

RESOLUTION LCRB-18-001 - Adoption of Public Contracting Rules

This recommended resolution amends certain adopted rules on public contracting.

Background:

Between 2003 and 2005, the Oregon legislature and Attorney General made major changes to the contract selection and procurement rules for Oregon.

At that time, the legislature authorized government agencies to adopt their own administrative rules for contract selection processes, but gave local agencies the option of adopting the Attorney General's rules.

An MESD review of the Attorney General's rules in 2005 found that the Attorney General's rules were well written, and those rules were therefore adopted by MESD's Local Contract Review Board.

In some instances, the AG's rules required MESD to add provisions based upon our agency's individual practices, and those additional provisions were adopted by the Board via LCRB Resolution 05-C1 in 2005.

Generally, the added provisions authorized the Superintendent and other specifically-named MESD staff to make certain determinations regarding the contract selection processes specified in the rules.

In the subsequent thirteen years, the legislature and the Attorney General have made modifications to the procurement rules, while MESD staff roles have changed due to staff turnover and reorganization of responsibilities.

The changes recommended at this time incorporate the modifications made by the legislature and Attorney General to the procurement rules, as well as accommodate the role changes by MESD staff which have occurred during the past thirteen years. A discussion of the changes to each rule follows.

OAR 137-047-0255. The original resolution authorized MESD to give public notice of solicitation for bids by electronic means when the Superintendent, Director of Business Services or Supervisor, Purchasing Services, determines such notice is likely to be cost-effective. The recommended changes include authorizing that the determination be made *by the Superintendent or his/her delegate(s)*, and adding new requirements for legal information to be included within bid documents, matching changes already adopted by the Attorney General in the Oregon Administrative Rules.

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OAR 137-047-0265. The original resolution authorized MESD to award a contract for \$5,000 or less (also known as a small-dollar contract) when the *Superintendent, Director of Business Services or Supervisor, Purchasing Services*, determines that the contract is in the best interest of MESD. The recommended change incorporates the Attorney General's adopted change in Oregon Administrative Regulation language, allowing the dollar threshold to automatically change when the legislature makes changes to that threshold, as well as authorizing that the determination to award a small-dollar contract be made by *the Superintendent or his/her delegate(s)*.

OAR 137-047-0275. The original resolution, based on a draft Oregon Administrative Regulation from the Attorney General's office, authorized MESD to award a sole-source contract when *the Superintendent, Director of Business Services or Supervisor, Purchasing Services*, determines that the goods or services are only available from one source, and included a *fourteen-day* period for receiving protests from the public, which was a clerical error in the draft OAR. The Attorney General has since corrected the length of the protest period in the OAR, but MESD's LCRB rule was not subsequently corrected. The recommended changes to MESD's LCRB rule include adoption of the Attorney General's *seven-day* period for receiving protests, and authorizing that the determination of sole-source be made by *the Superintendent or his/her delegate(s)*.

OAR-137-047-0280. The original resolution authorized *the Superintendent or Director of Business Services* to make procurements of goods or services in an emergency. The recommended change authorizes *the Superintendent or his/her delegate(s)* to procure goods or services in an emergency.

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WHEREAS in 2005, the MESD Local Contract Review Board adopted the Oregon Attorney General's model administrative rules for contract selection processes, pursuant to legislative revisions in public contracting law, and

WHEREAS MESD's LCRB made additions at the time of adoption to certain rules as required by the Attorney General's rules, and

WHEREAS the Attorney General has, in the subsequent thirteen years, made changes to some of the adopted rules, and

WHEREAS, in the subsequent thirteen years, the roles of MESD staff named in the adopted rule additions have changed,

NOW THEREFORE BE IT RESOLVED that the Board hereby adopts modifications to OAR- 137-047-0255, OAR-137-047-0265, OAR-137-047-0275 and OAR-137 -047-0280 as written.

137-047-0255
Competitive Sealed Bidding

(1) Generally. A Contracting Agency may procure Goods or Services by competitive sealed bidding as set forth in ORS 279B.055. An invitation to Bid is used to initiate a competitive sealed bidding solicitation and shall contain the information required by ORS 279B.055(2) and by section 2 of this rule. The Contracting Agency shall provide public notice of the competitive sealed bidding solicitation as set forth in OAR 137-047-0300. Public notice may be published electronically when such notice is likely to be cost-effective as determined by the Superintendent, or his/her delegate(s). ~~the Director of Business Services or Supervisor, Purchasing Services.~~

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

(a) General Information.

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

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

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

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

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

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

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

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

(F) Contractor 's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A. 1 10(4). (See OAR 137-046-0210(3)); and

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

(b) Contracting Agency Need to Purchase. The character of the Goods or Services the Contracting Agency is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by Oregon Laws 2009, chapter 880, section 5, the Contracting Agency's description of its need to purchase must:

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

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

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

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

(c) Bidding and Evaluation Process.

