

Council meeting agenda

Thur	rsday, Ap	oril 6, 2017	2:0	00 PM	Metro Regiona	l Center, Council chamber
1.	Call to	Order and Roll C	all			
2.	Citize	n Communication				
3.	Conse	ent Agenda				
	3.1	Consideration (23, 2017	of the Council Meetin	g Minutes	for March	<u>17-4773</u>
	3.2	2015-18 Metro Program (MTIP Part of the Feb	17-4774, For the Purpolitan Transportation to Modify and/or Actuary 2017 Formal Mickamas County, DEQ, and TriMet Resolution No. 17-4 Exhibit A to Resolution Staff Report	n Improvei dd New Pro FIP Amend Metro, Por	ment jects as ment for tland,	<u>RES 17-4774</u>
	3.3	the Chief Opera License to Veri Non-Recoveral Waste, at the O Brooks, Oregor	17-4773, For the Purp eting Officer to Issue a s Industries for Transp ele Solid Waste, Include ovanta Waste-to-Ene Resolution No. 17-4 Exhibit A to Resolut Staff Report	a New Non port and Disting Putres rgy Facility	-System sposal of cible Located in	<u>RES 17-4773</u>
	3.4	Deidra Krys-Ru	17-4784, For the Purp soff and Andrew Lone Advisory Board <u>Resolution 17-4784</u>	ergan Appo	_	<u>RES 17-4784</u>

Staff report

4. Resolutions

4.1 Resolution No. 17-4781, For the Purpose of Authorizing an

RES 17-4781

Exemption from Competitive Bidding and Direct Award of the Construction Contract for the New Primate Habitat Project at the Oregon Zoo by Amendment to the CM/GC Contract for the Construction of the New Polar Bear Habitat and Associated Infrastructure

Presenter(s): Gabriele Schuster, Metro

Heidi Rahn, Oregon Zoo Jim Mitchell, Oregon Zoo

Attachments: Resolution No. 17-4781

Exhibit A to Resolution No. 17-4781

Staff Report

4.1.1 Public Hearing for Resolution No. 17-4781

4.2 Resolution No. 17-4779, For the Purpose of Adopting Local

RES 17-4779

Contract Review Board Administrative Rules and Interim

Equity in Contracting Administrative Rules

Presenter(s): Cary Stacey, Metro
Attachments: Resolution No. 17-4779

Exhibit A to Resolution No. 17-4779

Exhibit B to Resolution No. 17-4779

Exhibit C to Resolution No. 17-4779

Staff Report

4.2.1 Public Hearing for Resolution No. 17-4781

5. Ordinances (First Reading and Public Hearing)

5.1 Ordinance No. 17-1398, For the Purpose of Amending

ORD 17-1398

Metro Code Section 2.04 and Declaring an Emergency

Presenter(s): Cary Stacey, Metro

Attachments: Ordinance No. 17-1398

Exhibit A for Ordinance No. 17-1398

Staff Report

Findings in Support of Ordinance No. 17-1398

5.1.1 Public Hearing for Ordinance No. 17-1398

- 6. Chief Operating Officer Communication
- 7. Councilor Communication
- 8. Adjourn

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Повідомлення Metro про заборону дискримінації

Меtro з повагою ставиться до громадянських прав. Для отримання інформації про програму Metro із захисту громадянських прав або форми скарги про дискримінацію відвідайте сайт <u>www.oregonmetro.gov/civilrights</u>. або Якщо вам потрібен перекладач на зборах, для задоволення вашого запиту зателефонуйте за номером 503-797-1890 з 8.00 до 17.00 у робочі дні за п'ять робочих днів до зборів.

Metro 的不歧視公告

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1890(工作日上午8點至下午5點),以便我們滿足您的要求。

Ogeysiiska takooris la'aanta ee Metro

Metro waxay ixtiraamtaa xuquuqda madaniga. Si aad u heshid macluumaad ku saabsan barnaamijka xuquuqda madaniga ee Metro, ama aad u heshid warqadda ka cabashada takoorista, booqo <u>www.oregonmetro.gov/civilrights</u>. Haddii aad u baahan tahay turjubaan si aad uga qaybqaadatid kullan dadweyne, wac 503-797-1890 (8 gallinka hore illaa 5 gallinka dambe maalmaha shaqada) shan maalmo shaqo ka hor kullanka si loo tixgaliyo codsashadaada.

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Metro의 시민권 프로그램에 대한 정보 또는 차별 항의서 양식을 얻으려면, 또는 차별에 대한 불만을 신고 할 수<u>www.oregonmetro.gov/civilrights.</u> 당신의 언어 지원이 필요한 경우, 회의에 앞서 5 영업일 (오후 5시 주중에 오전 8시) 503-797-1890를 호출합니다.

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សេចក្តីជូនដំណីងអ់ពីការមិនរើសអើងរបស់ Metro

ការគោរពសិទ្ធិពលរដ្ឋរបស់ ។ សំរាប់ព័ត៌មានអំពីកម្មវិធីសិទ្ធិពលរដ្ឋរបស់ Metro ឬដើម្បីទទួលពាក្យបណ្តឹងរើសអើងសូមចូលទស្សនាគេហទ់ព័រ www.oregonmetro.gov/civilrights។ បើលោកអ្នកគ្រូវការអ្នកបកប្រែកាសនៅពេលអង្គ

បើលោកអ្នកក្រូវការអ្នកបកប្រែកាសនៅពេលអង្គ ប្រជុំសាធារណៈ សូមទូរស័ព្ទមកលេខ 503-797-1890 (ម៉ោង 8 ព្រឹកដល់ម៉ោង 5 ល្ងាច ថ្ងៃធ្វើការ) ប្រាំពីរថ្ងៃ

ថៃធើការ មនថៃប្រជុំដើម្បីអាចឲ្យគេសម្រល់តាមសំណើរបស់លោកអ្នក ។

إشعار بعدم التمييز من Metro

تحترم Metro الحقوق المدنية. للمزيد من المعلومات حول برنامج Metro الحقوق المدنية أو لإيداع شكوى ضد التمييز، يُرجى زيارة الموقع الإلكتروني www.oregonmetro.gov/civilrights. إن كنت بحاجة إلى مساحدة في اللغة، يجب عليك الاتصال مقدماً برقم الهاتف 1890-797-503 (من الساعة 8 صباحاً حتى الساعة 5 مساحاً وقال عائم من موحد الاجتماع.

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Iginagalang ng Metro ang mga karapatang sibil. Para sa impormasyon tungkol sa programa ng Metro sa mga karapatang sibil, o upang makakuha ng porma ng reklamo sa diskriminasyon, bisitahin ang www.oregonmetro.gov/civilrights. Kung kailangan ninyo ng interpreter ng wika sa isang pampublikong pulong, tumawag sa 503-797-1890 (8 a.m. hanggang 5 p.m. Lunes hanggang Biyernes) lima araw ng trabaho bago ang pulong upang mapagbigyan ang inyong kahilingan.Notificación de no discriminación de Metro.

Notificación de no discriminación de Metro

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Metro txoj kev ntxub ntxaug daim ntawv ceeb toom

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Television schedule for June 16, 2016 Metro Council meeting

Clackamas, Multnomah and Washington counties, and Vancouver, WA Channel 30 – Community Access Network Web site: www.tvctv.org Ph: 503-629-8534 Call or visit web site for program times.	Portland Channel 30 – Portland Community Media Web site: www.pcmtv.org Ph: 503-288-1515 Call or visit web site for program times.
Gresham Channel 30 - MCTV Web site: www.metroeast.org Ph: 503-491-7636 Call or visit web site for program times.	Washington County and West Linn Channel 30– TVC TV Web site: www.tvctv.org Ph: 503-629-8534 Call or visit web site for program times.
Oregon City and Gladstone Channel 28 – Willamette Falls Television Web site: http://www.wftvmedia.org/ Ph: 503-650-0275 Call or visit web site for program times.	

PLEASE NOTE: Show times are tentative and in some cases the entire meeting may not be shown due to length. Call or check your community access station web site to confirm program times. Agenda items may not be considered in the exact order. For questions about the agenda, call the Metro Council Office at 503-797-1540. Public hearings are held on all ordinances second read. Documents for the record must be submitted to the Regional Engagement and Legislative Coordinator to be included in the meeting record. Documents can be submitted by e-mail, fax or mail or in person to the Regional Engagement and Legislative Coordinator. For additional information about testifying before the Metro Council please go to the Metro web site www.oregonmetro.gov and click on public comment opportunities.

Consideration of the Council Meeting Minutes for March 23,2017

Consent Agenda

Metro Council Meeting Thursday, April 6, 2017 Metro Regional Center, Council Chamber

Resolution No. 17-4774, For the Purpose of Amending the 2015-18 Metropolitan Transportation Improvement Program (MTIP) to Modify and/or Add New Projects as Part of the February 2017 Formal MTIP Amendment for Beaverton, Clackamas County, DEQ, Metro, Portland, ODOT, Tigard, and TriMet

Consent Agenda

Metro Council Meeting Thursday, April 6, 2017 Metro Regional Center, Council Chamber

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AMENDING THE 2015-18)	RESOLUTION NO. 17-4774
METROPOLITAN TRANSPORTATION)	
IMPROVEMENT PROGRAM (MTIP) TO MODIFY)	Introduced by Chief Operating Officer
AND/OR ADD NEW PROJECTS AS PART OF THE)	Martha Bennett in concurrence with
FEBRUARY 2017 FORMAL MTIP AMENDMENT)	Council President Tom Hughes
FOR BEAVERTON, CLACKAMAS COUNTY,)	-
DEQ, METRO, PORTLAND, ODOT, TIGARD,)	
AND TRIMET)	

WHEREAS, the Metropolitan Transportation Improvement Program (MTIP) prioritizes projects from the Regional Transportation Plan to receive transportation related funding; and

WHEREAS, the Joint Policy Advisory Committee on Transportation (JPACT) and the Metro Council approved the 2015-18 MTIP on July 31, 2014; and

WHEREAS, JPACT and the Metro Council must approve any subsequent amendments to add new projects or substantially modify existing projects in the MTIP; and

WHEREAS, the US Department of Transportation has issued new MTIP amendment submission rules and definitions for Formal and Administrative amendments; and

WHEREAS, ODOT requires a scope change and cost increase to their I-405 Fremont Bridge Ramps project in Key 19533, plus needs to add the PE phase as a new MTIP project to their US30 Sandy River (Troutdale) Bridge, and requires adjusting the scope and cost to their I-84/I-5 Banfield Interchange Bridge and Ramps project in Key 18308; and

WHEREAS, ODOT approved all three project improvement and STIP amendment needs during their October 2016 and February 2017 Oregon Transportation Commission (OTC) meetings and now are requesting the required amendments to the MTIP to be completed; and

WHEREAS, Clackamas County reprogramming action from their SE 172nd Ave – Foster Rd to Sunny Side Rd in Key 15389 will allow funding shortfalls to be eliminated in three other projects, SE 122nd Ave & 132nd in Key 17881, Sunnyside Rd Adaptive Signal System in Key 18305, and Jennings Ave – OR99E to Oatfield Rd: and

WHEREAS, the city of Portland's reprogramming action by pulling approved funding from their future planned Airport Way Connections ITS project can be used resolve the funding shortfall for their Columbia Blvd ITS project and was approved by the TransPort subcommittee; and

WHEREAS, the city of Beaverton can move forward and implement their OR210 ITS project to help reduce congestion and delays on OR210 through this Formal MTIP Amendment; and

WHEREAS, the city of Tigard can complete the de-federalization for their Main St Phase 2 project via a fund swap with TriMet and move forward as a locally funded project plus commit some of the federal funds to eliminate a funding shortfall with their Fanno Creek Trail project; and

WHEREAS, TriMet can complete the fund exchange with Tigard and move forward with the Surface Transportation Fund (STP) in support of their Preventative Maintenance Program; and

WHEREAS, Portland's Red Electric Trail project, Springwater Trail Gap project, and Twenties Bikeway project will be able to eliminate phase funding shortfalls through this amendment; and

WHEREAS, the Department of Environmental Quality will be able to implement the purchase and installation of advanced exhaust control devices on about 21 buses for the Multnomah County David Douglas School District; and

WHEREAS, the MTIP's financial constraint finding is maintained as the project changes reflect lateral funding; and

WHEREAS, TPAC received their notification and recommended approval on February 24, 2017; now therefore

BE IT RESOLVED that the Metro Council hereby adopts the recommendation of JPACT on March 16, 2017 to formally amend the 2015-18 MTIP to include the February 2017 Formal Amendment bundle of eighteen projects requiring changes.

ADOPTED by the Metro Council this day	y of2017.	
Approved as to Form:	Tom Hughes, Council President	
Alicon P. Kaan Matro Attorney		

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: I-405: Fremont Bridge Approach Ramps Modular Joint Replacement

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum STATE Match	Other (Local Overmatch) Funds	Total Funding
I-405: Fremont Bridge Approach Ramps Modular Joint Replacement	Replace modular joints; brs 09268B,092 68N,09268S ,08958B,089 58D,08958I	19533	ODOT	\$5,750,000	PE Cons	NHPP NHPP	2016 2018	\$1,383,300 \$3,919,350	\$154,050 \$330,650		\$5,750,000
							Totals:	\$5,302,650	\$447,350	\$0	\$5,750,000

Amended programming: I-405: Fremont Bridge Approach/ Ramps

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum STATE Match	Other (Local Overmatch) Funds	Total Funding
I-405: Fremont Bridge Approach/ Ramps	Replace modular joints and repair decks	19533	ODOT	\$21,200,000	PE Cons	NHPP NHPP	2016 2018	\$1,890,510 \$17,660,130	\$159,490 \$1,489,870		\$21,200,000
		<u> </u>					Totals:	\$19,550,640	\$1,649,360	\$0	\$21,200,000

Notes:

- 1. Fund type code Notes: NHPP = National Highway Performance Program, STATE = State funds
- 2. PE = Preliminary Engineering, Cons = Construction phase.

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: None – new project

Amended Programming: US 30 Sandy River (Troutdale) Bridge

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum STATE Match	Other (Local Overmatch) Funds	Total Funding
US 30 Sandy River (Troutdale) Bridge	Complete PE phase to determine permanent repair strategy with Construction planned for 2018 or later to bridge	20703	ODOT	Not Determined	PE	NHPP	2017	\$506,975	\$58,025	\$0	\$565,000
							Totals:	\$506,975	\$58,025	\$0	\$565,000

Note:

^{1.} Only PE funding is being added to the project through the February 2017 MTIP Formal Amendment

^{2.} NHPP = National Highway Performance Program

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: I-84/I-5: Banfield Interchange Deck Overlay & Bridge Rail Retrofit

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum STATE Match	Other (Local Overmatch) Funds	Total Funding
I-84/I-5: Banfield Interchange Deck Overlay & Bridge Rail Retrofit	Concrete deck overlay & bridge rail retrofit; bridges #08588A & 08588C	19531	ODOT	\$6,570,000	PE Cons	NHPP NHPP	2016 2018	\$1,014,420 \$5,044,434	\$85,580 \$425,566		\$6,570,000
							Totals:	\$6,058,854	\$511,146	\$0	\$6,570,000

Amended programming: I-84/I-5: Banfield Interchange Deck Overlay & Bridge Rail Retrofit

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum STATE Match	Other (Local Overmatch) Funds	Total Funding
I-84/I-5: Banfield Interchange Deck Overlay & Bridge Rail Retrofit	Concrete deck overlay & bridge rail retrofit; bridges #08588A & 08588C	19531	ODOT	\$8,629,000	PE Cons	NHPP NHPP	2016 2018	\$1,018,109 \$6,939,555	\$85,891 \$585,445		\$8,629,000
							Totals:	\$7,957,664	\$671,336	\$0	\$8,629,000

Note: NHPP = National Highway Performance Program

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: SE 172nd Ave – Foster Rd to Sunnyside Rd

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
SE 172 nd Ave – Foster Rd to Sunnyside Rd	Planning phase for a planned five lane arterial with bike lanes and sidewalks.	15389	Clackamas County	\$2,553,553	Planning PE	STP STP	2009 2017	\$1,368,554 \$922,749	\$156,637 \$105,613		\$2,553,553
							Totals:	\$2,291,303	\$262,250	\$0	2,553,553

Amended programming: SE 172nd Ave – Foster Rd to Sunnyside Rd

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
SE 172 nd Ave – Foster Rd to Sunnyside Rd	Planning phase for a planned five lane arterial with bike lanes and sidewalks.	15389	Clackamas County	\$1,525,191	Planning	STP	2009	\$1,368,554	\$156,637		\$1,525,191
							Totals:	\$1,368,558	\$156,637	\$0	\$1,525,191

Note: STP = Surface Transportation Program funds

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: SE 122nd Ave & 132nd Avenue: Sidewalk Connections

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
SE 122nd Ave & 132nd Avenue: Sidewalk Connections	Add sidewalks	17881	Clackamas County	\$784,000	PE ROW Cons Cons	TE TAP TAP TAP-S	2011 2015 2016 2016	\$144,531 \$233,298 \$10,695 \$219,014	\$16,542 26,702 \$1,224 \$25,067	\$17,927 \$89,000	\$784,000
						*	Totals:	\$607,538	\$69,535	\$106,927	\$784,000

Amended programming: SE 122nd Ave & 132nd Avenue: Sidewalk Connections

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
SE 122nd Ave & 132nd Avenue: Sidewalk Connections	Add sidewalks	17881	Clackamas County	\$1,095,878	PE PE PE ROW Cons Cons Cons	TE TAP STP TAP TAP TAP-S STP	2011 2011 2015 2016 2016 2016 2016	\$144,531 \$25,340 \$30,368 \$233,298 \$10,695 \$219,014 \$304,000	\$16,542 \$2,900 \$3,476 \$26,702 \$1.224 \$25,067 \$34,794	\$17,927	\$1,095,878
							Totals:	\$967,246	\$110,705,	\$17,927	\$1,095,878

Fund code notes:

1. TE = Transportation Enhancements funds

2. TAP-S = State TAP funds

TAP = Transportation Alternatives Program funds

STP = Surface Transportation Program funds

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: Sunnyside Rd Adaptive Signal System

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Sunnyside Rd Adaptive Signal System	Design adaptive traffic signal system and transit signal priority on Sunnyside Rd.	18305	Clackamas County	\$1,007,546	PE Cons	STP STP	2014 2017	\$227,507 \$657,433	\$26,039 \$75,246	\$21,321	\$1,007,546
							Totals:	\$884,940	\$101,285	\$21,321	\$1,007,546

Amended programming: Sunnyside Rd Adaptive Signal System

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Sunnyside Rd Adaptive Signal System	Design adaptive traffic signal system and transit signal priority on Sunnyside Rd.	18305	Clackamas County	\$1,392,098	PE Cons Cons	STP STP STP	2014 2017 2017	\$227,507 \$657,433 \$364,190	\$26,039 \$75,246 \$41,683		\$1,392,098
							Totals:	\$1,249,130	\$142,968	\$0	\$1,392,098

Notes: STP = Surface Transportation Program funds

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: Jennings Ave: OR 99E to Oatfield Rd

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Jennings Ave: OR 99E to Oatfield Rd	Construct curb tight sidewalks and bike lanes along Jennings Ave.	19276	Clackamas County	\$3,790,362	PE ROW Cons	STP STP STP	2017 2018 2018	\$583,245 \$403,785 \$2,414,062	\$66,755 \$46,215 \$276,300		\$3,790,362
							Totals:	\$3,401,092	\$389,270	\$0	\$3,790,362

Amended programming: Jennings Ave: OR 99E to Oatfield Rd

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Jennings Ave: OR 99E to Oatfield Rd	Construct curb tight sidewalks and bike lanes along Jennings Ave	19276	Clackamas County	\$4,040,213	PE ROW Cons Cons	STP STP STP STP	2017 2018 2018 2018	\$583,245 \$403,785 \$2,414,062 \$224,191	\$66,755 \$46,215 \$276,300 \$25,660		\$4,040,213
							Totals:	\$3,625,283	\$414,930	\$0	\$4,040,213

Note: STP = Surface Transportation Program funds

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: N/NE Columbia Blvd Traffic/Transit Signal Upgrade

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
N/NE Columbia Blvd Traffic/ Transit Signal Upgrade	Construct upgrade to traffic signal hardware, communicat ions and signal timing	18308	Portland	\$557,228	PE Cons Other	STP STP STP	2017 2017 2016	\$82,702 \$350,000 \$67,298	\$9,466 \$40,059 7,703		\$557,228
							Totals:	\$500,000	\$57,228	\$0	\$557,228

Amended programming: N/NE Columbia Blvd Traffic/Transit Signal Upgrade

Project Name	Project Description	ODOT Key #	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
N/NE Columbia Blvd Traffic/ Transit Signal Upgrade	Construct upgrade to traffic signal hardware, communicat ions and signal timing	18308	Portland	\$1,225,900	PE PE Cons Cons	STP STP STP STP	2017 2017 2017 2017 2016	\$82,702 \$105,731 \$350,000 \$494,269 \$67,298	\$9,466 \$12,101 \$40,059 \$56,571 \$7,703		\$1,225,900
Note: Total PF	Note: Total PE cost increases to \$210,000. Total Cons cost increases to \$940,899							\$1,100,000	\$125,900	\$0	\$1,225,900

NoteL STP

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: None

Amended programming: OR210: SW Scholls Ferry Rd to SW Hall Blvd ITS Project

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
OR210: SW Scholls Ferry Rd to SW Hall Blvd ITS project	Implement an Adaptive Signal control Technology (ASCT) to help reduce congestion and delays	TBD	Beaverton	\$836,097	PE Cons Other	STP STP STP	2017 2018 2017	\$134,595 \$305,082 \$310,466	\$15,505 \$34,918 \$35,534		\$836,097
Other phase =	ner phase = ConOps							\$750,143	\$85,957	\$0	\$836,100

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: Transportation System Management & Operations (FY 2016)

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Transportation System Management & Operations (FY 2016)	TSMO funding source bucket for ITS related projects	19287	Metro	\$1,154,695	Other	STP	2017	\$1,035,838	\$118,857		\$1,154,695
							Totals:	\$1,035,838	\$118,857	\$0	\$1,154,695

Amended programming: Transportation System Management & Operations (FY 2016)

Project Name	Project Description	ODOT Key #	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Transportation System Management & Operations (FY 2016)	TSMO funding source bucket for ITS related projects	19287	Metro	\$0							\$0
			-				Totals:	\$0	\$0	\$0	\$0

Note:

- 1. The starting funding is based on the programming levels that will result after a TSMO fund draw is completed through n administrative amendment to establish the Regional TSMO Program 2016 occurring during February 2017 as well.
- 2. The fund draws for Portland's Columbia Blvd ITS project and Beaverton's OR210 ITS project exhausts all funding from this bucket. The bucket will be removed as part of the 2018 MTIP Update.

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: Transportation System Management & Operations (FY 2017)

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Transportatio n System Management & Operations (FY 2017)	TSMO funding source bucket for ITS related projects	19288	Metro	1,427,718	Other	STP	2017	\$1,281,091	\$146,627		\$1,427,718
							Totals:	\$1,281,091	\$146,627	\$0	\$1,427,718

Amended Programming Transportation System Management & Operations (FY 2017)

Amended program ming: Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Transportati on System Management & Operations (FY 2017)	TSMO funding source bucket for ITS related projects	19288	ODOT	\$1,077,598	Other	STP	2017	\$966,929	\$110,669		\$1,077.598
							Totals:	\$966,929	\$110,669	\$0	\$1,077,598

Note: The funding reduction reflects the fund draws for Portland's Columbia Blvd IST project and Beaverton's OR210 ITS project.

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: Main Street Phase 2: Rail Corridor to Scoffins (Tigard)

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Main Street Phase 2: Rail Corridor to Scoffins (Tigard)	Green street retrofit, pedestrian amenities, street lights	17757	Tigard	\$2,225,000	PE ROW Cons	STP STP STP	2017 2018 2018	\$400,000 \$150,000 \$684,424	\$45,782 \$17,168 \$78,335		\$2,225,000
(Tigalu)	succi lights				Cons	Other	2018 Totals:	\$5,302,650	\$	\$849,291 \$0	\$2,225,000

Amended programming: Main Street Phase 2: Rail Corridor to Scoffins (Tigard)

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Street Phase 2: Rail Corridor to Scoffins	Green street retrofit, pedestrian amenities,	17757	Tigard	\$2,225,000	PE ROW		2017 2018	\$0 \$0		\$445,782 \$167,168	\$2,225,000
(Tigard)	street lights				Cons		2018	\$0		\$1,612,050	
							Totals:	\$0	\$0	\$2,225,000	\$2,225,000

Notes:

- 1. As part of the fund swap with TriMet, Tigard agrees to provide TriMet \$533,000 of STP in exchange of \$533,000 of local fund for TriMet.
- 2. The remaining federal STP funds are being committed to Tigard's Fanno Creek Trail project in Key 19327. The STP will be swapped out with Metro CMAQ enabling CMAQ funds to remain on the Fanno Creek project. The STP then returns to the Metro MTIP Financial Plan

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: Fanno Creek Trail – Woodard Park Bonita/85th Ave to Tualatin Bridge

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Fanno Creek Trail – Woodard Park Bonita/85 th Ave to Tualatin Bridge	The project will construct 4 sections of the Fanno Creek Trail	19327	Tigard	\$4,847,877	PE Cons	CMAQ CMAQ	2017 2017	\$700,000 \$3,650,000	\$80,118 \$417,759		\$4,847,877
							Totals:	\$4,350,000	\$497,877	\$0	\$4,847,877

Amended programming: Fanno Creek Trail – Woodard Park Bonita/85th Ave to Tualatin Bridge

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Fanno Creek Trail – Woodard Park Bonita/85 th Ave to Tualatin Bridge	The project will construct 4 sections of the Fanno Creek Trail	19327	Tigard	\$4,905,187	PE PE ROW Cons	CMAQ STP CMAQ CMAQ	2017 2017 2018 2018	\$1,100,000 \$51,424 \$250,000 \$3,000,000	\$125,900 \$5,886 \$28,614 \$343,363		\$4,905,187
							Totals:	\$4,401,424	\$503,763	\$0	\$4,905,187

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: None

Amended programming: Tigard FS for Prevent Maint – FY18

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Tigard FS for Prevent Maint – FY 18	The project represents the federal funds TriMet will receive from Tigard's Main St Phase 2 project in Key 17757	TBD	TriMet	\$594,004	Other	STP	2018	\$533,000	\$61,004		\$594,004
							Totals:	\$533,000	\$61,004	\$0	\$594,004

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: Red Electric Trail – SW Berta – SW Vermont

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Red Electric Trail – SW Berta – SW Vermont	Provide peds and cyclists with an off-street trail, and on- street bike blvd with sidewalks	17268	Portland	\$3,113,250	PE PE ROW Cons Cons	CMAQ STP STP STP CMAQ	2014 2014 2016 2017 2017	\$389,413 \$187,231 \$180,360 \$15,800 \$1,359,410	\$44,570 \$21,429 \$20,643 \$1,808 \$155,591	\$736,995	\$3,113,250
							Totals:	\$2,132,214	\$244,041	\$736,995	\$3,113,250

Amended programming: Red Electric Trail – SW Berta – SW Vermont

Project Name	Project Description	ODOT Key #	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Red Electric Trail – SW Berta – SW Vermont	Provide peds and cyclists with an off-street trail, and onstreet bike blvd with sidewalks	17268	Portland	\$3,991,292	PE PE Cons Cons	CMAQ STP STP STP CMAQ	2014 2014 2017 2017 2017	\$389,413 \$187,231 \$180,360 \$15,800 \$1,359,410	\$44,570 \$21,429 \$20,643 \$1,808 155,591	\$253,271 \$1,361,766	\$3,991,292
							Totals:	\$2,132,214	\$244,041	\$1,615,037	\$3,991,292

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: Springwater Trail Gap: SE Umatilla - SE 13th Ave

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Springwater Trail Gap: SE Umatilla - SE 13th Ave	Construct a trail to close the existing gap in the trail sections	18416	Portland	\$1,278,581	PE ROW UR Cons	CMAQ CMAQ CMAQ CMAQ	2014 2016 2016 2016	\$205,482 \$8,987 \$154,336 778,480	\$23,518 \$1,027 \$17,664 \$89,101		\$1,278,581
		-					Totals:	\$1,147,271	\$131,310	\$0	\$1,278,581

Amended programming: Springwater Trail Gap: SE Umatilla - SE 13th Ave

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Springwater Trail Gap: SE Umatilla - SE 13th Ave	Construct a trail to close the existing gap in the trail sections	18416	Portland	\$1,838,581	PE PE UR Cons Cons	CMAQ HPP CMAQ CMAQ HPP	2014 2014 2016 2017	\$205,482 88,000 \$44,865 \$896,924 \$256,364	\$23,518 \$22,000 \$5,135 \$102,657 \$64,091	\$129,545	\$1,838,581
		.				i	Totals:	\$1,491,635	\$217,401	\$129,545	\$1,838,581

Notes:

- 1. UR phase = Utility Relocation
- 2. CMAQ = Federal Congestion Mitigation Air Quality (CMAQ) improvement funds
- 3. HPP = Federal High Priority Program earmark funds

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: Twenties Bikeway: NE Lombard - SE Crystal Springs

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Twenties Bikeway: NE Lombard - SE Crystal Springs	Bicycle boulevard improvements	17267	Portland	\$4,135,118	PE ROW Cons	STP STP STP	2013 2017 2016	\$775,504 \$44,865 1,266,575	\$88,760 \$5,135 \$144,965	\$1,809,314	\$4,135,118
	641101111111111111111111111111111111111	A	4	•	***************************************	18	Totals:	\$2,086,944	\$238,860	\$1,809.314	\$4,135,118

Amended programming: Twenties Bikeway: NE Lombard - SE Crystal Springs

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
Twenties Bikeway: NE Lombard - SE Crystal Springs	Bicycle boulevard improvements	17267	Portland	\$4,099,733	PE Cons Cons Cons	STP STP STP STP	2013 2016 2016 2016	\$775,504 \$44,865 1,266,575 \$10,906	\$88,760 \$5,135 \$144,965 \$1,248	\$14,615 \$1,747,160	\$4,099,733
							Totals:	\$2,097,850	\$240,108	\$1,761,775	\$4,099,733

Notes: STP = Surface transportation Program funds

2015-18 Metropolitan Transportation Improvement Plan Chapter 5 Tables Amendment

Action: Amend the MTIP to increase or adjust required funding and add new projects for the following projects

Existing programming: None - New Project

Amended Programming: School Bus Engine Emission Reduction

Project Name	Project Description	ODOT Key#	Lead Agency	Estimated Total Project Cost (all phases, all years)	Project Phase	Fund Type	Program Year	Federal Funding	Minimum Local Match	Other (Local Overmatch) Funds	Total Funding
School Bus Engine Emission Reduction	The project will purchase and install advanced exhaust control devices on about 21 buses for the Multnomah County David Douglas School District	17274	DEQ	\$380,000	Other	CMAQ	2017	\$340,974	\$39,026		\$380,000
Totals:								\$340,974	\$39,026	\$0	\$380,000

Note: CMAQ = Congestion Mitigation Air Quality improvement funds

STAFF REPORT

FOR THE PURPOSE OF AMENDING THE 2015-18 METROPOLITAN TRANSPORTATION IMPROVEMENT PROGRAM (MTIP) TO MODIFY AND/OR ADD NEW PROJECTS AS PART OF THE FEBRUARY 2017 FORMAL MTIP AMENDMENT FOR BEAVERTON, CLACKAMAS COUNTY, DEQ, METRO, PORTLAND, ODOT, TIGARD, AND TRIMET

Date: March 17, 2017 Prepared by: Ken Lobeck, 503-797-1785

BACKGROUND:

February 2017 Bundled Formal MTIP Amendment

This Formal MTIP amendment involves multiple projects which require significant funding changes and scope changes, or are new projects being added to the MTIP.

Staff is requesting Metro Council approval of Resolution 17-4774 to allow the projects and their required changes as part of the Formal MTIP Amendment to be approved in the 2015-18 MTIP.

The February 2017 Formal Amendment contains a total of 18 projects with changes that require them to be processed as a formal MTIP amendment under FHWA's new STIP /MTIP Amendment guidance. This resolution reflects a new approach to bundle multiple projects together as part of a single amendment. Each month Metro normally will plan for a possible Formal and Administrative amendment to be developed processed and submitted for approval.

The advantage of this approach enables ODOT and/or USDOT the ability to review and approve multiple project amendments at one time. It also allows one resolution to cover the entire amendment rather than creating one for each project. FHWA requested Metro begin adopting this approach as a way to improve MTIP amendment processing efficiency.

One exception exists for Emergency Relief mitigation projects that do not change function or location will be submitted independently as a priority to save time. If the requested project amendment situation, it will be process independently from the bundled approach.

Summary of FHWA's New Amendment Guidance:

FHWA's new MTIP amendment guidance eliminates most exceptions to Formal MTIP Amendments as currently stated in Chapter 6 of the approved 2015-18 MTIP. The majority of project changes will trigger a Formal MTIP amendment if their proposed changes result in one or more of following as shown on the table on the next page. A key change to Metro's past amendment rules and policies are the impact of cost changes to the project. Previously, there was no limit to a project cost change that triggered a Formal amendment. Now, based on Section 3, project cost changes will have significant limits for the change to be processed as an

Administrative amendment. The rules listed on the Amendment are now active and will be used to determine all future types of MTIP and STIP amendments.

ODOT-FTA-FHWA Amendment Matrix

Type of Change

FULL AMENDMENTS

- Adding or cancelling a federally funded, and regionally significant project to the STIP and state funded projects which will potentially be federalized
- 2. Major change in project scope. Major scope change includes:
- · Change in project termini greater than .25 mile in any direction
- . Changes to the approved environmental footprint
- Impacts to AQ conformity
- · Adding capacity per FHWA Standards
- · Adding or deleting worktype
- 3. Changes in Fiscal Constraint by the following criteria:
- FHWA project cost increase/decrease:
 - · Projects under \$500K increase/decrease over 50%
 - · Projects \$500K to \$1M increase/decrease over 30%
 - · Projects \$1M and over increase/decrease over 20%
- All FTA project changes increase/decrease over 30%
- Adding an emergency relief permanent repair project that involves substantial change in function and location.

ADMINISTRATIVE/TECHNICAL ADJUSTMENTS

- Advancing or Slipping an approved project/phase within the current STIP (If slipping outside current STIP see Full Amendments #2)
- 2. Adding or deleting any phase (except CN) of an approved project below Full Amendment #3
- Combining two or more approved projects into one or splitting an approved project into two or more, or splitting part of an approved project to a new one.
- 4. Splitting a new project out of an approved program-specific pool of funds (but not reserves for future projects) or adding funds to an existing project from a bucket or reserve if the project was selected through a specific process (i.e. ARTS, Local Bridge...)
- Minor technical corrections to make the printed STIP consistent with prior approvals, such as typos or missing data.
- Changing name of project due to change in scope, combining or splitting of projects, or to better conform to naming convention. (For major change in scope, see Full Amendments #2)
- Adding a temporary emergency repair and relief project that does not involve substantial change in function and location.

THE FEBRUARY 2017 FORMAL MTIP AMENDMENT BUNDLE:

As part of the February 2017 Formal MTIP Amendment Bundle, all included projects were reviewed against the usual seven MTIP Amendment review factors that included:

- Project eligibility/proof of funding commitment and verification
- RTO consistency review
- RTP goals consistency

- Amendment type determination; Formal or Administrative
- Air conformity review
- Fiscal constraint verification
- MPO responsibilities completion

All included projects are compliant with the seven review factors with one exception. ODOT's new *US30 Sandy River (Troutdale) Bridge* project is not in the current financially constrained RTP. However, as only the Preliminary Engineering (PE) funding is being added, it can be added via a Formal amendment to the MTIP. Right-of Way (ROW) and/or Construction phase funding can't be added to the MTIP until the full project is in the approved financially constrained RTP. ODOT has been advised to ensure they add the project to the 2018 RTP through the upcoming 2018 RTP project solicitation.

A summary of the projects included in the February 2017 Formal Amendment Bundle includes the following:

1. ODOT: 3 Projects

a. Key 19533. I-405: Fremont Bridge Approach/Ramps:

- i. There was a failure in the bridge deck of the Fremont Bridge. This resulted in a lane closure on the bridge and an emergency repair of the hole in the deck. The proposal is to increase the scope of an existing joint repair project on the bridge to add repair work for the bridge deck.
- ii. The amendment reflects a major scope change to repair bridge deck.
- iii. The cost increase is from \$5.7 million to \$21.2 million.
- iv. The Oregon Transportation Commission (OTC) approval the request during their October 2016 meeting.

b. New Project. US30 Sandy River (Troutdale) Bridge:

- i. The Sandy River (Troutdale) bridge, (Bridge 02019), on U.S. 30 at mile point 0.03, is a truss bridge built in 1912 and is listed as a National Historic landmark. The timber sidewalk planks that were placed in 1999 have areas of advanced to severe deterioration. In 2016, the Major Bridge Maintenance program funded a temporary repair that placed plywood over the sidewalk so that it could remain in service until a permanent repair can be installed. Replacing the deteriorated timber sidewalk will ensure that pedestrians can continue to use this bridge safely.
- ii. PE phase funding is being added in amount of \$565,000 total to develop the final repair requirements.
- iii. The project is not in the current constrained RTP. However, the PE phase can be added to the MTIP without any issues. ODOT has been advised to ensure they add the project to the RTP as part of the upcoming 2018 RTP Project Solicitation.
- iv. Construction funds are planned to be added later (Target is FY2018).
- v. OTC approval during February 2017 meeting.

c. Key 19531. I-84/I-5 Banfield Interchange Deck Overlay & Bridge Rail Retrofit:

- i. The project adds two more ramps for rehabilitation as part of the planned interchange rehab project This project will retrofit the deficient bridge rails on bridges 08588A, 08588B, and 08588C with rails that meet safety standards, and place a concrete overlay on the decks to increase the friction and reduce vehicle impacts. The overlay will add a protective layer to preserve the decks and seal the cracks. Bridge 08588D will receive a deck seal to prevent water penetrating the deck.
- ii. The amendment represents a scope change to project with a cost increase needed improvements from two ramps to all four ramps.
- iii. Adds \$2 million to project resulting significant cost increase of 31.3%.
- iv. OTC approval during February 2017 meeting.

2. Clackamas County: 4 Projects

- a. The four projects, Keys 15389, and 17881, 18305, and 19276 initially were considered eligible to be processed as an Administrative amendment. A two week public period was completed and the projects were ready to be submitted to ODOT-Salem for approval. During development, Metro received additional feedback from FHWA concerning interpretations related to the formal and administrative amendment guidance. Bottom line: All four projects must be submitted as a Formal amendment due to their individual cost changes with three exceeding the new 20% cost change rule.
- b. The projects have been added to the February 2017 Formal amendment bundle and include the following projects:

i. Key 15389. SE 172^{nd} Ave-Foster Rd to Sunnyside Rd:

- 1. The project funded project development activities which are now completed and was proposed to be a five lane arterial with bike lanes and sidewalks.
- 2. Deprograms \$922,749 of STP from the PE phase and reprograms the funds to Keys 17881, 18305, and 19268.
- 3. The cost change to the \$2.2 million plus project = a 36% change.
- 4. Project development activities are complete, but PE and implementation phases will not proceed. Project is effectively completed and will be removed during the 2018 MTIP Update.

ii. Key 17881. SE 122nd Ave & 132nd Ave - Sidewalk Connections:

- 1. The project will add sidewalks.
- 2. \$334,368 of STP from Key 15389 is added to PE and construction.
- 3. \$25,340 of the last Metro Contingency TAP funds are also added to the PE phase
- 4. PE and Construction phase funding shortfalls eliminated.
- 5. Cost increase to this \$1 million plus project = \$35%.

iii. Key 18305: Sunnyside Adaptive Signal System.

- 1. The project will design an adaptive traffic signal system and transit signal priority on Sunnyside Rd.
- 2. The amendment adds \$364,190 of STP and match from Key 15389. to construction phase to plug phase funding gap.
- 3. Cost change to this \$1 million plus project = 27%.

iv. Key 19276: Jennings Ave: OR99E to Oatfield Rd.

- 1. The project will construct curb tight sidewalks and bike lanes along Jennings Ave between OR 99E (McLoughlin Blvd) and Oatfield Rd.
- 2. The amendment adds \$224,191 of STP from Key 15389 to construction phase to plug phase funding shortfall.
- 3. Cost change to this \$3.7 million project = 6.6%, but still must be processed with project bundle.

3. Portland: 1 Project.

a. Key18308: N/NE Columbia Blvd Traffic/Transit Signal Upgrade (ITS Project).

- i. The project will construct upgrade to traffic signal hardware, communications and signal timing on Columbia Blvd.
- ii. The project experienced significant cost increases due to ADA compliance requirements.
- iii. Portland decided to cannibalize another approved Portland ITS project, Airport Way Connections, in the approved TSMO bucket to backfill the Columbia Blvd shortfall.
- iv. The amendment will reprogram \$600,000 of STP and match approved from the Airport Way Connections ITS project (and required match) to Key 18308.
- v. The project cost increases from \$557,227 to \$1,225,900 to cover a PE and construction phase funding shortfall.
- vi. The cost change equals 120% increase to the project total cost which exceeds the administrative amendment limit of 30% for projects between \$500,000 to \$1 million dollars.
- vii. The reprogramming request was also approved by TransPort subcommittee.

4. City of Beaverton: 1 Project.

a. New Beaverton OR210: SW Scholls Ferry Rd to SW Hall Blvd ITS project.

i. Through this project the city of Beaverton will implement Adaptive Signal Control Technologies (ASCT) that can adjust traffic signal to actual conditions to help Scholls Ferry Rd reduce significant congestion and delays due to variable and unpredictable traffic demands.

- ii. Approved TSMO project.
- iii. Remaining \$435,838 from the FY 2016 TSMO bucket (Key 19287) of STP plus \$314,162 of STP funds from the FY 2017 TSMO bucket (Key 19288) will be reprogrammed to Beaverton's new ITS project in FY 2017.

