Draft Rules

RULES PROPOSED:
736-146-0010, 736-146-0012, 736-146-0015, 736-146-0022, 736-146-0050, 736-146-0060, 736-146-0070, 736-146-0080, 736-146-0100, 736-146-0110, 736-146-0120, 736-146-0130, 736-146-0140, 736-147-0000, 736-147-0030, 736-147-0040, 736-147-0050, 736-147-0060, 736-147-0070, 736-147-0255, 736-147-0260, 736-147-0265, 736-147-0270, 736-147-0275, 736-147-0300, 736-147-0310, 736-147-0330, 736-147-0400, 736-147-0420, 736-147-0430, 736-147-0440, 736-147-0450, 736-147-0460, 736-147-0470, 736-147-0485, 736-147-0500, 736-147-0560, 736-147-0575, 736-147-0600, 736-147-0610, 736-147-0620, 736-147-0640, 736-147-0660, 736-147-0700, 736-147-0800, 736-147-0810, 736-147-0850, 736-148-0100, 736-148-0110, 736-148-0120, 736-148-0130, 736-148-0200, 736-148-0210, 736-148-0220, 736-148-0230, 736-148-0240, 736-148-0250, 736-148-0270, 736-148-0300, 736-149-0020, 736-149-0100, 736-149-0120, 736-149-0130, 736-149-0160, 736-149-0200, 736-149-0210, 736-149-0220, 736-149-0230, 736-149-0240, 736-149-0245, 736-149-0250, 736-149-0260, 736-149-0270, 736-149-0280, 736-149-0290, 736-149-0310, 736-149-0340, 736-149-0350, 736-149-0360, 736-149-0370, 736-149-0380, 736-149-0385, 736-149-0390, 736-149-0395, 736-149-0400, 736-149-0410, 736-149-0430, 736-149-0440, 736-149-0450, 736-149-0460, 736-149-0600, 736-149-0620, 736-149-0630, 736-149-0640, 736-149-0645, 736-149-0650, 736-149-0660, 736-149-0670, 736-149-0690, 736-149-0820, 736-149-0830, 736-149-0840, 736-149-0850, 736-149-0870, 736-149-0880, 736-149-0900, 736-149-0910

AMEND: 736-146-0010
RULE TITLE: Application
RULE SUMMARY: Describes purpose for rules
RULE TEXT:

(1) Purpose: The purpose of this division is to establish a comprehensive framework governing the Oregon Parks and Recreation Department's (OPRD) procurement processes. Pursuant to the authority granted under ORS 279A.025(3)(k), these rules enable the department to develop and implement its own contracting and purchasing procedures. The intent is to ensure consistency in procurement practices, safeguard the interests of the department, and promote fairness and transparency in its engagement with the business community.

(a) This division 146 which applies to all of OPRD's Public Contracting in accordance with ORS 279A.025(3)(k). The intent of these rules is to identify exemptions from public contracting code as identified in ORS 279A.025(3)(k) except as identified in ORS 279A.250 to ORS 279A.290.

(b) Division 147, which describes procedures for Public Contracting for Goods, Services and Personal Services other than Architectural, Engineering and Land Surveying Services and Related Services;

(c) Division 148, which describes procedures for Public Contracting for Architectural, Engineering, Land Surveying Services and Related Services; and

(d) Division 149, which describes procedures for Public Contracting for Construction Services.

(e) The department's contracting activities related to information technology, photogrammetric mapping, or telecommunications will comply with the Department of Administrative Services (DAS) Enterprise Information Services (EIS) investment oversight processes.

(f)This division applies to OPRD's procurement of printing and printing purchase exemptions in accordance with ORS 282.020(1). The intent of these rules is to allow the department the authority to seek the most cost effective, printing services for the products needed while still complying with ORS 282.210 to 282.230 as required of all public agencies.

(2) If a conflict arises between these division 146 rules and rules in divisions 147, 148 and 149, the rules in divisions 147, 148 and 149 take precedence over these division 146 rules.

(3) In addition to the source selection methods set forth in this division, the department may enter into contracts for the types of goods and services described by any method the department determines is reasonable in the circumstances, including by Direct Award and negotiation.

(4) Reservation of Rights: Except as set forth in ORS 279A.025(3)(k), OPRD is exempt from the provisions of ORS chapters 279A, 279B and 279C, which govern public contracting and procurement, OPRD reserves the right to consult the following as guidance in making procurement decisions:

(a) ORS chapters 279A, 279B and 279C;

(b) The Attorney General's Model Public Contract Rules (OAR chapter 137, divisions 46, 47, 48, and 49);

(c) The DAS established Public Contracting Rules (OAR chapter 125, divisions 246, 247, 248, and 249) including but not limited to the use of the state electronic procurement tools;

(d) Any written opinions issued by the courts of the State of Oregon interpreting any of the foregoing; and

(e) The provisions set forth in the foregoing statutes, administrative rules, and interpretations thereof are not binding on the department, but the department may refer to such statutes, administrative rules, and interpretations for guidance in the interpretation and administration of procurements subject to this division. The department will document in the procurement file the extent to which it relied on the foregoing statutes, administrative rules, or interpretations as guidance for its decisions related to the procurement.

(5) Applicable federal statutes and regulations govern when federal funds are involved and the federal statutes or regulations conflict with any provision of rules or require additional conditions in Public Contracts not authorized by rules.

STATUTORY/OTHER AUTHORITY: ORS 279A.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279A.025(3)(k)

AMEND: 736-146-0012
RULE TITLE: Definitions
RULE SUMMARY: Definitions for use in Division 146 to 149.
RULE TEXT:

Unless the context of a specifically applicable definition in the Code requires otherwise, terms used in Chapter 736 have the meaning set forth in the division of these Rules in which they appear, and if not defined there, the meaning set forth in these division 146 rules. The following terms, when used in these Rules, have the meaning given below:

(1) “Addendum” or “Addenda” means an addition to, deletion from, a material change in, or general interest explanation of a Solicitation Document.

(2) “Amendment” means a written modification to the terms and conditions of a contract, other than by changes to the work, within the general scope of the original procurement that requires mutual agreement between the department and the contractor.

(3) “Architect” has the meaning given that term in ORS 671.010.

(4) “Architect and Engineering (A&E) [means a] contract” means a contract with a consultant or firm for architectural, engineering, photographic mapping, land surveying and related services.

(5) “Architectural, engineering, photogrammetric mapping, transportation planning or land surveying services” means professional services that are required to be performed by an architect, engineer, photogrammetrist, transportation planner or land surveyor.

(6) “Award” means the decision of the Department to enter into a Contract with any Person.

(7) “Bid” means a Written response to an Invitation to Bid.

(8) “Bidder” means a Person who submits a Bid in response to the Department’s Invitation to Bid.

(9) “Business Day” means Monday through Friday, 8:00 a.m. to 5:00 p.m. Pacific Time, excluding recognized holidays and any other Day that the Departments Headquarters is closed for business for any reason.

(10) “Closing” means the date and time specified in a Solicitation Document as the deadline for submitting Offers.

(11) “Commission” has that meaning as defined in ORS 390.005(1).

(12) "Consultant" means an architect, engineer, photogrammetrist, transportation planner, land surveyor or provider of related services. A consultant includes a business entity that employs architects, engineers, photogrammetrists, transportation planners, land surveyors or providers of related services, or any combination of the foregoing.

(13) “Contract” means a contract for sale or other disposal, or a purchase, lease, rental or other acquisition, by the Department of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. “Contract” does not include grants.

(14) “Contract Administration” means all functions related to a given contract between OPRD and a contractor from the time the contract is awarded until the work is completed and accepted or the contract is terminated, payment has been made, and disputes have been resolved.

(15) “Contract Price” means, as the context requires, the maximum monetary obligation that the Department either will or may incur under a Contract, including bonuses, incentives and contingency amounts, if the Contractor fully performs under the Contract.

(16) “Contractor” means the Person, including a Consultant, with whom the Department enters into a Contract.

(17) “Day” means calendar day.

(18) “Department” means the Oregon State Parks and Recreation Department and has the meaning as defined in ORS 390.005(2).

(19) "Designated Procurement Officer" (DPO) means the individual designated and authorized by the department Director to perform certain procurement functions described in these rules.

(20) “Direct Award” or “Small Procurement” mean a public contract for goods or services that does not exceed a contract price of $100,000 in any manner the [contracting agency] the Department deems practical or convenient, including by direct selection or award.

(21) “Director” has that meaning as defined in ORS 390.005(3).

(22) “Disqualification” means a disqualification, suspension or debarment under ORS 200.065, 200.075 or the preclusion of a Person from contracting with the department for a period of time in accordance with OAR 736-147-0575 and 736-149-0370.

(23) “Electronic Advertisement” means the Department Solicitation Document, Request for Proposal, Request for Qualifications, Invitation to Bid, or other document inviting participation in the Department’s Procurements made available over the Internet via:

(a) The World Wide Web or some other Internet protocol; or

(b) The Department’s Electronic Procurement System.

(24) “Electronic Offer” means a response to the Department’s Solicitation Document or Request for Quotes submitted to the Department via:

(a) The World Wide Web or some other Internet protocol; or

(b) The Department's Electronic Procurement System.

(25) "Electronic Procurement System" means 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 the Department to post Electronic Advertisements, receive Electronic Offers, and conduct other activities related to a Procurement.

(26) "Emergency" means circumstances that:

(a) Could not have been reasonably foreseen;

(b) Require prompt execution of a Contract to remedy the condition; and

(c) Substantially threaten a loss of revenue, damage or interruption of services or a substantial threat to property, public health, welfare or safety.

(27) "Engineer" means a person who is registered and holds a valid certificate in the practice of engineering in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002 (2).

(28) "Enterprise Information Services (EIS) investment oversight" means requirements described in ORS 276A.206.

(29) "Formal Procurement" means a public contract that [exceeds a contract price of $500,000 and must be] is awarded by using a formal Invitation to Bid (ITB) or Request for Proposal (RFP) process if the department will base contractor selection on criteria in addition to cost or if the ability to negotiate terms and conditions with the selected contractor is desired. Procurements that exceed a contract price of $500,000 will be solicited using the Formal Procurement process. The solicitation process must provide opportunities for prospective proposers to protest the solicitation and the award.

(30) "Goods" means supplies, equipment, materials, and personal property, including any tangible, intangible, and intellectual property, and associated rights and licenses.

(31) "Information Technology", as defined in ORS 276A.230(2).

(32) "Intermediate Procurement" means a public contract that exceeds a contract price of $100,000, but does not exceed a contract price of $500,000[]. The department is required to seek at least three informally solicited competitive price quotes or competitive proposals from prospective contractors.

(a) A contract awarded under this section may be amended to exceed $500,000 only in accordance with rules adopted under this division.

(b) This procurement may not be artificially divided or fragmented so as to constitute an intermediate procurement under this section.

(33) “Invitation to Bid” or "ITB" means the Solicitation Document issued to invite Offers from prospective Contractors.

(34) “Land surveyor” means a person who is registered and holds a valid certificate in the practice of land surveying in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002 (5).

(35) “Maintenance” means activities to keep facilities in an efficient operating condition and that do not add to the value or extend the economic life of the facilities.

(36) “Minor Alteration” means work done to an existing structure, facility, or use that results in a ten per cent or less increase in the size of the structure, facility, or use, and that does not require an increase in capacity to structural, mechanical or electrical systems, and does not add facilities.

(37) “Offer” means a Written offer to provide Goods or Services in response to a Solicitation Document.

(38) “Offeror” means a Person who submits an Offer.

(39) “Opening” means the date, time and place specified in the Solicitation Document for the public opening of Offers.

(40) “Person” means any of the following with legal capacity to enter into a Contract: individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation or any other legal or commercial entity.

(41) “Personal Services” as used in division 147 and as used in division 146 when applicable to division 147 means services that require specialized skills, knowledge and resources in the application of technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment, including, without limitation, the services of an accountant, information technology professional, Consultant, or artist (including a photographer, filmmaker, painter, weaver or sculptor). The services performed under a Personal Services Contract. “Personal Services” as used in division 148 and division 149, and as used in this division 146 when applicable to division 148 or division 149, or both, includes architectural, engineering, photogrammetric mapping, transportation planning, land surveying services and related services.

(42) “Personal Services Contract” means a Contract, or member of a class of Contracts, other than a Contract for the services of an Architect, Engineer, Land Surveyor or Provider of Related Services (as defined in OAR 736-148 and OAR 736-149), whose primary purpose is to acquire specialized skills, knowledge and resources in the application of technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment, including, without limitation, a Contract for the services of an accountant, consultant, or artist (including a photographer, filmmaker, painter, weaver or sculptor).

(43) “Photogrammetric mapping”, as defined in ORS 672.002.

(44) “Photogrammetrist” has the meaning given that term in ORS 672.002.

(45) “Price Agreement” means a written agreement between the Department and a Person for Goods, Services, or both, that the Department may purchase:

(a) Through issuance of a service request order, work order, task order, purchase order or similar written ordering instrument as prescribed by the agreement; and

(b) At a set price or at a price established using a method prescribed by the agreement with either:

(A) No guarantee of a minimum or maximum purchase quantity; or

(B) An initial order or minimum purchase quantity specified in the agreement, combined with Contractor’s continuing obligation to provide the Goods, Services, or both, upon the Department’s written request, with no guarantee of minimum or maximum additional purchase quantities.

(46) “Proposal” means a Written response to a Request for Proposals.

(47) “Proposer” means a Person who submits a Proposal to the Department.

(48) “Public Contract” means a contract for sale or other disposal, or a purchase, lease, rental or other acquisition, the Department of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. “contract” does not include grants.

(49) “Public Improvement” means a project for construction, reconstruction or major renovation on real property by or for the department. “Public improvement” does not include:

(a) Projects for which no funds of the department are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or

(b) Emergency work; or

(c) Minor alteration, ordinary repair or routine maintenance projects, necessary to preserve a public improvement.

(50) “Public Improvement Contract” means a public contract for a public improvement. “Public improvement contract” does not include a public contract for emergency work, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement.

(51) “Related services” means personal services, other than architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, that are related to planning, designing, engineering or overseeing public improvement projects or components of public improvement projects, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, hazardous substances or hazardous waste

or toxic substances testing services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner’s representation services or land-use planning services.

(52) “Repair” means work done to restore worn or damaged real property or facilities to normal operating condition.

(53) “Replace” means to exchange or substitute a facility component for another component performing the same function at the same or higher level of performance or economy and in compliance with then current building code requirements.

(54) “Request for Proposals” means a written document Department issues requesting Proposals, which the Department intends to evaluate and score according to the processes and scored selection criteria described in the Request for Proposals, with the intent to enter into a Contract(s) with the Responsive and Responsible Offeror(s) whose written response(s) either receives the highest score or presents the best value to the State of Oregon, or both.

(55) “Request for Qualifications” or “RFQ” means a Written document issued by the Department to which Contractors respond in Writing by describing their experience with and qualifications for the Services, Personal Services or Architectural, Engineering or Land Surveying Services, or Related Services, described in the document.

(56) “Request for Quotes” means a Written or oral request for prices, rates or other conditions under which a potential Contractor would provide Goods or perform Services, Personal Services or Public Improvements described in the request.

(57) “Responsible” means a reasonable determination by the department that a person would be a reliable, competent, responsible, accountable, and legally authorized contractor, not debarred or disqualified by the department.

(58) “Responsible Offeror” means, as the context requires, a responsible bidder or a person who has submitted an offer and meets the standards of responsibility, and who has not been debarred or disqualified by the department.

(59) “Responsive” means having the characteristic of substantial compliance in all material respects with applicable solicitation requirements.

(60) “Responsive Offer” means, as the context requires, a Responsive Bid, Responsive Proposal or other Offer that substantially complies in all material respects with applicable solicitation requirements.

(61) “Services” means labor utilizing skills, knowledge and resources for physical, technical or scientific work or utilizing professional, artistic or managerial thought, discretion or judgment.

(62) “Signature” means any Written mark, word or symbol that is made or adopted by a Person with

the intent to be bound and that is attached to or logically associated with a Written document to which the Person intends to be bound.

(63) “Signed” means, as the context requires, that a Written document contains a Signature or that the act of making a Signature has occurred.

(64) “Sole Source” means a contract for goods or services without competition that exceeds a contract price of $100,000 if the department determines in writing that the goods or services are available from only one source.

(a) The department must base the determination of sole source on written findings that may include that:

(A) the efficient utilization of existing goods requires acquiring compatible goods or services;

(B) the goods or services required to exchange software or data with other public or private agencies are available from only one source;

(C) the goods or services are for use in a pilot or an experimental project; or other findings that support the conclusion that the goods or services are available from only one source.

(b) The department must, to the extent reasonably practical, negotiate with the sole source provider to obtain contract terms that are advantageous to the department.

(65) “Solicitation Document” means an Invitation to Bid, Request for Proposals, Request for Quotes, or other similar document issued to invite Offers from prospective Contractors. The following are not Solicitation Documents unless they invite Offers from prospective Contractors: a Request for Qualifications, a prequalification of bidders, a request for information, a sole source notice, an approval of a Special Procurement, or a request for product prequalification. A project-specific selection document under a Price Agreement that has resulted from a previous Solicitation Document is not itself a Solicitation Document.

(66) “Telecommunications”, as defined in ORS 276A.206(9)(h).

(67) “Trade Services” means all remaining services that do not meet the definition for Personal Services.

(68) “Transportation planning services” means transportation planning services for projects that require compliance with the National Environmental Policy Act, 42 U.S.C. 4321 et seq.

(69) “Writing” means letters, characters and symbols inscribed on paper by hand, print, type or other method of impression, intended to represent or convey particular ideas or meanings. “Writing,” when required or permitted by law, or required or permitted in a Solicitation Document, also means letters, characters and symbols made in electronic form and intended to represent or convey particular ideas or meanings.

(70) “Written” means existing in Writing.

STATUTORY/OTHER AUTHORITY: ORS 279A.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279A.025(3)(k)

AMEND: 736-146-0015
RULE TITLE: Special Approvals for Public Contracts When Required
RULE SUMMARY: Describes when special approvals are required.
RULE TEXT:

(1) When Attorney General legal sufficiency approval is required under ORS 291.047, the department must seek legal approval.

(2) When the department contracts for services normally provided by another contracting agency or for services for which another contracting agency has statutory responsibilities, the department is required to seek the other contracting agency's approvals. Examples of these special approvals include, but are not limited to:

(a) DAS, State Services Division, Risk Management for providing tort liability coverage;

(b) DAS Enterprise Information Services for telecommunications services;

(c) Office of the Treasurer, Debt Management Division, for bond counsel and financial advisory services (bond counsel services also require the approval of the Attorney General);

(d) DAS Enterprise Information Services for information-system related services.

(3) The Attorney General has sole authority to contract for attorney services. Exceptions may be granted in writing on a case-by-case basis only by the Attorney General.

(4) The Secretary of State Audits Division has sole authority to contract for financial auditing services. Exceptions may be granted in writing on a case-by-case basis only by the Secretary of State Audits Division.

STATUTORY/OTHER AUTHORITY: ORS 282.020
STATUTES/OTHER IMPLEMENTED: ORS 282.020

ADOPT: 736-146-0022
RULE TITLE: Procurement Activity
RULE SUMMARY: process for conducting procurement activities.
RULE TEXT:

(1) Contracting Authority of Director: By adopting these rules the Commission authorizes the director to conduct procurements as described in these rules, subject to any limitations set forth in these rules.

(2) Delegation by Director: Pursuant to ORS 390.131, the director may delegate to any department employee the authority to exercise or discharge any of the director’s powers, duties or functions under these Chapter 736 rules.

(3) Commission Approval for Major Procurements: The director may execute a contract for a major procurement only after the commission has approved the award.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k), ORS 390.131
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

AMEND: 736-146-0050
RULE TITLE: Contract Administration; General Provisions
RULE SUMMARY: Describes provisions for contract administration.
RULE TEXT:

(1) The department conducts procurements for goods or services, including architectural, engineering, land surveying and related services, and public improvements.

(2) The department must appoint, in writing, a contract administrator as an OPRD representative for each contract. The contract administrator may delegate in writing a portion of the contract administrator's responsibilities to a technical representative for specific day-to-day administrative activities for each contract.

(3) The department must maintain a procurement file for procurements for goods or services; the informal selection threshold for architectural, engineering, and land surveying services; and the intermediate procurement threshold for public improvements, respectively:

(a) Each procurement file must contain an executed contract, if awarded.

(b) The department must maintain procurement files, including all documentation, for a period not less than six years, except for 10 years beyond each contract's expiration date for architectural, engineering, and land surveying services and related services or for another period in accordance with another provision of law.

STATUTORY/OTHER AUTHORITY: ORS 279A.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279A.025(3)(k)

AMEND: 736-146-0060
RULE TITLE: Payment Authorization of Cost Overruns for Goods or Services including Architectural, Engineering and Land Surveying Services and Related Services Contracts
RULE SUMMARY: Requirements for authorization of Cost Overruns for Goods or Services including Architectural, Engineering and Land Surveying Services and Related Services Contracts
RULE TEXT:

(1) Payments on contracts that exceed the maximum contract consideration require approval from the department's designated procurement officer and may require approval from the Attorney General pursuant to OAR 137-045-0015. Approval may be provided if there is compliance with all of the following:

(a) The original contract was duly executed and, if required, approved by the Attorney General.

(b) The original contract has not expired, been terminated, or been reinstated under OAR 736-147-0070 as of the date written approval to increase the contract amount is granted.

(c) The cost overrun is not associated with any change in the statement of work set out in the original contract.

(d) The cost overrun arose out of extraordinary circumstances or conditions encountered in the course of contract performance that were reasonably not anticipated at the time the original contract or the most recent amendment, if any, was signed. Such circumstances include but are not limited to cost overruns that:

(A) Address emergencies arising in the course of the contract that require prompt action to protect the work already completed.

(B) Comply with official or judicial commands or directives issued during contract performance.

(C) Ensure that the purpose of the contract will be realized;

(e) The cost overrun was incurred in good faith, results from the good faith performance by the contractor, and is no greater than the prescribed hourly rate or the reasonable value of the additional work or performance rendered.

(f) Except for the cost overrun, the contract and its objective are within the statutory authority of the department and funds are available for payment under the contract.

(g) An officer or employee of the department has presented a written report to the department's designated procurement officer within 60 days of the discovery of the overrun that states the reasons for the cost overrun and demonstrates to the satisfaction of the department's designated procurement officer that the original contract and the circumstances of the overrun satisfy the conditions stated above.

(h) The department's designated procurement officer approves in writing the payment of the overrun, or such portion of the overrun amount as the department's designated procurement officer determines may be paid consistent with the conditions of this rule. If the department's designated procurement officer has signed the contract or has immediate supervisory responsibility over performance of the contract, that person must designate an alternate delegate to grant or deny written approval of payment.

(2) The department must obtain an Attorney General's approval of the contract amendment, if such approval is required by ORS 291.047, before making any overrun payment.

STATUTORY/OTHER AUTHORITY: ORS 279A.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279A.025(3)(k)

AMEND: 736-146-0070
RULE TITLE: Ethics in Public Contracting — Policy
RULE SUMMARY: Describes agency policy toward ethics in public contracting
RULE TEXT:

Oregon public contracting is a public trust. The department and contractors involved in public contracting must safeguard this public trust.

STATUTORY/OTHER AUTHORITY: ORS 244.010, ORS 244.400, ORS 279A.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 244.010, ORS 244.400, ORS 279A.025(3)(k)

AMEND: 736-146-0080
RULE TITLE: Ethics in Selection and Award of Public Contracts
RULE SUMMARY: Describes requirements for ethics in selection and award of contracts.
RULE TEXT:

(1) OPRD officers, employees or agents involved in the process of the selection and award of public contracts must carefully review the provisions of ORS 244.040.

(2) OPRD officers, employees and agents are prohibited from soliciting or receiving gifts, which means something of economic value given to a public official or the public official's relative without an exchange of valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, and which is not extended to others who are not public officials or the relatives of public officials on the same terms and conditions; and something of economic value given to a public official or the public official's relative for valuable consideration less than that required from others who are not public officials.

(3) OPRD officers, employees and agents are prohibited from using their official position for personal or financial gain.

(4) OPRD officers, employees and agents are prohibited from using confidential information gained in the course of the screening and selection procedures for personal or financial gain.

STATUTORY/OTHER AUTHORITY: ORS 244.010 - 244.400, ORS 279A.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 244.010 - 244.400, ORS 279A.025(3)(k)

AMEND: 736-146-0100
RULE TITLE: Non-retaliation
RULE SUMMARY: Describes prohibition on retaliation.
RULE TEXT:

Retaliation against anyone who complies with the rules in this division related to ethics is prohibited. Any officer, employee or agent of the department or contractor who engages in retaliation action will be subject to penalties pursuant to ORS 244.350 to 244.400 and related rules. Also, any contractor who engages in a retaliation action may be debarred.

STATUTORY/OTHER AUTHORITY: ORS 279A.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279A.025(3)(k)

AMEND: 736-146-0110
RULE TITLE: Ethics in Specification Development
RULE SUMMARY: Describes requirements for ethics in development of specifications.
RULE TEXT:

(1) The department and contractors must not develop specifications that primarily benefit a contractor, directly or indirectly, to the detriment of the department or the best interest of the state.

(2) The department and contractors must not develop specifications that inhibit or tend to discourage public contracting under the rules in this division or policies of the department.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

AMEND: 736-146-0120
RULE TITLE: Ethics in Sole Source
RULE SUMMARY: Requirements for ethics in sole source contracting.
RULE TEXT:

The department may not select a sole-source procurement and avoid a competitive procurement if the purpose of the selection is to primarily benefit the contractor, directly or indirectly, to the detriment of the department or the best interest of the state.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

AMEND: 736-146-0130
RULE TITLE: Fragmentation
RULE SUMMARY: Describes prohibition on fragmentation.
RULE TEXT:

The department may not artificially divide or fragment a procurement so as to constitute a small procurement, pursuant to ORS 279B.065, or an intermediate procurement, pursuant to ORS 279B.070.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

AMEND: 736-146-0140
RULE TITLE: Ethics in OPRD and Contractor Communications
RULE SUMMARY: Outlines requirements for ethical communications with contractors.
RULE TEXT:

(1) The department is encouraged to conduct research with contractors who can meet the state's needs. This research phase includes but is not limited to:

(a) Meetings;

(b) Industry presentations; and

(c) Demonstrations with contractors that, in the department's discretion, may be able to meet the department's needs.

