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FILING CAPTION: Amends Model Public Contract Rules pursuant to 2019 legislative changes.

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RULES:

137-047-0500, 137-048-0120, 137-048-0130, 137-048-0200, 137-048-0210, 137-048-0220, 137-048-0240, 137-048-0270, 137-049-0200, 137-049-0390, 137-049-0820

AMEND: 137-047-0500

RULE TITLE: Responsibility of Bidders and Proposers

NOTICE FILED DATE: 10/30/2019

RULE SUMMARY: The Attorney General proposes to amend the Model Public Contract Rules to respond to legislative changes enacted in the 2019 Regular Session of the Oregon Legislative Assembly.

2019 Oregon Laws, chapter 124 (Enrolled House Bill 2094 (2019)), was added to and made a part of ORS chapter 279A to include as part of a contracting agency's evaluation of a bid or proposal, a bidder's or proposer's debt-to-the-state status when awarding a public contract, and to consider debt-to-the-state status when assessing consultant qualifications.

The proposed modifications to Division 047, 048 and 049 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 124 (Enrolled House Bill 2094 (2019)) are: (1) to revise OAR 137-047-0500, OAR 137-048-0210 and OAR 137-049-0390, to include as part of a contracting agency's evaluation of a bid or proposal, a bidder's or proposer's debt-to-the-state status when awarding a public contract; and (2) to revise OAR 137-048-0120, OAR 137-048-0200 and OAR 137-048-0220 to consider debt-to-the-state status when assessing consultant qualifications.

The Attorney General requests public comment on whether other options should be considered for achieving the proposed rule amendments.

RULE TEXT:

(1) Before Awarding a Contract the Contracting Agency shall determine that the Bidder submitting the lowest Bid or Proposer submitting the most Advantageous Proposal is Responsible. The Contracting Agency shall use the standards set forth in ORS 279B.110 and OAR 137-047-0640(1)(c)(F) to determine if a Bidder or Proposer is Responsible. In the event a Contracting Agency determines a Bidder or Proposer is not Responsible it shall prepare a Written determination of non-Responsibility as required by ORS 279B.110 and shall reject the Offer.

(2) In addition to making the responsibility determination under ORS 279B.110 and OAR 137-047-0640(1)(c)(F), the Contracting Agency may consider (as authorized by House Bill 2094 (2019 Oregon Laws, chapter 124)), as part of the Contracting Agency's evaluation of a Bid or Proposal, whether the Bidder or Proposer owes a liquidated and delinquent debt to the state.

STATUTORY/OTHER AUTHORITY: ORS 279A.065

STATUTES/OTHER IMPLEMENTED: ORS 279B.110

AMEND: 137-048-0120

RULE TITLE: List of Interested Consultants; Performance Record

NOTICE FILED DATE: 10/30/2019

RULE SUMMARY: The Attorney General proposes to amend the Model Public Contract Rules to respond to legislative changes enacted in the 2019 Regular Session of the Oregon Legislative Assembly.

2019 Oregon Laws, chapter 124 (Enrolled House Bill 2094 (2019)), was added to and made a part of ORS chapter 279A to include as part of a contracting agency's evaluation of a bid or proposal, a bidder's or proposer's debt-to-the-state status when awarding a public contract, and to consider debt-to-the-state status when assessing consultant qualifications.

The proposed modifications to Division 047, 048 and 049 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 124 (Enrolled House Bill 2094 (2019)) are: (1) to revise OAR 137-047-0500, OAR 137-048-0210 and OAR 137-049-0390, to include as part of a contracting agency's evaluation of a bid or proposal, a bidder's or proposer's debt-to-the-state status when awarding a public contract; and (2) to revise OAR 137-048-0120, OAR 137-048-0200 and OAR 137-048-0220 to consider debt-to-the-state status when assessing consultant qualifications.

The Attorney General requests public comment on whether other options should be considered for achieving the proposed rule amendments.

RULE TEXT:

(1) Consultants who are engaged in the lawful practice of their profession and who are interested in providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, may annually submit a statement describing their qualifications and related performance information to Contracting Agencies' office addresses. Contracting Agencies shall use this information to create a list of prospective Consultants and shall update this list at least once every two years.

(2) Contracting Agencies may compile and maintain a record of each Consultant's performance under Contracts with the particular Contracting Agency, 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), Contracting Agencies may make available copies of the records.

(3) State Contracting Agencies 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). State Contracting Agencies 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: OL 2011, ORS 279A.065, ch 458

AMEND: 137-048-0130

RULE TITLE: Applicable Selection Procedures; Pricing Information; Disclosure of Proposals; Conflicts of Interest

NOTICE FILED DATE: 10/30/2019

RULE SUMMARY: The Attorney General proposes to amend the Model Public Contract Rules to respond to legislative changes enacted in the 2019 Regular Session of the Oregon Legislative Assembly.

2019 Oregon Laws, chapter 55 (Enrolled House Bill 2769 (2019)), section 1, amends ORS 279C.110 to specify the contents of local contracting agency requests for proposals for A/E consultants if the local contracting agency wants to consider price as a selection factor.

The proposed modifications to Division 048 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 55 (Enrolled House Bill 2769 (2019)) are: (1) to revise OAR 137-048-0130, OAR 137-048-0200, OAR 137-048-0210, OAR 137-048-0220 and OAR 137-048-0270 to allow Local Contracting Agencies to use pricing information in selection procedures when selecting an A/E consultant pursuant to the requirements of ORS 279C.110(5); and (2) to revise OAR 137-048-0240 to allow disappointed A/E proposers to protest: (i) A/E solicitation documents; and (ii) the selection of an A/E consultant.

The Attorney General requests public comment on whether other options should be considered for achieving the proposed rule amendments.

RULE TEXT:

(1) When selecting the most qualified Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Contracting Agencies shall follow the applicable selection procedure under either OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure) or 137-048-0220 (Formal Selection Procedure). State Contracting Agencies selecting a Consultant under this section (1) may solicit or use pricing policies and pricing Proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, to determine a Consultant's compensation only after the State Contracting Agency has selected the most qualified Consultant in accordance with the applicable selection procedure; provided, however, this restriction on a State Contracting Agency's solicitation or use of pricing policies, pricing Proposals or other pricing information does not apply to selection procedures used by the State Contracting Agency to select a Consultant when the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services for the Project do not exceed \$100,000 or in an Emergency, pursuant to ORS 279C.0110(10) and (11). In following the Direct Appointment Procedure under OAR 137-048-0200, a State Contracting Agency or Local Contracting Agency may base its selection of a Consultant on any information available to the Agency prior to beginning the Direct Appointment Procedure for the Project involved. Local Contracting Agencies may solicit or use pricing policies and pricing Proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, in any of the Local Contracting Agencies' selection procedures to select Consultants to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, pursuant to the requirements of ORS 279C.110(5) [House Bill 2769 (2019 Oregon Laws, Chapter 55)].

(2) Contracting Agencies selecting a Consultant to perform Related Services shall follow one of the following selection procedures:

(a) When selecting a Consultant on the basis of qualifications alone, Contracting Agencies shall follow the applicable selection procedure under OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection

Procedure), or 137-048-0220 (Formal Selection Procedure);

(b) When selecting a Consultant on the basis of price competition alone, Contracting Agencies shall follow the applicable provisions under OAR 137-048-0200 (Direct Appointment Procedure), the applicable provisions of 137-048-0210 (Informal Selection Procedure) pertaining to obtaining and evaluating price Proposals and other pricing information, or the applicable provisions of 137-048-0220 (Formal Selection Procedure) pertaining to obtaining and evaluating price Proposals and other pricing information; and

(c) When selecting a Consultant on the basis of price and qualifications, Contracting Agencies shall follow the applicable provisions under OAR 137-048-0200 (Direct Appointment Procedure), the applicable provisions of 137-048-0210 (Informal Selection Procedure) pertaining to obtaining and evaluating price and qualifications Proposals, or the applicable provisions of 137-048-0220 (Formal Selection Procedure) pertaining to obtaining and evaluating price and qualifications Proposals. For selections under the informal selection procedure of OAR 137-048-0210, Contracting Agencies may use abbreviated requests for Proposals that nevertheless meet the requirements of OAR 137-048-0210, when the Contracting Agency determines, in its sole discretion, that the characteristics of the Project and the Related Services required by the Contracting Agency would be adequately addressed by a more abbreviated request for Proposals document, generally comparable to the intermediate Procurement procedures and related documentation under ORS 279B.070 and OAR 137-047-0270. Contracting Agencies subject to this section (2) may request and consider a Proposer's pricing policies and pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, submitted with a Proposal.