5. Metro: 2 Projects

a. Transportation System Management and Operations Program TSMO Project Grouping Bucket adjustments (for Portland and Beaverton)

Note: The TSMO FY 2017 project grouping buckets contain the master funding earmarked for approved ITS projects supporting the TSMO goals. The approved projects undergo preliminary project development to determine require scope and costs. When the scope is ready, they are removed from the TSMO bucket and programmed as stand-alone projects. Based on Portland's Columbia Blvd ITS project and Beaverton, the February Formal Amendment includes the funding adjustments to the TSMO buckets. Reductions will occur to Keys 19287 and 19288. Key 19287 will be reduced to \$0 as a result of bucket draws.

6. Tigard: 2 projects.

a. Key 17757 - Main St Ph 2: Rail Corridor – Scoffins (Tigard)

- i. This project is a Green street retrofit with pedestrian amenities, and street light improvements.
- ii. The amendment de-federalizes project by removing \$1,234,424 of STP and replacing with local funds.
- iii. \$701,424 of STP will be reprogrammed to Tigard's Fanno Creek Trail project in Key 19327.
- iv. The amendment includes a \$533,000 STP transfer to TriMet in exchange for local funds for the Main Street project.
- v. As a de-federalized project can progress faster and allows federal funding to backfill and existing funding shortage to the Fanno Creek project in Key 19327.

b. <u>Key 19327: Fanno Creek Trail - Woodard Park Bonita/85th Ave to Tualatin Bridge:</u>

- The project intends to construct four sections of the Fanno Creek Trail from Woodard Park to Bonita Road and 85th Avenue to Tualatin River Bridge in Tigard.
- ii. The project will receive \$702,424 of STP from the Main Street project (Key 17757)
- iii. \$650,000 of the available STP is swapped with available CMAQ funds
- iv. The CMAQ \$650,000 over programming issue is resolved. Total authorized CMAQ is not correctly at \$3,650,000.
- v. \$51,424 of STP remains available and is committed to the PE phase.
- vi. The PE phase significantly increases to prevent a phase funding shortfall.

vii. The overall net change in the total project cost as a result of the amendment is only 1.1%

7. TriMet: 1 Project.

a. New: Tigard FS for Prevent Maint - FY18

- i. This project represents the federal fund portion from Tigard's Main Street project Key 17757 that is being de-federalized and swapped with TriMet local funds.
- ii. TriMet is providing \$533,000 of local funds to Tigard in exchange for \$533,000 of federal STP.
- iii. For accounting purposes and to enable TriMet to flex-transfer the STP to FTA without issues, the federal exchange portion is programmed as a separate stand-alone project in the MTIP.

8. Portland Part Two: 3 Previously Submitted Project Amendments.

a. Key 17268: Red Electric Trail – SW Berta – SW Vermont.

- The project will provide east-west route for pedestrians and cyclists in SW Portland with an off-street trail, and on-street bike boulevard with sidewalks, and potentially a widened off-street sidewalk around SW Bertha Blvd.
- ii. This project was initially submitted to be amended to plug a significant funding shortfall back last October 2016 to the PE and Constructions phases. Due to the STIP Update, the amendment review was delayed until December. At that time, the new STIP/MTIP Amendment rules were now the law of the land.
- iii. The funding changes reflect a 22% cost increase which under the new amendment rules requires a formal amendment.
- iv. The project is now being re-submitted as part of the February 2017 Formal MTIP Amendment

b. <u>Key 18416: Springwater Trail Gap – SE Umatilla to SE 13th Ave.</u>

- i. The project will construct a trail to close the existing gap in the trail sections.
- ii. The project was submitted in early November 2016 and now is being resubmitted again for the same reason as Red Electric.
- iii. The latest project costs as determined by the project engineer were significantly more than the early estimates used to program the project. The project estimate was off by almost \$600,000 for both PE and the Construction phase.
- iv. This project was awarded a High Priority Program (HPP) earmark back in 2013. A review of the earmark expended across other projects determined additional HPP was still available. Extensive discussions between ODOT,

- Metro, and Portland determined an additional \$344,364 was available for the project.
- v. Through a complex fund leveraging exercise and with the added HPP, Portland Parks will be able to salvage the project and move forward for implementation in 2017.

c. Key 17267: Twenties Bikeway – NE Lombard to SE Crystal Springs

- i. The project will provide 6.9 miles of bicycle boulevard improvements running north-to-south, routed along the Northeast and Southeast Twenties blocks as through movements permit.
- ii. The project amendment was originally submitted in early December 2016, but approval was denied until it completed a formal amendment with a public notification process.
- iii. The amendment plugs a small PE phase funding shortfall with local funds.
- iv. The ROW phase was not required and is eliminated with the funding shifted to the construction phase.

9. Department of Environmental Quality (DEQ): 1 project

a. Key 17274: School Bus Engine Emission Reduction

- The project will include the purchase and installation of advanced exhaust control devices on about 21 buses for the Multnomah County David Douglas School District
- Technically, the project is a new project being re-added to the MTIP. The original version could not progress and the project was significantly downscoped.
- iii. It was submitted in early December and thought it would be reviewed under the old amendment rules allowing it to be added administratively.
- iv. However, a review by ODOT determined it must follow the new rules.
- v. As new project, it requires a formal MTIP amendment.

SUMMARY

As part of the Formal MTIP Amendment all included projects are completing a required 30-day public notification/public comment opportunity. Projects are posted for comment on Metro's MTIP webpage reflecting the before and after programming actions. The comment period opened on February 17, 2017 and will continue until March 24, 2017. All comments reviewed are reviewed and replies are provided if required.

Staff is seeking approval of this Formal MTIP amendment to enable the impacted agencies the ability to move forward with the phase of their project. Without the amendment approval, fund obligations won't be able to occur, changes in finding levels won't happen, new projects can't be added, the project notice to proceed won't occur, required reimbursements can't occur, etc.

Staff will complete the MTIP programming action upon final approval from the Metro Council and monitor subsequent required approvals up and through USDOT for final inclusion in the MTIP/STIP. The programming summary is shown in Exhibit A to the Resolution 17-4774.

Approval Actions and Status:

- TPAC: Approval: February 24, 2017.
- JPACT Approval: March 16, 2017.

ANALYSIS/INFORMATION

- 1. **Known Opposition:** None known at this time.
- 2. **Legal Antecedents:** Amends the 2015-2018 Metropolitan Transportation Improvement Program adopted by Metro Council Resolution 14-4532 on July 31, 2014 (For The Purpose of Adopting the Metropolitan Transportation Improvement Program for the Portland Metropolitan Area).
- 3. **Anticipated Effects:** Enables the projects to obligate and expend awarded federal funds.
- 4. **Budget Impacts:** None

RECOMMENDED ACTION:

Staff recommends the approval of Resolution 17-4774.

Attachments: None

Resolution No. 17-4773, For the Purpose of Authorizing the Chief Operating Officer to Issue a New Non-System License to Veris Industries for Transport and Disposal of Non-Recoverable Solid Waste, Including Putrescible Waste, at the Covanta Waste-to-Energy Facility Located in Brooks, Oregon

Consent Agenda

Metro Council Meeting Thursday, April 6, 2017 Metro Regional Center, Council Chamber

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AUTHORIZING THE CHIEF OPERATING OFFICER TO ISSUE A NEW NON-SYSTEM LICENSE TO VERIS) RESOLUTION NO. 17-4773
INDUSTRIES FOR TRANSPORT AND DISPOSAL OF NON-) Introduced by Chief Operating
RECOVERABLE SOLID WASTE, INCLUDING PUTRESCIBLE) Officer Martha Bennett with the
WASTE, AT THE COVANTA WASTE-TO-ENERGY FACILITY) concurrence of Council President
LOCATED IN BROOKS, OREGON) Tom Hughes,
,	,
WHEREAS, the Metro Code requires a non-system ligenerated from within the Metro Region to a non-system dis	• • • • • • • • • • • • • • • • • • • •
WHEREAS, Veris Industries has filed a complete app recoverable solid waste, including putrescible waste, to a no Metro Code Chapter 5.05, "Solid Waste Flow Control;" and	lication seeking a non-system license to transport non- n-system facility for disposal under the provisions of
WHEREAS, the solid waste authorized under the Norfacility located in Tualatin, Oregon, and is transported to the	n-System License is generated at the Veris Industries Covanta Waste-to-Energy Facility for disposal; and
WHEREAS, Metro Code Chapter 5.05 provides that a putrescible waste shall be reviewed by the Chief Operating C Metro Council; and	··
WHEREAS, the Chief Operating Officer has analyzed under the Metro Code; and	the application and considered the relevant factors
WHEREAS, the Chief Operating Officer recommends specific conditions as provided in Exhibit A to this Resolution	that the non-system license be issued together with now therefore,
THE METRO COUNCIL RESOLVES AS FOLLOWS: 1. The non-system license application of Veris Industric limitations contained in Exhibit A to this Resolution.	* *
2. The Chief Operating Officer is authorized to issue to similar to the one attached as Exhibit A.	Veris Industries a non-system license substantially
ADOPTED by the Metro Council this day of, 20	017.
_ T	om Hughes, Council President
Approved as to Form:	
Alison R. Kean, Metro Attorney	



METRO SOLID WASTE FACILITY NON-SYSTEM LICENSE

No. N-177-17

LICENSEE:

Veris Industries 12345 SW Leventon Dr Tualatin, OR 97062

CONTACT PERSON:

Cathy McNeill

Phone: (503) 597-0797

E-mail: cathy.mcneill@veris.com

MAILING ADDRESS:

Veris Industries 12345 SW Leventon Dr Tualatin, OR 97062

ISSUED BY METRO:

Paul Slyman,	Date



1	Nature of Waste Covered by License
	Non-recoverable solid waste commingled with putrescible waste, including restroom and lunchroom waste, generated at the Veris Industries site located at 12345 SW Leventon Drive in Tualatin, Oregon.

2	CALENDAR YEAR TONNAGE LIMITATION
	The licensee is authorized to transport to the non-system facility described in Section 3 up to 475 tons per calendar year of the waste described in Section 1.

3	Non-System Facility			
	The licensee is authorized to transport the waste described above in Section 1 to the following non-system facility:			
	Covanta Waste-to-Energy Facility 4850 Brooklake Road, NE Brooks, OR 97305			
	This license is issued on condition that the non-system facility named in this section is authorized to accept the type of waste described in Section 1. If Metro receives notice from the Oregon Department of Environmental Quality that this non-system facility is not authorized to accept such waste, Metro may immediately terminate this license pursuant to Section 9.			

4	TERM OF LICENSE
	The license term is from May 1, 2017 to December 31, 2019, unless terminated sooner under Section 9.

5	REPORTING OF ACCIDENTS AND CITATIONS
	The licensee must report to Metro any significant incidents (such as fires), accidents, and citations involving the vehicles that are used to transport the solid waste authorized by this license.



6	RECORD KEEPING AND REPORTING		
	(a) The licensee must keep and maintain accurate records of the amount of all solid waste that the licensee transports to the non-system facility described in Section 3. These records must include the information specified in the Metro document titled, <u>Reporting Requirements and Data Standards for Metro Solid Waste Licensees, Franchisees, and Parties to Designated Facility Agreements</u> .		
	(b) The licensee must perform the following no later than fifteen days following the end of each month:		
	 Transmit to Metro the records required under Section 6(a) above in an electronic format prescribed by Metro; 		
	Submit to Metro a Regional System Fee and Excise Tax Report, that covers the preceding month; and		
	iii. Remit to Metro the requisite Regional System Fees and Excise Tax in accordance with the Metro Code provisions applicable to the collection, payment, and accounting of such fees and taxes.		
	(c) The licensee must make available to Metro (or Metro's designated agent) all records from which Sections 6(a) and 6(b) above are derived for its inspection or copying, as long as Metro provides at least three business days written notice of an intent to inspect or copy documents. The licensee must, in addition, sign or otherwise provide to Metro any consent or waiver necessary for Metro to obtain information or data from a third party, including the non-system facilities named in Section 3.		

9	ADDITIONAL LICENSE CONDITIONS		
	This license is subject to the following conditions:		
	(a) The permissive transport of solid waste to the non-system facility, listed in Section 3, authorized by this license is subordinate to any subsequent decision by Metro to direct the solid waste described in this license to any other facility.		
	(b) The Chief Operating Officer (the "COO") may amend or terminate this license the COO determines that:		
	 There has been sufficient change in any circumstances under which Metro issued this license; 		
	 The provisions of this license are actually or potentially in conflict with any provision in Metro's disposal contract with Oregon Waste Systems, Inc.; or 		
	 iii. Metro's solid waste system or the public will benefit from, and will be better served by, an order directing that the waste described in Section 1 be transferred to, and disposed of at, a facility other than the facility listed in Section 3. 		



- (c) In addition to subsections (b)(i) through (iii), Metro may amend, suspend, revoke or terminate this license pursuant to the Metro Code.
- (d) The licensee may not transfer or assign any right or interest in this license without Metro's prior written approval.
- (e) This license will terminate upon the execution of a designated facility agreement with the facility listed in Section 3 that authorizes the facility to accept the waste described in Section 1.
- (f) This license authorizes transport of solid waste to the facility listed in Section 3. The transport of waste generated from within the Metro boundary to any non-system facility other than that specified in this license is prohibited unless authorized in writing by Metro.

The licensee must fully comply with all applicable local, regional, state and federal laws, rules, regulations, ordinances, orders, and permits pertaining in any manner to this license, including all applicable Metro Code provisions and administrative rules adopted pursuant to Chapter 5.05 whether or not those provisions have been specifically mentioned or cited herein. All conditions imposed on the collection and hauling of the Licensee's solid waste by federal, state, regional or local governments or agencies having jurisdiction over solid waste generated by the Licensee are deemed part of this license as if specifically set forth herein.

11	Indemnification
	The licensee must defend, indemnify and hold harmless Metro, its elected officials, officers, employees, agents and representatives from any and all claims, demands, damages, causes of action, or losses and expenses arising out of or related in any way to the issuance or administration of this non-system license. Expenses include, but are not limited to, all attorneys' fees, whether incurred before any litigation is commenced, during any litigation or on appeal.

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 17-4773 AUTHORIZING THE CHIEF OPERATING OFFICER TO ISSUE A NEW NON-SYSTEM LICENSE TO VERIS INDUSTRIES FOR TRANSPORT AND DISPOSAL OF NON-RECOVERABLE SOLID WASTE, INCLUDING PUTRESCIBLE WASTE, AT THE COVANTA WASTE-TO-ENERGY FACILITY LOCATED IN BROOKS, OREGON

March 23, 2017 Prepared by: Hila Ritter 503-797-1862

Approval of Resolution No. 17-4773 will authorize the Chief Operating Officer (COO) to issue a new non-system license (NSL) to Veris Industries (a subsidiary of Schneider Electric). The proposed NSL will authorize Veris Industries to transport up to 475 tons per calendar year of non-recoverable waste, including putrescible (wet) waste, generated at its facility located at 12345 SW Leveton Drive in Tualatin (Metro District 3) to the Covanta Waste-to-Energy facility (Covanta) located in Brooks, Oregon.

BACKGROUND

The applicant, Veris Industries, is a manufacturing company that makes heating, ventilating, and air conditioning system controls and monitoring meters. Veris Industries has a robust sustainability program and seeks to become a zero-waste-to-landfill company. All areas of the facility have dedicated recycling stations including desk spaces, production floor, and an employee cafeteria. Centralized collection stations are provided for paper, corrugated cardboard, batteries, fluorescent tubes, wood pallets, metal, scrap boards and assemblies, polystyrene, hard plastics, and film plastic. In the cafeteria, non-protein food items are collected and composted in an on-site employee garden. The waste that Veris Industries seeks to transport to Covanta includes the non-recoverable waste from its manufacturing process, cafeteria waste, and restroom waste.

On December 16, 2016, Veris Industries filed a complete application seeking a new NSL to transport up to 475 tons per calendar year of non-recoverable waste, including wet waste, generated at its facility to Covanta. The proposed license is subject to approval or denial by the Metro Council because it authorizes the transport of wet waste to a non-system facility.¹

ANALYSIS/INFORMATION

A. Known Opposition

Marion County staff has recently raised concerns about Covanta's practice of accepting waste from the Metro region to the exclusion of waste generated within Marion County. The County notified Covanta of its concerns about the facility's capacity in a letter issued last fall. County staff verbally requested that Metro take Covanta's capacity into account when it considers issuing NSLs to use the facility. Metro staff sent an email on March 2nd and then a letter on March 7th to the County requesting written clarification on its concerns and seeking specific comment on the proposed NSL application. The County did not respond to either of Metro's request for more information.

¹ Metro Code Section 5.05.110(c)

Although approval of this resolution would authorize Veris Industries to transport waste to Covanta, the proposed NSL does not obligate Covanta to accept the waste. In addition, Metro may subsequently amend, suspend, or terminate the proposed NSL should there be any change in circumstances after it is issued. Metro staff will continue to monitor the situation and work with the County to resolve any issues that may arise during the term of this license.

B. Legal Antecedents

Metro Code Chapter 5.05 prohibits any person from utilizing non-system facilities without an appropriate license from Metro. Additionally, Metro Code Section 5.05.140 provides that, when determining whether or not to issue an NSL, the Metro Council must consider the following factors to the extent relevant to such determination.

(1) The degree to which prior users of the non-system facility and waste types accepted at the non-system facility are known and the degree to which those wastes pose a future risk of environmental contamination;

Covanta primarily accepts solid waste generated in Marion County. The facility also accepts special waste and other wastes generated by companies seeking to promote alternative disposal policies or government agencies seeking to destroy certain waste for public safety or the public good such as contraband, postage stamps, expired pharmaceuticals, and lottery tickets.

The proposed disposal site is a waste-to-energy facility rather than a landfill and thus does not pose the same potential environmental risk from waste delivered from prior users. Air emissions from the facility are controlled through the use of high efficiency combustion within the furnace/boiler as well as by selective non-catalytic reduction, spray dryer absorbers, fabric filter baghouses and an activated carbon injection system. The ash generated at the facility is then disposed, or used beneficially, in accordance with Oregon Department of Environmental Quality (DEQ) requirements.

(2) The non-system facility owner's and operator's regulatory compliance record with federal, state and local requirements including but not limited to public health, safety and environmental regulations;

Covanta holds a DEQ Solid Waste Energy Recovery Permit.² No formal enforcement actions have been taken at Covanta by DEQ in the last five years and Covanta is in compliance with federal, state, and local requirements. Staff has also received confirmation that Covanta has a good compliance record with respect to public health, safety and environmental regulations.

(3) The adequacy of the non-system facility's operational practices and management controls;

Covanta screens incoming waste for hazardous, radioactive, and other unacceptable materials and has a state-of-the-art emissions control system to minimize the risk of future environmental contamination. In addition, Covanta uses operational practices and management controls that are considered by the DEQ to be appropriate for the protection of health, safety, and the environment.

² Oregon DEQ permit #364

(4) The expected impact on the region's recycling and waste reduction efforts;

Veris Industries maintains an internal recycling program with the established goal of a 97 percent recovery rate. It seeks to deliver only its non-recoverable waste, including wet waste, to a waste-to-energy facility instead of to a landfill.

The Metro-area waste that is delivered to Covanta is considered to be disposal and does not count toward recovery in Metro's recovery rate calculation because state statute³ stipulates that only those wastesheds that burn mixed solid waste for energy recovery within their wasteshed boundaries may count a portion of the waste towards their DEQ recovery rate calculation. Marion County is the only wasteshed within Oregon that hosts a waste-to-energy facility within its boundaries; therefore, it is the only wasteshed that is currently allowed to include a portion of the in-county waste that is delivered to Covanta in its recovery rate. Approval of the proposed NSL is not expected to impact on the Metro region's recycling and waste reduction efforts.

(5) The proposed non-system license's effect with Metro's existing contractual arrangements;

Metro has a contractual agreement to deliver a minimum of 90 percent of the region's putrescible waste that is delivered to general purpose landfills during the calendar year, to landfills owned by Waste Management. The waste subject to this proposed license will not be disposed at a general-purpose landfill. Thus, approval of the proposed license will not conflict with Metro's disposal contract.

(6) The applicant's record regarding compliance with Metro ordinances and agreements or assistance to Metro in Metro ordinance enforcement and with federal, state and local requirements, including but not limited to public health, safety and environmental regulations; and

The applicant has a good record of compliance with regard to Metro regulations.

(7) Any other factors as the Chief Operating Officer considers appropriate.

Covanta is the primary disposal site for solid waste generated within Marion County. At certain times during the year, in order to operate more efficiently, the facility requires more solid waste than is generated within the County. Metro transfer stations have provided this waste in the past, but have not done so since December of 2015.

The proposed license includes a 32-month term, commencing on May 1, 2017, and expiring on December 31, 2019. Metro Code Section 5.05.170(5)(B) states that a new NSL may be issued for a term of up to a three years. The proposed term will align future consideration of this NSL with other similar NSLs.

C. Anticipated Effects

-

³ Oregon Revised Statutes 465A.010(4)(f)(B)

The effect of Resolution No. 17-4773 will be to issue a new NSL to Veris Industries authorizing the transport of up to 475 tons per calendar year of non-recoverable waste, including wet waste, to Covanta for disposal. The proposed license will commence on May 1, 2017, and expire on December 31, 2019.

D. Budget/Rate Impacts

The waste covered under the proposed NSL will be delivered to Covanta. Covanta is not a general-purpose landfill and the proposed tonnage will not impact Metro's obligations under its disposal contract. The regional system fee and excise tax will continue to be collected on the waste transported to Covanta under authority of the proposed NSL.

RECOMMENDED ACTION

The COO finds that the proposed license satisfies the requirements of Metro Code Chapter 5.05 and recommends that the Metro Council adopt Resolution No. 17-4773. Approval of this resolution will authorize the COO to issue a new NSL to Veris Industries (attached as Exhibit A).

HR Queue **Resolution No. 17-4784**, For the Purpose of Confirming Deidra Krys-Rusoff and Andrew Lonergan Appointments to the Investment Advisory Board

Consent Agenda

Metro Council Meeting Thursday, April 6, 2017 Metro Regional Center, Council Chamber

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF CONFIRMING THE APPOINTMENT OF DEIDRA KRYS-RUSOFF AND) RESOLUTION NO 17-4784		
ANDREW LONERGAN TO THE INVESTMENT ADVISORY BOARD	 Introduced by Martha Bennett, Chief Operating Officer, with the concurrence of Council President Tom Hughes 		
WHEREAS, Metro Code, Section 7.03.030(c) pro Advisory Board and requires the Chief Operating Officer at to recommend to the Council for confirmation those perso advise on investment strategies, banking relationships, the and the establishment of written procedures of the investment	acting in the capacity of the Investment Officer ns who shall serve on the Board to discuss and legality and probity of investment activities,		
WHEREAS, the Metro Charter requires appointment subject to Council confirmation; and	ents to be made by the Council President		
WHEREAS, the Chief Operating Officer has recommended Deidra Krys-Rusoff, a portfolio manager at Ferguson Wellma and Andrew Lonergan, the Senior Investment Officer for Reed College to the Council President and the Council President has appointed Mr. Bleiler for a new term beginning upon confirmation of the appointment and ending July 31, 2020; and			
WHEREAS, the Metro Council desires to confirm	the appointment; now, therefore,		
BE IT RESOLVED, that the Metro Council confin Andrew Lonergan to the Metro Investment Advisory Boar			
ADOPTED by the Metro Council this day of April, 2017.			
APPROVED AS TO FORM:	Tom Hughes, Council President		
Alison Kean, Metro Attorney			
,			

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 17-4784, FOR THE PURPOSE OF CONFIRMING THE APPOINTMENT OF DEIDRA KRYS-RUSOFF AND ANDREW LONERGAN TO THE INVESTMENT ADVISORY BOARD

Date: April 3, 2017 Prepared by: Tim Collier

503-797-1913

BACKGROUND

Metro Code, Section 7.03.030, includes the creation of the Investment Advisory Board. One provision of this Code requires the Chief Operating Officer acting in the capacity of the Investment Officer to recommend to the Council for confirmation those persons who shall serve on the Board to discuss and advise on investment strategies, banking relationships, the legality and probity of investment activities, and the establishment of written procedures of the investment operation. The Metro Charter requires appointments to be made by the Council President subject to Council Confirmation. Metro Council President Tom Hughes, upon the recommendation of the Chief Operating Officer, has appointed Deidra Krys-Rusoff and Andrew Lonergan to the board subject to Council confirmation. This appointment will be for a full term beginning upon appointment and ending July 31, 2020.

Deidra Krys-Rusoff is a portfolio manager and a member of the fixed income team at Ferguson Wellman Capital Management. A native of Idaho, Krys-Rusoff earned her B.A. in Zoology from the College of Idaho. She is currently the secretary/treasurer and budget chair of the Metropolitan Exposition and Recreation Commission (MERC). She has served as the Chair of the Oregon Zoo Bond Citizens' Oversight Committee and President of the Mt. Tabor Middle School PTA. She is a past board member of the Northwest Taxable Bond Club, the Junior League of Portland and the Childcare Volunteer Advisory Board of the Columbia-Willamette YMCA.

Andrew Lonergan is the Senior Investment Officer for Reed College. Working closely with the Investment Committee for the Reed College endowment, he is responsible for all day-to-day activities within the endowment and has principal authority for Reed's private investment portfolio. Before joining Reed College in 20015, Lonergan was a Research Associate for Windermere Investment Associates assisting the CEO with advising ultra-high net-worth clients on asset allocation, investment manager selection and investment policy

We are fortunate they are willing to devote their time and energy serving on the Metro Investment Advisory Board. Their experience and knowledge will be a valuable resource.

ANALYSIS/INFORMATION

- 1. **Known Opposition** [identify known opposition to the proposed legislation]
- 2. **Legal Antecedents** Metro code sections 2.19.150 and 7.03.030
- 3. **Anticipated Effects** Confirmation of the appointment of Deidra Krys-Rusoff and Andrew Lonergan will provide directly related experience in investments to the Investment Advisory Board.

4. **Budget Impacts** There is no out-of-pocket expense created by the appointment of Deidra Krys-Rusoff and Andrew Lonergan to these volunteer positions.

RECOMMENDED ACTION

Martha Bennett, Chief Operating Officer, in concurrence with Council President Tom Hughes, recommends the confirmation of Deidra Krys-Rusoff and Andrew Lonergan for the term expiring July 31, 2020.

Resolution No. 17-4781, For the Purpose of Authorizing an Exemption from Competitive Bidding and Direct Award of the Construction Contract for the New Primate Habitat Project at the Oregon Zoo by Amendment to the CM/GC Contract for the Construction of the New Polar Bear Habitat and Associated Infrastructure

Resolutions

Metro Council Meeting Thursday, April 6, 2017 Metro Regional Center, Council Chamber

BEFORE THE METRO CONTRACT REVIEW BOARD

FOR THE PURPOSE OF AUTHORIZING AN)	Resolution No. 17-4781
EXEMPTION FROM COMPETITIVE)	
BIDDING AND DIRECT AWARD OF THE)	Introduced by Chief Operating Officer
CONSTRUCTION CONTRACT FOR THE)	Martha Bennett in concurrence with
NEW PRIMATE HABITAT PROJECT AT)	Council President Tom Hughes
THE OREGON ZOO BY AMENDMENT TO)	
THE CM/GC CONTRACT FOR THE)	
CONSTRUCTION OF THE NEW POLAR)	
BEAR HABITAT AND ASSOCIATED)	
INFRASTRUCTURE)	

WHEREAS, at the General Election held on November 4, 2008, the Metro Area voters approved Oregon Zoo Bond Measure 26-96, entitled "Bonds to Protect Animal Health And Safety; Conserve and Recycle Water," major components of which are the construction of a new polar bear habitat, which includes associated infrastructure work such as a public plaza with guest amenities, visitor path upgrades, and utility upgrades (the "Polar Bear Habitat"), and the construction of new Primate and Rhinoceros Habitats (the "Primate Habitat"); and

WHEREAS, ORS 279C.335 and Metro Code 2.04.054 require that all Metro public improvement contracts shall be procured based on competitive bids, unless exempted by the Metro Council, sitting as the Metro Contract Review Board; and

WHEREAS, Metro Code Section 2.04.054(c) authorizes the Metro Contract Review Board to exempt a public improvement contract from competitive bidding and direct the appropriate use of alternative contracting methods that take account of market realities and modern innovating contracting and purchasing methods, so long as they are consistent with the public policy of encouraging competition, subject to the requirements of ORS 279C.335; and

WHEREAS, in accordance with the Metro Contract Review Board's November 15, 2015 Resolution No. 15-4656, "For the Purpose of Authorizing an Exemption to Competitive Bidding and Authorizing the Procurement of Construction Manager/General Contractor ("CM/GC") Services by Competitive Request for Proposals for the Construction of the New Polar Bear Habitat and Associated Infrastructure at the Oregon Zoo," the Chief Operating Officer issued a competitive Request for Proposals ("RFP") for CM/GC services for the new Polar Bear Habitat project; and

WHEREAS, on May 11, 2016, Metro selected Lease Crutcher Lewis to be the CM/GC contractor for the Polar Bear Habitat project; and

WHEREAS, Metro now wishes to expand the above set forth authorization to permit the simultaneous construction of the Primate Habitat with the Polar Bear Habitat, and therefore seeks a new exemption from competitive bidding, authorizing Metro to contract directly with

Lease Crutcher Lewis ("LCL") for the simultaneous construction of the Primate Habitat and the Polar Habitat projects, via amendment to the Polar Bear Habitat CM/GC Contract; and

WHEREAS, Oregon Administrative Rule 137-049-0630 and ORS 279C.335(2) and (4) and Metro Code Section 2.04.054(c) require that the Metro Contract Review Board hold a public hearing and adopt written findings establishing, among other things, that: the exemption of a public improvement contract from competitive bidding is unlikely to encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts; and that said exemption will likely result in substantial cost savings and other substantial benefits to Metro; now therefore

BE IT RESOLVED THAT THE METRO CONTRACT REVIEW BOARD:

- 1. Exempts from competitive bidding the procurement and award of a public improvement contract for the construction of the Primate Habitat at the Oregon Zoo; and
- 2. Adopts as its findings in support of such exemption the justifications, information and reasoning set forth in the attached Exhibit A, which is incorporated by this reference as if set forth here in full; and
- 3. Authorizes the Chief Operating Officer to directly award a contract to Lease Crutcher Lewis for the construction of the Primate Habitat at the Oregon Zoo, by amendment to the Polar Bear Habitat and Associated Infrastructure CM/GC contract with Lease Crutcher Lewis.

ADOPTED by the Metro Contract Review Board this 6th day of April 2017.

	Council President Tom Hughes, Metro Contract Review Board
Approved as to Form:	
Alison R. Kean, Metro Attorney	

EXHIBIT A

Findings in Support of an Exemption from Competitive Bidding and Direct Award of the Construction Contract for the New Primate Habitat project at the Oregon Zoo byAmendment to the CM/GC Contract for the New Polar Bear Habitat and Associated Infrastructure

Pursuant to ORS 279C.335 (2) and (4), and Metro Code Section 2.04.054(c), the Metro Contract Review Board makes the following findings in support of exempting the procurement of the Primate Habitat Project at the Oregon Zoo from competitive bidding, and authorizing use of a Request for Proposals (RFP) solicitation for a Construction Manager/General Contractor public improvement construction contract:

- 1. The exemption is unlikely to encourage favoritism or substantially diminish competition.
 - a. Lease Crutcher Lewis Advantage in Timing and Proximity. Combining the Primate Habitat Project with the Polar Bear Habitat Project is unlikely to encourage favoritism or substantially diminish competition because, due to the proximity of the primate exhibit to the polar bear exhibit and the overlapping project schedules, Lease Crutcher Lewis ("LCL") already has a distinct advantage in the competitive process for the Primate Habitat Project if an RFP or Invitation to Bid (ITB) were to be conducted. Any competitor for the Primate Project would have to coordinate project activities and schedule with LCL to work around the adjacent LCL Polar Bear Habitat Project, which will already be under way. LCL, on the other hand, would be able to combine project working space and management personnel to save money and time. Furthermore, potential competitors would undoubtedly be aware of LCL's advantage and thus less than enthusiastic about investing the effort to submit a proposal in the current construction environment, in which there are presently many large projects in the region coming to bid. As a result, it is conceivable that LCL could be the only firm to respond if an RFP or ITB were to be conducted. This exemption to competitive bidding does not encourage favoritism or substantially diminish competition, it simply acknowledges advantages that exist as a result of construction environment at the Zoo, project timing, proximity and the current construction market.

Competition will be preserved for the vast majority of the Primate Habitat Project work, as LCL will be required to competitively bid the subcontracts for all project construction work, and will not self-perform work that can be subcontracted.

b. Robust Polar Bear Habitat Project Procurement. Combining the Primate Habitat Project with the Polar Bear Habitat Project is unlikely to encourage favoritism or substantially diminish competition because it follows upon and takes advantage of the robust competitive process that was carried out through the Polar Bear Habitat CM/GC RFP. The Polar Bear Habitat RFP was formally advertised and made available to all qualified contractors by posting on ORPIN (Oregon Procurement Information Network), the Oregon Daily Journal of Commerce and a minority business publication. Lease Crutcher Lewis was chosen from a field of three well-qualified respondents, based on robust selection criteria, including the inclusion of aspirational COBID contracting goals, and no dissatisfied proposers protested the award. Furthermore, as with the Polar Bear

Habitat Project, LCL's subcontractor selection process will be a low-bid competitive method for contracts by requiring a minimum of three bids per scope, unless there is an approved exception. LCL intends to subcontract for all project construction work, and will not self-perform work that can be subcontracted. Competition among subcontractors will be encouraged by: contacting local subcontractors, including COBID firms, and notifying them of any opportunities within their area of expertise, and by performing outreach to local business groups representing minority-owned, women-owned, emerging small businesses, and service-disabled veteran-owned businesses. LCL is recommending a COBID aspiration goal for the combined projects of 15 percent to 18 percent.

2. The exemption will likely result in substantial cost savings to Metro.

The Metro Contract Review Board finds that exempting the procurement of the construction of the Polar Bear habitat from competitive bidding will likely result in substantial costs savings to Metro, considering the following factors required by OAR 137-049-0630 and ORS 279C.335:

a. <u>Direct Construction Cost Savings Due to Shortened Schedule</u>. Combining the projects will substantially reduce the total construction costs by shortening their duration by eight months. The estimated reduction from 30 months to 22 months reduces the management, labor and general conditions costs of the general contractor and subcontractors as follows:

Estimated savings in General Conditions and direct labor, LCL: \$753,000 Estimated savings from Subcontractors: \$525,000

Total Estimated Saving: \$1,278,000

b. Staff Cost Savings/Restored Revenue Generation Due to Shortened Schedule. Combining the projects will substantially reduce the impacts to the Zoo of staff time and resources to coordinate with the design and construction efforts, because it shrinks two overlapping major design and construction efforts into one effort with a shorter duration. The shorter length of the combined projects will also reduce the duration of the impacts to Zoo revenues resulting from construction impacts on the guest experience and temporary loss of revenue-generating visitor amenities.

- c. <u>Number of entities available to bid</u>. As a result of the proximity of the two projects and the overlap in construction schedules, LCL has an advantage in the competitive process for the Primate Habitat Project. This, combined with a construction market with no shortage of projects, causes an inherent disincentive for other capable firms to compete for the Primate Habitat Project. This will likely result in decreased interest and an erosion of the competitive procurement process for the Primate Habitat Project were an Invitation to Bid or RFP to be issued.
- d. Construction budget and future operating costs. Combining the two projects under one CM/GC firm will allow Metro to obtain cost reductions through preconstruction services by the contractor during the design phase, including a constructability review, value engineering, and other services. The high degree of complexity of interface of the project improvements, and the need to integrate both with each other and the Zoo's pre-existing infrastructure, calls for integrating their design and construction under one

design firm and one CM/GC. Given the challenging environmental and topographical site constraints, integrating the two projects and involving the same contractor early during the design process fosters teamwork that results in a better more holistic design, fewer change orders, and faster progress with fewer unexpected delays, resulting in lower costs to Metro. The ability to have the CM/GC do early work prior to completion of design shortens the overall duration of construction, resulting in less disruption to the Zoo as the state's top paid tourist attraction. Faster progress and an earlier completion date will also help Metro avoid the risk of inflationary increase in materials and construction labor costs.

CM/GC constructability review also allows for an ongoing review of the long-term operating costs of design options, allowing for midcourse design choices leading to a project having lower long-term operating maintenance and repair costs.

Metro has experience benefitting from CM/GC on constructability review with Elephant Lands, the Zoo's largest project to date.

e. <u>Public Benefits</u>. Combining the two projects under one common CM/GC contractor will help realize Metro's aspirational COBID construction subcontractor goals. LCL is recommending a COBID aspirational goal for the combined projects of 15 percent to 18 percent, which is more than the Polar Bear Project's 15 percent goal. LCL has partnered with a COBID-certified woman-owned civil and paving contractor for pre-construction services on the Polar Bear Project, and the partnership will extend to the Primate Habitat Project.

LCL has a history with the Zoo of mentoring COBID contractors, and LCL is a registered agent of the Oregon Bureau of Labor and Industries (BOLI) that trains and mentors carpenter and laborer apprentices on most projects. LCL will submit a workforce diversity and contracting plan prior to seeking subcontractor bids on the project.

- f. Value engineering. Combining the two projects under one CM/GC firm allows Metro to consider otherwise unavailable value engineering opportunities for guest common area spaces shared by these two adjacent associated habitat spaces. The CM/GC process enables the contractor to work with the project architect and the Zoo bond staff to help reduce construction costs by providing early input and constructability review to designers, avoiding costly redesigns and change orders, and providing opportunities for the architects and contractor to work together on both practical and innovative solutions to complex design issues.
- g. Specialized expertise required. Unique projects require special qualifications. The Primate Habitat Project includes work that can only be performed by a few specialists and which will require a design team and contractor with depth of experience, including but not limited to: large-scale construction work through identified landslide area; guest safety on campus; specialized animal containment and barriers; and project phasing to minimize impacts to guests, animals, and Zoo operations. The combination of the two projects under LCL will ensure that the Primate Habitat Project will benefit from LCL's substantial experience on Elephant Lands, and its preconstruction planning already

- performed for the Polar Bear Habitat Project increasing the likelihood of the project being completed on or ahead of schedule, resulting in lower costs and increased benefit to the community.
- h. Public safety. The Polar Bear and Primate Habitat Projects are both complex projects subject to aggressive construction schedules. Construction will occur across a large swath in the center of the Zoo, disrupting the flow of visitors on Zoo street, while the rest of the Zoo must remain safely open to the public. Combining the two projects under one CM/GC contracting process will shorten the duration of this disturbance and enable the project architect and the Zoo construction and design staff to work with one construction manager (instead of two) to plan for minimizing safety hazards and coordinate the projects and ongoing Zoo operations, by providing early input into issues of project phasing, construction staging areas, construction access corridors for both projects simultaneously. This will limit risks to public safety, thus reducing the risk of costly injury claims. Metro's experience using CM/GC on Elephant Lands demonstrated the success in planning in advance for visitor needs and safety.
- i. Reduces risk to Metro and the public. The Primate Habitat Project is a major construction project that will take place in the heart of the Zoo at its central hub. As such, it will have an impact on the revenue-generating operations of the Oregon Zoo. Combining the two Projects under one CM/GC contracting process will reduce the risk to Zoo operations by minimizing the duration of the construction disruption through early work amendments. Early, simultaneous Construction Manager (CM) involvement in the phasing and planning of both projects reduces the risk of change orders, thus shortening the likely duration, lessening the risk of late delivery, and will inform the decisions of designers and the Zoo Bond so that Zoo operations may continue in and around construction efforts meanwhile preserving the safety of visitors. Coordination of the design of the infrastructure and project connections between the two projects will be greatly enhanced and there will be fewer disconnects and less likelihood of incompatibility when designing both holistically. This will result in fewer change orders and constructability surprises. Metro's experience with CM/GC on Elephant Lands demonstrated the reduced risk in change orders on a large scale project.
- j. <u>Exemption's effect on funding</u>. The exemption of the Primate Habitat Project from competitive bidding will have no effect on funding for the project.
- k. Effect on ability to control impact of market conditions. Construction costs are presently escalating at an estimated 4 percent to 4.5 percent per year. Combining the projects will allow the Primate Habitat Project subcontracts to be bid a year or more earlier then if procured separately. Furthermore, the ability to implement early work amendments will enable the Zoo to save on labor and material costs for early work elements in an environment where construction costs are escalating rapidly. The ability to do early work shortens the project's overall duration, allowing bids to be obtained sooner, before further inflationary increases occur. The CM/GC firm will be working alongside the design team to identify measures to keep the project within budget during the design phase.

- 1. <u>Technical complexity</u>. The design and construction of Zoo exhibits requires technical expertise, knowledge, and experience, all of which was factored into the contractor selection in the Polar Bear Habitat RFP process. LCL has demonstrated experience and success in implementing similar projects. Combining the two projects under LCL as CM/GC will result in a substantially lower risk to Metro, because it increases the likelihood of the project being completed sooner and on budget, with fewer construction delays and change orders, resulting in reduced short term revenue loss and increased benefit to the community.
- m. New construction. Both projects involve new construction and the extensive replacement of existing antiquated infrastructure, much of which is underground and some of which is of unknown location, quality and condition. Some of the design limitations and conditions are likely to be unknown until uncovered by work performed under an early work amendment, which can be performed during design development to inform the design process. Combining the two projects avoids the need to connect new Polar Bear Habitat utilities and infrastructure to old Primate Exhibit utilities and infrastructure, only to have those connections torn out when the Primate Habitat Projects begins construction
- n. Occupancy during construction. Construction will occur across a large swath in the center of the Zoo while the rest of the Zoo must continue to operate safely and be open to the public. Combining the two Projects under one CM/GC construction contract will shorten the duration of this disturbance and enable the project architect and the Zoo construction and design staff to work with one CM/GC, instead of trying to coordinate the efforts of two, to minimize conflict between the projects and ongoing Zoo operations, by providing a coordinated project phasing plan, construction staging areas, construction access corridors, and scheduling design to minimize as much as possible the disruption of the guest experience and revenue losses due to the displacement of revenue-generating amenities. Construction staging areas for the projects can be merged when using one CM/GC contractor, and combining the project allows the Zoo to limit the construction access to one point of entry, Washington Park gate J, keeping the Zoo middle service road open for visitor crossing and Zoo operations.
- o. <u>Multi-phase construction</u>. The combined projects would be conducted jointly in phases, allowing for early work amendments to start on the beginning construction phases while finalizing overall design, which ultimately saves time on the overall project. Early work phases are expected to uncover latent conditions at the project site that, once exposed, will then be addressed efficiently and less expensively during ongoing design, avoiding costly redesigns and change orders.
- p. Availability of personnel, consultants and legal counsel with CM/GC expertise. The Zoo Bond Program has established a successful track record of negotiating, administering and enforcing the terms of Metro's CM/GC public improvement contract. This team, or a team equivalent in qualifications and expertise, will be deployed on the combined project.

