

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AMENDING METRO) ORDINANCE NO. 11-1256
CODE CHAPTER 2.04 IN ORDER TO)
STRENGTHEN METRO’S CONTRACT) Introduced by Acting Chief Operating Officer
POLICIES) Dan Cooper with the Concurrence of Council
President Tom Hughes

WHEREAS, Metro Chapter 2.04 establishes agency policies for Public Contracts and Amendments, Special Procurements, and Notices of Awards and Appeals;

WHEREAS, the Acting Chief Operating Officer has proposed certain revisions to Metro Code Chapter 2.04 to improve the provisions of the Metro Contracting Code concerning contract amendments and special procurements, as well as to align certain thresholds for bonds and appeals with Metro’s established threshold for formal procurements.

WHEREAS, the Metro Council finds that the Metro Procurement Program furthers Metro’s objectives for best public agency practices; now therefore,

THE METRO COUNCIL ORDAINS AS FOLLOWS:

- 1. Metro Code Amendment. Metro Code section 2.04.052 is amended in the form attached hereto as Exhibit A.
- 2. Metro Code Amendment. Metro Code section 2.04.053 is amended in the form attached hereto as Exhibit B.
- 3. Metro Code Amendment. Metro Code section 2.04.058 is amended in the form attached hereto as Exhibit C.
- 4. Metro Code Amendment. Metro Code section 2.04.070 is amended in the form attached hereto as Exhibit D.

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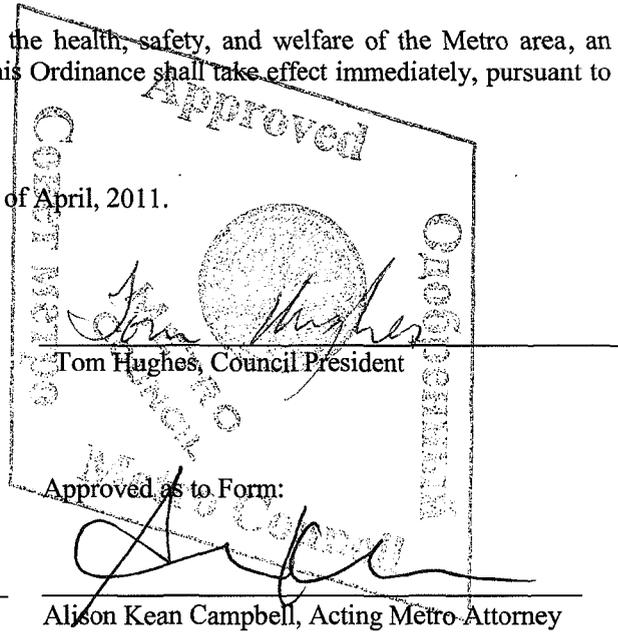
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5. This Ordinance being necessary for the health, safety, and welfare of the Metro area, an emergency is declared to exist and this Ordinance shall take effect immediately, pursuant to Metro Charter Section 39(1).

ADOPTED by the Metro Council this 21 day of April, 2011.



Attest:

Kelsey Newell, Recorder

Approved as to Form:

Alison Kean Campbell, Acting Metro Attorney

Exhibit A

2.04.052 Public Contracts -- Public Improvement Contracts

(a) Procedural Requirements.

- (1) The procedures for sealed competitive bidding, sealed competitive proposals, and all other methods of procurement of public contracts used by Metro shall comply with all requirements that are generally applicable to local governments as set forth in ORS Chapters 279A and 279B.
- (2) The procedures for competitive bidding of all Metro public improvement contracts shall comply with all requirements that are generally applicable to local governments as set forth in ORS Chapter 279C.
- (3) Notwithstanding the provisions of subsections (a) (1) and (a) (2), and pursuant to ORS 279A.065(5), the model rules adopted by the Oregon Attorney General shall not apply to Metro.
- (4) The Chief Operating Officer may establish by executive order detailed procedural requirements consistent with this chapter and state law. In so doing, the Chief Operating Officer may adopt in whole or in part the model rules of procedure established by the Oregon Attorney General pursuant to ORS 279A.065.

(b) Substantive Requirements.

- (1) All Metro public contracts shall contain all provisions required of local contracting agencies by ORS Chapters 279A and 279B and shall be construed to be consistent with all provisions of ORS Chapters 279A and 279B.
- (2) All Metro public improvement contracts shall contain all provisions required of local contracting agencies by ORS Chapter 279C and

shall be construed to be consistent with all provisions of ORS Chapter 279C.