(3) A Contracting Agency is not required to follow the procedures in Section (1) or Section (2) of this rule, when the Contracting Agency has established Price Agreements with more than one Consultant and is selecting a single Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under an individual work order or task order. Provided, however, the criteria and procedures the Contracting Agency uses to select a single Consultant, when the Contracting Agency has established Price Agreements with more than one Consultant, must meet the requirements of OAR 137-048-0270 (Price Agreements).

(4) Contracting Agencies may use electronic methods to screen and select a Consultant in accordance with the procedures described in sections (1) and (2) of this rule. If a Contracting Agency uses electronic methods to screen and select a Consultant, the Contracting Agency shall first promulgate rules for conducting the screening and selection procedure by electronic means, substantially in conformance with OAR 137-047-0330 (Electronic Procurement).

(5) For purposes of these division 48 rules, a "mixed" Contract is one requiring the Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and also provide Related Services, other Services or other related Goods under the Contract. A Contracting Agency's classification of a procurement that will involve a "mixed" Contract will be determined by the predominant purpose of the Contract. A Contracting Agency will determine the predominant purpose of the Contract by determining which of the Services involves the majority of the total Estimated Fee to be paid under the Contract. If the majority of the total Estimated Fee to be paid under the Contract is for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, the Contracting Agency shall comply with the requirements of ORS 279C.110 and section (1) of this rule. If majority of the total Estimated Fee to be paid under the Contract is for Related Services, the Contracting Agency shall comply with the requirements of ORS 279C.120 and section (2) of this rule. If the majority of the total Estimated Fee to be paid under the Contract is for some other Services or Goods under the Public Contracting Code, the Contracting Agency shall comply with the applicable provisions of the Public Contracting Code and divisions 46, 47 and 49 of the Model Rules that match the predominant purpose of the Contract.

(6) In applying these rules, State Contracting Agencies shall support the State of Oregon's goal of promoting a sustainable economy in the rural areas of the state.

(7) Consistent with the requirements of ORS 279C.107 and the remaining requirements of ORS 279C.100, 279C.105 and 279C.110 through 279C.125, the following provisions apply to Proposals received by a Contracting Agency for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related

Services:

(a) The term "competitive proposal," for purposes of ORS 279C.107, includes Proposals under OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure), 137-048-0220 (Formal Selection Procedure) or 137-048-0130(2)(c) (selection based on price and qualifications) and any Proposals submitted in response to a selection process for a work order or task order under 137-048-0270 (Price Agreements).

(b) For purposes of Proposals received by a Contracting Agency under OAR 137-048-0200 (Direct Appointment Procedure), a formal notice of intent to award is not required. As a result, while a Contracting Agency may make Proposals under 137-048-0200 (Direct Appointment Procedure) open for public inspection following the Contracting Agency's decision to begin Contract negotiations with the selected Consultant, 137-048-0200 Proposals are not required to be open for public inspection until after the Contracting Agency has executed a Contract with the selected Consultant.

(c) In the limited circumstances permitted by ORS 279C.110, 279C.115 and 279C.120, where the Contracting Agency is conducting discussions or negotiations with Proposers who submit Proposals that the Contracting Agency has determined to be closely competitive or to have a reasonable chance of being selected for award, the Contracting Agency may open Proposals so as to avoid disclosure of Proposal contents to competing Proposers, consistent with the requirements of ORS 279C.107. Otherwise, Contracting Agencies may open Proposals in such a way as to avoid disclosure of the contents until after the Contracting Agency executes a Contract with the selected Consultant. If the Contracting Agency determines that it is in the best interest of the Contracting Agency to do so, the Contracting Agencies may make Proposals available for public inspection following the Contracting Agency's issuance of a notice of intent to award a Contract to a Consultant; and

(d) Disclosure of Proposals and Proposal information is otherwise governed by ORS 279C.107.

(8) As required by ORS 279C.307, pertaining to requirements to ensure the objectivity and independence of providers of certain Personal Services which are procured under ORS chapter 279C, Contracting Agencies may not:

(a) Procure the Personal Services identified in ORS 279C.307 from a Contractor or an affiliate of a Contractor 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 identified in ORS 279C.307 through the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the Personal Services.

(9) The requirements of ORS 279C.307 and section (8) of this rule apply in the following circumstances, except as provided in section (10) of this rule:

(a) A Contracting Agency 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 that is subject to ORS chapter 279C. A Public Contract that is "subject to ORS chapter 279C" includes a Public Contract for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, a Public Contract for Related Services or a Public Contract for construction services under ORS chapter 279C.

(b) The Procurements of Personal Services subject to the restrictions of ORS 279C.307 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 subject to ORS chapter 279C;

(B) Procurements for commissioning services, which involve monitoring, inspecting, evaluating or otherwise overseeing the performance of a Contractor 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 subject to ORS chapter 279C;

(C) Procurements for project management services, which involve administration, management, monitoring, inspecting, evaluating compliance with or otherwise overseeing the performance of a Contractor providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, construction services

subject to ORS chapter 279C, 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 subject to ORS chapter 279C; 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 described in Section (9)(a) of this rule.

(10) The restrictions of ORS 279C.307 do not apply in the following circumstances, except as further specified below:

(a) To a Contracting Agency's Procurement of both design services and construction services through a single "Design-Build" Procurement, as that term is defined in OAR 137-049-0610. Such a Design-Build Procurement includes a Procurement under an Energy Savings Performance Contract, as defined in ORS 279A.010. Provided, however, the restrictions of ORS 279C.307 do apply to a Contracting Agency's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Design-Build Contract or performance under such a Contract resulting from a Design-Build Procurement; and

(b) To a Contracting Agency's Procurement of both pre-construction services and construction services through a single Procurement of Construction Manager/General Contractor Services, as that term is defined in ORS 279C.332(3). Provided, however, the restrictions of ORS 279C.307 do apply to a Contracting Agency's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Construction Manager/General Contractor Services Contract or performance under such a Contract resulting from a Procurement of Construction Manager/General Contractor Services.

STATUTORY/OTHER AUTHORITY: ORS 279A.065, OL 2011, ch 458

STATUTES/OTHER IMPLEMENTED: ORS 279A.065, ORS 279C.100-279C.125, OL 2009, ch. 880, sec. 11, OL 2011, ch 458

AMEND: 137-048-0200

RULE TITLE: Direct Appointment Procedure

NOTICE FILED DATE: 10/30/2019

RULE SUMMARY: The Attorney General proposes to amend the Model Public Contract Rules to respond to legislative changes enacted in the 2019 Regular Session of the Oregon Legislative Assembly.

This rule is amended pursuant to two House Bills:

2019 Oregon Laws, chapter 124 (Enrolled House Bill 2094 (2019)), was added to and made a part of ORS chapter 279A to include as part of a contracting agency's evaluation of a bid or proposal, a bidder's or proposer's debt-to-the-state status when awarding a public contract, and to consider debt-to-the-state status when assessing consultant qualifications.

The proposed modifications to Division 047, 048 and 049 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 124 (Enrolled House Bill 2094 (2019)) are: (1) to revise OAR 137-047-0500, OAR 137-048-0210 and OAR 137-049-0390, to include as part of a contracting agency's evaluation of a bid or proposal, a bidder's or proposer's debt-to-the-state status when awarding a public contract; and (2) to revise OAR 137-048-0120, OAR 137-048-0200 and OAR 137-048-0220 to consider debt-to-the-state status when assessing consultant qualifications.

2019 Oregon Laws, chapter 55 (Enrolled House Bill 2769 (2019)), section 1, amends ORS 279C.110 to specify the contents of local contracting agency requests for proposals for A/E consultants if the local contracting agency wants to consider price as a selection factor.

The proposed modifications to Division 048 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 55 (Enrolled House Bill 2769 (2019)) are: (1) to revise OAR 137-048-0130, OAR 137-048-0200, OAR 137-048-0210, OAR 137-048-0220 and OAR 137-048-0270 to allow Local Contracting Agencies to use pricing information in selection procedures when selecting an A/E consultant pursuant to the requirements of ORS 279C.110(5); and (2) to revise OAR 137-048-0240 to allow disappointed A/E proposers to protest: (i) A/E solicitation documents; and (ii) the selection of an A/E consultant.

The Attorney General requests public comment on whether other options should be considered for achieving the proposed rule amendments.