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 17-4781, FOR THE PURPOSE OF AUTHORIZING AN EXEMPTION FROM COMPETITIVE BIDDING AND DIRECT AWARD OF THE CONSTRUCTION CONTRACT FOR THE NEW PRIMATE HABITAT PROJECT AT THE OREGON ZOO BY AMENDMENT TO THE CM/GC CONTRACT FOR THE CONSTRUCTION OF THE NEW POLAR BEAR HABITAT AND ASSOCIATED INFRASTRUCTURE

Date: March 22, 2017 Prepared by: Heidi Rahn, 503-220-5709

BACKGROUND

In 2008, voters approved \$125 million in bond funds to support animal welfare, conservation education, and sustainable infrastructure investments at the Oregon Zoo. This funding has since increased to \$149 million due to bond sale premiums, interest earnings, and grants, donations and rebates.

The Oregon Zoo is confident in its ability to complete all of the projects approved by the voters and to deliver on the public promise. The zoo has completed construction of five major projects to date, all within approved budgets. The final three projects – Polar Passage, primate habitat and rhino habitat – are scheduled to be complete by 2020.

Staff recommends that one contractor oversee the construction of the remaining three projects. This requires a modification to the Construction Management General Contractor (CM/GC) contract for Polar Passage. The building demolition scope modification proposed for the primate project results in a change to the location of the construction on the zoo campus. Construction of the new primate habitat will occur directly adjacent to the construction of Polar Passage, and right through the center of the zoo. Staff proposes to combine the primate/rhino project construction with Polar Passage.

Managing the construction of the remaining projects with one CM/GC contract will reduce the total construction schedule from 30 months to 22 months and save an estimated \$1.3 million in construction costs. In addition, coordinating the mobilization and staging of construction equipment on site, construction phasing, and project management will lower the impact on zoo operations and the guest experience. Combining construction management for the projects will not impact competitive bidding since the contract requires bids from a minimum of three subcontractors and suppliers in every scope of work. Cost savings from the construction coordination of the three remaining projects will support animal welfare, conservation education, and sustainable infrastructure.

ANALYSIS/INFORMATION

- 1. Known Opposition None
- 2. Legal Antecedents Metro Code 2.04.054; Oregon Revised Statutes 279C.335(4).
- 3. **Anticipated Effects** Managing the remaining projects with one CM/GC contract will reduce the overall construction schedule, lower the construction impact on zoo operations and guest experience, and result in cost savings. See Resolution Exhibit A: Findings in Support of an Exemption from

Competitive Bidding and Direct Award of the Construction Contract for the New Primate Habitat project at the Oregon Zoo by Amendment to the CM/GC Contract for the New Polar Bear Habitat and Associated Infrastructure, Metro Contract No. 934194.

4. **Budget Impacts** Managing the construction of the remaining projects with one CM/GC contract will reduce the total construction schedule from 30 months to 22 months and save an estimated \$1.3 million in construction costs. Cost savings will be redirected to support animal welfare, conservation education, and sustainable infrastructure. Project budgets will not be impacted.

RECOMMENDED ACTION

Approve a new exemption from competitive bidding, authorizing Metro to contract directly with Lease Crutcher Lewis ("LCL") for the simultaneous construction of the Primate Habitat and the Polar Habitat projects, via amendment to the Polar Bear Habitat CM/GC Contract.

Resolution No. 17-4779, For the Purpose of Adopting Local Contract Review Board Administrative Rules

Resolutions

Metro Council Meeting Thursday, April 6, 2017 Metro Regional Center, Council Chamber

BEFORE THE METRO LOCAL CONTRACT REVIEW BOARD

FOR THE PURPOSE OF ADOPTING LOCAL)	RESOLUTION NO. 17-4779
CONTRACT REVIEW BOARD)	
ADMINISTRATIVE RULES AND INTERIM)	Introduced by Metro Attorney Alison R.
EQUITY IN CONTRACTING)	Kean in concurrence with Council
ADMINISTRATIVE RULES)	President Tom Hughes

WHEREAS, it is the policy of both the State of Oregon and Metro to utilize public contracting practices and methods that (a) simplify, clarify and modernize procurement practices so that they reflect the marketplace and industry standards, (b) instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government, (c) promote efficient use of government resources, (d) allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement, and (f) provide a public contracting structure that can take full advantage of evolving procurement methods as they emerge within various industries; and

WHEREAS, the Oregon Legislature adopted HB 2341 (2003 Oregon Laws, Chapter 794), which was signed by the Governor and had an operative date of March 1, 2005. HB 2341 repealed Oregon Revised Statutes Chapter 279 (with minor exceptions) and replaced it with three new subchapters: ORS 279A, 279B, and 279C. These three subchapters collectively constitute the Oregon Public Contracting Code (referred to herein as the "State Code"); and

WHEREAS, the State Code directs that the Attorney General prepare and maintain model rules that specify procedures for public contracting ("Model Rules"), specifically requiring that the Model Rules be used by all public bodies authorized by law to conduct procurements of public contracts, unless a public body "opts out" by adopting its own public rules; and

WHEREAS, in 2005, Metro "opted out" of following the Model Rules and relied on the policies contained in Metro Code Chapter 2.04 as Metro's rules of procedure for public contracting; and

WHEREAS, Metro now desires to make changes to its rules of procedure for public contracting, to (a) reflect legislative changes to the State Code and (b) implement public contracting practices and methods that achieve the policy directives referenced above; and

WHEREAS, the Metro Council is the Local Contract Review Board for Metro, and as such is authorized to adopt rules of procedure for public contracting; and

WHEREAS, the State Code empowers and directs the Metro Local Contract Review Board to designate certain public contracts as "personal services contracts" and to create procedures to screen and select persons to perform personal services for Metro; and

WHEREAS, Oregon Revised Statutes Chapter 200 requires that all public bodies authorized by law to conduct procurements of public contracts (a) aggressively pursue a policy of providing opportunities for disadvantaged business enterprises, minority-owned businesses, woman-owned businesses, businesses that service-disabled veterans own and emerging small businesses and (b) cooperate with the Governor's Policy Advisor for Economic and Business Equity to determine the best means by which to make such opportunities available; and

WHEREAS, recognizing the validity in the findings set forth in ORS 200.015, the Metro Local Contract Review Board desires to adopt rules of procedure to advance equity in public contracting that promote economic growth of disadvantaged business enterprises, minority-owned businesses, womanowned businesses, businesses that service-disabled veterans own and emerging small businesses; now therefore

BE IT RESOLVED THAT THE METRO LOCAL CONTRACT REVIEW BOARD:

- 1. Adopts the administrative rules attached hereto as <u>Exhibit A</u>, as its rules of procedure for public contracting (hereinafter referred to as the "LCRB Contracting Rules");
- 2. Adopts the findings set forth in Exhibit A-1, which are required by State Code to approve the classes of special procurements set forth in Rule 47.0288 of the attached LCRB Contract Rules;
- 3. In accordance with ORS 279A.065(6)(b), directs Metro staff to review the LCRB Contracting Rules each time the Attorney General modifies the Model Rules in order to determine whether amendments to the LCRB Contracting Rules are necessary for statutory compliance;
- 4. Adopts the administrative rules attached hereto as <u>Exhibit B</u>, as its rules of procedure for screening and selecting persons to perform personal services for Metro (hereinafter referred to as the "Personal Services Contracting Rules");
- 5. Adopts the administrative rules attached hereto as <u>Exhibit C</u>, as its rules of procedure to advance equity in public contracting at Metro (hereinafter referred to as the "Equity in Contracting Rules"); and
- 6. Recognizing the importance of public and stakeholder involvement in the development and drafting of administrative rules, declares the attached LCRB Contracting Rules, the attached Personal Services Contracting Rules, and the attached Equity in Contracting Rules, to be interim rules effective immediately and directs Metro staff to return to the Local Contract Review Board for final adoption after Metro has provided those persons likely to be affected by the permanent adoption of these rules with an opportunity to provide public comment.

ADOPTED by the Metro Council this	day of April, 2017.
	Tom Hughes, Council President
	Approved as to Form:
	Alison R Kean Metro Attorney

METRO LOCAL CONTRACT REVIEW BOARD RULES PROCUREMENT ADMINISTRATIVE PROCEDURES

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METRO LOCAL CONTRACT REVIEW BOARD ADMINISTRATIVE RULES

Effective	,	2017

DIVISION 5 INTRODUCTION

05-0100 Content and Source of Rules

- (1) These Metro Local Contract Review Board Administrative Rules (these "Administrative Rules") implement ORS Chapters 279, 279A, 279B and 279C, the Oregon Public Contracting Code, referred to in this document as "the State Code." These Administrative Rules are rules of procedure for public contracting as required under ORS 279A.065. These Administrative Rules consist of the following divisions:
- (a) Division 10, Definitions, was compiled from definitions from Model Rules Divisions 46, 47, 48 and 49 and the former Metro Contract Policies Code.
- (b) Division 46 implements ORS chapter 279A, General Provisions. Division 46 applies to all public contracting conducted under these Administrative Rules.
- (c) Division 47 implements ORS chapter 279B, Public Procurements. Division 47 applies to Procurement of Goods and Services.
- (d) Division 48 implements ORS chapter 279C, Public Improvements and Related Contracts. Division 48 applies to the Procurement of architectural, engineering, land surveying and related services Contracts.
- (e) Division 49 implements ORS chapter 279C, Public Improvements and Related Contracts. Division 49 applies to the Procurement of construction services and Public Improvements.
- (2) The primary source documents for these Administrative Rules are the State Code, the Oregon Attorney General's Model Public Contract Rules (the "Model Rules"), and the former Metro Contract Policies Code. To create these Administrative Rules, the Model Rules have been revised to meet the particular requirements of Metro. For ease of reference, these Administrative Rules will maintain the same division numbering system as the Model Rules.

05-0120 Policy

Metro shall conduct public contracting to further the following policies, and policies set forth in ORS Chapters 279, 279A, 279B and 279C, as those chapters may be amended, and these Administrative Rules. A sound and responsive public contracting system should:

- (1) Simplify, clarify and modernize procurement practices so that they reflect the market place and industry standards.
- (2) Instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government.

- (3) Promote efficient use of federal, state and local government resources, maximizing the economic investment in public contracting within this state.
- (4) Clearly identify rules and policies that implement each of the socioeconomic programs that overlay public contracting and accompany the expenditure of public funds mandated by the legislature or Local Contract Review Board.
- (5) Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement. In public procurement, as set out in ORS chapter 279B, meaningful competition may be obtained by evaluation of performance factors and other aspects of service and product quality, as well as pricing, in arriving at best value.
- (6) Provide a public contracting structure that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competitive Bidding as the standard for Public Improvement Contracts unless otherwise exempted.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.015 & ORS 279A.065

DIVISION 10 DEFINITIONS

10-0000 Definitions

Unless the context of a specifically applicable definition in the State Code requires otherwise, capitalized terms used in these Administrative Rules have the meaning set forth in the division of the Administrative Rules in which they appear, and if not defined there, the meaning set forth in these Division 10 rules, and if not defined here, the meaning set forth in the State Code. The following terms, when capitalized in these Administrative Rules, have the meaning given below:

Addendum or **Addenda.** An addition to, deletion from, a material change in, or general interest explanation of a Solicitation Document.

Administering Contracting Agency. A contracting agency described in ORS 279A.200(1)(a), and for Interstate Cooperative Procurements includes the entities specified in ORS 279A.220(4).

Administrative Rules. These Metro Public Contract Review Board Administrative Rules.

Advantageous. In Metro's best interests, as assessed according to the judgment of Metro.

Affected Person or Affected Offeror. A Person whose ability to participate in a Procurement is adversely affected by a decision of Metro.

Bid. A Written response to an Invitation to Bid.

Bidder. A Person who submits a Bid in response to an Invitation to Bid.

Closing. The date and time specified in a Solicitation Document as the deadline for submitting Offers.

Competitive Quote. A quote made in response to Request for Quote issued pursuant to Rule 49-0160.

Competitive Range. The number of Proposers with whom Metro will conduct Discussions or negotiate if Metro intends to conduct discussions or negotiations in accordance with Rule 47-0261 or Rule 49-0650.

Concession Services Agreement. A contract that authorizes and requires a private entity or individual to promote or sell, for its own business purposes, specified types of Goods or Services from a site within a building or upon lands owned or operated by Metro and under which the concessionaire makes payments to Metro based, at least in part, on the concessionaire's revenue from sales. The term "concession agreement" does not include an agreement which is merely a flat-fee or per-foot rental, lease, license, permit or other arrangement for the use of public property.

Conduct Disqualification. A Disqualification pursuant to ORS 279C.440 and Rule 49-0370, or Debarment pursuant to Rule 47-0575.

Contract. A Public Contract, as such term is defined in ORS 279A.010.

Contract Price. As the context requires, the maximum payments that Metro will or may incur under a Contract, including bonuses, incentives and contingency amounts, if the Contractor fully performs under the Contract.

Contractor. The Person, including a Consultant as defined in Administrative Rule 48-0110(1), with whom Metro executes a Contract.

Days. Calendar days, including weekdays, weekends and holidays, beginning at midnight and ending at midnight twenty-four hours later, unless otherwise specified by these Administrative Rules or the Solicitation Document.

Descriptive Literature. Informational materials concerning available products or services submitted by Offerors in response to a Solicitation Document.

Disqualification. The preclusion of a Person from contracting with Metro after Notice and hearing pursuant to Rule 46-0210 or ORS 279C.440 and Rule 49-0370.

Electronic. Any means of transmission of information by electronic device, including but not limited to electronic mail.

Electronic Advertisement. Notice of Metro's Solicitation Document, or Request for Qualifications (RFQ) or information, or a request for price quotations, available over the Internet via Metro's Electronic Procurement System.

Electronic Offer. A response to a Solicitation Document or a request for price quotations submitted to Metro via Metro's Electronic Procurement System.

Electronic Procurement System. An information system that Persons may access through the Internet or that Persons may otherwise remotely access through a computer, that enables Persons to send Electronic Offers and Metro to post Electronic Advertisements, receive Electronic Offers, and conduct other activities related to Metro Procurements. Metro currently uses the Oregon Department of Administrative Services' Electronic Procurement System known as "ORPIN" (Oregon Procurement Information Network) as its Electronic Procurement System.

Emergency. Circumstances that could not have been reasonably foreseen, that create a substantial risk of loss, damage, interruption of services or threat to property, public health, welfare or safety, and that require prompt execution of a Contract to remedy the condition.

Emerging Small Business. A business concern described in ORS 200.005(3) and 200.005(4) and certified as such with the State of Oregon pursuant to ORS 200.055.

Foreign Contractor. A Contractor that is not domiciled in or registered to do business in the State of Oregon. See Rule 49-0490.

Goods. Supplies, equipment, or materials, and any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, and combinations of any of the items identified in this definition.

Goods and Services/Goods or Services. Any combination of any of the items identified in the definitions of "Goods" and "Services".

Intermediate Procurement. A sourcing method authorized by Rule 47-0270, Rule 48-0210 and Rule 49-0160.

Intermediate Proposal. A response to an Intermediate Request for Proposals.

Intermediate Request for Proposals. An Intermediate Procurement method that requests potential Contractors submit proposals for providing goods or services described in the request. See Rule 47-0270 and Rule 48-0210.

Invitation to Bid or ITB. The Solicitation Document issued to invite Offers from prospective Contractors under either ORS 279B.055 or 279C.335. As used herein, an "Invitation to Bid" or "ITB" has previously been referred to at Metro as a "Request for Bid" or an "RFB".

Local Contract Review Board. The Metro Council acting as the Local Contract Review Board pursuant to ORS 279A.060; also referred to as "Board."

Nonresident Bidder. A Bidder described in ORS 279A.120(1)(a).

Offer. A Written response to a Solicitation Document.

Offeror. A Person that submits an Offer; a Bidder or a Proposer.

Opening. The date, time and place announced in the Solicitation Document for the opening of Bids or Proposals. Competitive, sealed Bids shall be opened publicly in accordance with ORS 279B.055(5)(a)

Original Contract. As defined in ORS 279A.200(1)(f), the initial Contract or Price Agreement solicited and awarded during a Cooperative Procurement by an Administering Contracting Agency.

Person. An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation or any other legal or commercial entity who has the legal capacity to enter into a Contract.

Personal Services. As used in Division 46 of these Administrative Rules, the services performed under a Personal Services Contract governed by Metro's Personal Services Contracting Rules or pursuant to ORS 279A.055. "Personal Services" as used in Division 48 and Division 49 of these Administrative Rules (and as used in Division 46 when applicable to Division 48 or Division 49) has the meaning set forth in ORS 279C.100.

Personal Services Contracting Rules. The Metro administrative procedures that apply to the Procurement of Personal Services Contracts.

Price Agreement. A Public Contract for the Procurement of Goods or Services at a set price with: (a) no guarantee of a minimum or maximum purchase; or (b) an initial order or minimum purchase combined with a continuing Contractor obligation to provide Goods and Services in which Metro does not guarantee a minimum or maximum additional purchase.

Price Quote. A quote made in response to Request for Quote issued pursuant to Rule 47-0270.

Procurement. As defined in ORS 279A.010, the act of purchasing, leasing, renting or otherwise acquiring goods or services as well as the act of contracting for a Public Improvement. "Procurement" includes each function and procedure undertaken or required to be undertaken by Metro to enter into a Public Contract, administer a Public Contract and obtain the performance of a Public Contract under the State Code.

Procurement Officer. The Metro Director of Finances and Regulatory Services, or the Procurement Manager as his/her delegate.

Product Sample. The exact Goods, or a representative portion of the exact Goods requested by a Solicitation Document.

Proposal. A Written response to a Request for Proposals.

Proposer. A Person who submits a Proposal in response to Metro's Request for Proposals.

Public Improvement. As defined in ORS 279A.010, a project for construction, reconstruction or major renovation on real property by or for Metro. "Public Improvement" does not include projects for which no funds of Metro are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or Emergency work, minor alteration, ordinary repair or maintenance necessary to preserve a Public Improvement.

Public Works. Public Works as defined in ORS 279C.800(5).

Purchasing Contracting Agency. A contracting agency described in ORS 279A.200(1)(h).

Qualified Rehabilitation Facility (QRF). A nonprofit community rehabilitation program or a vocational service provider whose purpose is to assist and encourage disabled individuals and which:

- (1) During the fiscal year employs disabled individuals for not less than 75 percent of the hours of direct labor required for the manufacture or provision of its products or services;
- (2) Shall be either a community rehabilitation program certified through the Oregon Vocational Rehabilitation Division or a vocational service provider certified through the Oregon Mental Health Division of the Department of Human Resources;
- (3) Meets the definition given in ORS 279.835(4); and
- (4) Shall be currently certified by the Oregon Department of Administrative Services (DAS) as a QRF (i.e., is listed as a current certificate holder in the annual QRF Directory, published by DAS).

Request for Proposals or RFP. A Solicitation Document calling for Proposals.

Request for Qualifications or RFQu. A Written document issued by Metro to which Contractors respond in Writing by describing their experience with and qualifications for the Services or Architectural, Engineering or Land Surveying Services, or Related Services, described in the document.

Request for Quotes or RFQ. An Intermediate Procurement method that requests Price Quotes for Goods or Services (see Rule 47-0270) or Competitive Quotes for Public Improvements (see Rule 49-0160).

Responsible. Meeting the standards set forth in Administrative Rule 47-0640 or 49-0390(2), and not debarred or disqualified by Metro under Administrative Rule 47-0575 or 49-0370.

Responsive. Having the characteristic of substantial compliance in all material respects with applicable Solicitation requirements.

Services. Services other than "Personal Services" designated under ORS 279A.055 and covered in the Personal Services Contracting Manual.

Sign, Signed or Signature. Any Written mark, word or symbol attached to or logically associated with a document and executed or adopted by a Person with the intent to be bound.

Small Procurement. A sourcing method authorized by Rule 47-0265.

Solicitation. A request by Metro for prospective Contractors to submit Offers.

Solicitation Document. An Invitation to Bid, Request for Proposals, Request for Quotes, Intermediate Request for Proposals or other document issued to invite Offers from prospective Contractors pursuant to ORS Chapter 279B or 279C. The following are not Solicitation Documents if they do not invite Offers from prospective Contractors: a Request for Qualifications, a prequalification of Bidders, a request for information, or a request for product prequalification.

Specifications. A description of the physical or functional characteristics, or of the nature of a supply, Services or construction item, including any requirement for inspecting, testing or preparing a supply, Services or construction item for delivery and quantities or qualities of materials to be furnished under a Contract. Specifications generally will state the result to be obtained and may, on occasion, describe the method and manner of doing the work to be performed.

State Code. The Oregon Public Contracting Code ORS chapters 279, 279A, 279B and 279C.

Unauthorized Purchase. The Procurement made without following the requirements set forth in the State Code or these Rules or without delegated authority. See Rule 46-0200.

Writing or Written. Conventional paper documents, whether handwritten, typewritten or printed, in contrast to spoken words. It also includes electronic transmissions when required by applicable law or permitted by a Solicitation Document or Contract.

Source: The State Code, Attorney General Model Rules, Former Metro Contract Policies

DIVISION 46

GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTING

46-0100 Application; Federal Law Supremacy

- (1) If a conflict arises between these Division 46 rules and rules in Divisions 47, 48 and 49, the rules in Divisions 47, 48 and 49 take precedence over these Division 46 rules.
- (2) Except as otherwise expressly provided in ORS 279C.800 through 279C.870, and notwithstanding ORS Chapters 279A, 279B, and 279C.005 through 279C.670, applicable federal statutes and regulations govern when federal funds are involved and the federal statutes or regulations conflict with any provision of ORS Chapters 279A, 279B, or 279C.005 through 279C.670 or these Administrative Rules, or require additional conditions in Public Contracts not authorized by ORS Chapters 279A, 279B, and 279C.005 through 279C.670 or these Administrative Rules.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.030 & ORS 279A.065

46-0130 Application of the State Code and Administrative Rules; Exceptions

- (1) Except as set forth in this section, Metro shall exercise all procurement authority related to Public Contracting in accordance with the State Code and these Administrative Rules.
- (2) Metro has specifically opted out of the Oregon Department of Justice Model Rules for Public Contracting and has elected to exercise its own contracting authority by adopting these Administrative Rules pursuant to ORS 279A.065. Except for those portions of the Oregon Department of Justice Model Rules for Public Contracting pertaining to the Procurement of Construction Manager/General Contractor Services under ORS 279A.065(3), (where the State Code provides that Metro is not permitted to opt out) the Oregon Department of Justice Model Rules for Public Contracting do not apply to Metro.
- (3) Other than the Division 48 Administrative Rules that apply to Architectural, Engineering and Surveying Services and Related Services, contracts or classes of contracts for Personal Services designated as such by the Metro Local Contract Review Board are not subject to Divisions 46, 47, and 49 of these Administrative Rules.
- (4) These Administrative Rules do not apply to Contracts or classes of Contracts described in ORS 279A.025(2)to which the State Code, ORS Chapters 279A, 279B and 279C, do not apply. Contracts that are exempt from competitive Bidding under the State Code, including but not limited to the following, retain that exemption regardless of any provisions of these Administrative Rules:
 - (a) Contracts between Metro and:
 - A. Another "Contracting Agency" as defined by ORS 279A.010;
 - B. The Oregon Health and Science University;
 - C. The Oregon State Bar;
 - D. A governmental body of another state;
 - E. The federal government;
 - F. An American Indian tribe or an agency of an American Indian tribe;

- G. A nation, or a governmental body in a nation, other than the United States; or
- H. An intergovernmental entity formed between or among governmental bodies of this or another state, the federal government, an American Indian tribe or an agency of an American Indian tribe, a nation other than the United States or a governmental body in a nation other than the United States.
- (b) Contracts pursuant to 10 U.S.C. § 381 (relating to law enforcement equipment suitable for counter-drug activities through the Department of Defense), the Electronic Government Act of 2002 (relating to automated data processing equipment, including firmware, software, supplies, support equipment, and services from federal supply schedules), or other federal law that Metro Council determines are similar to those Acts in effectuating or promoting transfers of property to Metro;
- (c) Contracts, agreements or other documents entered into, issued or established in connection with:
- A. The incurring of debt by a public body, including but not limited to the issuance of bonds, certificates of participation and other debt repayment obligations, and any associated Contracts, agreements or other documents, regardless of whether the obligations that the Contracts, agreements or other documents establish are general, special or limited;
- B. The making of program loans and similar extensions or advances of funds, aid or assistance by a public body to a public or private body for the purpose of carrying out, promoting or sustaining activities or programs authorized by law;
- C. The investment of funds by a public body as authorized by law, and other financial transactions of a public body that by their character cannot practically be established under the competitive contractor selection procedures;
- D. Banking, money management or other predominantly financial transactions of Metro that, by their character, cannot practically be established under competitive contractor selection procedures, based upon findings of the Purchasing Administrator.
 - (d) Grants, defined as follows:
 - A. An agreement under which:
 - (i) Metro receives moneys, property or other assistance, including, but not limited to, federal assistance that is characterized by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities, or other assets;
 - (ii) The assistance received by Metro is from a grantor for the purpose of supporting or stimulating a program or activity of Metro; and
 - (iii) No substantial involvement by the grantor is anticipated in the program or activity other than involvements associated with monitoring compliance with grant conditions.
 - B. An agreement under which:
 - (i) Metro provides moneys, property or other assistance, including by not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets;
 - (ii) The assistance is provided to a recipient for the purpose of supporting or stimulating a program or activity of the recipient; and

- (iii) No substantial involvement by Metro is anticipated in the program or activity of the recipient other than involvement associated with monitoring compliance with the grant conditions.
 - (e) Acquisitions or disposals of real property or interests in real property;
 - (f) Transfer, sale or disposal of personal property;
- (g) Sole source expenditures when rates are set by law or ordinance for purposes of these rules concerning source selection;
- (h) Contracts for employee benefit plans as provided in ORS 243.105(1), 243.125(4), 243.221, 243.275, 243.291, 243.303 and 243.565;
- (i) Revenue Generating Contracts, defined as agreements whose primary purpose is generating revenue for Metro and are typically awarded to the offeror proposing the most Advantageous or highest monetary return to Metro. The Metro Council may designate a particular Contract as a revenue-generating Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.050, ORS 279A.055, ORS 279A.065 & ORS 279A.180

46-0140 Solicitation Document Templates; Contract Forms and Contract Templates; Contract Administrator Accountability

- (1) The Procurement Officer will make available to all Metro departments Solicitation Document templates, Contract forms, and Contract templates. Metro departments and staff shall use approved Solicitation Document templates, Contract forms or Contract templates.
- (2) All Solicitation Document templates, Contract forms, and Contract templates must be in a form preapproved by the Metro Attorney. The Metro Attorney may exempt from required use a Solicitation Document template, Contract form, or Contract template, subject to any conditions the Metro Attorney may impose on the continued use of the exempted and approved Solicitation Document template, Contract form or Contract template.
- (3) Before Metro executes a Contract with a Contract Price that exceeds \$150,000, Metro must identify the staff employee who will oversee such specific Contract, or specifically identified Contracts, or a specifically identified category of Contracts. Such staff employee will be designated as the "Contract Administrator" for the Contract or Contracts. The Contract Administrator is responsible for reading and understanding all advice and recommendations given with respect to the Contract and Procurement. As used herein, "advice and recommendations" means material advice and recommendations from the Office of Metro Attorney or the Procurement Office with respect to a specific Contract and amendments to the Contract, or a Procurement that resulted in the Contract. Material advice or recommendations are communications that address: (i) subject matter that modifies or influences the meaning, performance, administration, or means of enforcement of a Contract; or (ii) the allocation of significant liabilities or risk under a Contract.

Stat. Auth.: ORS 279A.065, OL 2015, ch 646 (HB 2375) Stats. Implemented: OL 2015, ch 646 (HB 2375)

46-0200 Unauthorized Purchases

(1) The Procurement Officer may approve claims for payment arising from Unauthorized Purchases or may refer such claims to the Chief Operating Officer for approval.

- (2) Prior to processing a request for approval of payment of an Unauthorized Purchase, the Procurement Officer shall require the following information:
 - (a) Description of the Goods or Services furnished as a result of the Unauthorized Purchase;
- (b) A detailed statement of facts relating to the unauthorized purchase, including the name and position of the person who made the unauthorized purchase and an explanation of the reason Metro Procurement requirements were not followed;
 - (c) Documentation that the amount claimed by the Contractor is fair and reasonable;
 - (d) Copies of all invoices and other documents pertinent to the transaction;
 - (e) Verification that the Goods or Services have been received and accepted by Metro;
- (f) A statement of the steps taken or planned to prevent recurrence of such Unauthorized Purchase.

46-0210 Discrimination; Disqualification

- (1) Metro shall include in each Solicitation Document a requirement that Offerors certify in their Offers, in a form prescribed by Metro:
- (a) That the Offeror has not discriminated, and will not discriminate, against a subcontractor in the awarding of a subcontract because the subcontractor is certified under ORS 200.055 as a disadvantaged business enterprise, a minority-owned business, a woman-owned business, an emerging small business, or a business that a service-disabled veteran owns; and
- (b) That the Offeror will not, in the performance of the Contract, discriminate based on race, religion, color, sex, marital status, familial status, national origin, age, mental or physical disability, sexual orientation, gender identity or source of income.
- (2) Disqualification.
- (a) Metro may disqualify a Person from consideration of award of Metro Contracts under ORS 200.065(5), or suspend a Person's right to bid on or participate in any Public Contract pursuant to ORS 200.075(1) after providing the Person with notice and a reasonable opportunity to be heard in accordance with this section.
- (b) As provided in ORS 200.065 and 200.075 Metro may disqualify or suspend a Person's right to submit an Offer or to participate in a Contract (e.g. act as a subcontractor) as follows:
- A. Metro may disqualify a Person upon finding that the Person engaged in any of the activities made unlawful by ORS 200.065(1) or (2), or if the Person has been disqualified by another public entity pursuant to ORS 200.065.
- B. Metro may suspend a Person upon finding that the Person engaged in any of the acts prohibited by ORS 200.075(a) through (c).
- (c) Metro may disqualify or suspend a Person's right to submit Offers or participate in Public Contracts only for the length of time permitted by ORS 200.065 or ORS 200.075, as applicable.
- (d) Metro shall notify the Person in Writing of a proposed Disqualification pursuant to this section, served personally or by registered or certified mail, return receipt requested. This notice must:
 - A. State that Metro intends to disqualify or suspend 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 Metro does not receive the Person's Written request for a hearing within the time stated, the Person will have waived its right to a hearing;
- D. Include a statement that the hearing will be conducted pursuant to ORS 200.065 and 200.075;
 - 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.
- (e) Metro shall schedule a hearing upon Metro's receipt of the Person's timely request. Metro 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 prior to the hearing.
- (f) Metro shall notify the Person in Writing of its Disqualification, served personally or by registered or certified mail, return receipt requested. The notice must 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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 200.065, ORS 200.075, ORS 279A.065, ORS 279A.105 & ORS 279A.110

Contract Preferences

46-0300 Preference for Oregon Goods and Services

- (1) **Tiebreaker Preference and award When Offers Are Identical**. Under ORS 279A.120, when Metro receives Offers identical in price, fitness, availability and quality, and chooses to award a Contract, Metro shall award the Contract based on the following order of precedence:
- (a) Metro shall award the Contract to the Offeror among those submitting identical Offers who is offering Goods or Services, or both, that are manufactured, produced or to be performed in Oregon.
- (b) If two or more Offerors submit identical Offers, and they all offer Goods or Services, or both, that are manufactured, produced or to be performed in Oregon, Metro shall award the Contract by drawing lots among the identical Offers. Metro shall provide the Offerors who submitted the identical Offers notice of the date, time and location of the drawing of lots and an opportunity for these Offerors to be present when the lots are drawn.
- (c) If Metro receives identical Offers, and none of the identical Offers offer Goods or Services, or both, that are manufactured, produced or to be performed in Oregon, then Metro shall award the Contract by drawing lots among the identical Offers. Metro shall provide to the Offerors who submitted the identical Offers notice of the date, time and location of the drawing of lots and an opportunity for these Offerors to be present when the lots are drawn.
- (2) Determining if Offers are Identical. Metro shall consider Offers identical in price, fitness, availability and quality as follows:

- (a) Bids received in response to an Invitation to Bid are identical in price, fitness, availability and quality if the Bids are Responsive, and offer the Goods or Services, or both, described in the Invitation to Bid at the same price.
- (b) Proposals received in response to a Request for Proposals are identical in price, fitness, availability and quality if they are Responsive and achieve equal scores when scored in accordance with the evaluation criteria set forth in the Request for Proposals.
- (c) Offers received in response to a Special Procurement conducted under ORS 279B.085 are identical in price, fitness, availability and quality if, after completing the contracting procedure approved by the Local Contract Review Board, Metro determines, in Writing, that two or more Offers are equally Advantageous to Metro.
- (d) Offers received in response to an Intermediate Procurement conducted pursuant to ORS 279B.070 are identical if the Offers equally best serve the interests of Metro in accordance with ORS 279B.070(4).
- (3) **Determining if Goods or Services are Manufactured or Produced in Oregon**. In applying section (1) of this Rule, Metro shall determine whether a Contract is predominantly for Goods or Services and then use the predominant purpose to determine if the Goods or Services are manufactured, produced, or performed in Oregon. Metro may request, either in a Solicitation Document, following Closing, or at any other time Metro determines is appropriate, any information Metro may need to determine if the Goods or Services are manufactured or produced in Oregon. Metro may use any reasonable criteria to determine if Goods or Services are manufactured, produced, or performed in Oregon, provided that the criteria reasonably relate to that determination, and provided that Metro applies those criteria equally to each Offer.
- (4) **Procedure for Drawing Lots**. When this Rule calls for the drawing of lots, Metro shall draw lots by a procedure that affords each Offeror subject to the drawing a substantially equal probability of selection and that does not allow the person making the selection the opportunity to manipulate the drawing of lots to increase the probability of selecting one Offeror over another.
- (5) **Discretionary Preference and award**. Under ORS 279A.128, Metro may provide, in a Solicitation Document for Goods or Services a specified percentage preference of not more than ten percent for Goods fabricated or processed entirely in Oregon or Services performed entirely in Oregon. For competitive Proposals, the preference percentage allowed under this section will be added to the total overall Proposal score. If more than one Offeror qualifies for the preference, Metro may give a further preference to a qualifying Offeror that resides in or is headquartered in Oregon. Metro may establish a preference percentage higher than ten percent by Written order that finds good cause to establish the higher percentage and which explains Metro's reasons and evidence for finding good cause to establish a higher percentage. Metro may not apply the preferences described in this section in a Procurement for Emergency work, minor alterations, ordinary repairs or maintenance of public improvements, or construction work that is described in ORS 297C.320.

Stat. Auth.: ORS 279A.065; OL 2011, ch 237

Stats. Implemented: ORS 279A.065; ORS 279A.120 & ORS 279A.128; OL 2011, ch 237

46-0310 Reciprocal Preferences

When evaluating Bids pursuant to Administrative Rule 47-0255, 47-0257 or 49-0390 and applying the reciprocal preference provided under ORS 279A.120(2)(b) Metro may rely on the list prepared and maintained by the Oregon Department of Administrative Services pursuant to ORS 279A.120(4) to determine (i) whether the Nonresident Bidder's state gives preference to in-state bidders and (ii) the amount of such preference.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.120

46-0320 Preference for Recycled Materials

- (1) In comparing Goods from two or more Offerors, if at least one Offeror offers Goods manufactured from Recycled Materials, and at least one Offeror does not, Metro shall select the Offeror offering Goods manufactured from Recycled Materials if each of the conditions specified in ORS 279A.125(2) exists. When making the determination under ORS 279A.125(2)(d), Metro shall consider the costs of the Goods following any adjustments Metro makes to the price of the Goods after evaluation pursuant to Administrative Rule 46-0310.
- (2) The determination of whether Goods are manufactured from Recycled Materials must be made in accordance with standards established by Metro.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.125

Cooperative Procurement

46-0400 Authority for Cooperative Procurements

- (1) Metro may participate in, sponsor, conduct or administer Joint Cooperative Procurements, Permissive Cooperative Procurements and Interstate Cooperative Procurements in accordance with ORS 279A.200 through 279A.225.
- (2) Metro shall determine in Writing whether the Solicitation and award process for an Original Contract arising out of a Cooperative Procurement is substantially equivalent to those identified in ORS 279B.055, 279B.060 or 279B.085, consistent with ORS 279A.200(2).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.205

46-0410 Responsibilities of Administering Contracting Agencies and Purchasing Contracting Agencies

(1) If Metro is an Administering Contracting Agency of a Cooperative Procurement, Metro may establish the conditions under which Persons may participate in the Cooperative Procurement administered by Metro. Such conditions may include, without limitation, whether each Person who participates in the Cooperative Procurement must pay administrative fees to Metro, whether each Person must enter into a Written agreement with Metro, and any other matters related to the administration of the Cooperative Procurement and the resulting Original Contract. When acting as an Administering Contracting Agency Metro may, but is not required to, include provisions in the

Solicitation Document for a Cooperative Procurement and advertise the Solicitation Document in a manner to assist Purchasing Contracting Agencies' compliance with State Code.

- (2) If Metro, acting as a Purchasing Contracting Agency, enters into a Contract based on a Cooperative Procurement, Metro shall comply with State Code and these Administrative Rules, including without limitation those sections of the State Code and these Administrative Rules that govern:
- (a) The extent to which Metro, as a Purchasing Contracting Agency, may participate in the Cooperative Procurement;
 - (b) The advertisement of the Solicitation Document related to the Cooperative Procurement; and
- (c) Public notice of Metro's intent, as a Purchasing Contracting Agency, to establish Contracts based on a Cooperative Procurement.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.205

46-0420 Joint Cooperative Procurements

If Metro chooses to participate in, sponsor, conduct or administer a Joint Cooperative Procurement, Metro may do so only in accordance with ORS 279A.210.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.210

46-0430 Permissive Cooperative Procurements

If Metro chooses to participate in, sponsor, conduct or administer a Permissive Cooperative Procurement, it may do so only in accordance with ORS 279A.215.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.215

46-0440 Advertisements of Intent to Establish Contracts through a Permissive Cooperative Procurement

- (1) For purposes of determining whether Metro, acting as a Purchasing Contracting Agency, must give notice of intent to establish a Contract through a Permissive Cooperative Procurement as required by ORS 279A.215(2)(a), the estimated amount of the Procurement will exceed \$250,000 if:
- (a) Metro's Contract arising out of the Permissive Cooperative Procurement expressly provides that Metro will make payments over the term of the Contract that will, in aggregate, exceed \$250,000, whether or not the total amount or value of the payments is expressly stated;
- (b) Metro's Contract arising out of the Permissive Cooperative Procurement expressly provides for payment, whether in a fixed amount or up to a stated maximum amount, that exceeds \$250,000; or
- (c) At the time Metro enters into the Contract, Metro reasonably contemplates, based on historical or other data available to Metro, that the total payments it will make for Goods or Services, or both, under the Contract will, in aggregate, exceed \$250,000 over the anticipated duration of the Contract.

(2) If Metro intends to establish a Contract arising out of the Permissive Cooperative Procurement it administers, it may satisfy the notice requirements set forth in ORS 279A.215(2)(a) by including the information required by ORS 279A.215(2)(b) in the Solicitation Document related to the Permissive Cooperative Procurement, and including instructions in the Solicitation Document to potential Offerors describing how they may submit comments in response to Metro's intent to establish a Contract through the Permissive Cooperative Procurement. The content and timing of such notice must comply in all respects with ORS 279A.215(2), ORS 279A.215(3) and these Administrative Rules.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.215

46-0450 Interstate Cooperative Procurements

If Metro chooses to participate in, sponsor, conduct or administer an Interstate Cooperative Procurement, it may do so only in accordance with ORS 279A.220.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.220

46-0460 Advertisements of Interstate Cooperative Procurements

- (1) The Solicitation Document for an Interstate Cooperative Procurement is advertised in Oregon for purposes of ORS 279A.220(2)(a) if it is advertised in Oregon in compliance with ORS 279B.055(4) or ORS 279B.060(4) by:
 - (a) The Administering Contracting Agency;
 - (b) The Purchasing Contracting Agency;
- (c) The Cooperative Procurement Group, or a member of the Cooperative Procurement Group, of which the Purchasing Contracting Agency is a member; or
- (d) Another Purchasing Contracting Agency that is subject to the State Code, so long as such advertisement would, if given by the Purchasing Contracting Agency, comply with ORS 279B.055(4) or ORS 279B.060(4) with respect to the Purchasing Contracting Agency.
- (2) A Purchasing Contracting Agency or the Cooperative Procurement Group of which the Purchasing Contracting Agency is a member satisfies the advertisement requirement under ORS 279A.220(2)(b) if the notice is advertised in the same manner as provided in ORS 279B.055(4)(b) and (c).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.220

46-0470 Protests and Disputes

(1) An Offeror or potential Offeror wishing to protest the Procurement process, the contents of a Solicitation Document related to a Cooperative Procurement or the award or proposed award of an Original Contract shall make the protest in accordance with ORS 279B.400 through ORS 279B.425 unless the Administering Contracting Agency is not subject to the State Code. If the Administering Contracting Agency is not subject to the State Code, then the Offeror or potential Offeror shall make the protest in accordance with the processes and procedures established by the Administering Contracting Agency.