(c) Rejection of Bids and Proposals. The Chief Operating Officer may reject any bid, proposal or response not in compliance with all prescribed procedures and requirements and may, for good cause, reject any or all bids, proposals or procurement responses for personal service contracts and public contracts in accordance with the provisions of ORS 279B.100 and may reject all bids or proposals for public improvement contracts in accordance with the provisions of ORS 279C.395.

(d) Bonds. Unless the Board shall otherwise provide, bonds and bid security requirements are as follows:

- (1) Bid security not exceeding 10 percent of the amount bid for the contract is required unless the contract is for ~~\$50,000.00~~ \$100,000.00 or less.
- (2) For public improvements, a labor and materials bond and a performance bond, both in an amount equal to 100 percent of the contract price are required for contracts over ~~\$50,000.00.~~ \$100,000.00.
- (3) Bid security, labor and material bond and performance bond may be required even though the contract is of a class not identified above, if the Chief Operating Officer determines it is in the public interest.

(e) Disadvantaged Business Program. All public contracts are subject to the Metro Disadvantaged Business Enterprise Program for Federally-Funded Contracts, Metro Women Business Enterprise Program, and the Metro Minority Business Enterprise Program provisions of this chapter.

Exhibit B

2.04.053 Special Procurements

(a) Pursuant to ORS 279B.085, the following public contracts are approved as classes of special procurements based on the legislative finding by the Metro Contract Review Board that the use of a special procurement will be unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts and will result in substantial cost savings to Metro or the public or will otherwise substantially promote the public interest in a manner that could not practicably be realized by complying with the requirements that are applicable under ORS 279B.055, ORS 279B.060, ORS 279B.065, ORS 279B.070:

- (1) All contracts estimated to be not more than \$100,000.00 provided that the procedures required by Metro Code Section 2.04.056 are followed.
- (2) Food for zoo animals, the Purchase purchase and sale of zoo animals, feed for zoo animals, and the purchase of zoo gift shop retail inventory and resale items.
- (3) Contracts for management and operation of food, parking or similar concession services at Metro facilities provided that procedures substantially similar to the procedures required for sealed competitive Request for Proposals used by Metro for personal services contracts are followed.
- (4) Emergency contracts provided that the provisions of ORS 279B.080 are followed. An emergency contract must be awarded within 60 days of the declaration of the emergency unless the Board grants an extension.
- (5) Purchase of food items for resale at facilities owned or operated by Metro.
- (6) Contracts for warranties, including but not limited to computer software warranties, in which the supplier of the goods or services covered by the warranty has designated an authorized provider for the warranty service.

- (7) Contracts for computer hardware, or computer software.
- (8) Contracts under which Metro is to receive revenue by providing a service.
- (9) Contracts for the lease or use of the convention, trade, and spectator buildings and facilities operated by the Metro Exposition-Recreation Commission.
- (10) Public contracts by the Metro Exposition-Recreation Commission in an amount less than \$100,000.00, which amount shall be adjusted each year to reflect any changes in the Portland SMSA CPI, provided that any rules adopted by the commission which provide for substitute selection procedures are followed.
- (11) Contracts for equipment repair or overhaul, but only when the service and/or parts required are unknown before the work begins and the cost cannot be determined without extensive preliminary dismantling or testing.
- (12) Contracts in the nature of grants to further a Metro purpose provided a competitive Request for Proposal process is followed.
- (13) The procurement of utilities or any other services whose price is regulated by any governmental body, including but not limited to telephone service, electric, natural gas, and sanitary services, provided that if competition is available, a Request for Proposal process is followed.
- (14) Contracts for goods or services when the provider of the procured goods or services is required by the federal government or by the state of Oregon.
- (15) Contracts for co-operative procurements permitted under ORS 279A.220 to 279A.225.

- (16) The procurement of art and art related production and fabrication provided that a Request for Proposal process is followed.
- (17) Sponsorships which are identified and approved in the proposed budget and are not designated by Council as having a significant impact as outlined in Section 2.04.026 need not follow a competitive bidding or proposal process. In order to be eligible for this exemption the sponsorship shall provide Metro with event advertising and/or media releases.
- (18) Sponsorship contracts, provided that quotes are obtained from at least three potential sponsors or that good faith efforts to obtain such quotes are documented. A sponsorship contract is any contract under which the sponsor's name or logo is used in connection with a facility's goods, buildings, parts of buildings, services, systems, or functions in exchange for the sponsor's agreement to pay consideration, including money, goods, services, labor, credits, property or other consideration.
- (19) Contracts for projects that are not public improvements as defined in Metro Code Section 2.04.010(n) in which a contractor provides a material and substantial portion of the funding for such project.
- (20) Contracts with any media outlet for the purchase of classified advertising, display advertising or the placement of public notices to publicize legal notices of public meetings and procurements.
- (21) Any contract exempt from competitive bidding under any statute of the state of Oregon.

