

OFFICE OF THE SECRETARY OF STATE

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ARCHIVES DIVISION

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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 137
DEPARTMENT OF JUSTICE

FILED
11/09/2023 1:24 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Amends rules governing the Attorney General's Model Rules for Public Contracting Division 47

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/21/2023 5:00 PM

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

CONTACT: Jeffrey Wheeler
503-947-4342
2023MRPublicContracting@doj.state.or.us

Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301

Filed By:
Angie Emmert
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 12/15/2023

TIME: 1:00 PM - 3:00 PM

OFFICER: Jeffrey Wheeler

REMOTE MEETING DETAILS

MEETING URL: [Click here to join the meeting](#)

PHONE NUMBER: 323-792-6149

CONFERENCE ID: 631643514

SPECIAL INSTRUCTIONS:

[https://teams.microsoft.com/l/meetup-](https://teams.microsoft.com/l/meetup-join/19%3ameeting_Zjc0N2I5NTEtOTg4My00MWQwLTg1ZjQtMDdINTM4MWU3ZTEy%40thread.v2/0?context=%7b%22Tid%3a%22%3a%22%20id%22%3a%22e9770393-5708-4dc1-9af1-217d32e9c271%22%7d)

[join/19%3ameeting_Zjc0N2I5NTEtOTg4My00MWQwLTg1ZjQtMDdINTM4MWU3ZTEy%40thread.v2/0?context=%7b%22Tid%3a%22%3a%22%20id%22%3a%22e9770393-5708-4dc1-9af1-217d32e9c271%22%7d](https://teams.microsoft.com/l/meetup-join/19%3ameeting_Zjc0N2I5NTEtOTg4My00MWQwLTg1ZjQtMDdINTM4MWU3ZTEy%40thread.v2/0?context=%7b%22Tid%3a%22%3a%22%20id%22%3a%22e9770393-5708-4dc1-9af1-217d32e9c271%22%7d)

To receive a link by email, please contact: 2023MRPublicContracting@doj.state.or.us

NEED FOR THE RULE(S)

These rule amendments are needed to address changes to clarify provisions of existing rules, remove language that is no longer operative, and provide technical edits.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

None

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

A rules advisory committee (RAC) representing persons and communities likely to be affected by the rule amendments was convened and the RAC determined that the rule amendments will not affect racial equity in this state.

FISCAL AND ECONOMIC IMPACT:

The RAC did not identify a fiscal or economic impact resulting from these rule amendments.

COST OF COMPLIANCE:

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

(1) The proposed changes to Division 47 are unlikely to economically affect state agencies, units of local government, or members of the public. The proposed changes remove provisions that are no longer applicable and clean-up of references to old Session Laws.

(2) The proposed changes to Division 47 are unlikely to have an impact on small businesses. (a) None; (b) None; and (c) No known increased administrative costs resulting from these proposed rule changes.

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

The RAC included various business associations and councils that include small businesses. Small businesses, as well as the general public, are invited to provide public comment on whether other options should be considered for these rule amendments.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

137-047-0250, 137-047-0255, 137-047-0260, 137-047-0261, 137-047-0500

AMEND: 137-047-0250

RULE SUMMARY: Updated Session Law references with applicable statutory reference

- Section (2): section 2 to 4 of Oregon Laws 2009, chapter 880 updated to ORS 279B.030, 279B.033 and ORS 279B.036
- Section (3): Oregon Laws 2009, chapter 880, section 3 updated to ORS 279B.033 and Oregon Laws 2009, section 4 updated to ORS 279B.036
- Section (4): Oregon Laws 2009, section 4 updated to ORS 279B.036
- Section (5): Section 3 of Oregon Laws 2009, chapter 880 updated to ORS 279B.036
- Section (5)(b)(F): Oregon Laws 2009, chapter 880, section 3(1)(a) updated to ORS 279B.033
- Section (5)(c)(D): Oregon Laws 2009, chapter 880, section 3(1)(b) updated to ORS 279B.033

CHANGES TO RULE:

137-047-0250

Source Selection ¶

~~Methods of Source Selection; Feasibility Determination; Cost Analysis ¶~~

(1) Except as permitted by ORS 279B.065 through 279B.085 and 279A.200 through 279A.225, a Contracting Agency shall Award a Contract for Goods or Services, or both based on Offers received in response to either competitive sealed Bids pursuant to 279B.055 or competitive sealed Proposals pursuant to 279B.060. ¶

(2) Written Cost Analysis for Contracts for Services. Before conducting the Procurement of a Contract for Services that is subject to ~~sections 2 to 4 of Oregon Laws 2009, chapter 880~~ ORS 279B.030, 279B.033, and ORS 279B.036, a Contracting Agency must, in the absence of a determination under section 34 of that enactment that performing the services with the Contracting Agency's own personnel and resources is not feasible, conduct a