- (2) Any other protests related to a Cooperative Procurement, or disputes related to a Contract arising out of a Cooperative Procurement, must be made and resolved as set forth in ORS 279A.225.
- (3) The failure of a Purchasing Contracting Agency to exercise any rights or remedies it has under a Contract entered into through a Cooperative Procurement will not affect the rights or remedies of any other contracting agency that participates in the Cooperative Procurement, including the Administering Contracting Agency, and will not prevent any other Purchasing Contracting Agency from exercising any rights or seeking any remedies that may be available to it under its own Contract arising out of the Cooperative Procurement.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279A.225

46-0480 Contract Amendments

Metro, acting as a Purchasing Contracting Agency, may amend a Contract entered into pursuant to a Cooperative Procurement as set forth in Administrative Rule 47-0800.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

DIVISION 47

PUBLIC PROCUREMENTS FOR GOODS OR SERVICES

General Provisions

47-0000 Application

These Division 47 rules implement ORS Chapter 279B, Public Procurements and apply to the Procurement of Goods and Services. These Division 47 rules are not applicable to the procurement of Personal Services Contracts. Procurements of Personal Services are governed by Metro's Personal Services Contracting Rules. These Division 47 rules are also not applicable to procurements of Public Improvements, which are governed by ORS Chapter 279C and procured in accordance with the rules set forth in Division 49.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.015

Source Selection

47-0250 Methods of Source Selection

- (1) Metro may award a Contract for Goods and Services using any method authorized by State Code or these Administrative Rules. Such different methods are called methods of "source selection." Source selection methods include Cooperative Procurements, competitive Bids, competitive Proposals and small, Intermediate, sole-source, Emergency and special procurements.
- (2) State law requires Metro to use the Services of Qualified Rehabilitation Facilities (QRF's) in certain instances. When required, Metro must use a QRF pursuant to ORS 279 before proceeding with a purchase through other methods of source selection.
- (3) The methods of contractor selection must conform to the procedures identified in these Administrative Rules. The Procurement Officer is authorized, but not required, to waive any nonconformity with the rules of contractor selection if the Procurement Officer determines that the defect was minor and likely would not have had an effect on the outcome of the selection process.

47-0253 Feasibility Determination; Cost Analysis

- (1) Written Cost Analysis for Contracts for Services. In accordance with ORS 279B.030, before conducting the Procurement of a Contract for Services (other than Personal Services) with an estimated Contract Price that exceeds \$250,000, Metro must, in the absence of a determination that performing the Services with Metro's own personnel and resources is not feasible, conduct a Written cost analysis.
- (2) **Feasibility Determination for Contracts for Services**. Metro may proceed with the procurement of a Contract for Services without conducting the cost analysis required under ORS 279B.030 if Metro makes Written findings that one or more of the special circumstances described ORS 279B.036 make Metro's use of its own personnel and resources to provide the Services not feasible.
- (3) **Special Circumstances**. The special circumstances identified in ORS 279B.036 that require Metro to procure the Services by Contract include any circumstances, conditions or occurrences that would make the Services, if performed by Metro's employees, incapable of being managed, utilized or dealt with

successfully in terms of the quality, timeliness of completion, success in obtaining desired results, or other reasonable needs of Metro.

(4) Written Cost Analysis under ORS 279B.033.

- (a) **Basic Comparison**. The Written cost analysis must compare an estimate of Metro's cost of performing the Services with an estimate of the cost a potential Contractor would incur in performing the Services. However, Metro may proceed with the Procurement for Services only if it determines that Metro would incur more cost in performing the Services with Metro's own personnel than it would incur in procuring the Services from a Contractor. In making this determination, the cost Metro would incur in procuring the Services from a Contractor includes the fair market value of any interest in equipment, materials or other assets Metro will provide to the Contractor for the performance of the Services.
- (b) **Costs of Using Metro's Own Personnel and Resources**. When estimating Metro's cost of performing the Services, Metro shall consider cost factors that include:
- A. The salary or wage and benefit costs for the employees of Metro who would be directly involved in performing the Services, to the extent those costs reflect the proportion of the activity of those employees in the direct provision of the Services. These costs include those salary or wage and benefit costs of the employees who inspect, supervise or monitor the performance of the Services, to the extent those costs reflect the proportion of the activity of those employees in the direct inspection, supervision, or monitoring of the performance of the subject Services.
- B. The material costs necessary to the performance of the Services, including the costs for space, energy, transportation, storage, equipment and supplies used or consumed in the provision of the Services.
- C. The costs incurred in planning for, training for, starting up, implementing, transporting and delivering the Services.
- D. Any costs related to stopping and dismantling a project or operation because Metro intends to procure a limited quantity of Services or to procure the Services within a defined or limited period of time.
- E. The miscellaneous costs related to performing the Services. These costs exclude Metro's indirect overhead costs for existing salaries or wages and benefits for administrators, and exclude costs for rent, equipment, utilities and materials, except to the extent the cost items identified in this sentence are attributed solely to performing the Services and would not be incurred unless Metro performed the Services.
- F. Oregon Revised Statute Chapter 279B.033 (1)(a) provides that an estimate of Metro's costs of performing the Services include the costs described in subsections (4)(b)A through E of this Administrative Rule. Therefore, those costs do not constitute an exclusive list of cost information. Metro may consider other reliable information that bears on the cost to Metro of performing the Services. For example, if Metro has accounted for its actual costs of performing the Services under consideration, or reasonably comparable Services, in a relatively recent Services project, Metro may consider those actual costs in making its estimate.
 - (c) **Costs a Potential Contractor Would Incur**. When estimating the costs a potential Contractor would incur in performing the Services, Metro shall consider cost factors that include:
- A. The average or actual salary or wage and benefit costs for contractors and contractor employees:

- (i) Who work in the business or industry most closely involved in performing the Services; and
- (ii) Who would be necessary and directly involved in performing the Services or who would inspect, supervise or monitor the performance of the Services.
- B. The material costs necessary to the performance of the Services, including the costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies used or consumed in the provision of the Services.
- C. The miscellaneous costs related to performing the Services. These miscellaneous costs include reasonably foreseeable fluctuations in the costs listed in subsections (4)(c) (A) and (B) of this Administrative Rule over the expected duration of the Procurement.
- D. Oregon Revised Statute Chapter 279B.033 (1)(b) provides that an estimate of the costs a potential Contractor would incur in performing the Services includes the costs described in subsections (4)(c)A through C of this Rule. Therefore, those costs do not constitute an exclusive list of cost information. Metro may consider other reliable information that bears on the costs a potential Contractor would incur. For example, if Metro, in the reasonably near past, received Bids or Proposals for the performance of the Services under consideration, or reasonably comparable Services, Metro may consider the pricing offered in those Bids or Proposals in making its estimate. Similarly, Metro may consider what it actually paid out under a Contract for the same or similar Services. For the purposes of these examples, the reasonably near past is limited to Contracts, Bids or Proposals entered into or received within the five years preceding the date of the cost estimate. Metro must take into account, when considering the pricing offered in previous Bids, Proposals or Contracts, adjustments to the pricing in light of measures of market price adjustments like the consumer price indexes that apply to the Services.
- (5) **Decision Based on Cost Comparison**. After comparing the difference between the costs estimated for Metro to perform the Services under section (4)(b) and the estimated costs a potential Contractor would incur in performing the Services under section (4)(c), Metro may proceed with the Procurement only if Metro would incur more cost in performing the Services with the agency's own personnel and resources than it would incur in procuring the Services from a Contractor.
- (6) **Exception Based on Salaries or Wages and Benefits**. If the sole reason that the costs estimated for Metro to perform the Services under section (4)(b) exceed the estimated costs a potential Contractor would incur in performing the Services under section (4)(c) is because the average or actual salary or wage and benefit costs for Contractors and their employees estimated under subsection (4)(c)A are lower than the salary or wage and benefit costs for employees of Metro under subsection (4)(b)A, then Metro may not proceed with the Procurement.
- (7) Exception Based on Lack of Metro Personnel and Resources; Reporting. In cases in which Metro determines that it would incur less cost in providing the Services with its own personnel and resources, Metro nevertheless may proceed with the Procurement if, at the time Metro intends to conduct the Procurement, Metro determines that it lacks personnel and resources to perform the Services within the time Metro requires them. When Metro conducts a Procurement under this section, Metro must:
- (a) Make and keep a Written determination that it lacks personnel and resources to perform the Services within the time Metro requires them and of the basis for Metro's decision to proceed with the Procurement.
- (b) Provide to the Local Contract Review Board, each calendar quarter, copies of each Written cost analysis and Written determination.

Stat. Auth.: ORS 279A.065, OL 2009, c 880, §§ 3, 4 Stats. Implemented: ORS 279B.050, OL 2009, c 880, § 2-4

47-0255 Competitive Bidding

(1) **Generally**. Metro may procure Goods or Services by competitive sealed Bids as set forth in ORS 279B.055 and these Administrative Rules. Metro may issue a request for information, a request for interest or other preliminary documents to obtain information useful in the preparation of an Invitation to Bid. An Invitation to Bid is used to initiate a Bidding Solicitation, awarded by low cost only, and must contain the information required by ORS 279B.055(2) and by section (2) of this Rule. Metro shall provide public notice of the competitive Bid Solicitation as set forth below in Administrative Rule 47-0300.

- (2) **Invitation to Bid**. In addition to the provisions required by ORS 279B.055(2), the Invitation to Bid must include the following:
 - (a) General Information.

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 Metro's representatives at the conference are not binding upon Metro unless confirmed by Written Addenda.
- 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 Administrative Rule 47-0330 for required provisions of Electronic Bids);
 - C. The time, date and place of Opening;
 - D. The office where the Solicitation Document may be reviewed;
- E. A statement that each Bidder must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120(1);
- F. Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See Administrative Rule 46-0210(2)); and
- G. How Metro will notify Bidders of Addenda and how Metro will make Addenda available (See Administrative Rule 47-0430).
- (b) Metro's Need to Purchase. The character of the Goods or Services Metro is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.055, Metro's description of its need to purchase must:
- A. Identify the scope of the work to be performed under the resulting Contract, if Metro 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 Metro for Good Cause (as defined below in Section (3) of this Rule) 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 Metro is purchasing.
 - (c) Bidding and Evaluation Process.
 - The anticipated Solicitation schedule, deadlines, protest process, and evaluation process;
- B. Metro shall set forth objective evaluation criteria in the Solicitation Document in accordance with the requirements of ORS 279B.055(6)(a). Evaluation criteria need not be precise predictors of actual future costs, but to the extent possible, the evaluation factors must be reasonable estimates of actual future costs based on information Metro has available concerning future use; and
- C. If Metro intends to award Contracts to more than one Bidder pursuant to Administrative Rule 47-0600(4)(c), Metro 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) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
- (f) All contractual terms and conditions in the form of Contract provisions Metro determines are applicable to the Procurement. As required by State Code, 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. Metro's reduction or withholding of payment under the Contract;
- B. Metro'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. Metro's rights, which Metro 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 Metro. Metro shall document in the Procurement file the basis for the determination of Good Cause for specification otherwise. Metro 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; and
- (d) Any other circumstances in which Metro's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs Metro'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, OL 2009, ch. 880, sec. 5

Stats. Implemented: ORS 279B.055

47-0257 Multistep Competitive Bidding

- (1) **Generally**. Metro may procure Goods or Services by using multistep competitive Bidding under ORS 279B.055(12).
- (2) **Phased Process**. Multistep competitive Bidding is a phased Procurement process that seeks information or unpriced submittals in the first phase combined with regular competitive Bidding, inviting Bidders who submitted technically eligible submittals in the first phase to submit competitive sealed Bids in the second phase. The Contract must be awarded to the lowest Responsible Bidder.
- (3) **Public Notice**. When Metro uses multistep competitive Bidding, Metro shall give public notice for the first phase in accordance with Administrative Rule 47-0300. Public notice is not required for the second phase. However, Metro shall give Notice of the second phase to all Bidders, inform Bidders of the right to protest Addenda issued after the initial Closing under Administrative Rule 47-0430, and inform Bidders excluded from the second phase of the right, if any, to protest their exclusion under Administrative Rule 47-0720.
- (4) **Procedures Generally**. In addition to the procedures set forth in Administrative Rule 47-0300 through 47-0490, Metro shall employ the procedures set forth in this Rule for multistep competitive Bidding and in the Invitation to Bid.

(5) Procedure for Phase One of Multistep Competitive Bidding.

- (a) Form. Metro shall initiate multistep Bidding by issuing an Invitation to Bid in the form and manner required for competitive sealed Bids except as provided in this Rule. In addition to the requirements set forth Administrative Rule 47-0255(2), the multistep Invitation to Bid must state:
- A. That the Solicitation is a multistep competitive Bid Procurement and describe the process Metro will use to conduct the Procurement;
- B. That Metro requests unpriced submittals and that Metro will consider price Bids only in the second phase and only from those Bidders whose unpriced submittals are found eligible in the first phase;
- C. Whether Bidders must submit price Bids at the same time as unpriced submittals and, if so, that Bidders must submit the price Bids in a separate sealed envelope;
 - D. The criteria to be used in the evaluation of unpriced submittals.
- (b) Evaluation. Metro shall evaluate unpriced submittals in accordance with the criteria set forth in the Invitation to Bid.

(6) Procedure for Phase Two of Multistep competitive Bidding.

- (a) After the completion of phase one, if Metro does not cancel the Solicitation, Metro shall invite each eligible Bidder to submit a price Bid.
 - (b) Metro shall conduct phase two as any other competitive sealed Bid Procurement except:
 - A. As specifically set forth in this Rule or the Invitation to Bid; and
- B. No public notice need be given of the invitation to submit price Bids because such notice was previously given.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.055

47-0260 Competitive Proposals

- (1) **Generally**. Metro may procure Goods or Services by competitive Proposals as set forth in ORS 279B.060. Metro shall use a Request for Proposals to initiate a competitive Proposal Solicitation. The Request for Proposals must contain the information required by ORS 279B.060(2) and by section (2) of this Administrative Rule. Metro shall provide public notice of the Request for Proposals as set forth in Administrative Rule 47-0300.
- (2) **Request for Proposals**. In addition to the provisions required by ORS 279B.060(2), the Request for Proposals must include the following:
 - (a) General Information.
 - A. Notice of any pre-Offer conference as follows:
 - (i) The time, date and location of any pre-Offer conference;
 - (ii) Whether attendance at the conference will be mandatory or voluntary; and
 - (iii) A provision that provides that statements made by Metro's representatives at the conference are not binding on Metro unless confirmed by Written Addenda.
- B. The form and instructions for submission of Proposals and any other special information, e.g., whether Proposals may be submitted by Electronic means. (See Administrative Rule 47-0330 for required provisions of Electronic Proposals);
 - C. The office where the Solicitation Document may be reviewed;
- D. Proposer's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See Administrative Rule 46-0210(2)); and
- E. How Metro will notify Proposers of Addenda and how Metro will make Addenda available. (See Administrative Rule 47-0430).
- (b) Metro's Need to Purchase. The character of the Goods or Services Metro is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.060(2)(c), Metro's description of its need to purchase must:
- A. Identify the scope of the work to be performed under the resulting Contract, if Metro awards one;
 - B. Outline the anticipated duties of the Contractor under any resulting Contract;

- C. Establish the expectations for the Contractor's performance of any resulting Contract; and
- D. Unless the Contractor under any resulting Contract will provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services that are subject to ORS 279C.100 to 279C.125, or Metro 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 Metro is purchasing.
 - (c) Proposal and Evaluation Process.
 - A. The anticipated Solicitation schedule, deadlines, protest process, and evaluation process;
- B. Metro shall set forth selection criteria in the Solicitation Document in accordance with the requirements of ORS 279B.060(3)(e). Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, the criteria will:
 - (i) Afford Metro the ability to compare the Proposals and Proposers, applying the same standards of comparison to all Proposers;
 - (ii) Rationally reflect Proposers' abilities to perform the resulting Contract in compliance with the Contract's requirements; and
 - (iii) Permit Metro to determine the relative pricing offered by the Proposers, and to reasonably estimate the costs to Metro of entering into a Contract based on each Proposal, considering information available to Metro and subject to the understanding that the actual Contract costs may vary as a result of the statement of work ultimately negotiated or the quantity of Goods or Services for which Metro contracts.
- C. If Metro's Solicitation process calls for Metro to establish a Competitive Range, Metro shall generally describe, in the Solicitation Document, the criteria or parameters Metro will apply to determine the Competitive Range. Metro, however, subsequently may determine or adjust the number of Proposers in the Competitive Range in accordance with Administrative Rule 47-0261(6).
 - (d) Applicable Preferences, including those described in ORS 279A.120, 279A.125(2) and 282.210.
- (e) The Proposers' certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
- (f) All contractual terms and conditions Metro determines are applicable to the Procurement. Metro's determination of contractual terms and conditions that are applicable to the Procurement may take into consideration, as authorized by ORS 279B.060(3), those contractual terms and conditions Metro will not include in the Request for Proposals because Metro either will reserve them for negotiation, or will request Proposers to offer or suggest those terms or conditions. (See Administrative Rule 47-0260(3)).
- (g) As required by ORS 279B.060(2)(h), the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:
 - A. Metro's reduction or withholding of payment under the Contract;
- B. Metro's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the scope of work or to meet the performance standards established by the resulting Contract; and

- C. Metro's rights, which Metro 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) **Applicable Terms**. Metro may include the applicable contractual terms and conditions in the form of Contract provisions, or legal concepts to be included in the resulting Contract. Further, Metro may specify that it will include or use Proposer's terms and conditions that have been pre-negotiated under Administrative Rule 47-0550(3), but Metro may only include or use a Proposer's pre-negotiated terms and conditions in the resulting Contract to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. Metro may not agree to any Proposer's terms and conditions that were expressly rejected in a Solicitation protest under Administrative Rule 47-0420.
- (4) **For multiple award Contracts**. Metro may enter into Contracts with different terms and conditions with each Contractor to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. Metro may not agree to any Proposer's terms and conditions that were expressly rejected in a Solicitation protest under Administrative Rule 47-0420.
- (5) **Good Cause**. For the purposes of this Rule, "Good Cause" means a reasonable explanation for not requiring Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services under the Contract, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of Metro. Metro shall document in the Procurement file the basis for the determination of Good Cause for specifying otherwise. Metro will have Good Cause to specify otherwise when Metro determines:
- (a) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;
- (b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the Goods or Services will be compatible with, or will operate efficiently or effectively with, associated information technology, hardware, software, components, equipment, parts, or on-going Services with which the Goods or Services will be used, integrated, or coordinated;
- (c) The circumstances of the industry or business that provides the Goods or Services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, or scientific developments, that a reliable highest prevalent standard does not exist or has not been developed;
- (d) That other circumstances exist in which Metro's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs Metro's practical need for the highest standard prevalent in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract.

Stat. Auth.: ORS 279A.065

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

47-0261 Multi-tiered and Multistep Proposals

(1) **Generally**. Metro may use one or more, or any combination, of the methods of contractor selection set forth in ORS 279B.060(7), 279B.060(8) and these Administrative Rules to procure Goods or Services. In addition to the procedures set forth in Administrative Rules 47-0300 through 47-0490 for

methods of contractor selection, Metro may provide for a multi-tiered or multistep selection process that permits award to the highest ranked Proposer at any tier or step, calls for the establishment of a Competitive Range, or permits either serial or competitive simultaneous discussions or negotiations with one or more Proposers.

- (2) Multi-tiered and multistep competitions may use any combination or series of Proposals, discussions, negotiations, demonstrations, offers, or other means of soliciting information from Proposers that bear on the selection of a Contractor or Contractors. In multi-tiered and multistep competitions, Metro may use these means of soliciting information from prospective Proposers and Proposers in any sequence or order, as determined in the discretion of Metro, including, but not limited to, processes that embrace:
- (a) The evaluation of Proposals only, including the evaluation of serial Proposals (a series of more than one Proposal from each Proposer that remains eligible in the competition at the particular tier of the competition);
- (b) The use of Proposals in connection with discussions with Proposers that lead to best and final Offers;
- (c) The use of Proposals in connection with serial negotiations with Proposers that lead to best and final Offers or to the award of a Contract;
- (d) The use of Proposals in connection with competitive negotiations with Proposers that lead to best and final Offers or to the award of a Contracts; and
- (e) The use of Proposals in multi-tiered competition designed to identify, at each stage of the competition, a class of Proposers that fall within a Competitive Range of Proposers that have a reasonable chance of being determined the most Advantageous Proposer or, in multiple-award situations, a reasonable chance of being determined an awardee of a Public Contract.
- (3) When Metro's Request for Proposals prescribes a multi-tiered or multistep contractor selection process, Metro nevertheless may, at the completion of any stage in the competition and on determining the most Advantageous Proposer (or, in multiple-award situations, on determining the awardees of the Public Contracts), award a Contract (or Contracts) and conclude the Procurement without proceeding to subsequent stages. Metro also may, at any time, cancel the Procurement when the cancellation or rejection is in the best interest of Metro in accordance with ORS 279B.100.
- (4) **Exclusion Protest**. Metro may provide, before the notice of intent to award, an opportunity for a Proposer to protest exclusion from the Competitive Range or from subsequent phases of multi-tiered or multistep competitive Proposals as set forth in Administrative Rule 47-0720.
- (5) **Award Protest**. Metro shall provide an opportunity to protest its intent to award a Contract pursuant to ORS 279B.410 and Administrative Rule 47-0740. An Affected Offeror may protest, for any of the bases set forth in Administrative Rule 47-0720(2), its exclusion from the Competitive Range or from any phase of a multi-tiered or multistep competitive Proposal process, or may protest an Addenda issued following initial Closing, if Metro did not previously provide Proposers the opportunity to protest the exclusion or Addenda. The failure to protest will be considered the Proposer's failure to pursue an administrative remedy made available to the Proposer by Metro.
- (6) **Competitive Range**. When Metro's Solicitation process conducted under ORS 279B.060(8) calls for Metro to establish a Competitive Range at any stage in the Procurement process, Metro may do so as follows:
 - (a) Determining Competitive Range.

- A. Metro may establish a Competitive Range after evaluating all Responsive Proposals in accordance with the evaluation criteria in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria in the Request for Proposals, Metro may determine and rank the Proposers in the Competitive Range. Notwithstanding the foregoing, however, in instances in which Metro determines that a single Proposer has a reasonable chance of being determined the most Advantageous Proposer, Metro need not determine or rank Proposers in the Competitive Range. In addition, notwithstanding the foregoing, Metro may establish a Competitive Range of all Proposers to enter into discussions to correct deficiencies in Proposals.
- B. Metro may establish the number of Proposers in the Competitive Range in light of whether Metro's evaluation of Proposals identifies a number of Proposers who have a reasonable chance of being determined the most Advantageous Proposer, or whether the evaluation establishes a natural break in the scores of Proposers that indicates that a particular number of Proposers are closely competitive or have a reasonable chance of being determined the most Advantageous Proposer.
- (b) Protesting Competitive Range. Metro must provide Written notice to all Proposers identifying Proposers in the Competitive Range. Metro may provide an opportunity for Proposers excluded from the Competitive Range to protest Metro's evaluation and determination of the Competitive Range in accordance with Administrative Rule 47-0720.
- (7) **Discussions**. Metro may initiate oral or Written discussions with all "eligible Proposers" on subject matter within the general scope of the Request for Proposals. In conducting discussions, Metro:
 - (a) Shall treat all eligible Proposers fairly and may not favor any eligible Proposer over another;
- (b) May disclose other eligible Proposers' Proposals or discussions only in accordance with ORS 279B.060(8)(b) or (c);
- (c) May adjust the evaluation of a Proposal as a result of discussions. The conditions, terms, or price of the Proposal may be changed during the course of the discussions provided the changes are within the scope of the Request for Proposals.
 - (d) At any time during the time allowed for discussions, Metro may:
 - A. Continue discussions with a particular eligible Proposer;
- B. Terminate discussions with a particular eligible Proposer and continue discussions with other eligible Proposers; or
- C. Conclude discussions with all remaining eligible Proposers and provide, to the then-eligible Proposers, notice requesting best and final Offers.
- (8) **Negotiations**. Metro may commence serial negotiations with the highest-ranked eligible Proposer or commence simultaneous negotiations with all eligible Proposers. Metro may negotiate:
 - (a) The statement of work;
- (b) The Contract Price as it is affected by negotiating the statement of work and other terms and conditions authorized for negotiation in the Request for Proposals or Addenda thereto; and
- (c) Any other terms and conditions reasonably related to those authorized for negotiation in the Request for Proposals or Addenda thereto. Proposers may not submit for negotiation, and Metro may not accept, alternative terms and conditions that are not reasonably related to those authorized for negotiation in the Request for Proposals or any Addenda.

- (9) **Terminating Negotiations**. At any time during discussions or negotiations Metro conducts under this Rule, Metro may terminate discussions or negotiations with the highest-ranked Proposer, or the eligible Proposer with whom it is currently discussing or negotiating, if Metro reasonably believes that:
 - (a) The eligible Proposer is not discussing or negotiating in good faith; or
- (b) Further discussions or negotiations with the eligible Proposer will not result in the parties agreeing to the terms and conditions of a Contract in a timely manner.
- (c) Continuing Serial Negotiations. If Metro is conducting serial negotiations and Metro terminates negotiations with an eligible Proposer, Metro may then commence negotiations with the next highest scoring eligible Proposer, and continue the sequential process until Metro has either:
- A. Determined to award the Contract to the eligible Proposer with whom it is currently discussing or negotiating; or
 - B. Decided to cancel the Procurement under ORS 279B.100.
- (d) Competitive Simultaneous Negotiations. If Metro chooses to conduct competitive negotiations, Metro may negotiate simultaneously with competing eligible Proposers. Metro:
- A. Shall treat all eligible Proposers fairly and may not favor any eligible Proposer over another; and
- B. May disclose other eligible Proposers' Proposals or the substance of negotiations with other eligible Proposers only if Metro notifies all of the eligible Proposers with whom Metro will engage in negotiations of Metro's intent to disclose before engaging in negotiations with any eligible Proposer.
 - (e) Any oral modification of a Proposal resulting from negotiations must be reduced to Writing.
- (10) **Best and Final Offers**. If Metro requires best and final Offers, Metro must establish a common date and time by which eligible Proposers must submit best and final Offers. If Metro is dissatisfied with the best and final Offers, Metro may make a determination that it is in Metro's best interest to conduct additional discussions, negotiations or change Metro's requirements and require another submission of best and final Offers. Metro must inform all eligible Proposers that if they do not submit notice of withdrawal or another best and final Offer, their immediately previous Offers will be considered their best and final Offers. Metro shall evaluate Offers as modified by the best and final Offers. Metro shall conduct the evaluations as described in Administrative Rule 47-0600. Metro may not modify evaluation factors or their relative importance after the date and time that best and final Offers are due.
- (11) **Multistep Competitive Proposals**. Metro may procure Goods or Services by using multistep competitive Proposals under ORS 279B.060(8)(b)(g). Multistep competitive Proposals is a phased Procurement process that seeks necessary information or unpriced technical Proposals in the first phase and, in the second phase, invites Proposers who submitted technically qualified Proposals to submit competitive price Proposals on the technical Proposals. Metro must award the Contract to the Responsible Proposer submitting the most Advantageous Proposal in accordance with the terms of the Solicitation Document applicable to the second phase.
- (a) **Public Notice**. When Metro uses multistep competitive Proposals, Metro shall give public notice for the first phase in accordance with Administrative Rule 47-0300. Public notice is not required for the second phase. However, Metro shall give notice of the subsequent phases to all Proposers and inform any Proposers excluded from the second phase of the right, if any, to protest exclusion under Administrative Rule 47-0720.

- (b) **Procedure for Phase One of Multistep competitive Proposals**. Metro may initiate a multistep competitive Proposals Procurement by issuing a Request for Proposals in the form and manner required for competitive Proposals except as provided in this Rule. In addition to the requirements required for competitive Proposals, the multistep Request for Proposals must state:
 - A. That unpriced technical Proposals are requested;
- B. That the Solicitation is a multistep competitive Proposal Procurement and that, in the second phase, priced Proposals will be accepted only from those Proposers whose unpriced technical Proposals are found qualified in the first phase;
 - C. The criteria for the evaluation of unpriced technical Proposals; and
- D. That the Goods or Services being procured must be furnished generally in accordance with the Proposer's technical Proposal as found to be finally qualified and must meet the requirements of the Request for Proposals.
- (c) Addenda to the Request for Proposals. After receipt of unpriced technical Proposals, Addenda to the Request for Proposals must be distributed only to Proposers who submitted unpriced technical Proposals.
- (d) **Receipt and Handling of Unpriced Technical Proposals**. Unpriced technical Proposals need not be opened publicly.
- (e) **Evaluation of Unpriced Technical Proposals**. Unpriced technical Proposals will be evaluated solely in accordance with the criteria set forth in the Request for Proposals.
- (f) **Discussion of Unpriced Technical Proposals**. Metro may seek clarification of a technical Proposal of any Proposer who submits a qualified, or potentially qualified technical Proposal. During the course of such discussions, Metro may not disclose any information derived from one unpriced technical Proposal to any other Proposer.
- (g) **Methods of Contractor Selection for Phase One**. In conducting phase one, Metro may employ any combination of the methods of contractor selection that call for the establishment of a Competitive Range or include discussions, negotiations, or best and final Offers as set forth in this Rule.
- (h) **Procedure for Subsequent Phases**. On the completion of phase one, Metro shall invite each qualified Proposer to submit price Proposals. Metro shall conduct phase two as any other competitive Proposal Procurement except as set forth in this Rule.
- (i) No public notice need be given of the request to submit price Proposals because such notice was previously given.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

47-0265 Small Procurements

- (1) **Generally**. For Procurements of Goods or Services less than or equal to \$10,000, Metro may award a Contract as a Small Procurement pursuant to ORS 279B.065 and in accordance with this Administrative Rule. State Code prohibits a Procurement from being artificially divided or fragmented so as to constitute a Small Procurement under this section.
- (2) **Methods Available**. Metro may choose any method of selecting such Contractors, including, but not limited to, offering and directly awarding the Contract to only one firm or conducting a competition

for the Contract. However, if the Goods or Services are available from a QRF, they must be purchased as provided under Oregon law.

(3) Amendments. Metro may amend a Contract awarded as a Small Procurement in accordance with Administrative Rule 47-0800, but the cumulative amendments may not increase the total Contract Price to a sum that exceeds the higher dollar amount of \$10,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Any amendment that causes Contract to exceed the foregoing limits will be treated as an Unauthorized Purchase and shall be subject to the requirements of Rule 46-0200.

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

47-0270 Intermediate Procurements

- (1) **Generally; Price Quotes or Intermediate Proposals**. For Procurements of Goods or Services greater than \$10,000 and less than or equal to \$150,000, pursuant to ORS 279B.070 Metro may award a Contract as an Intermediate Procurement after seeking three Written Intermediate Proposals or Price Quotes. Notwithstanding the foregoing, if the Goods or Services are available from a QRF, they must be purchased as provided under Oregon law.
- (a) State Code prohibits a Procurement from being artificially divided or fragmented so as to constitute a Intermediate Procurement under this section.
- (b) The Intermediate Request for Proposal and the Request for Quotes are both Written solicitation processes. If three Written Price Quotes or Intermediate Proposals are not reasonably available or Metro concluded that a Written Intermediate solicitation process will not result in a robust, competitive procurement, Metro may proceed with an oral procurement method. Metro shall keep records of the sources of the Quotes or Intermediate Proposals received.
- (c) Metro uses ORPIN as a primary tool for contacting potential Contractors. In the event a potential contractor is not registered on ORPIN, Metro may email or otherwise directly distribute the Solicitation document to such potential contractor.
- (2) **Negotiations**. Metro may negotiate with a prospective Contractor who offers to provide Goods or Services in response to an Intermediate Procurement to clarify its Price Quote or Intermediate Proposal or to effect modifications that will make the Offer more Advantageous to Metro.
- (3) **Award**. If a Contract is to be awarded, Metro shall award the Contract to the responsive, Responsible Offeror who provides the lowest Price Quote, or if criteria other than price are to be considered, whose Intermediate Proposal is the highest scoring. Metro may consider other criteria, in addition to price, in making the award: experience, expertise, product functionality, suitability for a particular purpose, equity, sustainability, and Contractor Responsibility under ORS 279B.110. For Intermediate Request for Proposals, Metro may choose to establish an evaluation committee with various experts from within and outside Metro. For Intermediate Proposals under \$50,000 there is no required minimum number of evaluators on the panel. Intermediate Proposals over \$50,000 shall be evaluated by at least 3 evaluators.

- (4) Amendments. Metro may amend a Contract awarded as an Intermediate Procurement in accordance with Administrative Rule 47-0800, but the cumulative amendments may not increase the total Contract Price to a sum that exceeds the higher dollar amount of \$150,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Any amendment that causes Contract to exceed the foregoing limits will be treated as an Unauthorized Purchase and shall be subject to the requirements of Rule 46-0200.
- (5) **BOLI Applicability**. For Intermediate Contracts for minor alterations, ordinary repair or maintenance necessary to preserve a public improvement, where applicable Metro shall comply with the prevailing wage provisions of ORS 279C.800 to 279C.870. For Intermediate Contracts that involve Public Works, as defined in ORS 279C.800, Metro shall provide notification of award to BOLI as required by ORS 279C.835.

Stat. Auth.: ORS 279A.065 & ORS 279B.070 Stats. Implemented: ORS 279B.070

47-0275 Sole-Source Procurements

- (1) **Generally**. In accordance with ORS 279B.075, Metro may award a Contract without competition as a sole-source Procurement when it is determined that the Goods or Services, or class of Goods or Services, are available from only one source. Such determination must be made by the Procurement Officer for Procurements under \$150,000. For all other Procurements the determination must be made by the Metro Local Contract Review Board. The determination must be made based on Written findings that include, where applicable, findings:
- (a) Based on a brief description of the Contract or Contracts to be covered including volume of contemplated future purchases;
- (b) Based on a description of the Goods or Services to be purchased; That current market research supports the determination that the Goods or Services are available from only one seller or source;
- (c) That the efficient utilization of existing Goods or Services requires the acquisition of compatible Goods or Services;
- (d) That the Goods or Services required for the exchange of software or data with other public or private agencies are available from only one source;
- (e) That the required product is data processing equipment which will be used for research where there are requirements for exchange of software and data with other research establishments;
 - (f) That the Goods or Services are for use in a pilot or an experimental project; or
- (g) Other findings that support the conclusion that the Goods or Services are available from only one source.
- (2) **Public Notice**. For sole-source Contracts in excess of \$50,000, Metro shall give public notice of its determination that the Goods or Services or class of Goods or Services are available from only one source. Such notice must be published in a manner similar to public notice of competitive Bids under ORS 279B.055(4) and Administrative Rule 47-0300. The public notice must 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. Metro 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.

(3) **Protest**. An Affected Person may protest Metro's determination that the Goods or Services or class of Goods or Services are available from only one source in accordance with Administrative Rule 47-0710.

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

47-0280 Emergency Procurements

- (1) Metro may award a Contract as an Emergency Procurement without the use of competitive Bidding or competitive Proposals when the requirements of ORS 279B.080 and this Administrative Rule are met.
- (2) Metro shall document the nature of the Emergency and describe the method used for the selection of the particular Contractor. Metro shall encourage competition for Emergency Procurements to the extent reasonable under the circumstances.
- (3) The authority to declare an Emergency and authorize an Emergency Procurement is as follows:
- (a) The Procurement Officer or designee may declare the existence of an Emergency and authorize Metro or any of its departments to enter into an Emergency Procurement Contract under \$150,000.
- (b) The director of a department may declare the existence of an Emergency and authorize that department to enter into an Emergency Procurement Contract under \$150,000 only if the Procurement Officer or person to whom the powers of the Procurement Officer have been delegated, is not available when the Procurement needs to be made.
- (c) The Chief Operating Officer may declare the existence of an Emergency and authorize Emergency Procurement Contracts that exceed \$150,000.
- (4) All documentation of Emergency Procurements must be sent to the Procurement Officer for record keeping purposes.
- (5) After the award of an Emergency Procurement Contract, Metro shall execute a Written Contract with the Contractor as soon as possible, and in no event later than sixty (60) Days after the award.
- (6) All Emergency Procurement Contracts, whether or not Signed by the Contractor, will be deemed to contain a termination for convenience clause permitting Metro to immediately terminate the Contract at its discretion and, unless the Contract was void, Metro shall pay the Contractor only for work performed prior to the date of termination plus the Contractor's unavoidable costs incurred as a result of the termination. In no event will Metro pay for anticipated lost profits or consequential damages as a result of the termination.
- (7) In accordance with ORS 279B.080(2), for an Emergency Procurement of construction services that are not Public Improvements, Metro shall ensure competition for a Contract for the Emergency work that is reasonable and appropriate under the Emergency circumstances. In conducting the Procurement, Metro shall set a Solicitation time period that Metro determines to be reasonable under the Emergency circumstances and may issue Written or oral requests for Offers or make direct appointments without competition in case of extreme necessity.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.080

47-0285 Special Procurements

- (1) **Generally**. Metro may award a Contract as a Special Procurement pursuant to the requirements of this Administrative Rule and ORS 279B.085. Special Procurements allow Metro to enter into a series of Contracts over time pursuant to the authorization provided in regard to the Special Procurement and without necessarily following the requirements for Intermediate Procurement or formal competitive Bids or Proposals.
- (2) As used in this Rule and Rules 47-0288, 47-0700 and 47-0730:
- (a) "Special Procurement" means, unless the context requires otherwise, a Class Special Procurement, a Contract-Specific Special Procurement or both. A Special Procurement allows Metro to custom-design any contracting approach it determines will meet its procurement needs.
- (b) "Class Special Procurement" means a contracting procedure that differs from the procedures described in these rules and is for the purpose of entering into a series of Contracts over time for the acquisition of a specified class of Goods or Services.
- (c) "Contract-Specific Special Procurement" means a contracting procedure that differs from the procedures described in these rules and is for the purpose of entering into a single Contract or a number of related Contracts for the acquisition of specified Goods or Services on a one-time basis or for a single project.
- (3) The Local Contract Review Board may approve a Special Procurement if it finds that the use of a Special Procurement complies with the requirements set forth in ORS 279B.085(4).
- (4) **Public Notice**. Metro shall give public notice of the Local Contract Review Board's approval of a Special Procurement in the same manner as public notice of competitive Bids under ORS 279B.055(4) and Administrative Rule 47-0300. The public notice must describe the Goods or Services or class of Goods or Services to be acquired through the Special Procurement. Metro shall give Affected Persons at least seven (7) Days from the date of the notice of approval of the Special Procurement to protest the Special Procurement. When a Class Special Procurement has been approved, additional future procurements that fall within the class may be awarded according to the terms of the original Special Procurement, without a new request for, notice of, and approval of the Special Procurement.
- (5) **Protest**. An Affected Person may protest the request for approval of a Special Procurement in accordance with ORS 279B.400 and Administrative Rule 47-0700.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.085

47-0288 Special Procurements Authorized by Rule

The Local Contract Review Board declares the following as Class Special Procurements:

- (1) **Manufacturer Direct Supplies:** Metro may purchase Goods directly from a manufacturer if the cost from the manufacturer is the same or less than the cost the manufacturer charges to its distributor(s).
- (2) **Advertisements**: Metro may directly purchase media advertising, including print (e.g. newspaper), broadcast (e.g. television, radio), display (e.g. billboard), internet (e.g. web based publications) and other electronic media formats.

- (3) Intellectual Property (Periodicals, Books, Proprietary Software Licenses, Art, and Other Products of the Creative Process): Metro may directly purchase intellectual property (including, but not be limited to, periodicals, books, proprietary software licenses, reference materials, audio and visual media, and other products of the creative process) when the product is protected under intellectual property law (e.g. copyright, patent). If there is more than one source of the intellectual property, and the product is not being purchased directly from the creator or other original source, every attempt should be made to establish a competitive selection process to achieve the greatest economy.
- (4) **Financial Products**: Metro may directly purchase financial products such as bond insurance, surety bonds for Metro bond reserves and liquidity facilities such as letters of lines of credit. Metro may pay fees associated with such transactions, including, but not limited to, registrar, paying agent, and escrow agent fees and fees associated with outstanding debt issues.
- (5) **Employee Benefits Contracts**. Metro may purchase employee benefit insurance, and other taxable employee benefits, without a competitive Solicitation process, regardless of dollar amount.
- (6) Insurance Contracts: Contracts for insurance may be awarded directly to an insurer after Metro obtains Proposals from an insurance consultant. The insurance consultant will be selected in accordance with the applicable procedures set forth in the Personal Services Contracting Rules. Among the services to be provided by the consultant is the securing of competitive Proposals from insurance carriers for all coverages for which the insurance consultant is given responsibility and advice to Metro about the costs and benefits of the various Proposals. Metro may then negotiate or enter into the insurance Contract that appears most Advantageous to Metro without advertisement or issuance of its own Request for Proposals.
- (7) **Used Personal Property or Equipment**: Metro may directly purchase used personal property and equipment. Used property and used equipment is property or equipment that has been placed in use by a previous owner or user for a period of time, and which is recognized in the relevant trade or industry, if there is one, as qualifying the personal property or equipment as "used".
- (8) **Hazardous Material Removal and Oil Clean-up**. Metro may enter into a Public Contract without competitive Solicitation when ordered to clean up oil or other hazardous waste pursuant to the authority granted the Oregon Department of Environmental Quality under ORS Chapter 466, and such DEQ order necessitates the prompt establishment and performance of the Contract in order to comply with the statutes regarding spill or release of oil or hazardous materials. Metro shall not contract pursuant to this section in the absence of an order from DEQ to clean up a site with a time limitation that would not permit hiring a Contractor under the usual, required Procurement processes.
- (9) **Rating Agency Contracts**. Metro may purchase the services of Moody's Investors Service, Standard and Poors, or similar rating agencies without competitive Solicitation.
- (10) Information Technology (Software and Hardware Maintenance, Licenses, Subscriptions and Upgrades): Metro may directly enter into a Contract or renew existing Contracts for information technology (including hardware or software maintenance, licenses, subscriptions, and upgrades) where the maintenance, upgrades, subscriptions and licenses are either available from only one source or, if available from more than one source, are obtained from Metro's current provider in order to utilize the pre-existing knowledge of the provider regarding the specifics of Metro's information technology system. Metro shall document in the Procurement file the facts that justify either that maintenance, license(s), subscriptions and upgrades were available from only one source or, if from more than one source, that obtaining such Goods and Services from the current vendor is most Advantageous to Metro.

