

OFFICE OF THE SECRETARY OF STATE

LAVONNE GRIFFIN-VALADE
SECRETARY OF STATE

CHERYL MYERS
DEPUTY SECRETARY OF STATE
AND TRIBAL LIAISON



ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR

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

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 137
DEPARTMENT OF JUSTICE

FILED

11/09/2023 4:49 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Amends rules governing the Attorney General's Model Rules for Public Contracting Division 49

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_Zjc0N2I5NTEtOTg4My00MwQwLTg1ZjQtdDdINTM4MwU3ZTEy%40thread.v2/0?context=%7b%22Tid%3a%22%3a%22%20id%22%3a%22e9770393-5708-4dc1-9af1-217d32e9c271%22%7d)

[join/19%3ameeting_Zjc0N2I5NTEtOTg4My00MwQwLTg1ZjQtdDdINTM4MwU3ZTEy%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_Zjc0N2I5NTEtOTg4My00MwQwLTg1ZjQtdDdINTM4MwU3ZTEy%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 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 2649 (2023) <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/HB2649/Enrolled>
- SB 582(2023) <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/SB0582/Enrolled>
- SB 1047 (2023) <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/SB1047/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.

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) Any economic affect to state agencies, units of local government, or members of the public resulting from the proposed changes to Division 49 is likely to be minimal. Many of the proposed changes clean-up references to Session Laws or generally improve formatting and grammar. Other changes revise the definition of entities entitled to preferences in line with the statutory changes. The primary costs incurred by contracting agencies, if any, to comply with these rules would be those costs associated with updating contract templates and ensuring compliance with the updated documentation and recordkeeping requirements imposed by the updates to state statute.

(2) The proposed changes to Division 49 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:

137-049-0200, 137-049-0370, 137-049-0395, 137-049-0400, 137-049-0440, 137-049-0610, 137-049-0630, 137-049-0645, 137-049-0650, 137-049-0680, 137-049-0910

AMEND: 137-049-0200

RULE SUMMARY: In Section (1), new subsections added to provide contract terms and conditions that are required to be included when applied to certain Public Improvement projects. These subsections implement the requirements of HB 2649 (2023) and SB 582 (2023).

CHANGES TO RULE:

137-049-0200

Solicitation Documents; Required Provisions; Assignment or Transfer ¶¶

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

(a) General Information:¶¶

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

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

- (i) The time, date and location of any pre-Offer conference;¶
- (ii) Whether attendance at the conference will be mandatory or voluntary; and¶
- (iii) That statements made by the Contracting Agency's representatives at the conference are not binding upon the Contracting Agency unless confirmed by Written Addendum.¶
- (C) The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be prequalified if prequalification is a requirement;¶
- (D) The name and title of the authorized Contracting Agency Person designated for receipt of Offers and contact Person (if different);¶
- (E) Instructions and information concerning the form and submission of Offers, including the address of the office to which Offers must be delivered, any Bid or Proposal security requirements, and any other required information or special information, e.g., whether Offers may be submitted by facsimile or electronic means (See OAR 137-049-0300 regarding facsimile Bids or Proposals and OAR 137-049-0310 regarding electronic Procurement);¶
- (F) The time, date and place of Opening;¶
- (G) The time and date of Closing after which a Contracting Agency will not accept Offers, which time shall be not less than five Days after the date of the last publication of the advertisement. Although a minimum of five Days is prescribed, Contracting Agencies are encouraged to use at least a 14 Day solicitation period when feasible. If the Contracting Agency is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, the Contracting Agency shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and OAR 137-049-0360. For timing issues relating to Addenda, see OAR 137-049-0250;¶
- (H) The office where the Specifications for the Work may be reviewed;¶
- (I) A statement that each Bidder to an ITB must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120;¶
- (J) If the Contract resulting from a solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148), a statement that no Offer will be received or considered by the Contracting Agency unless the Offer contains a statement by the Offeror as a part of its Offer that "Contractor agrees to be bound by and will comply with the provisions of 279C.838, 279C.840 or 40 U.S.C. 3141 to 3148."¶
- (K) A statement that the Contracting Agency will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as specified in OAR 137-049-0230;¶
- (L) Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;¶
- (M) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See OAR 137-049-0440(3));¶
- (N) How the Contracting Agency will notify Offerors of Addenda and how the Contracting Agency will make Addenda available (See OAR 137-049-0250); and¶
- (O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in OAR 137-049-0360.¶
- (b) Evaluation Process:¶
- (A) A statement that the Contracting Agency may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, including the requirement to demonstrate the Bidder's responsibility under ORS 279C.375(3)(b), and may reject for good cause all Offers after finding that doing so is in the public interest;¶
- (B) The anticipated solicitation schedule, deadlines, protest process and evaluation process, if any;¶
- (C) Evaluation criteria, including the relative value applicable to each criterion, that the Contracting Agency will use to determine the Responsible Bidder with the lowest Responsive Bid (where Award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of competitive Proposals is authorized under ORS 279C.335 and OAR 137-049-0620), along with the process the Contracting Agency will use to determine acceptability of the Work;¶
- (i) If the Solicitation Document is an Invitation to Bid, the Contracting Agency shall set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, and ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors shall be objective, reasonable estimates based upon information the Contracting Agency has available concerning future use;¶
- (ii) If the Solicitation Document is a Request for Proposals, the Contracting Agency shall refer to the additional requirements of OAR 137-049-0650; and¶
- (c) Contract Provisions. The Contracting Agency shall include all Contract terms and conditions, including

warranties, insurance and bonding requirements, that the Contracting Agency considers appropriate for the Public Improvement project. The Contracting Agency must also include all applicable Contract provisions required by Oregon law as follows:¶

(A) Prompt payment to all Persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279C.505(1));¶

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(S) Notice of claim (ORS 279C.605);¶

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

(U) Contractor's certification that all subcontractors performing Work described in ORS 701.005(2) (i.e., construction Work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence Work under the Contract.¶

(V) If the Contract resulting from a solicitation will be a Public Improvement Contract, and if the Public Improvement that is the subject of the solicitation will have a value of \$20,000,000 or more and will be located within Multnomah County, Clackamas County or Washington County, State Contracting Agencies must include provisions in the Public Improvement Contract that meet the requirements of ~~HB 2007 (2019 Oregon Laws, Chapter 645) for diesel engines and non-road diesel engines~~ ORS 279C.537 for diesel engines and non-road diesel engines.¶

(W) If the Contract resulting from a solicitation will be a Public Improvement Contract with a "Qualifying Agency," as that term is defined in ORS 279C.533, and if the Public Improvement that is the subject of the solicitation will have a value that exceeds \$3,000,000, Qualifying Agencies must include provisions in the Public Improvement Contract that meet the requirements of ORS 279C.533 for apprenticeship employment;¶

