitation Document advertisement date on or after January 1, 2029, when the Public Improvement Contract will have an awarded Contract Amount of \$10 million or more, 100 percent of the total concrete mixer trucks and dump trucks, powered by compression ignition diesel engines, used on the Project Site during the performance of the contract must be powered by a model year 2010 or newer engine.¶

(9) The requirements of section (8) of this rule apply to on-road concrete mixer trucks and on-road dump trucks, powered by compression ignition diesel engines that are owned or operated by Contractors, subcontractors, and those operated under trucking services agreements.¶

(10) The requirements of section (8) of this rule do not apply to the following:¶

(a) Concrete mixer trucks or dump trucks powered by compression ignition diesel engines that are owned and operated by a Certified Firm under a Public Improvement Contract with a Solicitation Document advertisement date before January 1, 2029; and¶

(b) Concrete mixer trucks or dump trucks powered by compression ignition diesel engines that are owned and operated by suppliers or vendors delivering materials to a Project Site, that are not operated under a trucking services agreement or subcontract.¶

~~(11) For purposes of this rule, a Contract does not become a Public Improvement Contract until construction work is described, specified, authorized and agreed upon by the parties to the Contract. A Contract that has not yet become a Public Improvement Contract includes, but is not limited to, a Contract for Construction Manager/General Contractor Services which only includes preconstruction services to be provided by the Contractor, or a progressive design-build Contract that only includes preliminary design services to be provided by the Contractor.¶~~

~~(12) The Contracting Agency may at any time suspend, extend, or otherwise modify the timeline provided in sections (5)(b) and (10)(a) of this rule related to exemptions provided to Certified Firms, if the Contracting Agency finds that market conditions, or other factors, exist that would render the expiration of the exemption unreasonable, or would inflict undue burden on Certified Firms.~~

Statutory/Other Authority: ORS 184.619, ORS 279C

Statutes/Other Implemented: ORS 279C

REPEAL: 731-007-0200

RULE SUMMARY: Relating to repealed rules.

CHANGES TO RULE:

~~731-007-0200~~

~~Repealed Rules~~

~~As required by OR Laws 2003, Chapter 794, Section 334, OAR 731-007-0010 through 731-007-0190 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~~

REPEAL: 731-007-0210

RULE SUMMARY: Relating to effective date of rules.

CHANGES TO RULE:

~~731-007-0210~~

~~Effective Date~~

~~OAR 731-007-0200 through 731-007-0400 as amended become effective on January 1, 2010 and apply to Public Contracts first advertised, but if not advertised then entered into, on or after January 1, 2010.~~

~~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~~

REPEAL: 731-007-0220

RULE SUMMARY: Relating to the applicability of rules.

CHANGES TO RULE:

~~731-007-0220~~

~~Application~~

~~In addition to the requirements set forth in chapter 731, division 5, and the definitions therein, OAR 731-007-0200 through 731-007-0400 apply to Public Improvement Contracts. In the event of conflict or ambiguity, the more specific requirements of the rules in Division 7 take precedence over the more general requirements of the Division 5 rules.~~

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

~~Statutes/Other Implemented: ORS 279A.065~~

REPEAL: 731-007-0225

RULE SUMMARY: Relating to definitions of words used in this Division.

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~~

REPEAL: 731-007-0230

RULE SUMMARY: Relating to methods to solicit Public Improvement Contracts.

CHANGES TO RULE:

~~731-007-0230~~

~~Competitive Procurement~~

~~ODOT shall solicit Bids for Public Improvement Contracts by Invitation to Bid (ITB), except as otherwise allowed or required pursuant to ORS 279A.030, 279A.100, or 279C.335. See OAR 731-007-0340 through 731-007-0400 regarding the use of Alternative Contracting Methods.~~

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

~~Statutes/Other Implemented: ORS 279C.335~~

REPEAL: 731-007-0240

RULE SUMMARY: Relating to the provisions required in Public Improvement Contracts.