(2) The department must document the items discussed during the research phase of solicitation development. The research phase ends the day of a solicitation release or request for a quote pursuant to an intermediate procurement, unless the solicitation or intermediate procurement provides for a different process that permits on-going research.

(3) Any communication between the department and contractors regarding a solicitation, that occurs after the solicitation release or request for a quote and before the award of a contract, must only be made in the solicitation and contracting phase within the context of the solicitation document or intermediate procurement requirements.

(4) Communication may allow for discussions, negotiations, addenda, contractor questions, and the department's answers to contractor questions about terms and conditions, specifications, amendments, or related matters. During this phase, telephone conversations, electronic communications and meetings must be documented in the procurement file. Written inquiries regarding the solicitation should be responded to by the department in writing.

(5) A record of all material communications regarding the solicitation by interested contractors must be made part of the procurement file pursuant to OAR 736-146-0050.

STATUTORY/OTHER AUTHORITY: ORS 279A.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279A.025(3)(k)

ADOPT: 736-147-0000
RULE TITLE: Application
RULE SUMMARY: defines application
RULE TEXT:

These division 147 rules apply to the Procurement of Goods and Services. The department shall procure personal services, except for architectural, engineering, land surveying and related services, in the same manner other services are procured under these division 147 rules.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

AMEND: 736-147-0030
RULE TITLE: Emergency Procurements Process
RULE SUMMARY: Outlines the emergency procurement process
RULE TEXT:

(1) The director or designee, may authorize department personnel to award a public contract for goods and services as an emergency procurement. Emergency contracts are exempt from Department of Justice legal sufficiency review under OAR 137-045-0070 as set out in subsection (3)(b).

(2) Pursuant to the requirements of this rule, OPRD may, in its discretion, enter into a public contract without competitive solicitation if an emergency exists. Emergency means circumstances that could not have been reasonably foreseen that create a substantial risk of loss, damage, interruption of services or threat to public health or safety that requires prompt execution of a contract to remedy the condition.

(3) For contracts above $100,000, when entering into an emergency contract, the department must:

(a) Encourage competition that is reasonable and appropriate under the circumstances;

(b) Award contract within 60 days following the event triggering the need for an emergency contract unless an extension has been granted by the director or designee;

(c) Have a written report prepared and signed by an executive of the department who is responsible for oversight of the public contract within 10 business days after execution of the public contract, said report to contain:

(A) A concise summary of the circumstances that constitute the emergency and the character of the risk of loss, damage, interruption of services, or threat to public health or safety created or anticipated to be created by the emergency circumstances;

(B) A statement of the reason or reasons why the prompt execution of the proposed public contract was required to deal with the risk created or anticipated to be created by the emergency circumstances;

(C) A brief description of the services or goods to be provided under the public contract, together with its anticipated cost; and

(D) A brief explanation of how the public contract, in terms of duration, services, or goods provided under it, was restricted to the scope reasonably necessary to adequately deal only with the risk created or anticipated to be created by the emergency circumstances.

(d) Maintain a copy of report described in subsection (c) in the department's emergency public contract file.

STATUTORY/OTHER AUTHORITY: ORS 279A.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279A.025(3)(k)

AMEND: 736-147-0040
RULE TITLE: Price Agreements
RULE SUMMARY: Process for price agreements
RULE TEXT:

(1) The department may create price agreements designed for the exclusive use of the department or use DAS multi-agency price agreements.

(2) The department may create price agreements for the purposes of achieving continuity of product, securing a source of supply, reducing inventory, combining requirements for volume discounts, standardization among agencies, and reducing lead time for ordering.

(3) If the department conducts a purchase of goods or services pursuant to a DAS or OPRD price agreement, the department does not need to undertake an additional competitive solicitation.

STATUTORY/OTHER AUTHORITY: ORS 279A.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279A.025(3)(k)

REPEAL: 736-147-0050
RULE TITLE: Mandatory Use Contracts and Mandatory Use Price Agreements
RULE SUMMARY: Repeal mandatory use contracts
RULE TEXT:

(1) For the purposes of this rule, a Mandatory Use Contract or Mandatory Use Price Agreement means a public contract, DAS price agreement, or other agreement that the department is required to use for the procurement of goods and services.

(2) If DAS State Procurement Office establishes a price agreement that is designated mandatory for state agency use, the department may procure applicable goods and services pursuant to the Mandatory Use Contract or Mandatory Use Price Agreement unless otherwise specified in these rules.

(3) The department is exempted from Mandatory Use Contracts or Mandatory Price Agreements for acquisition except for duties or obligations the department has under ORS 279A.250 to 279A.290 and the department's contracting activities related to information technology, photogrammetric mapping, or telecommunications.

STATUTORY/OTHER AUTHORITY: ORS 279A.025(3)(k), ORS 279A.070, ORS 282.020, ORS 279A.065(5)(a)
STATUTES/OTHER IMPLEMENTED: ORS 279A.025(3)(k), ORS 279B.060, ORS 282.020

REPEAL: 736-147-0060
RULE TITLE: Amendments for Intermediate Goods or Services Procurements
RULE SUMMARY: Repeal intermediate goods or services procurement process
RULE TEXT:

(1) The department may amend a public contract awarded as an intermediate procurement in accordance with OAR 137-047-0800, but the cumulative amendments shall not increase the total contract price to a sum that is greater than 125 percent of the procurement threshold.

(2) Any public contract with a total value amended over $250,000 and every $250,000 thereafter must be approved by the department Designated Procurement Officer and Department of Justice.

STATUTORY/OTHER AUTHORITY: ORS 279A.025(3)(k), ORS 279A.070, ORS 279A.065(6)(a), ORS 282.020
STATUTES/OTHER IMPLEMENTED: ORS 279A.025(3)(k), ORS 279A.070, ORS 279A.050, ORS 279A.065(5), ORS 279A.140, ORS 282.020

AMEND: 736-147-0070
RULE TITLE: Reinstatement of Expired or Terminated Contracts
RULE SUMMARY: Process for reinstating expired or terminated contacts.
RULE TEXT:

(1) If the department enters into a contract for goods or services and that contract subsequently expires or is terminated, the department may reinstate the contract subject to the following:

(a) The type or aggregated value (including all amendments) of the contract, after reinstatement, falls under the department procurement thresholds in accordance with these rules;

(b) The department may reinstate and amend for time only;

(c) The purpose must be for:

(A) Fulfillment of its term, up to the maximum time period provided in the contract; or

(B) Completion of a deliverable, provided:

(i) The deliverable, including but not limited to goods, services, or work, was defined in the contract as having a completion date or event; and

(ii) The department documents the uncompleted work as of the date of the reinstatement of the expired contract in the procurement file.

(d) The expired or terminated contract was previously properly executed; and

(e) The failure to extend or renew the contract in a timely manner was due to unforeseen circumstances, unavoidable conditions or any other occurrence outside the reasonable control of the department or the contracting party.

(2) The department may amend an expired contract for time only in accordance with section (1). The department may amend the contract purposes other than time in accordance with OAR 137-047-0800.

(3) If the department reinstates and amends an expired contract for time, pursuant to this rule, the department may compensate the contracting party for work performed in the interim between the expiration of the original contract and the effective date of the reinstatement and amendment.

(4) Once a contract is reinstated, it is in full force and effect as if it had not expired or terminated.

STATUTORY/OTHER AUTHORITY: ORS 279A.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279A.025(3)(k)

ADOPT: 736-147-0255
RULE TITLE: Competitive Sealed Bidding – Formal Procurement
RULE SUMMARY: formal procurement process
RULE TEXT:

(1) Generally, the department may procure goods or services by competitive sealed bidding for contracts with an estimated contract price that exceeds $500,000. An Invitation to Bid is used to initiate a competitive sealed bidding solicitation and shall contain the information required by OAR 736-147-0255.

(2) The department shall provide public notice of the competitive sealed bidding solicitation as set forth in OAR 736-147-0300.

(3) Invitation to Bid. The Invitation to Bid shall include the following:

(a) General Information.

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

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

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

(iii) A provision that provides that statements made by the department's representatives at the conference are not binding upon the department unless confirmed by written addendum.

(B) The name and title of the authorized designated procurement officer (DPO) designated for receipt of offers and contact person (if different);

(C) The form and instructions for submission of bids and any other special information, e.g., whether bids may be submitted by electronic means;

(D) The time, date and place of opening, if public;

(E) The location where the solicitation document may be reviewed;

(F) How the department will notify bidders of addenda and how the department will make addenda available (see OAR 736-147-0430).

(b) Department Need to Purchase. The character of the goods or services the department is purchasing including, if applicable, a description of the acquisition, specifications, delivery or performance schedule, inspection and acceptance requirements. The department's description of its need to purchase must:

(A) Identify the scope of the work to be performed under the resulting contract, if the department awards one;

(B) Outline the anticipated duties of the contractor under any resulting contract;

(C) Establish the expectations for the contractor's performance of any resulting contract; and

(D) Unless the department for good cause specifies otherwise, the scope of work must require the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the goods or services that the department is purchasing.

(c) Bidding and Evaluation Process.

(A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;

(B) The department shall set forth objective evaluation criteria in the Solicitation Document. Evaluation criteria need not be precise predictors of actual future costs, but to the extent possible, the evaluation factors shall be reasonable estimates of actual future costs based on information the Department has available concerning future use; and

(C) If the department intends to award contracts to more than one bidder pursuant to OAR 736-147-0600(4)(c), the department shall identify in the Solicitation Document the manner in which it will determine the number of contracts it will award.

(d) All contractual terms and conditions in the form of contract provisions the department determines are applicable to the procurement. The contract terms and conditions must specify the consequences of the contractor's failure to perform the scope of work or to meet the performance standards established by the resulting contract. Those consequences may include, but are not limited to:

(A) The department's reduction or withholding of payment under the contract;

(B) The department's right to require the contractor to perform, at the contractor's expense, any additional work necessary to perform the statement of work or to meet the performance standards established by the resulting contract; and

(C) The department's rights, which the department may assert individually or in combination, to declare a default of the resulting contract, to terminate the resulting contract, and to seek damages and other relief available under the resulting contract or applicable law.

(4) Good Cause. For the purposes of this rule, "Good Cause" means a reasonable explanation for not requiring contractor to meet the highest standards, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of the department. The department shall document in the procurement file the basis for the determination of good cause for specification otherwise. A department will have good cause to specify otherwise under the following circumstances:

(a) The use or purpose to which the goods or services will be put does not justify a requirement that the contractor meet the highest prevalent standards in performing the contract;

(b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the goods or services will be compatible with or will operate efficiently or effectively with components, equipment, parts, services or information technology including hardware, services or software with which the goods or services will be used, integrated, or coordinated;

(c) The circumstances of the industry or business that provides the goods or services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, scientific developments, that a reliable highest prevalent standard does not exist or has not been developed;

(d) Any other circumstances in which department's interest in achieving economy, efficiency, compatibility or availability in the procurement of the goods or services reasonably outweighs the department's practical need for the highest prevalent standard in the applicable or closest industry or business that supplies the goods or services to be delivered under the resulting contract.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0260
RULE TITLE: Competitive Sealed Proposals – Formal Procurements
RULE SUMMARY: process for competitive sealed proposals in formal procurements
RULE TEXT:

(1) Generally. A department may procure goods or services by competitive sealed proposals, for contracts with an estimated contract price that exceeds $500,000. The department shall use a request for proposal to initiate a competitive sealed proposal solicitation. The request for proposal must contain the information required by section (2) of this rule. The department shall provide public notice of the request for proposal as set forth in OAR 736-147-0300.

(2) Request for Proposal. The request for proposal must include the following:

(a) General information.

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

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

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

(iii) A provision that provides that statements made by the department's representatives at the conference are not binding on the department unless confirmed by Written Addendum.

(B) The form and instructions for submission of proposals and any other special information, e.g., whether proposals may be submitted by electronic means. (See OAR 736-147-0330 for required provisions of electronic proposals);

(C) The time, date and place of opening;

(D) The office where the Solicitation Document may be reviewed;

(E) How the department will notify proposers of addenda and how the department will make addenda available. (See OAR 736-147-0430).

(b) Department Need to Purchase. The character of the goods or Services the department is purchasing including, if applicable, a description of the acquisition, specifications, delivery or performance schedule, inspection and acceptance requirements. The department's description of its need to purchase must:

(A) Identify the scope of the work to be performed under the resulting contract, if the department awards one;

(B) Outline the anticipated duties of the contractor under any resulting contract;

(C) Establish the expectations for the contractor’s performance of any resulting contract; and

(D) Unless the contractor under any resulting contract will provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services that are subject to OAR 736 division 148, the scope of work must require the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the goods or services that the department is purchasing.

(c) Proposal and Evaluation Process.

(A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;

(B) The department shall set forth selection criteria in the Solicitation Document. Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, the criteria shall:

(i) Afford the department the ability to compare the proposals and proposers, applying the same standards of comparison to all proposers;

(ii) Rationally reflect proposers' abilities to perform the resulting contract in compliance with the contract's requirements; and

(iii) Permit the department to determine the relative pricing offered by the proposers, and to reasonably estimate the costs to the department of entering into a contract based on each proposal, considering information available to the department and subject to the understanding that the actual contract costs may vary as a result of the Statement of Work ultimately negotiated or the quantity of goods or Services for which the department contracts.

(C) If the department's solicitation process calls for the department to establish a Competitive Range, the department shall generally describe, in the solicitation document, the criteria or parameters the department will apply to determine the competitive range. The department, however, subsequently, may determine or adjust the number of proposers in the competitive range.

(i) The department may establish a competitive range after evaluating all responsive proposals in accordance with the evaluation criteria in the request for proposals. After evaluation of all proposals in accordance with the criteria in the request for proposals, the department may determine and rank the proposers in the competitive range. Notwithstanding the foregoing, however, in instances in which the department determines that a single proposer has a reasonable chance of being determined the most advantageous proposer, the department need not determine or rank proposers in the competitive range. In addition, notwithstanding the foregoing, a department may establish a competitive range of all proposers to enter into discussions to correct deficiencies in proposals.

(ii) The department may establish the number of proposers in the competitive range in light of whether the department's evaluation of proposals identifies a number of proposers who have a reasonable chance of being determined the most advantageous proposer, or whether the evaluation establishes a natural break in the scores of proposers that indicates that a particular number of proposers are closely competitive or have a reasonable chance of being determined the most advantageous proposer.

(d) All contractual terms and conditions the department determines are applicable to the Procurement. The department's determination of contractual terms and conditions that are applicable to the procurement may take into consideration, as authorized by OAR 736-147-0260, those contractual terms and conditions the department will not include in the request for proposal because the department either will reserve them for negotiation, or will request proposers to offer or suggest those terms or conditions.

(e) The contract terms and conditions must specify the consequences of the contractor's failure to perform the scope of work or to meet the performance standards established by the resulting contract. Those consequences may include, but are not limited to:

(A) The department's reduction or withholding of payment under the contract;

(B) The department's right to require the contractor to perform, at the contractor's expense, any additional work necessary to perform the scope of work or to meet the performance standards established by the resulting contract; and

(C) The department's rights, which the department may assert individually or in combination, to declare a default of the resulting contract, to terminate the resulting contract, and to seek damages and other relief available under the resulting contract or applicable law.

(3) The department may include the applicable contractual terms and conditions in the form of contract provisions, or legal concepts to be included in the resulting contract. The department shall not agree to any proposer's terms and conditions that were expressly rejected in a solicitation protest under OAR 0736-147-0700.

(4) For multiple award contracts, the department may enter into contracts with different terms and conditions with each contractor to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. The department shall not agree to any Proposer's terms and conditions that were expressly rejected in a solicitation protest under OAR -736-147-0700.

(5) Good Cause. For the purposes of this rule, "Good Cause" means a reasonable explanation for not requiring contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the goods or Services under the contract and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of the department. The department shall document in the Procurement file the basis for the determination of good cause for specifying otherwise. A department will have good cause to specify otherwise when the department determines:

(a) The use or purpose to which the goods or Services will be put does not justify a requirement that the contractor meet the highest prevalent standards in performing the contract;

(b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the goods or services will be compatible with, or will operate efficiently or effectively with, associated information technology, hardware, software, components, equipment, parts, or on-going services with which the goods or services will be used, integrated, or coordinated;

(c) The circumstances of the industry or business that provides the goods or services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, or scientific developments, that a reliable highest prevalent standard does not exist or has not been developed;

(d) That other circumstances exist in which the department's interest in achieving economy, efficiency, compatibility or availability in the procurement of the goods or services reasonably outweighs the department’s practical need for the highest standard prevalent in the applicable or closest industry or business that supplies the goods or services to be delivered under the resulting contract

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0265
RULE TITLE: Direct Award or Small Procurements
RULE SUMMARY: Process for direct award or small procurements
RULE TEXT:

(1) Generally. For procurements of goods or services less than or equal $100,000, the department may award a contract as a Direct Award, Small Procurement, or Sole Source pursuant to OAR 736-146-0012(17).

(2) Amendments. The department may amend a contract awarded as a small procurement in accordance with OAR 736-147-0800, but the cumulative amendments may not increase the total contract price to greater than one hundred twenty-five percent (125%) of the dollar amount stated in OAR 736-147-0265(1).

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0270
RULE TITLE: Intermediate Procurements
RULE SUMMARY: Process for intermediate procurements.
RULE TEXT:

(1) Generally. For procurements of goods or services greater than $100,000 OAR 736-146-0012(28) and less than or equal to $500,000, the department may award a contract as an intermediate procurement pursuant to OAR 736-146-0012.

(2) Negotiations. The department may negotiate with a prospective contractor who offers to provide goods or services in response to an intermediate procurement to clarify its quote or offer or to effect modifications that will make the quote or offer more advantageous to the department.

(3) Amendments. The department may amend a contract awarded as an intermediate procurement in accordance with OAR 736-147-0800, but the cumulative amendments may not increase the total contract price to a sum that exceeds one hundred twenty-five percent (125%) of the maximum procurement threshold.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0275
RULE TITLE: Sole-Source Procurements
RULE SUMMARY: Process for sole-source procurements
RULE TEXT:

(1) Generally. The department may Award a contract without competition as a sole-source procurement pursuant to OAR 736-146-0012(51).

(2) Public Notice. If, but for the department's determination that it may enter into a contract as a sole-source, the department would be required to select a contractor using source selection methods set forth in these Chapter 736 rules, the department shall give public notice of the designated procurement officer's determination that the goods or services or class of goods or services are available from only one source. The department shall publish such notice in a manner similar to public notice of competitive sealed Bids OAR 736-147-0300. The public notice shall describe the goods or services to be acquired by a sole-source procurement, identify the prospective contractor and include the date, time and place that protests are due. The department shall give affected persons at least seven (7) days from the date of the notice of the determination that the goods or services are available from only one source to protest the sole source determination.

(3) Protest. An affected person may protest the department's determination that the goods or services or class of goods or services are available from only one source in accordance with OAR 736-147-0700.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0300
RULE TITLE: Public Notice of Solicitation Documents
RULE SUMMARY: Requirements for public notices of solicitation documents
RULE TEXT:

(1) Notice of Solicitation Documents; Fee. The department shall provide public notice of solicitation documents for formal procurements. The department may advertise or give additional notice using any method it determines appropriate to foster and promote competition, including:

(a) By publishing notice on the on-line system maintained by the Oregon Department of Administrative Services;

(b) By publishing notice on the department's electronic procurement system;

(c) By placing a notice in a newspaper or trade journal of general circulation in the area where the contract will be performed;

(d) By giving direct written or electronic notice to potential providers known to the department; or

(e) By giving or publishing notice by any other means reasonably determined by the department under the circumstances to provide sufficient notice to fulfill the purpose and policies of these rules.

(2) Content of Advertisement. All advertisements for offers shall set forth:

(a) The location where contract terms, conditions and specifications may be reviewed;

(b) A general description of the goods or services to be acquired;

(c) The interval between the first date of notice of the solicitation document given in accordance with section (1) above and closing, which shall not be less than fourteen (14) days for an Invitation to Bid and thirty (30) days for a Request for Proposals, unless the designated procurement officer determines that a shorter interval is in the public's interest, and that a shorter interval will not substantially affect competition. However, in no event shall the interval between the first date of notice of the solicitation document given and closing be less than seven (7) days. The department shall document the specific reasons for the shorter public notice period in the procurement file;

(d) The name, title and address of the individual authorized by the department to receive Offers;

(e) The scheduled opening; and

(f) Any other information the department deems appropriate.

(3) Notice of Addenda. The department shall provide potential offerors notice of any addenda to a solicitation document in accordance with OAR 736-147-0430.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)

STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0310
RULE TITLE: Bids or Proposals are Offers
RULE SUMMARY: Requirement of bids or proposals being considered offers.
RULE TEXT:

(1) Offer and Acceptance. The bid or proposal is the bidder's or proposer's offer to enter into a contract.

(a) In competitive bidding and competitive proposals, the offer is always a "Firm Offer," i.e. the offer shall be held open by the offeror for the department's acceptance for the period specified in OAR 736-147-0480. The department may elect to accept the offer at any time during the specified period, and the department's award of the contract constitutes acceptance of the offer and binds the offeror to the contract.

(b) Notwithstanding the fact that a competitive Proposal is a "Firm Offer" for the period specified in OAR 137-047-0480, the department may elect to discuss or negotiate certain contractual provisions, as identified in these rules or in the solicitation document, with the Proposer. Where negotiation is permitted by the rules or the solicitation document, Proposers are obligated to negotiate in good faith and only on those terms or conditions that the rules or the solicitation document have reserved for negotiation.

(2) Contingent Offers. Except to the extent the proposer is authorized to propose certain terms and conditions, a proposer shall not make its offer contingent upon the department's acceptance of any terms or conditions (including Specifications) other than those contained in the solicitation document.

(3) Offeror's Acknowledgment. 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 proposals permits proposers to propose alternative terms or conditions, the offeror's offer includes any nonnegotiable terms and conditions, any proposed terms and conditions offered for negotiation upon and to the extent accepted by the department in writing, and offeror's agreement to perform the scope of work and meet the performance standards set forth in the final negotiated scope of work.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0330
RULE TITLE: Electronic Procurement
RULE SUMMARY: Requirements for electronic procurements.
RULE TEXT:

(1) General. The department may utilize electronic advertisement of contracts, provided that advertisement of such contracts with an estimated contract price in excess of $500,000 are posted in accordance with public notice of solicitation documents (OAR 736-147-0300). Notices of intent to award may be posted electronically.

(2) Electronic Procurement Authorized.

(a) The department 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 the department specifies in a solicitation document how to participate in the procurement.

(b) The department shall open an electronic offer in accordance with electronic security measures in effect at the department at the time of its receipt of the electronic offer. Unless the department 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) The department's use of electronic signatures shall be consistent with applicable statutes and rules. The department may limit the use of electronic methods of conducting a procurement as advantageous to the department.

(d) If the department determines that bid or proposal security is or will be required, the department should not authorize electronic offers unless the department has another method for receipt of such security.

(3) Rules Governing Electronic procurements. The department shall conduct all portions of an electronic procurement in accordance with these division 147 rules, unless otherwise set forth in this rule.

(4) Preliminary Matters. As a condition of participation in an electronic procurement the department may require potential contractors to register with the department before the date and time on which the department will first accept offers, to agree to the terms, conditions, or other requirements of a solicitation document, or to agree to terms and conditions governing the procurement, such as procedures that the department may use to attribute, authenticate or verify the accuracy of an electronic offer, or the actions that constitute an electronic signature.

(5) Offer Process. The department may specify that persons must submit an electronic offer by a particular date and time, or that persons may submit multiple electronic offers during a period of time established in the electronic advertisement. When the department specifies that persons may submit multiple electronic offers during a specified period of time, the department must designate a time and date on which persons may begin to submit electronic offers, and a time and date after which persons may no longer submit electronic offers. The date and time after which persons may no longer submit

electronic offers need not be specified by a particular date and time, but may be specified by a description of the conditions that, when they occur, will establish the date and time after which persons may no longer submit electronic offers. When the department will accept electronic offers for a period of time, then at the designated date and time that the department will first receive electronic offers, the department must begin to accept real time electronic offers on the department's electronic procurement system, and shall continue to accept electronic offers until the date and time specified by the department, after which the department will no longer accept electronic offers.

(6) Receipt of Electronic Offers.

(a) When the department conducts an electronic procurement that provides that all electronic offers must be submitted by a particular date and time, the department shall receive the electronic offers in accordance with these Chapter 736 rules.

(b) When the department specifies that persons may submit multiple electronic offers during a period of time, the department shall accept electronic offers, and persons may submit electronic offers, in accordance with the following:

(A) Following receipt of the first electronic offer after the day and time the department first receives electronic offers the department shall post on the department's electronic procurement system, and updated on a real time basis, the lowest electronic offer price or the highest ranking electronic offer. At any time before the date and time after which the department will no longer receive electronic offers, a person may revise its electronic offer, except that a person may not lower its price unless that price is below the then lowest electronic offer.

(B) A person may not increase the price set forth in an electronic offer after the day and time that the department first accepts electronic offers.

(C) A person may withdraw an electronic offer only in compliance with these rules. If a person withdraws an electronic offer, it may not later submit an electronic offer at a price higher than that set forth in the withdrawn electronic offer.

(7) Failure of the E-procurement System. In the event of a failure of the department's electronic procurement system that interferes with the ability of persons to submit electronic offers, protest or to otherwise participate in the procurement, the department may cancel the procurement in accordance with OAR 736-147-0660, 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.

(8) Interpretation. Nothing in this rule shall be construed as prohibiting the department from making procurement documents available in hard copy as well as in electronic format when bids are to be submitted only in hard copy.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0400
RULE TITLE: Offer Preparation
RULE SUMMARY: Process for preparation of an offer.
RULE TEXT:

(1) Instructions. An Offeror shall submit and Sign its Offer in accordance with the instructions set forth in the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to Opening in accordance with the requirements for submitting an Offer set forth in 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 the department with all documents and Descriptive Literature required by the Solicitation Document.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0420
RULE TITLE: Pre-Offer Conferences
RULE SUMMARY: Process for pre-offer conferences
RULE TEXT:

(1) Purpose. The department may hold pre-offer conferences with prospective offerors prior to closing, to explain the procurement requirements, obtain information or to conduct site inspections.