(X) If the Contract resulting from a solicitation will be a Public Improvement Contract with a "Qualifying Agency," as that term is defined in ORS 279C.533, the Qualifying Agency shall require, as a material provision of the Public Improvement Contract, that the contractor establish and implement a plan for outreach to and recruitment and retention of women, minority individuals and veterans to perform work under the Public Improvement Contract, in compliance with ORS 279C.533; and¶

(Y) Contractor and subcontractor licensure and certification related to the installation of electric vehicle charging systems under SB 582 (2023 Oregon Laws, Chapter 577), when the Contracting Agency is a State Contracting Agency.¶

(2) Assignment or Transfer Restricted. Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, or transfer rights, or delegate duties under the Contract, either in whole or in part, without the Contracting Agency's prior Written consent. Unless otherwise agreed by the Contracting Agency in Writing, such consent shall not relieve the Contractor of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If the Contracting Agency consents in Writing to an assignment, sale, disposal or transfer of the Contractor's rights or delegation of

Contractor's duties, the Contractor and its surety, if any, shall remain liable to the Contracting Agency for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the Contracting Agency otherwise agrees in Writing.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.110, ORS 279A.120, ORS 279C.365, ORS 279C.370, ORS 279C.390, ORS 279C.505 - 580, ORS 279C.605, ORS 305.385, ORS 468A.720, ORS 701.005, ORS 701.055

AMEND: 137-049-0370

RULE SUMMARY: In Section (1), edits made to change "service-disabled veteran business" to "veteran-owned business" in accord with HB 2295 (2023).

CHANGES TO RULE:

137-049-0370

Disqualification of Persons ¶¶

(1) Authority. A Contracting Agency may disqualify a Person from consideration of Award of the Contracting Agency's Contracts after providing the Person with notice and a reasonable opportunity to be heard in accordance with sections (2) and (4) of this rule.¶¶

(a) Standards for Conduct Disqualification. As provided in ORS 279C.440, a Contracting Agency may disqualify a Person for:¶¶

(A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.¶¶

(B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the Person's responsibility as a contractor.¶¶

(C) Conviction under state or federal antitrust statutes.¶¶

(D) Violation of a contract provision that is regarded by the Contracting Agency to be so serious as to justify Conduct Disqualification. A violation under this subsection (1)(a)(D) may include but is not limited to material failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a Person's failure to perform or unsatisfactory performance caused by acts beyond the Person's control is not a basis for Disqualification.¶¶

(b) Standards for Disqualification. As provided in ORS 200.065, 200.075 or 279A.110, a Contracting Agency may disqualify a Person's right to submit an Offer or to participate in a Contract (e.g. subcontractors) as follows:¶¶

(A) For a Disqualification under ORS 200.065, the Contracting Agency may disqualify a Person upon finding that:¶¶

(i) The Person fraudulently obtained or retained or attempted to obtain or retain or aided another Person to fraudulently obtain or retain or attempt to obtain or retain certification as a disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business, or a ~~business that a service-disabled veteran own~~ Veteran-owned business; or¶¶

(ii) The Person knowingly made a false claim that any Person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit; or¶¶

(iii) The Person has been disqualified by another Contracting Agency under ORS 200.065.¶¶

(B) For a Disqualification under ORS 200.075, the Contracting Agency may disqualify a Person upon finding that:¶¶

(i) The Person has entered into an agreement representing that a disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business, or a ~~business that a service-disabled veteran own~~ Veteran-owned business, certified under ORS 200.055 ("Certified Enterprise"), will perform or supply materials under a Public Improvement Contract without the knowledge and consent of the Certified Enterprise; or¶¶

(ii) The Person exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any Certified Enterprise; or¶¶

(iii) The Person uses a Certified Enterprise to perform Work under a Public Improvement Contract to meet an established Certified Enterprise goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the contract.¶¶

(iv) If a Person is Disqualified for a Disqualification under ORS 200.075, the affected Contracting Agency shall not permit that Person to participate in that Contracting Agency's Contracts.¶¶

(C) For a Disqualification under ORS 279A.110, a Contracting Agency may disqualify a Person if the Contracting Agency finds that the Person discriminated against a disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business, or a ~~business that a service-disabled veteran own~~ Veteran-owned business in awarding a subcontract under a Contract with that Contracting Agency.¶¶

(2) Notice of Intent to Disqualify. The Contracting Agency shall notify the Person in Writing of a proposed Disqualification personally or by registered or certified mail, return receipt requested. This notice shall:¶¶

(a) State that the Contracting Agency intends to disqualify the Person;¶¶

(b) Set forth the reasons for the Disqualification;¶¶

(c) Include a statement of the Person's right to a hearing if requested in Writing within the time stated in the notice and that if the Contracting Agency does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived its right to a hearing;¶¶

- (d) Include a statement of the authority under which the hearing will be held;¶
 - (e) Include a reference to the particular sections of the statutes and rules involved;¶
 - (f) State the proposed Disqualification period; and¶
 - (g) State that the Person may be represented by legal counsel.¶
- (3) Hearing. The Contracting Agency shall schedule a hearing upon the Contracting Agency's receipt of the Person's timely hearing request. Within a reasonable time prior to the hearing, the Contracting Agency shall notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing.¶
- (4) Notice of Disqualification. The Contracting Agency will notify the Person in Writing of its Disqualification, personally or by registered or certified mail, return receipt requested. The notice shall contain:¶
- (a) The effective date and period of Disqualification;¶
 - (b) The grounds for Disqualification; and¶
 - (c) A statement of the Person's appeal rights and applicable appeal deadlines. For a Conduct Disqualification or a Disqualification under ORS 279A.110, the disqualified person must notify the Contracting Agency in Writing within three business Days after receipt of the Contracting Agency's notice of Disqualification if the Person intends to appeal the Contracting Agency's decision.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 200.065, 200.075, 279A.110, 279C.440, 279C.445, 279C.450, OL 2015, ch 565 (HB 3303)

AMEND: 137-049-0395

RULE SUMMARY: In Section (1), edit made to update the increased limit to small procurements resulting from SB 1047 (2023).

CHANGES TO RULE:

137-049-0395

Notice of Intent to Award ¶¶

(1) Notice. At least seven days before the Award of a Public Improvement Contract, the Contracting Agency shall issue to each Bidder (pursuant to ORS 279C.375(2)) and each Proposer (pursuant to 279C.410(7)), or post electronically or otherwise, a notice of the Contracting Agency's intent to Award the Contract. This requirement does not apply to Award of a small (~~under \$5,000~~) or intermediate (informal competitive quotes) Public Improvement Contract awarded under 279C.335(1)(c) or (d).¶¶

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

(3) Finalizing Award. The Contracting Agency's Award shall not be final until the later of the following:¶¶

(a) Seven Days after the date of the notice, unless the Solicitation Document provided a different period for protest; or¶¶

(b) The Contracting Agency provides a Written response to all timely-filed protests that denies the protest and affirms the Award.¶¶

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

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.375

AMEND: 137-049-0400

RULE SUMMARY: In Section (9), new subsection added to account for the newly added recordkeeping requirements in SB 1047 (2023).