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- (A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;
- (B) The Contracting Agency shall set forth objective evaluation criteria in the Solicitation Document in accordance with the requirements of ORS 279B.055(6)(a). Evaluation criteria need not be precise predictors of actual future costs, but to the extent possible, such evaluation factors shall be reasonable estimates of actual future costs based on information the Contracting Agency has available concerning future use; and
- (C) If the Contracting Agency intends to Award Contracts to more than one Bidder pursuant to OAR 137-047-0600(4)(c), the Contracting Agency shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award.
- (d) Applicable preferences pursuant to ORS 279B.055(6)(b).
- (e) For Contracting Agencies subject to ORS 305 .385, Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
- (f) ~~All Contract terms and conditions, including a provision indicating whether the Contractor can assign the Contract, delegate its duties, or subcontract the delivery of the Goods or Services without prior written approval from the Contracting Agency.~~ All contractual terms and conditions in the form of Contract provisions the Contracting Agency determines are applicable to the Procurement. As required by Oregon Laws 2009, chapter 880, section 5, the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:
 - (A) The Contracting Agency's reduction or withholding of payment under the Contract;
 - (B) The Contracting Agency's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the statement of work or to meet the performance standards established by the resulting Contract; and
 - (C) The Contracting Agency's rights, which the Contracting Agency may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available under the resulting Contract or applicable law.
- (3) Good Cause. For the purposes of this rule, "Good Cause" means a reasonable explanation for not requiring Contractor to meet the highest standards, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of the Contracting Agency. The Contracting Agency shall document in the Procurement file the basis for the determination of Good Cause for specification otherwise. A Contracting Agency will have Good Cause to specify otherwise under the following circumstances:
 - (a) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;
 - (b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the Goods or Services will be compatible with or will operate efficiently or effectively with components, equipment, parts, Services or information technology including hardware, Services or software with which the Goods or Services will be used, integrated, or coordinated;
 - (c) The circumstances of the industry or business that provides the Goods or Services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, scientific developments, that a reliable highest prevalent standard does not exist or has not been developed;
 - (d) Any other circumstances in which Contracting Agency's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs the

Contracting Agency's practical need for the highest prevalent standard in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract.

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279B.055

137-047-0265 Small Procurements

- (1) Generally. For Procurements of Goods or Services less than or equal to the dollar amount stated in ORS 279B.065, a Contracting Agency may Award a Contract as a small Procurement pursuant to ORS 279B.065. ~~For Procurements of Goods or Services less than or equal to \$5,000 a Contracting Agency may Award a Contract as a small Procurement pursuant to ORS 279B.065 and in accordance with rules promulgated by the Contracting Agency pursuant to ORS 279A.070.~~
- (2) Amendments. A Contracting Agency may amend a Public Contract Awarded as a small Procurement in accordance OAR 137-047-0800, but the cumulative amendments shall not increase the total Contract Price to greater than \$6,000.
- (3) Award. A contract may be awarded in any manner deemed practical or convenient and in the best interest of the Contracting Agency as determined by the Superintendent, or his/her delegate(s). ~~Director of Business Services or the Supervisor, Purchasing Services.~~

Stat. Auth.: ORS 279A.065 & ORS 279B.065
Stats. Implemented: ORS 279B.065

137-047-0275 Sole-source Procurements

- (1) Generally. A Contracting Agency may Award a Public Contract without competition as a sole-source Procurement pursuant to the requirements of ORS 279B.075.
- (2) Public Notice. If, but for the Contracting Agency's determination that it may enter into a Contract as a sole-source, a Contracting Agency would be required to select a Contractor using source selection methods set forth in either ORS 279B.055 or ORS 279B.060, a Contracting Agency shall give public notice of the Contract Review Authority's determination that the Goods or Services or class of Goods or Services are available from only one source. The Contracting Agency shall publish such notice in a manner similar to public notice of competitive sealed Bids under 279B.055(4) and OAR 137-047-0300. The public notice shall describe the Goods or Services to be acquired by a sole-source Procurement, identify the prospective Contractor and include the date, time and place that protests are due. The Contracting Agency shall give Affected Persons at least seven (7) days from the date of the notice of the determination that the Goods or Services are available from only one source to protest the sole source determination. ~~a Contracting Agency shall give public notice of the Contract Review Authority's determination that the Goods or Services or class of Goods or Services are available from only one source in a manner similar to public notice of competitive sealed Bids under ORS 279B.055(4) and OAR 137-047-0300. The public notice shall describe the Goods or Services to be acquired by a sole-source Procurement, identify the prospective Contractor and include the~~

~~date, time and place that protests are due. The Contracting Agency shall give such public notice at least fourteen (14) Days before Award of the Contract.~~

(3) Protest. An Affected Person may protest the Contract Review Authority's determination that the Goods or Services or class of Goods or Services are available from only one source in accordance with OAR 137-047-0710.

(4) Designated Persons. A contract may be awarded for goods or services, or class of goods or services, that are available from only one source as determined by the Superintendent, **or his/her delegate(s)**. ~~Director of Business Services or Supervisor, Purchasing Services.~~

Stat. Auth.: ORS 279A.065 & ORS 279B.075

Stats. Implemented: ORS 279B.075

137-047-0280 Emergency Procurements

A Contracting Agency may Award a Public Contract as an Emergency Procurement pursuant to the requirements of ORS 279B.080. When an Emergency Procurement is authorized, the Procurement shall be made with competition that is practicable under the circumstances. The Superintendent **or his/her delegate(s)** ~~or Director of Business Services~~ may make or authorize others to make an Emergency Procurement of goods or services in an emergency.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.080