RULE TEXT:

(1) Contracting Agencies may enter into a Contract directly with a Consultant without following the selection procedures set forth elsewhere in these rules if:

(a) Emergency. Contracting Agency finds that an Emergency exists; or

(b) Small Estimated Fee. The Estimated Fee to be paid under the Contract does not exceed \$100,000; or

(c) Continuation of Project With Intermediate Estimated Fee. For Contracting Agencies where a Project is being continued, as more particularly described below, and where the Estimated Fee will not exceed \$250,000, the

Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be performed under the Contract must meet the following requirements:

(A) The services consist of or are related to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that have been substantially described, planned or otherwise previously studied in an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services rendered under the earlier Contract;

(B) The Estimated Fee to be made under the Contract does not exceed \$250,000; and

(C) The Contracting Agency used either the formal selection procedure under OAR 137-048-0220 (Formal Selection Procedure) or the formal selection procedure applicable to selection of the Consultant at the time of original selection to select the Consultant for the earlier Contract; or

(d) Continuation of Project With Extensive Estimated Fee. For Contracting Agencies where a Project is being continued, as more particularly described below, and where the Estimated Fee is expected to exceed \$250,000, the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be performed under the Contract must meet the following requirements:

(A) The services consist of or are related to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that have been substantially described, planned or otherwise previously studied under an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services rendered under the earlier Contract;

(B) The Contracting Agency used either the formal selection procedure under OAR 137-048-0220 (Formal Selection Procedure) or the formal selection procedure applicable to selection of the Consultant at the time of original selection to select the Consultant for the earlier Contract; and

(C) The Contracting Agency makes written findings that entering into a Contract with the Consultant, whether in the form of an amendment to an existing Contract or a separate Contract for the additional scope of services, will:

(i) Promote efficient use of public funds and resources and result in substantial cost savings to the Contracting Agency; and,

(ii) Protect the integrity of the Public Contracting process and the competitive nature of the Procurement by not encouraging favoritism or substantially diminishing competition in the award of the Contract.

(2) Contracting Agencies may select a Consultant for a Contract under this rule from the following sources:

(a) The Contracting Agency's list of Consultants that is created under OAR 137-048-0120 (List of Interested Consultants; Performance Record);

(b) Another Contracting Agency's list of Consultants that the Contracting Agency has created under OAR 137-048-0120 (List of Interested Consultants; Performance Record), with written consent of that Contracting Agency; or

(c) All Consultants offering the required Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that the Contracting Agency reasonably can identify under the circumstances.

(3) As part of the Contracting Agency's assessment of the qualifications of any Consultant being considered for award of a Contract under this rule, the Contracting Agency can, at any time before entering into a contract with the Consultant, consider information pertaining to whether the Consultant owes a liquidated and delinquent debt to the State of Oregon.

(4) The Contracting Agency shall direct Contract negotiations with a Consultant selected under this rule toward discussing, refining and finalizing the following:

(a) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the Contracting Agency, as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and (d) Any other conditions or provisions the Contracting Agency believes to be in the Contracting Agency's best interest to negotiate.

STATUTORY/OTHER AUTHORITY: ORS 279A.065, OL 2011, ch 458

STATUTES/OTHER IMPLEMENTED: ORS 279C.110 & 279C.115, OL 2011, ch 458

AMEND: 137-048-0210

RULE TITLE: Informal Selection Procedure

NOTICE FILED DATE: 10/30/2019

RULE SUMMARY: The Attorney General proposes to amend the Model Public Contract Rules to respond to legislative changes enacted in the 2019 Regular Session of the Oregon Legislative Assembly.

This rule is being amended pursuant to two House Bills.

2019 Oregon Laws, chapter 124 (Enrolled House Bill 2094 (2019)), was added to and made a part of ORS chapter 279A to include as part of a contracting agency's evaluation of a bid or proposal, a bidder's or proposer's debt-to-the-state status when awarding a public contract, and to consider debt-to-the-state status when assessing consultant qualifications.

The proposed modifications to Division 047, 048 and 049 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 124 (Enrolled House Bill 2094 (2019)) are: (1) to revise OAR 137-047-0500, OAR 137-048-0210 and OAR 137-049-0390, to include as part of a contracting agency's evaluation of a bid or proposal, a bidder's or proposer's debt-to-the-state status when awarding a public contract; and (2) to revise OAR 137-048-0120, OAR 137-048-0200 and OAR 137-048-0220 to consider debt-to-the-state status when assessing consultant qualifications.

2019 Oregon Laws, chapter 55 (Enrolled House Bill 2769 (2019)), section 1, amends ORS 279C.110 to specify the contents of local contracting agency requests for proposals for A/E consultants if the local contracting agency wants to consider price as a selection factor.

The proposed modifications to Division 048 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 55 (Enrolled House Bill 2769 (2019)) are: (1) to revise OAR 137-048-0130, OAR 137-048-0200, OAR 137-048-0210, OAR 137-048-0220 and OAR 137-048-0270 to allow Local Contracting Agencies to use pricing information in selection procedures when selecting an A/E consultant pursuant to the requirements of ORS 279C.110(5); and (2) to revise OAR 137-048-0240 to allow disappointed A/E proposers to protest: (i) A/E solicitation documents; and (ii) the selection of an A/E consultant.

The Attorney General requests public comment on whether other options should be considered for achieving the proposed rule amendments.

RULE TEXT:

(1) Contracting Agencies may use the informal selection procedure described in this rule to obtain a Contract if the Estimated Fee is expected not to exceed \$250,000.

(2) Contracting Agencies using the informal selection procedure on the basis of qualifications alone or, for Related 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 Architectural, Engineering, Photogrammetric Mapping,

Transportation Planning or Land Surveying Services or Related Services are needed and a description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services;
- (ii) Proposed management techniques for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;
- (iii) A Consultant's capability, experience and past performance history and record in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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) If the Contracting Agency is selecting a Consultant to provide Related Service, pricing policies and 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 Contracting Agency 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 48 rules; and

(H) A sample form of the Contract.

(b) Provide an RFP to a minimum of five (5) prospective Consultants. If fewer than five (5) prospective Consultants are available, Contracting Agencies shall provide the RFP to all available prospective Consultants and shall maintain a written record of the Contracting Agencies' efforts to locate available prospective Consultants for the RFP. Contracting Agencies shall draw prospective Consultants from:

- (A) The Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record);
- (B) Another Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record); or
- (C) All Consultants that the Contracting Agency reasonably can locate that offer the desired Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, or any combination of the foregoing.

- (c) Review and rank all Proposals received according to the criteria set forth in the RFP, and select the three highest ranked Proposers.
- (3) Contracting Agencies using the informal selection procedure for Related Services on the basis of price Proposals and other pricing information alone shall:
- (a) Create an RFP that includes at a minimum the following:
- (A) A description of the Project for which a Consultant's Related Services are needed and a description of the Related 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) Any minimum or pass-fail qualifications that the Proposers must meet, including but not limited to any such qualifications in the subject matter areas described in section (2)(a)(E)(i) through section (2)(a)(E)(viii) of this rule that are related to the Related Services described in the RFP;
- (F) Pricing criteria upon which the highest ranked Consultant will be selected. Pricing criteria may include, but are not limited to, the total price for the Related Services described in the RFP, Consultant pricing policies and other pricing information such as the Consultant's estimated number of staff hours needed to perform the Related Services described in the RFP, expenses, hourly rates and overhead;
- (G) A statement directing Proposers to the protest procedures set forth in these Division 48 rules; and
- (H) A sample form of the Contract.
- (b) Provide the RFP to a minimum of five (5) prospective Consultants. If fewer than five (5) prospective Consultants are available, Contracting Agencies shall provide the RFP to all available prospective Consultants and shall maintain a written record of the Contracting Agencies' efforts to locate available prospective Consultants for the RFP. Contracting Agencies shall draw prospective Consultants from:
- (A) The Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record);
- (B) Another Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record); or
- (C) All Consultants that the Contracting Agency reasonably can locate that offer the desired Related Services; and.
- (c) Review and rank all responsive Proposals received, according to the total price for the Related Services described in the RFP, Consultant pricing policies and other pricing information requested in the RFP, including but not limited to the number of hours proposed for the Related Services required, expenses, hourly rates and overhead, and select the three highest-ranked Proposers.
- (4) If the Contracting Agency does not cancel the RFP after it reviews the Proposals and ranks each Proposer, the Contracting Agency will begin negotiating a Contract with the highest ranked Proposer. The Contracting Agency shall direct Contract negotiations toward discussing, refining and finalizing the following:
- (a) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the Contracting Agency as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and
- (d) Any other conditions or provisions the Contracting Agency believes to be in the Contracting Agency's best interest to negotiate.
- (5) The Contracting Agency shall, either orally or in writing, formally terminate negotiations with the highest ranked

Proposer, if the Contracting Agency and the Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The Contracting Agency may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, in accordance with section (4) 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 Contracting Agency may end the particular informal solicitation and thereafter may proceed with a new informal solicitation under this rule or proceed with a formal solicitation under OAR 137-048-0220 (Formal Selection Procedure).