CHANGES TO RULE:

137-049-0400

Documentation of Award; Availability of Award Decisions ¶¶

- (1) Basis of Award. After Award, the Contracting Agency shall make a record showing the basis for determining the successful Offeror part of the Contracting Agency's solicitation file.¶¶
- (2) Contents of Award Record for Bids. The Contracting Agency's record shall include:¶¶
 - (a) All submitted Bids;¶¶
 - (b) Completed Bid tabulation sheet; and¶¶
 - (c) Written justification for any rejection of lower Bids.¶¶
- (3) Contents of Award Record for Proposals. Where the use of Requests for Proposals is authorized as set forth in OAR 137-049-0650, the Contracting Agency's record shall include:¶¶
 - (a) All submitted Proposals.¶¶
 - (b) The completed evaluation of the Proposals;¶¶
 - (c) Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and¶¶
 - (d) If the Contracting Agency permitted negotiations in accordance with OAR 137-049-0650, the Contracting Agency's completed evaluation of the initial Proposals and the Contracting Agency's completed evaluation of final Proposals.¶¶
- (4) Contract Document. The Contracting Agency shall deliver a fully executed copy of the final Contract to the successful Offeror.¶¶
- (5) Bid Tabulations and Award Summaries. Upon request of any Person the Contracting Agency shall provide tabulations of Awarded Bids or evaluation summaries of Proposals for a nominal charge which may be payable in advance. Requests must contain the Solicitation Document number and, if requested, be accompanied by a self-addressed, stamped envelope. Contracting Agencies may also provide tabulations of Bids and Proposals Awarded on designated Web sites or on the Contracting Agency's Electronic Procurement System.¶¶
- (6) Availability of Solicitation Files. The Contracting Agency shall make completed solicitation files available for public review at the Contracting Agency.¶¶
- (7) Copies from Solicitation Files. Any Person may obtain copies of material from solicitation files upon payment of a reasonable copying charge.¶¶
- (8) Minority, Women Emerging Small Business. State Contracting Agencies shall provide timely notice of Contract Award to the Advocate for Minority, Women and Emerging Small Business if the estimated Contract Price exceeds \$5,000. See ORS 200.035.¶¶
- (9) Contents of Award Record for Small Procurements. When the award of a Public Improvement Contract is exempt from the competitive bidding process pursuant to ORS 279C.335(1)(c), the State Contracting Agency's record shall include the following information, when the contract price meets or exceeds the dollar threshold in ORS 279C.335(1)(c):¶¶
 - (a) Documentation of the actions taken by the State Contracting Agency to comply with ORS 200.035; and¶¶
 - (b) Documentation of the actions taken by the State Contracting Agency to invite qualified businesses or enterprises, that the Certification Office for Business Inclusion and Diversity certifies under ORS 200.055, to participate in the procurement.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.365;35, ORS 279C.365, ORS 279C.375

AMEND: 137-049-0440

RULE SUMMARY: In Section (3), edits made to change "service-disabled veteran business" to "veteran-owned business" in accord with HB 2295 (2023).

CHANGES TO RULE:

137-049-0440

Rejection of Offers ¶¶

(1) Rejection of an Offer.¶

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

(b) The Contracting Agency shall reject an Offer upon the Contracting Agency's finding that the Offer:¶

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

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

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

(D) Offers Work that fails to meet the Specifications of the Solicitation Document;¶

(E) Is late;¶

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

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

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

(A) Has not been prequalified under ORS 279C.430 and the Contracting Agency required mandatory prequalification;¶

(B) Has been Disqualified;¶

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

(D) Is listed as not qualified by the Construction Contractors Board, if the Contract is for a Public Improvement;¶

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

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

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

(H) Is not Responsible. See OAR 137-049-0390(2) regarding Contracting Agency determination that the Offeror has met statutory standards of responsibility.¶

(2) Form of Business. For purposes of this rule, the Contracting Agency may investigate any Person submitting an Offer. The investigation may include that Person's officers, Directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this rule or to apply the Disqualification provisions of ORS 279C.440 to 279C.450 and OAR 137-049-0370.¶

(3) Certification of Non-Discrimination. The Offeror shall certify and deliver to the Contracting Agency Written certification, as part of the Offer, that the Offeror has not discriminated and will not discriminate against any disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business, or ~~business that a service-disabled veteran owns~~ Veteran-owned business, in obtaining any required subcontracts. Failure to do so shall be grounds for disqualification.¶

(4) Contract and Subcontract Conditions. If a Contracting Agency awards a Contract to an Offeror that has been determined to be responsible under ORS 200.005(8) and ORS 200.045(3), or awards a Contract under ORS 279A.100:¶

(a) The Contracting Agency must provide, as a material condition of the Contract:¶

(A) That the Contractor must maintain its certification under ORS 200.055 throughout the term of the Contract and any extensions (if the Contracting Agency used the certification as a factor in or as a basis for the award of the Contract);¶

(B) That the Contractor must promptly pay each subcontractor that is certified under ORS 200.055 in accordance with ORS 279B.220, or 279C.570 and ORS 279C.580, whichever apply to the Contract;¶

(C) That the Contractor must include, in any subcontract the Contractor establishes in connection with the Contract, a provision that requires the subcontractor to maintain the subcontractor's certification under ORS 200.055 throughout the term of the subcontract and any extensions (if the Contractor used the certification as a factor in or as a basis for the award of the subcontract);¶

(D) That the Contracting Agency may require the Contractor to terminate a subcontract with a subcontractor that fails to maintain its certification under ORS 200.055 throughout the term of the subcontract and any extensions.¶

(b) In the administration of Contracts that are subject to section (4) of this rule, the Contracting Agency must

verify the Contractor's and any subcontractor's compliance with subsection (4)(a) of this rule.¶¶

(c) Subparagraph (4)(a)(A) of this section does not apply to an emerging small business that ceases to qualify as a tier one firm or a tier two firm (as ORS 200.005 defines those terms) due to the growth in the business's number of full-time equivalent employees or in average annual gross receipts during the term of the Contract. This section (4) does not apply to an emerging small business for which a certification under ORS 200.055 expires during the term of the Contract or any extensions.¶¶

(5) Rejection of all Offers. A Contracting Agency may reject all Offers for good cause upon the Contracting Agency's Written finding it is in the public interest to do so. The Contracting Agency shall notify all Offerors of the rejection of all Offers, along with the good cause justification and finding.¶¶

(6) Criteria for Rejection of All Offers. The Contracting Agency may reject all Offers upon a Written finding that:¶¶

(a) The content of or an error in the Solicitation Document, or the solicitation process unnecessarily restricted competition for the Contract;¶¶

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

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

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

(e) The Contracting Agency cancels the solicitation in accordance with OAR 137-049-0270; or¶¶

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

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.105, 279A.110, 279C.375, 279C.380, 279C.395, OL 2015, ch 325 (HB 2716), OL 2015, ch 565 (HB 3303)

AMEND: 137-049-0610

RULE SUMMARY: In Section (17), edit made to correct typo related to the defined term "Findings."