(2) Required attendance. The department may require attendance at the pre-offer conference as a condition for making an offer. Unless otherwise specified in the solicitation document, a mandatory attendance requirement is considered to have been met if, at any time during the mandatory meeting, a representative of an offering firm is present.

(3) Scheduled time. If the department holds a pre-offer 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 the department's representative at the pre-offer conference do not change the solicitation document unless the department confirms such statements with a written addendum to the solicitation document.

(5) Department Announcement. The department must set forth notice of any pre-offer conference in the solicitation document in accordance with OAR 736-147-0255 and 736-147-0260.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0430
RULE TITLE: Addenda to Solicitation Documents
RULE SUMMARY: Process to add to solicitation documents
RULE TEXT:

(1) Issuance; Receipt. The department may change a solicitation document only by written addenda. An offeror shall provide written acknowledgement of receipt of all issued addenda with its offer, unless the department otherwise specifies in the addenda or in the solicitation document.

(2) Notice and Distribution. The department shall notify prospective offerors of addenda consistent with the standards of notice set forth in OAR 736-147-0300. The solicitation document shall specify how the department will provide notice of addenda and how the department will make the addenda available.

(3) Timelines; Extensions. The department shall issue addenda within a reasonable time to allow prospective offerors to consider the addenda in preparing their offers. The department may extend the closing if the department determines prospective offerors need additional time to review and respond to addenda. Except to the extent required by public interest, the department shall not issue addenda less than 72 hours before the closing unless the addendum also extends the closing.

(4) Request for Change or Protest. Unless a different deadline is set forth in the addendum, an offeror may submit a written request for change or protest to the addendum, as provided in OAR 736-147-0440, by the close of the department's next business day after issuance of the addendum, or up to the last day allowed to submit a request for change or protest under 736-147-0440, whichever date is later. The department shall consider only an offeror's request for change or protest to the addendum; the department shall not consider a request for change or protest to matters not added or modified by the addendum, unless the offeror submits the request for change or protest before the deadline for the department’s receipt of request for change or protests as set forth in 736-147-0440.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0440
RULE TITLE: Pre-Closing Modification or Withdrawal of Offers
RULE SUMMARY: Process for modifying or withdrawing offers
RULE TEXT:

(1) 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 the department in accordance with OAR 736-147-0400 and 736-147-0410, 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 Document Number (or other identification as specified in the Solicitation Document).

(2) Withdrawals.

(a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, Signed by an authorized representative of the Offeror, delivered to the individual and location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by the department prior to the Closing. 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 evidence of authority satisfactory to the department.

(b) The department may release an unopened Offer withdrawn under subsection (2)(a) of this rule 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:

(A) Bid (or Proposal) Withdrawal; and

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

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

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0450
RULE TITLE: Receipt, Opening, and Recording of Offers; Confidentiality of Offers
RULE SUMMARY: Process for opening and recording offers.
RULE TEXT:

(1) Receipt. The department shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The department shall not open the Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If the department inadvertently opens an Offer or a modification prior to the Opening, the department shall return the Offer or modification to its secure and confidential state until Opening. The department shall document the resealing for the procurement file (e.g. "department inadvertently opened the Offer due to improper identification of the Offer.").

(2) Opening and Recording. The department shall publicly open Offers including any modifications made to the Offer pursuant to OAR 736-147-0430 and 736-147-0440. In the case of Invitations to Bid, to the extent practicable, the department shall read aloud the name of each Bidder, and such other information as the department considers appropriate. However, the department may withhold from disclosure information.

(a) Notwithstanding a requirement to make bids open to public inspection after the department issues notice of intent to award a contract, the department may withhold from disclosure to the public trade secrets, as defined in ORS 192.345, and information submitted to a public body in confidence, as described in ORS 192.355, that are contained in a bid.

(b) The department may open proposals in a manner that avoids disclosing contents to competing proposers during, when applicable, the process of negotiation, but the department shall record and make available the identity of all proposers as part of the contracting agency's public records after the proposals are opened. Proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued. The fact that proposals are opened at a meeting, as defined in ORS 192.610, does not make the contents of the proposals subject to disclosure.

(3) In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the department will not read Offers aloud.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0460
RULE TITLE: Late Offers, Late Withdrawals and Late Modifications
RULE SUMMARY: Requirement that late offers not be considered.
RULE TEXT:

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. An department shall not consider late Offers, withdrawals or modifications except as permitted in OAR 736-147-0470.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0470
RULE TITLE: Minor Informalities
RULE SUMMARY: Process for reviewing minor informalities.
RULE TEXT:

(1) General: The department may accept offers that contain, or allow an offeror to correct an offer that contains, minor informalities.

(2) Examples: Minor informalities include errors in form rather than substance and errors in an offer that can be overlooked or corrected without prejudice to other offerors. Minor informalities do not cause an offer to be non-responsive. Examples of minor informalities include, but are not limited to:

(a) Incorrect Number of Copies: The offeror failed to submit the correct number of signed offers or the correct number of other documents required by the solicitation document;

(b) Signature Errors: The offeror failed to sign the offer in the designated block, provided that an authorized signature appears elsewhere in the offer as evidence of offeror's intent to be bound;

(c) Failure to Acknowledge: The offeror failed to acknowledge receipt of an addendum to the solicitation document. Provided that it is evident on the face of the offer, or the department has written evidence, that the offeror received the addendum and intends to be bound by its terms; or

(d) Clerical Errors: Clerical errors that are evident within the offer, including typographical errors, errors in extending unit prices, math errors, and instances in which the intended correct unit or amount is evident by simple arithmetic calculations. If a specified unit price, when extended, does not equal the specified extended price, then the department shall use the specified unit price for purposes of extended price determination.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0485
RULE TITLE: Time for Department Acceptance; Extension
RULE SUMMARY: Process for timing of department offer acceptance
RULE TEXT:

(1) Time for Offer Acceptance. An offeror's bid submitted as a firm offer, is irrevocable, valid and binding on the offeror for not less than 30 days from closing unless otherwise specified in the solicitation document.

(2) Extension of Acceptance Time. The department may request, orally or in writing, that offerors extend, in writing, the time during which the department may consider and accept their offer(s). If an offeror agrees to such extension, the offer shall continue as a firm offer, irrevocable, valid and binding on the offeror for the agreed-upon extension period.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0500
RULE TITLE: Responsible Offerors; Rejection for Offeror Non-Responsibility
RULE SUMMARY: Requirements for responsible offerors.
RULE TEXT:

(1) General: Only responsible offerors are eligible for award. The department will reject offers from offerors determined not responsible by the department and provide a written summary for the basis of the determination to the offeror.

(2) Considerations: In determining whether an offeror is responsible, the department may seek and use information in addition to that submitted with offeror's offer. In making its determination of responsibility, in addition to any other criteria the department deems relevant, the department may consider whether the offeror:

(a) Corporate Capability and Business Qualifications: Has available the appropriate financial, material, equipment, facilities, and personnel resources and expertise, or ability to obtain the resources and expertise, necessary for the offeror to meet all potential contractual obligations;

(b) Record of Performance: Has a satisfactory contract performance record. The department will carefully review an offeror's contract performance record to determine if the offeror is or recently has been materially deficient in contract performance. The department will determine whether the offeror's deficient performance was excused under the specific terms of the contract or whether the offeror took appropriate corrective action. The department may review the offeror's performance under both private and public contracts through interviews with the other contracting party or review of performance documentation, or both;

(c) Record of Integrity: Has a satisfactory record of integrity. An offeror may lack integrity if the department determines the offeror demonstrates a lack of business ethics such as by evidence of offeror's violation of state environmental laws or by making false certifications. The department may find an offeror not responsible based on the lack of integrity of any individual or 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 under the contract or a parent company, predecessor or successor individual or entity);

(d) Legally Authorized: Is legally authorized to contract with the department;

(e) Necessary Information: Promptly provided all information the department requested to facilitate the department's determination whether offeror is responsible. If the offeror fails to promptly provide requested information, the department will base its determination upon available information; and

(f) Disqualification: If an offeror has been disqualified by the department. The department may consider a disqualified offeror for award during the disqualification period if the director determines the offeror's participation is in the department's best interest. The department will specify in writing the factors and limits upon which the offeror's participation is based.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)

STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0560
RULE TITLE: Personal Services Contract to Provide Specifications —Disqualification as Bidder or Proposer
RULE SUMMARY: Specifications for personal services contacts.
RULE TEXT:

(1) A reasonable person would believe that a person who assisted the department, under a personal services contract, in the development of a solicitation for goods or services (or that person's affiliate), would have an advantage in obtaining the public contract that is the subject of the solicitation if:

(a) The specifications recommended by the personal service contractor for the sequence of services, incorporation of special service or fabrication techniques, or design of any goods or components or elements of goods that the department published in its solicitation documents call for, expressly or implicitly, requirements that only the personal services contractor (or the contractor's affiliate), or a limited class of individuals in the contractor's area of specialty, have the ability to perform or produce or have the rights to perform or produce.

(b) The rendering of solicitation document development assistance under the personal services contract gives the contractor knowledge of the department's special needs or procedures, not generally known to the public, that give the contractor (or the contractor's affiliate) a material competitive advantage in competing for the contract for goods or services.

(c) The rendering of solicitation document development assistance under the personal services contract gives the contractor, significantly in advance of other prospective bidders or proposers, knowledge of the solicitation document requirements that would allow the personal services contractor (or the contractor's affiliate) a materially longer period in which to craft or refine a proposal in response to the solicitation documents.

(2) A reasonable person would believe that a person who assisted the department , under a personal services contract, in the development of a solicitation for goods or services (or that person's affiliate) would appear to have an advantage in obtaining the public contract that is the subject of the solicitation if:

(a) Taking into account the personal services contractor's announced areas of specialization, expertise or experience, the personal service contractor (or the contractor's affiliate), or only a limited class of individuals in the contractor's area of specialty, appear to have the capability to conform closely with the solicitation document requirements.

(b) Taking into account the personal services contractor's announced areas of specialization, expertise or experience, the personal service contractor (or the contractor's affiliate), or only a severely limited class of individuals in the contractor's area of specialty, appear to have the qualifications, training, experience or capacity to satisfy any minimum requirements that may be stated in the solicitation documents.

(c) The solicitation documents for a contract for goods or services contain restrictions, deadlines or requirements that do not, when viewed objectively, reasonably promote rational procurement objectives of the department.

(3) If the department engages a personal services contractor to advise or assist in the development of solicitation documents for a public contract for goods or services and the personal services contractor is engaged in the business of providing goods or services described in the solicitation documents, and the department wishes to accept a bid or proposal from the personal services contractor under conditions described in section (2) or section (3) of this rule, the department must apply to the Designated procurement Officer, for an exemption from the disqualification from the ability to submit a bid or proposal.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0575
RULE TITLE: Disqualification of Prospective Offerors
RULE SUMMARY: Process for disqualifying prospective offerors
RULE TEXT:

(1) Generally. The department may disqualify prospective Offerors. from an award of department contracts for up to three years if:

(a) Contract Performance: The person has performed unsatisfactorily under a contract or has committed a material breach of a contract.

(b) Contract Offense Conviction: The person has been convicted of a criminal offense resulting from obtaining, or attempting to obtain, a public or private contract or subcontract, or resulting from the performance of such contract or subcontract.

(c) Business Offense Conviction: The person has been convicted 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 person's responsibility as a contractor or the department determines may affect the fairness, integrity, honesty, or security of the department.

(d) Antitrust Conviction: The person has been convicted under state or federal antitrust statutes.

(e) Workers' Compensation or Employment Statute Violation: The person does not carry worker's compensation or unemployment insurance as required by statute.

(f) Other: The department may attribute improper conduct of an individual or entity or its affiliate or affiliates having a contract with a person to the person for purposes of suspension determinations where the impropriety occurred in connection with the individual's or entity's duty for, on behalf of, or with the knowledge, approval, or acquiescence of, the person.

(2) Responsibility. Notwithstanding the limitation on the term for disqualification, the department may determine that a previously Disqualified Offeror is not Responsible prior to contract Award.

(3) Imputed Knowledge. The department may attribute improper conduct of a person or its affiliate or affiliates having a contract with a prospective Offeror to the prospective Offeror for purposes of Debarment where the impropriety occurred in connection with the person's duty for or on behalf of, or with the knowledge, approval, or acquiescence of, the prospective Offeror.

(4) Limited Participation. The department may allow a Debarred person to participate in solicitations and contracts on a limited basis during the Debarment period upon Written determination that participation is Advantageous to a contracting department . The determination shall specify the factors on which it is based and define the extent of the limits imposed.

(5) Notice. The department will provide written notice to a person suspended by the department.

(6) Disqualification Protest Opportunity: Any person who receives a disqualification notice from the department may submit a written protest of the notice to the designated procurement officer within the later of five days following the date of the disqualification notice or the date specified in the disqualification notice.

(a) Disqualification Protest Content: All disqualification protests must be in writing and signed either in writing or electronic form by the person's authorized representative. The disqualification protest must state all facts and arguments upon which the person is basing the protest.

(b) OPRD's Response: The designated procurement officer will review each timely-submitted disqualification protest and will issue a written response to the person within three business days following receipt of the protest.

(A) Response Content: The department's written response may include the designated procurement officer's decision affirming or denying the disqualification protest, a notice to the person that the department needs additional time to evaluate the protest, or a request for additional information the department may need to evaluate the protest.

(B) Follow-up Response: The department will issue a follow-up response to the person within a reasonable time following notice to the person that the department needs additional time to evaluate the disqualification protest or following receipt of the additional information requested from the person.

(7) Disqualification Effective Date: A person's disqualification is effective when the person's rights to protest the disqualification are exhausted.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0600
RULE TITLE: Offer Evaluation; Clarification of Offers; Award
RULE SUMMARY: Process for evaluating offers.
RULE TEXT:

(1) The department will evaluate offers using the process and criteria specified in the solicitation document.

(2) Evaluation of Bids. The department shall use only objective criteria to evaluate Bids as set forth in the ITB. The department shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid.

(3) Clarification of Offers: The department may contact offerors after closing for clarification of offers to facilitate the department's full understanding of the offers. The department will document in the procurement file all offer clarifications obtained.

(4) Award Based on Bids :

(a) Unless otherwise specified in the Invitation to Bid , the department will issue an award to the responsible bidder who has submitted a responsive bid that includes the lowest contract cost to the department and that otherwise complies with these rules.

(b) The department may issue multiple awards from one Invitation to bid according to the criteria specified in the solicitation document.

(c) Partial Awards: The department may issue an award for only a portion of the services specified in a solicitation document according to the criteria specified in the solicitation document.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0610
RULE TITLE: Award Notice
RULE SUMMARY: Process for providing notice of awards.
RULE TEXT:

(1) Notice. At least seven days before the award of a goods and services contract in excess of $500,000, the department shall post electronically or otherwise, a notice of the department's intent to Award the contract. This requirement does not apply to award of contracts through direct award (small) or intermediate (informal competitive quotes) procurement procedures.

(2) Form and Manner of Posting. The form and manner of posting notice shall conform to customary practices within the department's procurement system, and may be made electronically.

(3) Finalizing Award. The department's award shall not be final until the later of the following:

(a) Seven days after the date of the notice, unless the solicitation document provided a different period for protest; or

(b) The department provides a written response to all timely-filed protests that denies the protest and affirms the award.

(4) Prior Notice Impractical. Posting of notice of intent to award shall not be required when the department determines that it is impractical due to unusual time constraints in making prompt award for its immediate procurement needs, documents the contract file as to the reasons for that determination, and posts notice of that action as soon as reasonably practical.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0620
RULE TITLE: Documentation of Award; Availability of Award Decisions
RULE SUMMARY: Process for documenting awards
RULE TEXT:

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

(2) Contents of Award Record for Bids. The department's record shall include:

(a) All submitted bids;

(b) Completed bid tabulation sheet; and

(c) Written justification for any rejection of lower bids.

(3) contract Document. The department shall deliver a fully executed copy of the final contract to the successful offeror.

(4) Bid Tabulations and Award Summaries. Upon request of any person the department shall provide tabulations of awarded bids or evaluation summaries of proposals for a nominal charge which may be payable in advance. Requests must contain the solicitation document number and, if requested, be accompanied by a self-addressed, stamped envelope. The department may also provide tabulations of bids and proposals awarded on designated web sites or on the department's electronic procurement system.

(5) Availability of Solicitation Files. The department shall make completed solicitation files available for public review at the department.

(6) Copies from Solicitation Files. Any person may obtain copies of material from solicitation files upon payment of a reasonable copying charge.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0640
RULE TITLE: Bid Rejection
RULE SUMMARY: Process for rejecting bids
RULE TEXT:

(1) The department may at any time reject all offers provided in response to a solicitation document if determined it is in the department's best interest to do so and may reject individual offers upon the department's finding the offer:

(a) Contingent: Is contingent upon the department's acceptance of terms and conditions (including specifications) that differ from those specified in the solicitation document;

(b) Exceptions: Takes exceptions to terms and conditions (including specifications) specified in the solicitation document;

(c) Non Responsive because the offer:

(A) Offers goods or services that fail to meet the specifications;

(B) Offers goods or services that otherwise fail to meet the requirements of the solicitation document;

(C) Is submitted after closing; or

(D) Is otherwise not responsive to the terms of the solicitation document.

(2) The department shall reject an Offer upon finding that the Offeror:

(a) Has been disqualified;

(b) Is listed as not qualified by the Construction contractors Board, if the contract is for construction;

(c) Has not submitted properly executed bid or proposal security as required by the solicitation document;

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

(e) Is not Responsible. See OAR 736-147-0500 regarding department determination that the offeror has met rules and standards of responsibility.

(3) Rejection of all Offers. The department may reject all offers for good cause upon the department's written finding it is in the public interest to do so. The department shall notify all offerors of the rejection of all offers, along with the good cause justification and finding.

(4) Criteria for Rejection of All Offers. The department may reject all offers upon a written finding that:

(a) The content of or an error in the solicitation document, or the solicitation process unnecessarily restricted competition for the contract;

(b) The price, quality or performance presented by the offerors is too costly or of insufficient quality to justify acceptance of the offer;

(c) Misconduct, error, or ambiguous or misleading provisions in the solicitation document threaten the fairness and integrity of the competitive process;

(d) Causes other than legitimate market forces threaten the integrity of the competitive procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct and inadvertent or intentional errors in the solicitation document;

(e) The department cancels the solicitation in accordance with OAR 736-147-0600; or

(f) Any other circumstance indicating that awarding the contract would not be in the public interest.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0660
RULE TITLE: Cancellation of Procurement or Solicitation
RULE SUMMARY: Process for cancelling a procurement or solicitation.
RULE TEXT:

(1) The department may cancel a solicitation or may reject all offers when the cancellation or rejection is in the best interest of the department as determined by the department.

(a) The reasons for the cancellation or rejection must be made a part of the procurement file.

(b) The department is not liable to any offeror for any loss or expense caused by or resulting from the cancellation of a solicitation document, or the rejection of any or all offers.

(2) Notice of Cancellation. If the department cancels a solicitation prior to opening, the department shall provide notice of cancellation in the same manner they initially provided notice of solicitation. Such notice of cancellation shall:

(a) Identify the solicitation;

(b) Briefly explain the reason for cancellation; and

(c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.

(3) After Offer Opening. If the department rejects all offers, the department shall retain all such offers as part of the department's solicitation file.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0700
RULE TITLE: Protest of Formal Contract Awards
RULE SUMMARY: Process for protesting formal contract awards.
RULE TEXT:

(1) Award Protest Opportunity: Any offeror who submitted an offer in response to a formal procurement may protest the award by submitting a protest to the department within five days following the date of the award notice, unless a different time period is specified in the solicitation document.

(2) Award Protest Content: All award protests must be received in writing and signed either in writing or electronic form by the offeror’s authorized representative. The award protest must be received by the department by the time set forth in subsection (1) above, and provide relevant legal and factual arguments that:

(a) All lower bids or higher ranked offerors are ineligible to receive the award because they are not responsive; or

(b) The department committed a material violation of a provision in the solicitation document or of an applicable statute or administrative rule that resulted in prejudice to the offeror that caused the department to not issue an award to that offeror.

(3) department’s Response: The designated procurement officer or designee will review each timely-submitted award protest and will issue a written response to the offeror within three business days following receipt of the protest.

(a) Response Content: The department’s written response may include the department's decision affirming or denying the award protest, a notice to the offeror the department needs additional time to evaluate the protest, or a request for additional information from the offeror the department may need to evaluate the protest.

(b) Follow-up Response: The department will issue a follow-up response to the offeror within a reasonable time following the department's notice to the offeror that the department needs additional time to evaluate the award protest or following receipt of the additional information the department has requested from the offeror.

(4) Late Protests: The department will not consider an offeror’s protest submitted after the timelines specified for submission in this rule.

(5) Successful Protest: If the department sustains any or all of a protest, the department may, in its sole discretion, withdraw the award and issue a subsequent award, or withdraw the award and cancel the offeror selection process. The department may, at any time after cancellation of the offeror selection process or award withdrawal, conduct a new offeror selection process, including issuing a new Invitation to Bid with the same or revised terms, conditions and specifications as used in the original solicitation document.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0800
RULE TITLE: Amendments to Contracts and Price Agreements
RULE SUMMARY: Process for making amendments to contracts and Price Agreements.
RULE TEXT:

(1) Generally. The department may amend a contract without additional competition in any of the following circumstances:

(a) The amendment is within the scope of the procurement as described in the Solicitation Documents, if any, or if no Solicitation Documents, as described in the sole source notice or the approved Special procurement, if any. An amendment is not within the scope of the procurement if the Agency determines that if it had described in the procurement the changes to be made by the amendment, it would likely have increased competition or affected award of the contract.

(b) These Rules otherwise permit the department to Award a contract without competition for the goods or services to be procured under the Amendment.

(c) The amendment is necessary to comply with a change in law that affects performance of the contract.

(d) The amendment results from renegotiation of the terms and conditions, including the contract Price, of a contract and the amendment is Advantageous to the contracting Agency, subject to all of the following conditions:

(A) The goods or services to be provided under the amended contract are the same as the goods or services to be provided under the unamended contract.

(B) The department determines that, with all things considered, the amended contract is at least as favorable to the department as the unamended contract.

(C) The amended contract does not have a total term greater than allowed in the Solicitation Documents, if any, or if no Solicitation Documents, as described in the sole source notice or the approved Special procurement, if any, after combining the initial and extended terms. For example, a one-year contract described as renewable each year for up to four additional years, may be renegotiated as a two to five-year contract, but not beyond a total of five years.

(2) Small or Intermediate contract. The department may amend a contract Awarded as a small or intermediate procurement pursuant to section (1) of this rule, provided that the cumulative amendments shall not increase the total contract price to a sum that is greater than 125 percent of the procurement thresholds set forth in OAR 736-147-0265 for small procurements or 736-147-0270 for intermediate procurements.

(3) Price Agreements. The department may amend a Price Agreement as follows:

(a) As permitted by the Price Agreement;

(b) Any failure of the department to receive funding, appropriations, limitations, allotments or other expenditure authority, including the continuation of program operating authority sufficient, as determined in the discretion of the contracting agency, to sustain purchases at the levels contemplated at the time of contracting; or

(c) Any change in law or program termination that makes purchases under the price agreement no longer authorized or appropriate for the department's use.

(d) As permitted by applicable law.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0810
RULE TITLE: Termination of Contracts and Price Agreements
RULE SUMMARY: Process for termination of Contracts and Price Agreements
RULE TEXT:

The department may terminate a Contract or Price Agreement as follows:

(1) Any failure of the department to receive funding, appropriations, limitations, allotments or other expenditure authority, including the continuation of program operating authority sufficient, as determined in the discretion of the contracting agency, to sustain purchases at the levels contemplated at the time of contracting; or

(2) Any change in law or program termination that makes purchases under the price agreement no longer authorized or appropriate for the department's use.

(3) As permitted by applicable law.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-147-0850
RULE TITLE: Reinstatement of Expired or Terminated Contracts
RULE SUMMARY: Describes process for reinstatement of expired or terminated contracts.
RULE TEXT:

(1) If the department enters into a contract for goods or services and that contract subsequently expires or is terminated, the department may reinstate the contract subject to the following:

(a) The type or aggregated value (including all amendments) of the contract, after reinstatement, falls under the department procurement thresholds in accordance with these rules;

(b) The department may reinstate and amend for time only;

(c) The purpose must be for:

(A) Fulfillment of its term, up to the maximum time period provided in the contract; or

(B) Completion of a deliverable, provided:

(i) The deliverable, including but not limited to goods, services, or work, was defined in the contract as having a completion date or event; and

(ii) The department documents the uncompleted work as of the date of the reinstatement of the expired contract in the procurement file.

(d) The expired or terminated contract was previously properly executed; and

(e) The failure to extend or renew the contract in a timely manner was due to unforeseen circumstances, unavoidable conditions or any other occurrence outside the reasonable control of the department or the contracting party.

(2) The department may amend an expired contract for time only in accordance with section (1). The department may amend the contract purposes other than time in accordance with OAR 736-147-0800.

(3) If the department reinstates and amends an expired contract for time, pursuant to this rule, the department may compensate the contracting party for work performed in the interim between the expiration of the original contract and the effective date of the reinstatement and amendment.

(4) Once a contract is reinstated, it is in full force and effect as if it had not expired or terminated.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-148-0100
RULE TITLE: Purpose
RULE SUMMARY: Describes purpose of rules in division.
RULE TEXT:

(1) In addition to the rules set forth in Division 146 and 147, these Division 148 rules apply to the screening and selection of architects, engineers, photogrammetrists, transportation planners, land surveyors and providers of related services contracts and set forth the following procedures through which the department may select consultants to perform architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, or related services.

(2) The dollar threshold amounts that are applicable to the selection procedures are independent from and have no effect on the dollar threshold amounts that trigger the legal sufficiency review requirement for the department under ORS 291.047.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-148-0110
RULE TITLE: Definitions
RULE SUMMARY: Additional definitions for use in Division 148.
RULE TEXT:

In addition to the definitions set forth in OAR 736-146-0012, the following definitions apply to these Division 148 rules:

(1) "Estimated Fee" means the department's reasonably projected fee to be paid for a consultant's services under the anticipated contract, excluding all anticipated reimbursable or other non-professional fee expenses. The estimated fee is used solely to determine the applicable contract solicitation method and is distinct from the total amount payable under the contract.

(2) "Formal Selection Procedure," means the process of selection of a consultant to provide architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, or related services for a formal procurement as defined in 736-146-0012.

