

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 1:03 PM  
ARCHIVES DIVISION  
SECRETARY OF STATE

FILING CAPTION: Amends rules governing the Attorney General's Model Rules for Public Contracting Division 48.

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_Zjc0N2I5NTEtOTg4My00MWQwLTg1ZjQ0MDdINTM4MWU3ZTEy%40thread.v2/0?context=%7b%22Tic)

[join/19%3ameeting\\_Zjc0N2I5NTEtOTg4My00MWQwLTg1ZjQ0MDdINTM4MWU3ZTEy%40thread.v2/0?context=%7b%22Ticcf62-4d12-bfd5-1e71dfde39c2%22%2c%22Oid%22%3a%22e9770393-5708-4dc1-9af1-217d32e9c271%22%7d](https://teams.microsoft.com/l/meetup-join/19%3ameeting_Zjc0N2I5NTEtOTg4My00MWQwLTg1ZjQ0MDdINTM4MWU3ZTEy%40thread.v2/0?context=%7b%22Ticcf62-4d12-bfd5-1e71dfde39c2%22%2c%22Oid%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 resulting from recent legislation, clarify provisions of existing rules, remove language that is no longer operative, and provide technical edits.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

- HB 2295 (2023) <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/HB2295/Enrolled>
- HB 3055 (2021) <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/HB3055/Enrolled>

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.

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**FISCAL AND ECONOMIC IMPACT:**

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

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**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 48 are unlikely to economically affect state agencies, units of local government, or members of the public. Many of the proposed changes clean-up references to Session Laws or generally improve grammar. Other changes revise the definition of entities entitled to preferences, or to clarify the scope of entities that may be covered by a specific statutory provision, in line with the statutory changes. Contracting agencies, both state and local, could experience a de minimis economic impact depending on how the contracting agency chooses to implement the new requirements of OAR 137-048-0130(11).

(2) The proposed changes to Division 48 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.

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**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.

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**WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES**

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**RULES PROPOSED:**

137-048-0130, 137-048-0220

AMEND: 137-048-0130

**RULE SUMMARY:** • In Section (8), edits made to clarify that the statutory prohibition set out in ORS 279C.307 applies equally to those individuals or entities that the rules specifically define as a “consultant.” These edits also include the addition of pinpoint citations and grammatical improvements.

- In Section (9), edits made to clarify that the statutory prohibition set out in ORS 279C.307 applies equally to those individuals or entities that the rules specifically define as a “consultant.” These edits also include the addition of pinpoint citations and grammatical improvements.
- In Section (10), edits include the addition of pinpoint citations and grammatical improvements.
- In Section (11), a new subsection was added to augment the “exception” process set forth in ORS 279C.307(3).

**CHANGES TO RULE:**

137-048-0130

Applicable Selection Procedures; Pricing Information; Disclosure of Proposals; Conflicts of Interest ¶¶

(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(1), 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 Consultant or an affiliate of a Contractor or Consultant who is a party to the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the Personal Services; or¶

(b) Procure the Personal Services 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(1) and section (8) of this rule apply in the following circumstances, except as provided in sections (10) and (11) 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 restriction requirements 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 or Consultant providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or the performance of a construction Contractor under a Public Contract for construction services 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 or Consultant 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 restriction requirements of ORS 279C.307(1) and section (8) of this rule 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 restriction requirements 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 restriction requirements 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.¶

(11) As permitted by ORS 279C.307(3), a Contracting Agency may apply for an exception to the requirements of ORS 279C.307(1) in the situation when the Contracting Agency anticipates that it must procure 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, and the Contracting Agency desires to accept a Bid or other Proposal from a Contractor or Consultant that would otherwise be prohibited from bidding or proposing to provide the required Personal Services. In order for the Contracting Agency to obtain such an exception to the requirements of ORS 279C.307(1), the Contracting Agency must apply for and obtain an approved exception from the Appropriate Authority for the Contracting Agency before awarding a contract to the Contractor or Consultant under a Procurement for the required Personal Services, or before entering into an amendment of an existing Public Contract with the Contractor or Consultant to obtain the Personal Services.¶

(a) Application Requirements. The Contracting Agency's application to the Appropriate Authority for an exception under ORS 279C.307(3) must include the following Findings and Justifications:¶

(A) The Contracting Agency requires the Personal Services described in ORS 279C.307(1); ¶

(B) Accepting a Bid or Proposal from a Contractor or Consultant that would be subject to the prohibition described in ORS 279C.307(1) is in the best interest of the Contracting Agency;¶

(C) Approving the exception is unlikely to encourage favoritism in awarding Public Contracts or to substantially diminish competition for Public Contracts; and¶

(D) Approving the exception: ¶

(i) Is reasonably expected to result in substantial cost savings to the Contracting Agency or the public; or¶

(ii) Otherwise will substantially promote the public interest in a manner that could not be practicably realized by complying with the prohibition described in ORS 279C.307(1).¶

(b) Consultation with Legal Counsel. A Contracting Agency shall consult with the Contracting Agency's legal counsel during the exception process provided for in ORS 279C.307(3) as follows:¶

(A) During the process of preparing an application for the exception to ensure compliance with the requirements of ORS 279C.307 and with the other applicable provisions of ORS Chapter 279C;¶

(B) Pursuant to the requirements of an ORS 279C.307(3) exception approved by the Contracting Agency's Appropriate Authority; and¶

(C) The Contracting Agency's consultation with its legal counsel should include discussion and evaluation of mitigation measures that the Contracting Agency can include in the Procurement and in any resulting Public Contract for the Personal Services, in order to reduce any competitive advantage that the Contractor or Consultant may have or may be perceived to have, and to increase the objectivity and independence of the Contractor or Consultant during its performance of the Personal Services.¶

(c) Definitions. The following definitions apply to section (11) of this rule: ¶

(A) "Appropriate Authority" means, for a State Contracting Agency, the Director of the Oregon Department of Administrative Services; for the Oregon Department of Transportation pursuant to ORS 279A.050(3)(b), the Director of Transportation; and, for a Local Contracting Agency, the Local Contracting Agency's local contract review board; and ¶

(B) "Findings and Justifications" means the determinations, findings and justifications for a conclusion that a Contracting Agency, in seeking an exception from the objectivity and independence requirements of ORS 279C.307(1), reaches based on the considerations set forth in ORS 279C.307(3)(d) and based on sufficient supporting facts.

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: 137-048-0220

RULE SUMMARY: In Sections (2) and (4), edits made to change "service-disabled veteran business" to "veteran-owned business" in accord with HB 2295 (2023).

CHANGES TO RULE:

137-048-0220

Formal Selection Procedure ¶

(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~~ Veteran-owned 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 SDBV participation goals or good faith efforts with respect to DBE, MBE, WBE, ESB and SDBV 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)