Written cost analysis.¶

(3) Feasibility Determination for Contracts for Services. A Contracting Agency may proceed with the procurement of a Contract for Services without conducting a cost analysis under ~~Oregon Laws 2009, chapter 880, section 3, RS 279B.033~~ if the Contracting Agency makes Written findings that one or more of the special circumstances described in ~~Oregon Laws 2009, chapter 880, section 4~~ ORS 279B.036, make the Contracting Agency's use of its own personnel and resources to provide the Services not feasible.¶

(4) Special Circumstances. The special circumstances identified in ~~Oregon Laws 2009, section 4~~ RS 279B.036 that require a Contracting Agency to procure the Services by Contract include any circumstances, conditions or occurrences that would make the Services, if performed by the Contracting Agency's employees, incapable of being managed, utilized or dealt with successfully in terms of the quality, timeliness of completion, success in obtaining desired results, or other reasonable needs of the Contracting Agency.¶

(5) Written Cost Analysis under ~~Section 3 of Oregon Laws 2009, chapter 880~~ ORS 279B.036.¶

(a) Basic Comparison. The Written cost analysis must compare an estimate of the Contracting Agency's cost of performing the Services with an estimate of the cost a potential Contractor would incur in performing the Services. However, The Contracting Agency may proceed with the Procurement for Services only if it determines that the Contracting Agency would incur more cost in performing the Services with the Contracting Agency's own personnel than it would incur in procuring the Services from a Contractor. In making this determination, the cost the Contracting Agency would incur in procuring the Services from a Contractor includes the fair market value of any interest in equipment, materials or other assets the Contracting Agency will provide to the Contractor for the performance of the Services.¶

(b) Costs of Using Contracting Agency's Own Personnel and Resources. When estimating the Contracting Agency's cost of performing the Services, the Contracting Agency shall consider cost factors that include:¶

(A) The salary or wage and benefit costs for the employees of the Contracting Agency who would be directly involved in performing the Services, to the extent those costs reflect the proportion of the activity of those employees in the direct provision of the Services. These costs include those salary or wage and benefit costs of the employees who inspect, supervise or monitor the performance of the Services, to the extent those costs reflect the proportion of the activity of those employees in the direct inspection, supervision, or monitoring of the performance of the subject Services.¶

(B) The material costs necessary to the performance of the Services, including the costs for space, energy, transportation, storage, equipment and supplies used or consumed in the provision of the Services.¶

(C) The costs incurred in planning for, training for, starting up, implementing, transporting and delivering the Services.¶

(D) Any costs related to stopping and dismantling a project or operation because the Contracting Agency intends to procure a limited quantity of Services or to procure the Services within a defined or limited period of time.¶

(E) The miscellaneous costs related to performing the Services. These costs exclude the Contracting Agency's indirect overhead costs for existing salaries or wages and benefits for administrators, and exclude costs for rent, equipment, utilities and materials, except to the extent the cost items identified in this sentence are attributed solely to performing the Services and would not be incurred unless the Contracting Agency performed the Services.¶

(F) ~~Oregon Laws 2009, chapter 880, section 3(1)(a)~~ RS 279B.033 provides that an estimate of the Contracting Agency's costs of performing the Services includes the costs described in subsections (5)(b)(A) through (E) of this rule. Therefore, those costs do not constitute an exclusive list of cost information. A Contracting Agency may consider other reliable information that bears on the cost to the Contracting Agency of performing the Services. For example, if the Contracting Agency has accounted for its actual costs of performing the Services under consideration, or reasonably comparable Services, in a relatively recent Services project, the Contracting Agency may consider those actual costs in making its estimate.¶

(c) Costs a Potential Contractor Would Incur. When estimating the costs a potential Contractor would incur in performing the Services, the Contracting Agency shall consider cost factors that include:¶

(A) The average or actual salary or wage and benefit costs for Contractors and Contractor employees:¶

(i) Who work in the business or industry most closely involved in performing the Services; and¶

(ii) Who would be necessary and directly involved in performing the Services or who would inspect, supervise or monitor the performance of the Services.¶

(B) The material costs necessary to the performance of the Services, including the costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies used or consumed in the provision of the Services.¶

(C) The miscellaneous costs related to performing the Services. These miscellaneous costs include reasonably foreseeable fluctuations in the costs listed in subsections (5)(c)(A) and (B) of this rule over the expected duration of the Procurement.¶

(D) ~~Oregon Laws 2009, chapter 880, section 3(1)(b)~~ RS 279B.033¶

provides that an estimate of the costs a potential Contractor would incur in performing the Services includes the costs described in subsections (5)(c)(A) through (C) of this rule. Therefore, those costs do not constitute an exclusive list of cost information. A Contracting Agency may consider other reliable information that bears on the costs a potential Contractor would incur. For example, if the Contracting Agency, in the reasonably near past, received Bids or Proposals for the performance of the Services under consideration, or reasonably comparable Services, the Contracting Agency may consider the pricing offered in those Bids or Proposals in making its estimate. Similarly, the Contracting Agency may consider what it actually paid out under a Contract for the same or similar Services. For the purposes of these examples, the reasonably near past is limited to Contracts, Bids or Proposals entered into or received within the five years preceding the date of the cost estimate. The Contracting Agency must take into account, when considering the pricing offered in previous Bids, Proposals or Contracts, adjustments to the pricing in light of measures of market price adjustments like the consumer price indexes that apply to the Services.¶