(3) "Intermediate Selection Procedure," means the process of selection of a consultant to provide architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, or Related Services for an Intermediate Procurement as defined in 736-146-0012.

(4) "Price Agreement," for purposes of this division, means an agreement related to the procurement of architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, or related services, under agreed-upon terms and conditions, including, but not limited to terms and conditions of later work orders, task orders, purchase order or similar written ordering instrument as prescribed by the agreement, and which may include Consultant compensation at a set price or at a price established using a method prescribed by the agreement with either:

(a) No guarantee of a minimum or maximum purchase; or

(b) An initial work order, task order or minimum purchase, combined with a continuing consultant obligation to provide services in which the department does not guarantee a minimum or maximum additional purchase.

(5) "Project" means all components of the department's planned undertaking that gives rise to the need for a consultant's architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, or related services, under a contract.

(6) “Related services” means personal services, other than architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, that are related to planning, designing, engineering or overseeing public improvement projects or components of public improvement projects, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, hazardous substances or hazardous waste or toxic substances testing services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner’s representation services or land-use planning

services.

(7) “Statement of Qualifications” means a written response to a request for qualifications.

(8) "Transportation Planning Services" include only project-specific transportation planning involved in the preparation of categorical exclusions, environmental assessments, environmental impact statements and other documents required for compliance with the National Environmental Policy Act, 42 USC 4321 et. seq.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-148-0120
RULE TITLE: List of Consultants; Performance Record
RULE SUMMARY: Describes how department will develop a list of consultants.
RULE TEXT:

(1) The department may compile and maintain a record of each consultant's performance under contracts with the department, including information obtained from consultants during an exit interview and information pertaining to whether the consultant owes a liquidated and delinquent debt to the state of Oregon. Upon request and in accordance with the Oregon Public Records Law (ORS 192.311 through 192.478), the department may make available copies of the records.

(2) The department shall keep a record of all contracts with consultants and shall make these records available to the public, consistent with the requirements of the Oregon Public Records Law (ORS 192.311 through 192.478). The department shall include the following information in the record:

(a) Locations throughout the state where the contracts are performed;

(b) Consultants' principal office address and all office addresses in the state of Oregon;

(c) Consultants' direct expenses on each contract, whether or not those direct expenses are reimbursed. "Direct expenses" include all amounts that are directly attributable to consultants' services performed under each contract, including personnel travel expenses, and that would not have been incurred but for the services being performed. The record must include all personnel travel expenses as a separate and identifiable expense on the contract; and

(d) The total number of contracts awarded to each consultant over the immediately preceding 10-year period from the date of the record.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-148-0130
RULE TITLE: Applicable Selection Procedures; Pricing Information; Disclosure of Proposals; Conflicts of Interest
RULE SUMMARY: Describes selection procedures.
RULE TEXT:

(1) When selecting a consultant to perform architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, and related services, the department shall follow the applicable selection procedure under either direct award procedure (736-148-0200), intermediate selection procedure (736-148-0210) or formal selection procedure (736-148-0220) and as outlined in the solicitation document. The department may use qualifications, pricing policies and pricing proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, or a combination of the these to determine the most qualified consultant in accordance with the project requirements, and consistent with federal law, as applicable;

(2) The department is not required to follow the procedures in section (1) of this rule, when the department has established price agreements and is selecting a consultant to perform services under an individual work order or task order.

(3) The department may use electronic methods to screen and select a consultant.

(4) The following provisions apply to proposals:

(a) The term “competitive proposal,” includes proposals submitted for intermediate and formal selection procurements and any proposals submitted in response to a selection process for a work order under an existing price agreement.

(b) For direct award procurement, a formal notice of intent to award is not required. Proposals are not required to be open for public inspection until after the department has executed a contract with the selected consultant.

(c) When the department is conducting discussions or negotiations with proposers who submit proposals that have been determined to be closely competitive or to have a reasonable chance of being selected for award, the department may open proposals so as to avoid disclosure of proposal contents to competing proposers. The department may make proposals available for public inspection following the department’s issuance of a notice of intent to award a contract to a consultant; and

(d) The department shall withhold from disclosure to the public trade secrets, as defined in ORS 192.345, and information submitted to the department in confidence, as described in ORS 192.355, that are contained in a proposal. Opening a proposal at a public meeting, as defined in ORS 192.610, does not make the contents of the proposal subject to disclosure.

(5) To ensure the objectivity and independence of providers of certain personal services, the department may not:

(a) Procure the personal services from a contractor or consultant or an affiliate of a contractor or consultant who is a party to the public contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the personal services; or

(b) Procure the personal services through the public contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the personal services.

(6) The requirements of section (5) of this rule apply in the following circumstances:

(a) The department requires the procurement of personal services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a public contract or performance under a public Contract.

(b) The procurements of personal services may include, but are not limited to, the following:

(A) Procurements for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, which involve overseeing or monitoring the performance of a construction contractor under a public contract for construction services;

(B) Procurements for commissioning services, which involve monitoring, inspecting, evaluating or otherwise overseeing the performance of a contractor or consultant providing architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or the performance of a construction contractor under a public contract for construction services;

(C) Procurements for project management services, which involve administration, management, monitoring, inspecting, evaluating compliance with or otherwise overseeing the performance of a contractor or consultant providing architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, construction services, commissioning services or other related services for a project;

(D) Procurements for special inspections and testing services, which involve inspecting, testing or otherwise overseeing the performance of a construction contractor under a public contract for construction services; and

(E) Procurements for other related services or personal services, which involve administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing the public contracts.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-148-0200
RULE TITLE: Direct Award Procedure
RULE SUMMARY: Describes procedure for direct awards.
RULE TEXT:

(1) The department may base its selection of a consultant for direct award on any information available to the department prior to beginning the direct award procedure for the project.

(2) The department may enter into a contract directly with a consultant without following the selection procedures set forth elsewhere in these rules if:

(a) Emergency. The department finds that an emergency exists; or

(b) Small Estimated Fee. The estimated fee to be paid under the contract does not exceed $100,000.

(3) The department may select a consultant offering the required services that the department reasonably can identify under the circumstances for a contract under this rule.

(4) As part of the department’s assessment of the qualifications of any consultant being considered for award of a contract, the department can, at any time before entering into a contract, consider information pertaining to whether the consultant owes a liquidated and delinquent debt to the state of Oregon.

(5) The department shall negotiate with a consultant to discuss, refine and finalize the following:

(a) The specific scope of services to be provided by the consultant;

(b) The consultant's performance obligations and performance schedule;

(c) Payment methodology, consultant’s rates and number of hours, and a maximum amount payable to the consultant for the services required under the contract that is fair and reasonable to the department, as determined solely by the department, taking into account the value, scope, complexity and nature of the services; and

(d) Any other conditions or provisions the department believes to be in the department's best interest to negotiate.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-148-0210
RULE TITLE: Intermediate Selection Procedure
RULE SUMMARY: Describes procedure for selection of intermediate procurement.
RULE TEXT:

(1) The department may use the intermediate selection procedure to obtain a contract if the estimated fee is expected to be greater than $100,000 but not to exceed $500,000.

(2) The department using the intermediate selection procedure for services, on the basis of price and qualifications shall:

(a) Create a request for proposals (“RFP”) that includes at a minimum the following:

(A) A description of the project for which a consultant's services are needed and a description of the services that will be required under the resulting contract;

(B) The anticipated contract performance schedule;

(C) Conditions or limitations, if any, that may constrain or prohibit the selected consultant's ability to provide additional services related to the project, including construction services;

(D) The date and time proposals are due and other directions for submitting proposals;

(E) Criteria upon which the most qualified consultant will be selected. Selection criteria may include, but are not limited to, the following:

(i) The amount and type of resources and number of experienced staff the consultant has committed to perform the services described in the RFP within the applicable time limits, including the current and projected workloads of such staff and the proportion of time such staff would have available for the services;

(ii) Proposed management techniques for the services described in the RFP;

(iii) A consultant's capability, experience and past performance history and record in providing similar services, including but not limited to quality of work, ability to meet schedules, cost control methods and contract administration practices;

(iv) A consultant's approach to the services described in the RFP and design philosophy, if applicable;

(v) A Consultant's geographic proximity to and familiarity with the physical location of the project;

(vi) Volume of work, if any, previously awarded to a consultant, with the objective of effecting equitable distribution of contracts among qualified consultants, provided such distribution does not violate the principle of selecting the most qualified consultant for the type of professional services required;

(vii) A consultant's ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;

(viii) Whether the consultant owes a liquidated and delinquent debt to the state of Oregon; and

(ix) Pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead.

(F) A statement that proposers responding to the RFP do so solely at their expense, and the department is not responsible for any proposer expenses associated with the RFP;

(G) A statement directing proposers to the protest procedures set forth in these Division 148 rules; and

(H) A sample form of the contract.

(b) Provide an RFP to a minimum of three (3) prospective consultants. If fewer than three (3) prospective consultants are available, the department shall provide the RFP to all available prospective consultants and shall maintain a written record of the department's efforts to locate available prospective consultants for the RFP. The department may solicit proposals from consultants that the department can identify that offer the desired services.

(c) Review and rank all proposals received according to the criteria set forth in the RFP and select the highest ranked proposer.

(3) If the department does not cancel the RFP after it reviews the proposals and ranks each proposer, the department will begin negotiating a contract with the highest ranked proposer. The department shall direct contract negotiations toward discussing, refining and finalizing the following:

(a) The specific scope of services to be provided by the consultant;

(b) The consultant's performance obligations and performance schedule;

(c) Payment methodology, consultant's rates and number of hours, and a maximum amount payable to the consultant for the services required under the contract that is fair and reasonable to the department as determined solely by the department, taking into account the value, scope, complexity and nature of the services; and

(d) Any other conditions or provisions the department believes to be in the department's best interest to negotiate.

(4) The department shall, in writing, formally terminate negotiations with the highest ranked proposer, if the department and the proposer are unable for any reason to reach agreement on a contract within a reasonable amount of time. The department may thereafter negotiate with the second ranked proposer, and if necessary, with the third ranked proposer, in accordance with section (3) of this rule, until negotiations result in a contract. If negotiations with any of the top three proposers do not result in a contract within a reasonable amount of time, the department may end the particular intermediate

solicitation and thereafter may proceed with a new Intermediate solicitation under this rule or proceed with formal selection procedure.

(5) The department shall terminate the intermediate selection procedure and proceed with the formal selection procedure if the scope of the anticipated contract is revised during negotiations so that the estimated fee will exceed $500,000.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-148-0220
RULE TITLE: Formal Selection Procedure
RULE SUMMARY: Describes procedure for formal selections.
RULE TEXT:

(1) The department shall use the formal selection procedure to select a consultant if the total fee is expected to exceed $500,000. The formal selection procedure may otherwise be used at the department's discretion.

(2) The department shall obtain contracts through public advertisement of RFPs, or requests for qualifications (RFQ's) followed by RFPs.

(a) The department shall publish each RFP and RFQ by one or more of the electronic methods identified in conformance with OAR 736-147-0330. The department may advertise the RFP or RFQ in other publications including, but not limited to, local newspapers, trade journals, and publications targeted to reach disadvantaged business enterprise ("DBE"), Veteran-owned business ("VB"), minority business enterprise ("MBE"), women business enterprise ("WBE") and emerging small business enterprise ("ESB") audiences. Published advertisements shall include the following:.

(A) The department shall publish the advertisement within a reasonable time before the deadline for the proposal submission or response to the RFQ or RFP, but in any event no fewer than fourteen (14) calendar days before the closing date set forth in the RFQ or RFP.

(B) The department shall include a brief description of the following items in the advertisement:

(i) The project;

(ii) A description of the services the department seeks;

(iii) How and where consultants may obtain a copy of the RFQ or RFP; and

(iv) The deadline for submitting a statement of qualifications, proposal or response to the RFQ or RFP.

(b) The department may send notice of the RFP or RFQ directly to any consultants the department has identified that can provide the services required.

(3) Request for Qualifications Procedure. The department may use the RFQ procedure to evaluate potential consultants and establish a short list of qualified consultants to whom the department may issue an RFP for some or all of the services described in the RFQ.

(a) The department shall include the following, at a minimum, in each RFQ:

(A) A brief description of the project for which the department is seeking a consultant;

(B) A description of the services the department seeks for the project;

(C) Conditions or limitations, if any, that may constrain or prohibit the selected consultant's ability to provide additional services related to the project, including but not limited to construction services;

(D) The deadline for submitting a response to the RFQ;

(E) A description of required consultant qualifications for the services the department seeks;

(F) The RFQ evaluation criteria, including weights, points or other classifications applicable to each criterion;

(G) A statement whether or not the department will hold a pre-qualification meeting for all interested consultants to discuss the project and the services described in the RFQ and if a pre-qualification meeting will be held, the location of the meeting and whether or not attendance is mandatory; and

(H) A statement that consultants responding to the RFQ do so solely at their expense, and that the department is not responsible for any consultant expenses associated with the RFQ.

(b) The department may include a request for any or all of the following in each RFQ:

(A) A statement describing consultants' general qualifications and related performance information;

(B) A description of consultants' specific qualifications to perform the services described in the RFQ including consultants' committed resources and recent, current and projected workloads;

(C) A list of similar services and references concerning past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration;

(D) A copy of all records, if any, of consultants' performance under contracts with any other department;

(E) The number of consultants' experienced staff committed to perform the services described in the RFQ, including such personnel's specific qualifications and experience and an estimate of the proportion of time that such personnel would spend on those services;

(F) Consultants' approaches to services described in the RFQ and design philosophy, if applicable;

(G) Consultants' geographic proximity to and familiarity with the physical location of the project;

(H) Consultants' ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;

(I) If the department is selecting a consultant to provide related services, consultants' pricing policies and pricing proposals or other pricing information, including the number of hours estimated for the services required, expenses, hourly rates and overhead;

(J) Consultants’ ability to assist the department in complying with art acquisition requirements, pursuant to ORS 276.073 through 276.090, if required by the project;

(K) Consultants’ ability to assist the department in complying with state of Oregon energy efficient design requirements, pursuant to ORS 276.900 through 276.915, when required;

(L) Whether the consultant owes a liquidated and delinquent debt to the state of Oregon; and

(M) Any other information the department deems reasonably necessary to evaluate consultants’ qualifications.

(c) If the department uses a request for qualifications followed by an RFP to procure services, the department cannot request cost proposals or otherwise use pricing policies, proposals or other pricing information as part of the request for qualifications. The department may only request cost proposals or otherwise use pricing policies, proposals or other pricing information during the RFP process, following the establishment of a short list of qualified consultants through the request for qualifications process.

(d) RFQ Evaluation Committee. The department shall establish an RFQ evaluation committee of at least two (2) individuals to review, score and rank the responding consultants according to the evaluation criteria. The department may appoint to the evaluation committee department employees or employees of other public agencies with experience in the requested services, construction services or public contracting. The department shall designate one member of the evaluation committee as the evaluation committee chairperson.

(e) The department may use any reasonable screening or evaluation method to establish a short list of qualified consultants, including but not limited to, the following:

(A) Requiring consultants responding to an RFQ to achieve a threshold score before qualifying for placement on the short list;

(B) Placing a pre-determined number of the highest scoring consultants on a short list;

(C) Placing on a short list only those consultants with certain essential qualifications or experience, whose practice is limited to a particular subject area, or who practice in a particular geographic locale or region, provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFQ.

(f) After the evaluation committee reviews, scores and ranks the responding consultants, the Department shall establish a short list of at least three qualified consultants, if feasible; provided however, if four or fewer consultants responded to the RFQ or if fewer than three consultants fail to meet the department’s minimum requirements, then:

(A) The department may establish a short list of fewer than three qualified consultants; or

(B) The department may cancel the RFQ and issue an RFP.

(g) No consultant will be eligible for placement on the department's short list established if consultant or any of consultant's principals, partners or associates are members of the department's RFQ evaluation committee.

(h) If the RFQ is cancelled, the department shall provide a copy of the subsequent RFP to each consultant on the short list.

(4) RFP Procedure. The department may use the RFP procedure described in section when issuing an RFP for a contract for services.

(a) RFP Required Contents. The department using the formal selection procedure shall include at least the following in each RFP, whether or not the RFP is preceded by an RFQ:

(A) General background information, including a description of the project and the specific Services sought for the project, the estimated project cost, the estimated time period during which the project is to be completed, and the estimated time period in which the specific services sought will be performed;

(B) The RFP evaluation process and the criteria which will be used to select the most qualified Proposer, including the weights, points or other classifications applicable to each criterion. If the department does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value. Evaluation criteria may include, but are not limited to, the following:

(i) Proposers' availability and capability to perform the services described in the RFP;

(ii) Experience of proposers' key staff persons in providing similar architectural, engineering, photogrammetric mapping, transportation planning or land surveying services, or related services on comparable projects;

(iii) The amount and type of resources, and number of experienced staff persons proposers have committed to perform the services described in the RFP;

(iv) The recent, current and projected workloads of the staff and resources proposed ;

(v) The proportion of time proposers estimate that the proposed staff, would spend on the services described in the RFP;

(vi) Proposers' demonstrated ability to complete successfully similar services on time and within budget, including whether or not there is a record of satisfactory performance;

(vii) References and recommendations from past clients;

(viii) Proposers' performance history in meeting deadlines, submitting accurate estimates, producing high quality work, meeting financial obligations, price and cost data from previous projects, cost controls and contract administration;

(ix) Status and quality of any required license or certification;

(x) Proposers' knowledge and understanding of the project and services described in the RFP as shown in proposers' approaches to staffing and scheduling needs for the services and proposed solutions to any perceived design and constructability issues;

(xi) Results from interviews, if conducted;

(xii) Design philosophy, if applicable, and approach to the services described in the RFP;

(xiii) Whether the consultant owes a liquidated and delinquent debt to the state of Oregon.

(xiv) Pricing policies and pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead; and

(xv) Any other criteria that the department deems relevant to the project and the services described in the RFP.

(C) Conditions or limitations, if any, that may constrain or prohibit the selected consultant's ability to provide additional services related to the project, including but not limited to construction services;

(D) Whether interviews are possible and if so, the weight, points or other classifications applicable to the potential interview;

(E) The date and time proposals are due, and the delivery location for proposals;

(F) Reservation of the right to seek clarifications of each proposal;

(G) Reservation of the right to negotiate a final contract that is in the best interest of the department;

(H) Reservation of the right to reject any or all proposals and reservation of the right to cancel the RFP at any time if doing either would be in the public interest as determined by the department;

(I) A Statement that proposers responding to the RFP do so solely at their expense, and department is not responsible for any proposer expenses associated with the RFP;

(J) A statement directing proposers to the protest procedures set forth in these division 148 rules;

(K) Special contract requirements, including but not limited to DBE, MBE, WBE, ESB and VB participation goals or good faith efforts with respect to DBE, MBE, WBE, ESB and VB participation, and federal requirements when federal funds are involved;

(L) A statement whether or not the department will hold a pre-proposal meeting for all interested consultants to discuss the project and the services described in the RFP and if a pre-proposal meeting will be held, the location of the meeting and whether or not attendance is mandatory;

(M) A request for any information the department deems reasonably necessary to permit the department to evaluate, rank and select the most qualified proposer to perform the services described in the RFP; and

(N) A sample form of the contract.

(O) If the RFP provides for the possibility of proposer interviews, the department may elect to interview proposers if it considers it necessary or desirable.

(i) If the department conducts interviews, it shall award weights, points or other classifications indicated in the RFP for the anticipated interview; and

(ii) The department shall record the results of the scoring and ranking for each proposer.

(b) If the department does not cancel the RFP after it receives the results of the scoring and ranking for each proposer, the department will begin negotiating a contract with the highest ranked proposer. The department shall direct contract negotiations toward discussing, refining and finalizing the following:

(A) The specific scope of services to be provided by the consultant;

(B) The consultant’s performance obligations and performance schedule;

(C) Payment methodology, consultant’s rates and number of hours, and a maximum amount payable to the consultant for the services required under the contract that is fair and reasonable to the department as determined solely by the department, taking into account the value, scope, complexity and nature of the services; and

(D) Any other conditions or provisions the department believes to be in the department’s best interest to negotiate.

(c) The department shall, in writing, formally terminate negotiations with the highest ranked proposer if the department and proposer are unable for any reason to reach agreement on a contract within a reasonable amount of time. The department may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked proposer, and so on if applicable, until negotiations result in a contract. If negotiations with any proposer do not result in a contract within a reasonable amount of time, the department may cancel the formal solicitation. Nothing in this rule precludes the department from proceeding with a new formal solicitation for the same Services described in the RFP that failed to result in a contract.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-148-0230
RULE TITLE: Ties Among Proposers
RULE SUMMARY: Describes procedure for addressing ties among offers.
RULE TEXT:

If the department is selecting a consultant on the basis of price alone, or on the basis of price and qualifications, and determines after ranking the proposals that two or more are identical in terms of price or are identical in terms of price and qualifications, then the department shall use the following procedure to select the consultant.

(1) Tiebreaker Preference and Award When Offers Are Identical. When the department receives offers identical in price, fitness, availability and quality, and chooses to award a contract, the department shall award the contract to the offeror among those submitting identical offers whose main corporate office or primary business location is in Oregon and who is offering services that are to be performed in Oregon.

(2) Determining if Offers are Identical. For purposes of this rule, the department shall consider offers identical if proposals received are identical in price, fitness, availability and quality, if they are responsive, and achieve equal scores when scored in accordance with the evaluation criteria set forth in the request for proposals.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-148-0240
RULE TITLE: Protest Procedures
RULE SUMMARY: Describes procedure for addressing protests.
RULE TEXT:

(1) RFP Protest and Request for Change. Consultants may submit a written protest of anything contained in an RFP and may request a change to any provision, specification or contract term contained in an RFP, no later than seven (7) calendar days prior to the date proposals are due, unless a different deadline is indicated in the RFP. Each protest and request for change must include the reasons for the protest or request, and any proposed changes to the RFP provisions, specifications or contract terms. The department may not consider any protest or request for change that is submitted after the submission deadline.

(2) Protest of Consultant Selection. Consultants may submit a written protest of the department's selection of a consultant for award of a contract as follows:

(a) Single Award. In the event of an award to a single proposer, the department shall provide to all proposers a copy of the selection notice that the department sent to the highest ranked proposer. A proposer who claims to have been adversely affected or aggrieved by the selection of the highest ranked proposer may submit a written protest of the selection to the department no later than seven (7) calendar days after the date of the selection notice unless a different deadline is indicated in the RFP. A proposer submitting a protest must claim that the protesting proposer is the highest ranked proposer because the proposals of all higher ranked proposers failed to meet the requirements of the RFP or because the higher ranked proposers otherwise are not qualified to perform the services described in the RFP.

(b) Multiple Award. In the event of an award to more than one proposer, the department shall provide to all proposers copies of the selection notices that the department sent to the highest ranked proposers. A proposer who claims to have been adversely affected or aggrieved by the selection of the highest ranked Proposers may submit a written protest of the selection to the Department no later than seven (7) calendar days after the date of the selection notices, unless a different deadline is indicated in the RFP. A proposer submitting a protest must claim that the protesting proposer is one of the highest ranked proposers because the proposals of all higher ranked proposers failed to meet the requirements of the RFP, or because a sufficient number of proposals of higher ranked proposers failed to meet the requirements of the RFP. In the alternative, a proposer submitting a protest must claim that the proposals of all higher ranked proposers, or a sufficient number of higher ranked proposers, are not qualified to perform the services described in the RFP.

(c) Effect of Protest Submission Deadline. The department may not consider any protest that is submitted after the submission deadline.

(3) Resolution of Protests. A duly authorized representative of the department shall resolve all timely submitted protests within a reasonable time following the department's receipt of the protest and once resolved, shall promptly issue a written decision on the protest to the proposer who submitted the protest. If the protest results in a change to the RFP, the department shall revise the RFP accordingly and shall re-advertise the RFP in accordance with these rules.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-148-0250
RULE TITLE: Solicitation Cancellation, Delay or Suspension; Rejection of All Proposals or Responses; Consultant Responsibility For Costs
RULE SUMMARY: Describes process for cancelling, delaying or suspending a solicitation.
RULE TEXT:

The department may cancel, delay or suspend a solicitation, RFQ or other preliminary procurement document, whether related to a direct award procedure, an intermediate selection procedure, a formal selection procedure, or reject all proposals, responses to RFQs, responses to other preliminary procurement documents, or any combination of the foregoing, if the department believes it is in the public interest to do so. In the event of any such cancellation, delay, suspension or rejection, the department is not liable to any proposer for any loss or expense caused by or resulting from any such cancellation, delay, suspension or rejection. Consultants responding to either solicitations, RFQs or other preliminary procurement documents are responsible for all costs they may incur in connection with submitting proposals, responses to RFQs or responses to other preliminary procurement documents.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-148-0270
RULE TITLE: Price Agreements
RULE SUMMARY: Describes process for developing price agreements.
RULE TEXT:

(1) The department may establish price agreements for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services, when the department cannot determine the precise quantities of those services which the department will require over a specified time period.

(2) When establishing price agreements, the department shall select no fewer than three consultants, when feasible. The selection procedures for establishing price agreements shall be in accordance with the selection procedures outlined in the solicitation document, or if not defined, in accordance with the Formal Selection Procedure in OAR 736-148-220. The department may select a single consultant, when a price agreement is awarded to obtain services for a specific Project or a closely-related group of Projects.

(3) In addition to any other applicable solicitation requirements set forth in these Division 148 rules, solicitation materials and the terms and conditions for a price agreement for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services or related services must:

(a) Include a scope of services, menu of services, a specification for services or a similar description of the nature, general scope, complexity and purpose of the procurement that will reasonably enable a prospective bidder or proposer to decide whether to submit a bid or proposal;

(b) Specify whether the department intends to award a price agreement to one consultant or to multiple consultants. If the department will award a price agreement to more than one consultant, the solicitation document and price agreement shall describe the criteria and procedures the department will use to select a consultant for each individual work order or task order. The criteria and procedures to assign work orders or task orders may be based solely on the qualifications of the consultants, solely on pricing information, or a combination of both qualifications and pricing information; and

(c) Specify the maximum term for assigning services under the price agreement.