(6) Local Contracting Agencies using the informal selection procedure for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, when the Local Contracting Agencies will be using pricing policies, proposals or other pricing information as part of the Local Contracting Agencies' screening and selection of prospective Consultants, pursuant to ORS 279C.110(5) [HB 2769 (Oregon Laws 2019, Chapter 55)], shall:

(a) Create an RFP that meets the requirements of ORS 279C.110(5)(a) In providing an estimate of the cost of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, the Local Contracting Agency may provide a specific estimate of that cost, or a range of estimated costs;

(b) Provide the RFP to a minimum of five (5) prospective Consultants. If fewer than five (5) prospective Consultants are available, the Local Contracting Agency shall provide the RFP to all available prospective Consultants and shall maintain a written record of the Local Contracting Agency's efforts to locate available prospective Consultants for the RFP. The Local Contracting Agency shall draw prospective Consultants from:

(A) The Local Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record);

(B) Another Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record); or

(C) All Consultants that the Local Contracting Agency reasonably can locate that offer the desired Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, or any combination of the foregoing.

(c) In the initial phase of the RFP, evaluate each prospective Consultant on the basis of each Consultant's qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, with those qualifications including the criteria set forth in subsections (2)(a)(E)(i) through (2)(a)(E)(viii) of this rule;

(d) At the end of the initial phase of the RFP, announce the evaluation scores of each Consultant and rank each Consultant according to the evaluation scores. The Local Contracting Agency shall identify up to three (3) of the highest ranked prospective Consultants as being qualified to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, and as being eligible to participate in the second phase of the RFP process;

(e) In the second phase of the RFP, request a pricing proposal from the highest ranked prospective Consultants identified in the initial phase of the RFP, with that pricing proposal to meet the requirements of ORS 279C.110(5)(c)(A) and (B);

(f) Complete the evaluation of the highest ranked prospective Consultants that have decided to provide price proposals. In the Local Contracting Agency's final evaluation of the prospective Consultants who have provided price proposals, the Local Contracting Agency cannot assign more than fifteen (15) percent of the overall weight of the evaluation criteria in the second phase of the RFP to each Consultant's price proposal;

(g) If the Local Contracting Agency does not cancel the RFP after it reviews the qualifications of all prospective Consultants and the price proposals received from the highest ranked Consultants and ranks the highest ranked Consultants from the second phase of the RFP, begin negotiating a Contract with the highest ranked prospective Consultant. The Local Contracting Agency shall direct Contract negotiations toward discussing, refining and finalizing the following:

(A) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land

Surveying Services or Related Services to be provided by the Consultant;

(B) The Consultant's performance obligations and performance schedule;

(C) The Consultant's payment methodology, rates and number of hours, and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services required under the Contract that is fair and reasonable to the Local Contracting Agency as determined solely by the Local Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services; and

(D) Any other conditions or provisions the Local Contracting Agency believes to be in the Local Contracting Agency's best interest to negotiate; and

(h) The Local Contracting Agency shall, either orally or in writing, formally terminate negotiations with the highest ranked Consultant, if the Local Contracting Agency and the Consultant are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The Local Contracting Agency may thereafter negotiate with the second ranked Consultant, and if necessary, with the third ranked Consultant, in accordance with section (6)(g) of this rule, until negotiations result in a Contract. If negotiations with any of the top three prospective Consultants do not result in a Contract within a reasonable amount of time, the Local Contracting Agency may end the particular informal solicitation and thereafter may proceed with a new informal solicitation under this rule or proceed with a formal solicitation under OAR 137-048-0220 (Formal Selection Procedure).

(7) When the Estimated Fee in an informal selection procedure under this rule is expected not to exceed \$150,000, the Contracting Agency is only required to provide the RFP under sections (2), (3) and (6) of this rule to three (3) prospective Consultants. If fewer than three (3) prospective Consultants are available, the Contracting Agency shall provide the RFP to all available prospective Consultants and shall maintain a written record of the Contracting Agency's efforts to locate available prospective Consultants for the RFP.

(8) The Contracting Agency shall terminate the informal selection procedure and proceed with the formal selection procedure under OAR 137-048-0220 if the scope of the anticipated Contract is revised during negotiations so that the Estimated Fee will exceed \$250,000.

STATUTORY/OTHER AUTHORITY: ORS 279A.065, OL 2011, ch 458

STATUTES/OTHER IMPLEMENTED: ORS 279C.110, OL 2011, ch 458

AMEND: 137-048-0220

RULE TITLE: Formal Selection Procedure

NOTICE FILED DATE: 10/30/2019

RULE SUMMARY: The Attorney General proposes to amend the Model Public Contract Rules to respond to legislative changes enacted in the 2019 Regular Session of the Oregon Legislative Assembly.

This rule is being amended pursuant to two House Bills.

2019 Oregon Laws, chapter 124 (Enrolled House Bill 2094 (2019)), was added to and made a part of ORS chapter 279A to include as part of a contracting agency's evaluation of a bid or proposal, a bidder's or proposer's debt-to-the-state status when awarding a public contract, and to consider debt-to-the-state status when assessing consultant qualifications.

The proposed modifications to Division 047, 048 and 049 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 124 (Enrolled House Bill 2094 (2019)) are: (1) to revise OAR 137-047-0500, OAR 137-048-0210 and OAR 137-049-0390, to include as part of a contracting agency's evaluation of a bid or proposal, a bidder's or proposer's debt-to-the-state status when awarding a public contract; and (2) to revise OAR 137-048-0120, OAR 137-048-0200 and OAR 137-048-0220 to consider debt-to-the-state status when assessing consultant qualifications.

2019 Oregon Laws, chapter 55 (Enrolled House Bill 2769 (2019)), section 1, amends ORS 279C.110 to specify the contents of local contracting agency requests for proposals for A/E consultants if the local contracting agency wants to consider price as a selection factor.

The proposed modifications to Division 048 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 55 (Enrolled House Bill 2769 (2019)) are: (1) to revise OAR 137-048-0130, OAR 137-048-0200, OAR 137-048-0210, OAR 137-048-0220 and OAR 137-048-0270 to allow Local Contracting Agencies to use pricing information in selection procedures when selecting an A/E consultant pursuant to the requirements of ORS 279C.110(5); and (2) to revise OAR 137-048-0240 to allow disappointed A/E proposers to protest: (i) A/E solicitation documents; and (ii) the selection of an A/E consultant.

The Attorney General requests public comment on whether other options should be considered for achieving the proposed rule amendments.

RULE TEXT:

- (1) Subject to OAR 137-048-0130 (Applicable Selection Procedures; Pricing Information; Disclosure of Proposals), Contracting Agencies shall use the formal selection procedure described in this rule to select a Consultant if the Consultant cannot be selected under either 137-048-0200 (Direct Appointment Procedure) or under 137-048-0210 (Informal Selection Procedure). The formal selection procedure described in this rule may otherwise be used at Contracting Agencies' discretion.
- (2) Contracting Agencies using the formal selection procedure shall obtain Contracts through public advertisement of

RFPs, or Requests for Qualifications followed by RFPs.

(a) Except as provided in subsection (b) of this section, a Contracting Agency shall advertise each RFP and RFQ at least once in at least one newspaper of general circulation in the area where the Project is located and in as many other issues and publications as may be necessary or desirable to achieve adequate competition. Other issues and publications may include, but are not limited to, local newspapers, trade journals, and publications targeted to reach disadvantaged business enterprise ("DBE"), service-disabled veteran business ("SDVB"), minority business enterprise ("MBE"), women business enterprise ("WBE") and emerging small business enterprise ("ESB") audiences.

(A) A Contracting Agency 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) A Contracting Agency shall include a brief description of the following items in the advertisement:

(i) The Project;

(ii) A description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services the Contracting Agency seeks;

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

(iv) The deadline for submitting a Proposal or response to the RFQ or RFP.

(b) In the alternative to advertising in a newspaper as described in subsection (2)(a) of this rule, the Contracting Agency shall publish each RFP and RFQ by one or more of the electronic methods identified in OAR 137-046-0110(14). The Contracting Agency shall comply with subsections (2)(a)(A) and (2)(a)(B) of this rule when publishing advertisements by electronic methods.

(c) A Contracting Agency may send notice of the RFP or RFQ directly to all Consultants on the Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record).

(3) Request for Qualifications Procedure. Contracting Agencies may use the RFQ procedure to evaluate potential Consultants and establish a short list of qualified Consultants to whom the Contracting Agency may issue an RFP for some or all of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ.

(a) A Contracting Agency shall include the following, at a minimum, in each RFQ:

(A) A brief description of the Project for which the Contracting Agency is seeking a Consultant;

(B) A description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services the Contracting Agency 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services the Contracting Agency seeks;

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

(G) A statement whether or not the Contracting Agency will hold a pre-qualification meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Contracting Agency is not responsible for any Consultant expenses associated with the RFQ.