- (11) **Equipment Maintenance, Repair and Overhaul**. Metro may directly award a Contract for equipment maintenance, repair and/or overhaul if:
- (a) Service and/or parts required are unknown, and the cost cannot be determined without extensive preliminary dismantling or testing;
- (b) Service and/or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source; or
- (c) Services and/or parts must be acquired from the provider of the equipment and/or software being maintained in order to be compatible, preserve warranties, provide the best possible service, or conform to other similar agreements being provided by the same provider for maximizing economy and/or servicing functions.
- (12) **Price-regulated Goods and Services, utilities and utility related services**. Metro may directly purchase, without a competitive Solicitation process, goods, services, repair, equipment and/or maintenance work, where the rate or price for such Goods and Services is established by federal, state, or local regulatory authority or when the Services can be provided only by a specific utility.
- (13) **Goods, Services or Equipment Required by a Federal or State Grant Agreement**. Metro may directly purchase, without a competitive Solicitation process, Goods, Services or equipment when they are required in the federal or state grant agreement to be purchased from a specific source or when a specific brand name is required and no competition is otherwise available.
- (14) **Membership Dues**. Metro may directly purchase, without a competitive Solicitation process, dues or memberships in professional or community organizations for the benefit of Metro.
- (15) **Services Related to Legal Advice**. Metro may directly enter into a Contract, without a competitive Solicitation process, Services related to the provision of legal advice to Metro.
- (16) **Seminar, Training Registration and Conference Fees**. Metro may directly purchase, without a competitive Solicitation process, seminar registrations and training session fees for attendance at seminars, conferences and training courses hosted by outside entities.
- (17) **Event Sponsorship Agreements**. Metro may directly pay to sponsor an event, whether or not Metro receives Goods or Services in return for its payment.
- (18) **Sponsorship Agreements**. Sponsorship Agreements, under which Metro receives a gift or donation in exchange for recognition of the donor, may be awarded in any manner which Metro deems appropriate to meet its needs, including by direct award.
- (19) **Contractor Provided Funding**. Metro may directly award contracts for Goods or Services to a Contractor who provides substantial materials or a substantial portion of the funding for a project.
- (20) Maintenance and Training Services from the Contractor Supplying Goods. Metro may directly purchase, without a competitive Solicitation process, maintenance or training services directly from a Contractor from whom Metro has previously acquired Goods and the services or training is directly related to such Goods.
- (21) **Nonprofit Partnerships**. Metro may directly award Contracts for Goods and Services when the Contractor is a not-for-profit organization and where both parties share in the decision making process work together to define a scope of work, contribute resources, share responsibilities, and accept risk and benefits according to a mutually agreed upon arrangement.

(22) **Zoos and Animal Conservation Organizations**. Metro may directly award Contracts for Goods and Services when the contractor is (a) a not-for-profit entity and (b) a zoo or other organization dedicated to the study, conservation, or care of zoo animals.

(23) Concession Services Agreements.

- (a) <u>Small Concessions</u>. Small Concessions are Concession Services Agreements to sell or promote food, beverages, merchandise or Services, including but not limited to performances and entertainment, to the public for which the concessionaire's projected annual gross revenues are estimated to be \$500,000 or less. Small Concessions shall be awarded based on any method determined by Metro to provide an opportunity to all persons desiring to operate a concession, including without limitation, by direct award, private negotiation, or using a competitive process.
- (b) <u>Major Concessions</u>. Major Concessions are Concessions Services Agreements to sell or promote food, beverages, merchandise or Services, including but not limited to performances and entertainment, to the public for which the concessionaire's projected annual gross revenues under the Contract are estimated to exceed \$500,000 annually. Major Concessions shall be awarded using a Request for Proposals under these Rules.
- (24) **Animals and Animal Transportation.** Contracts for the acquisition or transport of animals may be awarded in any manner which Metro deems appropriate to meet Metro's needs, including by direct award.
- (25) **Perishables (e.g. Medication, Food, Plants, Chemicals and Laboratory Supplies).** Metro may directly purchase, without a competitive Solicitation process, perishables, including (without limitation) animal medication, animal food, human food, plants, chemicals and laboratory supplies upon the department's determination that the quality of the desired perishable item is of greater importance than the cost. However if longevity is not an issue and multiple sources exist, standard Procurement practices shall be utilized to the extent possible.
- (26) **Items for Resale**. Metro may directly purchase, without a competitive Solicitation process, Goods and Services being purchased for resale (including, without limitation, Zoo gift shop retail inventory and food for resale). This Special Procurement category applies to Goods and Services that are specifically for resale as opposed to internal use or consumption.

Procurement Process

47-0300 Public Notice of Solicitation Documents for Formal Procurements

- (1) **Notice of Solicitation Documents**. Metro shall provide public notice of every formal Solicitation in accordance with subsection (2) of this Rule. Metro may give additional notice using any method it determines appropriate to foster and promote competition, including:
- (a) Mailing or emailing notice of the availability of the Solicitation Document to Persons that have expressed an interest in Metro's Procurements;
- (b) Publishing the advertisement for Offers in newspapers or other publications of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as Metro may determine; or
 - (c) Placing Notice on Metro's Internet Web site.
- (2) Required Advertising. Metro shall advertise every notice of a formal Solicitation as follows:

- (a) Metro shall publish the advertisement for formal Offers in accordance with the requirements of ORS 279B.055(4)(a) and (b) and ORS 279B.060(5); or
- (b) Because Metro finds that it would be cost effective to Electronically post notice of Solicitations, Metro will publish advertisements for formal Offers on the Oregon Department of Administrative Services' Electronic Procurement System known as "ORPIN" (Oregon Procurement Information Network).
- (3) Content of Advertisement. All advertisements for formal Offers must set forth:
 - (a) Where, when, how, and for how long the Solicitation Document may be obtained;
 - (b) A general description of the Goods or Services to be acquired;
- (c) The interval between the first date of notice of the Solicitation Document given in accordance with subsection (2) above and Closing, which may not be less than fourteen (14) Days for an Invitation to Bid and twenty-one (21) Days for a Request for Proposals, unless Metro determines that a shorter interval is in the public's interest, and that a shorter interval will not substantially affect competition. However, in no event may the interval between the first date of notice of the Solicitation Document given in accordance with subsection (2) above and Closing be less than seven (7) Days as set forth in ORS 279B.055(4)(f). Metro shall document the specific reasons for the shorter public notice period in the Procurement file;
- (d) The date that Persons must file applications for prequalification if prequalification is a requirement and the class of Goods or Services is one for which Persons must be prequalified;
 - (e) The office where Contract terms, conditions and Specifications may be reviewed;
 - (f) The name, title and address of the individual authorized by Metro to receive Offers;
 - (g) For formal ITB's, the scheduled Opening; and
 - (h) Any other information Metro deems appropriate.
- (4) Fees. Metro may charge a fee or require a deposit for the Solicitation Document.
- (5) **Notice of Addenda**. Metro shall provide potential Offerors notice of any Addenda to a Solicitation Document in accordance with Administrative Rule 47-0430.

Stat. Auth.: ORS 279A.065, ORS 279B.055 & ORS 279B.060 Stats. Implemented: ORS 279B.055 & ORS 279B.060

47-0310 Bids and Proposals are Offers

- (1) **Offer and Acceptance**. The Bid or Proposal is the Bidder's or Proposer's Offer to enter into a Contract.
- (a) In competitive Bids and competitive Proposals, the Offer is always a "Firm Offer," i.e. the Offer shall be held open by the Offeror for Metro's acceptance for the period specified in Administrative Rule 47-0480. Metro may elect to accept the Offer at any time during the specified period, and Metro's award of the Contract constitutes acceptance of the Offer and binds the Offeror to the Contract.
- (b) Notwithstanding the fact that a competitive Proposal is a "Firm Offer" for the period specified in Administrative Rule 47-0480, Metro may elect to discuss or negotiate certain contractual provisions, as identified in these rules or in the Solicitation Document, with the Proposer. Where negotiation is permitted by the rules or the Solicitation Document, Proposers are obligated to negotiate in good faith

and only on those terms or conditions that the rules or the Solicitation Document have reserved for negotiation.

- (2) **Contingent Offers**. Except to the extent the Proposer is authorized to propose certain terms and conditions pursuant to Administrative Rule 47-0261, a Proposer may not make its Offer contingent upon Metro's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.
- (3) **Offeror's Acknowledgment**. By Signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits Proposers to propose alternative terms or conditions under Administrative Rule 47-0261, the Offeror's Offer is deemed to have accepted (i) any nonnegotiable terms and conditions and (ii) any proposed terms and conditions offered for negotiation upon and to the extent accepted by Metro in Writing.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065, ORS 279B.055 & ORS 279B.60

47-0330 Electronic Procurement

- (1) **Electronic Procurement Authorized**. Metro may conduct all phases of a Procurement, including without limitation the posting of Electronic Advertisements and the receipt of Electronic Offers, by Electronic methods if and to the extent Metro specifies in a Solicitation Document, a Request for Quotes, or any other Written instructions on how to participate in the Procurement.
- (2) Metro shall open an Electronic Offer in accordance with Electronic security measures in effect at Metro at the time of its receipt of the Electronic Offer. Unless Metro provides procedures for the secure receipt of Electronic Offers, the Person submitting the Electronic Offer assumes the risk of premature disclosure due to submission in unsealed form.
- (3) Metro's use of Electronic Signatures must be consistent with applicable statutes and rules. Metro may limit the use of Electronic methods of conducting a Procurement as Advantageous to Metro.
- (4) If Metro determines that Bid or Proposal security is or will be required, Metro should not authorize Electronic Offers unless Metro has another method for receipt of such security.
- (5) **Rules Governing Electronic Procurements**. Metro shall conduct all portions of an Electronic Procurement in accordance with these Division 47 Administrative rules, unless otherwise set forth in this Rule.
- (6) **Preliminary Matters**. As a condition of participation in an Electronic Procurement Metro may require potential Contractors to register with Metro before the date and time on which Metro will first accept Offers, to agree to the terms, conditions, or other requirements of a Solicitation Document, or to agree to terms and conditions governing the Procurement, such as procedures that Metro may use to attribute, authenticate or verify the accuracy of an Electronic Offer, or the actions that constitute an Electronic Signature.
- (7) **Offer Process**. Metro may specify that Persons must submit an Electronic Offer by a particular date and time, or that Persons may submit multiple Electronic Offers during a period of time established in the Electronic Advertisement. When Metro specifies that Persons may submit multiple Electronic Offers during a specified period of time, Metro must designate a time and date on which Persons may begin to submit Electronic Offers, and a time and date after which Persons may no longer submit Electronic

Offers. The date and time after which Persons may no longer submit Electronic Offers need not be specified by a particular date and time, but may be specified by a description of the conditions that, when they occur, will establish the date and time after which Persons may no longer submit Electronic Offers. When Metro will accept Electronic Offers for a period of time, then at the designated date and time that Metro will first receive Electronic Offers, Metro must begin to accept real time Electronic Offers on Metro's Electronic Procurement System, and must continue to accept Electronic Offers in accordance with section (8)(b) of this Rule until the date and time specified by Metro, after which Metro will no longer accept Electronic Offers.

(8) Receipt of Electronic Offers.

- (a) When Metro conducts an Electronic Procurement that provides that all Electronic Offers must be submitted by a particular date and time, Metro shall receive the Electronic Offers in accordance with these Administrative Rules.
- (b) When Metro specifies that Persons may submit multiple Electronic Offers during a period of time, Metro shall accept Electronic Offers, and Persons may submit Electronic Offers, in accordance with the following:
- A. Following receipt of the first Electronic Offer after the day and time Metro first receives Electronic Offers Metro shall post on Metro's Electronic Procurement System, and updated on a real time basis, the lowest Electronic Offer price or the highest ranking Electronic Offer. At any time before the date and time after which Metro will no longer receive Electronic Offers, a Person may revise its Electronic Offer, except that a Person may not lower its price unless that price is below the then lowest Electronic Offer.
- B. A Person may not increase the price set forth in an Electronic Offer after the day and time that Metro first accepts Electronic Offers.
- C. A Person may withdraw an Electronic Offer only in compliance with these Administrative Rules.
- (9) **Failure of the E-Procurement System**. In the event of a failure of Metro's Electronic Procurement System that interferes with the ability of Persons to submit Electronic Offers, protest or to otherwise participate in the Procurement, Metro may cancel the Procurement in accordance with Administrative Rule 47-0660, or may extend the date and time for receipt of Electronic Offers by providing notice of the extension immediately after the Electronic Procurement System becomes available.

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

Bid and Proposal Preparation

47-0400 Offer Preparation

- (1) **Instructions**. An Offeror shall submit and Sign its Offer in accordance with the instructions set forth in the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to Closing in accordance with the requirements for submitting an Offer set forth in the Solicitation Document.
- (2) **Forms**. An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.

(3) **Documents**. An Offeror shall provide Metro with all documents and Descriptive Literature required by the Solicitation Document. If the Solicitation Document instructs Offerors not to include documents or literature, such as warranty provisions, Metro is entitled to disregard those documents in determining whether the Offer is responsive to Metro's request.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

47-0410 Offer Submission

(1) **Product Samples and Descriptive Literature**. Metro may require Product Samples or Descriptive Literature if Metro determines either is necessary or desirable to evaluate the quality, features or characteristics of an Offer. Metro will dispose of Product Samples, or make them available for the Offeror to retrieve in accordance with the Solicitation Document.

(2) Identification of Offers

- (a) To ensure proper identification and handling, Offers must be submitted in a sealed envelope appropriately marked or in the envelope provided by Metro, whichever is applicable. If Metro permits Electronic Offers in the Solicitation Document, the Offeror may submit and identify Electronic Offers in accordance with these Administrative Rules and the instructions set forth in the Solicitation Document.
- (b) Metro is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.
- (3) **Receipt of Offers**. The Offeror is responsible for ensuring Metro receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer. Offers not so received are late as provided in Administrative Rule 47-0460 and must be returned unopened.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

47-0420 Pre-Offer Conferences

- (1) **Purpose**. Metro may hold pre-Offer conferences with prospective Offerors prior to Closing, to explain the Procurement requirements, obtain information, or to conduct site inspections.
- (2) **Required Attendance**. Metro may require attendance at the pre-Offer conference as a condition for making an Offer.
- (3) **Scheduled Time**. If Metro holds a pre-Offer conference, it must be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference.
- (4) **Statements Not Binding**. Statements made by Metro's representative at the pre-Offer conference do not change the Solicitation Document unless Metro confirms such statements with a Written Addenda to the Solicitation Document.
- (5) **Agency Announcement**. Metro must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with Administrative Rule 47-0255(2) or 47-0260(2).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

47-0430 Addenda to Solicitation Document

- (1) **Issuance; Receipt**. Metro may change a Solicitation Document only by Written Addenda. An Offeror shall provide Written acknowledgment of receipt of all issued Addenda with its Offer, unless Metro otherwise specifies in the Addenda.
- (2) **Notice and Distribution**. Metro may notify prospective Offerors of Addenda in a manner intended to foster competition and to make prospective Offerors aware of the Addenda. The Solicitation Document must specify how Metro will provide notice of Addenda and how Metro will make the Addenda available before Closing, and at each subsequent step or tier of evaluation if Metro will engage in a multistep competitive Bidding process in accordance with Administrative Rule 47-0257, or a multitiered or multistep competitive Proposal process in accordance with Administrative Rule 47-0261.

(3) Timelines; Extensions.

- (a) Metro shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. Metro may extend the Closing if Metro determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent justified by a countervailing public interest, Metro may not issue Addenda related to an Invitation to Bid or a Request for Proposal less than 72 hours before the Closing unless the Addenda also extends the Closing.
- (b) Notwithstanding subsection (3)(a) of this Rule, Addenda that modifies the evaluation criteria, selection process or procedure for any tier of competition under a multistep competitive Bid or a multitiered or multistep competitive Proposal issued in accordance with ORS 279B.060(6)(d) and Administrative Rule 47-0261 must be issued no fewer than five (5) Days before the beginning of that tier or step of competition, unless Metro determines that a shorter period is sufficient to allow Offerors to prepare for that tier or step of competition. Metro shall document the factors it considered in making that determination, which may include, without limitation, the scope of the changes to the Solicitation Document, the location of the remaining eligible Proposers, or whether shortening the period between issuing an Addenda and the beginning of the next tier or step of competition favors or disfavors any particular Proposer or Proposers.
- (4) **Request for Change or Protest**. Unless a different deadline is set forth in the Addenda, an Offeror may submit a Written request for change or protest to the Addenda, as provided in Administrative Rule 47-0730, by the close of Metro's next business day after issuance of the Addenda, or up to the last day allowed to submit a request for change or protest under Administrative Rule 47-0730, whichever date is later. If the date established in the previous sentence falls after the deadline for receiving protests to the Solicitation Document in accordance with Administrative Rule 47-0730, then Metro may consider an Offeror's request for change or protest to the Addenda only, and Metro may not consider a request for change or protest to matters not added or modified by the Addenda. Notwithstanding any provision of this section (4), Metro is not required to provide a protest period for Addenda issued after initial Closing during a multi-tier or multistep Procurement process conducted pursuant to ORS 279B.055 or ORS 279B.060.

Stat. Auth.: ORS 279A.065 & ORS 279B.060 Stats. Implemented: ORS 279B.060

47-0440 Pre-Closing Modification or Withdrawal of Offers

(1) **Modifications**. An Offeror may modify its Offer in Writing prior to the Closing. An Offeror must prepare and submit any modification to its Offer to Metro in accordance with Administrative Rule 47-0400 and 47-0410, unless otherwise specified in the Solicitation Document. Any modification must

include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror must mark the submitted modification as follows:

- (a) Bid (or Proposal) Modification; and
- (b) Solicitation number (or other identification as specified in the Solicitation Document).

(2) Withdrawals.

- (a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, Signed by an authorized representative of the Offeror, delivered to the individual and location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by Metro prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in person prior to the Closing, upon presentation of appropriate identification and evidence of authority satisfactory to Metro.
- (b) Metro may release an unopened Offer withdrawn under subsection (2)(a) of this Rule to the Offeror or its authorized representative, after voiding any date and time stamp mark.
 - (c) The Offeror must mark the Written request to withdraw an Offer as follows:
 - A. Bid (or Proposal) Withdrawal; and
 - B. Solicitation number (or other identification as specified in the Solicitation Document).
- (3) **Documentation**. Metro shall include all documents relating to the modification or withdrawal of Offers in the appropriate Procurement file.

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

47-0450 Receipt, Opening, and Recording of Bids and Proposals; Confidentiality of Formal Offers

- (1) **Receipt**. Metro must electronically or mechanically time-stamp or hand-mark each Bid or Proposal and any modification upon receipt. Metro may not open Bids or Proposals or modifications upon receipt, but shall maintain it as confidential and secure until Opening. If Metro inadvertently opens an Offer or a modification prior to the Opening, Metro is required return the Offer or modification to its secure and confidential state until Opening. Metro shall document the resealing for the Procurement file (e.g. "Metro inadvertently opened the Bid due to improper identification").
- (2) **Opening and Recording of Bids**. Metro shall publicly open Bids, including any modifications made pursuant to Administrative Rule 47-0440(1). To the extent practicable, Metro will read aloud the name of each Bidder, and such other information as Metro considers appropriate. However, Metro may withhold from disclosure information in accordance with ORS 279B.055(5)(c) and ORS 279B.060(6). In the case of voluminous Bids, Metro may elect not to read Offers aloud and will only disclose the name of each Bidder.
- (3) **Availability**. After Opening, Offers will be available for public inspection except for those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.501(2); ORS 646.461 to 646.475.
- (a) To the extent such designation is not in accordance with applicable law, Metro will make those portions available for public inspection. The Offeror must separate information designated as confidential from other non-confidential information at the time of submitting its Offer.

- (b) Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and will be publicly available regardless of an Offeror's designation to the contrary. Metro may determine the appropriate charge to be paid for copies made pursuant to public records requests and may request payment for such copies before they are released.
- (c) Notwithstanding anything contrary above, Metro is not required to disclose the contents of Proposals until after Metro posts a notice of intent to award pursuant to Administrative Rule 47-0610.

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

47-0460 Late Offers, Late Withdrawals and Late Modifications

- (1) Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. Metro may not consider late Offers, withdrawals or modifications except as permitted in Administrative Rule 47-0470 or 47-0261.
- (2) For manual submissions of Offers, the Metro Regional Center reception desk time clock will be the clock of record and the date and time imprint of that clock on an Offer will determine the timeliness of the submission. Late manual submissions must be returned to the Offeror unopened with a copy of the envelope containing the Metro's time stamp on the Offer retained for the Procurement file.
- (3) For Electronic submissions, when permitted, the time shown by Metro as to the date of arrival of the Electronic submission will determine the timeliness of the submission. Late Electronic submissions will be deleted from Metro's files, returned Electronically to the Offeror and the time of the submission and the time of return must be documented in the Procurement file.
- (4) Failure to properly return or dispose of a late submission does not mean an Offer or submission arrived on time.

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

47-0470 Mistakes

- (1) **Generally**. To protect the integrity of the competitive Procurement process and to assure fair treatment of Offerors, Metro should carefully consider whether to permit waiver, correction or withdrawal of Offers for certain mistakes.
- (2) **Treatment of Mistakes**. Metro may not allow an Offeror to correct or withdraw an Offer for an error in judgment. If Metro discovers certain mistakes in an Offer after Closing, but before award of the Contract, Metro may take the following action:
- (a) Metro may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:

- A. Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;
- B. Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and
- C. Acknowledge receipt of an Addenda to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addenda and intended to be bound by its terms; or the Addenda involved did not affect price, quality or delivery.
- (b) Metro may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms Metro's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example, a missing unit price may be established by dividing the total price for the units by the quantity of units for that item, or a missing or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). Unit prices will prevail over extended prices in the event of a discrepancy between extended prices and unit prices.
- (c) Metro may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:
 - A. The nature of the error;
 - B. That the error is not a minor informality under this subsection or an error in judgment;
 - C. That the error cannot be corrected or waived under subsection (b) of this section;
- D. That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;
- E. That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;
- F. That the Offeror will suffer substantial detriment if Metro does not grant the Offeror permission to withdraw the Offer;
- G. That Metro's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on Metro or the public it represents; and
 - H. That the Offeror promptly gave notice of the claimed error to Metro.
- (d) The criteria in subsection (2)(c) of this Rule will determine whether Metro will permit an Offeror to withdraw its Offer after Closing. These criteria also will apply to the question of whether Metro will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to Metro based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by Metro, whether by award to the next lowest Responsive and Responsible Bidder or the most Advantageous Responsive and Responsible Proposer, or by resort to a new Solicitation.
- (3) **Rejection for Mistakes**. Metro shall reject any Offer in which a mistake is evident on the face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents submitted with the Offer.

- (4) **Identification of Mistakes after award**. The procedures and criteria set forth above are Offeror's only opportunity to correct mistakes or withdraw Offers because of a mistake. Following award, an Offeror is bound by its Offer, and may withdraw its Offer or rescind a Contract entered into pursuant to these Administrative Rules only to the extent permitted by applicable law.
- (5) **Written Determination**. All decisions to permit the correction or withdrawal of Offers, or to cancel an award or a Contract based on mistakes, must be supported by a Written determination by Metro that states the reasons for the action taken.

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

47-0480 Time for Acceptance

A Bid or Proposal is a Firm Offer, irrevocable, valid and binding on the Offeror for not less than thirty (30) Days following Closing, unless otherwise specified in the Solicitation Document.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

47-0490 Extension of Time for Acceptance of Offer

Metro may request, orally or in Writing, that Offerors extend, in Writing, the time during which Metro may consider their Offer(s). If an Offeror agrees to such extension, the Bid or Proposal will continue as a Firm Offer, irrevocable, valid and binding on the Offeror for the agreed-upon extension period. An extension may occur after the expiration of the initial Offer period.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

Qualifications and Duties

47-0500 Responsibility of Bidders and Proposers

- (1) Before awarding a Contract Metro shall determine that the Bidder submitting the lowest Bid or Proposer submitting the most Advantageous Proposal is Responsible. Metro shall use the standards set forth in ORS 279B.110 and Administrative Rule 47-0640(1)(c)(F) to determine if a Bidder or Proposer is Responsible. In the event Metro determines a Bidder or Proposer is not Responsible it shall prepare a Written determination of non-Responsibility as required by ORS 279B.110 and reject the Offer.
- (2) For purposes of this Rule, Metro 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 debarment provisions of ORS 279B.130.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.110

47-0525 Qualified Products Lists

Metro may develop and maintain a qualified products list pursuant to ORS 279B.115.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.115

47-0550 Prequalification of Prospective Offerors; Pre-negotiation of Contract Terms and Conditions

- (1) Metro may prequalify prospective Offerors to submit Bids or Proposals for Public Contracts to provide particular types of Goods or Services pursuant to ORS 279B.120 and ORS 279B.125.
- (2) When Metro permits or requires prequalification of Offerors, Metro shall prepare a prequalification application setting forth the criteria and qualifications for prequalification. Upon receipt of a prequalification application, Metro shall investigate the prospective Offeror as necessary to determine whether the prospective Offeror is qualified. The determination must be made in less than thirty (30) Days, if practicable, if the prospective Offeror requests an early decision to allow the prospective Offeror as much time as possible to prepare an Offer for a Contract that has been advertised. In making its determination, Metro shall consider only the applicable standards of Responsibility listed in Administrative Rule 47-0640(1)(c)(F). Metro shall promptly notify the prospective Offeror whether the prospective Offeror is qualified.
- (3) Notwithstanding the prohibition against revocation of prequalification in ORS 279B.120(3), Metro may determine that a prequalified Offeror is not Responsible prior to Contract award.
- (4) Metro may pre-negotiate some or all Contract terms and conditions including prospective Proposer Contract forms such as license agreements, maintenance and support agreements or similar documents for use in future Procurements. Such pre-negotiation of Contract terms and conditions (including prospective Proposer forms) may be part of the prequalification process of a Proposer in section (1) or the pre-negotiation may be a separate process and not part of a prequalification process. Unless required as part of the prequalification process, the failure of Metro and the prospective Proposer to reach agreement on pre-negotiated Contract terms and conditions does not prohibit the prospective Proposer from responding to Procurements. Metro may agree to different pre-negotiated Contract terms and conditions with different prospective Proposers. When Metro has pre-negotiated different terms and conditions with Proposers or when permitted, Proposers offer different terms and conditions, Metro may consider the terms and conditions in the Proposal evaluation process.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.015, ORS 279B.120

47-0575 Debarment of Prospective Offerors

- (1) **Generally**. Metro may debar prospective Offerors from consideration for Metro Contracts for a period up to three years for the reasons listed in ORS 279A.110 or ORS 279B.130(2). Metro shall comply with the notice and hearing provisions after providing notice and the opportunity for hearing as set forth in this Rule and ORS 279B.130.
- (2) **Notice of Intent to Debar**. Metro may notify the Person in Writing of a proposed debarment personally or by registered or certified mail, return receipt requested. This notice must:
 - (a) State that Metro intends to debar the Person;
 - (b) Set forth the reasons for the debarment;

- (c) Include a statement that the Person has a right to appeal the notice of intent to debar and have a hearing in accordance with Administrative Rule 47-0760 and a statement of the time within which an appeal must be filed;
 - (d) Include a reference to the particular sections of the statutes and rules involved;
 - (e) State that the Person may be represented by legal counsel at the hearing.
- (3) **Appeal and Hearing**. Appeal of the notice and hearing on the appeal must be in accordance with the provisions of Administrative Rule 47-0760.
- (4) **Responsibility**. Notwithstanding the limitation on the term for debarment in ORS 279B.130(1)(b), Metro may determine that a previously debarred Offeror is not Responsible prior to Contract award.
- (5) **Imputed Knowledge**. Metro may attribute improper conduct of a Person or its affiliate or affiliates having a contract with a prospective Offeror to the prospective Offeror for purposes of debarment where the impropriety occurred in connection with the Person's duty for or on behalf of, or with the knowledge, approval, or acquiescence of, the prospective Offeror.
- (6) **Limited Participation**. Metro may allow a debarred Person to participate in Solicitations and Contracts on a limited basis during the debarment period upon Written determination that participation is Advantageous to Metro. The determination must specify the factors on which it is based and define the extent of the limits imposed.

Stats. Implemented: ORS 279B.130

Offer Evaluation and Award

47-0600 Offer Evaluation and award

- (1) **Evaluation**. Metro shall evaluate Offers only as set forth in the Solicitation Document, pursuant to ORS 279B.055(6)(a) and ORS 279B.060(6)(b), and in accordance with applicable law. Metro may not evaluate Offers using any other requirement or criterion.
 - (a) Evaluation of Bids; Preferences.
- A. Nonresident Bidders. In determining the lowest Responsive Bid, Metro shall apply the reciprocal preference set forth in ORS 279A.120(2)(b) and Administrative Rule 46-0310 for Nonresident Bidders.
- B. Public Printing. Metro shall, for the purpose of evaluating Bids, apply the public printing preference set forth in ORS 282.210.
- C. Award When Bids are Identical. If Metro determines that two or more Bids are identical under Administrative Rule 46-0300, Metro shall award a Contract in accordance with the procedures set forth in Administrative Rule 46-0300.

(b) Evaluation of Proposals.

- A. Award When Proposals are Identical. If Metro determines that two or more Proposals are identical under Administrative Rule 46-0300, Metro shall award a Contract in accordance with the procedures set forth in Administrative Rule 46-0300.
- B. Public Printing. Metro shall for the purpose of evaluating Proposals apply the public printing preference set forth in ORS 282.210.
- (c) Recycled Materials. When procuring Goods, Metro shall give preference for recycled materials as set forth in ORS 279A.125 and Administrative Rule 46-0320.
- (2) Clarification of Bids or Proposals. After Opening, Metro may conduct discussions with apparent Responsive Offerors for the purpose of clarification to assure full understanding of the Bids or Proposals. All Bids or Proposals, in Metro's sole discretion, needing clarification must be accorded such an opportunity. Metro shall document clarification of any Offer in the Procurement file.

(3) Negotiations.

- (a) Bids. Metro may not negotiate with any Bidder. After award of the Contract Metro and Contractor may only modify the Contract in accordance with Administrative Rule 47-0800.
- (b) Proposals. Metro may conduct discussions or negotiate with Proposers only in accordance with ORS 279B.060(6)(b) and Administrative Rule 47-0261. After award of the Contract, Metro and Contractor may only modify the Contract in accordance with Administrative Rule 47-0800.

(4) Award.

- (a) General. If awarded, Metro shall award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the most Advantageous, Responsive Proposal. Metro may award by item, groups of items or the entire Offer provided such award is consistent with the Solicitation Document and in the public interest.
- (b) Multiple Items. An Invitation to Bid or Request for Proposals may call for pricing of multiple items of similar or related type with award based on individual line item, group total of certain items, a "market basket" of items representative of Metro's expected purchases, or grand total of all items.
 - (c) Multiple Awards -- Bids.
- A. Notwithstanding subsection (4)(a) of this Rule, Metro may award multiple Contracts under an Invitation to Bid in accordance with the criteria set forth in the Invitation to Bid. A multiple award may be made if award to two or more Bidders of similar Goods or Services is necessary for adequate availability, delivery, service or product compatibility and skills. A notice to prospective Bidders that multiple Contracts may be awarded for any Invitation to Bid may not preclude Metro from awarding a single Contract for such Invitation to Bid.
- B. If an Invitation to Bid permits the award of multiple Contracts, Metro shall specify in the Invitation to Bid the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services.
 - (d) Multiple Awards -- Proposals.
- A. Notwithstanding subsection (4)(a) of this Rule, Metro may award multiple Contracts under a Request for Proposals in accordance with the criteria set forth in the Request for Proposals. A multiple award may be made if award to two or more Proposers of similar Goods or Services is necessary for adequate availability, delivery, service or product compatibility. A notice to prospective

Proposers that multiple Contracts may be awarded for any Request for Proposals may not preclude Metro from awarding a single Contract for such Request for Proposals.

- B. If a Request for Proposals permits the award of multiple Contracts, Metro shall specify in the Request for Proposals the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services, which may include consideration and evaluation of the Contract terms and conditions agreed to by the Contractors.
- (e) Partial awards. If after evaluation of Offers, Metro determines that an acceptable Offer has been received for only parts of the requirements of the Solicitation Document:
- A. Metro may award a Contract for the parts of the Solicitation Document for which acceptable Offers have been received; or
- B. Metro may reject all Offers and may issue a new Solicitation Document on the same or revised terms, conditions and Specifications.
- (f) All or None Offers. Metro may award all or none Offers if the evaluation shows an all or none award to be the lowest cost for Bids or the most Advantageous for Proposals of those submitted.

Stat. Auth.: ORS 279A.065 & ORS 279B.060 Stats. Implemented: ORS 279B.055 & ORS 279B.060

47-0610 Notice of Intent to award

- (1) **Notice of Intent to award**. Metro shall provide Written notice of its intent to award to all Bidders and Proposers pursuant to ORS 279B.135 at least seven (7) Days before the award of a Contract, unless Metro determines that circumstances justify prompt execution of the Contract, in which case Metro may provide a shorter notice period. Metro shall document the specific reasons for the shorter notice period in the Procurement file. A Written notice of intent to award is not required for Contracts awarded as a Small Procurement, an Intermediate Procurement, a sole-source Procurement, an Emergency Procurement or a Special Procurement authorized under Rule 47-0288.
- (2) **Finality**. Metro's award may not be final until the later of the following:
 - (a) The expiration of the protest period provided pursuant to Administrative Rule 47-0740; or
- (b) Metro provides Written responses to all timely-filed protests denying the protests and affirming the award.

Stat. Auth.: ORS 279A.065 & ORS 279B.135 Stats. Implemented: ORS 279B.135

47-0620 Documentation of award

- (1) **Basis of award**. After award, Metro shall make a record showing the basis for determining the successful Offeror part of Metro's Procurement file.
- (2) **Contents of Award Record**. Metro's record must include:
- (a) For Bids: Bids, the completed Bid tabulation sheet, and Written justification for any rejection of lower Bids.
- (b) For Proposals: Proposals, the completed evaluation of the Proposals, Written justification for any rejection of higher scoring Proposals, and if Metro permitted negotiations in accordance with

Administrative Rule 47-0261, Written documentation of the content of any discussions, negotiations, best and final Offers, or any other procedures Metro used to select a Proposer.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

47-0630 Availability of Award Decisions

- (1) **Contract Documents**. To the extent required by the Solicitation Document, Metro shall deliver to the successful Offeror a Contract, Signed purchase order, Price Agreement, or other contractual documents as applicable.
- (2) Availability of Award Decisions. A Person may obtain tabulations of awarded Bids or evaluation summaries of Proposals for a minimal charge, in person or by submitting to Metro a Written request accompanied by payment. The requesting Person shall provide the Solicitation Document number and, if documents must be mailed, enclose a self-addressed, stamped envelope. In addition, Metro may make available tabulations of Bids and Proposals through the Electronic Procurement System of Metro, email, or Metro's website.
- (3) Availability of Procurement Files. After issuance of the notice of intent to award, Metro shall make Procurement files available in accordance with applicable law. Metro may withhold from disclosure the public materials included in a Proposal that are exempt or conditionally exempt from disclosure under ORS 192.501 or ORS 192.502 including trade secrets, as defined in ORS 192.501 and information submitted to a public body in confidence, as described in ORS 192.502.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.055 & ORS 279B.060

47-0640 Rejection of an Offer

(1) Rejection of an Offer.

- (a) Metro may reject any Offer when Metro determines that rejection is in the best interest of Metro, as set forth in ORS 279B.100.
 - (b) Metro shall reject an Offer upon Metro's finding that the Offer:
- A. Is contingent on Metro's acceptance of terms and conditions (including Specifications) that materially differ from the Solicitation Document;
- B. Takes exception to terms and conditions (including Specifications) set forth in the Solicitation Document;
- C. Attempts to prevent public disclosure of matters in contravention of the terms and conditions of the Solicitation Document or in contravention of applicable law;
 - D. Offers Goods or Services that fail to meet the Specifications of the Solicitation Document;
 - E. Is late;
 - F. Is not in substantial compliance with the Solicitation Document;
 - G. Is not in substantial compliance with all prescribed public Procurement procedures; or
 - H. Fails to comply with any applicable equity in contracting programs adopted pursuant to Metro's Equity in Contracting Administrative Rules.

- (c) Metro shall reject an Offer upon Metro's finding that the Offeror:
- A. Has not been prequalified under ORS 279B.120 and Metro required mandatory prequalification;
 - B. Has been debarred as set forth in ORS 279B.130;
- C. Has not met the requirements of ORS 279A.105 regarding subcontracting to COBID Certified Businesses, if required by the Solicitation Document;
- D. Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;
- E. Has failed to provide the certification of non-discrimination required under ORS 279A.110(4); or
- F. Is non-Responsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before awarding a Contract, Metro must have information that indicates that the Offeror meets the applicable standards of Responsibility. To be a Responsible Offeror, Metro must determine, under ORS 279B.110, that the Offeror:
 - (i) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to meet all contractual responsibilities;
 - (ii) Has completed previous contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that to the extent the costs associated with and time available to perform a previous contract were within the Offeror's control, the Offeror stayed within the time and budget allotted for the procurement and otherwise performed the Contract in a satisfactory manner. Metro should carefully scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in Contract performance. In reviewing the Offeror's performance, Metro should determine whether the Offeror's deficient performance was expressly excused under the terms of the Contract, or whether the Offeror took appropriate corrective action. Metro may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. Metro shall make its basis for determining an Offeror non-Responsible under this subparagraph part of the Procurement file as required by ORS 279B.110(2)(b);
 - (iii) Has a satisfactory record of integrity. An Offeror may lack integrity if Metro determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to Metro. Metro may find an Offeror non-Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for debarment under ORS 279B.130 may be used to determine an Offeror's integrity. Metro may find an Offeror non-responsible based on previous convictions of offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the Offeror's performance of a contract or subcontract. Metro shall make its basis for determining that an Offeror is non-Responsible under this subparagraph part of the Procurement file as required by ORS 279B.110(2)(c);
 - (iv) Is legally qualified to contract with Metro;

- (v) Has attested in Writing that the Offeror complied with the tax laws of this state and of political subdivisions of this state; and
- (vi) Has supplied all necessary information in connection with the inquiry concerning Responsibility. If the Offeror fails to promptly supply information requested by Metro concerning Responsibility, Metro shall base the determination of Responsibility on any available information, or may find the Offeror non-Responsible.
- (2) For the purposes of subparagraph (1)(c)F(v) of this Rule:
- (a) The period for which the Offeror must attest that it complied with the applicable tax laws must extend no fewer than six years into the past from the date of the Closing.
- (b) Tax laws include, but are not limited to, ORS 305.620, ORS chapters 316, 317 and 318, any tax provisions imposed by a political subdivision that apply to the Offeror or to the performance of the Contract, and any rules and regulations that implement or enforce those tax laws.
- (c) Metro may exercise discretion in determining whether a particular form of attesting to compliance with the tax laws is "credible and convenient" under ORS 279B.110(2)(e), taking into consideration the circumstances in which the attestation is made and the consequences of making a false attestation. Therefore, Metro may accept forms of attestation that range from a notarized statement to a less formal document that records the Offeror's attestation. However, Metro may not accept the certificate of compliance with tax laws required by ORS 305.385 unless that certificate embraces, in addition to the tax laws described in ORS 305.380, the tax laws of political subdivisions.
- (3) **Form of Business Entity**. For purposes of this Rule, Metro 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 debarment provisions of ORS 279B.130.

Stats. Implemented: ORS 279B.100, ORS 279B.110, OL 2015, ch 454 (SB 491), OL 2015, ch 539 (SB 675)

47-0650 Rejection of All Offers

- (1) **Rejection**. Metro may reject all Offers as set forth in ORS 279B.100. Metro may notify all Offerors of the rejection of all Offers, along with the reasons for rejection of all Offers.
- (2) **Criteria**. Metro may reject all Offers based upon the following criteria:
- (a) The content of or an error in the Solicitation Document, or the Procurement process unnecessarily restricted competition for the Contract;
- (b) The price, quality or performance presented by the Offerors are too costly or of insufficient quality to justify acceptance of any 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 process. These causes may include, without limitation, 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) Metro cancels the Procurement or Solicitation in accordance with Administrative Rule 47-0660; or
- (f) Any other circumstance indicating that awarding the Contract would not be in the public interest.

Stats. Implemented: ORS 279B.100

47-0660 Cancellation, Rejection, Delay or Suspension of a Procurement or Solicitation

- (1) Cancellation in the Public Interest. Any Solicitation or Procurement may be canceled, or any or all Bids or Proposals may be rejected in whole or in part, when the cancellation or rejection is in the best interest of Metro, as determined by Metro. Any Solicitation or Procurement described in a Solicitation may be delayed or suspended when the delay or suspension is in the best interest of Metro, as determined by Metro. The reasons for the cancellation or rejection will be made part of the Procurement file. Metro may not be liable to any Bidder, Proposer or other Affected Persons for any loss or expense caused by or resulting from the cancellation or rejection of a Solicitation, Bid, Proposal or award.
- (2) **Notice of Cancellation Before Closing**. If Metro cancels a Procurement or Solicitation prior to Closing, Metro shall provide Written notice of cancellation in the same manner that Metro initially provided notice of the Solicitation. Such notice of cancellation must:
 - (a) Identify the Solicitation Document;
 - (b) Briefly explain the reason for cancellation; and
 - (c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.
- (3) **Notice of Cancellation After Closing**. If Metro cancels a Procurement or Solicitation after Closing, Metro shall provide Written notice of cancellation to all Offerors who submitted Offers.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

47-0670 Disposition of Offers if Procurement or Solicitation Canceled

- (1) **Prior to Opening**. If Metro cancels a Procurement or Solicitation prior to Opening, Metro shall return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, Metro shall open the Offer to determine the source and then return it to the Offeror. For Electronic Offers, Metro shall delete the Offers from Metro's Electronic Procurement System or information technology system.
- (2) After Opening. If Metro rejects all Offers or otherwise cancels a Procurement after Opening, Metro will retain all such Offers as part of Metro's Solicitation file. If a Request for Proposals is cancelled after Proposals are received, Metro may return a Proposal to the Proposer that submitted it. Metro shall keep a list of returned Proposals in the Solicitation file.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

Remedies

47-0700 Protests and Judicial Review of Special Procurements

- (1) **Purpose**. An Affected Person may protest the Local Contract Review Board's approval of a Special Procurement. Pursuant to ORS 279B.400(1), before seeking judicial review of the approval of a Special Procurement, an Affected Person must file a Written protest with the Procurement Officer and exhaust all administrative remedies.
- (2) **Delivery**. Notwithstanding the requirements for filing a writ of review under ORS Chapter 34 pursuant to ORS 279B.400(4)(a), an Affected Person must deliver a Written protest to the Procurement Officer within seven (7) Days after the first date of public notice of Metro's approval of a Special Procurement, unless a different protest period is provided in the public notice of the approval of a Special Procurement. Metro may not consider a protest submitted after the timeline established for submitting such protest under this Rule.
- (3) **Content of Protest**. The Written protest must include:
 - (a) A detailed statement of the legal and factual grounds for the protest;
 - (b) A description of the resulting harm to the Affected Person; and
 - (c) The relief requested.
- (4) **Required Metro Response**. Metro shall take the following actions, as appropriate:
 - (a) Inform the Affected Person in Writing if the protest was not timely filed;
- (b) Inform the Affected Person if it failed to meet the requirements of section (3) of this Rule and the reasons for that failure;
- (c) If the protest was timely filed and provides the information required by section (3), issue a decision in Writing and provide that decision to the Affected Person within a reasonable period of time;
- (d) If Metro denies the protest, inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contract Review Board.
- (5) **Optional Metro Response**: In addition to the requirements set forth above in section (4), Metro may do any of the following:
 - (a) Agree with the protest and take any corrective action necessary;
 - (b) Issue a Written response to the protest and provide that decision to the Affected Person;
- (c) Refer the protest and any response from the Procurement Officer to the Local Contract Review Board for decision;
- (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.