CHANGES TO RULE:

137-049-0610

Definitions for Alternative Contracting Methods ¶¶

The following definitions shall apply to these OAR 137-049-0600 to 137-049-0690 rules, unless the context requires otherwise:¶¶

(1) Affiliate has the meaning set forth in ORS 279C.332(1).¶¶

(2) Alternative Contracting Methods means innovative techniques for procuring or performing Public Improvement Contracts, utilizing processes other than the traditional methods involved in the design-bid-build construction contracting method (with Award of a Public Improvement Contract based solely on price, in which a final design is issued with formal Bid documents, construction Work is obtained by sealed Bid Awarded to the Responsible Bidder submitting the lowest Responsive Bid, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design-Build contracting, CM/GC forms of contracting and ESPCs, which are specifically addressed in these OAR 137-049-0600 to 137-049-0690 rules. These methods also include other developing techniques, which include but are not limited to general "performance contracting," "cost plus time" contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(I)) and "qualifications plus project approach" contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(II)). Procedural requirements for these methods are identified in these OAR 137-049-0600 to 137-049-0690 rules, when a Contracting Agency uses an Alternative Contracting Method in a procurement that requires an exemption from competitive bidding under ORS 279C.335(2) or in an ESPC procurement that is excepted from competitive bidding under ORS 279.335(1).¶¶

(3) Construction Manager/General Contractor (or "CM/GC") has the meaning set forth in ORS 279C.332(2).¶¶

(4) Construction Manager/General Contractor Method (or "CM/GC Method") means the Alternative Contracting Method which involves a Contracting Agency's selection of a CM/GC to perform CM/GC Services for a project or projects.¶¶

(5) Construction Manager/General Contractor Services (or "CM/GC Services") has the meaning set forth in ORS 279C.332(3).¶¶

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

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

(8) Energy Conservation Measures (or "ECMs") (also known as "energy efficiency measures") means, as used in ESPC Procurement, any equipment, fixture or furnishing to be added to or used in an existing building or structure, and any repair, alteration or improvement to an existing building or structure that is designed to reduce energy consumption and related costs, including those costs related to electrical energy, thermal energy, water consumption, waste disposal, and future contract-labor costs and materials costs associated with maintenance of the building or structure. For purposes of these OAR 137-049-0600 to 137-049-0690 rules, use of either or both of the terms "building" or "structure" shall be deemed to include existing energy, water and waste disposal systems connected or related to or otherwise used for the building or structure when such system(s) are included in the project, either as part of the project together with the building or structure, or when such system(s) are the focus of the project. Maintenance services are not Energy Conservation Measures, for purposes of these 137-049-0600 to 137-049-0690 rules.¶¶

(9) Energy Savings Guarantee means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the Contracting Agency that certain energy savings and performance will be achieved for the project covered by the RFP, through the installation and implementation of the agreed-upon ECMs for the project. The Energy Savings Guarantee shall include, but shall not be limited to, the specific energy savings and performance levels and amounts that will be guaranteed, provisions related to the financial remedies available to the Contracting Agency in the event the guaranteed savings and performance are not

achieved, the specific conditions under which the ESCO will guarantee energy savings and performance (including the specific responsibilities of the Contracting Agency after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.¶¶

(10) Energy Savings Performance Contract (or "ESPC") means a Public Improvement Contract between a Contracting Agency and a Qualified Energy Service Company for the identification, evaluation, recommendation, design and construction of Energy Conservation Measures, including a Design-Build Contract, that guarantee energy savings or performance.¶¶

(11) General Conditions Work (or "GC Work") means a general grouping of project Work required to support construction operations on the project that is not included within the Contractor's overhead or fee.¶¶

(12) Guaranteed Maximum Price (or "GMP") has the meaning set forth in ORS 279C.332(4), pertaining to procurements for CM/GC Services. For Alternative Contracting Methods other than the CM/GC Method, "Guaranteed Maximum Price" or "GMP" means the total maximum price provided to the Contracting Agency by the Contractor and accepted by the Contracting Agency that includes all reimbursable costs and fees for completion of the Contract Work and any particularly identified contingency amounts, as defined by the Public Improvement Contract.¶¶

(13) Measurement and Verification (or "M & V") means, as used in ESPC Procurement, the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy-using systems pre-installation and post-installation.¶¶

(14) Project Development Plan means a secondary phase of Personal Services and Work performed by an ESCO in an ESPC Procurement when the ESCO performs more extensive design of the agreed-upon ECMs for the project, provides the detailed provisions of the ESCO's Energy Savings Guarantee that the fully installed and commissioned ECMs will achieve a particular energy savings level for the building or structure, and prepares an overall report or plan summarizing the ESCO's Work during this secondary phase of the Work and otherwise explaining how the agreed-upon ECMs will be implemented during the design and construction phase of the Work; The term "Project Development Plan" can also refer to the report or plan provided by the ESCO at the conclusion of this phase of the Work.¶¶

(15) Qualified Energy Service Company (or "ESCO") means, as used in ESPC Procurement, a company, firm or other legal Person with the following characteristics: demonstrated technical, operational, financial and managerial capabilities to design, install, construct, commission, manage, measure and verify, and otherwise implement Energy Conservation Measures and other Work on building systems or building components that are directly related to the ECMs in existing buildings and structures; a prior record of successfully performing ESPCs on projects involving existing buildings and structures that are comparable to the project under consideration by the Contracting Agency; and the financial strength to effectively guarantee energy savings and performance under the ESPC for the project in question, or the ability to secure necessary financial measures to effectively guarantee energy savings under an ESPC for that project.¶¶

(16) Savings has the meaning set forth in ORS 279C.337(4), pertaining to CM/GC Services procurements. For other Alternative Contracting Methods, "Savings" means a positive difference between a Guaranteed Maximum Price or other maximum not-to-exceed price set forth in a Public Improvement Contract and the actual cost of the Contractor's performance of the Contract Work payable by the Contracting Agency under the terms of the Contract, including costs for which a Contracting Agency reimburses a Contractor and fees, profits or other payments the Contractor earns.¶¶

(17) Technical Energy Audit means, as used in ESPC Procurement, the initial phase of Personal Services to be performed by an ESCO that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the Contracting Agency of the ESCO's findings during this initial phase of the Work; the term "Technical Energy Audit" can also refer to the report provided by the ESCO at the conclusion of this phase of the Work.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.332, 279C.335, 279A.065

AMEND: 137-049-0630

RULE SUMMARY: • In Sections (2), (3) and (6), edits made to correct typo related to the defined term "Findings."

• In Section (7), edit made to address the revised approach to public hearings for exemptions from the competitive bidding process.