(6) Decision Based on Cost Comparison. After comparing the difference between the costs estimated for the Contracting Agency to perform the Services under section (5)(b) and the estimated costs a potential Contractor would incur in performing the Services under section (5)(c), the Contracting Agency may proceed with the Procurement only if the Contracting Agency would incur more cost in performing the Services with the agency's own personnel and resources than it would incur in procuring the Services from a Contractor.¶

(7) Exception Based on Salaries or Wages and Benefits. If the sole reason that the costs estimated for the Contracting Agency to perform the Services under section (5)(b) exceed the estimated costs a potential Contractor would incur in performing the Services under section (5)(c) is because the average or actual salary or wage and benefit costs for Contractors and their employees estimated under subsection (5)(c)(A) are lower than the salary or wage and benefit costs for employees of the Contracting Agency under subsection (5)(b)(A), then the Contracting Agency may not proceed with the Procurement.¶

(8) Exception Based on Lack of Contracting Agency Personnel and Resources; Reporting. In cases in which the Contracting Agency determines that it would incur less cost in providing the Services with its own personnel and resources, the Contracting Agency nevertheless may proceed with the Procurement if, at the time the Contracting Agency intends to conduct the Procurement, the Contracting Agency determines that it lacks personnel and resources to perform the Services within the time the Contracting Agency requires them. When a Contracting Agency conducts a Procurement under this section, the Contracting Agency must:¶

(a) Make and keep a Written determination that it lacks personnel and resources to perform the Services within the time the Contracting Agency requires them and of the basis for the Contracting Agency's decision to proceed with the Procurement.¶

(b) If the Contracting Agency is a Local Contracting Agency, provide to its Local Contract Review Board, each calendar quarter, copies of each Written cost analysis and Written determination.¶

(c) If the Contracting Agency is a State Contracting Agency, provide to the Emergency Board, each calendar quarter, copies of each Written cost analysis and Written determination.¶

(d) If the Contracting Agency is a State Contracting Agency, prepare a request to the Governor for an appropriation and authority necessary for the State Contracting Agency to hire personnel and obtain resources necessary to perform the Services that are the subjects of the Written cost analyses and Written determinations within the time needed by the State Contracting Agency. The request to the Governor must include copies of the records submitted to the Emergency Board under subsection (8)(c) of this rule.

Statutory/Other Authority: ORS 279A.065, OL 2009, c 880, ¶¶ 3, ¶¶ 4

Statutes/Other Implemented: ORS 279B.050, OL 2009, c 880, ¶ 2-4

AMEND: 137-047-0255

RULE SUMMARY: Updated Session Law references with applicable statutory reference

- Section (2)(b): Oregon Laws 2009, chapter 880, section 5 updated to ORS 279B.055
- Section (2)(f): Oregon Laws 2009, chapter 880, section 5 updated to ORS 279B.055

CHANGES TO RULE:

137-047-0255

Competitive Sealed Bidding ¶

(1) Generally. A Contracting Agency may procure Goods or Services by competitive sealed bidding as set forth in ORS 279B.055. An Invitation to Bid is used to initiate a competitive sealed bidding solicitation and shall contain the information required by 279B.055(2) and by section 2 of this rule. The Contracting Agency shall provide public notice of the competitive sealed bidding solicitation as set forth in OAR 137-047-0300.¶

(2) Invitation to Bid. In addition to the provisions required by ORS 279B.055(2), the Invitation to Bid shall include the following:¶

(a) General Information.¶

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

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

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

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

(B) The form and instructions for submission of Bids and any other special information, e.g., whether Bids may be submitted by electronic means (See OAR 137-047-0330 for required provisions of electronic Bids);¶

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

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

(E) A statement that each Bidder must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120(1);¶

(F) Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-046-0210(2)); and¶

(G) How the Contracting Agency will notify Bidders of Addenda and how the Contracting Agency will make Addenda available (See OAR 137-047-0430).¶

(b) Contracting Agency Need to Purchase. The character of the Goods or Services the Contracting Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ~~Oregon Laws 2009, chapter 880, section~~ ORS 279B.055, the Contracting Agency's description of its need to purchase must:¶

(A) Identify the scope of the work to be performed under the resulting Contract, if the Contracting Agency awards one;¶

(B) Outline the anticipated duties of the Contractor under any resulting Contract;¶

(C) Establish the expectations for the Contractor's performance of any resulting Contract; and¶

(D) Unless the Contracting Agency for Good Cause specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the Contracting Agency is purchasing.¶