(6) **Judicial Review**. An Affected Person may seek judicial review of the Procurement Officer's final decision (or if referred to the Local Contract Review Board by the Procurement Officer, the Board's final decision) denying a protest of the approval of a Special Procurement in accordance with ORS 279B.400. Judicial review is not available if the protest denial is withdrawn by Metro.

Stat. Auth.: ORS 279A.065 & ORS 279B.400 Stats. Implemented: ORS 279B.400

47-0710 Protests and Judicial Review of Sole-Source Procurements

- (1) **Purpose**. For sole-source Procurements requiring public notice, an Affected Person may protest the determination of the Procurement Officer or the Board under Administrative Rule 47-0275 that the Goods or Services or class of Goods or Services are available from only one source. Pursuant to ORS 279B.420(3)(f), before seeking judicial review, an Affected Person must file a Written protest with the Procurement Officer and exhaust all administrative remedies.
- (2) **Delivery**. Unless otherwise specified in the public notice of the sole-source Procurement, an Affected Person must deliver a Written protest to the Procurement Officer within seven (7) Days after the first date Metro posts public notice that it will make a sole source purchase. The Procurement Officer may not consider a protest submitted after the timeline established for submitting such protest under this Rule or such different time period as may be provided in the Notice of Intent to make a Sole Source purchase.
- (3) **Content of Protest**. The Written protest must include:
 - (a) A detailed statement of the legal and factual grounds for the protest;
- (b) Evidence or supporting documentation that supports the grounds on which the protest is based;
 - (c) A description of the resulting harm to the Affected Person; and
 - (d) The relief requested.
- (4) **Required Metro Response.** Metro shall take the following actions, as appropriate:
 - (a) Inform the Affected Person in Writing if the protest was not timely filed;
- (b) Inform the Affected Person if it failed to meet the requirements of set forth above in section (3) of this Rule and the reasons for that failure;
- (c) If the protest was timely filed and provides the information required by section (3) of this Rule, issue a decision in Writing and provide that decision to the Affected Person within a reasonable period of time;
- (d) If Metro denies the protest, inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contracting Board.
- (5) **Optional Metro Response**. In addition to the requirements of subsection (4), Metro may do any of the following:
 - (a) Agree with the protest and take any corrective action necessary;
 - (b) Issue a Written response to the protest and provide that decision to the Affected Person;
- (c) Refer the protest and any response from the Procurement Officer to the Local Contract Review Board for decision;

- (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.
- (6) **Judicial Review**. An Affected Person may not seek judicial review of Metro's approval of a Sole Source Procurement unless it has complied fully with the protest requirements of this Rule and received a final decision denying the protest either from the Procurement Officer of the Local Contract Review Board if referred to the Board by the Procurement Officer. Judicial review of the sole-source Procurement protest will be in accordance with ORS 279B.420. Judicial review is not available if Metro elects not to make a Sole Source Procurement.

Stats. Implemented: ORS 279B.075

47-0720 Protests and Judicial Review of Multi-Tiered and Multistep Solicitations

- (1) **Purpose**. An Affected Offeror may protest exclusion from the Competitive Range or from subsequent tiers or steps of a Solicitation in accordance with the applicable Solicitation Document. When such a protest is permitted by the Solicitation Document, then pursuant to ORS 279B.420(3)(f), before seeking judicial review, an Affected Offeror must file a Written protest with Metro and exhaust all administrative remedies.
- (2) **Basis for Protest**. An Affected Offeror may protest its exclusion from a tier or step of competition only if:
 - (a) The Affected Offeror is Responsible and submitted a Responsive Offer;
- (b) Metro made a mistake that, if corrected, would have made the Affected Person eligible to participate in the next stage of the Procurement;
- (c) In the case of a Request for Proposals, the exercise of judgment used by the evaluation committee members in scoring Written Proposals and oral interviews, including the use of outside expertise, was biased or not exercised in good faith. The unbiased, good faith judgment of Evaluation is not grounds for protest. The unbiased, good faith judgment of evaluation committee members will not be a basis for sustaining a protest.
- (3) **Delivery**. Unless otherwise specified in the Solicitation Document, an Affected Offeror must deliver a Written protest to the Procurement Officer within seven (7) Days after issuance of the notice of the Competitive Range or notice of subsequent tiers or steps.
- (4) **Content of Protest**. The Affected Offeror's protest must be in Writing and must include the following information:
- (a) Sufficient information to identify the errors that led to the Affected Person's exclusion from the Competitive Range or from subsequent stages of a Procurement;
 - (b) A detailed statement of all the legal and factual grounds for the protest;
- (c) Evidence or supporting documentation that supports the grounds on which the protest is based;
 - (d) A description of the resulting harm to the Affected Person; and
 - (e) The relief requested.
- (5) Required Metro Response. Metro shall take the following actions, as appropriate:

- (a) Inform the Affected Offeror in Writing if the protest was not timely filed;
- (b) Inform the Affected Offeror if it failed to meet the requirements set forth above in section (4) of this Rule and the reasons for that failure;
- (c) If the protest was timely filed and provides the information required by section (4) of this Rule, issue a decision in Writing and provide that decision to the Affected Offeror within a reasonable period of time.
- (d) If Metro denies the protest, inform the Affected Offeror if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contracting Board.
- (6) **Optional Metro Response**. In addition to the requirements of subsection (5) of this Rule, the Procurement Officer may do any of the following:
 - (a) Agree with the protest and take any corrective action necessary;
 - (b) Issue a Written response to the protest and provide that decision to the Affected Person;
- (c) Refer the protest and any response by the Procurement Officer to the Local Contract Review Board for decision; or
- (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.
- (7) **Judicial Review**. Judicial review of Metro's decision relating to a multi-tiered or multistep Solicitation protest must be in accordance with ORS 279B.420. An Affected Person may not seek judicial review unless it has complied fully with the protest requirements of this Rule and has exercised all administrative appeal rights. Judicial review is not available if Metro elects not to make a Procurement.

Stats. Implemented: ORS 279B.060

47-0730 Protests and Judicial Review of Solicitations

- (1) **Purpose**. A prospective Offeror may protest the Procurement process or the Solicitation Document for a Contract solicited under ORS 279B.055, 279B.060 and 279B.085 as set forth in ORS 279B.405(2). Pursuant to ORS 279B.405(3), before seeking judicial review, a prospective Offeror must file a Written protest with Metro and exhaust all administrative remedies.
- (2) **Delivery**. Unless otherwise specified in the Solicitation Document, a prospective Offeror must deliver a Written protest to the Procurement Officer within seven (7) Days after a Solicitation Document is first advertised. Metro may not consider a protest submitted after the timeline established for submitting such protest under this Rule or such different time period as may be provided in the Solicitation Document. A Written Protest of any Addenda must be submitted by the close of the next business day after issuance of the Addenda.
- (3) **Content of Protest**. In addition to the information required by ORS 279B.405(4), a prospective Offeror's Written protest shall include a statement of the desired changes to the Procurement process or the Solicitation Document that the prospective Offeror believes will remedy the conditions upon which the prospective Offeror based its protest.
- (4) **Required Metro Response.** Metro shall take the following actions, as appropriate:
 - (a) Inform the Affected Person in Writing if the protest was not timely filed;

- (b) Inform the Affected Person if it failed to meet the requirements of set forth above in section (3) of this Rule and the reasons for that failure;
- (c) If the protest was timely filed and provides the information required by section (3) of this Rule, issue a decision in Writing and provide that decision to the Affected Person no less than three (3) business days before Offers are due, unless a Written determination is made by Metro that circumstances exist that require a shorter time limit;
- (d) If Metro denies the protest, inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contracting Board. When the decision is final, the Affected Person must seek judicial review before the Opening of Bids, Proposals or Offers.
- (5) **Optional Metro Response**. In addition to the requirements of subsection (4), Metro may do any of the following:
 - (a) Agree with the protest and take any corrective action necessary;
 - (b) Issue a Written response to the protest and provide that decision to the Affected Person;
- (c) Refer the protest and any response by the Procurement Officer to the Local Contract Review Board for decision;
- (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest, including without limitation, extending Closing if Metro determines an extension is necessary to consider the protest and to issue an Addenda to the Solicitation Document.
- (6) **Clarification**. Prior to the deadline for submitting a protest, a prospective Offeror may request that Metro clarify any provision of the Solicitation Document. Metro's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on Metro unless Metro amends the Solicitation Document by Addenda.
- (7) **Judicial Review**. Judicial review of Metro's decision relating to a Solicitation protest must be in accordance with ORS 279B.405. An Affected Person may not seek judicial review unless it has complied fully with the protest requirements of this section and exercised all administrative appeal rights. Judicial review is not available if Metro withdraws the Solicitation Document that was the subject of the protest.

Stat. Auth.: ORS 279A.065 & ORS 279B.405 Stats. Implemented: ORS 279B.405

47-0740 Protests and Judicial Review of Contract Award

- (1) **Generally**. An Offeror may protest the award of a Contract, or the intent to award of a Contract, whichever occurs first, only if the conditions set forth in ORS 279B.410(1) are satisfied. In the case of a Request for Proposals, disagreement with the judgment exercised in scoring by evaluators is not a basis for protest.
- (2) **Exhaustion of Remedies**. An Offeror must file a Written protest with the Purchasing Officer and exhaust all administrative remedies before seeking judicial review of Metro's Contract award decision.
- (3) **Delivery**. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest to Metro within seven (7) Days after the award of a Contract, or issuance of the notice of intent to award the Contract, whichever occurs first.
- (4) **Content of Protest**. An Offeror's Written protest shall include the following information:

- (a) Sufficient information to identify the award that is the subject of the protest;
- (b) A detailed statement of all the legal and factual grounds for the protest (see section (1) of this Rule);
- (c) Evidence or supporting documentation that supports the grounds on which the protest is based;
 - (d) A description of the resulting harm to the Affected Person; and
 - (e) The relief requested.
- (5) **Required Metro Response**. Metro shall take the following actions, as appropriate:
 - (a) Inform the Affected Person in Writing if the protest was not timely filed;
- (b) Inform the Affected Person if it failed to meet the content requirements set forth above in section (4) of this Rule the reasons for that failure;
- (c) If the protest was timely filed and provides the information required by ORS 279B.410(2), issue a decision in Writing and provide that decision to the Affected Person within a reasonable time of the receipt of the protest;
- (d) If Metro denies the protest, inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contract Review Board.
- (6) **Optional Metro Response**. In addition to the requirements of section (5) above, Metro may do any of the following:
- (a) Agree with the protest and issue a revised Notice of Intent to award or take any other corrective action that may be necessary to ensure that the Contract is awarded to the appropriate Offeror;
 - (b) Issue a Written response to the protest and provide that decision to the Affected Person;
- (c) Refer the protest and any response by the Procurement Officer to the Local Contract Review Board for decision;
- (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.
- (7) **Judicial Review**. Judicial review of Metro's decision relating to a Contract award must be in accordance with ORS 279B.415 and this Rule. An Affected Person may not seek judicial review of a Contract award unless it has complied fully with the protest requirements of this section. Judicial review is not available if Metro elects not to make an award.

Stat. Auth.: ORS 279A.065 & ORS 279B.410 Stats. Implemented: ORS 279B.410 & ORS 279B.415

47-0745 Protests and Judicial Review of Qualified Products List Decisions

(1) **Purpose**. A prospective Offeror may protest Metro's decision to exclude the prospective Offeror's Goods from Metro's qualified products list under ORS 279B.115. A prospective Offeror must file a Written protest and exhaust all administrative remedies before seeking judicial review of Metro's qualified products list decision.

- (2) **Delivery**. Unless otherwise stated in Metro's notice to prospective Offerors of the opportunity to submit Goods for inclusion on the qualified products list, a prospective Offeror must deliver a Written protest to Metro within seven (7) Days after issuance of Metro's decision to exclude the prospective Offeror's Goods from the qualified products list.
- (3) **Content of Protest**. The prospective Offeror's protest shall be in Writing and must specify the grounds upon which the protest is based.
- (4) **Metro Response**. Metro may not consider a prospective Offeror's qualified products list protest submitted after the timeline established for submitting such protest under this Rule, or such different time period as may be provided in Metro's notice to prospective Offerors of the opportunity to submit Goods for inclusion on the qualified products list. Metro shall issue a Written disposition of the protest in a timely manner. If Metro upholds the protest, it shall include the successful protestor's Goods on the qualified products list.
- (5) **Judicial Review**. Judicial review of Metro's decision relating to a qualified products list protest must be in accordance with ORS 279B.420.

Stats. Implemented: ORS 279B.115

47-0750 Judicial Review of Other Violations

Any violation of ORS Chapter 279A or ORS 279B by Metro for which no judicial remedy is otherwise provided in the State Code is subject to judicial review as set forth in ORS 279B.420.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.420

47-0760 Review of Prequalification and Debarment Decisions

- (1) Review of Metro's pregualification and debarment decisions is as set forth in ORS 279B.425.
- (2) The Local Contract Review Board hereby delegates its authority to the Chief Operating Officer for the purposes of receiving notice that a Person has appealed. Upon receipt of the notice the Chief Operating Officer may notify the Person appealing of a time and place of a hearing designed to consider the appeal within thirty (30) Days or a date mutually agreed upon by both parties.
- (3) The Local Contract Review Board delegates its authority to conduct a hearing to the Chief Operating Officer. The Chief Operating Officer may subdelegate the authority to conduct a hearing to any person the Chief Operating Officer deems appropriate, including the Procurement Officer.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.425

47-0800 Amendments to Contracts and Price Agreements

- (1) **Generally**. Metro may amend a Contract reasonably related to the scope of work under the original Contract without additional competition.
- (2) **Contract Increases.** Contract amendments for additional Goods and Services are allowed under the following circumstances, without any additional approvals:

- (a) The original Contract was issued following a competitive Solicitation or alternative process (e.g. as a Special Procurement or Sole Source Procurement) and unit prices or additive alternates were provided that established the cost basis for the additional Goods or Services and a binding obligation exists on the parties covering the terms and conditions of the additional work;
- (b) The original Contract was issued pursuant to a declaration of Emergency, in accordance with Rule 47-0280;
- (c) The additional Goods or Services are required by reason of existing or new laws, rules, regulations or ordinances of federal, state or local agencies, that affect performance of the original Contract;
- (d) The amendment resolves a bona fide dispute with the Contractor and is within the general scope of the original Contract; or
- (e) The aggregate increase resulting from all amendments to the Contract does not exceed twenty-five percent (25%) of the original Contract price. Escalation clauses agreed to in the original Contract (e.g. COLA increases) are excluded from the 25% calculation.
- (3) **Limits on Contract Increases; Authority**. If the circumstances set forth in section (2) of this Rule are not applicable, Metro may nonetheless amend a Contract for additional Goods and Services if the amendment is Advantageous to Metro. For Contracts that exceed \$150,000, such a determination shall be made by the Chief Operating Officer prior to authorization of delivery of goods or performance of the services. All Contract Amendments processed under this section (3) shall be treated as an Unauthorized Purchase in accordance with Rule 46-0200.
- (4) **Renegotiated Contract**. Metro may renegotiate the terms and conditions of a Contract without additional competition and amend a Contract if it is Advantageous subject to the following conditions:
- (a) The Goods or Services to be provided under the amended Contract are the same as the Goods or Services to be provided under the unamended Contract; and
- (b) Metro determines that, with all things considered, the amended Contract is at least as favorable to Metro as the unamended Contract; and
- (c) The amended Contract does not have a total term greater than allowed in the Solicitation Documents, if any, or if no Solicitation Documents, as described in the sole source notice or the approved Special Procurement, if any, after combining the initial and extended terms. For example, a one-year Contract described as renewable each year for up to four additional years, may be renegotiated as a two to five-year Contract, but not beyond a total of five years.
- (5) **Small or Intermediate Contracts**. Metro may amend a Contract awarded as a small or Intermediate Procurement pursuant Rule 47-0265 for Small Procurements or Rule 47-0270 for Intermediate Procurements.
- (6) **Emergency Contracts**. Metro may amend a Contract awarded as an Emergency Procurement if the Emergency justification for entering into the Contract still exists, and the amendment is necessary to address the continuing Emergency.
- (7) **Price Agreements**. Metro may amend or terminate a Price Agreement as follows:
 - (a) As permitted by the Price Agreement;
 - (b) As permitted by this Rule;

- (c) Metro fails to receive funding, appropriations, limitations, allotments or other expenditure authority, including the continuation of program operating authority sufficient, as determined in the discretion of Metro, to sustain purchases at the levels contemplated at the time of contracting;
- (d) Any change in law or program termination that makes purchases under the price agreement no longer authorized or appropriate for Metro's use; or
 - (e) As otherwise permitted by applicable law.

Stats. Implemented: ORS 279A.065 & ORS 279B.140

47-0820 Records Maintenance; Right to Audit Records

- (1) Contractors and subcontractors shall maintain all fiscal records relating to a Contract executed with Metro in accordance with generally accepted accounting principles. In addition, Contractors and subcontractors shall maintain any other records necessary to clearly document:
- (a) Contract performance, including, but not limited to, compliance with plans and specifications, compliance with fair contracting and employment programs, compliance with Oregon law on payment of wages and accelerated payment provisions, and any and all requirements imposed on the Contractor or subcontractor under the Contract or subcontract;
 - (b) Any claims arising from or relating to their performance under a Contract;
 - (c) Any cost and pricing data; and,
 - (d) Payment to suppliers and subcontractors.
- (2) Such records must be maintained for a period of six years from the date of final completion of the Contract or until the conclusion of any audit, controversy or litigation arising out of or related to a Contract, whichever is longer.
- (3) Contractors and subcontractors shall make all their records available to Metro (and its authorized representatives, including but not limited to the staff of any Metro department and the Metro Auditor) within the boundaries of the Metro region, at reasonable times and places regardless of whether litigation has been filed on any claims. If the records are not made available within the boundaries of Metro, the Contractor or subcontractor shall pay all costs for Metro employees, and any necessary consultants hired by Metro, including travel, per diem costs, salary, and any other expenses incurred by Metro in sending its employees or consultants to examine, audit, inspect, and copy those records. If the Contractor elects to have such records outside these boundaries, the costs paid by the Contractor to Metro for inspection, auditing, examining and copying those records are not recoverable costs in any legal proceeding.
- (4) Metro and its authorized representatives (including but not limited to the staff of any Metro department and the Metro Auditor) are entitled to inspect, examine, copy and audit the books and records of any Contractor or subcontractor upon request by Metro for any reason, including any documents that may be placed in escrow according to any Contract requirements. The records that may be inspected and copied include financial documents of the Contractor, including tax returns and financial statements. Metro will keep such documents confidential to the extent permitted by Oregon law, subject to subsection 5 below.

- (5) Contractors and subcontractors shall disclose the records requested by Metro and agree to their admission as evidence in any proceeding between the parties, including, but not limited to a court proceeding, arbitration, mediation or other alternative dispute resolution process.
- (6) In the event that the records disclose that Metro is owed money or establishes that any portion of any claim made against Metro is not warranted, the Contractor or subcontractor shall pay all costs incurred by Metro in conducting the audit and inspection. Such costs may be withheld from any sum due or that becomes due to the Contractor by Metro.
- (7) Failure of the Contractor or subcontractor to keep or disclose records as required may result in disqualification as a Bidder or Proposer for future Metro Contracts or may result in a finding that the Contractor or subcontractor is not a Responsible Bidder or Proposer.

DIVISION 48

CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING, PHOTOGRAMMETRIC MAPPING, TRANSPORTATION PLANNING, LAND SURVEYING AND RELATED SERVICES CONTRACTS

48-0100 Application

These Division 48 Rules implement ORS 279C and apply to the screening and selection of Architects, Engineers, Photogrammetrists, Transportation Planners, Land Surveyors and providers of Related Services. These Rules set forth the procedures through which Metro will select consultants to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services.

Stat. Auth.: ORS 279A.065; ORS 279A.070 Stats. Implemented: ORS 279A.065

48-0110 Definitions

The definitions for this Division 48 are found in Division 10, except the following definitions apply only to this Division 48:

- (1) "Consultant" means an Architect, Engineer, Photogrammetrist, Transportation Planner, Land Surveyor or provider of Related Services, as those terms are defined in ORS 279C.100. A Consultant includes a business entity that employs Architects, Engineers, Photogrammetrists, Transportation Planners, Land Surveyors or providers of Related Services, or any combination of the foregoing.
- (2) "Estimated Fee" means Metro's reasonably projected fee to be paid for a Consultant's services under the anticipated Contract, excluding all anticipated reimbursable or other non-professional fee expenses. The Estimated Fee is used solely to determine the applicable Contract Solicitation method and is distinct from the total amount payable under the Contract.
- (3) **"Formal Selection Procedure"** means the Consultant selection method provided for under Rule 48-0220.
- (4) "Intermediate Selection Procedure" means the Consultant selection method provided for under Rule 48-0210.
- (5) "Price Agreement," for purposes of this Division 48, is limited to mean an agreement related to the procurement of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services, under agreed-upon terms and conditions, including, but not limited to terms and conditions of later work orders or task orders for Project-specific Services, and which may include Consultant compensation information, with:
 - (a) No guarantee of a minimum or maximum purchase; or
- (b) An initial work order, task order or minimum purchase, combined with a continuing Consultant obligation to provide Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services in which Metro does not guarantee a minimum or maximum additional purchase.

- (6) "**Project**" means all components of Metro's planned undertaking that give rise to the need for a Consultant's Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services under a Contract.
- (7) "**Proposer**" means a Consultant who submits a Proposal to Metro in response to a Request for Proposals.
- (8) "Related Services" means Personal Services, other than Architectural, Engineering and Land Surveying Services, that are related to the planning, design, engineering or oversight of public improvement projects or components thereof, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, environmental impact studies, hazardous substances or hazardous waste or toxic substances testing services, wetland delineation studies, wetland mitigation studies, Native American studies, historical research services, endangered species studies, rare plant studies, biological services, archaeological services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner's representative services or land-use planning services.
- (9) "Transportation Planning Services" are defined in ORS 279C.100. Transportation Planning Services include only Project-specific transportation planning involved in the preparation of categorical exclusions, environmental assessments, environmental impact statements and other documents required for compliance with the National Environmental Policy Act, 42 USC 4321 et. seq. Transportation Planning Services do not include transportation planning for corridor plans, transportation system plans, interchange area management plans, refinement plans and other transportation plans not directly associated with an individual Project that will require compliance with the National Environmental Policy Act, 42 USC 4321 et. seq. Transportation Planning Services also do not include transportation planning for Projects not subject to the National Environmental Policy Act, 42 USC 4321 et. seq.

Stat. Auth.: ORS 279A.065, ORS 279A.070 Stats. Implemented: ORS 279A.065

48-0120 List of Pre-Qualified Consultants; Performance Record

- (1) Metro may conduct Request for Qualifications process to compile a list of Consultants who are interested in providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services. The RFQu will request prospective Consultants provide Metro with statements of qualifications and related performance information. Metro may use this information to create a list of pre-qualified Consultants.
- (2) Metro may compile and maintain a record of each Consultant's performance under Metro Contracts, including information obtained from Consultants during an exit interview. Upon request and in accordance with the Oregon Public Records Law (ORS 192.410 through 192.505), Metro may make available copies of the records.
- (3) Metro shall keep a record of all Contracts and will make these records available to the public consistent with the requirements of the Oregon Public Records Law (ORS 192.410 to 192.505). Metro will include the following information in the record:
 - (a) Consultant's principal office address and all office addresses in the State of Oregon;
- (b) Consultant's direct expenses on each Contract whether or not those direct expenses are reimbursed. "Direct expenses" include all amounts that are directly attributable to Consultant's services

performed under each Contract, including personnel travel expenses, and that would not have been incurred but for the services being performed. The record must include all personnel travel expenses as a separate and identifiable expense on the Contract; and

(c) The total number of Contracts Awarded to each Consultant over the immediately preceding 10-year period from the date of the record.

Stat. Auth.: ORS 279A.065(6)(a); ORS 279A.070; Or. Laws 2011, chapter 458; and Or. Laws 2013, chapter 522 Stats. Implemented: ORS 279A.065; ORS 279C.110; Or. Laws 2011, chapter 458; and Or. Laws 2013, chapter 522

48-0130 Applicable Selection Procedures; Pricing Information; Disclosure of Proposals; Conflicts of Interest

- (1) When selecting the most qualified Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Metro shall follow the applicable selection procedure under either Administrative Rule 48-0200 (Direct Appointment Procedure), 48-0210 (Intermediate Selection Procedure) or 48-0220 (Formal Selection Procedure). When selecting a Consultant under this section(1), Metro may solicit or use pricing policies and pricing Proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, to determine a Consultant's compensation **only after** Metro has selected the most qualified Consultant in accordance with the applicable selection procedure.
- (2) The restriction on Metro's Solicitation or use of pricing policies, pricing Proposals or other pricing information does not apply to selection procedures used by Metro to select a Consultant when (a) the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services for the Project do not exceed \$100,000 (b) the Consultant will be performing Related Services or (c) in an Emergency.
- (3) Metro is not required to follow the selection procedures in section (1) of this Rule, when Metro has established Price Agreements with more than one Consultant and is selecting a single Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services under an individual work order or task order. Provided, however, the criteria and procedures Metro uses to select a single Consultant, when Metro has established Price Agreements with more than one Consultant, must meet the requirements of Administrative Rule 48-0270 (Price Agreements).
- (4) For purposes of these Division 48 Rules, a "mixed" Contract is one requiring the Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services and also provide other Services or other related Goods under the Contract. Metro's classification of a procurement that will involve a "mixed" Contract will be determined by the predominant purpose of the Contract. Metro will determine the predominant purpose of the Contract by determining which of the Services involves the majority of the total Estimated Fee to be paid under the Contract. If the majority of the total Estimated Fee to be paid under the Contract is for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Metro shall comply with the requirements of ORS 279C.110 and Administrative Rule 48-0130(1). If majority of the total Estimated Fee to be paid under the Contract is for Related Services, Metro shall comply with the requirements of ORS 279C.120 and Administrative Rule 48-0130(2). If the majority of the total Estimated Fee to be paid under the Contract is for some other Services or Goods under the Public Contracting State Code, Metro shall comply with the applicable

provisions of the Public Contracting State Code and Divisions 46, 47 and 49 of these Rules that match the predominant purpose of the Contract.

- (5) Consistent with the requirements of ORS 279C.107 and the remaining requirements of ORS 279C.100, 279C.105 and 279C.110 through 279C.125, subsections (a) through (c) apply to Proposals received by Metro for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services:
- (a) For purposes of Proposals received by Metro under Administrative Rule 48-0200 (Direct Appointment Procedure), a formal notice of intent to award is not required. As a result, while Metro may make Proposals under 48-0200 (Direct Appointment Procedure) open for public inspection following Metro's decision to begin Contract negotiations with the selected Consultant, 48-0200 Proposals are not required to be open for public inspection until after Metro has executed a Contract with the selected Consultant.
- (b) In the limited circumstances permitted by ORS 279C.110, 279C.115 and 279C.120, where Metro is conducting discussions or negotiations with Proposers who submit Proposals that Metro has determined to be closely competitive or to have a reasonable chance of being selected for award, Metro may open Proposals so as to avoid disclosure of Proposal contents to competing Proposers, consistent with the requirements of ORS 279C.107. Otherwise, Metro may open Proposals in such a way as to avoid disclosure of the contents until after Metro executes a Contract with the selected Consultant. If Metro determines that it is in the best interest of Metro to do so, Metro may make Proposals available for public inspection following Metro's issuance of a notice of intent to award a Contract to a Consultant; and
 - (c) Disclosure of Proposals and Proposal information is otherwise governed by ORS 279C.107.
- (6) As required by ORS 279C.307, pertaining to requirements to ensure the objectivity and independence of providers of certain Personal Services which are procured under ORS chapter 279C, Metro may not:
- (a) Procure the Personal Services identified in ORS 279C.307 from a Contractor or an affiliate of a Contractor who is a party to the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the Personal Services; or
- (b) Procure the Personal Services identified in ORS 279C.307 through the Public Contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the Personal Services.
- (7) The requirements of ORS 279C.307 and section (6) of this Rule apply in the following circumstances, except as provided in section (8) of this Rule:
- (a) Metro requires the Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Public Contract or performance under a Public Contract that is subject to ORS chapter 279C. A Public Contract that is "subject to ORS chapter 279C" includes a Public Contract for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, a Public Contract for Related Services or a Public Contract for construction services under ORS chapter 279C.
- (b) The Procurements of Personal Services subject to the restrictions of ORS 279C.307 include, but are not limited to, the following:

- A. Procurements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, which involve overseeing or monitoring the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C;
- B. Procurements for commissioning services, which involve monitoring, inspecting, evaluating or otherwise overseeing the performance of a Contractor providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C;
- C. Procurements for project management services, which involve administration, management, monitoring, inspecting, evaluating compliance with or otherwise overseeing the performance of a Contractor providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, construction services subject to ORS chapter 279C, commissioning services or other Related Services for a Project;
- D. Procurements for special inspections and testing services, which involve inspecting, testing or otherwise overseeing the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C; and
- E. Procurements for other Related Services or Personal Services, which involve administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing the Public Contracts described in section (7)(a) of this Rule.
- (8) The restrictions of ORS 279C.307 do not apply in the following circumstances, except as further specified below:
- (a) To Metro's Procurement of both design services and construction services through a single "Design-Build" Procurement, as that term is defined in Administrative Rule 49-0610. Such a Design-Build Procurement includes a Procurement under an Energy Savings Performance Contract, as defined in ORS 279A.010. Provided, however, the restrictions of ORS 279C.307 do apply to Metro's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Design-Build Contract or performance under such a Contract resulting from a Design-Build Procurement; and
- (b) To Metro's Procurement of both pre-construction services and construction services through a single Procurement of Construction Manager/General Contractor Services, as that term is defined in ORS 279C.332(3). Provided, however, the restrictions of ORS 279C.307 do apply to Metro's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a Construction Manager/General Contractor Services Contract or performance under such a Contract resulting from a Procurement of Construction Manager/General Contractor Services.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458 Stats. Implemented: ORS 279A.065, 279C.100-279C.125, OL 2009, ch. 880, sec. 11, OL 2011, ch 458

Selection Procedures

48-0200 Direct Appointment Procedure

(1) Metro may enter into a Contract directly with a Consultant without following the selection procedures set forth elsewhere in these Rules if:

- (a) Emergency. Metro finds that an Emergency exists;
- (b) **Small Estimated Fee**. The Estimated Fee to be paid under the Contract does not exceed \$10,000;
- (c) **Pre-Qualified Consultant**. The Consultant has been pre-qualified pursuant to Metro's process described in Rule 48-0120 and the Estimated Fee to be paid under the Contract does not exceed \$100,000; or
 - (d) Continuation of Project. Where the Contract meets the following requirements:
- A. The services consist of or are related to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services that have been substantially described, planned or otherwise previously studied in an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services rendered under the earlier Contract;
- B. Metro used either the formal selection procedure under Administrative Rule 48-0220 (Formal Selection Procedure) or the Intermediate selection procedure applicable to selection of the Consultant at the time of original selection to select the Consultant for the earlier Contract.
- (2) Metro may select a Consultant for a Contract awarded under (1)(a), (1)(b), or (1)(d) above from the following sources:
 - (a) Metro's current list of pre-qualified Consultants created under Administrative Rule 48-0120;
 - (b) A list of Consultants from another public jurisdiction; or
- (c) Consultants offering the required Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services that Metro reasonably can identify under the circumstances.
- (3) Metro shall direct negotiations with a Consultant selected under this Rule toward obtaining Written agreement on:
 - (a) The Consultant's performance obligations and performance schedule;
- (b) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to Metro as determined solely by Metro, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services; and
 - (c) Any other provisions Metro believes to be in Metro's best interest to negotiate.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279C110 & 279C.115, OL 2011, ch 458

48-0210 Intermediate Selection Procedure

- (1) Metro may use the Intermediate Selection Procedure described in this Rule to obtain a Contract if the Estimated Fee is expected not to exceed \$150,000.
- (2) When using the Intermediate Selection Procedure on the basis of qualifications alone or, for Related Services, on the basis of price and qualifications Metro shall:

- (a) Create a written Intermediate Request for Proposals that includes at a minimum the following:
- A. A description of the Project for which a Consultant's Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services are needed and a description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services that will be required under the resulting Contract;
 - B. The anticipated Contract performance schedule;
- C. Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including construction services;
 - D. The date and time Intermediate Proposals are due and other directions for submitting Intermediate Proposals;
- E. Criteria upon which the most qualified Consultant will be selected. Selection criteria may include, but are not limited to, the following:
 - (i) The amount and type of resources and number of experienced staff the Consultant has committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the Intermediate Request for Proposals within the applicable time limits, including the current and projected workloads of such staff and the proportion of time such staff would have available for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services;
 - (i) Proposed management techniques for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the Intermediate Request for Proposals;
 - (ii) A Consultant's capability, experience and past performance history and record in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services, including but not limited to quality of work, ability to meet schedules, cost control methods and Contract administration practices;
 - (iii) A Consultant's approach to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the Intermediate Request for Proposals and design philosophy, if applicable;
 - (iv) A Consultant's geographic proximity to and familiarity with the physical location of the Project;
 - (v) Volume of work, if any, previously awarded to a Consultant, with the objective of effecting equitable distribution of Contracts among qualified Consultants, provided such distribution does not violate the principle of selecting the most qualified Consultant for the type of professional services required;
 - (vi) A Consultant's ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses; and
 - (vii) If Metro is selecting a Consultant to provide Related Services, pricing policies and pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead.

- F. A Statement that Proposers responding to the Intermediate Request for Proposals do so solely at their expense, and Metro is not responsible for any Proposer expenses associated with the Intermediate Request for Proposals;
- (b) Provide the Intermediate Request for Proposals to a minimum of three (3) prospective Consultants. In accordance with Metro's Equity in Contracting Administrative Rules, Departments must also complete a COBID search and, if available, one Minority-owned business, one Women-owned business, one Emerging Small Business and one Service-disabled Veteran business must be solicited.
- (c) Review and rank all Intermediate Proposals received according to the criteria set forth in the Intermediate Request for Proposals.
- (3) When using the Intermediate Selection Procedure for Related Services on the basis of price Proposals and other pricing information Metro will also include pricing criteria upon which the highest ranked Consultant will be selected. Pricing criteria may include, but are not limited to, the total price for the Related Services described in the Intermediate Request for Proposals, Consultant pricing policies and other pricing information such as the Consultant's estimated number of staff hours needed to perform the Related Services described in the Intermediate Request for Proposals, expenses, hourly rates and overhead.
- (4) If Metro does not cancel the Intermediate Request for Proposals after it reviews the Intermediate Proposals and ranks each Intermediate Proposal, Metro will begin negotiating a Contract with the highest ranked Consultant. Metro will direct Contract negotiations toward obtaining written agreement on the following:
 - (a) The Consultant's performance obligations and performance schedule;
- (b) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to Metro as determined solely by Metro, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services; and
 - (c) Any other provisions Metro believes to be in Metro's best interest to negotiate.
- (5) Metro shall, either orally or in Writing, formally terminate negotiations with the highest ranked Intermediate Proposer, if Metro and the proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. Metro may thereafter negotiate with the second ranked Intermediate Proposer, and if necessary, with the third ranked proposer, until negotiations result in a Contract. If negotiations with any of the top three (3) Intermediate Proposers do not result in a Contract within a reasonable amount of time, Metro may end the particular intermediate Solicitation and thereafter may proceed with a new intermediate Solicitation under this Rule or proceed with a formal Solicitation under Administrative Rule 48-0220 (Formal Selection Procedure).

(6) Metro must terminate the Intermediate Selection Procedure and proceed with the formal selection procedure under Administrative Rule 48-0220 if the scope of the anticipated Contract is revised during negotiations so that the Estimated Fee will exceed \$150,000.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458 Stats. Implemented: ORS 279C.110, OL 2011, ch 458

48-0220 Formal Selection Procedure

- (1) **General**. Metro shall use the formal selection procedure described in this Rule to select a Consultant if the Consultant cannot be selected under either 48-0200 (Direct Appointment Procedure) or under 48-0210 (Intermediate Selection Procedure). The formal selection procedure described in this Rule may otherwise be used at Metro's discretion.
- (2) Advertisement. When using the formal selection procedure Metro shall obtain Contracts through public advertisement of RFPs, or Requests for Qualifications followed by RFPs. Advertisement of each RFP and RFQu must be in accordance with the requirements of Rule 47-0300.
- (a) Metro shall publish the advertisement within a reasonable time before the deadline for the Proposal submission or response to the RFQu or RFP, but in no event fewer than fourteen (14) Days before the Closing date set forth in the RFQu or RFP.
 - (b) Metro shall include a brief description of the following items in the advertisement.
 - A. The Project;
- B. A description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services Metro seeks;
 - C. How and where Consultants may obtain a copy of the RFQu or RFP; and
 - D. The deadline for submitting a Proposal or response to the RFQu or RFP.
- (3) **Request for Qualifications Procedure**. Metro may use the Request for Qualifications procedure to evaluate potential Consultants and establish a short list of qualified Consultants to whom Metro may issue an RFP for some or all of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFQu.
 - (a) Metro shall include the following, at a minimum, in each RFQu:
 - A. A brief description of the Project for which Metro is seeking a Consultant;
- B. A description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services Metro seeks for the Project;
- C. Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including but not limited to construction services;
 - D. The deadline for submitting a response to the RFQu;
- E. A description of required Consultant qualifications for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services Metro seeks;

- F. The RFQu evaluation criteria, including weights, points or other classifications applicable to each criterion;
- G. A statement whether or not Metro will hold a pre-qualification meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFQu and if a pre-qualification meeting will be held, the location of the meeting and whether or not attendance is mandatory; and
- H. A statement that Consultants responding to the RFQu do so solely at their expense, and that Metro is not responsible for any Consultant expenses associated with the RFQu.
 - (b) Metro may include a request for any or all of the following in each RFQu:
- A. A statement describing Consultants' general qualifications and related performance information;
- B. A description of Consultants' specific qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQu including Consultants' committed resources and recent, current and projected workloads;
- C. A list of similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services and references concerning past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration;
- D. A copy of all records, if any, of Consultants' performance under Contracts with any other Contracting Agency;
- E. The number of Consultants' experienced staff available to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFQu, including such personnel's specific qualifications and experience and an estimate of the proportion of time that such personnel would spend on those services;
- F. Consultants' approaches to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFQu and design philosophy, if applicable;
- G. Consultants' geographic proximity to and familiarity with the physical location of the Project;
- H. Consultants' Ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;
- I. If Metro is selecting a Consultant to provide Related Services, Consultants' pricing policies and pricing proposals or other pricing information, including the number of hours estimated for the services required, expenses, hourly rates and overhead;
- J. Consultants' ability to assist Metro in complying with the energy technology requirements of ORS 279C.527 and 279C.528; and
- K. Any other information Metro deems reasonably necessary to evaluate Consultants' qualifications.