CHANGES TO RULE:

137-049-0630

Findings, Notice and Hearing ¶

(1) Cost Savings and Other Substantial Benefits Factors. When Findings are required under ORS 279C.335 to exempt a Contract or class of Contracts from the competitive bidding requirements, the "substantial cost savings and other substantial benefits" criteria at 279C.335(2)(b) require consideration of the type, cost and amount of the Contract and, to the extent applicable, the other factors set forth in 279C.335(2)(b). If a particular factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts, the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board does not need to consider that factor, and the Contracting Agency is not required to address the factor, other than to explain why the factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts. ¶

(2) Required Information. The statutory definition of "Findings" at ORS 279C.330(2), which applies to exemptions from competitive bidding under ORS 279C.335, means the justification for a Contracting Agency or State Agency conclusion regarding the factors listed in both ORS 279C.335(2)(a) and 279C.335(2)(b) or, in the alternative, both 279C.335(2)(a) and 279C.335(2)(c). For an exemption granted by the Director of the Oregon Department of Administrative Services or the Director of Transportation under ORS 279C.350 by order, however, the order must also include the Findings listed in ORS 279C.330(1). ¶

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

(a) Specified Findings that address the factors and other information specifically identified by statute, including, but not limited to, an analysis or reasonable forecast of present and future cost savings and other substantial benefits; and ¶

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

(c) As an alternative to the "substantial cost savings and other substantial benefits" requirement in ORS 279C.335(2)(b), if an Alternative Contracting Method has not been previously used, the Contracting Agency or State Agency may make a Finding that identifies the project as a "pilot project" under ORS 279C.335(2)(c). Nevertheless, the Contracting Agency or State Agency must still make the Findings required in ORS 279C.335(2)(a). ¶

(4) Favoritism and Competition. The criteria at ORS 279C.335(2)(a) that the exemption "is unlikely to encourage favoritism" or "substantially diminish competition" may be addressed in contemplating the use of Alternative Contracting Methods by specifying the manner in which an RFP process will be utilized, that the Procurement will be formally advertised with public notice and disclosure of the planned Alternative Contracting Method, competition will be encouraged, Award made based upon identified selection criteria and an opportunity to protest that Award. ¶

(5) Descriptions. Findings supporting a competitive bidding exemption must describe with specificity any Alternative Contracting Method to be used in lieu of competitive bidding, including, but not limited to, whether a one-step (request for Proposals), two-step (beginning with a Request for Qualifications, followed by a request for Proposals) or other solicitation process will be utilized. The Findings may also describe anticipated characteristics or features of the resulting Public Improvement Contract. However, the purpose of an exemption from competitive bidding is limited to a determination of the Procurement method. Any unnecessary or incidental descriptions of the specific details of the anticipated Contract within the supporting Findings are not binding upon the Contracting Agency. The parameters of the Public Improvement Contract are those characteristics or specifics that are announced in the Solicitation Document. ¶

(6) Class Exemptions. In making the Findings supporting a class exemption the Contracting Agency shall clearly identify the "class" with respect to its defining characteristics, pursuant to the requirements of ORS 279C.335(3). The class must meet the following requirements: ¶

(a) The class cannot be based on a single characteristic or factor, so that an Agency directly or indirectly creates a class whereby the Agency uses, for example, the CM/GC Method for all Agency construction projects or all Agency construction projects over a particular dollar amount, unidentified future Agency construction projects of a particular work category, or all Agency construction projects from a particular funding source such as the sale of bonds; and¶

(b) The class must include a combination of factors, be defined by the Agency through characteristics that reasonably relate to the exemption criteria set forth in ORS 279C.335(2) and must reflect a detailed evaluation of those characteristics so that the class is defined in a limited way that effectively meets the Agency's objectives while allowing for impartial and open competition, and protecting the integrity of the exemption process. An example of a class that might be permitted under the statute is a series of projects, such as a specific group of building renovation projects, that¶

(A) Involve renovations for a common purpose;¶

(B) Require completion on a related schedule in order to avoid unnecessary disruption of Contracting Agency operations;¶

(C) Share common characteristics, such as historic building considerations, the presence of asbestos or other hazardous substances, or the presence of agency staff during construction;¶

(D) Otherwise possess characteristics that meet the requirements of ORS 279C.335(2); and¶

(E) Otherwise meet the requirements of the Director of the Oregon Department of Administrative Services, the Director of Transportation or the local contract review board, as applicable.¶

(7) Public Hearing. Before final adoption of Findings exempting a Public Improvement Contract or class of Contracts from the requirement of competitive bidding, a Contracting Agency or State Agency ~~shall give notice and hold a~~ must provide public notice of the proposed exemption under ORS 279C.335(2), as required by ORS 279C.335(5). The notice must state that, in response to a written request, the Contracting Agency or State Agency will hold a public hearing for the purpose of taking comments on the draft Findings for an exemption from the competitive bidding requirement. The notice may include specific information about the date, time and location of the public hearing that may be held, or the Contracting Agency or State Agency may issue a secondary public notice with the date, time and location of the public hearing, as required by ORS 279C.335(5). The hearing after a written request for a public hearing is made. Any written request for a public hearing must be submitted to the Contracting Agency or State Agency within seven (7) calendar days of the publication date of the original public notice. If the Contracting Agency or State Agency does not receive a written request from an interested party to hold a public hearing, the Contracting Agency or State Agency may hold a public hearing, but is not required to hold a public hearing. The public hearing, if held, shall be for the purpose of receiving public comment on the Contracting Agency's or State Agency's draft Findings.¶

(8) Prior Review of Draft Findings. State Contracting Agencies shall submit draft Findings to their Contract Review Authority for review and concurrence prior to advertising ~~the~~ any public hearing that is required by ORS 279C.335(5). State Contracting Agencies shall also submit draft Findings to the Department of Justice for review and comment prior to submitting the final form of the Findings to the Contract Review Authority and prior to advertising the any public hearing that is required by ORS 279C.335(5).

Statutory/Other Authority: ORS 279A.065

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

AMEND: 137-049-0645

RULE SUMMARY: Formatting edits provided for document consistency and grammatical improvements.

CHANGES TO RULE:

137-049-0645

Requests for Qualifications (RFQ) ¶

As provided by ORS 279C.405(1), Contracting Agencies may utilize a Requests for Qualifications ("RFQs") to obtain information useful in the preparation or distribution of a Request for Proposals ("RFPs"). When using an RFQs as the first step in a two-step solicitation process, in which distribution of the RFPs will be limited to the firms identified as most qualified through their submitted statements of qualification, Contracting Agencies shall first advertise and provide notice of the RFQ in the same manner in which RFPs are advertised, specifically stating that RFPs will be distributed only to the firms selected in the RFQ process. In such cases the Contracting Agencies shall also provide within the RFQ a protest provision substantially in the form of OAR 137-049-0450(5) regarding protests of the Competitive Range. Thereafter, contracting agencies may distribute RFPs to the selected firms without further advertisement of the solicitation.