(c) Bidding and Evaluation Process.¶

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

(B) The Contracting Agency shall set forth objective evaluation criteria in the Solicitation Document in accordance with the requirements of ORS 279B.055(6)(a). Evaluation criteria need not be precise predictors of actual future costs, but to the extent possible, the evaluation factors shall be reasonable estimates of actual future costs based on information the Contracting Agency has available concerning future use; and¶

(C) If the Contracting Agency intends to Award Contracts to more than one Bidder pursuant to OAR 137-047-0600(4)(c), the Contracting Agency shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award.¶

(d) Applicable preferences pursuant to ORS 279B.055(6)(b).¶

(e) For Contracting Agencies subject to ORS 305.385, Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385.¶

(f) All contractual terms and conditions in the form of Contract provisions the Contracting Agency determines are applicable to the Procurement. As required by ~~Oregon Laws 2009, chapter 880, section~~ RS 279B.055, the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of

work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:¶¶

(A) The Contracting Agency's reduction or withholding of payment under the Contract;¶¶

(B) The Contracting Agency's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the statement of work or to meet the performance standards established by the resulting Contract; and¶¶

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

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

(a) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;¶¶

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

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

(d) Any other circumstances in which Contracting Agency's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs the Contracting Agency's practical need for the highest prevalent standard in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279B.055

AMEND: 137-047-0260

RULE SUMMARY: In Section (6), the deletion of provisions addressing waiver of the 30% requirement since the law requiring agencies to adhere to a 30% weighting requirement in evaluation sunseted.

CHANGES TO RULE:

137-047-0260

Competitive Sealed Proposals ¶¶

(1) Generally. A Contracting Agency may procure Goods or Services by competitive sealed Proposals as set forth in ORS 279B.060. A Contracting Agency shall use a Request for Proposal to initiate a competitive sealed Proposal solicitation. The Request for Proposal must contain the information required by 279B.060(2) and by section (2) of this rule. The Contracting Agency shall provide public notice of the Request for Proposal as set forth in OAR 137-047-0300.¶¶

(2) Request for Proposal. In addition to the provisions required by ORS 279B.060(2), the Request for Proposal must include the following:¶¶

(a) General Information.¶¶

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

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

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

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

(B) The form and instructions for submission of Proposals and any other special information, e.g., whether Proposals may be submitted by electronic means. (See OAR 137-047-0330 for required provisions of electronic Proposals);¶¶

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

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

(E) Proposer's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-046-0210(2)); and¶¶

(F) How the Contracting Agency will notify Proposers of Addenda and how the Contracting Agency will make Addenda available. (See OAR 137-047-0430).¶¶

(b) Contracting Agency Need to Purchase. The character of the Goods or Services the Contracting Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.060(2)(c), the Contracting Agency's description of its need to purchase must:¶¶

(A) Identify the scope of the work to be performed under the resulting Contract, if the Contracting Agency awards one;¶¶

(B) Outline the anticipated duties of the Contractor under any resulting Contract;¶¶

(C) Establish the expectations for the Contractor's performance of any resulting Contract; and¶¶

(D) Unless the Contractor under any resulting Contract will provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services that are subject to ORS 279C.100 to 279C.125, or the Contracting Agency for Good Cause specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the Contracting Agency is purchasing.¶¶

(c) Proposal and Evaluation Process.¶¶

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

(B) The Contracting Agency shall set forth selection criteria in the Solicitation Document in accordance with the requirements of ORS 279B.060(3)(e). Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, the criteria shall:¶¶

(i) Afford the Contracting Agency the ability to compare the Proposals and Proposers, applying the same standards of comparison to all Proposers;¶¶

(ii) Rationally reflect Proposers' abilities to perform the resulting Contract in compliance with the Contract's requirements; and¶¶

(iii) Permit the Contracting Agency to determine the relative pricing offered by the Proposers, and to reasonably estimate the costs to the Contracting Agency of entering into a Contract based on each Proposal, considering information available to the Contracting Agency and subject to the understanding that the actual Contract costs may vary as a result of the Statement of Work ultimately negotiated or the quantity of Goods or Services for which the Contracting Agency contracts.¶¶

(C) If the Contracting Agency's solicitation process calls for the Contracting Agency to establish a Competitive

Range, the Contracting Agency shall generally describe, in the Solicitation Document, the criteria or parameters the Contracting Agency will apply to determine the Competitive Range. The Contracting Agency, however, subsequently may determine or adjust the number of Proposers in the Competitive Range in accordance with OAR 137-047-0261(6).¶

(d) Applicable Preferences, including those described in ORS 279A.120, 279A.125(2) and 282.210.¶

(e) For Contracting Agencies subject to ORS 305.385, the Proposers' certification of compliance with the Oregon tax laws in accordance with ORS 305.385.¶

(f) All contractual terms and conditions the Contracting Agency determines are applicable to the Procurement. The Contracting Agency's determination of contractual terms and conditions that are applicable to the Procurement may take into consideration, as authorized by ORS 279B.060(3), those contractual terms and conditions the Contracting Agency will not include in the Request for Proposal because the Contracting Agency either will reserve them for negotiation, or will request Proposers to offer or suggest those terms or conditions. (See OAR 137-047-0260(3)).¶