- (c) RFQu Evaluation Committee. Metro shall establish an RFQu evaluation committee of at least three (3) individuals to review, score and rank the responding Consultants according to the Solicitation criteria. Metro may appoint to the evaluation committee Metro employees or employees of other public entities with experience in Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, Related Services, construction services or public contracting. Metro may include on the evaluation committee private practitioners of architecture, engineering, photogrammetry, transportation planning, land surveying or related professions. Metro may designate one member of the evaluation committee as the evaluation committee chairperson.
- (d) Metro may use any reasonable screening or evaluation method to establish a short list of qualified Consultants, including but not limited to, the following:
- A. Requiring Consultants responding to an RFQu to achieve a threshold score before qualifying for placement on the short list;
 - B. Placing a pre-determined number of the highest scoring Consultants on a short list;
- C. Placing on a short list only those Consultants with certain essential qualifications or experience, whose practice is limited to a particular subject area, or who practice in a particular geographic locale or region, provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFQu.
- (e) After the evaluation committee reviews, scores and ranks the responding Consultants, Metro shall establish a short list of at least three (3) qualified Consultants, if feasible; provided however, if four (4) or fewer Consultants responded to the RFQu or if fewer than three (3) Consultants fail to meet Metro's minimum requirements, then:
 - A. Metro may establish a short list of fewer than three (3) qualified Consultants; or
 - B. Metro may cancel the RFQu and issue an RFP.
- (f) No Consultant will be eligible for placement on Metro's short list established under subsection (3)(d) of this Rule if Consultant or any of Consultant's principals, partners or associates are members of Metro's RFQu evaluation committee.
- (g) Except when the RFQu is cancelled, Metro shall provide a copy of the subsequent RFP to each Consultant on the short list.
- (4) **Formal Selection of Consultants through Request for Proposals**. Metro shall use the procedure described below when issuing an RFP for a Contract described in section (1) of this Rule.
- (a) **RFP Required Contents**. When using the formal selection procedure Metro shall include at least the following in each RFP, whether or not the RFP is preceded by an RFQu:

- A. General background information, including a description of the Project and the specific Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services sought for the Project, the estimated time period during which the Project is to be completed, and the estimated time period in which the specific Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services sought will be performed;
- B. The RFP evaluation process and criteria which will be used to select the most qualified Proposer, including the weights, number of points or other classifications applicable to each criterion. If Metro does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value. Evaluation criteria may include, but are not limited to, the following:
 - (i) Proposers' availability and capability to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP;
 - (ii) Experience of Proposers' key staff persons in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services on comparable projects;
 - (iii) The amount and type of resources, and number of experienced staff persons Proposers have available to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP;
 - (iv) The recent, current and projected workloads of the staff and resources referenced in this Section;
 - (v) The proportion of time Proposers estimate that the staff referenced in this Section would spend on the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP;
 - (vi) Proposers' demonstrated ability to successfully complete similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services on time and within budget, including whether or not there is a record of satisfactory performance under Rule 48-0120 (List of Interested Consultants; Performance Record);
 - (vii) References and recommendations from past clients;
 - (viii) Proposers' performance history in meeting deadlines, submitting accurate estimates, producing high quality work, meeting financial obligations, price and cost data from previous projects, cost controls and contract administration;
 - (ix) Status and quality of any required license or certification;
 - (x) Proposers' knowledge and understanding of the Project and Architectural, Engineering and Land Surveying Services or Related Services described in the RFP as shown in Proposers' approaches to staffing and scheduling needs for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services and proposed solutions to any perceived design and constructability issues;
 - (xi) Results from interviews, if conducted;
 - (xii) Design philosophy, if applicable, and approach to the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP;

- (xiii) If Metro is selecting a Consultant to provide Related Services, pricing policies and pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead; and
- (xiv) Any other criteria that Metro deems relevant to the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP, including, where the nature and budget of the Project so warrant, a design competition between competing Proposers. Provided, however, these additional criteria cannot include pricing policies, pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, when the sole purpose or predominant purpose of the RFP is to obtain Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services.
 - C. The RFP shall include at a minimum the following provisions:
 - (i) The date and time Proposals are due, and the delivery location for Proposals;
 - (ii) Reservation of the right to seek clarifications of each Proposal;
- (iii) Reservation of the right to negotiate a final Contract that is in the best interest of Metro;
- (iv) Reservation of the right to reject any or all Proposals and reservation of the right to cancel the RFP at any time if doing either would be in the public interest as determined by Metro;
- (v) A statement that Proposers responding to the RFP do so solely at their expense, and Metro is not responsible for any Proposer expenses associated with the RFP;
- (vi) A statement directing Proposers to the protest procedures set forth in these Division 48 Rules;
- (vii) Special Contract requirements, including but not limited to MBE, WBE, ESB and SDV participation goals or good faith efforts with respect to MBE, WBE, ESB and SDV participation, and federal requirements when federal funds are involved;
- (viii) A statement whether or not Metro will hold a pre-Proposal meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP and if a pre-Proposal meeting will be held, the location of the meeting and whether or not attendance is mandatory;
- (ix) A request for any other information Metro deems reasonably necessary to permit Metro to evaluate, rank and select the most qualified Proposer to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP; and
 - (x) A sample form of Contract.
- (b) RFP Contents for Related Services Selections Based on Price. When using the formal selection procedure Metro may also include evaluation price criteria including, but not limited to, the total price for the Related Services described in the RFP, Consultant pricing policies, and other pricing information such as the Consultant's estimated number of staff hours needed to perform the Related Services described in the RFP, expenses, hourly rates and overhead.
- (5) **RFP Evaluation Committee**. Metro shall establish a committee of at least three (3) individuals to review, score and rank Proposals according to the evaluation criteria set forth in the RFP. If the RFP has

followed an RFQu, Metro may include the same members who served on the RFQu evaluation committee. Metro may appoint to the evaluation committee Metro employees or employees of other public agencies with experience in Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying, Related Services, construction services or Public Contracting. At least one (1) member of the evaluation committee must be Metro employee. Metro may include on the evaluation committee private practitioners of architecture, engineering, land surveying or related professions. Metro shall designate one (1) of its employees who also is a member of the evaluation committee as the evaluation committee chairperson. No Proposer will be eligible for award of the Contract under the RFP if Proposer or any of Proposer's principals, partners or associates are members of Metro's RFP evaluation committee for the Contract. If the RFP provides for the possibility of Proposer interviews, the evaluation committee may elect to interview Proposers if the evaluation committee considers it necessary or desirable. If the evaluation committee conducts interviews, it shall award weights, points or other classifications indicated in the RFP for the anticipated interview. The evaluation committee shall provide to Metro the results of the scoring and ranking for each Proposer.

- (6) **Initial Negotiations**. If Metro does not cancel the RFP after it receives the results of the scoring and ranking for each Proposer, Metro will begin negotiating a Contract with the highest ranked Proposer. Metro shall direct negotiations toward obtaining written agreement on:
 - (a) The Consultant's performance obligations and performance schedule;
- (b) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to Metro as determined solely by Metro, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services;
 - (c) Any other provisions Metro believes to be in Metro's best interest to negotiate:
- (7) **Subsequent Negotiations**. Metro shall, either orally or in writing, formally terminate negotiations with the highest ranked Proposer if Metro and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. Metro may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, and so on, in accordance with section (6) of this Rule, until negotiations result in a Contract. If negotiations with any Proposer do not result in a Contract within a reasonable amount of time, Metro may end the particular formal Solicitation. Nothing in this Rule precludes Metro from proceeding with a new formal Solicitation for the same Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services described in the RFP that failed to result in a Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.110, 279C.527, OL 2015, ch 565 (HB 3303)

48-0230 Ties Among Proposers

(1) If Metro is selecting a Consultant on the basis of qualifications alone and determines after the ranking of proposals that two or more Consultants are equally qualified, Metro may select a candidate through any process that Metro believes will result in the best value for Metro taking into account the scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services. Provided, however, the tie breaking process established by Metro under this section (1) cannot be based on the Consultant's pricing policies, pricing proposals or other pricing information, including the number of hours proposed for the services

required, expenses, hourly rates and overhead. The process must be designed to instill public confidence through ethical and fair dealing, honesty and good faith on the part of Metro and Proposers and shall protect the integrity of the Public Contracting process. Once a tie is broken, Metro and the selected Consultant shall proceed with negotiations under Administrative Rule 48-0210(3) or 48-0220(4)(c), as applicable.

(2) If Metro is selecting a Consultant on the basis of price alone, or on the basis of price and qualifications, and determines after the ranking of proposers that two or more Consultants are identical in terms of price or are identical in terms of price and qualifications, then Metro shall follow the procedure set forth in Administrative Rule 46-0300 (Preferences for Oregon Goods and Services), to select the Consultant.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458 Stats. Implemented: ORS 279C.110, OL 2011, ch 458

48-0240 Protest Procedures

- (1) **Solicitation Protest and Request for Change**. Consultants may submit a written protest of anything contained in an Solicitation Document and may request a change to any provision, specification or Contract term contained therein, no later than seven (7) Days prior to the date Offers are due, unless a different deadline is indicated in the Solicitation Document. Each protest and request for change must include the reasons for the protest or request, and any proposed changes to the Solicitation Document provisions, specifications or Contract terms. Metro will not consider any protest or request for change that is submitted after the submission deadline.
- (2) **Protest of Consultant Selection**. For formal Requests for Proposals, Metro shall provide to all Proposers a notice of intent to award the Contract to the highest ranked Proposer. A Proposer who claims to have been adversely affected or aggrieved by the selection of the highest ranked Proposer may submit a written protest of the selection to Metro no later than seven (7) Days after the date of the selection notice unless a different deadline is indicated in the RFP. A Proposer submitting a protest must claim that the protesting Proposer is the highest ranked Proposer because the Proposals of all higher ranked Consultants failed to meet the requirements of the RFP. Metro may not consider any protest that is submitted after the submission deadline.
- (3) **Decision**. Metro shall resolve all timely submitted protests within a reasonable time following Metro's receipt of the protest and once resolved, shall promptly issue a Written decision on the protest to the Proposer who submitted the protest.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279A.065 & 279C.110, OL 2011, ch 458

48-0250 Solicitation Cancellation, Delay or Suspension; Rejection of All Proposals or Responses; Consultant Responsibility For Costs

Metro may cancel, delay or suspend a Solicitation, RFQu or other preliminary Procurement document, whether related to a Direct Appointment Procedure (Administrative Rule 48-0200), the Intermediate Selection Procedure (Administrative Rule 48-0210), and the Formal Selection Procedure (Administrative Rule 48-0220), or reject all Proposals, responses to RFQus, responses to other preliminary Procurement documents, or any combination of the foregoing, if Metro believes it is in the public interest to do so. In the event of any such cancellation, delay, suspension or rejection, Metro is not liable to any Proposer for any loss or expense caused by or resulting from any such cancellation, delay, suspension or rejection. Consultants responding to either Solicitations, RFQus or other preliminary Procurement documents are responses to other preliminary Procurement documents.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065, 279C.110

48-0270 Price Agreements

- (1) Metro may establish Price Agreements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services, when Metro cannot determine the precise quantities of those Services that Metro will require over a specified time period.
- (2) When establishing Price Agreements under this Rule, Metro shall select no fewer than three (3) Consultants, when feasible. The selection procedures for establishing Price Agreements shall be in accordance with Administrative Rule 48-0130(1) or 48-0130(2), as applicable. Metro may select a single Consultant, when a Price Agreement is awarded to obtain services for a specific Project or a closely-related group of Projects.
- (3) In addition to any other applicable Solicitation requirements set forth in these Division 48 Rules, Solicitation materials and the terms and conditions for a Price Agreement for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services must:
- (a) Include a scope of services, menu of services, a specification for services or a similar description of the nature, general scope, complexity and purpose of the Procurement that will reasonably enable a prospective Proposer to decide whether to submit a Proposal;
- (b) Specify whether Metro intends to award a Price Agreement to one (1) Consultant or to multiple Consultants. If Metro will award a Price Agreement to more than one (1) Consultant, the Solicitation document and Price Agreement shall describe the criteria and procedures Metro will use to select a Consultant for each individual work order or task order. Subject to the requirements of ORS 279C.110, the criteria and procedures to assign work orders or task orders that only involve or predominantly involve Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying services are at Metro's sole discretion; provided, however, in circumstances where a direct contract is not permitted under Administrative Rule 48-0200, the selection criteria cannot be based on pricing policies, pricing proposals or other pricing information, including the number of hours proposed for the Services required, expenses, hourly rates and overhead. In accordance with Administrative Rule 48-0130(2) applicable to Related Services procurements, the selection criteria and procedures may be based solely on the qualifications of the Consultants, solely on pricing information, or a combination of both qualifications and pricing information. Pricing information may include the number of hours

proposed for the Related Services required, expenses, hourly rates, overhead and other price factors. Work order or task order assignment procedures under Price Agreements may include direct appointments, subject to the requirements of Administrative Rule 48-0200; and

- (c) Specify the maximum 5-year term for assigning Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services under the Price Agreement.
- (4) All Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services assigned under a Price Agreement require a written work order or task order issued by Metro. Any work orders or task orders assigned under a Price Agreement must include, at a minimum, the following:
 - (a) The Consultant's performance obligations and performance schedule;
- (b) The payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services required under the work order or task order that is fair and reasonable to Metro, as determined solely by Metro, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services;
- (c) Language that incorporates all applicable terms and conditions of the Price Agreement into the work order or task order; and
 - (d) Any other provisions Metro believes to be in Metro's best interest.

Stat. Auth.: ORS 279A.065 & OL 2011, ch 458

Stats. Implemented: ORS 279A.065, 279C.110, 279C.120 & OL 2011, ch 458

Post-Selection Considerations

48-0300 Prohibited Payment Methodology; Purchase Restrictions

- (1) Except as otherwise allowed by law, a Contracting Agency shall not enter into any Contract which includes compensation provisions that expressly provide for payment of:
 - (a) Consultant's costs under the Contract plus a percentage of those costs; or
 - (b) A percentage of the Project construction costs or total Project costs.
- (2) Except as otherwise allowed by law, a Contracting Agency shall not enter into any Contract in which:
- (a) The compensation paid under the Contract is solely based on or limited to the Consultant's hourly rates for the Consultant's personnel working on the Project and reimbursable expenses incurred during the performance of work on the Project (sometimes referred to as a "time and materials" Contract); and
- (b) The Contract does not include a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract.
- (3) Except in cases of Emergency or in the particular instances noted in the subsections below, Metro shall not purchase any building materials, supplies or equipment for any building, structure or facility

constructed by or for Metro from any Consultant under a Contract with Metro to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services, for the building, structure or facility. This prohibition does not apply if either of the following circumstances exists:

- (a) The Consultant is providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services under a Contract with Metro to perform Design-Build services or Energy Savings Performance Contract services (see Administrative Rule 49-0670 and 49-0680); or
- (b) That portion of the Contract relating to the acquisition of building materials, supplies or equipment was awarded to the Consultant pursuant to applicable law governing the award of such a Contract.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458 Stats. Implemented: ORS 279A.065, OL 2011, ch 458

48-0310 Expired or Terminated Contracts; Reinstatement

- (1) If Metro enters into a Contract for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services and that Contract subsequently expires or is terminated, Metro may proceed as follows, subject to the requirements of subsection (2) of this Rule:
- (a) **Expired Contracts**. If the Contract has expired as the result of Project delay caused by Metro or caused by any other occurrence outside the reasonable control of Metro or the Consultant, and if no more than one (1) year has passed since the Contract expiration date, Metro may amend the Contract to extend the Contract expiration date, revise the description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services required under the Contract to reflect any material alteration of the Project made as a result of the delay, and revise the applicable performance schedule. Beginning on the effective date of the amendment, Metro and the Consultant shall continue performance under the Contract as amended; or
- (b) **Terminated Contracts**. If Metro or both parties to the Contract have terminated the Contract for any reason and if no more than one (1) year has passed since the Contract termination date, then Metro may enter into a new Contract with the same Consultant to perform the remaining Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services or Related Services not completed under the original Contract, or to perform any remaining Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services not completed under the Contract as adjusted to reflect a material alteration of the Project.
- (2) Metro may proceed under either subsection (1)(a) or subsection (1)(b) of this Rule only after making written findings that amending the existing Contract or entering into a new Contract with the Consultant will:
- (a) Promote efficient use of public funds and resources and result in substantial cost savings to Metro;
- (b) Protect the integrity of the Public Contracting process and the competitive nature of the Procurement process by not encouraging favoritism or substantially diminishing competition in the award of Contracts; and

(c) Result in a Contract that is still within the scope of the original Procurement document.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279A.065 & 279C.110, OL 2011, ch 458

48-0320 Contract Amendments

- (1) Metro may amend any Contract if Metro, in its sole discretion, determines that the amendment is within the scope services contemplated under the Solicitation and that the amendment would not materially impact the field of competition for the services described in the Solicitation. In making this determination, Metro shall consider potential alternative methods of procuring the services contemplated under the proposed amendment. An amendment would not materially impact the field of competition for the services described in the Solicitation Document, if Metro reasonably believes that the number of Proposers would not significantly increase if the Solicitation were re-issued to include the additional services.
- (2) Amendments are required to document price and schedule changes agreed upon between the parties.
- (3) Metro may amend any Contract if the additional services are required by reason of existing or new laws, rules, regulations or ordinances of federal, state or local agencies, which affect performance of the original Contract.
- (4) All amendments to Contracts must be in Writing, must be Signed by an authorized representative of the Consultant and Metro.
- (5) For a Contract under \$10,000 awarded under Rule 48-0200(1)(b) (Direct Appointment Procedure), Metro may authorize increases resulting from amendments to such Contract provided that the total of all such increases does not exceed \$10,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Any amendment that causes Contract to exceed the foregoing limits shall be (a) submitted to the Chief Procurement Officer for approval prior to the authorization of the additional work and (b) treated as Unauthorized Purchase in accordance with Rule 46-0200.
- (6) For a Contract directly awarded to a pre-qualified Consultant under Rule 48-0200(1)(c) (Direct Appointment Procedure), Metro may authorize increases resulting from amendments to such Contract provided that the total of all such increases does not exceed \$100,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Any amendment that causes Contract to exceed the foregoing limits shall be (a) submitted to the Chief Procurement Officer for approval prior to the authorization of the additional work and (b) treated as an Unauthorized Purchase in accordance with Rule 46-0200.
- (7) For a Contract awarded under Rule 48-0210 (Intermediate Selection Procedure), Metro may authorize increases resulting from amendments to such Contract provided that the total of all such increases does not exceed \$150,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Any amendment that causes Contract to exceed the foregoing limits shall be (a) submitted to the Chief Procurement Officer for approval prior to the authorization of the additional work and (b) treated as an Unauthorized Purchase in accordance with Rule 46-0200.
- (8) For a Contract awarded under Rules 48-0220 (Formal Selection Procedure) Metro may authorize increases resulting from amendments to such Contract provided that the total of all such increases does not exceed one hundred twenty-five percent (125%) of the original Contract Price. Increases in excess of the 125% limit shall be (a) submitted to the Chief Operating Officer for approval prior to the

authorization of the additional work and (b) treated as an Unauthorized Purchase in accordance with Rule 46-0200.

Stat. Auth.: ORS 279A.065, OL 2011, ch 458

Stats. Implemented: ORS 279A.065, 279C.110, OL 2011, ch 458

DIVISION 49

GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTS FOR CONSTRUCTION SERVICES

49-0100 Application

These Division 49 Rules address matters covered in ORS Chapter 279C and apply to Public Improvement Contracts as well as, where identified, Public Contracts for ordinary construction that are not Public Improvements. Contracts for minor alteration, ordinary repair or maintenance of Public Improvements or Price Agreements, as well as other Contracts for construction services that are not defined as a Public Improvement under Division 10 of these Rules, are to be awarded and executed pursuant to Division 47 of these Rules and ORS 279B and not this Division 49.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

49-0110 Policies

In addition to the general State Code policies set forth in ORS 279A.015, the ORS 279C.300 policy on competition and the ORS 279C.305 policy on least-cost for Public Improvements apply to these Division 49 Rules.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.300 & 279C.305

49-0130 Competitive Bidding Requirement

Metro shall solicit Bids for Public Improvement Contracts by Invitation to Bid ("ITB"), except as otherwise allowed or required pursuant to ORS 279C.335 on Competitive Bidding exceptions and exemptions, ORS 279A.030 on federal law overrides, or ORS 279A.100 on affirmative action. See Rules 49-0600 to 49-0690 regarding the use of Alternative Contracting Methods and the process for obtaining an exemption from Competitive Bidding requirements.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335

49-0140 Contracts for Construction Other Than Public Improvements

(1) **Procurement Under ORS Chapter 279B.** Pursuant to ORS 279C.320, Public Contracts for construction services that are not Public Improvement Contracts may be procured and amended as general trade Services under the provisions of ORS Chapter 279B rather than under the provisions of ORS Chapter 279C and these Division 49 Rules. In accordance with ORS 279A.010, Contracts for emergency work, minor alternation, ordinary repair or maintenance necessary to preserve a Public Improvements are not Public Improvement Contracts.

(2) Application of ORS Chapter 279C. Notwithstanding the forgoing, Public Contracts for construction services that are not Public Improvement Contracts, and are therefore procured under ORS 279B are nonetheless subject to the non-procurement provisions of ORS Chapter 279C and these Division 49 Rules may still be applicable. See, for example, particular statutes on Disqualification (ORS 279C.440, 445, 450); Legal Actions (ORS 279C.460 and 465); Required Contract Conditions (ORS 279C.505, 515, 520, 530); Hours of Labor (ORS 279C.540, 545); Retainage (ORS 279C.550, 560 and 565); Subcontracts (ORS 279C.580); Action on Payment Bonds (ORS 279C.600, 605, 610, 615, 620, 625); Termination (ORS 279C.650, 660, 670); and all of the Prevailing Wage Rates requirements (ORS 279C.800 through 870) for Public works Contracts.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.320

49-0150 Emergency Contracts; Bidding and Bonding Exemptions

- (1) **Emergency Declaration**. Metro may declare that Emergency circumstances exist that require prompt execution of a Public Contract for Emergency construction or repair work pursuant to the procedures in Rules 47-0280 and 47-0800(4).
- (2) **Excusing Bonds**. If the circumstances in ORS 279C.380(4) are met, the Emergency declaration may also state that Metro waives the requirement of furnishing a performance bond and payment bond for the Emergency Contract. After making such an Emergency declaration, those bonding requirements are excused for the procurement. However, an Emergency declaration does not affect the separate Public works bond requirement for the benefit of the Bureau of Labor and Industries (BOLI) in enforcing prevailing wage rate and overtime payment requirements. In addition, nothing herein prevents Metro from subsequently requesting such bonds from the Contractor after work begins.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.080, 279C.320, 279C.380

49-0160 Intermediate Procurements; Competitive Quotes and Amendments

- (1) **General**. As provided for under ORS 279C.412 and 279C.414, Public Improvement Contracts estimated by Metro not to exceed \$100,000 may be awarded in accordance with intermediate level procurement procedures for Competitive Quotes established by this Rule. A Procurement may not be artificially divided or fragmented so as to constitute an Intermediate Procurement under this Rule in order to circumvent Competitive Bidding requirements.
- (2) **Written Competitive Quotes**. Requests for Competitive Quotes for a Public Improvement project anticipated not to exceed \$5,000 must be in Writing. Metro must seek at least three (3) Competitive Quotes and otherwise comply with Metro's Equity in Contracting Administrative Rules. The Request for Competitive Quotes must include the selection criteria to be utilized in selecting a Contractor and, if the criteria are not of equal value, their relative value or ranking. The criteria may be limited to price or some combination of price, experience, specific expertise, availability, project understanding, Contractor capacity, Responsibility and similar factors. Written requests must include the Bureau of Labor and Industries (BOLI) provisions regarding the prevailing wage, if the estimated cost exceeds \$50,000. Written Request for Competitive Quotes must also include the following:
 - (a) A complete description of the proposed work.
 - (b) Location and deadline for submittal of Competitive Quotes.

- (c) The prevailing wage provisions of ORS 279C.800 to 279C.870, when applicable.
- (d) The performance bond, payment bond and BOLI Public works bond requirements of ORS 279C.380 and 279C.830, when applicable.
 - (e) The Contractor registration requirements of ORS 701.
 - (f) Any other law applicable to such a Contract.
- (3) **Award**. Metro shall award the Contract to the prospective Contractor whose Competitive Quote will best serve the interests of Metro, taking into account the announced selection criteria. If award is not made to the Contractor offering the lowest price, Metro shall make a Written record of the basis for award.
- (4) **BOLI Notification**. Metro shall provide notification of award to BOLI as required by ORS 279C.835.
- (5) **Price Increases and Amendments**. Intermediate level Public Improvement Contracts obtained by Competitive Quotes may be increased in accordance with Administrative Rule 49-0910, provided that the cumulative amendments may not increase the total Contract Price to a sum that exceeds the higher dollar amount of \$100,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater.

Stats. Implemented: ORS 279C.412 and ORS 279C.414.

Formal Procurement Rules

49-0200 Solicitation Documents; Required provisions; Assignment or Transfer

- (1) **Solicitation Document**. Pursuant to ORS 279C.365 and this Rule, the Solicitation Document must 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 Metro's representatives at the conference are not binding upon Metro unless confirmed by Written Addenda.
- 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 Metro representative designated for receipt of Offers and contract representative (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 Electronic means (See Rule 49-0310 regarding Electronic Procurement);

- F. The time and date of Closing after which Metro will not accept Offers, which time cannot be less than five (5) Days after the date of the last publication of the advertisement. Although a minimum of five (5) Days is prescribed, Metro will elect to use at least a fourteen (14) Day Solicitation period when feasible. If Metro is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, the time of Closing must be consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and Rule 49-0360;
 - G. The time, date and place of Opening;
 - 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 Metro 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 ORS 279C.838, 279C.840 or 40 U.S.C. 3141 to 3148."
- K. A statement that Metro 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 Rule 49-0230;
- 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 Rule 49-0440(3));
- N. How Metro will notify Offerors of Addenda and how Metro will make Addenda available (See Rule 49-0250); and
- O. When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in Rule 49-0360.
- (b) The Solicitation Document must also contain the following information about the evaluation process:
- A. A statement that Metro 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 Metro 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 Rule 49-0620), along with the process Metro will use to determine acceptability of the work;
- (i) If the Solicitation Document is an Invitation to Bid, Metro 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 must be objective, reasonable estimates based upon information Metro has available concerning future use;

- (ii) If the Solicitation Document is a Request for Proposals, Metro shall refer to the additional requirements of Rule 49-0650; and
- (c) **Contract provisions**. The Solicitation Document must include all Contract terms and conditions, including warranties, insurance and bonding requirements, that Metro considers appropriate for the Public Improvement project. The Solicitation Document must also include all applicable Contract provisions required by Oregon law, including:
- A. Prompt payment to all Persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279C.505(1));
 - B. A demonstration 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. A 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. Fee paid to BOLI (ORS 279C.830);
 - P. BOLI Public works bond (ORS 279C.830(2));
 - Q. Retainage (ORS 279C.550 to 279C.570);

- R. Prompt payment policy, progress payments, rate of interest (ORS 279C.570);
- S. Contractor's relations with Subcontractors (ORS 279C.580);
- T. notice of claim (ORS 279C.605);
- U. Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385; and
- V. 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 Chapter 701 or 671, respectively before the Subcontractors commence work under the Contract.
- (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 Metro's prior Written consent. Unless otherwise agreed by Metro in Writing, such consent does not relieve the Contractor of any obligations under the Contract. Any assignee or transferee is considered the agent of the Contractor and is bound to abide by all provisions of the Contract. If Metro 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, remain liable to Metro for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless Metro otherwise agrees in Writing.

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

49-0210 Solicitation notice and Advertising Requirements; Posting

- (1) **Notice and Distribution Fee.** Metro shall furnish "notice" as set forth below in subsections (a) through (c), to a number of Persons sufficient for the purpose of fostering and promoting competition. The notice must indicate where, when, how and for how long the Solicitation Document may be obtained and generally describe the Public Improvement project or work. The notice may contain any other appropriate information. Metro may charge a fee or require a deposit for the Solicitation Document. Metro may furnish notice using any method determined to foster and promote competition, including, without limitation:
- (a) Placing notice on the Oregon Department of Administrative Services' Electronic Procurement System known as "ORPIN" (Oregon Procurement Information Network) or a successor Electronic System; or
- (b) Mailing notice of the availability of Solicitation Documents to Persons that have expressed an interest in Metro's Procurements; or
 - (c) Placing notice on Metro's Internet Web site.
- (2) **Advertising**. Pursuant to ORS 279C.360 and this Rule, Metro shall advertise every Solicitation for Bids or Proposals for a Public Improvement Contract, unless the Local Contract Review Board has exempted the Solicitation from the advertisement requirement as part of a Competitive Bidding exemption under ORS 279C.335.

- (a) Unless Metro publishes by Electronic Advertisement as permitted by Section 2(b) below, Metro shall publish the advertisement for Offers at least once in at least one newspaper of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as Metro may determine to be necessary or desirable to foster and promote competition.
- (b) Metro finds it cost effective to Electronically post notice of Solicitations. Metro may therefore publish advertisements for formal Offers on the Oregon Department of Administrative Services' Electronic Procurement System known as "ORPIN" (Oregon Procurement Information Network).
- (c) In addition to Metro's publications under subsection (a) and (b) above, Metro shall also publish an advertisement for Bids or Proposals in at least one trade newspaper of general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000.
 - (d) All advertisements for Bids or Proposals must set forth:
 - A. The Public Improvement project;
 - B. The office where Contract terms, conditions and Specifications may be reviewed;
- C. The date that Persons must file applications for prequalification under ORS 279C.340, if prequalification is a requirement, and the class or classes of work for which Persons must be prequalified;
 - D. The date of mandatory pre-offer meeting, if applicable;
- E. The scheduled Closing, which must not be less than five (5) Days after the date of the last publication of the advertisement;
 - F. The name, title and address of Metro representative authorized to receive Offers;
 - G. The scheduled Opening; and
 - H. If applicable, that the Contract is for a Public work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148).

Stats. Implemented: ORS 279C.360 & 200.035

49-0220 Prequalification of Offerors

- (1) Mandatory Prequalification. Pursuant to ORS 279C.430 and this Rule, Metro may require mandatory prequalification of Offerors for Contracts to construct Public Improvements or to perform Public works. Metro must indicate in the Solicitation Document if it will require mandatory prequalification. Mandatory prequalification is when Metro conditions a Person's submission of an Offer upon the Person's prequalification. Metro may not consider an Offer from a Person that is not prequalified if Metro required prequalification. Applications for Prequalification must be submitted to Metro in accordance with the deadlines provided in the Solicitation Document.
- (2) **Prequalification Presumed**. If a an Offeror is currently Prequalified by either the Oregon Department of Transportation or the Oregon Department of Administrative Services to perform Contracts, the Bidder is rebuttably presumed qualified to perform the same work for Metro upon submission of proof of such Prequalification. If a Bidder submits proof of Prequalification, then the Bidder is rebuttably presumed qualified under ORS 279C.435. Nothing contained in this section waives

Metro's requirements for Prequalification, Metro's authority to require additional information or detail, or prior approval as otherwise set forth in this Rule.

- (3) **Standards for Prequalification**. To qualify, a Bidder must demonstrate to Metro's satisfaction, that they are a Responsible Bidder based on criteria set forth in ORS 279C.375 (3)(b) and Rule 49-0390. If Metro determines the Bidder is qualified, notification shall be sent stating the Bidder's qualified Bidding limits, classes of work and the validity period of the Bidder's pregualification.
- (4) **Notice of Denial; Appeal**. If a Person fails to prequalify for a mandatory prequalification, Metro shall notify the Person, specify the reasons for denying prequalification, and inform the Person of the Person's right to a hearing under ORS 279C.445 and 279C.450. The Procurement Officer shall conduct the hearing and has the authority of the Local Contract Review Board as provided in ORS 279C.450. The Procurement Officer may adopt rules of procedure for the hearing. The appeal shall be conducted and decided within thirty (30) Days of Metro's issuance of the non-qualification notice or a date mutually agreed upon by both parties.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.430 & 279C.435

49-0230 Eligibility to Bid or Propose; Registration or License

- (1) **Construction Contracts**. Metro shall not consider a Person's Offer to do work as a Contractor, as defined in ORS 701.005(2), unless the Person has a current, valid certificate of registration issued by the Construction Contractors Board at the time the Offer is made.
- (2) **Landscape Contracts**. Metro shall not consider a Person's Offer to do work as a landscape Contractor as defined in ORS 671.520(2), unless the Person has a current, valid landscape Contractors license issued pursuant to ORS 671.560 by the State Landscape Contractors Board at the time the offer is made.
- (3) **Noncomplying Entities**. Metro deems an Offer received from a Person that fails to comply with this Rule nonresponsive and shall reject the Offer as stated in ORS 279C.365(1)(k), unless contrary to federal law or subject to different timing requirements set by federal funding agencies.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, 671.530 & 701.055

49-0240 Pre-Offer Conferences

- (1) **Purpose**. Metro may hold pre-Offer conferences with prospective Offerors prior to Closing to explain the Procurement requirements, obtain information, or to conduct site inspections.
- (2) **Required attendance**. Metro may require attendance at the pre-Offer conference as a condition for making an Offer. Unless otherwise specified in the Solicitation Document, a mandatory attendance requirement is considered met if, at any time during the mandatory meeting, a representative of an offering firm is present.
- (3) **Scheduled time**. If Metro holds a pre-Offer conference, it will be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference.

- (4) **Statements Not Binding**. Statements made by Metro's representative at the pre-Offer conference do not change the Solicitation Document unless Metro confirms such statements with a Written Addenda to the Solicitation Document.
- (5) **Announcement**. Metro must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with Rule 49-0200(1)(a)(B).

Stats. Implemented: ORS 279C.365 & 279C.370

49-0250 Addenda to Solicitation Documents

- (1) **Issuance; Receipt**. Metro may change a Solicitation Document for Bids or Proposals only by Written Addenda. An Offeror shall provide Written acknowledgement of receipt of all issued Addendas with its Offer, unless Metro otherwise specifies in the Addenda or in the Solicitation Document.
- (2) **Notice and Distribution**. Metro shall notify prospective Offerors of Addendas consistent with the standards of notice set forth in Rule 49-0210(1). The Solicitation Document must specify how Metro will provide notice of Addendas and how Metro will make the Addendas available (see, Rule 49-0200(1)(a)(N)).
- (3) **Timelines; Extensions**. Metro shall issue Addendas within a reasonable time to allow prospective Offerors to consider the Addendas in preparing their Offers. Metro may extend the Closing if Metro determines prospective Offerors need additional time to review and respond to an Addenda. Except to the extent required by public interest, Metro will not issue an Addenda to an Invitation to Bid or Request for Proposal less than 72 hours before the Closing unless such Addenda also extends the Closing.
- (4) **Request for Change or Protest to Addenda**. Unless a different deadline is set forth in the Addenda, an Offeror may submit a Written request for change or protest to an Addenda by the close of Metro's next business day after issuance of the Addenda, or up to the last Day allowed to submit a request for change or protest under Rule 49-0260, whichever date is later. Metro shall consider only an Offeror's request for change or protest to the Addenda. Metro shall not consider a request for change or protest to matters not added or modified by the Addenda.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.395 & 279A.065

49-0260 Request for Clarification or Change; Solicitation Protests

- (1) **Clarification**. Prior to the deadline for submitting a Written request for change or protest, an Offeror may request that Metro clarify any provision of the Solicitation Document, including any attached form of Contract. Metro's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on Metro unless Metro amends the Solicitation Document by Addenda.
- (2) Request for Change to Specifications or Contract Terms.
- (a) **Delivery**. An Offeror may request in Writing a change to the Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver the Written request for change to Metro not less than ten (10) Days prior to Closing;

(b) Content of Request for Change.

- A. An Offeror's Written request for change must include a statement of the requested change(s) to the Contract terms and conditions or Specifications, together with the reason for the requested change.
 - B. An Offeror shall mark its request for change as follows:
 - (i) "Request for Change to Specifications or Contract Terms"; and
 - (ii) Solicitation Document number.

(3) Protest and Judicial Review of Solicitation Documents and Solicitation Processes.

- (a) **Purpose**. A prospective Offeror may protest the Solicitation process or the Solicitation Document for a Contract solicited pursuant to competitive sealed ITB process or through an alternative contracting process.
- (b) **Delivery**. Written protest regarding a Solicitation Document or the Public Improvement procurement process must be provided to the Procurement Officer within seven (7) Days after a Solicitation Document is advertised, unless the Solicitation Document requires a shorter period of time. Metro shall not consider a protest submitted after the timeline established for submitting such protest under this Rule.

(c) Content of Protest. The Written protest must include:

- A. Sufficient information to identify the portion or portions of the Solicitation Document that are being protested or the Solicitation process or processes that are the subject of the protest;
 - B. A detailed statement of the legal and factual grounds for the protest;
- C. Evidence or supporting documentation that supports the grounds on which the protest is based;
 - D. A description of the resulting harm to the Affected Person; and
- E. The relief requested or a statement of the desired changes to the Contract terms and conditions, including any Specifications.

(d) Required Metro Response.

- A. Metro shall inform the Affected Person in Writing if the protest was not timely filed;
- B. Metro shall inform the Affected Person if it failed to meet the requirements set forth above in subsection (c) of this Rule and the reasons for that failure;
- C. If the protest was timely filed and provides the information required by subsection (c), Metro shall issue a decision in Writing and provide that decision to the Affected Person no less than three days before Offers are due, unless a Written determination is made by Metro that circumstances exist that require a shorter time limit.
- D. If Metro denies the protest, it shall inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contract Review Board.
- (e) **Optional Metro Response**. In addition to the requirements of subsection (d), Metro may do any or all of the following:

- A. Agree with the protest and make any necessary corrections to the Solicitation Document or Procurement process;
 - B. Issue a Written response to the protest and provide that decision to the Affected Person;
 - C. Refer the protest and any response to the Local Contract Review Board; or
- D. Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest, including without limitation, (i) extending Closing if Metro determines an extension is necessary to consider the protest and to issue an Addenda to the Solicitation Document or (ii) canceling the Solicitation under Rule 49-0270.
- (f) **Judicial Review**. An Affected Person may not seek judicial review of Metro's final decision regarding its protest of the contents of a Solicitation Document or the Solicitation process unless it has timely and fully complied with the Protest requirements of this Rule and has exhausted all avenues of appeal provided by Metro. Judicial review is not available if Metro withdraws the Solicitation Document that was the subject of the protest.

Stats. Implemented: ORS 279C.345 & 279C.365

49-0270 Cancellation, Delay or Suspension of Solicitation Document

- (1) **Cancellation in the Public Interest**. At any time prior to executing a Contract, Metro may cancel a Solicitation for good cause if Metro finds that cancellation is in the public interest. Metro's reasons for cancellation shall be made part of the Solicitation file.
- (2) **Delay or Suspension**. Any Solicitation may be delayed or suspended in whole, or in part, when the delay or suspension is in the best interest of Metro as determined by Metro.
- (3) **Costs**. Metro is not liable to any Offeror for costs, expenses or losses caused by the cancellation, delay, or suspension of a Solicitation.
- (4) **Notice of Cancellation**. If Metro cancels a Solicitation prior to Opening, Metro shall provide notice of cancellation in accordance with Rule 49-0210(1). Such notice of cancellation must:
 - (a) Identify the Solicitation;
 - (b) Briefly explain the reason for cancellation; and
 - (c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.

(5) **Disposition of Offers**.

- (a) **Prior to Offer Opening**. If Metro cancels a Solicitation prior to Offer Opening, Metro shall return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, Metro may open the Offer to determine the source and then return it to the Offeror.
- (b) After Offer Opening. If Metro cancels a Solicitation after Offer Opening or if Metro rejects all Offers, Metro will retain all such Offers as part of Metro's Solicitation file. If a Request for Proposals is cancelled after Proposals are received, Metro may return a Proposal to the Proposer that submitted it. Metro shall keep a list of returned Proposals in the Solicitation file.

Stat. Auth.: ORS 279A.065 Stats. Implemented: ORS 279C.395

49-0280 Bid and Proposal Offer Submissions

- (1) Offer and Acceptance. The Bid or Proposal is the Bidder's or Proposer's Offer to enter into a Contract. In competitive Bidding and competitive Proposals, the Offer is always a "Firm Offer," i.e., the Offer is held open by the Offeror for Metro's acceptance for the period specified in Rule 49-0410, unless otherwise specified in the Solicitation Document. Metro may elect to accept the Offer at any time during the specified period, and Metro's award of the Contract to a Bidder constitutes acceptance of the Offer.
- (2) **Negotiation**. A competitive Proposal is a "Firm Offer" for the specified period referenced above in Section (1), but Metro may nonetheless elect to discuss or negotiate certain contractual provisions, as identified in these Rules or in the Solicitation Document with the Proposer. Where negotiation is permitted by the Rules or the Solicitation Document, Proposers are bound to negotiate in good faith and only on those terms and the Rules or the Solicitation Document has reserved for negotiation.
- (3) **Responsive Offer**. Metro may award a Contract only to a Responsible Offeror with a Responsive Offer.
- (4) **Contingent Offers**. Except to the extent that an Offeror is authorized to propose certain terms and conditions pursuant to Rule 49-0650, an Offeror cannot make an Offer contingent upon Metro's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.
- (5) **Offeror's Acknowledgement**. By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits the proposal of alternative terms under Rule 49-0650, the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by Metro in Writing.
- (6) **Instructions**. An Offeror shall submit and Sign its Offer in accordance with the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document.
- (7) **Forms**. An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.
- (8) **Documents**. An Offeror shall provide Metro with all documents and Descriptive Literature required under the Solicitation Document.
- (9) **Electronic Submissions**. If Metro permits Electronic Offers in the Solicitation Document, the Offeror may submit Electronic Offers in accordance with the Solicitation Document. Metro may not consider Electronic Offers unless authorized by the Solicitation Document.
- (10) **Product Samples and Descriptive Literature.** Metro may require Product Samples or Descriptive Literature if it is necessary or desirable to evaluate the quality, features, or characteristics of the offered items. Metro will dispose of Product Samples or return or make available for return Product Samples to the Offeror in accordance with the Solicitation Document.
- (11) **Identification of Offers**. To ensure proper identification and handling, Offers must be submitted in a sealed envelope appropriately marked or in the envelope provided by Metro, whichever is applicable.

Metro is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.

(12) **Receipt of Offers**. The Offeror is responsible for ensuring that Metro receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365 & 279C.375

49-0290 Bid or Proposal Security

- (1) **Security Amount**. If Metro requires Bid or Proposal security, it may not be more than ten percent (10%) or less than five percent (5%) of the Offeror's Bid or Proposal, consisting of the base Bid or Proposal together with all additive alternates. Metro may not use Bid or Proposal security to discourage competition. Metro must clearly state any Bid or Proposal security requirements in its Solicitation Document. The Offeror shall forfeit Bid or Proposal security after award if the Offeror fails to execute the Contract or otherwise fails to promptly return the Contract with any required performance bond, payment bond, BOLI Public works bond, or any required proof of insurance. See ORS 279C.365(5), ORS 279C.385, and ORS 279C.830.
- (2) Requirement for Bid Security (Optional for Proposals). Unless Metro has otherwise exempted a Solicitation or class of Solicitations from Bid security pursuant to ORS 279C.390, Metro must require Bid security for its Solicitation of Bids for Public Improvements. This requirement applies only to Public Improvement Contracts with a value, estimated by Metro, of more than \$100,000. Metro may require Bid security even if it has exempted a class of Solicitations from Bid security. Metro may also require Proposal security in RFPs. See ORS 279C.400(5).
- (3) **Form of Bid or Proposal Security**. Metro may accept only the following forms of Bid or Proposal security:
- (a) A surety bond, Signed by the surety's authorized Attorney in Fact, from a company authorized to do business in the State of Oregon and that is duly listed in the United States Treasury list as published in the Federal Register, or which is otherwise approved by the Metro Attorney. The A Power of Attorney for the Attorney in Fact shall be submitted; or
- (b) A Signed irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or
 - (c) A cashier's check or Offeror's certified check.
- (4) **Return of Security**. Metro shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been fully executed and all required bonds and insurance have been provided, or after all Offers have been rejected. Metro may return the Bid or Proposal security of unsuccessful Offerors prior to award if the return does not prejudice Contract award and the security of at least the Bidders with the three lowest Bids, or the Proposers with the three highest scoring Proposals, is retained pending execution of a Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, 279C.385 & 279C.390

49-0310 Electronic Procurement

- (1) **General**. Metro may utilize Electronic Advertisement of Public Improvement Contracts in accordance with ORS 279C.360(1) and Rule 49-0210, provided that advertisement of such Contracts with an estimated Contract Price in excess of \$125,000 must also be published in a trade newspaper of general statewide circulation. Metro may post notices of intent to award Electronically as provided by ORS 279C.410(7).
- (2) **Alternative Procedures**. In the event that Metro desires to direct or permit the submission and receipt of Offers for a Public Improvement Contract by Electronic means, as allowed under ORS 279C.365(1)(d), it shall first adopt supporting procedures substantially in conformance with Rule 47-0330 (Electronic Procurement under ORS Chapter 279B), taking into account ORS Chapter 279C requirements for Written Bids, Opening Bids publicly, Bid security, first-tier Subcontractor disclosure and inclusion of prevailing wage rates.
- (3) **Interpretation**. Nothing in this Rule shall be construed as prohibiting Metro from making procurement documents for Public Improvement Contracts available in Electronic format as well as in hard copy when Bids are to be submitted only in hard copy. See ORS 279C.365(2).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365

49-0320 Pre-Closing Modification or Withdrawal of Offers

- (1) **Modifications**. Once submitted, Bids or Proposals may only be modified in Writing prior to the time and date set for Bid or Proposal Closing. An Offeror shall prepare and submit any modification to its Offer to Metro in accordance with Rule 49-0280, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:
 - (a) Bid (or Proposal) Modification; and
 - (b) Solicitation number.