Statutory/Other Authority: ORS 279C.405, 279A.065

Statutes/Other Implemented: ORS 279C.405

AMEND: 137-049-0650

RULE SUMMARY: Formatting edits provided for document consistency.

CHANGES TO RULE:

137-049-0650

Requests for Proposals (RFP) ¶

(1) Generally. The use of competitive Proposals must be specially authorized for a Public Improvement Contract under the competitive bidding exception and exemption requirements of ORS 279C.335, OAR 137-049-0130 and 137-049-0600 to 137-049-0690. Also see ORS 279C.337 and 279C.400 to 279C.410 for statutory requirements regarding competitive Proposals and OAR 137-049-0640 regarding competitive Proposal procedures.¶

(2) Solicitation Documents. In addition to the Solicitation Document requirements of OAR 137-049-0200, this rule applies to the requirements for RFPs. RFP Solicitation Documents shall conform to the following standards:¶

(a) The Contracting Agency shall set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references and warranty provisions. See OAR 137-049-0640 regarding Proposal evaluation and evaluation factors. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors must be reasonable estimates based on information available to the Contracting Agency. Subject to ORS 279C.410(4), the Solicitation Document may provide for discussions with Proposers to be conducted for the purpose of Proposal evaluation prior to award or prior to establishing any Competitive Range;¶

(b) When the Contracting Agency is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, the Contracting Agency shall identify the specific terms and conditions in or provisions of the Solicitation Document that are subject to negotiation or discussion and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions the Contracting Agency has identified as authorized for negotiation. The Contracting Agency shall describe the evaluation, discussion and negotiation processes, including how the Contracting Agency will establish the Competitive Range, if any;¶

(c) The anticipated size of any Competitive Range must be stated in the Solicitation Document, but may be decreased if the number of Proposers that submit responsive Proposals is less than the specified number, or may be increased as provided in OAR 137-049-0650(4)(a)(B);¶

(d) When the Contracting Agency intends to Award Contracts to more than one Proposer, the Contracting Agency shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. The Contracting Agency shall also include the criteria it will use to determine how the Contracting Agency will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular Contractor to provide Personal Services or Work from those Contractors Awarded Contracts.¶

(3) Evaluation of Proposals.¶

(a) Evaluation. The Contracting Agency shall evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. The Contracting Agency shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.¶

(A) Clarifications. In evaluating Proposals, a Contracting Agency may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer shall submit Written and Signed clarifications and such clarifications shall become part of the Proposer's Proposal.¶

(B) Limited Negotiation. If the Contracting Agency did not permit negotiation in its RFP, the Contracting Agency may, nonetheless, negotiate with the highest-ranked Proposer, but may then only negotiate the:¶

(i) Statement of Work; and¶

(ii) Contract Price as it is affected by negotiating the statement of Work. The process for discussions or negotiations that is outlined and explained in subsections (5)(b) and (6) of this rule does not apply to this limited negotiation.¶

(b) Discussions; Negotiations. If the Contracting Agency permitted discussions or negotiations in the RFP, the Contracting Agency shall evaluate Proposals and establish the Competitive Range, and may then conduct discussions and negotiations in accordance with this rule.¶

(A) If the Solicitation Document provided that discussions or negotiations may occur at Contracting Agency's discretion, the Contracting Agency may forego discussions and negotiations and evaluate all Proposals in accordance with this rule.¶

(B) If the Contracting Agency proceeds with discussions or negotiations, the Contracting Agency shall establish a negotiation team tailored for the acquisition. The Contracting Agency's team may include legal, technical, auditing and negotiating personnel.¶

(c) Cancellation. Nothing in this rule shall restrict or prohibit the Contracting Agency from canceling the solicitation at any time.¶

(4) Competitive Range; Protest; Award.¶

(a) Determining Competitive Range.¶

(A) If the Contracting Agency does not cancel the solicitation, after the Opening the Contracting Agency will evaluate all Proposals in accordance with the evaluation criteria set forth in the RFP. After evaluation of all Proposals in accordance with the criteria set forth in the RFP, the Contracting Agency will rank the Proposers based on the Contracting Agency's scoring and determine the Competitive Range.¶

(B) The Contracting Agency may increase the number of Proposers in the Competitive Range if the Contracting Agency's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the best Proposer after the Contracting Agency's evaluation of revised Proposals submitted in accordance with the process described in this rule.¶

(b) Protesting Competitive Range. The Contracting Agency shall provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest the Contracting Agency's evaluation and determination of the Competitive Range in accordance with OAR 137-049-0450.¶

(c) Intent to Award; Discuss or Negotiate. After the protest period provided in accordance with these rules expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency may either:¶

(A) Provide Written notice to all Proposers in the Competitive Range of its intent to Award the Contract to the highest-ranked Proposer in the Competitive Range.¶

(i) An unsuccessful Proposer may protest the Contracting Agency's intent to Award in accordance with OAR 137-049-0450.¶

(ii) After the protest period provided in accordance with OAR 137-049-0450 expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency shall commence final Contract negotiations with the highest-ranked Proposer in the Competitive Range; or¶

(B) Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them, and, following such discussions and receipt and evaluation of revised Proposals, conduct negotiations with the Proposers in the Competitive Range.¶

(5) Discussions; Revised Proposals. If the Contracting Agency chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, the Contracting Agency shall proceed as follows:¶

(a) Initiating Discussions. The Contracting Agency shall initiate oral or Written discussions with all of the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP that the Contracting Agency identified in the RFP as the subject of discussions. The Contracting Agency may conduct discussions for the following purposes:¶

(A) Informing Proposers of deficiencies in their initial Proposals;¶

(B) Notifying Proposers of parts of their Proposals for which the Contracting Agency would like additional information; and¶

(C) Otherwise allowing Proposers to develop revised Proposals that will allow the Contracting Agency to obtain the best Proposal based on the requirements and evaluation criteria set forth in the RFP.¶

(b) Conducting Discussions. The Contracting Agency may conduct discussions with each Proposer in the Competitive Range necessary to fulfill the purposes of this section, but need not conduct the same amount of discussions with each Proposer. The Contracting Agency may terminate discussions with any Proposer in the Competitive Range at any time. However, the Contracting Agency shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with Contracting Agency before the Contracting Agency notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.¶

(A) In conducting discussions, the Contracting Agency:¶

(i) Shall treat all Proposers fairly and shall not favor any Proposer over another;¶

(ii) Shall not discuss other Proposers' Proposals;¶

(iii) Shall not suggest specific revisions that a Proposer should make to its Proposal, and shall not otherwise direct the Proposer to make any specific revisions to its Proposal.¶

(B) At any time during the time allowed for discussions, the Contracting Agency may:¶