CHANGES TO RULE:

731-007-0240

Mandatory Provisions

In addition to the Bidder qualification, selection, rejection, and Disqualification criteria applicable to all public Contracts, certain criteria apply specifically to Public Improvement Contracts. Likewise, in addition to provisions required in all solicitations for public Contracts and resulting Contracts, certain provisions must be included in Public Improvement solicitations and resulting Contracts. Those criteria and mandatory provisions are contained in division 5, and are referenced in this rule for convenience:¶

- (1) Eligibility to bid or propose. See OAR 731-005-0460(1) (Construction Contracts).¶
- (2) Solicitation Document statement of required certification or licensing. See OAR 731-005-0470(3)(a)(K).¶
- (3) Solicitation Document terms and conditions:¶
 - (a) Demonstration of drug testing program. See OAR 731-005-0470(3)(d)(B).¶
 - (b) Liability for late payment. See OAR 731-005-0470(3)(d)(F).¶
 - (c) Right to file complaints with Construction Contractors Board. See OAR 731-005-0470(3)(d)(G).¶
 - (d) Environmental and natural resources regulations. See OAR 731-005-0470(3)(d)(I).¶
 - (e) Prevailing wage rates. See OAR 731-005-0470(3)(d)(M).¶
 - (f) Fee paid to BOLI. See OAR 731-005-0470(3)(d)(N).¶
 - (g) Retainage. See OAR 731-005-0470(3)(d)(O).¶
 - (h) Prompt payment policy. See OAR 731-005-0470(3)(d)(P).¶
 - (i) Contractor's relations with subcontractors. See OAR 731-005-0470(3)(d)(Q).¶
 - (j) Certification of compliance with tax laws. See OAR 731-005-00470(3)(d)(T).¶
- (4) Advertising of solicitation in trade newspaper. See OAR 731-005-0520(2)(c).¶
- (5) Bid or Proposal security. See OAR 731-005-0550(2).¶
- (6) Deadline for delivering request for change or protest of Specification or Contract terms and conditions. See OAR 731-005-0570(1)(a).¶
- (7) Rejection of individual Bids or Proposals. See OAR 731-005-0670.¶
- (8) Standards for DBE Disqualification. See OAR 731-005-0710(1)(b)(B)(i) and (iii).¶
- (9) Performance security. See OAR 731-005-0770(1).

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

Statutes/Other Implemented: ORS 279A.065

REPEAL: 731-007-0250

RULE SUMMARY: Relating to the criteria to be used to evaluate a bid or proposal for a Public Improvement Contract.

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 OAR 731-007-0340 for Alternative Contracting Methods.¶¶~~

~~(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 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 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) and as required by OAR 137-049-0650 and ORS 279C.335(2) and (3).~~

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

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

REPEAL: 731-007-0260

RULE SUMMARY: Relating to the adoption of DOJ Model Rule for First-Tier Subcontractors.

CHANGES TO RULE:

~~731-007-0260~~

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

~~The Oregon Department of Transportation adopts DOJ Model Rule 137-049-0360 First-Tier Subcontractors; Disclosure and Substitution.~~

~~Statutory/Other Authority: ORS 279A.065~~

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

REPEAL: 731-007-0340

RULE SUMMARY: Relating to the Rules applicable for Public Contracts for Construction Services, Alternative Contracting Methods.

CHANGES TO RULE:

~~731-007-0340~~

~~Alternative Contracting Methods ¶¶~~

~~(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 279A.050, 279A.065~~

~~Statutes/Other Implemented: ORS 279C.335, 279C.337, 279C.380(2)~~

REPEAL: 731-007-0350

RULE SUMMARY: Relating to the definition of words used in this section of the Rules.

CHANGES TO RULE:

~~731-007-0350~~

~~Definitions-~~

~~In addition to those definitions at OAR 731-005-0430, the following definitions shall apply to OARs 731-007-0340 to 731-007-0400, unless the context requires otherwise:¶¶~~

~~(1) Alternative Contracting Methods: Innovative techniques for obtaining Public Improvement Contracts, utilizing processes other than the traditional method of design-bid-build with award based solely on price (in which a final design is issued with formal Bid documents, construction services are obtained by sealed Bid awarded to the lowest Responsive, Responsible Bidder, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design/Build and Cost Plus Time forms of contracting, which are specifically addressed in these rules.¶¶~~

~~(2) Design/Build: A form of contracting that results in the construction Contractor providing or obtaining specified design services, participates on the project team with ODOT, and manages both design and construction. In this form of Contract, a single Entity provides ODOT with all of the services necessary to both design and construct the project.¶¶~~

~~(3) Cost Plus Time: A Bid process (also known as A plus B) where time is assigned a monetary value and is Bid along with the Work and materials.~~

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

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

REPEAL: 731-007-0360

RULE SUMMARY: Relating to Competitive Bidding and Post-Project Evaluation when using Alternative Contracting Methods.