(b) Description of procurement procedures for class special procurements: Procurements for each of the class special procurements described in subsection (a) shall be performed by means of procedures chosen by the Chief Operating Officer as an appropriate method tailored to and in light of the demands, circumstances and market realities associated with obtaining each of the enumerated goods and services. Such

procurement procedures may include but shall not limited to direct negotiations with individual or multiple vendors or suppliers; negotiations with ranked proposers; competitive negotiations; or multiple tiered competitions.

(c) Specific contracts not within the classes described in subsection (a) may be procured by special procurements subject to the requirements of ORS 279B.085.

Exhibit C

2.04.058 Public Contract Amendments

(a) The Chief Operating Officer may execute amendments to public contracts, provided that any one of the following conditions are met:

- (1) The original contract was let by a formal competitive procurement process, the amendment is for the purpose of authorizing additional work for which unit prices or alternates were provided that established the cost for the additional work and the original contract governs the terms and conditions of the additional work; or
- (2) The amendment is a change order that resolves a bona fide dispute with the contractor regarding the terms and conditions of a public contract or public improvement contract ~~for a public improvement~~ and the amendment does not materially add to or delete from the original scope of work included in the original contract; or
- (3) The amendment is for a public improvement contract and increases the total obligation of the contract by no more than 20 percent. ~~contract amendment to a contract for a public improvement does not increase the contract amount more than \$25,000 if the amount of the aggregate cost resulting from all amendments authorized pursuant to this subsection does not exceed five percent of the initial contract.~~ In computing the dollar amount of any amendment for the purpose of this subsection, the amount of original contract obligation shall be used. In addition, only the amount of additional work or extra cost shall be considered and such work or cost may not be offset by the amount of any deletions; amendments made under subsection (1) or (2) are not included in computing the aggregate amount under this subsection; or

(4) The amount of the aggregate cost increase resulting from all amendments to a public contract other than a public improvement contract does not exceed 20 percent of the initial contract if the face amount is less than or equal to \$1,000,000.00 or 10 percent if the face amount is greater than \$1,000,000.00; amendments made under subsection (1) or (2) are not included in computing the aggregate amount under this subsection; or

~~(5) The amendment is for a change order for additional work if the original contract was let by a formal competitive procurement, the amendment is for the purpose of authorizing additional work for which unit prices or bid alternates were provided that established the cost for the additional work and the original contract governs the terms and conditions of the additional work; or~~

~~(6)~~ The amendment is for a change order to a public improvement contract in order to meet an emergency; or

~~(7)~~ The Metro Contract Review Board has authorized the extension of the contract amendment.

(b) No public contract may be amended to include additional work or improvements that are not directly related to the scope of work that was described in the competitive process utilized to award the contract.

Exhibit D

2.04.070 Notice of Award and Appeals

(a) At least seven (7) days prior to the execution of any public contract over ~~\$50,000.00~~ \$100,000.00 for which a competitive bid or proposal process is required, Metro shall provide a notice of award to the contractor selected and to all contractors who submitted unsuccessful bids or proposals.

(b) Bid/Request for Proposals Appeal Procedures. The following procedure applies to aggrieved bidders and proposers who wish to appeal an award of a public contract or a personal services contract above ~~\$150,000.00.~~ \$100,000.00. The appeal process for bids is the same as for a Request for Proposals. In the case of a Request for Proposal(s), disagreement with the judgment exercised in scoring by evaluators is not a basis for appeal.

- (1) All appeals shall be made in writing and shall be delivered to the Procurement Officer at Metro's main office within seven (7) working days of the postmarked date on the notice of award. The written appeal must describe the specific citation of law, rule, regulation, or procedure upon which the appeal is based.
- (2) The Procurement Officer shall forthwith notify the appropriate Department Director and the Chief Operating Officer of the appeal. In the case of an appeal of an award by a Commission or the Metro Auditor, the appeal shall be forwarded to the Commission or Metro Auditor. Within 10 working days of the receipt of the notice of appeal, the Chief Operating Officer, Commission or Metro Auditor shall send a notice of rejection of the appeal or a notice of acceptance of the appeal, as applicable, to the appellant. The appellant may appeal the Chief Operating Officer's, Commission's, or Metro Auditor's decision to reject the appeal in writing to the Board within five (5) working days from the postmarked date on the notice of rejection.