(b) A Contracting Agency 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ including

Consultants' committed resources and recent, current and projected workloads;

(C) A list of similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Contracting Agency;

(E) The number of Consultants' experienced staff committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Contracting Agency 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 a State Contracting Agency in complying with art acquisition requirements, pursuant to ORS 276.073 through 276.090;

(K) Consultants' ability to assist a State Contracting Agency in complying with State of Oregon energy efficient design requirements, pursuant to ORS 276.900 through 276.915;

(L) Consultants' ability to assist a Contracting Agency in complying with the energy technology requirements of ORS 279C.527 and 279C.528;

(M) Whether the Consultant owes a liquidated and delinquent debt to the State of Oregon; and

(N) Any other information the Contracting Agency deems reasonably necessary to evaluate Consultants' qualifications.

(c) If a Local Contracting Agency will use a Request for Qualifications followed by an RFP to procure Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services under this rule and the Local Contracting Agency intends to use pricing policies, proposals or other pricing information as part of the Local Contracting Agency's screening and selection of prospective Consultants, pursuant to ORS 279C.110(5) [HB 2769 (Oregon Laws 2019, Chapter 55)], the Local Contracting Agency cannot request cost proposals or otherwise use pricing policies, proposals or other pricing information as part of the Request for Qualifications. The Local Contracting Agency 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 Contracting Agency 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 Contracting Agency may appoint to the evaluation committee Contracting Agency employees or employees of other public agencies with experience in Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Related Services, construction services or Public Contracting. If the Contracting Agency procedure permits, the Contracting Agency may include on the evaluation committee private practitioners of architecture, engineering, photogrammetry, transportation planning, land surveying or related professions. The Contracting Agency shall designate one member of the evaluation committee as the evaluation committee chairperson.

(e) A Contracting Agency 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 Contracting Agency 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 Contracting Agency's minimum requirements, then:
- (A) The Contracting Agency may establish a short list of fewer than three qualified Consultants; or
- (B) The Contracting Agency may cancel the RFQ and issue an RFP.
- (g) No Consultant will be eligible for placement on a Contracting Agency's short list established under subsection (3)(d) of this rule if Consultant or any of Consultant's principals, partners or associates are members of the Contracting Agency's RFQ evaluation committee.
- (h) Except when the RFQ is cancelled, a Contracting Agency shall provide a copy of the subsequent RFP to each Consultant on the short list.
- (4) Formal Selection of Consultants through Request for Proposals. Contracting Agencies shall use the procedure described in section (4) of this rule when issuing an RFP for a Contract described in section (1) of this rule.
- (a) RFP Required Contents. Except as otherwise provided in Sections (4)(b) and (4)(c) of this rule, Contracting Agencies 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Contracting Agency 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;
- (iv) The recent, current and projected workloads of the staff and resources referenced in section (4)(a)(B)(iii), above;
- (v) The proportion of time Proposers estimate that the staff referenced in section (4)(a)(B)(iii), above, would spend on the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;
- (vi) Proposers' demonstrated ability to complete successfully similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services on time and within budget, including whether or not there is a record of satisfactory performance under OAR 137-048-0120 (List of Interested Consultants; Performance Record);
- (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 Architectural, Engineering and Land Surveying Services or Related Services described in the RFP as shown in Proposers' approaches to staffing and scheduling needs for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;
- (xiii) Whether the Consultant owes a liquidated and delinquent debt to the State of Oregon.
- (xiv) If the Contracting Agency is selecting a Consultant to provide Related Services, 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 Contracting Agency deems relevant to the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP, including, where the nature and budget of the Project so warrant, a design competition between competing Proposers. Provided, however, these additional criteria cannot include pricing policies, pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, when the sole purpose or predominant purpose of the RFP is to obtain Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services.
- (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 Contracting Agency;
- (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 Contracting Agency;
- (I) A Statement that Proposers responding to the RFP do so solely at their expense, and Contracting Agency 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 48 rules;
- (K) Special Contract requirements, including but not limited to DBE, MBE, WBE, ESB and SDVB participation goals or good faith efforts with respect to DBE, MBE, WBE, ESB and SDVB participation, and federal requirements when federal funds are involved;
- (L) A statement whether or not the Contracting Agency will hold a pre-Proposal meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Contracting Agency deems reasonably necessary to permit the Contracting Agency to evaluate, rank and select the most qualified Proposer to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP; and
- (N) A sample form of the Contract.
- (b) RFP Contents for Related Services Selections Based on Price Only. Contracting Agencies using the formal selection procedure shall include at least the following in each RFP, whether or not the RFP is preceded by an RFQ, when the formal selection procedure is for Related Services selected on the basis of price Proposals and other pricing information only:
 - (A) General background information, including a description of the Project and the specific Related 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 Related Services sought will be performed;

(B) The RFP evaluation process and the price criteria which will be used to select the highest ranked Proposer, including the weights, points or other classifications applicable to each criterion. If the Contracting Agency does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value. Evaluation price criteria may include, but are not limited to, the total price for the Related Services described in the RFP, Consultant pricing policies, and other pricing information such as the Consultant's estimated number of staff hours needed to perform the Related Services described in the RFP, expenses, hourly rates and overhead;

(C) Any minimum or pass-fail qualifications that the Proposers must meet, including but not limited to any such qualifications in the subject matter areas described in section (4)(a)(B)(i) through section (4)(a)(B)(xii) of this rule; and

(D) The information listed in section (4)(a)(C) through section (4)(a)(N) of this rule pertaining to the Related Services described in the RFP.

(c) RFP Contents for Local Contracting Agencies' Selection of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services with Pricing Policies, Proposals or Other Pricing Information. Local Contracting Agencies that will be including pricing policies, proposals or other pricing information in the Local Contracting Agencies' formal selection procedure criteria for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services pursuant to ORS 279C.110(5) [HB 2769 (Oregon Laws 2019, Chapter 55)] shall meet the following minimum requirements for each RFP:

(A) If the Local Contracting Agency has used the Request for Qualifications procedure in Section (3) of this rule to evaluate potential Consultants and establish a short list of qualified Consultants pursuant to ORS 279C.110(5), the RFP must meet the requirements of ORS 279C.110(5) that address the second phase of the selection process applicable to the short list of no more than three of the highest ranked prospective consultants that were identified in the initial phase of the selection process described in ORS 279C.110(5)(a) and (b).

(B) If the Local Contracting Agency has elected to not use the Request for Qualifications procedure in Section (3) of this rule, and will use only an RFP in the Local Contracting Agency's use of the formal selection procedure, the Local Contracting Agency shall include at least the following in the RFP:

(i) The information set forth in ORS 279C.110(5)(a). In providing an estimate of the cost of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, the Local Contracting Agency may provide a specific estimate of that cost, or a range of estimated costs;

(ii) In the initial phase of the RFP, provisions describing the Local Contracting Agency's evaluation of each prospective Consultant on the basis of each Consultant's qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, with those qualifications including the criteria set forth in subsections (4)(a)(B)(i) through (4)(a)(B)(xiii) and (4)(a)(B)(xv) of this rule;

(iii) At the end of the initial phase of the RFP, provisions describing the Local Contracting Agency's evaluation scores of each Consultant and rank of each Consultant according to the evaluation scores. The Local Contracting Agency shall identify up to three (3) of the highest ranked prospective Consultants as being qualified to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, and as being eligible to participate in the second phase of the RFP process;

(iv) In the second phase of the RFP, provisions describing the Local Contracting Agency's request of a pricing proposal from each of the highest ranked prospective Consultants identified in the initial phase of the RFP, pursuant to the requirements of ORS 279C.110(5)(c)(A) and (B);

(v) Provisions describing the Local Contracting Agency's evaluation of the highest ranked prospective Consultants that have decided to provide price proposals. In the Local Contracting Agency's final evaluation of the prospective Consultants who have provided price proposals, the Local Contracting Agency cannot assign more than fifteen (15) percent of the overall weight of the evaluation criteria in the second phase of the RFP to each Consultant's price proposal;

(d) RFP Evaluation Committee. The Contracting Agency shall establish a committee of at least three individuals to

review, score and rank Proposals according to the evaluation criteria set forth in the RFP. If the RFP has followed an RFQ, the Contracting Agency may include the same members who served on the RFQ evaluation committee. The Contracting Agency may appoint to the evaluation committee Contracting Agency employees or employees of other public agencies with experience in Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying, Related Services, construction services or Public Contracting. At least one member of the evaluation committee must be a Contracting Agency employee. If the Contracting Agency procedure permits, the Contracting Agency may include on the evaluation committee private practitioners of architecture, engineering, land surveying or related professions. The Contracting Agency shall designate one of its employees who also is a member of the evaluation committee as the evaluation committee chairperson.

(A) No Proposer will be eligible for award of the Contract under the RFP if Proposer or any of Proposer's principals, partners or associates are members of the Contracting Agency's RFP evaluation committee for the Contract;

(B) If the RFP provides for the possibility of Proposer interviews, the evaluation committee may elect to interview Proposers if the evaluation committee considers it necessary or desirable. If the evaluation committee conducts interviews, it shall award weights, points or other classifications indicated in the RFP for the anticipated interview; and

(C) The evaluation committee shall provide to the Contracting Agency the results of the scoring and ranking for each Proposer.