CHANGES TO RULE:

~~731-007-0360~~

~~Use of Alternative Contracting Methods~~

~~(1) Competitive Bidding Exemptions. ORS Chapter 279C requires a competitive bidding process for Public Improvement Contracts unless a statutory exception applies, a class of Contracts has been exempted or an individual Contract has been exempted in accordance with ORS 279C.335 and any applicable DAS rules. Alternative Contracting Methods are therefore an exception to the prescribed public contracting practices in Oregon, and their use must be justified in accordance with the public contracting law and these rules. See OAR 731-007-0370 regarding required findings.¶¶~~

~~(2) Post-Project Evaluation. ORS 279C.355 requires that ODOT prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 for which the competitive bidding process was not used. The purpose of this evaluation is to determine whether it was actually in ODOT's best interest to use an Alternative Contracting Method. The evaluation must be delivered to the DAS Director within 30 Days of the date ODOT "accepts" the Public Improvement project, which event is typically defined in the Contract. In the absence of such definition, acceptance of the project occurs on the latter of the date of final payment or the date of final completion of the Work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:¶¶~~

~~(a) Financial information, consisting of cost estimates, any guaranteed maximum price, changes and actual costs;¶¶~~

~~(b) A narrative description of successes and failures during design, engineering and construction; and¶¶~~

~~(c) An objective assessment of the use of the Alternative Contracting Method as compared to the exemption findings.~~

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

~~Statutes/Other Implemented: ORS 279A.065, 279C.335, 279C.355~~

REPEAL: 731-007-0370

RULE SUMMARY: Relating to the procedures to be used when findings are required to exempt a Contract or class of Contracts from competitive bidding requirements.

CHANGES TO RULE:

~~731-007-0370~~

~~Findings-~~

~~(1) When findings are required under ORS 279C.335(2) and 279C.335(3)(b) to exempt a Contract or class of Contracts from competitive bidding requirements, the "substantial cost savings" criterion at ORS 279C.335(2)(b) requires consideration of the type, cost, amount of the Contract, number of Entities available to bid, and "such other factors as may be deemed appropriate."¶¶~~

~~(2) Likewise, the statutory definition of "findings" at ORS 279C.330 means the justification for ODOT's conclusion that includes, but is not limited to, information regarding eight identified areas.¶¶~~

~~(3) Accordingly, when the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the "substantial cost savings" requirement may be addressed by a combination of:¶¶~~

~~(a) Specified findings that address the factors and other information specifically identified by statute; and¶¶~~

~~(b) Additional findings that address industry practices, surveys, trends, past experiences, evaluations of completed projects required by ORS 279C.355 and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable, such findings should relate back to the specific characteristics of the project or projects at issue in the exemption request.¶¶~~

~~(4) The criteria at ORS 279C.335(2)(a) that it is "unlikely" that the exemption will "encourage favoritism" or "substantially diminish competition" may be addressed in contemplating the use of Alternative Contracting Methods by specifying the manner in which an RFP process will be utilized, that the procurement will be formally advertised, that competition will be obtained, and that award will be made based upon identified selection criteria.~~

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

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

REPEAL: 731-007-0380

RULE SUMMARY: Relating to the pricing methods.

CHANGES TO RULE:

~~731-007-0380~~

~~Pricing Mechanisms~~

~~(1) A Request for Proposals may result in a lump-sum Contract Price, as in the case of competitive bidding.~~

~~Alternatively, a cost reimbursement Contract may be negotiated.¶~~

~~(2) Economic incentives or disincentives may be included to reflect stated ODOT purposes related to time of completion, safety or other public contracting objectives, including total least cost mechanisms such as life cycle costing.¶~~

~~(3) When cost reimbursement Contracts are utilized, ODOT shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.~~

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

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

REPEAL: 731-007-0390

RULE SUMMARY: Relating to the process used when conducting a Public Improvement contract using the RFP process.