- (3) The Board will review the grounds for appeal, all pertinent information, and the Chief Operating Officer's, Commission's or Metro Auditor's recommendation, and make a decision. The decision of the Board is final.
- (4) No contract, which is the subject of a pending appeal, may be executed unless the Board shall have given its approval. The Chief Operating Officer, Commission or Metro Auditor may request the Board to determine a matter without waiting for the expiration of the time periods provided for herein.
- (5) In the event Council authorization of execution of the contract is required under Section 2.04.026 of this Code, the appeal shall be heard before the Council considers authorization of the contract.

(c) Appeals from Debarment or Denial of Prequalification

- (1) The Board shall hear all appeals from any person who is disqualified by Metro as a bidder. The basis for the appeal shall be limited to the following grounds:
 - (A) Debarment of bidders and proposers pursuant to ORS 279B.130.
 - (B) Denial of prequalification to bid pursuant to ORS 279B.120 and 279B.125.
- (2) Any person who wishes to appeal debarment or denial of prequalification as a bidder shall, within three (3) business days after receipt of notice of disqualification, notify in writing the Metro Attorney that the person appeals the disqualification. The Metro Attorney shall promptly notify the Board of the appeal by providing notice to the Council President.
- (3) Promptly upon receipt of notice of appeal, the Council President shall notify the appellant and the Metro Attorney of the time and place of the appeal proceeding.

- (4) The Board shall conduct the appeal proceeding in accordance with the provisions of ORS 279B.425 and decide the appeal within 30 days after receiving notification of the appeal from the Metro Attorney. The Board shall set forth in writing the reasons for the decision.
- (5) Appeal Proceeding.
 - (A) The Council President shall preside over the appeal proceeding. The general order shall be as follows:
 - (i) Presentation by Metro of documentation and testimony supporting the disqualification.
 - (ii) Presentation by the appellant of documentation and testimony opposing the disqualification.
 - (B) Members of the Board shall have the right to ask both Metro and the appellant questions and to review documentation referred to and presented by the parties.
 - (C) Formal court rules of evidence shall not apply.
 - (D) The Board shall consider de novo the notice of debarment or denial of prequalification, and record of investigation made by Metro and any evidence provided by Metro and the appellant prior to or at the appeal proceeding. There shall be no continuance or reopening of the appeal proceeding to offer additional evidence unless the appellant can demonstrate to the Council President that the additional evidence was not known to the appellant at the time of the proceeding or that with reasonable diligence the appellant would not have discovered the evidence prior to the appeal proceeding.
 - (E) A tape recording will be made of the appeal proceeding which shall be made available to

the appellant upon payment of costs to Metro of making the tape.

(F) The Board shall render a decision which shall be reviewed only upon petition in the Circuit Court of Multnomah County. The petition must be filed within 15 days after the date of the decision in accordance with the provisions of ORS 279B.425.

(6) Metro may reconsider its determination with regard to the debarment or denial of prequalification at any time prior to the appeal proceeding.

(d) Appeals of contract awards and decisions of the Auditor shall be made directly to the Contract Review Board.

STAFF REPORT

FOR THE PURPOSE OF AMENDING METRO CODE CHAPTER 2.04.052 THROUGH 2.04.070 IN ORDER TO STRENGTHEN METRO'S CONTRACT POLICIES

Date: March 15, 2011

Prepared by:

Darin Matthews
Procurement Officer
797-1626

BACKGROUND

Metro Code 2.04.052 through 2.04.070 sets forth the agency's policies on the procurement of goods and services for the agency. These policies are in accordance with the Oregon Public Contracting Code (ORS 279A, B and C) and are consistent with public agency practices on competitive bidding.

The Metro Council, acting as the local contract review board, in accordance with ORS 279A.060, has elected to establish its own rules with regard to public contracting. While the Oregon Attorney General's Model Public Contract Rules serve as a resource for Metro, the AG's rules are not applicable to the agency.

Recent Code Changes

During 2010, the Metro Council approved certain revisions to the Metro contract policies. These changes strengthened the Code with regard to sustainable procurement (2.04.500) as well as the use of minority, women and emerging small businesses (2.04.100). Metro Contracting Code in these areas now represents current and leading practices for public agencies.