(i) Continue discussions with a particular Proposer;¶

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

(iii) Conclude discussions with all remaining Proposers in the Competitive Range and provide notice to the Proposers in the Competitive Range to submit revised Proposals.¶

(c) Revised Proposals. If the Contracting Agency does not cancel the solicitation at the conclusion of the Contracting Agency's discussions with all remaining Proposers in the Competitive Range, the Contracting Agency shall give all remaining Proposers in the Competitive Range notice of the date and time by which they must submit revised Proposals. This notice constitutes the Contracting Agency's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in the Contracting Agency's notice.¶

(A) Upon receipt of the revised Proposals, the Contracting Agency shall evaluate the revised Proposals based upon the evaluation criteria set forth in the RFP, and rank the revised Proposals based on the Contracting Agency's scoring.¶

(B) The Contracting Agency may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the RFP.¶

(d) Intent to Award; Protest. The Contracting Agency shall provide Written notice to all Proposers in the Competitive Range of the Contracting Agency's intent to Award the Contract. An unsuccessful Proposer may protest the Contracting Agency's intent to Award in accordance with OAR 137-049-0450. After the protest period provided in accordance with that rule expires, or after the Contracting Agency has provided a final response to any protest, whichever date is later, the Contracting Agency shall commence final Contract negotiations.¶

(6) Negotiations.¶

(a) Initiating Negotiations. The Contracting Agency may determine to commence negotiations with the highest-ranked Proposer in the Competitive Range following the:¶

(A) Initial determination of the Competitive Range; or¶

(B) Conclusion of discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.¶

(b) Conducting Negotiations. Scope. The Contracting Agency may negotiate:¶

(A) The statement of Work;¶

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

(C) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the RFP. Accordingly, Proposers shall not submit, and Contracting Agency shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the RFP.¶

(c) Continuing Negotiations. If the Contracting Agency terminates negotiations with a Proposer, the Contracting Agency may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this rule until the Contracting Agency has:¶

(A) Determined to Award the Contract to the Proposer with whom it is currently negotiating; or¶

(B) Completed one round of negotiations with all Proposers in the Competitive Range, unless the Contracting Agency provided for more than one round of discussions or negotiations in the RFP, in which case the Contracting Agency may proceed with any authorized further rounds of discussions or negotiations.¶

(7) Terminating Discussions or Negotiations. At any time during discussions or negotiations conducted in accordance with this rule, the Contracting Agency may terminate discussions or negotiations with the Proposer with whom it is currently conducting discussions or negotiations if the Contracting Agency reasonably believes that:¶

(a) The Proposer is not discussing or negotiating in good faith; or¶

(b) Further discussions or negotiations with the Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279C.400 - 279C.410

AMEND: 137-049-0680

RULE SUMMARY: • In Section (1), provided formatting edits for document consistency.

• In Section (9), edits made to clarify that the permitted scope of work under energy savings performance contract ("ESPC") procurements may include improvements that either completely, or substantially, pay for themselves over the useful life of the improvement.

CHANGES TO RULE:

137-049-0680

Energy Savings Performance Contracts (ESPC) ¶¶

(1) Generally. These OAR 137-049-0600 to 137-049-0690 rules include a limited, efficient method for Contracting Agencies to enter into ~~ESPCs~~an Energy Savings Performance Contract ("ESPC") outside the competitive bidding requirements of ORS 279C.335 for existing buildings or structures, but not for new construction. See ORS 279C.335(1)(f). If a Contracting Agency chooses not to utilize the ESPC Procurement method provided for by these OAR 137-049-0600 to 137-049-0690 rules, the Contracting Agency may still enter into an ESPC by complying with the competitive bidding exemption process set forth in ORS 279C.335, or by otherwise complying with the Procurement requirements applicable to any Contracting Agency not subject to all the requirements of 279C.335.¶¶

(2) ESPC Contracting Method. The ESPC form of contracting, as defined at OAR 137-049-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the Contracting Agency, as well as the additional technical complexities associated with a Design-Build Contract. Contracting Agencies shall only utilize the ESPC contracting method with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the ESPC contracting process, the Contracting Agency must be able to reasonably anticipate one or more of the following types of benefits:¶¶

(a) Obtaining, through an ESCO, the following types of integrated Personal Services and Work: facility profiling, energy baseline studies, ECMs, Technical Energy Audits, project development planning, engineering design, plan preparation, cost estimating, life cycle costing, construction administration, project management, construction, quality control, operations and maintenance staff training, commissioning services, M & V services and required documentation as a fully integrated function with a single point of responsibility;¶¶

(b) Obtaining, through an ESCO, an Energy Savings Guarantee;¶¶

(c) Integrating the Technical Energy Audit phase and the Project Development Plan phase into the design and construction phase of Work on the project;¶¶

(d) Reducing the risk of design flaws, misunderstandings and conflicts inherent in the construction process, through the integration of ESPC Personal Services and Work;¶¶

(e) Obtaining innovative design solutions through the collaboration of the members of the ESCO integrated ESPC team;¶¶

(f) Integrating cost-effective ECMs into an existing building or structure, so that the ECMs pay for themselves through savings realized over the useful life of the ECMs;¶¶

(g) Preliminary design, development, implementation and an Energy Savings Guarantee of ECMs into an existing building or structure through an ESPC, as a distinct part of a major remodel of that building or structure that is being performed under a separate remodeling Contract; and¶¶

(h) Satisfying local energy efficiency design criteria or requirements.¶¶

(3) Authority. Contracting Agencies desiring to pursue an exemption from the competitive bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086), shall utilize the ESPC form of contracting only in accordance with the requirements of these OAR 137-049-0600 to 137-049-0690 rules.¶¶

(4) No Findings Required. A Contracting Agency is only required to comply with the ESPC contracting procedures set forth in these OAR 137-049-0600 to 137-049-0690 rules in order for the ESPC to be exempt from the competitive bidding processes of ORS 279C.335. No Findings are required for an ESPC to be exempt from the competitive bidding process for Public Improvement Contracts pursuant to 279C.335, unless the Contracting Agency is subject to the requirements of 279C.335 and chooses not to comply with the ESPC contracting procedures set forth in OAR 137-049-0600 to 137-049-0690.¶¶

(5) Selection. ESPC selection criteria may include those factors set forth above in OAR 137-049-0640(2)(a), (b), (c) and (d). Since the Energy Savings Guarantee is such a fundamental component in the ESPC contracting process, Proposers must disclose in their Proposals the identity of any Person providing (directly or indirectly) any Energy Savings Guarantee that may be offered by the successful ESCO during the course of the performance of the ESPC, along with any financial statements and related information pertaining to any such Person.¶¶

(6) QBS Inapplicable. Because the value of construction Work predominates in the ESPC method of contracting,

the qualifications based selection (QBS) process mandated by ORS 279C.110 for State Contracting Agencies in obtaining certain consultant services is not applicable.¶