CHANGES TO RULE:

~~731-007-0390~~

~~RFP Process~~

~~ODOT may utilize the RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS Chapter 279C and OAR chapter 731 division 5.~~

~~(1) Proposal Evaluation. Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. Proposal evaluation shall be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall:~~

~~(a) Be reasonable estimates based on information available to ODOT;~~

~~(b) Treat all Proposals equitably; and~~

~~(c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to ODOT. See ORS 279C.305(1).~~

~~(2) Evaluation Factors.~~

~~(a) In basic negotiated construction contracting, where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that affect cost or quality.~~

~~(b) In Design/Build contracting, in addition to subsection (a) of this section, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, the ability to respond to the technical complexity or unique character of the project, project management including coordination and integration of multiple disciplines, the time required to commence and complete the improvement, design/builder team experience and related matters that affect cost or quality.~~

~~(3) Contract Negotiations. Contract terms may be negotiated to the extent allowed by the RFP and these rules, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See OAR 731-005-0470(3). Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that affect cost or quality. Negotiations must always be in keeping with the least cost policy for public improvements.~~

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

~~Statutes/Other Implemented: ORS 279A.065, 279C.305, 279C.335~~

RULE SUMMARY: Relating to the process of conducting a Design/Build form of contracting.

CHANGES TO RULE:

731-007-0400

Design/Build

(1) General. The Design/Build form of contracting, as defined in OAR 731-007-0350(2), has technical complexities that are not readily apparent. ODOT shall only utilize this contracting method with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the Design/Build process ODOT must be able to reasonably expect the following types of benefits:¶

(a) Obtaining, through a Design/Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control, and required documentation as a fully integrated function with a single point of Contractor responsibility;¶

(b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;¶

(c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims;¶

(d) Shortening project duration as construction activity (early submittals, mobilization, subcontracting and advance Work) commences prior to completion of a final design, or where a design solution is still required (as in complex or phased projects); and¶

(e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.¶

(2) Authority. Agencies shall utilize the Design/Build form of contracting only in accordance with the requirements of division 7 rules. See particularly OAR 731-007-0360 on "Use of Alternative Contracting Methods."¶

(3) Selection. Design/Build selection criteria may include those factors set forth in OAR 731-007-0390(2).¶

(4) Qualification Based Selection (QBS). Inapplicable. Because the value of construction services predominates the Design/Build form of contracting, and ODOT is not issuing a personal service Contract, the QBS process mandated by ORS 279C.110 for State Agencies is not applicable. See ORS 279C.100(5) and 279C.110(2)(a).¶

(5) Licensing. Where the Design/Build Contractor is not a licensed or registered design professional, the Design/Build process contemplates that state licensing and registration requirements related to architectural and engineering services may be fulfilled by design professionals who are employees, subcontractors, joint venturers or in other lawful business relationships with the Design/Build Contractor. Under this approach, Design/Build Contractors are not required to fulfill design licensing or registration requirements at the time of submitting Proposals, but shall specifically identify the licensed design professionals by individual or firm names.¶

(6) Performance Security. ORS 279C.375(3)(b) provides that for Design/Build Contracts the surety's obligation on performance bonds, or the Bidder's obligation on cashier's or certified checks accepted in lieu thereof, includes the preparation and completion of design and related professional services specified in the Contract. This additional obligation, beyond performance of construction services, extends only to the provision of professional services and related design revisions, corrective Work and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage.¶

(7) Contract Requirements. ODOT shall conform its Design/Build contracting practices to all of the following requirements:¶

(a) Design Services. The level or type of design services required must be clearly defined within the Solicitation Documents and Contract, along with a description of the level or type of design services previously performed for the project. The services to be performed shall be clearly designated as either design Specifications or performance standards, and performance measurements must be identified.¶

(b) Professional Liability. The Contract shall clearly identify the liability of design professionals with respect to the Design/Build Contractor and ODOT, as well as requirements for professional liability insurance.¶

(c) Risk Allocation. The Contract shall clearly identify the extent to which ODOT requires an express indemnification from the Design/Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.¶

(d) Warranties. The Contract shall clearly identify any express warranties made to ODOT regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the

stated project performance and budget guidelines.¶

(e) Incentives. The Contract shall clearly identify any economic incentives and disincentives, the specific criteria that apply and their relationship to other financial elements of the Contract.¶

(f) Honoraria. If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the solicitation process on the basis that ODOT is benefited from such deliverables.

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

Statutes/Other Implemented: ORS 279A.065, 279C.100-110, 279C.335

AMEND: 731-007-0500

RULE SUMMARY: Relating to the mandatory prequalification of bidders.