The latest proposed changes are intended to improve the Metro Contracting Code with regard to contract amendments and special procurements, as well as to align certain thresholds for bonds and appeals with the established threshold for formal procurements.

Bonds

Currently Metro Code requires bid security for contracts of \$50,000 or more. Bid security is normally in the amount of five percent (5%) of the bid amount and is provided by the bidder in the form of a bond or cashier's check. This assures that the bidder, if selected, will honor their offer to Metro.

Since the established threshold for formal procurement at Metro is \$100,000, it is reasonable that the bid security requirement be consistent with this amount. Contracts under this amount are referred to as intermediate procurements and can be handled informally by email or facsimile. Not requiring bid security in these instances would help speed up the procurement process.

Additionally, this would make it easier for MWESB contractors to submit bids to Metro on intermediate procurements. The cost of bid bonds can be a challenge for small businesses and has been identified as a barrier for MWESB's in the public contracting process.

Special Procurements

Currently Metro exempts certain types of purchases from traditional competitive bidding. In accordance with the Oregon Contracting Code, Metro has identified several categories of special procurements that include emergency contracts, repair contracts, sponsorships, and art work that are deemed impractical for competitive bidding.

Certain purchases for the Oregon Zoo are currently exempted from competitive bidding. These include the purchase of zoo animals, retail inventory for the Zoo gift shop, and items for resale.

The Metro Procurement Officer is proposing that animal food for the Oregon Zoo be added to the list of special procurements. Due to the specialized nature of this food and the unique dietary requirements of the animals, it is often impractical to purchase these items through a competitive low-bid process. Recent experiences have confirmed that it would be in the best interest of the agency to exempt animal food. Best value would be obtained by leveraging existing contracts, considering product quality and past performance, and negotiating directly with proven suppliers.

Additionally, all contracts that are already exempted by the Oregon Contracting Code should also be exempted by Metro and treated as a special procurement.

Contract Amendments

The Metro Code currently limits contract amendments and change orders for its contracts. A summary of these limits are as follows:

- Personal services contracts can be increased up to 100 percent of their original value.
- Public contracts for goods and services can be increased up to 20 percent of their original value.
- Public improvement contracts can be increased up to 5 percent of their original value.

The Metro Procurement Officer believes that the current limit for public improvement contracts is impractical and much lower than industry standards. Public improvement contracts are for construction, reconstruction or major renovation. The current threshold of 5 percent requires many change orders that are routine and justifiable to be approved by the Metro Council. Therefore, it is suggested that the Council consider raising this threshold to 20 percent.

In determining the proposed limitation of contract amendments, Metro reviewed other area agencies that procure public improvement contracts. The following represents a summary of their respective rules:

<u>Agency</u>	<u>Public Improvement Amendment Threshold</u>
City of Portland	25%
Multnomah County	20%
Washington County	20%
State of Oregon	20%

It is believed that a threshold that is consistent with other area agencies would be in the best interest of Metro. This would put the agency in line with other similar organizations and would increase efficiency in the contracting process.

Contract Appeals

The Metro Contract Code currently allows bidders and proposers the opportunity to challenge the agency's contracting decisions through an appeal process. Within seven (7) days of Metro's notice of intent to award a contract, aggrieved bidders can submit a written appeal to the Procurement Officer, who then works with the Chief Operating Officer, Metro Attorney and Department Director in responding to

the appellant. If the matter cannot be resolved, then the bidder can appeal to the Metro Council acting as the contract review board.

The thresholds in the current Code are \$50,000 for the notice of award and \$150,000 for the appeal process. It is believed that aligning these amounts with Metro's formal procurement threshold of \$100,000 would establish consistency and clarity in the appeal process.

Summary

The Metro Procurement Officer has reviewed best contracting practices of other area public agencies and consulted with the Office of Metro Attorney. It is believed that the proposed changes in this legislation will increase efficiency in the contracting and procurement process and are in the best interest of Metro.

The proposed revisions to this section of the Metro Code are attached to the ordinance as Exhibits A, B, C and D.

ANALYSIS/INFORMATION

1. **Known Opposition** None known.
2. **Legal Antecedents** Metro Code 2.04.052 through 2.04.070, ORS 279A, B, and C.
3. **Anticipated Effects** Metro Contract Code will be strengthened in the areas of bonds, special procurements, contract amendments and contract appeals.
4. **Budget Impacts** Minimal impact to budget as changes to policies and forms would be accomplished through current staff resources.

RECOMMENDED ACTION

Metro Council approves the proposed revisions to Metro Code 2.04 in order to strengthen the agency's Contract Program.