(g) As required by ORS 279B.060(2)(h), the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:¶

(A) The Contracting Agency's reduction or withholding of payment under the Contract;¶

(B) The Contracting Agency's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the scope of work or to meet the performance standards established by the resulting Contract; and¶

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

(3) The Contracting Agency may include the applicable contractual terms and conditions in the form of Contract provisions, or legal concepts to be included in the resulting Contract. Further, the Contracting Agency may specify that it will include or use Proposer's terms and conditions that have been pre-negotiated under OAR 137-047-0550(3), but the Contracting Agency may only include or use a Proposer's pre-negotiated terms and conditions in the resulting Contract to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. The Contracting Agency shall not agree to any Proposer's terms and conditions that were expressly rejected in a solicitation protest under OAR 137-047-0420.¶

(4) For multiple Award Contracts, the Contracting Agency may enter into Contracts with different terms and conditions with each Contractor to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. The Contracting Agency shall not agree to any Proposer's terms and conditions that were expressly rejected in a solicitation protest under OAR 137-047-0420.¶

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

(a) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;¶

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

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

(d) That other circumstances exist in which the Contracting Agency's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs the Contracting Agency's practical need for the highest standard prevalent in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract.¶

~~(6) Waiver of Thirty Percent to Contract Price Weighting Requirement. ORS 279B.060(3)(e) and (9)(a) generally require a state Contracting Agency, when soliciting a Contract for Goods or Services using a Request for Proposal Contractor selection method, to give the proposed Contract price not less than thirty percent of the total weight that the agency gives to the total of all factors in the agency's final evaluation of a Proposal. ORS 279B.060(9)(b), however, empowers the director or other head of a state Contracting Agency to waive the at least thirty percent-~~

to Contract price final evaluation weighting requirement if the director or agency head makes a determination that a waiver is in the best interest of the state Contracting Agency. For the purposes of ORS 279B.060(9)(b), a determination that the waiver of the weighting requirement in ORS 279B.060(3)(e) and (9)(a) is in the best interest of the state Contracting Agency may be based on factors that may include, but are not limited to, any one or a combination of the following:¶¶

(a) Circumstances that support a finding that the requirement would unreasonably limit competition for the advertised Contract or would frustrate the procurement objectives of the state Contracting Agency. For example, where the state Contracting Agency is attempting to attract competition from smaller firms (like businesses owned by service-disabled veterans or emerging small business enterprises that are certified under ORS 200.055), allocating a substantial proportion of the weighting to Contract price may make larger, higher-volume firms disproportionately price-competitive, thereby impairing the smaller firms' chances of securing a Contract award.¶¶

(b) Where the state Contracting Agency will use the Goods or Services over a significant period, so that the long-term costs of acquiring, using, or maintaining them constitutes a more important consideration than just the Contract price. Procurements in which the evaluation of life cycle costing will yield a more accurate assessment of the overall cost to the Contracting Agency or to the public fall within this category.¶¶

(c) Procurements in which the value or results of a successfully performed Contract or project are more important than the amount of direct payments under the Contract to be awarded.¶¶

(d) Procurements in which the adverse effects (which may include costs or losses) of project failure or of a failure in Contract performance can be anticipated to significantly outweigh the state Contracting Agency's burden of paying the Contract price.¶¶

(e) Circumstances in which the Contract price for the development or production of a design, process, or business solution are projected to be significantly less than the cost to the state Contracting Agency of implementing, operating, or maintaining the resulting design, process, or solution.¶¶

(f) Circumstances in which the Contract price for the development or production of a design, process, or business solution is projected to be significantly less than the monetary value to the state Contracting Agency of the successful implementation or the successful operation of the resulting design, process, or solution.¶¶

(g) Situations in which the savings the state Contracting Agency will realize from using the design, process, or solution that will result from the performance of the anticipated Contract will be more significant than the amount of the Contract price the state Contracting Agency will pay under the Contract.¶¶

(h) Conditions under which the consulting guidance or value-engineering assistance to be provided by the Contractor have the potential to produce long-term savings for the state Contracting Agency or for the public that will significantly exceed the anticipated Contract price of the advertised Contract. Examples may include circumstances in which Contractor expertise or experience in the selection of "next stage" products, configurations, or components for the completion of a project or for the operation of a system or of equipment likely will yield savings or efficiencies that eclipse the amount of the Contract price.¶¶

(i) Where the expertise, experience, or precision that a Contractor must provide in the performance of a service Contract or of a Contract for both Goods and Services is demonstrably more critical to the satisfaction of the state Contracting Agency's procurement objectives than the direct Contract price.¶¶