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

(A) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the Contracting Agency as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and

(D) Any other conditions or provisions the Contracting Agency believes to be in the Contracting Agency's best interest to negotiate.

(f) The Contracting Agency shall, either orally or in writing, formally terminate negotiations with the highest ranked Proposer if the Contracting Agency and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The Contracting Agency may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, and so on if applicable, in accordance with section (4)(e) of this rule, until negotiations result in a Contract. If negotiations with any Proposer do not result in a Contract within a reasonable amount of time, the Contracting Agency may end the particular formal solicitation. Nothing in this rule precludes a Contracting Agency from proceeding with a new formal solicitation for the same Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP that failed to result in a Contract.

STATUTORY/OTHER AUTHORITY: ORS 279A.065

STATUTES/OTHER IMPLEMENTED: ORS 279C.110, ORS 279C.527, OL 2015, ch 565 (HB 3303)

AMEND: 137-048-0240

RULE TITLE: Protest Procedures

NOTICE FILED DATE: 10/30/2019

RULE SUMMARY: The Attorney General proposes to amend the Model Public Contract Rules to respond to legislative changes enacted in the 2019 Regular Session of the Oregon Legislative Assembly.

2019 Oregon Laws, chapter 55 (Enrolled House Bill 2769 (2019)), section 1, amends ORS 279C.110 to specify the contents of local contracting agency requests for proposals for A/E consultants if the local contracting agency wants to consider price as a selection factor.

The proposed modifications to Division 048 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 55 (Enrolled House Bill 2769 (2019)) are: (1) to revise OAR 137-048-0130, OAR 137-048-0200, OAR 137-048-0210, OAR 137-048-0220 and OAR 137-048-0270 to allow Local Contracting Agencies to use pricing information in selection procedures when selecting an A/E consultant pursuant to the requirements of ORS 279C.110(5); and (2) to revise OAR 137-048-0240 to allow disappointed A/E proposers to protest: (i) A/E solicitation documents; and (ii) the selection of an A/E consultant.

The Attorney General requests public comment on whether other options should be considered for achieving the proposed rule amendments.

RULE TEXT:

(1) RFP Protest and Request for Change. Pursuant to ORS 279C.110(8) [HB 2769 (Oregon Laws 2019, Chapter 55)], 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 Contracting Agency may not consider any protest or request for change that is submitted after the submission deadline.

(2) Protest of Consultant Selection. Pursuant to ORS 279C.110(8) [HB 2769 (Oregon Laws 2019, Chapter 55)], Consultants may submit a written protest of the Contracting Agency'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 Contracting Agency shall provide to all Proposers a copy of the selection notice that the Contracting Agency 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 Contracting Agency 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP.

(b) Multiple Award. In the event of an award to more than one Proposer, the Contracting Agency shall provide to all Proposers copies of the selection notices that the Contracting Agency 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 Contracting Agency 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP.

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

(3) Resolution of Protests. A duly authorized representative of the Contracting Agency shall resolve all timely submitted protests within a reasonable time following the Contracting Agency'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 Contracting Agency shall revise the RFP accordingly and shall re-advertise the RFP in accordance with these rules.

STATUTORY/OTHER AUTHORITY: ORS 279A.065, OL 2011, ch 458

STATUTES/OTHER IMPLEMENTED: ORS 279A.065 & 279C.110, OL 2011, ch 458

AMEND: 137-048-0270

RULE TITLE: Price Agreements

NOTICE FILED DATE: 10/30/2019

RULE SUMMARY: The Attorney General proposes to amend the Model Public Contract Rules to respond to legislative changes enacted in the 2019 Regular Session of the Oregon Legislative Assembly.

2019 Oregon Laws, chapter 55 (Enrolled House Bill 2769 (2019)), section 1, amends ORS 279C.110 to specify the contents of local contracting agency requests for proposals for A/E consultants if the local contracting agency wants to consider price as a selection factor.

The proposed modifications to Division 048 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 55 (Enrolled House Bill 2769 (2019)) are: (1) to revise OAR 137-048-0130, OAR 137-048-0200, OAR 137-048-0210, OAR 137-048-0220 and OAR 137-048-0270 to allow Local Contracting Agencies to use pricing information in selection procedures when selecting an A/E consultant pursuant to the requirements of ORS 279C.110(5); and (2) to revise OAR 137-048-0240 to allow disappointed A/E proposers to protest: (i) A/E solicitation documents; and (ii) the selection of an A/E consultant.

The Attorney General requests public comment on whether other options should be considered for achieving the proposed rule amendments.

RULE TEXT:

(1) A Contracting Agency may establish Price Agreements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, when the Contracting Agency cannot determine the precise quantities of those Services which the Contracting Agency will require over a specified time period.

(2) When establishing Price Agreements under this rule, a Contracting Agency shall select no fewer than three Consultants, when feasible. The selection procedures for establishing Price Agreements shall be in accordance with OAR 137-048-0130(1) or 137-048-0130(2), as applicable. Contracting Agencies 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 48 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 Contracting Agency intends to award a Price Agreement to one Consultant or to multiple Consultants. If the Contracting Agency will award a Price Agreement to more than one Consultant, the solicitation document and Price Agreement shall describe the criteria and procedures the Contracting Agency will use to select a Consultant for each individual work order or task order. Subject to the requirements of ORS 279C.110, the criteria and procedures to assign work orders or task orders that only involve or predominantly involve Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying services are at the Contracting Agency's sole discretion; provided, however, in circumstances where a direct contract is not permitted under OAR 137-048-0200 and a State Contracting Agency is conducting the solicitation, the selection criteria cannot be based on pricing policies, pricing proposals or other pricing information, including the number of hours proposed for the Services required, expenses, hourly rates and overhead. In accordance with OAR 137-048-0130(2) applicable to Related Services procurements, the selection criteria and procedures may be based solely on the qualifications of the Consultants, solely

on pricing information, or a combination of both qualifications and pricing information. Pricing information for a Local Contracting Agency's solicitation of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying services, or any Contracting Agency's solicitation of Related Services, may include the number of hours proposed for the services required, expenses, hourly rates, the number of hours, overhead and other price factors. Work order or task order assignment procedures under Price Agreements may include direct appointments, subject to the requirements of OAR 137-048-0200; and

(c) Specify the maximum term for assigning Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under the Price Agreement.

(4) When the solicitation materials and terms and conditions for a Price Agreement involve a two-tiered selection process pursuant to ORS 279C.125 and OAR 137-048-0260(1), the solicitation materials and terms and conditions for a Price Agreement must meet the requirements of subsection (3) of this rule, except as provided in this subsection (4). In the event of a planned multiple award of Price Agreements under a Procurement, the solicitation materials and terms and conditions for the Price Agreements must include assignment procedures for project-specific work orders or task orders that will allow the Local Contracting Agency to select an Architect, Engineer, Photogrammetrist, Transportation Planner or Land Surveyor for a work order or task order from the Consultants who have executed Price Agreements with the State Contracting Agency. If the Local Contracting Agency decides to use an alternative process adopted by the Local Contracting Agency for its tier-two selection process, however, the Local Contracting Agency's alternative process must be described in the solicitation materials and terms and conditions supporting the initial award of Price Agreements, in the executed Price Agreements, or in the project-specific assignment procedures for a work order or task order that are provided to the firms who have executed Price Agreements, at the time of selection for the project-specific work order or task order. The Local Contracting Agency's alternative process may be structured to take into account the unique circumstances of the particular Local Contracting Agency and may include provisions to allow the Local Contracting Agency to perform its tier two responsibilities efficiently and economically, alone or in cooperation with other Local Contracting Agencies, including, but not limited to, the methods specified in OAR 137-048-0260(3)(b).

(5) All Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services assigned under a Price Agreement require a written work order or task order issued by the Contracting Agency. Any work orders or task orders assigned under a Price Agreement must include, at a minimum, the following:

(a) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the work order or task order that is fair and reasonable to the Contracting Agency, as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Contracting Agency believes to be in the Contracting Agency's best interest.

STATUTORY/OTHER AUTHORITY: ORS 279A.065 & OL 2011, ch 458

STATUTES/OTHER IMPLEMENTED: ORS 279A.065, ORS 279C.110, ORS 279C.120, ch 458, OL 2011

AMEND: 137-049-0200

RULE TITLE: Solicitation Documents; Required Provisions; Assignment or Transfer

NOTICE FILED DATE: 10/30/2019

RULE SUMMARY: The Attorney General proposes to amend the Model Public Contract Rules to respond to legislative changes enacted in the 2019 Regular Session of the Oregon Legislative Assembly.