CHANGES TO RULE:

731-007-0500

Mandatory Contractor Prequalification--Application ¶

OAR 731-007-0010 through OAR 731-007-0080 apply to public improvement projects procured for highways and bridges through ODOT's Construction Contracts Unit in conjunction with the Office of Project Letting (1) All bidders on public improvement projects procured pursuant to OAR, Chapter 731 Division 5, except for those that are procured through an Exempted Selection Method as set forth in OAR 731-005-0440(2), must be prequalified.

¶
(2) OAR, Chapter 731 Division 7 is not applicable to the procurement of projects utilizing an Alternative Contracting Method. ¶

(3) Bidders must be prequalified in the class(es) of work designated in the special provisions for the specific project on which the Bidder desires to bid.

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

Statutes/Other Implemented: ORS 279C.430

REPEAL: 731-007-0510

RULE SUMMARY: Relating to definitions of terms using in this section of the rules.

CHANGES TO RULE:

~~731-007-0510~~

~~Contractor Prequalification – Definitions~~

~~The following definitions apply to terms used in OAR 731-007-0010 to 731-007-0080.~~

- ~~(1) "Applicant" means the person submitting a contractor's prequalification application to ODOT.~~
- ~~(2) "Disqualification" means an action taken by ODOT to prohibit an applicant from becoming prequalified or from bidding on ODOT contracts.~~
- ~~(3) "Notice to Proceed" means written notice authorizing the contractor to begin performance of the work.~~
- ~~(4) "ODOT" means the Oregon Department of Transportation.~~
- ~~(5) "OPO" means the ODOT Procurement Office.~~
- ~~(6) "Revocation" means an action taken by ODOT terminating a contractor's prequalification and ability to bid.~~
- ~~(7) "Suspension" means 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 184.616, 184.619, 279A.050, 279A.065, 279C.430~~

~~Statutes/Other Implemented: ORS 279C.430~~

AMEND: 731-007-0520

RULE SUMMARY: Relating to instances where ODOT may require special prequalification of contractor.

CHANGES TO RULE:

731-007-0520

Special 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~~ ODOT may require special prequalification of contractor in addition to the mandatory prequalification ~~in subsection (1)~~ when the elements of a particular Public Improvement 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 Public Improvement 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 184.619, 279A.050, 279A.065, 279C.430

Statutes/Other Implemented: ORS 279C.430

AMEND: 731-007-0530

RULE SUMMARY: Relating to the process prospective bidders must follow to become prequalified.

CHANGES TO RULE:

731-007-0530

Conditions of Prequalification Requirements ¶

- ~~(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.¶~~
~~(2) All applicants desiring to prequalify shall 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. Applicants must sign a sworn affidavit that the information they provide in the prequalification application is true.¶~~
(3) If an applicant fails to complete the application as required, 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 ~~OP~~ODOT as required 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) Any applicants desiring to prequalify shall complete and submit the prequalification application, in accordance with the directions contained therein, setting forth their qualifications to satisfactorily for prequalification who willfully makes, or causes to be made, any false, deceptive or fraudulent statements in any questionnaire or statement required to be submitted under this rule, shall be denied prequalification (or the applicant's carry-out the work to be performed prequalification shall be revoked).¶~~
(8) Applicants must renew their prequalifications 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 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, 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 184.619, 279A.050, 279A.065, 279C.430

Statutes/Other Implemented: ORS 279C.430

AMEND: 731-007-0540

RULE SUMMARY: Regarding the notification of prequalification approval.

CHANGES TO RULE:

731-007-0540

~~Effect of Prequalification on Bidding Approval ¶~~

~~(1) Applicant If ODOT finds s shall be considered prequalified on the date determined by ODOT.¶~~

~~(2) Bidders will be considered non-responsive and bids will be rejected under any of the following conditions:¶~~

~~(a) The bidder's prequalification application is not received at ODOT's address shown int the applicant is qualified, ODOT will issue a notice stating the nature and type of contracts for which the prospective contractor may submit a bid and the period of time for which the prequalification application at least 10 days prior to bid opening;¶~~

~~(b) The b is valid. Applicants shall be consider is noted prequalified ion the class(es) of work designated in the special provisions; or¶~~

~~(c) The bidder's prequalification is not approved by ODOT date set forth in the notice.~~

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

Statutes/Other Implemented: ORS 279C.430

AMEND: 731-007-0560

RULE SUMMARY: Regarding notification process if a prequalification is disqualified, revoked, or suspended.