(j) Circumstances in which giving greater weight to the Proposers' satisfaction of technical, standard, dimensional, or mathematical specifications, and lesser weight to Contract price, will better ensure that the Goods or Services will be compatible with or will operate efficiently or effectively with components, equipment, parts, Services, or information technology (including hardware, Services, or software) with which the Goods or Services will be used, integrated, or coordinated.¶¶

(k) Where the Procurement represents the first or an early phase in a multiple phase project or in a multiple set of related Contract solicitations and the results of the Contract award under the Procurement can be anticipated to significantly affect the amount of the state Contracting Agency's costs in subsequent phases or solicitations.¶¶

(L) Where the state Contracting Agency employs serial negotiations or competitive simultaneous negotiations under ORS 279B.060(8), and the application of the weighting requirement in ORS 279B.060(3)(e) and (9)(a) could inhibit flexibility in negotiations or impede the ability of the agency or the Proposers to arrive at the most beneficial overall combination of Public Contract elements.¶¶

(m) Any other circumstances in which the Contracting Agency's interest in achieving economy, efficiency, compatibility, or availability in the Procurement of the Goods or Services significantly outweighs the Contract price the state Contracting Agency anticipates to pay under the advertised Contract.¶¶

(7) The director or head of a state Contracting Agency, or the designee of the director or agency head, must document in the Procurement file the basis for any determination that the waiver of the thirty percent weighting requirement is in the best interest of the Contracting Agency. A director or head of a state Contracting Agency, or the designee of the director or agency head, must report each waiver of that requirement to the Director of the Department of Administrative Services in a Written report that outlines the reasons for the waiver. The

requirement to report each waiver to the Director of the Department of Administrative Services does not apply to the Secretary of State or the State Treasurer.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279B.060, OL 2015, ch 325 (HB 2716)

AMEND: 137-047-0261

RULE SUMMARY: In Section (12), the deletion of provisions addressing waiver of the 30% requirement since the law requiring agencies to adhere to a 30% weighting requirement in evaluation sunseted.

CHANGES TO RULE:

137-047-0261

Multi-tiered and Multistep Proposals ¶¶

(1) Generally. A Contracting Agency may use one or more, or any combination, of the methods of Contractor selection set forth in ORS 279B.060(7), 279B.060(8) and this rule to procure Goods or Services. In addition to the procedures set forth in OAR 137-047-0300 through 137-047-0490 for methods of Contractor selection, a Contracting Agency may provide for a multi-tiered or multistep selection process that permits award to the highest ranked Proposer at any tier or step, calls for the establishment of a Competitive Range, or permits either serial or competitive simultaneous discussions or negotiations with one or more Proposers.¶¶

(2) When conducting a multi-tiered or multistep selection process, a Contracting Agency may use any combination or series of Proposals, discussions, negotiations, demonstrations, offers, or other means of soliciting information from Proposers that bears on the selection of a Contractor or Contractors. In multi-tiered and multistep competitions, a Contracting Agency may use these means of soliciting information from prospective Proposers and Proposers in any sequence or order, and at any stage of the selection process, as determined in the discretion of the Contracting Agency.¶¶

(3) When a Contracting Agency's Request for Proposals prescribes a multi-tiered or multistep Contractor selection process, a Contracting Agency nevertheless may, at the completion of any stage in the competition and on determining the Most Advantageous Proposer (or, in multiple-award situations, on determining the awardees of the Public Contracts), award a Contract (or Contracts) and conclude the Procurement without proceeding to subsequent stages. The Contracting Agency also may, at any time, cancel the Procurement under ORS 279B.100.¶¶

(4) Exclusion Protest. A Contracting Agency may provide, before the notice of an intent to Award, an opportunity for a Proposer to protest exclusion from the Competitive Range or from subsequent phases of multi-tiered or multistep sealed Proposals as set forth in OAR 137-047-0720.¶¶

(5) Award Protest. A Contracting Agency shall provide an opportunity to protest its intent to Award a Contract pursuant to ORS 279B.410 and OAR 137-047-0740. An Affected Offeror may protest, for any of the bases set forth in 137-047-0720(2), its exclusion from the Competitive Range or from any phase of a multi-tiered or multistep sealed Proposal process, or may protest an Addendum issued following initial Closing, if the Contracting Agency did not previously provide Proposers the opportunity to protest the exclusion or Addendum. The failure to protest shall be considered the Proposer's failure to pursue an administrative remedy made available to the Proposer by the Contracting Agency.¶¶

(6) Competitive Range. When a Contracting Agency's solicitation process conducted under ORS 279B.060(8) calls for the Contracting Agency to establish a Competitive Range at any stage in the Procurement process, the Contracting Agency may do so as follows:¶¶

(a) Determining Competitive Range.¶¶

(A) The Contracting Agency may establish a Competitive Range after evaluating all Responsive Proposals in accordance with the evaluation criteria in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria in the Request for Proposals, the Contracting Agency may determine and rank the Proposers in the Competitive Range. Notwithstanding the foregoing, however, in instances in which the Contracting Agency determines that a single Proposer has a reasonable chance of being determined the most Advantageous Proposer, the Contracting Agency need not determine or rank Proposers in the Competitive Range. In addition, notwithstanding the foregoing, a Contracting Agency may establish a Competitive Range of all Proposers to enter into discussions to correct deficiencies in Proposals.¶¶