(7) Licensing. If the ESCO is not an Oregon licensed design professional, the Contracting Agency shall require that the ESCO disclose in the ESPC that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and 672.060(11) regarding the offer of engineering services that are appurtenant to construction Work.¶

(8) Performance Security. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the ESCO must provide a performance bond and a payment bond, each for 100% of the full Contract Price, including the construction Work and design and related Personal Services specified in the ESPC Design-Build Contract, pursuant to ORS 279C.380(1)(a). For ESPC Design-Build Contracts, these "design and related services" include conventional design services, commissioning services, training services for the Contracting Agency's operations and maintenance staff, and any similar Personal Services provided by the ESCO under the ESPC Design-Build Contract prior to final completion of construction. M & V services, and any Personal Services or Work associated with the ESCO's Energy Savings Guarantee are not included in these 279C.380(1)(a) "design and related services." Nevertheless, a Contracting Agency may require that the ESCO provide performance security for M & V services and any Personal Services or Work associated with the ESCO's Energy Savings Guarantee, if the Contracting Agency so provides in the RFP.¶

(9) Contracting Requirements. Contracting Agencies shall conform their ESPC contracting practices to the following requirements:¶

(a) General ESPC Contracting Practices. An ESPC involves a multi-phase project, which includes the following contractual elements:¶

(A) A contractual structure which includes general Contract terms describing the relationship of the parties, the various phases of the Work, the contractual terms governing the Technical Energy Audit for the project, the contractual terms governing the Project Development Plan for the project, the contractual terms governing the final design and construction of the project, the contractual terms governing the performance of the M & V services for the project, and the detailed provisions of the ESCO's Energy Savings Guarantee for the project.¶

(B) The various phases of the ESCO's Work will include the following:¶

(i) The Technical Energy Audit phase of the Work;¶

(ii) The Project Development Plan phase of the Work;¶

(iii) A third phase of the Work that constitutes a Design-Build Contract, during which the ESCO completes any plans and Specifications required to implement the ECMs that have been agreed to by the parties to the ESPC, and the ESCO performs all construction, commissioning, construction administration and related Personal Services or Work to actually construct the project; and¶

(iv) A final phase of the Work, whereby the ESCO, independently or in cooperation with an independent consultant hired by the Contracting Agency, performs M & V services to ensure that the Energy Savings Guarantee identified by the ESCO in the earlier phases of the Work and agreed to by the parties has actually been achieved.¶

(b) Design-Build Contracting Requirements in ESPCs. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the Contracting Agency shall conform its Design-Build contracting practices to the Design-Build contracting requirements set forth in OAR 137-040-0560(7) above.¶

(c) Pricing Alternatives. The Contracting Agency may utilize one of the following pricing alternatives in an ESPC:¶

(A) A fixed price for each phase of the Personal Services and Work to be provided by the ESCO;¶

(B) A cost reimbursement pricing mechanism, with a maximum not-to-exceed price or a GMP; or¶

(C) A combination of a fixed fee for certain components of the Personal Services to be performed, a cost reimbursement pricing mechanism for the construction Work to be performed with a GMP, a single or annual fixed fee for M & V services to be performed for an identified time period after final completion of the construction Work, and a single or annual Energy Savings Guarantee fixed fee payable for an identified time period after final completion of the construction Work that is conditioned on certain energy savings being achieved at the facility by the ECMs that have been implemented by the ESCO during the project (in the event an annual M & V services fee and annual Energy Savings Guarantee fee is utilized by the parties, the parties may provide in the Design-Build Contract that, at the sole option of the Contracting Agency, the ESCO's M & V services may be terminated prior to the completion of the M & V/Energy Savings Guarantee period and the Contracting Agency's future obligation to pay the M & V services fee and Energy Savings Guarantee fee will likewise be terminated, under terms agreed to by the parties).¶

(d) Permitted ESPC Scope of Work. The scope of Work under the ESPC is restricted to implementation and installation of ECMs, as well as other Work on building systems or building components that are directly related to the ECMs, and that, as an integrated unit, will completely pay for themselves or substantially pay for themselves over the useful life of the ECMs installed. The permitted scope of Work for ESPCs resulting from a solicitation

under these 137-049-0600 to 137-049-0690 rules does not include maintenance services for the project facility.

Statutory/Other Authority: ORS 279C.335, 279A.065

Statutes/Other Implemented: ORS 279C.335, 279A.065, 279C.110, 351.086

AMEND: 137-049-0910

RULE SUMMARY: In Section (4), edit made to correct a typo related to the defined term "Findings."

CHANGES TO RULE:

137-049-0910

Changes to the Work and Contract Amendments ¶

(1) Definitions for Rule. As used in this rule:¶

(a) "Amendment" means a Written modification to the terms and conditions of a Public Improvement Contract, other than by Changes to the Work, within the general scope of the original Procurement that requires mutual agreement between the Contracting Agency and the Contractor.¶

(b) "Changes to the Work" means a mutually agreed upon change order, or a construction change directive or other Written order issued by the Contracting Agency or its authorized representatives to the Contractor requiring a change in the Work within the general scope of a Public Improvement Contract and issued under its changes provisions in administering the Contract and, if applicable, adjusting the Contract Price or contract time for the changed Work.¶

(2) Changes Provisions. Changes to the Work are anticipated in construction and, accordingly, Contracting Agencies shall include changes provisions in all Public Improvement Contracts that detail the scope of the changes clause, provide pricing mechanisms, authorize the Contracting Agency or its authorized representatives to issue Changes to the Work and provide a procedure for addressing Contractor claims for additional time or compensation. When Changes to the Work are agreed to or issued consistent with the Contract's changes provisions they are not considered to be new Procurements and an exemption from competitive bidding is not required for their issuance by Contracting Agencies.¶

(3) Change Order Authority. Contracting Agencies may establish internal limitations and delegations for authorizing Changes to the Work, including dollar limitations. Dollar limitations on Changes to the Work are not set by these Model Rules, but such changes are limited by the above definition of that term.¶

(4) Contract Amendments. Contract Amendments within the general scope of the original Procurement are not considered to be new Procurements and an exemption from competitive bidding is not required in order to add components or phases of Work specified in or reasonably implied from the Solicitation Document. Amendments to a Public Improvement Contract may be made only when:¶

(a) They are within the general scope of the original Procurement;¶

(b) The field of competition and Contractor selection would not likely have been affected by the Contract modification. Factors to be considered in making that determination include similarities in Work, project site, relative dollar values, differences in risk allocation and whether the original Procurement was accomplished through competitive bidding, competitive Proposals, competitive quotes, sole source or Emergency contract;¶

(c) In the case of a Contract obtained under an Alternative Contracting Method, any additional Work was specified or reasonably implied within the Findings supporting the competitive bidding exemption; and¶

(d) The Amendment is made consistent with this rule and other applicable legal requirements.

Statutory/Other Authority: ORS 279A.065

Statutes/Other Implemented: ORS 279A.065, 279C.335, 279C.400