(4) All services assigned under a price agreement require a written work order or task order issued by the department. Any work orders or task orders assigned under a price agreement must include, at a minimum, the following:

(a) The specific scope of services to be provided by the consultant;

(b) The consultant's performance obligations and performance schedule;

(c) The payment methodology, consultant’s rates and number of hours, and a maximum amount payable to the consultant for the services required under the work order or task order that is in accordance with the terms of the Price Agreement, fair and reasonable to the department, as determined solely by the department, taking into account the value, scope, complexity and nature of the services;

(d) Language that incorporates all applicable terms and conditions of the price agreement into the work order or task order; and

(e) Any other conditions or provisions the department believes to be in the department's best interest.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-148-0300
RULE TITLE: Prohibited Payment Methodology; Purchase Restrictions
RULE SUMMARY: Describes prohibitions on payment methods.
RULE TEXT:

(1) Except as otherwise allowed by law, the department shall not enter into any contract which includes compensation provisions that expressly provide for payment of:

(a) Consultant's costs under the contract plus a percentage of those costs; or

(b) A percentage of the project construction costs or total project costs.

(2) Except as otherwise allowed by law, the department shall not enter into any contract in which:

(a) The compensation paid under the contract is solely based on or limited to the consultant's hourly rates for the consultant's personnel working on the project and reimbursable expenses incurred during the performance of work on the project (sometimes referred to as a "time and materials" contract); and

(b) The contract does not include a maximum amount payable to the consultant for the services required under the contract.

(3) Except in cases of emergency, the department shall not purchase any building materials, supplies or equipment for any building, structure or facility constructed by or for the department from any consultant under a contract with the department to perform services, for the building, structure or facility.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0020
RULE TITLE: Procurement Authority
RULE SUMMARY: Outlines procurement authority
RULE TEXT:

Commission Approval for Major Procurements: For procurements exceeding $750,000, the Commission must approve the award prior to contract execution.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0100
RULE TITLE: Application
RULE SUMMARY: Describes requirement for applications.
RULE TEXT:

(1) In addition to the rules set forth in Division 146, 147 and 148, these division 149 rules apply to public improvement procurements and contracts.

(2) Emergency Contracts for construction services are not public improvement contracts and are regulated under OAR 736-147-0030.

(3) The dollar threshold amounts that are applicable to the selection procedures are independent from and have no effect on the dollar threshold amounts that trigger the legal sufficiency review requirement for the department under OAR 137-045-0030.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0120
RULE TITLE: Definitions
RULE SUMMARY: Additional definitions included in Division 149.
RULE TEXT:

Definitions in 736-146-0012 also apply in this division, in addition to the following definitions:

(1) "accepts" or “acceptance” means the later of the date of final payment or the date of final completion of the Contract Work.

(2) “Affiliate” means a person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with another person.

(3) “Alternative Contracting Methods” means innovative techniques for procuring or performing Public Improvement Contracts, utilizing processes other than the traditional design-bid-build construction contracting method (with Award of a Public Improvement Contract based solely on price, in which a final design is issued with formal Bid documents, construction Work is obtained by sealed Bid Awarded to the Responsible Bidder submitting the lowest Responsive Bid, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design-Build contracting and CM/GC forms of contracting, which are specifically addressed in these OAR 736-149-0600 to 736-149-0690 rules.

(4) “Architect and Engineering (A&E) contract” means a contract with a consultant or firm for architectural, engineering, photographic mapping, land surveying and related services.

(5) “Construction Manager/General Contractor” or "CM/GC" means a person that provides construction manager/general contractor services to the department under a public improvement or construction contract.

(6) “Construction Manager/General Contractor Method” or “CM/GC Method” means the Alternative Contracting Method which involves the Department’s selection of a CM/GC to perform CM/GC Services for a project or projects.

(7) Construction Manager/General Contractor Services or “CM/GC Services” means construction-related services performed by a CM/GC that the department procures by means of an alternative contracting method under OAR 736-149-0600 through 736-149-0690.

(8) “Changes to the Work” means a mutually agreed upon change order or a construction change directive or other written order issued by the department to the contractor requiring a change in the Work within the general scope of a public improvement contract, issued under its changes provisions and, if applicable, adjusting the contract price or contract time for the changed work.

(9) “Contract Price” means, as the context requires, the maximum amount the department may be obligated to pay the contractor under a contract.

(10) "Cost Estimate" means the department's most recent pre-bid, good faith assessment of anticipated

contract costs, consisting either of an estimate of an architect, engineer or other qualified professional, or confidential cost calculation work sheets, where available, and otherwise consisting of formal planning or budgetary documents.

(11) “Design-Build” means a form of Procurement that results in a Public Improvement Contract in which the construction Contractor also provides or obtains specified design services, participates on the project team with the Department, and manages both design and construction. In this form of Contract, a single Person provides the Department with all of the Personal Services and construction Work necessary to both design and construct the project.

(12) “Early Work” means construction services, construction materials and other Work authorized by the parties to be performed under the CM/GC Contract in advance of the establishment of the GMP, fixed price or other maximum, not-to-exceed price for the project. Permissible Early Work shall be limited to early procurement of materials and supplies, early release of bid or proposal packages for site development and related activities, and any other advance Work related to important components of the project for which performance prior to establishment of the GMP will materially and positively affect the development or completion of the project.

(13) “Findings” means the justification for a conclusion the department, in seeking an exemption from the competitive bidding requirement , reaches based on the considerations set forth in OAR 736-149-0130 The justification may include, but is not limited to, information regarding: (a) Operational, budget and financial data; (b) Public benefits; (c) Value engineering; (d) Specialized expertise required; (e) Public safety; (f) Market conditions; (g) Technical complexity; and, (h) Funding sources.

(14) “General Conditions Work” or “GC Work” means a general grouping of project Work required to support construction operations on the project that is not included within the Contractor’s overhead or fee.

(15) “Guaranteed Maximum Price” or "GMP" means the total price at which a construction manager/general contractor agrees to provide construction manager/general contractor services to the department in accordance with the terms and conditions and scope of work for a specific public improvement contract and within which are:

(a) All costs the contracting agency agrees to reimburse and all fees the contracting agency agrees to pay for completing the public improvement; and

(b) Any contingent costs, fees or other charges specifically identified in the public improvement contract.

(c) For Alternative Contracting Methods other than the CM/GC Method, “Guaranteed Maximum Price” or “GMP” means the total maximum price provided to the Department by the Contractor and accepted by the Department that includes all reimbursable costs and fees for completion of the Contract Work and any particularly identified contingency amounts, as defined by the Public Improvement Contract.

(16) “Minor Informalities” has that meaning as defined in OAR 736-149-1040.

(17) “Notice” means any of the alternative forms of public announcement of procurements, as described OAR 736-149-0210.

(18) “Retainage” means the difference between the amount earned by a contractor on a public improvement contract and the amount paid on the contract by the department.

(19) “Savings” means a positive difference between a Guaranteed Maximum Price or other maximum not-to-exceed price set forth in a Public Improvement Contract and the actual cost of the CM/GC or Contractor’s performance of the Contract Work payable by the Department under the terms of the Contract, including costs for which a Department reimburses a CM/GC or Contractor and fees, profits or other payments the Contractor earns.

(20) "Value Engineering" means the identification of alternative methods, materials or systems which provide for comparable function at reduced initial or life-time cost. It includes proposed changes to the plans, specifications, or other contract requirements which may be made, consistent with industry practice, under the original contract by mutual agreement in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the public improvement. Cost savings include those resulting from life cycle costing, which may either increase or decrease absolute costs over varying time periods.

(21) “Work” means the furnishing of all services, materials, equipment, labor and incidentals necessary to successfully complete any individual item or the entire contract and the carrying out and completion of all duties and obligations imposed by the contract.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0130
RULE TITLE: Competitive Bidding Requirement-Formal Procurement
RULE SUMMARY: Describes the competitive bid requirements for formal procurements.
RULE TEXT:

(1) For public improvement contracts and ordinary construction contracts with an estimated contract price that exceeds $500,000, the department shall solicit Bids by Invitation to Bid ("ITB"), except as otherwise allowed or required by these Division 149 rules.

(2) Exceptions and Exemptions.

(a) The department may award a public improvement contract only in response to competitive bids, except for:

(A) A public improvement contract that is exempt under subsection (b) of this section.

(B) A public improvement contract with a value of less than $100,000.

(C) A public improvement contract with a contract price that does not exceed $500,000 made under procedures for competitive quotes under OAR 736-149-0160.

(b) Subject to subsection (d)(B) and (C) of this section, the Designated Procurement Officer may exempt a public improvement contract or a class of public improvement contracts from the competitive bidding requirement of subsection (a) of this section after the Designated Procurement Officer approves the following findings that the department submits:

(A) The exemption is unlikely to encourage favoritism in awarding public improvement contracts or substantially diminish competition for public improvement contracts.

(B) Awarding a public improvement contract under the exemption will likely result in substantial cost savings and other substantial benefits to the department or, if the contract is for a public improvement to the department or the public. In approving a finding under this paragraph, the Department shall consider the type, cost and amount of the contract and, to the extent applicable to the particular public improvement contract or class of public improvement contracts, the following:

(i) How many persons are available to bid;

(ii) The construction budget and the projected operating costs for the completed public improvement;

(iii) Public benefits that may result from granting the exemption;

(iv) Whether value engineering techniques may decrease the cost of the public improvement;

(v) The cost and availability of specialized expertise that is necessary for the public improvement;

(vi) Any likely increases in public safety;

(vii) Whether granting the exemption may reduce risks to the Department or the public that are related to the public improvement;

(viii) Whether granting the exemption will affect the sources of funding for the public improvement;

(ix) Whether granting the exemption will better enable the department to control the impact that market conditions may have on the cost of and time necessary to complete the public improvement;

(x) Whether granting the exemption will better enable the department to address the size and technical complexity of the public improvement;

(xi) Whether the public improvement involves new construction or renovates or remodels an existing structure;

(xii) Whether the public improvement will be occupied or unoccupied during construction;

(xiii) Whether the public improvement will require a single phase of construction work or multiple phases of construction work to address specific project conditions; and

(xiv) Whether the department has, or has retained under contract, and will use department personnel, consultants and legal counsel that have necessary expertise and substantial experience in alternative contracting methods to assist in developing the alternative contracting method that the department will use to award the public improvement contract and to help negotiate, administer and enforce the terms of the public improvement contract.

(C) As an alternative to the finding described in paragraph (B) of this subsection, if the department seeks an exemption that would allow the department to use an alternative contracting method that the department has not previously used, the department may make a finding that identifies the project as a pilot project for which the department intends to determine whether using the alternative contracting method actually results in substantial cost savings to the department or the public. The department shall include an analysis and conclusion regarding actual cost savings, if any, in the evaluation.

(c) In making findings to support an exemption for a class of public improvement contracts, the department shall clearly identify the class using the class's defining characteristics. The characteristics must include a combination of project descriptions or locations, time periods, contract values, methods of procurement or other factors that distinguish the limited and related class of public improvement contracts from the department's overall construction program. The department may not identify a class solely by funding source, such as a particular bond fund, or by the method of procurement, but shall identify the class using characteristics that reasonably relate to the exemption criteria set forth in subsection (b) of this section.

(d) In granting exemptions under subsection (b) of this section, the Designated Procurement Officer shall:

(A) If appropriate, direct the use of alternative contracting methods that take account of market realities and modern practices and are consistent with the public policy of encouraging competition.

(B) Require and approve or disapprove written findings by the department that support awarding a particular public improvement contract or a class of public improvement contracts, without the competitive bidding requirement of subsection (a) of this section. The findings must show that the exemption of a contract or class of contracts complies with the requirements of subsection (b) of this section.

(C) Require the department that procures construction manager/general contractor services to conduct the procurement in accordance with these Division 149 rules.

(e) The department may hold a public hearing with the Commission before approving the findings required by subsection (b) of this section and before the Designated Procurement Officer grants an exemption from the competitive bidding requirement for a public improvement contract or a class of public improvement contracts.

(A) If the department conducts a public hearing, the department shall offer an opportunity for any interested party to appear and comment.

(B) If the department must act promptly because of circumstances beyond the department's control that do not constitute an emergency, notification of the proposed exemption may be published simultaneously with the department's solicitation of contractors for the alternative public contracting method, as long as responses to the solicitation are due at least five days after the department intends to take action to approve or disapprove the proposed exemption.

(f) The purpose of an exemption is to exempt one or more public improvement contracts from competitive bidding requirements. The representations in and the accuracy of the findings, including any general description of the resulting public improvement contract, are the bases for approving the findings and granting the exemption. The findings may describe anticipated features of the resulting public improvement contract, but the final parameters of the contract are those characteristics or specifics announced in the solicitation document.

(g) A public improvement contract awarded under the competitive bidding requirement of subsection (a) of this section may be amended only in accordance with rules adopted OAR Chapter 736.

(3) Alternative Contracting Methods. Also see OAR 137-049-0600 to 137-049-0690 regarding the use of Alternative Contracting Methods, use of Alternative Contracting Methods for projects which are excepted or exempt from the competitive bidding process, use of Alternative Contracting Methods within the competitive bidding process and the process for obtaining an exemption from competitive bidding requirements.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0160
RULE TITLE: Intermediate Procurements; Competitive Quotes and Amendments
RULE SUMMARY: Requirement for intermediate procurements.
RULE TEXT:

(1) General. Public improvement estimated by the department to be greater than $100,000 but not to exceed $500,000 may be awarded in accordance with intermediate level procurement procedures for competitive quotes established by this rule.

(2) Selection Criteria. The selection criteria may be limited to price or some combination of price, experience, specific expertise, availability, project understanding, contractor capacity, responsibility and similar factors.

(3) Request for Quotes. The department may utilize written requests for quotes. Written request for quotes shall include the selection criteria to be utilized in selecting a contractor and, if the criteria are not of equal value, their relative value or ranking.

(4) Number of Quotes; Record Required. The department shall seek at least three competitive quotes and keep a written record of the sources and amounts of the quotes received. If three quotes are not reasonably available the department shall make a written record of the effort made to obtain those quotes.

(5) Award. If awarded, the department shall award the contract to the prospective contractor whose quote will best serve the interests of the department, taking into account the announced selection criteria. If award is not made to the offeror offering the lowest price, the department shall make a written record of the basis for award.

(6) Price Increases. Intermediate level contracts obtained by competitive quotes may be increased above the original amount of award by department issuance of a change to the work or amendment, pursuant to OAR 736-149-0910, within the following limitations: The cumulative amendments to a contract arising out of an intermediate procurement must not increase the total contract price to an amount greater than one hundred twenty-five percent of the maximum threshold for a contract arising out of an intermediate procurement unless the designated procurement officer approves in writing a greater amount.

(7) Amendments. Amendments of intermediate level public improvement contracts that exceed the thresholds stated in section (1) are not considered new procurements when made in accordance with this rule.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0200
RULE TITLE: Solicitation Documents; Required Provisions; Assignment or Transfer
RULE SUMMARY: Describes required solicitation documents.
RULE TEXT:

(1) Solicitation Document. The Solicitation Document shall include the following:

(a) General information:

(A) Identification of the project, including the character of the work, and applicable plans, specifications and other contract documents.

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

(C) Notice of any pre-offer conference as follows:

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

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

(iii) That statements made by the department's representatives at the conference are not binding upon the department unless confirmed by written addendum.

(D) The name and title of the authorized designated procurement officer (DPO) designated for receipt of offers and contact person (if different);

(E) Instructions and information concerning the form and submission of offers, including the location to which offers must be delivered, any bid or proposal security requirements, and any other required information or special information, e.g., whether offers may be submitted by electronic or other means (See OAR 736-149-0310 regarding electronic Procurement);

(F) The time, date and place of opening, if public;

(G) The time and date of closing after which a department will not accept offers, which time shall be not less than five days after the date of the last publication of the advertisement. Although a minimum of five days is prescribed, department will use at least a 14-day solicitation period when feasible. If the department is issuing an ITB for a formal procurement, the department shall designate a time of closing consistent with the first-tier subcontractor disclosure requirements of OAR 736-149-0360. For timing issues relating to addenda, see OAR 736-149-0250;

(H) The location where the specifications for the work may be reviewed;

(I) If the contract resulting from a solicitation will be a contract for a public work subject to the Davis-Bacon Act (40 U.S.C. 3141 to 3148), a statement that no offer will be received or considered by the department unless the offer contains a statement by the offeror as a part of its offer that "contractor agrees to be bound by and will comply with the provisions of 40 U.S.C. 3141 to 3148."

(J) A statement that the department will not receive or consider an offer for a construction contract unless the offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as specified in OAR 736-149-0230;

(K) Whether a contractor or a subcontractor under the contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;

(L) Contractor's certification of nondiscrimination in obtaining required subcontractors. (See OAR 736-149-0440);

(M) How the contracting agency will notify offerors of addenda and how the department will make addenda available (See OAR 736-149-0250); and

(N) When applicable, instructions and forms regarding first-tier subcontractor disclosure requirements, as set forth in OAR 736-149-0360.

(b) Evaluation Process:

(A) A statement that the department may reject any offer not in compliance with all prescribed public contracting procedures and requirements, including the requirement to demonstrate the bidder's responsibility and may reject for good cause all offers after finding that doing so is in the public interest;

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

(C) Evaluation criteria, including the relative value applicable to each criterion, that the department will use to determine the responsible bidder with the lowest responsive bid (where award is based solely on price)

(c) Contract Provisions. The department shall include all contract terms and conditions, including warranties, insurance and bonding requirements, that the department considers appropriate for the project. The department must also include all applicable contract provisions required by Oregon law as follows:

(A) Prompt payment to all persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes;

(B) If the contract calls for demolition work, a condition requiring the contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;

(C) 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;

(D) Payment of claims by public officers;

(E) Contractor and first-tier subcontractor liability for late payment on public improvement contracts, including the rate of interest;

(F) Person's right to file a complaint with the Construction Contractors Board for all contracts related to a public improvement contract;

(G) Hours of labor;

(H) Environmental and natural resources regulations

(I) Payment for medical care and attention to employees;

(J) 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.";

(K) Maximum hours, holidays and overtime;

(L) Time limitation on claims for overtime;

(M) Prevailing wage rates, when applicable;

(N) Retainage;

(O) Prompt payment policy, progress payments, rate of interest;

(P) Contractor's relations with subcontractors;

(Q) Notice of claim;

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

(S) Contractor's certification that all subcontractors performing work described in ORS 701.005(2) (i.e., construction Work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence Work under the contract.

(T) Contractor and subcontractor licensure and certification related to the installation of electric vehicle charging systems under ORS 283.410.

(2) Assignment or Transfer Restricted. Unless otherwise provided in the contract, the contractor shall not assign, sell, dispose of, or transfer rights, or delegate duties under the contract, either in whole or

in part, without the department's prior written consent. Unless otherwise agreed by the department 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 the department 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 the department for complete performance of the contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the department otherwise agrees in writing.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0210
RULE TITLE: Public Notice of Solicitation Documents
RULE SUMMARY: Describes public notice requirements.
RULE TEXT:

(1) The department will provide notice of solicitation documents for Formal Procurements and other notices required or authorized by these rules by one or more of the following methods:

(a) By publishing notice on the on-line system maintained by the Oregon Department of Administrative Services;

(b) By publishing notice on the department electronic procurement system;

(c) By placing a notice in a newspaper or trade journal of general circulation in the area where the Contract will be performed;

(d) By giving direct written or electronic notice to potential providers known to the department; or

(e) By giving or publishing notice by any other means reasonably determined by the department under the circumstances to provide sufficient notice to fulfill the purpose and policies of these rules.

(2) All advertisements for offers shall set forth:

(a) The project;

(b) The location where contract terms, conditions and Specifications may be reviewed;

(c) The scheduled closing, which shall not be less than five days after the date of the last publication of the advertisement;

(d) The name, title and address of the department person authorized to receive offers;

(e) The date that Persons must file applications for prequalification under ORS 279C.340, if prequalification is a requirement, and the class or classes of Work for which Persons must be prequalified;

(f) The scheduled opening; and

(g) If applicable, that the contract is for a public work subject to Davis-Bacon Act (40 U.S.C. 3141 to 3148).

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0220
RULE TITLE: Prequalification of Offerors
RULE SUMMARY: Describes process for prequalifying offerors.
RULE TEXT:

(1) Prequalification. Two types of prequalification are authorized:

(a) Mandatory Prequalification. The department may require mandatory prequalification of Offerors on forms prescribed by the department's DPO. The department must indicate in the Solicitation Document if it will require mandatory prequalification. Mandatory prequalification is when the department conditions a Person's submission of an Offer upon the Person's prequalification. The department shall not consider an Offer from a Person that is not prequalified if the department required prequalification.

(b) Permissive Prequalification. The department may prequalify a Person for the department's solicitation list on forms prescribed by the department's Contract Review Authority, but in permissive prequalification the department shall not limit distribution of a solicitation to that list.

(3) Standards for Prequalification. A Person may prequalify by demonstrating to the department's satisfaction:

(a) That the Person's financial, material, equipment, facility and personnel resources and expertise, or ability to obtain such resources and expertise, indicate that the Person is capable of meeting all contractual responsibilities;

(b) The Person's record of performance;

(c) The Person's record of integrity;

(d) The Person is qualified to contract with the department. (See, OAR 736-149-0390 regarding standards of responsibility.)

(4) Prequalification Denial.

(a) Notice of Denial. If a Person fails to prequalify for a mandatory prequalification, the department shall notify the Person, specify the reasons under section (3) of this rule and inform the Person of the Person's right to protest.

(b) Denial Protest Opportunity: Any person who receives a denial notice from the department may submit a written protest of the notice to the designated procurement officer within the later of five days following the date of the denial notice or the date specified in the denial notice. All denial protests must be in writing and signed either in writing or electronic form by the person’s authorized representative. The denial protest must state all facts and arguments upon which the person is basing the protest.

(c) OPRD’s Response: The designated procurement officer will review each timely-submitted denial protest and will issue a written response to the person within three business days following receipt of the protest. The department’s written response may include the designated procurement officer's decision affirming or denying the denial protest, a notice to the person that the department needs additional time to evaluate the protest, or a request for additional information the department may need to evaluate the protest.

(d) Follow-up Response: The department will issue a follow-up response to the person within a reasonable time following notice to the person that the department needs additional time to evaluate the denial protest or following receipt of the additional information requested from the person.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0230
RULE TITLE: Eligibility to Bid or Propose; Registration or License
RULE SUMMARY: Describes eligibility requirements to bid.
RULE TEXT:

(1) Construction Contracts. The department shall not consider a person's offer to do work as a contractor, as defined in ORS 701.005(2), unless the person has a current, valid certificate of registration issued by the Construction Contractors Board at the time the offer is made.

(2) Landscape Contracts. The department shall not consider a Person's offer to do work as a landscape contractor as defined in ORS 671.520(2), unless the person has a current, valid landscape contractors license issued pursuant to 671.560 by the State Landscape Contractors Board at the time the offer is made.

(3) Noncomplying Entities. The department shall deem an offer received from a person that fails to comply with this rule nonresponsive and shall reject the offer as stated in OAR 736-149-1035, unless contrary to federal law or subject to different timing requirements set by federal funding agencies.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0240
RULE TITLE: Pre-Offer Conferences
RULE SUMMARY: Describes process for pre-offer conferences.
RULE TEXT:

(1) Purpose. The department may hold pre-offer conferences with prospective offerors prior to closing, to explain the procurement requirements, obtain information or to conduct site inspections.

(2) Required attendance. The department may require attendance at the pre-offer conference as a condition for making an offer. Unless otherwise specified in the solicitation document, a mandatory attendance requirement is considered to have been met if, at any time during the mandatory meeting, a representative of an offering firm is present.

(3) Scheduled time. If the department holds a pre-offer 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 the department's representative at the pre-offer conference do not change the solicitation document unless the department confirms such statements with a written addendum to the solicitation document.

(5) Department Announcement. The department must set forth notice of any pre-offer conference in the solicitation document in accordance with OAR 736-149-0200.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0245
RULE TITLE: Modification or Cancellation of Solicitation Process
RULE SUMMARY: Describes process for cancelling or modifying solicitations.
RULE TEXT:

(1) Modification: The department may modify or cancel a solicitation document as follows:

(a) Modification Issuance: Any changes to the solicitation document will be by written addenda.

(b) Addenda Issuance: The department will issue addenda in the manner described in the solicitation document or, if not described in the solicitation document, by providing notice within a reasonable time before closing to allow offerors to consider the addenda in preparing bids or proposals. See OAR 736-149-0250 for additional details.

(c) Extension of Closing: The department may extend closing if it determines that offerors need additional time to review and respond to addenda.

(2) Cancellation: The department may cancel a procurement at any time before execution of a contract, if it is determined in the department's best interests to do so.

(a) The department is not liable to any person or offeror for any loss or expense resulting from such cancellation.

(b) The department will document reasons for cancellations in its files.

(c) The department will retain any proposal it receives in accordance with applicable law. The department will not return offers unless explicitly requested by the offeror

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0250
RULE TITLE: Addenda to Solicitation Documents
RULE SUMMARY: Requirements to amend solicitation documents.
RULE TEXT:

(1) Issuance; Receipt. The Department may change a solicitation document only by written addenda. An offeror shall provide written acknowledgement of receipt of all issued addenda with its offer, unless the department otherwise specifies in the addenda or in the solicitation document.

(2) Notice and Distribution. The department shall notify prospective offerors of addenda consistent with the standards of notice set forth in OAR 736-149-0210. The solicitation document shall specify how the department will provide notice of addenda and how the department will make the addenda available (see, 736-149-0200)

(3) Timelines; Extensions. The department shall issue addenda within a reasonable time to allow prospective offerors to consider the addenda in preparing their offers. The department may extend the closing if the department determines prospective offerors need additional time to review and respond to addenda. Except to the extent required by public interest, the department shall not issue addenda less than 72 hours before the closing unless the addendum also extends the closing.

(4) Request for Change or Protest. Unless a different deadline is set forth in the addendum, an offeror may submit a written request for change or protest to the addendum, as provided in OAR 736-149-0260, by the close of the department's next business day after issuance of the addendum, or up to the last day allowed to submit a request for change or protest under 736-149-0260, whichever date is later. The department shall consider only an offeror's request for change or protest to the addendum; the department shall not consider a request for change or protest to matters not added or modified by the addendum, unless the offeror submits the request for change or protest before the deadline for the department’s receipt of request for change or protests as set forth in 736-149-0260.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0260
RULE TITLE: Requests for Changes to or Clarification of a Solicitation Document
RULE SUMMARY: Process for requesting changes or clarifications for a solicitation document.
RULE TEXT:

(1) Requests: If provided in the solicitation document, the department will accept and consider requests to change or clarify a solicitation document. Each request for change or clarification must include a statement clearly describing the desired change or clarification requested.