(B) The Contracting Agency may establish the number of Proposers in the Competitive Range in light of whether the Contracting Agency's evaluation of Proposals identifies a number of Proposers who have a reasonable chance of being determined the most Advantageous Proposer, or whether the evaluation establishes a natural break in the scores of Proposers that indicates that a particular number of Proposers are closely competitive or have a reasonable chance of being determined the most Advantageous Proposer.¶¶

(b) Protesting Competitive Range. The Contracting Agency must provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Contracting Agency may provide an opportunity for Proposers excluded from the Competitive Range to protest the Contracting Agency's evaluation and determination of the Competitive Range in accordance with OAR 137-047-0720.¶¶

(7) Discussions. The Contracting Agency may initiate oral or written discussions with all "eligible Proposers" on subject matter within the general scope of the Request for Proposals. In conducting discussions, the Contracting

Agency:¶¶

- (a) Shall treat all eligible Proposers fairly and shall not favor any eligible Proposer over another;¶¶
- (b) May disclose other eligible Proposers' Proposals or discussions only in accordance with ORS 279B.060(8)(b) or (c);¶¶
- (c) May adjust the evaluation of a Proposal as a result of discussions. The conditions, terms, or price of the Proposal may be changed during the course of the discussions provided the changes are within the scope of the Request for Proposals.¶¶
- (d) At any time during the time allowed for discussions, the Contracting Agency may:¶¶
 - (A) Continue discussions with a particular eligible Proposer;¶¶
 - (B) Terminate discussions with a particular eligible Proposer and continue discussions with other eligible Proposers; or¶¶
 - (C) Conclude discussions with all remaining eligible Proposers and provide, to the then-eligible Proposers, notice requesting best and final Offers.¶¶
- (8) Negotiations. A Contracting Agency may commence serial negotiations with the highest-ranked eligible Proposer or commence simultaneous negotiations with all eligible Proposers. A Contracting Agency may negotiate:¶¶
 - (a) The statement of work;¶¶
 - (b) The Contract Price as it is affected by negotiating the statement of work and other terms and conditions authorized for negotiation in the Request for Proposals or Addenda thereto; and¶¶
 - (c) Any other terms and conditions reasonably related to those authorized for negotiation in the Request for Proposals or Addenda thereto. Proposers shall not submit for negotiation, and a Contracting Agency shall not accept, alternative terms and conditions that are not reasonably related to those authorized for negotiation in the Request for Proposals or any Addendum.¶¶
- (9) Terminating Negotiations. At any time during discussions or negotiations a Contracting Agency conducts under this rule, the Contracting Agency may terminate discussions or negotiations with the highest-ranked Proposer, or the eligible Proposer with whom it is currently discussing or negotiating, if the Contracting Agency reasonably believes that:¶¶
 - (a) The eligible Proposer is not discussing or negotiating in good faith; or¶¶
 - (b) Further discussions or negotiations with the eligible Proposer will not result in the parties agreeing to the terms and conditions of a Contract in a timely manner.¶¶
 - (c) Continuing Serial Negotiations. If the Contracting Agency is conducting serial negotiations and the Contracting Agency terminates negotiations with an eligible Proposer, the Contracting Agency may then commence negotiations with the next highest scoring eligible Proposer, and continue the sequential process until the Contracting Agency has either:¶¶
 - (A) Determined to Award the Contract to the eligible Proposer with whom it is currently discussing or negotiating; or¶¶
 - (B) Decided to cancel the Procurement under ORS 279B.100.¶¶
- (d) Competitive Simultaneous Negotiations. If the Contracting Agency chooses to conduct competitive negotiations, the Contracting Agency may negotiate simultaneously with competing eligible Proposers. The Contracting Agency:¶¶
 - (A) Shall treat all eligible Proposers fairly and shall not favor any eligible Proposer over another;¶¶
 - (B) May disclose other eligible Proposers' Proposals or the substance of negotiations with other eligible Proposers only if the Contracting Agency notifies all of the eligible Proposers with whom the Contracting Agency will engage in negotiations of the Contracting Agency's intent to disclose before engaging in negotiations with any eligible Proposer.¶¶
 - (e) Any oral modification of a Proposal resulting from negotiations must be reduced to Writing.¶¶
- (10) Best and Final Offers. If a Contracting Agency requires best and final Offers, a Contracting Agency must establish a common date and time by which eligible Proposers must submit best and final Offers. If a Contracting Agency is dissatisfied with the best and final Offers, the Contracting Agency may make a written determination that it is in the Contracting Agency's best interest to conduct additional discussions, negotiations or change the Contracting Agency's requirements and require another submission of best and final Offers. A Contracting Agency must inform all eligible Proposers that if they do not submit notice of withdrawal or another best and final Offer, their immediately previous Offers will be considered their best and final Offers. The Contracting Agency shall evaluate Offers as modified by the best and final Offers. The Contracting Agency shall conduct the evaluations as described in OAR 137-047-0600. The Contracting Agency may not modify evaluation factors or their relative importance after the date and time that best and final Offers are due.¶¶
- (11) Multistep Sealed Proposals. A Contracting Agency may procure Goods or Services by using multistep competitive sealed Proposals under ORS 279B.060(8)(b)(g). Multistep sealed Proposals is a phased Procurement process that seeks necessary information or unpriced technical Proposals in the first phase and, in the second