2019 Oregon Laws, chapter 645 (Enrolled House Bill 2007 (2019)), authorizes DEQ by order to establish minimum standards for contract specifications that govern the use of diesel engines on certain state agency public improvement contracts. The enactment also authorizes the Attorney General to adopt rules for contract specifications for the use of diesel engines on such projects.

The proposed modifications to Division 049 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 645 (Enrolled House Bill 2007 (2019)), are to revise OAR 137-049-0200 to require state contracting agencies to include provisions in public improvement contracts with a value equal to or exceeding \$20,000,000 and located within Multnomah County, Clackamas County or Washington County, to meet the requirements for diesel engines and non-road diesel engines.

The Attorney General requests public comment on whether other options should be considered for achieving the proposed rule amendments.

RULE TEXT:

(1) Solicitation Document. Pursuant to ORS 279C.365 and this rule, the Solicitation Document shall include the following:

(a) General Information:

(A) Identification of the Public Improvement project, including the character of the Work, and applicable plans, Specifications and other Contract documents;

(B) 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 Contracting Agency's representatives at the conference are not binding upon the Contracting Agency unless confirmed by Written Addendum.

(C) 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;

(D) The name and title of the authorized Contracting Agency Person designated for receipt of Offers and contact Person (if different);

(E) Instructions and information concerning the form and submission of Offers, including the address of the office 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 facsimile or electronic means (See OAR 137-049-0300 regarding facsimile Bids or Proposals and OAR 137-049-0310 regarding electronic Procurement);

(F) The time, date and place of Opening;

(G) The time and date of Closing after which a Contracting Agency 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, Contracting Agencies are encouraged to use at least a 14 Day solicitation period when feasible. If the Contracting Agency is issuing an ITB that may result in a Public Improvement Contract with a value in excess of

\$100,000, the Contracting Agency shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and OAR 137-049-0360. For timing issues relating to Addenda, see OAR 137-049-0250;

(H) The office where the Specifications for the Work may be reviewed;

(I) A statement that each Bidder to an ITB must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120;

(J) If the Contract resulting from a solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148), a statement that no Offer will be received or considered by the Contracting Agency 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 279C.838, 279C.840 or 40 U.S.C. 3141 to 3148."

(K) A statement that the Contracting Agency will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as specified in OAR 137-049-0230;

(L) Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;

(M) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-049-0440(3));

(N) How the Contracting Agency will notify Offerors of Addenda and how the Contracting Agency will make Addenda available (See OAR 137-049-0250); and

(O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in OAR 137-049-0360.

(b) Evaluation Process:

(A) A statement that the Contracting Agency may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, including the requirement to demonstrate the Bidder's responsibility under ORS 279C.375(3)(b), 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 Contracting Agency will use to determine the Responsible Bidder with the lowest Responsive Bid (where Award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of competitive Proposals is authorized under ORS 279C.335 and OAR 137-049-0620), along with the process the Contracting Agency will use to determine acceptability of the Work;

(i) If the Solicitation Document is an Invitation to Bid, the Contracting Agency shall set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, and ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors shall be objective, reasonable estimates based upon information the Contracting Agency has available concerning future use;

(ii) If the Solicitation Document is a Request for Proposals, the Contracting Agency shall refer to the additional requirements of OAR 137-049-0650; and

(c) Contract Provisions. The Contracting Agency shall include all Contract terms and conditions, including warranties, insurance and bonding requirements, that the Contracting Agency considers appropriate for the Public Improvement project. The Contracting Agency 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 (ORS 279C.505(1));

(B) Demonstrate that an employee drug testing program is in place (ORS 279C.505(2));

(C) If the Contract calls for demolition Work described in ORS 279C.510(1), a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;

(D) If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective (ORS 279C.510(2));

(E) Payment of claims by public officers (ORS 279C.515(1));

(F) Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515(2), including the rate of interest;

(G) Person's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279C.515(3));

(H) Hours of labor in compliance with ORS 279C.520;

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

(J) Payment for medical care and attention to employees (ORS 279C.530(1));

(K) A Contract provision substantially as follows: "All employers, including Contractor, that employ subject workers who work under this Contract in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530(2));

(L) Maximum hours, holidays and overtime (ORS 279C.540);

(M) Time limitation on claims for overtime (ORS 279C.545);

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

(O) BOLI Public Works bond (ORS 279C.830(2));

(P) Retainage (ORS 279C.550 to 279C.570);

(Q) Prompt payment policy, progress payments, rate of interest (ORS 279C.570);

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

(S) Notice of claim (ORS 279C.605);

(T) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385; and

(U) 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.

(V) If the Contract resulting from a solicitation will be a Public Improvement Contract, and if the Public Improvement that is the subject of the solicitation will have a value of \$20,000,000 or more and will be located within Multnomah County, Clackamas County or Washington County, State Contracting Agencies must include provisions in the Public Improvement Contract that meet the requirements of HB 2007 (2019 Oregon Laws, Chapter 645) for diesel engines and non-road diesel engines.

(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 Contracting Agency's prior Written consent. Unless otherwise agreed by the Contracting Agency 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 Contracting Agency 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 Contracting Agency for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the Contracting Agency otherwise agrees in Writing.

STATUTORY/OTHER AUTHORITY: ORS 279A.065

STATUTES/OTHER IMPLEMENTED: ORS 279A.110, ORS 279A.120, ORS 279C.365, ORS 279C.370, ORS 279C.390, ORS 279C.505 - 580, ORS 279C.605, ORS 305.385, ORS 468A.720, ORS 701.005, ORS 701.055

AMEND: 137-049-0390

RULE TITLE: Offer Evaluation and Award; Determination of Responsibility

NOTICE FILED DATE: 10/30/2019

RULE SUMMARY: The Attorney General proposes to amend the Model Public Contract Rules to respond to legislative changes enacted in the 2019 Regular Session of the Oregon Legislative Assembly.

2019 Oregon Laws, chapter 124 (Enrolled House Bill 2094 (2019)), was added to and made a part of ORS chapter 279A to include as part of a contracting agency's evaluation of a bid or proposal, a bidder's or proposer's debt-to-the-state status when awarding a public contract, and to consider debt-to-the-state status when assessing consultant qualifications.

The proposed modifications to Division 047, 048 and 049 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 124 (Enrolled House Bill 2094 (2019)) are: (1) to revise OAR 137-047-0500, OAR 137-048-0210 and OAR 137-049-0390, to include as part of a contracting agency's evaluation of a bid or proposal, a bidder's or proposer's debt-to-the-state status when awarding a public contract; and (2) to revise OAR 137-048-0120, OAR 137-048-0200 and OAR 137-048-0220 to consider debt-to-the-state status when assessing consultant qualifications.

The Attorney General requests public comment on whether other options should be considered for achieving the proposed rule amendments.

RULE TEXT:

(1) General. If Awarded, the Contracting Agency shall Award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer or Proposers submitting the best, Responsive Proposal or Proposals, provided that such Person is not listed by the Construction Contractors Board as disqualified to hold a Public Improvement Contract (ORS 279C.375(3)(a)) or is ineligible for Award as a nonresident education service district (ORS 279C.325). The Contracting Agency may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in the public interest. Where Award is based on competitive Bids, ORS 279C.375(5) permits multiple Contract awards when specified in the ITB.

(2) Determination of Responsibility. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the Contracting Agency must have information that indicates that the Offeror meets the standards of responsibility set forth in ORS 279C.375(3)(b). To be a Responsible Offeror, the Contracting Agency must determine that the Offeror:

(a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to meet all contractual responsibilities;

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

determining an Offeror not Responsible under this paragraph part of the Solicitation file;

(c) Has a satisfactory record of integrity. An Offeror may lack integrity if a Contracting Agency determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to a Contracting Agency. A Contracting Agency may find an Offeror not Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Conduct Disqualification under OAR 137-049-0370 may be used to determine an Offeror's integrity. A Contracting Agency may find an Offeror non-responsible based on previous convictions of offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the Offeror's performance of a contract or subcontract. The Contracting Agency shall make its basis for determining that an Offeror is not Responsible under this paragraph part of the Solicitation file;

(d) Is legally qualified to contract with the Contracting Agency;

(e) In State Contracting Agency procurements, possesses an unexpired certificate, issued by the Oregon Department of Administrative Services under 2015 Oregon Laws, chapter 454, section 2, if the Offeror employs 50 or more full-time workers at the time of the Bid or Proposal Closing and the estimated Contract Price exceeds \$500,000; and

(f) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by the Contracting Agency concerning responsibility, the Contracting Agency shall base the determination of responsibility on any available information, or may find the Offeror not Responsible.

(3) In addition to making the responsibility determination under ORS 279C.375(3)(b) and section (2) of this rule, the Contracting Agency may consider, as authorized by House Bill 2094 (2019 Oregon Laws, chapter 124), as part of the Contracting Agency's evaluation of an Offer, whether the Offeror owes a liquidated and delinquent debt to the State of Oregon.