(2) Submission of Requests to the department: Persons must submit written requests for change or clarification to a solicitation document as specified in the solicitation document. The department may, but is not required to, consider a request for change or clarification submitted after the applicable submission deadline.

(3) Department's Response: The department will issue a written response to each request for change or clarification. The department is not bound by its written response unless the department modifies the solicitation document by publishing an addendum to reflect the response, and to make any associated changes to the solicitation document. After issuing a written response, the department may, in its sole discretion, leave the solicitation document unchanged, issue an addendum reflecting the department's disposition of the request for change or clarification, or cancel the procurement.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0270
RULE TITLE: Cancellation of a Procurement or Solicitation
RULE SUMMARY: Describes process for cancelling a procurement or solicitation.
RULE TEXT:

(1) The department may cancel a solicitation or may reject all offers when the cancellation or rejection is in the best interest of the department as determined by the department.

(a) The reasons for the cancellation or rejection must be made a part of the procurement file.

(b) The department is not liable to any offeror for any loss or expense caused by or resulting from the cancellation of a solicitation document, or the rejection of any or all offers.

(2) Notice of Cancellation. If the department cancels a solicitation prior to opening, the department shall provide notice of cancellation in the same manner they initially issued notice of solicitation. Such notice of cancellation shall:

(a) Identify the solicitation;

(b) Briefly explain the reason for cancellation; and

(c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.

(3) After Offer Opening. If the department rejects all offers, the department shall retain all such offers as part of the department's solicitation file.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0280
RULE TITLE: Submission, Receipt, Opening, and Recording of Offers; Confidentiality of Offers
RULE SUMMARY: Describes process for submission, Receipt, Opening, and Recording of Offers
RULE TEXT:

(1) Offer Submission: Offeror must submit offers in response to a procurement in the format specified by the solicitation document. All bids and proposals are firm offers and are irrevocable, valid, and binding on the offeror for not less than sixty days following closing unless otherwise specified in the solicitation document.

(2) Receipt: The Offeror is responsible for ensuring that the department receives its offer at the required delivery point prior to the closing, regardless of the method used to submit or transmit the offer.

(a) The department is not responsible for offers submitted in any manner, format or to any delivery point other than as required in the solicitation document.

(b) The department shall not open digital offers or any modification upon receipt, but shall maintain it as confidential until closing.

(3) Opening:

(a) The department does not publicly open offers on small, sole source, or intermediate procurements.

(b) Opening and Recording. The department shall publicly open offers on formal procurements including any modifications made to the offer in the location and manner described in the solicitation document. In the case of invitations to bid, to the extent practicable, the department shall read aloud the name of each bidder, the bid price(s), and such other information as the department considers appropriate

(c) Availability. After opening, the department shall make Bids available for public inspection. The department 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 the department determines such designation is not in accordance with applicable law, the department shall make those portions available for public inspection. The offeror shall separate information designated as confidential from other nonconfidential 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 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0290
RULE TITLE: Bid Security
RULE SUMMARY: Describes requirements for bid security.
RULE TEXT:

(1) Security Amount. If the department requires bid security, it shall be not more than 10% or less than 5% of the offeror's bid, consisting of the base bid together with all additive alternates. The department shall not use bid security to discourage competition. The department shall clearly state any bid security requirements in its solicitation document. The offeror shall forfeit bid 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.

(2) Requirement for Bid Security. The department shall require bid security for all solicitations of bids for public improvements with an estimated contract value of more than $500,000. The department may require bid security on any solicitation at its discretion. When required, it will be included in the solicitation document.

(3) Form of Bid Security. A department may accept only the following forms of bid security:

(a) A surety bond from a surety company authorized to do business in the state of Oregon;

(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.

(4) Return of Security. A department shall return or release the bid 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. The department 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, is retained pending execution of a contract.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0310
RULE TITLE: Electronic Procurement
RULE SUMMARY: Requirements for electronic procurements.
RULE TEXT:

(1) General. The department may utilize electronic advertisement of contracts, provided that advertisement of such contracts with an estimated contract price in excess of $500,000 are posted in accordance with public notice of solicitation documents (OAR 736-149-0210). Notices of intent to award may be posted electronically.

(2) The department is authorized to utilize electronic procurement methods, the process for use of electronic procurements shall be substantially in conformance with OAR 736-147-0330 and r requirements in these division 149 rules for for written bids, opening bids publicly, bid security, and first-tier subcontractor disclosure.

(3) Interpretation. Nothing in this rule shall be construed as prohibiting the department from making procurement documents for Public Improvement Contracts available in electronic format as well as in hard copy when Bids are to be submitted only in hard copy.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0340
RULE TITLE: Late Submission of Bids or Proposals, Modifications and Withdrawal
RULE SUMMARY: Describes requirement for consideration of late submission of Bids or Proposals.
RULE TEXT:

(1) Late Submission:

(a) Any Offer in response to a solicitation document received after closing is late. An offeror's request for withdrawal or modification of an offer in response to a solicitation document received after closing is late. The department shall not consider withdrawals submitted after closing.

(b) An Offer, withdrawal or modification will be considered received by the department as of the date and time affixed to the Offer, withdrawal, or modification, or recorded by the electronic procurement system utilized for submission of the Offer, withdrawal, or modification.

(2) Bids and Proposals - Modification or Withdrawal:

(a) Before Closing: An offeror may modify or withdraw its bid or proposal before closing by submitting a written bid or proposal modification or withdrawal notice to the department that includes the signature of offeror's authorized representative acknowledging the modification or withdrawal. The signature of offeror's authorized representative may be either electronic or handwritten. The last offer received by department before closing will supersede all previous offers.

(b) After Closing: The department may permit an offeror to withdraw an offer after closing based on one or more errors in the offer. The offeror provides a detailed written description of the error to the department demonstrating, to the satisfaction of the designated procurement officer, the following conditions:

(A) Minor Informality: The error is not a minor informality.

(B) Good Faith: The offeror acted in good faith and without gross negligence in submitting an offer to the department that contained the error and in claiming that error exists;

(C) Substantial Detriment: The offeror will suffer substantial detriment if the department does not permit the offeror to withdraw the offer;

(D) Non-Reliance of the department: The department has not relied upon the offer to the department's detriment such that permitting the offeror to withdraw the offer will cause substantial hardship on the department; and

(E) Prompt Notice: The offeror promptly gave notice of the claimed error to the department.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0350
RULE TITLE: Minor Informalities
RULE SUMMARY: Describes process for addressing minor informalities.
RULE TEXT:

(1) General: The department may accept offers that contain, or allow an offeror to correct an offer that contains, minor informalities.

(2) Examples: Minor informalities include errors in form rather than substance and errors in an offer that can be overlooked or corrected without prejudice to other offerors. Minor informalities do not cause an offer to be non-responsive. Examples of minor informalities include, but are not limited to:

(a) Incorrect Number of Copies: The offeror failed to submit the correct number of signed offers or the correct number of other documents required by the solicitation document;

(b) Signature Errors: The offeror failed to sign the offer in the designated block, provided that an authorized signature appears elsewhere in the offer as evidence of offeror's intent to be bound;

(c) Failure to Acknowledge: The offeror failed to acknowledge receipt of an addendum to the solicitation document. Provided that it is evident on the face of the offer, or the department has written evidence, that the offeror received the addendum and intends to be bound by its terms; or

(d) Clerical Errors: Clerical errors that are evident within the offer, including typographical errors, errors in extending unit prices, math errors, and instances in which the intended correct unit or amount is evident by simple arithmetic calculations. If a specified unit price, when extended, does not equal the specified extended price, then the department shall use the specified unit price for purposes of extended price determination.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0360
RULE TITLE: First-Tier Subcontractors; Disclosure and Substitution for Formal Procurements
RULE SUMMARY: Identifies requirements for disclosure and substitution for Formal Procurements
RULE TEXT:

(1) Required Disclosure. Within two working hours after the bid closing on an ITB for a public improvement having a contract price anticipated by the department to exceed $500,000, all bidders shall submit to the department a disclosure form as described by in these Division 149 rules, identifying any first-tier subcontractors (those entities that would be contracting directly with the prime contractor) that will be furnishing labor or labor and materials on the contract, if awarded, whose subcontract value would be equal to or greater than:

(a) Five percent of the total contract price, but at least $25,000; or

(b) $350,000, regardless of the percentage of the total contract price.

(2) Bid Closing, Disclosure Deadline and Bid Opening. For each ITB to which this rule applies, the department shall:

(a) To the extent practicable, the department will set the bid closing on a Tuesday, Wednesday or Thursday, and at a time between 2 p.m. and 5 p.m., and provided that the two-hour disclosure deadline described by this rule would not then fall on a legal holiday;

(b) Open bids publicly immediately after the bid closing; and

(c) Consider for contract award only those bids for which the required disclosure has been submitted by the announced deadline on forms prescribed by the department.

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

(a) Prescribe the disclosure form that must be utilized, substantially in the form set forth in the solicitation document; and

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

(A) Instructions for First-Tier Subcontractor Disclosure: Bidders are required to disclose information about certain first-tier subcontractors. Specifically, when the contract amount of a first-tier subcontractor furnishing labor or labor and materials would be greater than or equal to:

(i) 5% of the project bid, but at least $25,000; or

(ii) $350,000 regardless of the percentage.

(B) The bidder must disclose the following information about that subcontract either in its bid submission, or within two hours after bid closing:

(i) The subcontractor's name;

(ii) The category of work that the subcontractor would be performing, and

(iii) The dollar value of the subcontract. If the bidder will not be using any subcontractors that are subject to the above disclosure requirements, the Bidder is required to indicate "NONE" on the accompanying form. The department must reject a bid if the bidder fails to submit the disclosure form with this information by the stated deadline. (see 736-149-0360).

(4) Submission. A bidder shall submit the disclosure form required by this rule either in its bid submission, or within two working hours after bid closing in the manner specified by the ITB.

(5) Responsiveness. Compliance with the disclosure and submittal requirements of this rule is a matter of responsiveness. Bids that are submitted by bid closing, but for which the disclosure submittal has not been made by the specified deadline, are not responsive and shall not be considered for contract award.

(6) Department Role. The department shall obtain, and make available for public inspection, the disclosure forms required by this rule. The department are not required to determine the accuracy or completeness of the information provided on disclosure forms.

(7) Substitution. The contractor may substitute first-tier subcontractors by submitting the name of the new subcontractor to the department in writing. Substitutions are allowable under the following circumstances: failure to execute a written contract within reasonable time, bankruptcy or insolvency, failure to perform or meet the bond requirements, when the disclosure was an inadvertent clerical error, if subcontractor does not hold a license from the Construction Contractors Board and is required to be licensed by the board, performs unsatisfactory work, is ineligible to work on a public improvement contract under applicable statutory provisions. Substitutions may be permissible for additional reasons at the discretion of the department. the department does not have a duty to review, approve or resolve disputes concerning such substitutions.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0370
RULE TITLE: Disqualification of Persons
RULE SUMMARY: Describes process for disqualification of Persons
RULE TEXT:

(1) Disqualification. The department may disqualify a person from an award of department contracts for up to three years if:

(a) Contract Performance: The person has performed unsatisfactorily under a contract or has committed a material breach of a contract.

(b) Contract Offense Conviction: The person has been convicted of a criminal offense resulting from obtaining, or attempting to obtain, a public or private contract or subcontract, or resulting from the performance of such contract or subcontract.

(c) Business Offense Conviction: The person has been convicted 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 person's responsibility as a contractor or the department determines may affect the fairness, integrity, honesty, or security of the department.

(d) Antitrust Conviction: The person has been convicted under state or federal antitrust statutes.

(e) Workers' Compensation or Employment Statute Violation: The person does not carry worker's compensation or unemployment insurance as required by statute.

(f) Other: The department may attribute improper conduct of an individual or entity or its affiliate or affiliates having a contract with a person to the person for purposes of suspension determinations where the impropriety occurred in connection with the individual's or entity's duty for, on behalf of, or with the knowledge, approval, or acquiescence of, the person.

(2) Notice. The department will provide written notice to a person suspended by the department.

(3) Disqualification Protest Opportunity: Any person who receives a disqualification notice from the department may submit a written protest of the notice to the designated procurement officer within the later of five days following the date of the disqualification notice or the date specified in the disqualification notice.

(a) Disqualification Protest Content: All disqualification protests must be in writing and signed either in writing or electronic form by the person's authorized representative. The disqualification protest must state all facts and arguments upon which the person is basing the protest.

(b) OPRD's Response: The designated procurement officer will review each timely-submitted disqualification protest and will issue a written response to the person within three business days following receipt of the protest.

(A) Response Content: The department’s written response may include the designated procurement officer's decision affirming or denying the disqualification protest, a notice to the person that the department needs additional time to evaluate the protest, or a request for additional information the department may need to evaluate the protest.

(B) Follow-up Response: The department will issue a follow-up response to the person within a reasonable time following notice to the person that the department needs additional time to evaluate the disqualification protest or following receipt of the additional information requested from the person.

(4) Disqualification Effective Date: A person’s disqualification is effective when the person’s rights to protest the disqualification are exhausted.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0380
RULE TITLE: Offer Evaluation; Clarification of Offers; Award
RULE SUMMARY: Describes process for evaluating offers.
RULE TEXT:

(1) The department will evaluate offers using the process and criteria specified in the solicitation document.

(2) Evaluation of Bids. The Department shall use only objective criteria to evaluate Bids as set forth in the ITB. The Department shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid.

(3) Clarification of Offers: The department may contact offerors after closing for clarification of offers to facilitate the department's full understanding of the offers. The department will document in the procurement file all offer clarifications obtained.

(4) Award Based on Bids:

(a) Unless otherwise specified in the Invitation to Bid, the department will issue an award to the responsible bidder who has submitted a responsive bid that includes the lowest contract cost to the department and that otherwise complies with these rules.

(b) The department may issue multiple awards from one Invitation to bid according to the criteria specified in the solicitation document.

(c) Partial Awards: The department may issue an award for only a portion of the services specified in a solicitation document according to the criteria specified in the solicitation document.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0385
RULE TITLE: Identical Bids; Preference for Oregon Goods and Services
RULE SUMMARY: Describes preference for Oregon Goods and Services
RULE TEXT:

(1) Award When Bids are Identical: If the department receives bids determined identical in price (“identical bids”), and chooses to issue an award, the department will issue the award based on the following order of precedence:

(a) Oregon Bidder: The department will issue an award to the bidder offering goods manufactured in Oregon or whose main corporate office or primary business location is in Oregon. If the department receives identical bids from more than one bidder offering goods manufactured in Oregon or whose main corporate office or primary business location is in Oregon, the department will issue an award by drawing lots from among those bidders offering goods manufactured in Oregon or whose main corporate office or primary business location is in Oregon that submitted the identical bids.

(b) COBID Certified Bidders: The department will issue an award to a certification office for business inclusion and diversity (COBID) certified minority, women, emerging small business (MWESB) or veteran owned business. If multiple COBID certified bidders exist, department will issue an award by drawing lots from among those COBID certified bidders who submitted the identical bids.

(c) No Applicable Preferences: If department receives identical bids, and none of the identical bids include goods manufactured in Oregon or a bidder with a main corporate office or primary business location in Oregon, and none of the bidders are COBID certified bidders, then OPRD will issue an award by drawing lots from among bidders that submitted the identical bids.

(2) Procedure for Drawing Lots: When drawing of lots, the department will provide notice of the date, time of the drawing of lots to bidders who submitted identical bids. The department will draw lots by a procedure that affords each bidder subject to the drawing a substantially equal probability of selection and that does not allow the person making the selection the opportunity to manipulate the drawing to increase the probability of selecting one bidder over any other bidder.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0390
RULE TITLE: Responsible Offerors; Rejection for Offeror Non-Responsibility
RULE SUMMARY: Describes requirements for responsible offers.
RULE TEXT:

(1) General: Only responsible offerors are eligible for award. The department will reject offers from offerors determined not responsible by the department and provide a written summary for the basis of the determination to the offeror.

(2) Considerations: In determining whether an offeror is responsible, the department may seek and use information in addition to that submitted with offeror’s offer. In making its determination of responsibility, in addition to any other criteria the department deems relevant, the department may consider whether the offeror:

(a) Corporate Capability and Business Qualifications: Has available the appropriate financial, material, equipment, facilities, and personnel resources and expertise, or ability to obtain the resources and expertise, necessary for the offeror to meet all potential contractual obligations;

(b) Record of Performance: Has a satisfactory contract performance record. The department will carefully review an offeror’s contract performance record to determine if the offeror is or recently has been materially deficient in contract performance. The department will determine whether the offeror’s deficient performance was excused under the specific terms of the contract or whether the offeror took appropriate corrective action. The department may review the offeror’s performance under both private and public contracts through interviews with the other contracting party or review of performance documentation, or both;

(c) Record of Integrity: Has a satisfactory record of integrity. An offeror may lack integrity if the department determines the offeror demonstrates a lack of business ethics such as by evidence of offeror’s violation of state environmental laws or by making false certifications. The department may find an offeror not responsible based on the lack of integrity of any individual or 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 under the contract or a parent company, predecessor or successor individual or entity);

(d) Legally Authorized: Is legally authorized to contract with the department;

(e) Necessary Information: Promptly provided all information the department requested to facilitate the department's determination whether offeror is responsible. If the offeror fails to promptly provide requested information, the department will base its determination upon available information; and

(f) Disqualification: If an offeror has been disqualified by the department. The department may consider a disqualified offeror for award during the disqualification period if the director determines the offeror’s participation is in the department’s best interest. The department will specify in writing the factors and limits upon which the offeror’s participation is based.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)

STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0395
RULE TITLE: Award Notice
RULE SUMMARY: Outlines award notice process.
RULE TEXT:

(1) Notice. At least seven days before the award of a public improvement contract in excess of $500,000, the department shall post electronically or otherwise, a notice of the department's intent to Award the Contract. This requirement does not apply to award of contracts through direct award (small) as described in OAR 736-146 or intermediate (informal competitive quotes) procurement procedures.

(2) Form and Manner of Posting. The form and manner of posting notice shall conform to customary practices within the department's procurement system, and may be made electronically.

(3) Finalizing Award. The department's award shall not be final until the later of the following:

(a) Seven days after the date of the notice, unless the solicitation document provided a different period for protest; or

(b) The department provides a written response to all timely-filed protests that denies the protest and affirms the award.

(4) Prior Notice Impractical. Posting of notice of intent to award shall not be required when the department determines that it is impractical due to unusual time constraints in making prompt award for its immediate procurement needs, documents the contract file as to the reasons for that determination, and posts notice of that action as soon as reasonably practical.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0400
RULE TITLE: Documentation of Award; Availability of Award Decisions
RULE SUMMARY: Describes process for documenting awards.
RULE TEXT:

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

(2) Contents of Award Record for Bids. The department's record shall include:

(a) All submitted bids;

(b) Completed bid tabulation sheet; and

(c) Written justification for any rejection of lower bids.

(3) Contract Document. The department shall deliver a fully executed copy of the final contract to the successful offeror.

(4) Bid Tabulations and Award Summaries. Upon request of any person the department shall provide tabulations of awarded bids or evaluation summaries of proposals for a nominal charge which may be payable in advance. Requests must contain the solicitation document number and, if requested, be accompanied by a self-addressed, stamped envelope. The department may also provide tabulations of bids and proposals awarded on designated web sites or on the department's electronic procurement system.

(5) Availability of Solicitation Files. The department shall make completed solicitation files available for public review at the department.

(6) Copies from Solicitation Files. Any person may obtain copies of material from solicitation files upon payment of a reasonable copying charge.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0410
RULE TITLE: Time for Department Acceptance; Extension
RULE SUMMARY: Describes time for Department Acceptance
RULE TEXT:

(1) Time for Offer Acceptance. An offeror's bid submitted as a firm offer, is irrevocable, valid and binding on the offeror for not less than 30 days from closing unless otherwise specified in the solicitation document.

(2) Extension of Acceptance Time. The department may request, orally or in writing, that offerors extend, in writing, the time during which the department may consider and accept their offer(s). If an offeror agrees to such extension, the offer shall continue as a firm offer, irrevocable, valid and binding on the offeror for the agreed-upon extension period.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0430
RULE TITLE: Negotiations
RULE SUMMARY: Outlines process for negotiations.
RULE TEXT:

(1) Generally. If all responsive bids from responsible bidders on a competitively bid project exceed the department's cost estimate, prior to contract award the department may negotiate value engineering and other options with the responsible bidder submitting the lowest, responsive bid in an attempt to bring the project within the department's cost estimate.

(a) Scope of Negotiations. The department shall not proceed with contract award if the scope of the project is significantly changed from the original bid. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other bidders would have been expected by the department to participate in the bidding process had the change been made during the solicitation process rather than during negotiation. This rule shall not be construed to prohibit resolicitation of trade subcontracts.

(b) Discontinuing Negotiations. The department may discontinue negotiations at any time, and shall do so if it appears to the department that the apparent low bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to rebid any portion of the project, or to obtain subcontractor pricing information upon request, shall be considered a lack of good faith.

(c) Limitation. Negotiations may be undertaken only with the lowest responsive, responsible bidder.

(d) Public Records. To the extent that a bidder's records used in contract negotiations are public records, they are exempt from disclosure until after the negotiated contract has been awarded or the negotiation process has been terminated, at which time they are subject to disclosure pursuant to the provisions of the Oregon Public Records Law, ORS 192.311 through 192.478.

(2) Following Award, the department may negotiate any contract terms or conditions with the Contractor if the department determines that negotiation is in the department’s best interests.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0440
RULE TITLE: Bid Rejection
RULE SUMMARY: Process for rejection of bids.
RULE TEXT:

(1) The department may at any time reject all offers provided in response to a solicitation document if determined it is in the department's best interest to do so and may reject individual offers upon the department’s finding the offer:

(a) Contingent: Is contingent upon the department’s acceptance of terms and conditions (including specifications) that differ from those specified in the solicitation document;

(b) Exceptions: Takes exceptions to terms and conditions (including specifications) specified in the solicitation document;

(c) Non Responsive because the offer:

(A) Offers goods or services that fail to meet the specifications;

(B) Offers goods or services that otherwise fail to meet the requirements of the solicitation document;

(C) Is submitted after closing; or

(D) Is otherwise not responsive to the terms of the solicitation document.

(2) The department shall reject an Offer upon finding that the Offeror:

(a) Has been disqualified;

(b) Is listed as not qualified by the Construction Contractors Board, if the Contract is for a public improvement;

(c) Has not submitted properly executed bid or proposal security as required by the solicitation document;

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

(e) Is not Responsible. See OAR 736-149-0390 regarding department determination that the offeror has met rules and standards of responsibility.

(f) Has not been prequalified, if prequalification is indicated in the solicitation document required mandatory prequalification.

(3) Rejection of all Offers. The department may reject all offers for good cause upon the department's written finding it is in the public interest to do so. The department shall notify all offerors of the rejection of all offers, along with the good cause justification and finding.

(4) Criteria for Rejection of All Offers. The department may reject all offers upon a written finding that:

(a) The content of or an error in the solicitation document, or the solicitation process unnecessarily restricted competition for the contract;

(b) The price, quality or performance presented by the offerors is too costly or of insufficient quality to justify acceptance of the offer;

(c) Misconduct, error, or ambiguous or misleading provisions in the solicitation document threaten the fairness and integrity of the competitive process;

(d) Causes other than legitimate market forces threaten the integrity of the competitive procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct and inadvertent or intentional errors in the solicitation document;

(e) The department cancels the solicitation in accordance with OAR 736-149-0270; or

(f) Any other circumstance ndicating that awarding the contract would not be in the public interest.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0450
RULE TITLE: Protest of Formal Contract Awards
RULE SUMMARY: Describes process for protest of Formal Contract Awards
RULE TEXT:

(1) Award Protest Opportunity: Any offeror who submitted an offer in response to a formal procurement may protest the award by submitting a protest to the department within five days following the date of the award notice, unless a different time period is specified in the solicitation document.

(2) Award Protest Content: All award protests must be received in writing and signed either in writing or electronic form by the offeror's authorized representative. The award protest must be received by the department by the time set forth in subsection (1) above, and provide relevant legal and factual arguments that:

(a) All lower bids or higher ranked offerors are ineligible to receive the award because they are not responsive; or

(b) The department committed a material violation of a provision in the solicitation document or of an applicable statute or administrative rule that resulted in prejudice to the offeror that caused the department to not issue an award to that offeror.

(3) Department's Response: The designated procurement officer or designee will review each timely-submitted award protest and will issue a written response to the offeror within three business days following receipt of the protest.

(a) Response Content: The department's written response may include the department's decision affirming or denying the award protest, a notice to the offeror the department needs additional time to evaluate the protest, or a request for additional information from the offeror the department may need to evaluate the protest.

(b) Follow-up Response: The department will issue a follow-up response to the offeror within a reasonable time following the department's notice to the offeror that the department needs additional time to evaluate the award protest or following receipt of the additional information the department has requested from the offeror.

(4) Late Protests: The department will not consider an offeror's protest submitted after the timelines specified for submission in this rule.

(5) Successful Protest: If the department sustains any or all of a protest, the department may, in its sole discretion, withdraw the award and issue a subsequent award, or withdraw the award and cancel the offeror selection process. The department may, at any time after cancellation of the offeror selection process or award withdrawal, conduct a new offeror selection process, including issuing a new Invitation to Bid with the same or revised terms, conditions and specifications as used in the original solicitation document.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0460
RULE TITLE: Performance and Payment Security; Waiver
RULE SUMMARY: Requirements for performance and Payment Security
RULE TEXT:

(1) Performance and Payment Bonds- Public Improvement Contracts. Unless the required performance bond is waived in cases of emergency under OAR 736-147-0030, the contractor shall execute and deliver to the department a performance bond and a payment bond each in a sum equal to the contract price for all public improvement contracts. This requirement applies to public improvement contracts with a value, estimated by the department, of more than $100,000 or, in the case of contracts for highways, bridges and other transportation projects, more than $50,000.

(2) Requirement for Surety Bond. The department shall accept only a performance bond furnished by a surety company authorized to do business in Oregon unless otherwise specified in the solicitation document (i.e., the department may accept a cashier's check or certified check in lieu or all or a portion of the required performance bond if specified in the solicitation document). The payment bond must be furnished by a surety company authorized to do business in Oregon, and in an amount equal to the full contract price.