phase, invites Proposers who submitted technically qualified Proposals to submit competitive sealed price Proposals on the technical Proposals. The Contracting Agency must award the Contract to the Responsible Proposer submitting the most Advantageous Proposal in accordance with the terms of the Solicitation Document applicable to the second phase.¶¶

(a) Public Notice. When a Contracting Agency uses multistep sealed Proposals, the Contracting Agency shall give public notice for the first phase in accordance with OAR 137-047-0300. Public notice is not required for the second phase. However, a Contracting Agency shall give notice of the subsequent phases to all Proposers and inform any Proposers excluded from the second phase of the right, if any, to protest exclusion under OAR 137-047-0720.¶¶

(b) Procedure for Phase One of Multistep Sealed Proposals. A Contracting Agency may initiate a multistep sealed Proposals Procurement by issuing a Request for Proposals in the form and manner required for competitive sealed Proposals except as provided in this rule. In addition to the requirements required for competitive sealed Proposals, the multistep Request for Proposals must state:¶¶

(A) That unpriced technical Proposals are requested;¶¶

(B) That the solicitation is a multistep sealed Proposal Procurement and that, in the second phase, priced Proposals will be accepted only from those Proposers whose unpriced technical Proposals are found qualified in the first phase;¶¶

(C) The criteria for the evaluation of unpriced technical Proposals; and¶¶

(D) That the Goods or Services being procured shall be furnished generally in accordance with the Proposer's technical Proposal as found to be finally qualified and shall meet the requirements of the Request for Proposals.¶¶

(c) Addenda to the Request for Proposals. After receipt of unpriced technical Proposals, Addenda to the Request for Proposals shall be distributed only to Proposers who submitted unpriced technical Proposals.¶¶

(d) Receipt and Handling of Unpriced Technical Proposals. Unpriced technical Proposals need not be opened publicly.¶¶

(e) Evaluation of Unpriced Technical Proposals. Unpriced technical Proposals shall be evaluated solely in accordance with the criteria set forth in the Request for Proposals.¶¶

(f) Discussion of Unpriced Technical Proposals. The Contracting Agency may seek clarification of a technical Proposal of any Proposer who submits a qualified, or potentially qualified technical Proposal. During the course of such discussions, the Contracting Agency shall not disclose any information derived from one unpriced technical Proposal to any other Proposer.¶¶

(g) Methods of Contractor Selection for Phase One. In conducting phase one, a Contracting Agency may employ any combination of the methods of Contractor selection that call for the establishment of a Competitive Range or include discussions, negotiations, or best and final Offers as set forth in this rule.¶¶

(h) Procedure for Phase Two. On the completion of phase one, the Contracting Agency shall invite each qualified Proposer to submit price Proposals. A Contracting Agency shall conduct phase two as any other competitive sealed Proposal Procurement except as set forth in this rule.¶¶

(j) No public notice need be given of the request to submit price Proposals because such notice was previously given.¶¶

~~(12) Waiver of Thirty-Percent-to-Contract-Price Weighting Requirement. Under ORS 279B.060(9)(b), the director or other head of a state Contracting Agency may waive the at least thirty-percent-to-Contract-price final evaluation weighting requirement of ORS 279B.060(3)(e) and (9)(a) in the conduct of a multi-tiered or multistep selection process. In making a determination that a waiver is in the best interest of the state Contracting Agency, the director or agency head may consider the factors identified in OAR 137-047-0260(6). A director or agency head that waives the thirty percent weighting requirement must comply with the documentation and reporting requirements of OAR 137-047-0260(7).¶¶~~

~~(13) Unless the Legislative Assembly extends the thirty-percent weighting requirement of ORS 279B.060(3)(e) and (9)(a) beyond the January 2, 2020 expiration date anticipated by 2018 Oregon Laws, chapter 85, sections 4 and 8(2), OAR 137-047-0260(6) and (7) and section (12) of this rule expire on January 2, 2020.~~

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279B.060

AMEND: 137-047-0500

RULE SUMMARY: Updated Session Law references with applicable statutory reference

- Section (2): House Bill 2094 (2019 Oregon Laws, chapter 124) updated to ORS 279A.800

CHANGES TO RULE:

137-047-0500

Responsibility of Bidders and Proposers ¶¶

(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)~~ORS 279A.800), 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