CHANGES TO RULE:

731-007-0560

Disqualification, Revocation or Suspension ¶¶

~~(1) Applicants must sign a sworn affidavit that the information they provide in the prequalification application is true. Any applicant for prequalification who willfully makes, or causes to be made, any false, deceptive or fraudulent statements in any questionnaire or statement required to be submitted under this rule, shall be denied prequalification (or the applicant's current prequalification shall be revoked).¶¶~~

~~(2) If ODOT disqualifies an applicant or revokes a prequalification, the applicant or prospective bidder shall receive a written notice identifying the reasons for the disqualification or revocation as found in ORS 279C.440.¶¶~~
ODOT disqualifies, revokes, or suspends a prequalification, ODOT shall issue a written decision to disqualify which shall:¶¶

(a) State the reasons for the action taken; and¶¶

(b) Inform the disqualified person of the appeal right of the person under ORS 279C.445 and 279C.450.¶¶

(2) A copy of the decision to disqualify must be mailed or otherwise furnished immediately to the disqualified person.

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

Statutes/Other Implemented: ORS 279C.430

AMEND: 731-007-0570

RULE SUMMARY: Regarding notice if an applicant is not qualified.

CHANGES TO RULE:

731-007-0570

~~Appeals Covering Denial of Prequalification Application ¶~~

~~(1) If ODOT denies an finds the applicant's prequalification or revokes an existing is not qualified, ODOT will issue a notice specifying the reasons found under ORS 279C.375 (3)(b) for not prequalification, ying the applicant may appeal the denial or revocation by requesting a hearing with DAS in accordance with ORS 279C.445 and and informing the applicant of the right to a hearing under ORS 279C.450. If the applicant wishes to appeal disqualification to DAS, the applicant must, within three business days after receipt of notice of disqualification, notify the Construction Contractsing Manager in writing. ¶~~

(2) Upon receipt of such notice of appeal, the Construction Contractsing Manager will immediately notify the Director of DAS.

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

Statutes/Other Implemented: ORS 279C.430

AMEND: 731-149-0010

RULE SUMMARY: General provisions related to Public Contracts for Construction Services

CHANGES TO RULE:

731-149-0010

Application ¶

~~¶~~Except as specifically set forth below, the Oregon Department of Transportation adopts OAR 137-049-0100 through 137-049-0910, the Department of Justice Model Rules, General Provisions Related to Public Contracts for Construction Services for any Public Improvement Contract procurements conducted pursuant to OAR chapter 731, division 149, ~~except for any Department of Justice Model Rules applicable to procurements of construction manager/general contractor services adopted pursuant to ORS 279A.065(3) and ORS 279C.337(1). The adoption of the Department of Justice Model Rules by this rule does not apply to any Public Improvement Contracts procured pursuant to OAR chapter 731, division 5 or 7. The following exceptions apply to these 731-149 rules.~~¶

(1) The following sentence is adopted instead of the first sentence of OAR 137-049-0330(1): Receipt. ODOT shall electronically or mechanically time-stamp or hand-mark each Offer and any modification or other submittals upon receipt, or provide a self-time-stamping device for use by Offerors for these purposes.¶

(2) ~~OAR 137-049-0610 through 137-049-0690 related to Alternative Contracting Methods for Public Improvement Contracts, except for any DOJ Model Rules~~Per ORS 279C.337, construction manager/general contractor services shall be procured in accordance with the model rules the Attorney General adopts under ORS 279A.065 (3) as may be updated from time to time (see OAR 137-049-0690 et al); therefore, OAR 137-049-0610 through 137-049-0690 applicable to procurements of construction manager/general contractor services adopted pursuant to ORS 279A.065(3) and ORS 279C.337(1), are adopted ~~by the Oregon Department of Transportation. See OAR 731-007-0340. herein.~~¶

(3) The Oregon Department of Transportation does not adopt any Oregon Department of Justice Division 49 rule related to diesel engine requirements pursuant to ORS 279C.537. The Oregon Department of Transportation has adopted OAR 731-005-0800 and OAR 731-149-0020 to implement ORS 279C.537.¶

(4) In the event of a conflict between the ODOT Chapter 731, Division 149 Rules and the Department of Justice Model Rules referenced above for Alternative Contracting Methods for Public Improvement Contracts, the Department of Justice Model Rules for Alternative Contracting Methods for Public Improvement Contracts control.

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

Statutes/Other Implemented: ORS 279A.065