(3) Time for Submission. The apparent successful offeror must promptly furnish the required performance and payment security upon the department's request or as required in the solicitation document. If the offeror fails to furnish the performance and payment security as requested, the department may reject the offer and award the contract to the responsible bidder with the next lowest responsive bid, and, at the department's discretion, the offeror shall forfeit its bid security.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0600
RULE TITLE: Purpose
RULE SUMMARY: Describes purpose of the division.
RULE TEXT:

OAR 736-149-0600 to 736-149-0690 provide guidance regarding the use of Alternative Contracting Methods for Public Improvement Contracts over $500,000, as may be directed by a Department's Contract Review Authority. These Alternative Contracting Methods include, but are not limited to, Design-Build and the Construction Manager or General Contractor Method. To the extent any such Alternative Contracting Methods are utilized within the competitive bidding process set forth in these Division 149 rules, these OAR 736-149-0600 to 736-149-0690 rules are advisory only and may be used or referred to by a department in whole, in part or not at all, within the discretion of the department. As to contracting for Construction Manager or General Contractor Services requiring an exemption from competitive bidding, OAR 736-149-0600 to 736-149-0690 include mandatory and optional provisions pertaining to the procurement of Construction Manager orGeneral Contractor Services.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0620
RULE TITLE: Use of Alternative Contracting Methods
RULE SUMMARY: Describes alternative contracting methods.
RULE TEXT:

(1) Competitive Bidding Exemptions. OAR 736-149-0130(1) requires a competitive bidding process for Public Improvement Contracts over $500,000, unless an exception applies, a class of Contracts has been exempted from the competitive bidding process, or an individual Contract has been exempted from the competitive bidding process, in accordance with OAR 736-149-0130(2) and (3) and any other applicable Department administrative rules. Use of Alternative Contracting Methods may be directed by the department if that use is within the competitive bidding process, if feasible, or through an available exception to the competitive bidding process. Use of the Alternative Contracting Method for Formal Procurements requires an exemption to the prescribed competitive bidding requirement in conformance with OAR 736-149-0130. In any of these circumstances, use of Alternative Contracting Methods must be justified in accordance with any applicable department requirements and, these Division 149 rules. See 736-149-0130 and 736-149-0630 regarding required Findings and restrictions on exemptions from the competitive bidding requirement.

(2) Post-Project Evaluation. The department will prepare a formal post-project evaluation of Public Improvement projects in excess of $500,000 when the Department does not use the competitive bidding process required by OAR 736-149-0130. The purpose of this evaluation is to determine whether it was actually in the department's best interest to use an Alternative Contracting Method outside the competitive bidding process. The evaluation must be delivered to the Designated Procurement Officer within 60 Days of the date the department accepts the Public Improvement project. The evaluation must include but is not limited to the following matters:

(a) Financial information, consisting of cost estimates, any Guaranteed Maximum Price, changes and actual costs:

(A) The actual project cost as compared with original project estimates;

(B) The amount of any guaranteed maximum price;

(C) The number of project change orders issued by the department;

(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.

(d) The evaluations required by this section:

(A) Must be made available for public inspection; and

(B) Must be completed within 60 days of the date the department accepts:

(i) The public improvement project; or

(ii) The last public improvement project if the project falls within a class of public improvement contracts.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0630
RULE TITLE: Findings, Notice and Hearing
RULE SUMMARY: Describes the process for hearings, public notice and findings.
RULE TEXT:

(1) Cost Savings and Other Substantial Benefits Factors. When Findings are required under OAR 736-149-0130(2) to exempt a Contract or class of Contracts from the competitive bidding requirements, the "substantial cost savings and other substantial benefits" criteria require consideration of the type, cost and amount of the Contract and, to the extent applicable, the other factors set forth736-149-0130 If a particular factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts, the 736-Department is not required to address the factor, other than to explain why the factor is not applicable.

(2) Required Information. The definition of "Findings" at OAR 736-149-0120(18), applies to exemptions from competitive bidding and means the justification for the department conclusion regarding the factors listed in OAR's 736-149-0130, and 736-149-0600 through 736-149-0690

(3) Addressing Cost Savings. Accordingly, when the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the "substantial cost savings and other substantial benefits" requirement may be addressed by a combination of:

(a) Specified Findings that address the factors and other information specifically identified by statute, including, but not limited to, an analysis or reasonable forecast of present and future cost savings and other substantial benefits; and

(b) Additional Findings that address industry practices, surveys, trends, past experiences, evaluations of completed projects and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable, such Findings shall relate back to the specific characteristics of the project or projects at issue in the exemption request.

(c) As an alternative to the "substantial cost savings and other substantial benefits" requirement, if an Alternative Contracting Method has not been previously used, the Designated Procurement Officer may make a Finding that identifies the project as a "pilot project" . Nevertheless, the department must still make the findings required in 736-149-0130.

(4) Favoritism and Competition. The criteria that the exemption "is unlikely to 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 with public notice and disclosure of the planned Alternative Contracting Method, competition will be encouraged, Award made based upon identified selection criteria and an opportunity to protest that Award.

(5) Descriptions. Findings supporting a competitive bidding exemption must describe with specificity any Alternative Contracting Method to be used in lieu of competitive bidding, including, but not limited to, whether a one-step (request for Proposals), two-step (beginning with a Request for

Qualifications, followed by a request for Proposals) or other solicitation process will be utilized. The Findings may also describe anticipated characteristics or features of the resulting Public Improvement Contract. However, the purpose of an exemption from competitive bidding is limited to a determination of the Procurement method. Any unnecessary or incidental descriptions of the specific details of the anticipated Contract within the supporting Findings are not binding upon the Department. The parameters of the Public Improvement Contract are those characteristics or specifics that are announced in the Solicitation Document.

(6) Class Exemptions. In making the Findings supporting a class exemption the department shall clearly identify the “class” with respect to its defining characteristics,. The class must meet the following requirements:

(a) The class cannot be based on a single characteristic or factor, so that the department directly or indirectly creates a class whereby the department uses, for example, the CM/GC Method for all department construction projects or all department construction projects over a particular dollar amount, unidentified future department construction projects of a particular work category, or all department construction projects from a particular funding source such as the sale of bonds; and

(b) The class must include a combination of factors, be defined by the department through characteristics that reasonably relate to the exemption criteria set forth in OAR 736-149-0130(2) and must reflect a detailed evaluation of those characteristics so that the class is defined in a limited way that effectively meets the department’s objectives while allowing for impartial and open competition, and protecting the integrity of the exemption process. An example of a class that might be permitted under the statute is a series of projects, such as a specific group of building renovation projects, that

(A) Involve renovations for a common purpose;

(B) Require completion on a related schedule in order to avoid unnecessary disruption of department operations;

(C) Share common characteristics, such as historic building considerations, the presence of asbestos or other hazardous substances, or the presence of department staff during construction;

(D) Otherwise possess characteristics that meet the requirements of OAR 736-149-0130(2); and

(E) Otherwise meet the requirements of the department.

(7) Public Hearing. Before final adoption of Findings exempting a Public Improvement Contract or class of Contracts from the requirement of competitive bidding, the Department may hold a public hearing, but is not required to hold a public hearing. The public hearing, if held, shall be for the purpose of receiving public comment on the department’s draft Findings.

(8) Prior Review of Draft Findings. The department shall submit draft Findings to their Designated Procurement Officer for review and concurrence prior to any public hearing . The department shall also submit draft Findings to the Department of Justice for review and comment prior to submitting the final form of the Findings to the DPO.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0640
RULE TITLE: Competitive Proposals; Procedure
RULE SUMMARY: Describes competitive proposal procedure.
RULE TEXT:

The department may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, in accordance with these Division 149 rules The RFP process for the Alternative Contracting Methods identified in OAR 736-149-0600 to 736-149-0690 includes the following steps:

(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 the department;

(b) Treat all Proposals equitably; and

(c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the department.. For CM/GC Services Proposal evaluations, the department must comply with OAR 736-149-0650.

(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 could affect the cost or quality of the Work.

(b) In CM/GC contracting, in addition to (a) above, those factors may also include the ability to respond to the technical complexity or unique character of the project, analyze and propose solutions or approaches to complex project problems, analyze and propose value engineering options, analyze and propose energy efficiency measures or alternative energy options, coordinate multiple disciplines on the project, effectively utilize the time available to commence and complete the improvement, and related matters that could affect the cost or quality of the Work.(c) In Design-Build contracting, in addition to (a) and (b) above, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience and related matters that could affect the cost or quality of the Work.

(3) Contract Negotiations. Contract terms may be negotiated to the extent allowed by the RFP and OAR 736-149-0600 to 736-149-0690, 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 736-149-0650. 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 could affect the cost or quality of the Work. For the CM/GC Method, terms that may be negotiated also include the specific scope of pre-construction services, the GC Work, any Early Work and other construction Work to be performed by the CM/GC, and any other terms that the Department has identified as being subject to negotiation, consistent with the requirements of OAR 736-149-0690.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0645
RULE TITLE: Requests for Qualifications
RULE SUMMARY: Describes process for utilizing requests for qualifications
RULE TEXT:

The department may utilize a Request for Qualifications (“RFQ”) to obtain information useful in the preparation or distribution of a Request for Proposals (“RFP”). When using an RFQ as the first step in a two-step solicitation process, in which distribution of the RFPs will be limited to the firms identified as most qualified through their submitted statements of qualification, The department shall first advertise and provide notice of the RFQ in the same manner in which RFPs are advertised, specifically stating that RFPs will be distributed only to the firms selected in the RFQ process. In such cases the department shall also provide within the RFQ a protest provision substantially in the form of OAR 736-149-0450(5) regarding protests of the Competitive Range. Thereafter, the department may distribute RFPs to the selected firms without further advertisement of the solicitation.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0650
RULE TITLE: Requests for Proposals
RULE SUMMARY: Describes process to requests for proposals
RULE TEXT:

(1) Generally. The use of competitive Proposals must be specially authorized for a Public Improvement Contract under the competitive bidding exception and exemption requirements of OAR 736-149-0130 and 736-149-0600 to 736-149-0690. Also see and OAR 736-149-0640 regarding competitive Proposal procedures.

(2) Solicitation Documents. In addition to the Solicitation Document requirements of OAR 736-149-0200, this rule applies to the requirements for RFPs. RFP Solicitation Documents shall conform to the following standards:

(a) The department shall set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include 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, financial wherewithal, sources of supply, references and warranty provisions. See OAR 736-149-0640 regarding Proposal evaluation and evaluation factors. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors must be reasonable estimates based on information available to the Department. The Solicitation Document may provide for discussions with Proposers to be conducted for the purpose of Proposal evaluation prior to award or prior to establishing any Competitive Range;

(A) If interviews are part of the evaluation, include information on how the department will use interviews in the procurement and

(B) How information obtained from the interviews will be incorporated into the evaluation;

(b) When the department is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, the department shall identify the specific terms and conditions in or provisions of the Solicitation Document that are subject to negotiation or discussion and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions the department has identified as authorized for negotiation. The department shall describe the evaluation, discussion and negotiation processes, including how the department will establish the Competitive Range, if any;

(c) The anticipated size of any Competitive Range must be stated in the Solicitation Document, but may be decreased if the number of Proposers that submit responsive Proposals is less that the specified number, or may be increased as provided in OAR 736-149-0650(4)(a)(B);

(d) When the Department intends to Award Contracts to more than one Proposer, the Department shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. The Department shall also include the criteria it will use to determine how the Department will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular

Contractor to provide Personal Services or Work from those Contractors Awarded Contracts.

(3) Evaluation of Proposals.

(a) Evaluation. The department shall evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. The department shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.

(A) Clarifications. In evaluating Proposals, the department may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer shall submit Written and Signed clarifications and such clarifications shall become part of the Proposer's Proposal.

(B) Limited Negotiation. If the department did not permit negotiation in its RFP, the Department may, nonetheless, negotiate with the highest-ranked Proposer, but may then only negotiate the:

(i) Statement of Work; and

(ii) Contract Price as it is affected by negotiating the statement of Work. The process for discussions or negotiations that is outlined and explained in subsections (5)(b) and (6) of this rule does not apply to this limited negotiation.

(b) Discussions; Negotiations. If the department permitted discussions or negotiations in the RFP, the department shall evaluate Proposals and establish the Competitive Range, and may then conduct discussions and negotiations in accordance with this rule.

(A) If the Solicitation Document provided that discussions or negotiations may occur at department's discretion, the department may forego discussions and negotiations and evaluate all Proposals in accordance with this rule.

(B) If the department proceeds with discussions or negotiations, the department shall establish a negotiation team tailored for the acquisition. The department's team may include legal, technical, auditing and negotiating personnel.

(c) Cancellation. Nothing in this rule shall restrict or prohibit the department from canceling the solicitation at any time.

(4) Competitive Range; Protest; Award.

(a) Determining Competitive Range.

(A) If the department does not cancel the solicitation, after the Opening the Department will evaluate all Proposals in accordance with the evaluation criteria set forth in the RFP. After evaluation of all Proposals in accordance with the criteria set forth in the RFP, the Department will rank the Proposers based on the Department’s scoring and determine the Competitive Range.

(B) The department may increase the number of Proposers in the Competitive Range if the department's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the best Proposer after the department's evaluation of revised Proposals submitted in accordance with the process described in this rule.

(b) Protesting Competitive Range. The department shall provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest the department's evaluation and determination of the Competitive Range in accordance with OAR 736-149-0450.

(c) Intent to Award; Discuss or Negotiate. After the protest period provided in accordance with these rules expires, or after the department has provided a final response to any protest, whichever date is later, the department may either:

(A) Provide Written notice to all Proposers in the Competitive Range of its intent to Award the Contract to the highest-ranked Proposer in the Competitive Range.

(i) An unsuccessful Proposer may protest the department's intent to Award in accordance with OAR 736-149-0450.

(ii) After the protest period provided in accordance with OAR 736-149-0450 expires, or after the department has provided a final response to any protest, whichever date is later, the department shall commence final Contract negotiations with the highest-ranked Proposer in the Competitive Range; or

(B) Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them, and, following such discussions and receipt and evaluation of revised Proposals, conduct negotiations with the Proposers in the Competitive Range.

(5) Discussions; Revised Proposals. If the department chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, the department shall proceed as follows:

(a) Initiating Discussions. The department shall initiate oral or Written discussions with all of the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP that the department identified in the RFP as the subject of discussions. The department may conduct discussions for the following purposes:

(A) Informing Proposers of deficiencies in their initial Proposals;

(B) Notifying Proposers of parts of their Proposals for which the department would like additional information; and

(C) Otherwise allowing Proposers to develop revised Proposals that will allow the department to obtain the best Proposal based on the requirements and evaluation criteria set forth in the RFP.

(b) Conducting Discussions. The department may conduct discussions with each Proposer in the

Competitive Range necessary to fulfill the purposes of this section, but need not conduct the same amount of discussions with each Proposer. The department may terminate discussions with any Proposer in the Competitive Range at any time. However, the department shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with department before the department notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.

(A) In conducting discussions, the department:

(i) Shall treat all Proposers fairly and shall not favor any Proposer over another;

(ii) Shall not discuss other Proposers' Proposals;

(iii) Shall not suggest specific revisions that a Proposer should make to its Proposal, and shall not otherwise direct the Proposer to make any specific revisions to its Proposal.

(B) At any time during the time allowed for discussions, the department may:

(i) Continue discussions with a particular Proposer;

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

(iii) Conclude discussions with all remaining Proposers in the Competitive Range and provide notice to the Proposers in the Competitive Range to submit revised Proposals.

(c) Revised Proposals. If the department does not cancel the solicitation at the conclusion of the Department's discussions with all remaining Proposers in the Competitive Range, the department shall give all remaining Proposers in the Competitive Range notice of the date and time by which they must submit revised Proposals. This notice constitutes the department's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in the department's notice.

(A) Upon receipt of the revised Proposals, the department shall evaluate the revised Proposals based upon the evaluation criteria set forth in the RFP, and rank the revised Proposals based on the department's scoring.

(B) The department may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the RFP.

(d) Intent to Award; Protest. The department shall provide Written notice to all Proposers in the Competitive Range of the department's intent to Award the Contract. An unsuccessful Proposer may protest the department's intent to Award in accordance with OAR 736-149-0450. After the protest period provided in accordance with that rule expires, or after the department has provided a final response to any protest, whichever date is later, the department shall commence final Contract negotiations.

(6) Negotiations.

(a) Initiating Negotiations. The department may determine to commence negotiations with the highest-ranked Proposer in the Competitive Range following the:

(A) Initial determination of the Competitive Range; or

(B) Conclusion of discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.

(b) Conducting Negotiations. Scope. The department may negotiate:

(A) The statement of Work;

(B) The Contract Price as it is affected by negotiating the statement of Work; and

(C) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the RFP. Accordingly, Proposers shall not submit, and department shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the RFP.

(c) Continuing Negotiations. If the Department terminates negotiations with a Proposer, the Department may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this rule until the Department has:

(A) Determined to Award the Contract to the Proposer with whom it is currently negotiating; or

(B) Completed one round of negotiations with all Proposers in the Competitive Range, unless the Department provided for more than one round of discussions or negotiations in the RFP, in which case the department may proceed with any authorized further rounds of discussions or negotiations.

(7) Terminating Discussions or Negotiations. At any time during discussions or negotiations conducted in accordance with this rule, the Department may terminate discussions or negotiations with the Proposer with whom it is currently conducting discussions or negotiations if the Department reasonably believes that:

(a) The Proposer is not discussing or negotiating in good faith; or

(b) Further discussions or negotiations with the Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0660
RULE TITLE: RFP Pricing Mechanisms
RULE SUMMARY: Describes the pricing mechanisms for RFPs.
RULE TEXT:

(1) An RFP may result in a Contract with a lump-sum Contract Price or a fixed Contract Price, as in the case of competitive bidding. Alternatively, an RFP may result in a cost reimbursement Contract with a Guaranteed Maximum Price (GMP) or some other maximum price specified in the Contract.

(2) Economic incentives or disincentives may be included to reflect stated Department purposes related to time of completion, safety or other Public Contracting objectives, including but not limited to total least cost mechanisms such as life cycle costing.

(3) A GMP may be used as the pricing mechanism for CM/GC Services Contracts where a total Contract Price is provided in the design phase in order to assist the department in determining whether the project scope is within the department's budget, and allowing for design changes during preliminary design rather than after final design services have been completed.

(a) If the collaborative process described above in this section (3) is successful, the Contractor shall propose a final GMP, which may be accepted by the department and included within the Contract.

(b) If the collaborative process described above in this section (3) is not successful, and no mutually agreeable resolution on the GMP for the project construction Work can be achieved with the Contractor, then the department shall terminate the Contract. The department may then proceed to negotiate a new Contract (and GMP) with the firm that was next ranked in the original selection process, or employ other means for continuing the project through these Division 149 rules.

(4) When cost reimbursement Contracts are utilized, regardless of whether a GMP is included, the department shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0670
RULE TITLE: Design-Build Contracts
RULE SUMMARY: Describes process for design-build contracts.
RULE TEXT:

(1) General. The Design-Build form of contracting, as defined at OAR 736-149-0120(7), has technical complexities that are not readily apparent. The Department shall use this contracting method only with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to use the Design-Build process, the Department must be able to reasonably anticipate 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 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 time as construction activity (early submittals, mobilization, subcontracting and advance Work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased projects); or

(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. The department shall utilize the Design-Build form of contracting only in accordance with the requirements of these OARs 736-149-0600 to 736-149-0690 rules, particularly 736-149-0620 on "Use of Alternative Contracting Methods".

(3) Selection. Design-Build selection criteria may include those factors set forth above in OAR 736-149-0640(2)(a), (b) and (c).

(4) QBS Inapplicable. Because the value of construction Work predominates the Design-Build form of contracting, the qualifications based selection (QBS) in obtaining certain consultant Personal Services is not applicable.

(5) Licensing. If a Design-Build Contractor is not an Oregon licensed design professional, the department shall require that the Design-Build Contractor disclose in its Written Offer that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(2)(g) regarding the offer of architectural services, and 672.060(11) regarding the offer of engineering services that are appurtenant to construction Work.

(6) Performance Security. In addition to the requirements of OAR 736-149-0460 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, shall include the preparation and completion of design and related Personal Services specified in the Contract. This additional obligation, beyond performance of construction Work, extends only to the provision of Personal 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. The department shall conform their Design-Build contracting practices to the following requirements:

(a) Design Services. The level or type of design services required must be clearly defined within the Procurement documents and Contract, along with a description of the level or type of design services previously performed for the project. The Personal Services and Work to be performed shall be clearly delineated 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 the department, as well as requirements for professional liability insurance.

(c) Risk Allocation. The Contract shall clearly identify the extent to which the Department 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 the department 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 the department is benefited from such deliverables.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0690
RULE TITLE: Construction Manager or General Contractor Services (“CM/GC Services”)
RULE SUMMARY: Describes process for construction manger or general contractor services.
RULE TEXT:

(1) General. The CM/GC Method is a technically complex project delivery system. The Department shall use this contracting method only with the assistance of legal counsel with substantial experience and necessary expertise in using the CM/GC Method, as well as knowledgeable staff, consultants or both staff and consultants who have a demonstrated capability of managing the CM/GC process in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, contracting and project management. Unlike the Design-Build form of contracting, the CM/GC Method does not contemplate a "single point of responsibility" under which the CM/GC is responsible for successful completion of all Work related to a performance Specification. The CM/GC has defined contract obligations, including responsibilities as part of the project team along with the department and design professional, although with the CM/GC Method there is a separate contract between the department and design professional. In order to utilize the CM/GC Method, the Department must be able to reasonably anticipate the following types of benefits:

(a) Time Savings. With the CM/GC Method, the Public Improvement has significant schedule ramifications, such that concurrent design and construction are necessary in order to meet critical deadlines and shorten the overall duration of construction. The department may consider operational and financial data that show significant savings or increased opportunities for generating revenue as a result of early completion, as well as less disruption to public facilities as a result of shortened construction periods;

(b) Cost Savings. With the CM/GC Method, early CM/GC input during the design process is expected to contribute to significant cost savings. The Department may consider value engineering, building systems analysis, life cycle costing analysis and construction planning that lead to cost savings. The Department shall specify any special factors influencing this analysis, including high rates of inflation, market uncertainty due to material and labor fluctuations or scarcities, and the need for specialized construction expertise due to technical challenges; or

(c) Technical Complexity. With the CM/GC Method, the Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between the department, design professionals, any department project management or technical consultants and the CM/GC, in which the CM/GC will assist in addressing specific project challenges through pre-construction Personal Services. The Department may consider the need for CM/GC input on issues such as operations of the facility during construction, tenant occupancy, public safety, delivery of an early budget or GMP, financing, historic preservation, difficult remodeling projects and projects requiring complex phasing or highly coordinated scheduling.

(2) Authority. The department shall use the CM/GC form of contracting only in accordance with the requirements of these division 149 Rules, when a competitive bidding exemption is approved.

(3) Selection. CM/GC selection criteria may include those factors set forth above in OAR 736-149-0640(2)(b).

(4) Basis for Payment. The CM/GC process adds specified construction manager Personal Services to traditional design-bid-build general contractor Work, requiring full Contract performance within a negotiated GMP, fixed Contract Price or other maximum Contract Price. For a GMP pricing method, the basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for construction Work and Personal Services rendered, which together shall not exceed the GMP.

(5) Contract Requirements. The department shall conform their CM/GC contracting practices to the following requirements:

(a) Nature of the Initial CM/GC Services Contract Document. A solicitation for CM/GC Services is a Procurement for a Public Improvement, since the scope of the Procurement includes not only pre-construction Personal Services to be performed by the CM/GC, but also construction Work that is expected to result in a completed Public Improvement. In the traditional CM/GC Services contracting approach, the text of the resulting CM/GC Services Contract will include comprehensive contract provisions that will not only fully govern the relationship between the Department and the CM/GC for the pre-construction Personal Services, but will also include the general contract provisions that will control the CM/GC's providing of the construction Work necessary to complete the project (with any remaining necessary construction-related contract provisions being added through Early Work amendments to the Contract, the GMP amendment to the Contract or, if necessary, a conventional amendment to the Contract). The traditional CM/GC Services contracting approach, however, also contemplates that the Department will only authorize the CM/GC to perform the pre-construction Personal Services when the Contract is first executed unless construction Work is specifically included in the initial CM/GC Contract. Under this approach, the construction phase or phases of the CM/GC Services project are not yet authorized and the Contract only becomes a Public Improvement Contract once the parties amend the Contract, through an Early Work or a GMP amendment, to authorize the construction of a portion of the project or the entire project.

(b) Setting the GMP, Fixed Contract Price or Other Maximum Contract Price. The GMP, fixed Contract Price or other maximum Contract Price shall be set at an identified time consistent with industry practice and project conditions and after supporting information reasonably considered necessary to its use has been developed, which will normally take place by the end of the design development phase of the project. The supporting information for the GMP must define with particularity both what Personal Services and construction Work are included and excluded from the GMP, fixed Contract Price or other maximum Contract Price. A set of project drawings and Specifications shall be produced establishing the scope of construction Work contemplated by the GMP, fixed Contract Price or other maximum Contract Price.

(c) Adjustments to the GMP, Fixed Contract Price or Other Maximum Contract Price. The Contract shall clearly identify the standards or factors under which changes or additional construction Work will be considered outside of the Work scope that warrants an increase in the GMP, fixed Contract Price or other maximum Contract Price, as well as criteria for decreasing the GMP, fixed Contract Price or other maximum Contract Price. The GMP, fixed Contract Price or other maximum Contract Price shall not be increased without a concomitant increase to the scope of the Work defined at the establishment of the GMP, fixed Contract Price or other maximum Contract Price or most recent amendment to the GMP, fixed Contract Price or other maximum Contract Price. An increase to the scope of the Work may take the form of conventional additions to the project scope, as well as corrections to the Contract terms and conditions, additions to insurance coverage required by the Department and other changes to the Work.

(d) Cost Savings. The Contract shall clearly identify the disposition of any Cost Savings resulting from completion of the Work below the GMP, fixed Contract Price or other maximum Contract Price; that is, under what circumstances, if any, the CM/GC might share in those Cost Savings, or whether the Cost Savings accrue only to the Department's benefit. Unless there is a clearly articulated reason for sharing the Cost Savings set forth in the Contract, the Cost Savings must accrue to the Department.