(4) Documenting Agency Determinations. Contracting Agencies shall document their compliance with ORS 279C.375(3) and the above sections of this rule on a Responsibility Determination Form substantially as set forth in 279.375(3)(c), and file that form with the Construction Contractors Board within 30 days after Contract Award.

(5) Contracting Agency Evaluation. The Contracting Agency shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. The Contracting Agency shall not evaluate an Offer using any other requirement or criterion.

(6) Offeror Submissions.

(a) The Contracting Agency may require an Offeror to submit Product Samples, Descriptive Literature, technical data, or other material and may also require any of the following prior to Award:

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

(B) Examination of such elements as appearance or finish; or

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

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

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

(a) Nonresident Bidders. In determining the lowest Responsive Bid, the Contracting Agency shall, in accordance with OAR 137-046-0310, add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.

(b) Clarifications. In evaluating Bids, a Contracting Agency may seek information from a Bidder only to clarify the Bidder's Bid. Such clarification shall not vary, contradict or supplement the Bid. A Bidder must submit Written and Signed clarifications and such clarifications shall become part of the Bidder's Bid.

(c) Negotiation Prohibited. The Contracting Agency shall not negotiate scope of Work or other terms or conditions under an Invitation to Bid process prior to Award.

(8) Evaluation of Proposals. See OAR 137-049-0650 regarding rules applicable to Requests for Proposals.

STATUTORY/OTHER AUTHORITY: ORS 279A.065

STATUTES/OTHER IMPLEMENTED: ORS 279C.335, ORS 279C.365, ORS 279C.375, ORS 279C.395, OL 2015, ch 454 (SB 491)

AMEND: 137-049-0820

RULE TITLE: Retainage

NOTICE FILED DATE: 10/30/2019

RULE SUMMARY: The Attorney General proposes to amend the Model Public Contract Rules to respond to legislative changes enacted in the 2019 Regular Session of the Oregon Legislative Assembly.

2019 Oregon Laws, chapter 486 (Enrolled House Bill 2415 (2019)), section 1, amends ORS 279C.570 to require a contracting agency to place amounts deducted as retainage into an interest-bearing escrow account if the contract price exceeds \$500,000, and addresses the accrual of interest on the retainage.

The proposed modifications to Division 049 of the Model Public Contract Rules arising from the requirements of 2019 Oregon Laws, chapter 486 (Enrolled House Bill 2415 (2019)), are to revise OAR 137-049-0820, to require a contracting agency to place amounts deducted as retainage into an interest-bearing escrow account and for interest on the retainage amount to accrue from the date the payment request is approved until the date the retainage is paid to the contractor to which it is due, unless contractor provides an alternative retainage method in lieu of depositing the retainage in an interest-bearing escrow account.

The Attorney General requests public comment on whether other options should be considered for achieving the proposed rule amendments.

RULE TEXT:

- (1) Withholding of Retainage. A Contracting Agency shall not retain an amount in excess of five percent of the Contract Price for Work completed. If the Contractor has performed at least 50 percent of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written approval, the Contracting Agency may, in its discretion, reduce or eliminate retainage on any remaining progress payments. The Contracting Agency shall respond in Writing to all such applications within a reasonable time. When the Contract Work is 97-1/2 percent completed, the Contracting Agency may, at its discretion and without application by the Contractor, reduce the retained amount to 100 percent of the value of the remaining unperformed Contract Work. A Contracting Agency may at any time reinstate retainage. Retainage shall be included in the final payment of the Contract Price.
- (2) Cash Retainage - Contract Price \$500,000 or Less. When the Contract Price for a Public Improvement Contract is \$500,000 or less, a Contracting Agency may reserve as retainage from any progress payment an amount not to exceed five percent, pursuant to ORS 279C.570(7). The Contracting Agency shall hold all retained moneys in a Contracting Agency fund or account, and interest is not required to accrue on the retained moneys.
- (3) Cash Retainage - Contract Price in Excess of \$500,000. When the Contract Price for a Public Improvement Contract exceeds \$500,000, the Contracting Agency shall, in the ordinary course, deposit cash retainage in an amount not to exceed five percent from any progress payment due under the Public Improvement Contract into an interest-bearing escrow account, pursuant to ORS 279C.570(2) [House Bill 2415 (2019 Oregon Laws, Chapter 486)]. The Contractor under the Public Improvement Contract is entitled to receive interest on the retained moneys from the date the Contractor's related payment request is fully approved by the Contracting Agency until the date the retained moneys are paid by the Contracting Agency to the Contractor. For purposes of this section, a payment of retainage is deemed to be "paid" by a Contracting Agency when the payment is transmitted to the Contractor, or otherwise applied against an obligation of the Contractor under the Public Improvement Contract.
- (4) Alternatives In Lieu of Cash Retainage. Unless a Contracting Agency that reserves an amount as retainage finds in writing that accepting bonds, securities or other instruments described in part (a) of this section or a surety bond

described in part (b) of this section poses an extraordinary risk that is not typically associated with the bonds, securities, other instruments or surety bond, as applicable, the Contracting Agency, in lieu of withholding moneys from payment, shall accept from the Contractor:

(a) Bonds, securities or other instruments that are deposited and accepted as provided in subsection (6)(a) of this rule; or

(b) A surety bond deposited as provided in subsection (6)(b) of this rule.

(5) Deposit in interest-bearing accounts. Upon election of the Contractor and when the Contract Price in the Public Improvement Contract is \$500,000 or less, a Contracting Agency shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the Contracting Agency. Earnings on such an account shall accrue on the cash retainage from the date the Contractor's related payment request is fully approved by the Contracting Agency until the date the retained moneys are paid by the Contracting Agency to the Contractor. For purposes of this section, a payment of retainage is deemed to be "paid" by a Contracting Agency when the payment is transmitted to the Contractor, or otherwise applied against an obligation of the Contractor under the Public Improvement Contract. State Contracting Agencies shall establish the interest-bearing account through the State Treasurer. When the contractor makes an election for deposit of retainage into an interest-bearing account and the Contract Price in the Public Improvement Contract exceeds \$500,000, the Contractor's election shall be satisfied by the Contracting Agency's establishment of an interest-bearing escrow account, pursuant to ORS 279C.570(2) [House Bill 2415 (2019 Oregon Laws, Chapter 486)].

(6) Alternatives In Lieu of Cash Retainage - Requirements. In lieu of cash retainage to be held by a Contracting Agency, the Contractor may substitute one of the following:

(a) Deposit of bonds, securities or other instruments:

(A) The Contractor may deposit bonds, securities or other instruments with the Contracting Agency or in any bank or trust company to be held for the benefit of the Contracting Agency. If the Contracting Agency accepts the deposit, the Contracting Agency shall reduce the cash retainage by an amount equal to the value of the bonds and securities, and reimburse the excess to the Contractor.

(B) Bonds, securities or other instruments deposited or acquired in lieu of cash retainage must be of a character approved by the Oregon Department of Administrative Services, which may include, without limitation:

(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.

(C) Upon the Contracting Agency's determination that all requirements for the protection of the Contracting Agency's interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu of retainage.

(b) Deposit of surety bond. A Contracting Agency, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the Contracting Agency in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond shall accept surety bonds from its subcontractors and suppliers in lieu of retainage. In such cases, retainage shall be reduced by an amount equal to the value of the bond, and the excess shall be reimbursed.

(7) Recovery of Additional Costs. Pursuant to ORS 279A.560(3), a Contracting Agency may recover from the Contractor all additional costs incurred in the proper handling of retainage alternatives requested by the Contractor, whether a request for the deposit of bonds, securities or other instruments in lieu of cash retainage, a request for a surety bond in lieu of cash retainage or an election for an interest-bearing account. If a Contracting Agency incurs costs associated with establishing a fund or account under section (2) of this rule or establishing an interest-bearing escrow account under section (3) of this rule, the Contracting Agency is not permitted to recover such costs from the Contractor.

(8) Additional Retainage When Certified Payroll Statements Not Filed. Pursuant to ORS 279C.845(7), if a Contractor is required to file certified payroll statements and fails to do so, the Contracting Agency shall retain 25 percent of any

amount earned by the Contractor on a Public Works Contract until the Contractor has filed such statements with the Contracting Agency. The Contracting Agency shall pay the Contractor the amount retained under this provision within 14 days after the Contractor files the certified statements, regardless of whether a subcontractor has filed such statements (but see 279C.845(1) regarding the requirement for both contractors and subcontractors to file certified statements with the Contracting Agency). See BOLI rule at OAR 839-025-0010.

STATUTORY/OTHER AUTHORITY: ORS 279A.065, ORS 279C.845

STATUTES/OTHER IMPLEMENTED: ORS 279C.560, ORS 279C.570, ORS 701.420