(e) Cost Reimbursement. The Contract shall clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, fixed Contract Price or other maximum Contract Price, including any category of GC Work costs, and may also incorporate a mutually-agreeable cost-reimbursement standard.

(f) Audit. Cost reimbursements shall be made subject to final audit adjustment, and the Contract shall establish an audit process to ensure that Contract costs are allowable, properly allocated and reasonable.

(g) Fee. Compensation for the CM/GC's Personal Services and construction Work, where the Contract uses a GMP, shall include a fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee shall be expressly defined in the Contract terms and conditions at the time the Department selects the CM/GC. The fee, which may be expressed as either a fixed dollar amount or as a proposed percentage of all reimbursable costs, shall be identified during and become an element of the selection process. It shall subsequently be expressed as a fixed amount for particular construction Work authorized to be performed, when Early Work is added to the Contract through an amendment and when the GMP is established. The CM/GC fee does not include any fee paid to the CM/GC for performing pre-construction services during a separate pre-construction phase.

(h) Incentives. The Contract shall clearly identify any economic incentives, the specific criteria that apply and their relationship to other financial elements of the Contract (including the GMP, fixed Contract Price or other maximum Contract Price).

(i) Early Work. The RFP shall clearly identify, whenever feasible, the circumstances under which any Early Work may be authorized and undertaken for compensation prior to establishing the GMP, fixed Contract Price or other maximum Contract Price.

(j) Subcontractor Selection. Subcontracts under the Contract are not Public Contracts within the meaning of the Code. The CM/GC’s subcontractor selection process must meet the following parameters:

(A) Absent a written justification prepared by the CM/GC and approved by the Department as more particularly provided for in this section, the CM/GC’s Subcontractor selection process must be “competitive”, meaning that the process should include publicly-advertised subcontractor solicitations and be based on a low-bid competitive method, a low-quote competitive method for contracts in a specified dollar range agreeable to the Department, or a method whereby both price and qualifications of the subcontractors are evaluated in a competitive environment, consistent with the RFP and Contract requirements;

(B) When the Subcontractor selection process for a particular Work package will not be "competitive" as provided for in this section, the process must meet the following requirements:

(i) The CM/GC must prepare and submit a written justification to the Department, explaining the project circumstances that support a non-competitive Subcontractor selection process for a particular Work package, including, but not limited to, Emergency circumstances, the CM/GC's need to utilize a key Subcontractor member of the CM/GC's project team consistent with the CM/GC's project Proposal, the need to meet other specified Contract requirements, the continuation or expansion of an existing Subcontractor agreement that was awarded through a "competitive process" along with facts supporting the continuation or expansion of the Subcontractor agreement, or a "sole source" justification;

(ii) For a "sole source" selection of a subcontractor to proceed, the Department must evaluate the written justification provided by the CM/GC and must find that critical project efficiencies require utilization of labor, services or materials from one subcontractor; that technical compatibility issues on the project require labor, services or materials from one subcontractor; that particular labor, services or materials are needed as part of an experimental or pilot project or as part of an experimental or pilot aspect of the project; or that other project circumstances exist to support the conclusion that the labor, services or materials are available from only one subcontractor;

(iii) The CM/GC must provide an independent cost estimate for the Work package that will be subject to the non-competitive process, if required by the Department;

(iv) The CM/GC must fully respond to any questions or comments submitted to the CM/GC by the Department; and

(v) The Department must approve the CM/GC's use of the non-competitive Subcontractor selection process prior to the CM/GC's pursuit of the non-competitive process.

(C) A competitive selection process may be preceded by a publicly advertised sub-contractor pre-qualification process, with only those subcontractors meeting the pre-qualification requirements being invited to participate in the later competitive process through which the CM/GC will select the subcontractor to perform the construction Work described in the selection process;

(D) If the CM/GC or an Affiliate or subsidiary of the CM/GC will be included in the subcontractor selection process to perform particular construction Work on the project, the CM/GC must disclose that fact in the selection process documents and announcements. The Contract must also identify the conditions, processes and procedures the CM/GC will utilize in that competitive process in order to make the process impartial, competitive and fair, including but not limited to objective, independent review and opening of bids or proposals for the elements of Work involved, by a representative of the Department or another independent third party.

(k) Subcontractor Approvals and Protests. The Contract shall clearly establish whether the Department must approve subcontract awards, and to what extent, if any, the Department will resolve or be involved in the resolution of protests of the CM/GC's selection of subcontractors and suppliers. The procedures and reporting mechanisms related to the resolution of sub-contractor and supplier protests shall be established in the Contract with certainty, including the CM/GC's roles and responsibilities in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the Department must retain the right to monitor the subcontracting process in order to protect the Department's interests and to confirm the CM/GC's compliance with the Contract and with applicable statutes, administrative rules and other legal requirements.

(l) CM/GC Self-Performance or Performance by CM/GC Affiliates or Subsidiaries Without Competition. The Contract must establish the conditions under which the CM/GC or an Affiliate or subsidiary of the CM/GC may perform elements of the construction Work without competition from subcontractors, including, for example, job-site GC Work. Other than for GC Work, in order for the CM/GC or an Affiliate or subsidiary of the CM/GC to perform elements of the construction Work without competition from subcontractors, the CM/GC must provide, or must have included in the CM/GC's RFP Proposal to perform CM/GC Services for the project, a detailed proposal for performance of the Work by the CM/GC or an Affiliate or subsidiary of the CM/GC. If required by the Department, the CM/GC's proposal to perform the construction Work must be supported by at least one independent cost estimate prior to the Work being included in the Contract.

(m) Unsuccessful Subcontractor Briefing Subcontractors who were not selected by the CM/GC to perform a particular element of the construction Work may obtain specific information from the CM/GC, and meet with the CM/GC to discuss the subcontractor qualification and selection process involved and the CM/GC's subcontractor selection decisions, in order to better understand why the subcontractor was not successful in being selected to perform the particular element of the Work and to improve the subcontractor's substantive qualifications or the subcontractor's methods in competing for elements of the Work for the particular project involved, or for future projects. The briefing meetings may be held with individual subcontractors or, if the subcontractors agree, in groups of subcontractors, with those groups established by bid package or other designation agreed to by the Department and the CM/GC. Nevertheless, the CM/GC is not obligated to provide this briefing opportunity unless the CM/GC receives a written request from a subcontractor to discuss the subcontractor qualification and selection process involved. Unless the Department and the CM/GC agree on a different schedule, the CM/GC Contract should include provisions:

(A) Allowing a subcontractor 60 days from the CM/GC's notice of award of a subcontract for a particular Work package to request, in writing, a post-selection meeting with the CM/GC under this section; and

(B) Requiring the CM/GC to set a meeting with the subcontractor under this section within 45 days of the subcontractor's written request.

(n) Performance and Payment Bonds. Provided no construction Work is included with the pre-construction services to be performed under the initial form of the CM/GC Contract, no performance bond or payment bond is required to be provided by the CM/GC at the time of Contract signing. Once construction Work is included in the Contract and authorized by the Department to be performed by the CM/GC, however, the CM/GC must provide a performance bond and payment bond each in the full amount of any Early Work to be performed by the CM/GC, or the full amount of the GMP, fixed Contract Price or other maximum Contract Price, as applicable. Furthermore, in the event additional Early Work is added to the CM/GC Contract after the initial Early Work or in the event an amendment to the CM/GC Contract is made so that the GMP, fixed Contract Price or other maximum Contract Price must be increased, the performance bond and the payment bond must each be increased in an amount equal to the additional Early Work or the increased GMP, fixed Contract Price or other maximum Contract Price.

(o) Independent Review of CM/GC Performance; Conflicts of Interest. If the Department requires independent review, monitoring, inspection or other oversight of a CM/GC's performance of pre-construction Personal Services, construction Work or both, the Department must obtain those independent review services from a Contractor independent of the CM/GC, the CM/GC's Affiliates and the CM/GC's Subcontractors.

(p) Socio-Economic Programs. The Contract shall clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and Department.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0820
RULE TITLE: Retainage
RULE SUMMARY: Describes process for retainage.
RULE TEXT:

(1) Withholding of Retainage. The department may withhold amounts from a Contractor's progress payments on Public Improvement Contracts as retainage in an amount not to exceed five percent of the payment. Generally, the purpose of retainage is to incentivize the Contractor to satisfactorily progress the work and complete the Project on schedule or otherwise protect the department's interests.

(2) Procedures for Holding Retainage.

(a) If the department will withhold retainage on a Public Improvement Contract, it must include the retainage requirement and amount of retainage in the Solicitation Documents and resulting Contract.

(b) The department shall hold all retained moneys in a department fund or account, and, for all accounts, interest is not required to accrue on the retained moneys.

(3) Reduction or Elimination of Retainage.

(a) 50% Completion Milestone. After 50 percent of the work under the Public Improvement Contract is complete, the Contractor may request elimination or reduction of retainage by Written application, which shall include Written approval of the Contractor's surety. Following receipt of a Written application by the Contractor, the department shall consider whether work is progressing satisfactorily, requirements are being met, and the department's interests will be protected if retainage is eliminated or reduced. In its sole discretion, the department shall decide whether to grant the reduction or elimination of retainage and shall respond in Writing with its decision within a reasonable time.

(b) 97.5% Completion Milestone. After 97.5 percent of the work under the Public Improvement Contract is complete, at the department's discretion and without application by the Contractor, the department may reduce the retained amount to 100 percent of the value of the Contract work remaining to be done.

(4) Procedures for Payment of Retainage Following Final Completion. The retainage held by the department must be included in and paid to the Contractor as part of the final payment of the Contract Price.

(a) Notification of Final Completion. The Contractor shall notify the department in Writing when the Contractor considers the work complete. Within 15 days after receipt, the department shall either:

(A) Notify the Contractor that the work has been accepted and pay the amount held as retainage to the Contractor as part of the final payment of the Contract Price following notification of final completion. Additionally, the department shall pay interest at the rate of 1.5 percent per month on the final payment due the Contractor, interest to commence 30 days after the work under the Contract has been completed and accepted and to run until the date when the final payment is tendered to the Contractor; or

(B) Notify the Contractor that the work has not been accepted and describe the work yet to be performed on the Contract; however, if the department does not provide such notice within the 15-day period, the interest provided by this subsection shall commence to run 30 days after the end of the 15-day period. The amount held as retainage shall be paid following the Contractor's completion of the work and the department acceptance, as part of final payment of the Contract Price.

(b) Failure to Reach Final Completion. If the Contractor abandons the work or leaves the work unfinished or otherwise fails to reach final completion, the department may apply all or part of the retainage to costs incurred arising from the Contractor's failure to reach final completion. If there is a dispute with respect to compensation due under the Contract, retainage held may be released to the Contractor in conjunction or in accordance with resolution of such dispute.

(5) Alternatives In Lieu of Cash Retainage - Requirements. A Contractor may submit and the department may accept from a Contractor in lieu of withholding moneys for all or a portion of the retainage required under a Public Improvement Contract: (i) a Retainage Surety Bond, or (ii) deposit of bonds, securities or other instruments. The department may reject surety bonds, bonds, securities or other instruments that a Contractor submits only if the department first finds in Writing good cause for the rejection that is based on unique project circumstances.

(a) Retainage Surety Bonds. A Retainage Surety Bond compliant with the requirements of this section may be submitted to the department in lieu of all or any portion of the amount of funds retained, or to be retained, by the department. A Retainage Surety Bond must be in substantially the form specified in ORS 701.435(4). A surety bond must be executed by a surety bonding company that is authorized to transact surety business in Oregon and may not be a surety obligation of an individual. The surety bond and any proceeds of the surety bond must be made subject to all claims and liens and in the same manner and priority specified for retainage.

(A) Amount of Retainage Surety Bond.

Full Retainage Surety Bond. A Contractor may provide a Retainage Surety Bond in lieu of all retainage required by the Public Improvement Contract. The amount of the Retainage Surety Bond shall be calculated by applying the retainage percentage to the Contract Price and must include a provision for coverage of any increases in the Contract Price. If a full Retainage Surety Bond is provided by a Contractor at any time after the first progress payment has been made, the department, within 30 days after receipt, shall pay any retained amount to the Contractor.

(ii) Partial Retainage Surety Bond. A Contractor may provide a Retainage Surety Bond in lieu of a portion of the retainage required by the Public Improvement Contract. Following receipt of a Retainage Surety Bond in an amount less than the full amount required to be retained, the department, within 30 days of receipt, shall pay to the Contractor any retained amounts up to the amount of the Retainage Surety Bond. If the amount of the Retainage Surety Bond is less than the amount retained by the department, the department will pay to the Contractor the retainage in the amount of the Retainage Surety Bond, and the remaining required retainage will be subject to Section (4). If the amount of the Retainage Surety Bond is in excess of the amount retained by the department, the department will pay to the Contractor the retained amount, and will reduce the moneys the department holds as retainage from progress payments in an amount equal to the value of the Retainage Surety Bond in excess of the amount retained as of the date of the bond.

(B) Subcontracting Requirements for Retainage Surety Bonds. When the department accepts a Retainage Surety Bond in lieu of retainage from a Contractor under this section, the Contractor shall accept surety bonds from subcontractors or suppliers from which the Contractor has withheld retainage.

(i) At any time before final payment on a Public Improvement Contract, a subcontractor may submit a surety bond to a Contractor and request that the Contractor on the Public Improvement Contract submit a surety bond to the department for the portion of the Contractor's retainage that pertains to the subcontractor. The surety bond the subcontractor provides to the Contractor must meet the requirements set forth in paragraph (a)(A). When a Contractor at a subcontractor's request obtains and submits to the department a surety bond under this subsection, the Contractor may withhold from payments to the subcontractor an amount equivalent to the portion of the Contractor's surety bond premium for which the subcontractor is responsible.

(ii) Within 30 days after a subcontractor's request, the Contractor shall provide, and the department shall accept, a surety bond that meets the requirements set forth in subsection (a) unless:

(I) The department has found in Writing good cause to reject the surety bond based on unique project circumstances;

(II) The surety bond is not commercially available; or

(III) The subcontractor refuses to pay to the Contractor the subcontractor's portion of the surety bond premium or refuses to provide the Contractor with a surety bond that meets the requirements of subsection (a).

(iii) A surety bond the subcontractor submits under this section, and any proceeds from the surety bond, must be made subject to all claims and liens and in the same manner and priority specified for retainage. .

(iv) A Contractor must, within 30 days after receiving a surety bond from a subcontractor or supplier, release to the subcontractor or supplier the amount the Contractor holds as retainage that is equivalent to the amount the subcontractor or supplier submitted as the surety bond.

(v) A surety bond under this section must be in substantially the form specified in ORS 701.435(4).

(b) Requirements for Deposit of Bonds, Securities or Other Instruments ("Deposit") Submitted by a Contractor in Lieu of Retainage.

(A) Bonds, securities and other instruments deposited or acquired by a Contractor in lieu of retainage must be of a character approved by the Director of the Oregon Department of Administrative Services, including but not limited to:

(i) Bills, certificates, notes or bonds of the United States.

(ii) Other obligations of the United States or agencies of the United States.

(iii) Obligations of a corporation wholly owned by the federal government.

(iv) Indebtedness of the Federal National Mortgage Association.

(v) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.

(vi) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

(B) Bonds, securities or other instruments may be deposited with: (i) the department, or (ii) in a bank or other financial institution for the department to hold for the department benefit.

(C) Interest or earnings on the bonds, securities or other instruments accrue to the Contractor.

(D) Amount of Deposit.

(i) Deposit Equivalent to Full Amount of Retainage. A Contractor may provide a Deposit meeting the requirements of this section in lieu of all retainage required by the Public Improvement Contract. The amount of the Deposit shall be calculated by applying the retainage percentage to the Contract Price and must include a provision for coverage of any increases in the Contract Price. If a Deposit equivalent to the full amount of retainage is provided by a Contractor at any time after the first progress payment has been made, the department shall pay any retained amount to the Contractor.

(ii) Partial Deposit. If a Contractor provides a Deposit in lieu of a portion of the retainage required by the Public Improvement Contract in an amount less than the full amount required to be retained, the department shall pay to the Contractor any retained amounts up to the amount of the Deposit. If the amount of the Deposit is less than the amount retained by the department, the department will pay to the Contractor the retainage in the amount of the Deposit, and the remaining retainage will be remain subject to Section (4). If the amount of the Deposit is in excess of the amount retained by the department, the department will pay to the Contractor the retained amount, and will reduce the moneys the department holds as retainage from progress payments in an amount equal to the value of the surety bond in excess of the amount retained as of the date of the Deposit.

(6) Costs Incurred Holding Retainage or Amounts in Lieu of Retainage.

(a) Contractor's costs. A Contractor shall bear additional costs that the Contractor incurs after the date on which the Contractor submits a bid or proposal to the department that arise from (a) utilizing Retainage Surety Bonds, Bonds, Securities, or Other Instruments in lieu of holding retainage as described in Section (5) (including Retainage Surety Bond premiums). These costs are not reimbursable project costs and the department is not responsible for paying these costs.

(b) Recovery of Additional Costs Incurred by Agency. If the department incurs additional costs arising from a Contractor's exercise of (a) utilizing Retainage Surety Bonds, Bonds, Securities, or Other

Instruments in lieu of holding retainage as described in Section (5), the department may recover the additional costs from the Contractor by reducing the final payment. As work on the Contract progresses, the department shall, upon demand, inform the Contractor of all accrued costs.

(7) The department shall pay, upon settlement or judgment in favor of the contractor regarding any dispute as to the compensation due a contractor for work performed under the terms of a public improvement contract, the amount due plus interest at the rate of two times the discount rate, but not to exceed 30 percent, on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date of the settlement or judgment, and accruing from the later of:

(a) The due date of any progress payment received under the contract for the period in which such work was performed; or

(b) Thirty days after the date on which the claim for the payment under dispute was presented to the department by the contractor in writing or in accordance with applicable provisions of the contract.

(c) Interest shall be added to and not made a part of the settlement or judgment.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0830
RULE TITLE: Contractor Progress Payments
RULE SUMMARY: Describes Contractor Progress Payments.
RULE TEXT:

(1) Request for progress payments. Each month the contractor shall submit to the department its written request for a progress payment based upon an estimated percentage of contract completion. At the department's discretion, this request may also include the value of material to be incorporated in the completed work that has been delivered to the premises and appropriately stored. The sum of these estimates is referred to as the "value of completed work." With these estimates as a base, the department will make a progress payment to the contractor, which shall be equal to:

(a) The value of completed work;

(b) Less those amounts that have been previously paid;

(c) Less other amounts that may be deductible or owing and due to the department for any cause; and

(d) Less the appropriate amount of retainage.

(2) Progress payments do not mean acceptance of work. Progress payments shall not be construed as an acceptance or approval of any part of the work, and shall not relieve the contractor of responsibility for defective workmanship or material.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0840
RULE TITLE: Interest
RULE SUMMARY: Describes process for addressing interest.
RULE TEXT:

(1) Prompt payment policy. The department shall pay promptly all payments due and owing to the contractor on contracts for public improvements.

(2) Interest on progress payments. Late payment interest shall begin to accrue on payments due and owing on the earlier of 30 days after receipt of invoice or 15 days after department approval of payment (the "Progress Payment Due Date"). The interest rate shall equal three times the discount rate on 90-day commercial paper in effect on the progress payment due date at the federal reserve bank in the federal reserve district that includes Oregon, up to a maximum rate of 30 percent.

(3) Interest on final payment. Final payment on the contract price, including retainage, shall be due and owing no later than 30 days after contract completion and acceptance of the work. Late-payment interest on such final payment shall thereafter accrue at the rate of one and one-half percent per month until paid.

(4) Settlement or judgment interest. In the event of a dispute as to compensation due a contractor for work performed, upon settlement or judgment in favor of the contractor, interest on the amount of the settlement or judgment shall be added to, and not made part of, the settlement or judgment. Such interest, at the discount rate on 90-day commercial paper in effect at the federal reserve bank in the Federal Reserve District that includes Oregon, shall accrue from the later of the progress payment due date, or thirty days after the contractor submitted a claim for payment to the department in writing or otherwise in accordance with the contract requirements.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0850
RULE TITLE: Final Inspection
RULE SUMMARY: Describes final inspection process.
RULE TEXT:

(1) Notification of Completion; inspection. The contractor shall notify the department in writing when the contractor considers the contract work completed. Within 15 days of receiving contractor's notice, the department will inspect the project and project records and will either accept the work or notify the contractor of remaining work to be performed.

(2) Acknowledgment of acceptance. When the department finds that all work required under the contract has been completed satisfactorily, the department shall acknowledge acceptance of the work in writing.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0870
RULE TITLE: Specifications; Brand Name or Equal Specification
RULE SUMMARY: Describes requirements for brand name or equal specifications.
RULE TEXT:

(1) Equivalents. The department may identify products by brand names as long as the following language: "approved equal"; "or equal"; "approved equivalent" or "equivalent," or similar language is included in the solicitation document. The department shall determine, in its sole discretion, whether an offeror's alternate product is "equal" or "equivalent."

(2) Applicability and Use. The department may establish “brand name or equal” specifications in a solicitation or solicitation document in accordance with this rule.

(a) A brand name or equal specification may be used when the use of a brand name or equal specification is advantageous to the department because the brand name describes the standard of quality, performance, functionality, or other characteristics of the goods or services needed by the department.

(b) The department is entitled to determine what constitutes goods or services that are equal or superior to the goods or services specified, and any such determination made according to this section is final.

(c) Nothing in this subsection may be construed as prohibiting the department from specifying one or more comparable goods or services as examples of the quality, performance, functionality or other characteristics of the goods or services needed by the department.

(3) Determination. A brand name or equal specification may be prepared and used if the department determines that only the identified brand name or equal specification will meet the needs of the department based on one or more of the following written determinations:

(a) That use of a brand name or equal specification is unlikely to encourage favoritism in the award of a contract;

(b) That use of a brand name or equal specification would result in substantial cost savings to the department; or

(c) That efficient utilization of existing goods or services requires the acquisition of compatible goods or services.

(4) Department may use a brand name or equal specification in a small procurement without complying with subsection (2) of this rule.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0880
RULE TITLE: Records Maintenance; Right to Audit Records
RULE SUMMARY: Describes records maintenance concerns.
RULE TEXT:

(1) Records Maintenance; Access. Contractors and subcontractors shall maintain all fiscal records relating to contracts in accordance with generally accepted accounting principles ("GAAP"). In addition, contractors and subcontractors shall maintain all other records necessary to clearly document: (i) their performance; and (ii) any claims arising from or relating to their performance under a public contract. Contractors and subcontractors shall make all records pertaining to their performance and any claims under a contract (the books, fiscal records and all other records, hereafter referred to as "Records") accessible to the department at reasonable times and places, whether or not litigation has been filed as to such claims.

(2) Inspection and Audit. The department may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the records of any person that has submitted cost or pricing data according to the terms of a contract to the extent that the records relate to such cost or pricing data. If the person must provide cost or pricing data under a contract, the person shall maintain such records that relate to the cost or pricing data for 3 years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

(3) Records Inspection; Contract Audit. The department, and its authorized representatives, shall be entitled to inspect, examine, copy, and audit any contractor's or subcontractor's records, as provided in section 1 of this rule. The contractor and subcontractor shall maintain the records and keep the records accessible and available at reasonable times and places for a minimum period of 3 years from the date of final payment under the contract or subcontract, as applicable, or until the conclusion of any audit, controversy or litigation arising out of or related to the contract, whichever date is later, unless a shorter period is otherwise authorized in writing.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0900
RULE TITLE: Contract Suspension; Termination Procedures
RULE SUMMARY: Describes process for suspending or terminating contracts.
RULE TEXT:

(1) Suspension of Work. In the event the department suspends performance of work for any reason considered by the department to be in the public interest other than a labor dispute, the contractor shall be entitled to a reasonable extension of contract time, and to reasonable compensation for all costs, including a reasonable allowance for related overhead, incurred by the contractor as a result of the suspension.

(2) Termination of Contract by mutual agreement for reasons other than default.

(a) Reasons for termination. The parties may agree to terminate the contract or a divisible portion thereof if:

(A) The department suspends work under the contract for any reason considered to be in the public interest (other than a labor dispute, or any judicial proceeding relating to the work filed to resolve a labor dispute); and

(B) Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the work.

(b) Payment. When a contract, or any divisible portion thereof, is terminated pursuant to this section (2), the department shall pay the contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. The department shall also pay for all Work completed, based on the contract price. Unless the work completed is subject to unit or itemized pricing under the contract, payment shall be calculated based on percent of contract completed. No claim for loss of anticipated profits will be allowed.

(3) Public interest termination by Department. The department may include in its contracts terms detailing the circumstances under which the contractor shall be entitled to compensation as a matter of right in the event the department unilaterally terminates the contract for any reason considered by the department to be in the public interest.

(4) Responsibility for completed Work. Termination of the contract or a divisible portion thereof pursuant to this rule shall not relieve either the contractor or its surety of liability for claims arising out of the work performed.

(5) Remedies cumulative. The department may, at its discretion, avail itself of any or all rights or remedies set forth in these rules, in the contract, or available at law or in equity.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)

ADOPT: 736-149-0910
RULE TITLE: Changes to the Work; Contract Amendments
RULE SUMMARY: Describes process for contract amendments or changes to work.
RULE TEXT:

(1) Generally: The department may amend a contract if it determines it is in the department's best interests, subject to the following:

(a) Scope: The amended contract is within the scope and attributes of the goods and services described in the solicitation document, or if no solicitation document was issued for the contract, consistent with the authority under which the contract was formed; and

(b) Favorability: The department determines, with all things considered, the amended contract is at least as favorable to the department as the original contract.

(2) Changes Provisions. Changes to the work are anticipated in construction and, accordingly, the department shall include changes provisions in all public contracts that detail the scope of the changes clause, provide pricing mechanisms, authorize the department or its authorized representatives to issue changes to the work and provide a procedure for addressing contractor claims for additional time or compensation. When changes to the work are agreed to or issued consistent with the contract's changes provisions they are not considered to be new procurements and may be issued by the department.

(3) Authority to Change Work. The department has the authority to authorize Changes to the Work, with such changes limited by the definition of that term.

STATUTORY/OTHER AUTHORITY: ORS 279.025(3)(k)
STATUTES/OTHER IMPLEMENTED: ORS 279.025(3)(k)