(2) Withdrawals.

- (a) An Offeror may withdraw its Offer by Written notice, Signed by an authorized representative of the Offeror, delivered to the location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by Metro prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in Person prior to the Closing, upon presentation of appropriate identification and satisfactory evidence of authority.
- (b) Metro may release an unopened Offer withdrawn under subsection (2)(a) to the Offeror or its authorized representative, after voiding any date and time stamp mark.
 - (c) The Offeror shall mark the Written request to withdraw an Offer as follows:
 - A. Bid (or Proposal) Withdrawal; and
 - B. Solicitation number.
- (3) **Documentation**. Metro shall include all documents relating to the modification or withdrawal of Offers in the appropriate Solicitation file.

(4) Late Requests for Modification or Withdrawal. Any request for modification or withdrawal of a Bid or Proposal made after the time for Bid or Proposal Closing is late as provided by Rule 49-0340. Any late submission will be returned to the Bidder or Proposer unopened. If any late submission is opened inadvertently, the procedure provided by Rule 49-0330 applies, except the submission will be returned to the sender.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.360, 279C.365, 279C.375 & 279C.395

49-0330 Receipt, Opening and Recording of Offers; Confidentiality of Offers

- (1) **Receipt.** Metro shall Electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. Metro shall not open a Bid or Proposal or modification thereto upon receipt, but shall maintain it as confidential and secure until Opening. If Metro inadvertently opens an Offer or a modification prior to the Opening, Metro shall return the Offer or modification to its secure and confidential state until Opening. Metro shall document the resealing for the Procurement file (e.g. "Metro inadvertently opened the Offer due to improper identification of the Offer").
- (2) **Opening and Recording**. Metro shall publicly open Bids, including any modifications made to the Bid, pursuant to Rule 49-0320 and to the extent practicable, Metro shall read aloud the name of each Bidder, the Bid price(s), and such other information as Metro considers appropriate. In the case of voluminous Bids, Metro may elect not to read the Bids aloud.
- (3) Availability. After Opening, Metro shall make Bids available for public inspection, but pursuant to ORS 279C.410 Proposals are not required to be available for public inspection until after notice of intent to award is issued. In any event Metro may withhold from disclosure those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with the Oregon Public Records Law, ORS 192.410 et seq. To facilitate public inspection of the non-confidential portion of the Bid or Proposal, an Offeror must designate and separate from the remainder of the Offer, as confidential, any material it deems confidential. Application of the Oregon Public Records Law ORS 192.410 et seq. determines if the information designated as confidential and claimed to be exempt is in fact exempt from disclosure. To the extent Metro determines such designation is not in accordance with applicable law, Metro will make those portions available for public inspection. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and shall be publicly available regardless of an Offeror's designation to the contrary. Copies of public records will be made available upon payment of Metro's charges.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, 279C.375 & 279C.395

49-0340 Late Bids, Late Withdrawals and Late Modifications

(1) Any Bid or Proposal received after Closing is late. An Offeror's request for withdrawal or modification of a Bid or Proposal received after Closing is late. Metro shall not consider late Bids or Proposals, withdrawals or modifications except as permitted in Rule 49-0350 or 49-0390. Failure by Metro to properly return or dispose of a late submission does not mean an Offer or submission arrived on time.

(2) For manual submissions of Offers, Metro's time clock shall be the clock of record and the date and time imprint of that clock on an Offer shall determine the timeliness of the submission. Late manual submissions will be returned to the Offeror unopened with a copy of the envelope containing Metro's time stamp on the Offer retained for the Solicitation file.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, 279C.375 & 279C.395

49-0350 Mistakes

- (1) **Generally**. To protect the integrity of the competitive Procurement process and to assure fair treatment of Offerors, Metro will carefully consider whether to permit waiver, correction or withdrawal of Offers for certain mistakes.
- (2) **Treatment of Mistakes**. Metro will not allow an Bidder or Proposer to correct or withdraw an Offer for an error in judgment. Mistakes that constitute a minor informality may be waived or corrected. Mistakes that constitute clerical errors may be corrected or withdrawn in Metro's discretion pursuant to this Rule.
- (3) **Notification and Verification**. If Metro believes the Offer contains a mistake, Metro shall notify the Offeror, identify the apparent mistake, and request that the Offeror verify the Offer in Writing, or by Electronic transmission within one business day after notification.
- (a) If the Offeror fails to respond within one business day after notification of the apparent mistake, Metro shall consider the Offer as submitted unless the amount of the Offer is so far out of line with the amounts of other Bids received, or with the amount estimated by Metro, or there are other indications of error so clear, as to reasonably justify the conclusion or that acceptance of the Offer would be unfair to the Offeror or to other bona fide Offerors, in which case Metro is entitled to reject the Offer. Metro may extend the time for response for good cause shown.
- (b) If the Offeror verifies its Offer, Metro must consider the Offer as originally submitted. However, in fairness to other Offerors, verification does not preclude Metro from rejecting the Offer if it is clear that a mistake has been made and Metro determines the intended Offer is not evident.
- (4) **Minor Informality**. Metro may waive, or permit a Bidder or Proposer to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:
- (a) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;
- (b) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and
- (c) Acknowledge receipt of an Addenda to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addenda and intended to be bound by its terms; or the Addenda involved did not affect price, quality or delivery.
- (5) **Clerical Errors**. Metro may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms Metro's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended

correct unit or amount is evident by simple arithmetic calculations (for example a missing unit price may be established by dividing the total price for the units by the quantity of units for that item or a missing, or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). Unit prices prevail over extended prices in the event of a discrepancy between extended prices and unit prices.

- (a) Metro may permit a Bidder or Proposer to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:
 - A. The nature of the error;
 - B. That the error is not a minor informality under this subsection or an error in judgment;
- C. That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;
- D. That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;
- E. That the Offeror will suffer substantial detriment if Metro does not grant the Offeror permission to withdraw the Offer;
- F. That Metro's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on Metro or the public it represents; and
 - G. That the Offeror promptly gave notice of the claimed error to Metro.
- (b) The criteria in Section (5)(a) of this Rule is relevant in determining whether Metro will permit an Bidder or Proposer to withdraw its Offer after Closing. These criteria also shall apply to the question of whether Metro will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to Metro based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by Metro, whether by award to the next lowest Responsive and Responsible Bidder or the best Responsive and Responsible Proposer, or by resort to a new Solicitation.
- (6) **Rejection for Mistakes**. Metro will reject any Offer in which a mistake is evident on the face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents submitted with the Offer.
- (7) **Identification of Mistakes after award**. The procedures and criteria set forth above are Offeror's only opportunity to correct mistakes or withdraw Offers because of a mistake. Following award, an Offeror is bound by its Offer, and may withdraw its Offer or rescind a Contract entered into pursuant to this Division 49 only to the extent permitted by applicable law.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375 & 279C.395

49-0360 First-Tier Subcontractors; Disclosure and Substitution

(1) **Required Disclosure**. Within two working hours after the Bid Closing on an ITB for a Public Improvement having a Contract Price anticipated by Metro to exceed \$100,000, all Bidders shall submit to Metro a disclosure form as described by ORS 279C.370(2), identifying any first-tier subcontractors (those Entities that would be contracting directly with the prime contractor) that will be furnishing labor

or labor and materials on the Contract, and if awarded, whose subcontract value would be equal to or greater than:

- (a) Five percent (5%) of the total Contract Price, but at least \$15,000; or
- (b) \$350,000, regardless of the percentage of the total Contract Price.
- (2) Bid Closing, Disclosure Deadline and Bid Opening. For each ITB to which this Rule applies, Metro shall:
- (a) Set the Bid Closing on a Tuesday, Wednesday or Thursday, and at a time between 2 p.m. and 5 p.m., and provided that the two-hour disclosure deadline described by this Rule would not then fall on a legal holiday;
 - (b) Open Bids publicly immediately after the Bid Closing; and
- (c) Consider for Contract award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed in the Solicitation Document.
- (3) Bidder Instructions and Disclosure Form. For the purposes of this Rule, Metro in its Solicitation shall:
- (a) Prescribe the disclosure form that must be utilized, substantially in the form set forth in ORS 279C.370(2); and
 - (b) Provide instructions in a notice substantially similar to the following:

"Instructions for First-Tier Subcontractor Disclosure

Bidders are required to disclose information about certain first-tier subcontractors when the Contract value for a Public Improvement is greater than \$100,000 (see ORS 279C.370). Specifically, when the Contract amount of a first-tier subcontractor furnishing labor or labor and materials would be greater than or equal to: (i) 5% of the project Bid, but at least \$15,000; or (ii) \$350,000 regardless of the percentage, the Bidder must disclose the following information about that subcontract either in its Bid submission, or within two hours after Bid Closing:

- 1. The subcontractor's name;
- 2. The category of work that the subcontractor would be performing; and
- 3. The dollar value of the subcontract.

If the Bidder will not be using any subcontractors that are subject to the above disclosure requirements, the Bidder is required to indicate "NONE" on the accompanying form.

METRO MUST REJECT A BID AS NONRESPONSIVE IF THE BIDDER FAILS TO SUBMIT THE DISCLOSURE FORM WITH THIS INFORMATION BY THE STATED DEADLINE (see Rule 49-0360)."

- (4) **Submission**. A Bidder shall submit the disclosure form required by this Rule either in its Bid submission, or within two working hours after Bid Closing in the manner specified by the ITB.
- (5) **Responsiveness**. Compliance with the disclosure and submittal requirements of ORS 279C.370 and this Rule is a matter of Responsiveness. Bids that are submitted by Bid Closing, but for which the disclosure submittal has not been made by the specified deadline, are not Responsive and shall not be considered for Contract award.

- (6) **Metro Role**. Metro shall obtain, and make available for public inspection, the disclosure forms required by ORS 279C.370 and this Rule. Metro shall also provide copies of disclosure forms to the Bureau of Labor and Industries as required by ORS 279C.835. Metro is not required to determine the accuracy or completeness of the information provided on disclosure forms.
- (7) **Substitution**. Substitution of affected first-tier subcontractors may be made only in accordance with ORS 279C.585, the Solicitation Document, and the Contract. Metro will accept Written submissions filed under that statute as public records. Aside from issues involving inadvertent clerical error under ORS 279C.585, Metro does not have a statutory role or duty to review, approve or resolve disputes concerning such substitutions. See ORS 279C.590 regarding complaints to the Construction Contractors Board on improper substitution.

Stats. Implemented: ORS 279C.370, 279C.585, 279C.590 & 279C.835

49-0370 Disqualification of Persons

- (1) **Authority**. Metro may disqualify a Person from consideration of award of Metro's Contracts after providing the Person with notice and a reasonable opportunity to be heard in accordance with this Rule.
- (2) **Standards for Conduct Disqualification**. As provided in ORS 279C.440, Metro 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 Metro to be so serious as to justify Conduct Disqualification. A violation under this subsection (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.
 - (e) Failure to carry workers' compensation or unemployment insurance as required by statute.
- (f) Violation of ORS 279A.110 (discrimination in subcontracting) or violation of ORS 200.065 or ORS 200.075 (fraudulent and prohibited conduct related to COBID certification).
- (3) **Notice of Intent to Disqualify**. Metro shall notify the Person in Writing of a proposed Disqualification personally or by certified mail, return receipt requested. This notice shall:
 - (a) State that Metro 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 Metro 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.
- (4) **Hearing**. Metro shall schedule a hearing upon Metro's receipt of the Person's timely hearing request. Within a reasonable time prior to the hearing, Metro 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.
- (5) **Notice of Disqualification**. Metro will notify the Person in Writing of its Disqualification, personally or by 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 Metro in Writing within three (3) business Days after receipt of Metro's notice of Disqualification if the Person intends to appeal Metro's decision.

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

49-0380 Bid or Proposal Evaluation Criteria

- (1) **General**. A Public Improvement Contract, if awarded, must be awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. (See Rule 49-0390, and Rules for Alternative Contracting Methods at 49-0600 to 49-0690.)
- (2) **Bid Evaluation Criteria**. Invitations to Bid may solicit lump-sum Offers, with or without alternates, unit-price Offers, or any combination.
- (a) **Lump Sum**. If the ITB requires a lump-sum Bid without additive or deductive alternates, Bids must be compared on the basis of lump-sum base Bid prices. If the ITB calls for a lump-sum base Bid plus additive or deductive alternates, the total Bid price must be calculated and compared by adding to or deducting from the base Bid those alternates selected by Metro, which selection is at Metro's sole discretion.
- (b) **Unit Price**. If the Bid includes unit pricing for estimated quantities, without additive or deductive alternates, the total Bid price must be calculated and compared by multiplying the estimated quantities by the unit prices submitted by the Bidder. If the Bid includes unit pricing for estimated quantities, plus additive or deductive alternates, the total Bid price must be calculated and compared by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by Metro, which selection is at Metro's sole discretion. Metro shall specify within the Solicitation Document the estimated quantity of the Procurement to be used for

determination of the low Bidder. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price governs. (See Rule 49-0350(2)(b).)

(3) **Proposal Evaluation Criteria**. If the Local Contract Review Board has exempted a Public Improvement from the Competitive Bidding requirements of ORS 279C.335(1), and has directed the use of an Alternative Contracting Method under ORS 279C.335(3) and ORS 279C.337, evaluation criteria shall be set forth in the Solicitation Documents. (See Rule 49-0640, ORS 279C.335 and 279C.405.)

Stat. Auth.: ORS 279A.065, OL 2011, ch 458 Stats. Implemented: ORS 279C.335, OL 2011, ch 458

49-0390 Offer Evaluation and award; Determination of Responsibility

- (1) **General**. If awarded, Metro shall award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the best, Responsive Proposal, provided that such Person is not listed by the Construction Contractors Board as disqualified to hold a Public Improvement Contract (ORS 279C.375(3)(a)) or is ineligible for award as a nonresident education service district (ORS 279C.325). Metro may award by item, groups of items or the entire Offer provided such award is consistent with the Solicitation Document and in the public interest. Where award is based on competitive Bids, ORS 279C.375(5) permits multiple Contract awards when specified in the ITB.
- (2) **Determination of Responsibility**. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before awarding a Contract, Metro must have information that indicates that the Offeror meets the standards of responsibility set forth in ORS 279C.375(3)(b). To be a Responsible Offeror, Metro must determine that the Offeror:
- (a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to meet all contractual responsibilities;
- (b) Has completed previous Contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that to the extent the costs associated with and time available to perform a previous Contract were within the Offeror's control, the Offeror stayed within the time and budget allotted for the procurement and otherwise performed the Contract in a satisfactory manner. An Offeror's record of Contract performance should be carefully scrutinized if the Offeror is or recently has been materially deficient in Contract performance. In reviewing the Offeror's performance, Metro should determine whether the Offeror's deficient performance was expressly excused under the terms of the Contract, or whether the Offeror took appropriate corrective action. Metro may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. Metro shall make its basis for determining an Offeror not Responsible under this subsection part of the Solicitation file;
- (c) Has a satisfactory record of integrity. An Offeror may lack integrity if Metro determines the Offeror demonstrates a lack of business ethics such as violating state environmental laws or making false certifications to Metro. Metro may find an Offeror is not Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Conduct Disqualification under Rule 49-0370 may be used to determine an Offeror's integrity. Metro may find an Offeror is not Responsible based on previous convictions of offenses related to obtaining or attempting to obtain a contract or

subcontract or in connection with the Offeror's performance of a contract or subcontract. Metro shall make its basis for determining that an Offeror is not Responsible under this subsection part of the Procurement file;

- (d) Is legally qualified to contract with Metro;
- (e) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by Metro concerning responsibility, Metro shall base the determination of responsibility on any available information, or may find the Offeror not Responsible.
- (3) **Documenting Agency Determinations**. Metro shall document its compliance with ORS 279C.375(3) and the above sections of this Rule on a Responsibility Determination Form substantially as set forth in ORS 279.375(3)(c), and file that form with the Construction Contractors Board within thirty (30) Days after Contract award.
- (4) **Metro Evaluation**. Metro shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law..

(5) Offeror Submissions.

- (a) Metro may require an Offeror to submit Product Samples, Descriptive Literature, technical data, or other material and may also require any of the following prior to award:
- A. Demonstration, inspection or testing of a product prior to award for characteristics such as compatibility, quality or workmanship;
 - B. Examination of such elements as appearance or finish; or
 - C. Other examinations to determine whether the product conforms to Specifications.
- (b) Metro shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. Metro shall reject an Offer providing any product that does not meet the Solicitation Document requirements. Metro's rejection of an Offer because it offers nonconforming work or materials is not Disqualification and is not appealable under ORS 279C.445.
- (6) **Evaluation of Bids**. Metro shall use only objective criteria to evaluate Bids as set forth in the ITB. Metro shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid.
- (a) **Nonresident Bidders**. In determining the lowest Responsive Bid, Metro shall, in accordance with Rule 46-0310, add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.
- (b) **Clarifications**. In evaluating Bids, Metro may seek information from a Bidder only to clarify the Bidder's Bid. Such clarification shall not vary, contradict or supplement the Bid. A Bidder must submit Written clarifications and such clarifications shall become part of the Bidder's Bid.
- (7) **Evaluation of Proposals.** See Rule 49-0650 regarding rules applicable to Requests for Proposals.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335, 279C.365, 279C.375, 279C.395, OL 2015, ch 454 (SB 491)

49-0395 Notice of Intent to award

- (1) **Notice**. At least seven (7) Days before the award of a Public Improvement Contract, Metro shall issue to each Bidder (pursuant to ORS 279C.375(2)) and each Proposer (pursuant to ORS 279C.410(7)), or post Electronically or otherwise, a notice of Metro's intent to award the Contract. This notice requirement does not apply to contracts excepted or exempted from Competitive Bidding under ORS 279C.335(1)(c) or (d), including, without limitation, an award of a small Public Improvement Contract (under \$5,000) or an award of an intermediate Public Improvement Contract based off of Competitive Quotes.
- (2) **Form and Manner of Posting**. The form and manner of posting notice shall conform to customary practices within Metro's procurement system, and may be made Electronically.
- (3) Finalizing award. Metro's award shall not be final until the later of the following three (3) dates:
- (a) Seven (7) Days after the date of notice of intent to award, unless the Solicitation Document provided a different period for protest of Contract award. For purposes of this subsection, the Day on which the notice is posted from which the seven (7) Days or other time period begins to run is not included, but the last Day of the period is included; or
- (b) The Day Metro provides a Written response to all timely-filed protests that denies the protest and affirms the award; or
- (c) Upon concluding any administrative appeal pursuant to Rule 49-0450 if the Procurement Officer decides to permit an appeal.
- (4) **Prior notice Impractical**. Posting of notice of intent to award is not required when Metro determines that it is impractical due to unusual time constraints in making prompt award for its immediate procurement needs, documents the Procurement file as to the reasons for that determination, and posts notice of that action as soon as reasonably practical.

Stat. Auth,: ORS 279A.065 Stats. Implemented: ORS 279C.375

49-0400 Documentation of Award; Availability of Award Decisions

- (1) **Basis of Award**. After award, Metro must make a record showing the basis for determining the successful Offeror part of Metro's Solicitation file.
- (2) **Contents of Award Record for Bids**. Metro's record must 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 Rule 49-0650, Metro's record must 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 Metro permitted negotiations in accordance with Rule 49-0650, Metro's completed evaluation of the initial Proposals and Metro's completed evaluation of final Proposals.
- (4) **Contract Document**. Metro 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, Metro shall provide tabulations of awarded Bids or evaluation summaries of Proposals. Metro may charge 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. Metro may also provide tabulations of Bids and Proposals awarded on Metro's Website or on Metro's Electronic Procurement System.
- (6) **Availability of Solicitation Files**. Metro shall make completed Solicitation files available for public review at Metro.
- (7) **Copies from Solicitation Files**. Any Person may obtain copies of material from Solicitation files upon payment of a reasonable copying charge.

Stats. Implemented: ORS 279C.365 & 279C.375

49-0410 Time for Acceptance; Extension

- (1) **Time for Offer Acceptance**. An Offeror's Bid, or Proposal submitted as a Firm Offer (see Rule 49-0280), is irrevocable, valid and binding on the Offeror for not less than thirty (30) Days from Closing unless otherwise specified in the Solicitation Document.
- (2) **Extension of Acceptance Time**. Metro may request, orally or in Writing, that Offerors extend, in Writing, the time during which Metro may consider and accept their Offer(s). If an Offeror agrees to such extension, the Offer shall continue as a Firm Offer, irrevocable, valid and binding on the Offeror for the agreed-upon extension period. The extension agreement may occur after the 30-Day time period referenced above in section (1) of this Rule.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375

49-0420 Negotiation With Bidders Prohibited

- (1) **Bids**. Except as permitted by ORS 279C.340 and Rule 49-0430, Metro shall not negotiate with any Bidder prior to Contract award. After award of the Contract, Metro and Contractor may modify the resulting Contract only by change order or amendment to the Contract in accordance with 49-0910.
- (2) **Requests for Proposals**. Metro may conduct discussions or negotiations with Proposers only in accordance with the requirements of Rule 49-0650.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.340 & 279C.375

49-0430 Negotiation When Bids Exceed Cost Estimate

- (1) **Generally**. In accordance with ORS 279C.340, if all Responsive Bids from Responsible Bidders on a competitively Bid project exceed Metro's Cost Estimate, prior to Contract award Metro may negotiate Value Engineering and Other Options with the Responsible Bidder submitting the lowest, Responsive Bid in an attempt to bring the Project within Metro's Cost Estimate. The subcontractor disclosure and substitution requirements of Rule 49-0360 do not apply to negotiations under this Rule.
- (2) **Definitions**. The following definitions apply to this Rule:
- (a) "Cost Estimate" means Metro's most recent pre-Bid, good faith assessment of anticipated Contract costs, consisting either of an estimate of an architect, engineer or other qualified professional, or confidential cost calculation work sheets, where available, and otherwise consisting of formal planning or budgetary documents.
- (b) "Other Options" means those items generally considered appropriate for negotiation in the RFP process, relating to the details of Contract performance as specified in Rule 49-0650, but excluding any material requirements previously announced in the Solicitation process that would likely affect the field of competition.
 - (c) "Project" means a Public Improvement.
- (d) "Value Engineering" means the identification of alternative methods, materials or systems which provide for comparable function at reduced initial or life-time cost. It includes proposed changes to the plans, Specifications, or other Contract requirements which may be made, consistent with industry practice, under the original Contract by mutual agreement in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the Public Improvement. Cost savings include those resulting from life cycle costing, which may either increase or decrease absolute costs over varying time periods.
- (3) **Rejection of Bids**. In determining whether all Responsive Bids from Responsible Bidders exceed the Cost Estimate, only those Bids that have been formally rejected, or Bids from Bidders who have been formally disqualified by Metro, will be excluded from consideration.
- (4) **Scope of Negotiations**. Metro shall not proceed with Contract award if the scope of the Project is significantly changed from the original ITB. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other Bidders would have been expected by Metro to participate in the Bidding process had the change been made during the Solicitation process rather than during negotiation. This Rule shall not be construed to prohibit resolicitation of trade subcontracts.
- (5) **Discontinuing Negotiations**. Metro may discontinue negotiations at any time, and shall do so if it appears to Metro that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to rebid any portion of the project, or to obtain subcontractor pricing information upon request, is considered a lack of good faith.
- (6) **Limitation**. Negotiations may be undertaken only with the lowest Responsive, Responsible Bidder pursuant to ORS 279C.340. That statute does not provide any additional authority to further negotiate with Bidders next in line for Contract award.

(7) **Public Records**. To the extent that a Bidder's records used in Contract negotiations are public records, they are exempt from disclosure until after the negotiated Contract has been awarded or the negotiation process has been terminated, at which time they are subject to disclosure pursuant to the provisions of the Oregon Public Records Law, ORS 192.410 to 192.505.

Stat. Auth.: ORS 279C.340 & 279A.065 Stats. Implemented: ORS 279C.340

49-0440 Rejection of Offers

(1) Rejection of an Offer.

- (a) Metro may reject any Offer upon finding that accepting the Offer may impair the integrity of the Procurement process or that rejecting the Offer is in the public interest. An example of rejection in the public interest is Metro's determination that any of the unit Bid prices are significantly unbalanced to Metro's potential detriment.
 - (b) Metro may reject an Offer upon Metro's finding that the Offer:
- A. Is contingent on Metro'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;
 - H. Omits, or is unclear as to, the price;
 - I. Requires a delivery date different from that required by the Solicitation Document;
 - (c) Metro shall reject an Offer upon Metro's finding that the Offeror:
- A. Has not been prequalified under ORS 279C.430 and Metro 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. Has failed to substantially comply with Subcontractor Equity Program requirements (See Metro's Equity in Contracting Administrative Rules);
- I. Is not Responsible. See Rule 49-0390(2) regarding Metro determination that the Offeror has met statutory standards of responsibility.
- (2) **Form of Business**. For purposes of this Rule, Metro 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 Rule 49-0370.
- (3) **Certification of Non-Discrimination**. The Offeror shall certify and deliver to Metro 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, in obtaining any required subcontracts. Failure to do so shall be grounds for Disqualification.
- (4) **Rejection of all Offers**. Metro may reject all Offers for good cause upon Metro's Written finding it is in the public interest to do so. Metro shall notify all Offerors of the rejection of all Offers, along with the good cause justification and finding.
- (5) Criteria for Rejection of All Offers. Metro 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) Metro cancels the Solicitation in accordance with Rule 49-0270; or
- (f) Any other circumstance indicating that awarding the Contract would not be in the public interest.

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

49-0450 Protest of Contractor Selection

- (1) **Right to Protest award**. An adversely aggrieved or Affected Offeror (or a trade association acting on his behalf as permitted under ORS 279C.460) may protest the award or the notice of intent to award a Contract, whichever occurs first, resulting from a competitive Bid or competitive Proposal if:
- (a) The adversely aggrieved or Affected Offeror is eligible (i.e. next in line) for award of the Contract if the protest is successful; and
 - (b) The reason for the protest is that:
 - A. All other Offers are nonresponsive;
- B. Metro failed to conduct the evaluation of Proposals in accordance with the criteria or processes described in the Solicitation Document;
- C. Metro abused its discretion in rejecting the adversely aggrieved or Affected Offeror's Bid or Proposal as nonresponsive; or
- D. Metro's evaluation of Offers or Metro's subsequent determination of award is otherwise in violation of these Rules, ORS Chapter 279C or ORS Chapter 279A.

(2) Method of Protest.

- (a) **Time**. A Written protest of the notice of intent to award or award itself must be provided to Metro within seven (7) Days after Metro posts a notice that it will make a Contract award, or the Contract is awarded, whichever occurs first, unless the Solicitation Document specified a shorter period of time. Metro shall not consider a protest submitted after the timeline established for submitting such protest under this Rule or such different time period as may be provided in the Solicitation Document
 - (b) **Contents**: The protest must include the following information.
- A. Sufficient information to identify the Contract or notice of intent to award that is the subject of the protest;
 - B. A detailed statement of all the legal and factual grounds for the protest;
- C. Evidence or supporting documentation that supports the grounds on which the protest is based;
 - D. A description of the resulting harm to the Offeror submitting the protest; and
 - E. The relief requested.
- (3) **Required Metro Response**. Metro shall take the following actions, as appropriate:
 - (a) Metro shall inform protesting Offeror in Writing if the protest was not timely filed.
- (b) Metro shall inform protesting Offeror if it failed to meet the requirements of section (2)(b) of this Rule, and the reasons for that failure.
- (c) If the protest was timely filed and provides the required information, Metro shall issue a decision in Writing and provide that decision to the protesting Offeror within a reasonable time of the receipt of the protest.
- (d) If Metro denies the protest, it shall inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contract Review Board.

- (4) **Optional Metro Response**: In addition to the requirements set forth above in section (3), Metro may do any of the following:
- (a) Agree with the protest and issue a revised notice of intent to award or take any other corrective action that may be necessary to ensure that the Contract is awarded to the appropriate Offeror;
 - (b) Issue a Written response to the protest and provide that decision to the protesting Offeror.
- (c) Refer the protest and any response from the Procurement Officer to the Local Contract Review Board for decision:
- (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.
- (5) **Judicial Review**. A protesting Offeror may not seek judicial review of the Procurement Officer's final decision (or if referred to the Local Contract Review Board by the Procurement Officer, the Board's final decision) unless it timely and fully has complied with the protest requirements of this Rule and has exhausted all administrative avenues of appeal provided by Metro.

Stats. Implemented: ORS 279C.375, 279C.380, 279C.385 & 279C.460

49-0455 Protests of Other Violations

- (1) **Right to Protest**. Protests of any violation of ORS Chapter 279C, for which no administrative remedy is otherwise provided by these Rules, are subject to this Rule 49-0455. An Affected Person can file a protest under this Rule only if a Contract is about to be awarded or has been awarded and:
- (a) An alleged violation of ORS 279C has occurred in the Solicitation process and the violation has resulted or will result in the unlawful award of a Contract or the unlawful failure to award the Contract;
- (b) The alleged violation deprived the Affected Person of the award of the Contract or the opportunity to compete for the award of the Contract;
- (c) The Affected Person would have been a Responsible Bidder, Proposer or Offeror qualified to receive the award of the Contract; and
- (d) The Affected Person gave Written notice to Metro describing the alleged violation no later than seven (7) Days after the date on which the alleged violation occurred and in no event more than seven (7) Days after the date of the execution of the Contract.

(2) Method of Protest.

- (a) Time. The Procurement Officer shall not consider a protest submitted after the timeline established for submitting such protest under this Rule and shall not consider a protest under this section if a right to protest is elsewhere provided by these Rules.
 - (b) Contents. The protest must include the following information:

- A. Sufficient information to identify the Solicitation that is the subject of the protest;
- B. A detailed statement of the alleged violation and all the legal and factual grounds for the protest;
- C. Evidence or supporting documentation that supports the grounds on which the protest is based;
 - D. A description of the resulting harm to the Affected Person; and
 - E. The relief requested.
- (3) **Required Metro Response.** Metro shall take the following actions, as appropriate:
 - (a) Metro shall inform the Affected Person in Writing if the protest was not timely filed;
- (b) Metro shall inform the Affected Person if it failed to meet the requirements of Section 2(b) above and the reasons for that failure;
- (c) If the protest was timely filed and provides the information required by Section 2(b) above, Metro shall issue a decision in Writing and provide that decision to the Affected Person within a reasonable time of the receipt of the protest.
- (d) If Metro denies the protest, it shall inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Council Review Board.
- (4) **Optional Metro Response**. In addition to the requirements of section (3) above, Metro may take any or all of the following actions:
 - (a) Agree with the protest and take any corrective action necessary;
 - (b) Issue a Written response to the protest and provide that decision to the Affected Person;
- (c) Refer the protest and any response by the Procurement Officer to the Local Contract Review Board for decision; or
- (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest
- (5) **Judicial Review**. An Affected Person may not seek judicial review of the Procurement Officer's final decision (or if referred to the Local Contract Review Board by the Procurement Officer, the Board's final decision) unless it has timely and fully complied with the protest requirements of this Rule and has exhausted all administrative avenues of appeal provided by Metro.

Stats. Implemented: ORS 279C.375, 279C.380, 279C.385 & 279C.460

49-0460 Performance and Payment Security; Waiver

(1) **Public Improvement Contracts**. Unless the required performance bond is waived under ORS 279C.380(1)(a), excused in cases of Emergency under ORS 279C.380(4), or unless Metro's Local Contract Review Board exempts a Contract or classes of contracts from the required performance bond and payment bond pursuant to ORS 279C.390, the Contractor shall execute and deliver to Metro a performance bond and a payment bond each in a sum equal to the Contract Price for all Public Improvement Contracts. This requirement applies only to Public Improvement Contracts with a value, estimated by Metro, of more than \$100,000. See ORS 279C.380(5). The requirement for the BOLI Public

works payment bond under ORS 279C.830 may only be waived as provided in ORS 279C.836 (4), (7) and (8). See Rule 49-0815 regarding the separate requirement for a Public works bond.

- (2) Other Construction Contracts. Metro may require performance security for other construction Contracts that are not Public Improvement Contracts. Such requirements must be expressly set forth in the Solicitation Document.
- (3) **Requirement for Surety Bond**. Metro will accept only a performance bond and payment bond furnished by a surety company authorized to do business in Oregon and who is duly listed in the United States Treasury List as published in the Federal Register or is otherwise approved by the Metro Attorney each in the amount of 100 percent (100%) of the Contract Price unless otherwise specified in the Solicitation Document or such substitute security as approved by the Metro Attorney's office. The surety bond must be Signed by the surety's Attorney in Fact, and have attached the Power of Attorney for the Attorney in Fact.
- (4) **Time for Submission**. The apparent successful Offeror must promptly furnish the required performance and payment security within ten (10) Days after notification by Metro. If the Offeror fails to furnish all security bonds as requested, Metro may reject the Offer and award the Contract to the Responsible Bidder with the next lowest Responsive Bid or the Responsible Proposer with the next highest-scoring Responsive Proposal, and, at Metro's discretion, the Offeror shall forfeit its Bid or Proposal security.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375, 279C.380 & 279C.390

49-0470 Substitute Contractor

If the Contractor provided a performance bond, Metro may afford the Contractor's surety the opportunity to provide a substitute contractor to complete performance of the Contract. A substitute contractor shall perform all remaining Contract work and comply with all terms and conditions of the Contract, including the provisions of the performance bond and the payment bond. Such substitute performance does not involve the award of a new Contract and is not subject to the competitive Procurement provisions of ORS Chapter 279C.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365, 279C.370, 279C.375, 279C.380 & 279C.390

49-0490 Foreign Contractor

If the Contract Price exceeds \$10,000 and the Contractor is a Foreign Contractor, the Contractor shall promptly report to the Oregon Department of Revenue on forms provided by the Department of Revenue, the Contract Price, terms of payment, Contract duration, and such other information as the Department of Revenue may require before final payment can be made on the Contract. A copy of the report shall be forwarded to Metro. Metro shall satisfy itself that the above requirements have been complied with before it issues final payment on the Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.120

Alternative Contracting Methods

49-0600 Purpose

Rules 49-0600 to 49-0690 are intended to provide guidance regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as may be directed by the Local Contract Review Board under ORS 279C.335. Those methods include, but are not limited to: Design-Build, Energy Savings Performance Contract (ESPC) and the Construction Manager/General Contractor(CM/GC) forms of contracting. As to ESPC contracting, Rules 49-0600 to 49-0690 implement the requirements of ORS 279C.335 pertaining to the adoption of rules governing the procedures for entering into ESPCs. As to contracting for CM/CG Services requiring an exemption from Competitive Bidding under ORS 279C.335(2), Rules 49-0600 to 49-0690 include mandatory and optional procurement provisions pursuant to the requirements of ORS 279C.337.

Stat. Auth.: ORS 279C.335, 279A.065 & 351.086

Stats. Implemented: ORS 279C.335, 279C.337, 279A.065 & 351.086

49-0610 Definitions for Alternative Contracting Methods

The following definitions apply to Rules 49-0600 to 49-0690, 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 Design-Bid-Build method (with award 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 lowest Responsive, Responsible Bidder, 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 Rules 49-0600 to 49-0690, as well as other developing techniques such as general "performance contracting" and "cost plus time" contracting, for which procedural requirements are identified under Rules 49-0600 to 49-0690.
- (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 Metro's selection of a CM/GC to perform CM/GC Services for a project or projects. The CM/GC Method generally involves a form of Procurement that results in a Public Improvement Contract for a Construction Manager/General Contractor to undertake project team involvement with design development; constructability reviews; value engineering, scheduling, estimating and subcontracting services; establish a Guaranteed Maximum Price to complete the Contract work; act as General Contractor; hold all subcontracts, self-perform portions of the work as may be allowed by Metro under the CM/GC Contract; coordinate and manage the building process; provide general Contractor expertise; and act as a member of the project team along with Metro department staff, architects, engineers and other consultants. CM/GC also refers to a Contractor under this form of Contract, sometimes known as the "Construction Manager at Risk."
- (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 Metro, and manages both design and construction. In this form of Contract, a single Person provides Metro 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 Rules 49-0600 to 49-0690, 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 Rules 49-0600 to 49-0690.
- (9) "Energy Savings Guarantee" means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to Metro 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 Metro 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 Metro 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 Metro 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 Metro by the Contractor and accepted by Metro 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 Metro; 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 Metro under the terms of the Contract, including costs for which Metro 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 Metro 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.

Stats. Implemented: ORS 279C.332, 279C.335 & 279A.065

49-0620 Use of Alternative Contracting Methods

(1) **Competitive Bidding Exemptions**. ORS Chapter 279C requires a Competitive Bidding process for Public Improvement Contracts unless a statutory exception applies, a class of Contracts has been exempted from the Competitive Bidding process, or an individual Contract has been exempted from the Competitive Bidding process in accordance with ORS 279C.335 and any applicable Metro Rules. Use of Alternative Contracting Methods may be directed by the Local Contract Review Board as an exception to the prescribed public contracting practices in Oregon, and their use shall be justified in accordance with

the State Code and Rules 49-0600 to 49-0690. See Rule 49-0630 regarding required findings and restrictions on exemptions from the Competitive Bidding requirement under ORS 279C.335.

- (2) Energy Savings Performance Contracts. Unlike other Alternative Contracting Methods covered by Rules 49-0600 to 49-0690, ESPCs are exempted from the Competitive Bidding requirements for Public Improvement Contracts pursuant to ORS 279C.335(1)(f) upon compliance with the procedures set forth in Rule 49-0600 to 49-0690 related to the solicitation, negotiation, and contracting for ESPC work. If those procedures are not followed, an ESPC procurement may still be exempted from Competitive Bidding requirements by following the general exemption procedures within ORS 279C.335 and Rules 49-0620 (1) and 49-0630.
- (3) **Post-Project Evaluation**. ORS 279C.355 requires that Metro prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 when Metro does not use Competitive Bidding. The purpose of this evaluation is to determine whether it was actually in Metro's best interest to use an Alternative Contracting Method instead of Competitive Bidding. The evaluation must be delivered to Metro's Local Contract Review Board within thirty (30) Days of the date Metro "accepts" the Public Improvement project, which event is typically defined in the Contract. In the absence of a Contract definition, acceptance of the Project occurs on the later of the date of final payment or the date of final completion of the Contract work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:
- (a) Financial information, consisting of cost estimates, any Guaranteed Maximum Price, changes and actual costs;
- (b) A narrative description of successes and failures during design, engineering and construction; and
- (c) An objective assessment of the use of the Alternative Contracting Method as compared to the exemption findings.

Stat. Auth.: ORS 279C.335 & 279A.065

Stats. Implemented: ORS 279C.335, 279A.065, 279C.355 & 351.086

49-0630 Findings, Notice and Hearing

- (1) **Cost Savings Factors**. When findings are required under ORS 279C.335 to exempt a Contract or class of Contracts from Competitive Bidding requirements, the "substantial cost savings" criterion at ORS 279C.335(2)(b) requires consideration of the type, cost, amount of the Contract, number of Entities available to Bid, and "such other factors as may be deemed appropriate." If a particular factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts then such factor need not be addressed other than to state that the factor has no application.
- (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 Metro's conclusion regarding the factors listed in both ORS 279C.335(2)(a) and 279C.335(2)(b) or, in the alternative, both ORS 279C.335(2)(a) and 279C.335(2)(c).
- (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 of ORS 279C.335(2)(b) 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 where an Alternative Contracting Method has not been previously used, Metro may make a finding that identifies the project as a "pilot project" under ORS 279C.335(2)(c). Nevertheless, Metro 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) **Description**. Findings supporting a Competitive Bidding exemption must describe with specificity the Alternative Contracting Method to be used in lieu of Competitive Bidding, including (but not limited to) whether a one-step (Request for Proposals) or two-step (beginning with a Request for Qualifications, followed by a request for Proposals) solicitation process will be utilized. The findings may also describe anticipated characteristics or features of the resulting Public Improvement Contract. However, such description in the findings is not binding upon Metro. 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, Metro shall clearly identify the "class" with respect to its defining characteristics, pursuant to the requirements of ORS 279C.335(3), as indicated below:
- (a) The class cannot be based on a single characteristic or factor, so that Metro directly or indirectly creates a class (e.g., using the CM/GC Method for all Metro construction projects, unidentified future construction projects of a particular work category, or all construction projects from a particular funding source such as the sale of bonds); and
- (b) The class must include a combination of factors to be defined by Metro through characteristics that reasonably relate to the exemption criteria, and must reflect a detailed evaluation of those characteristics so that the class is defined in a limited way that effectively meets Metro's objectives while allowing for impartial and open competition and protecting the integrity of the exemption process (i.e., a series of renovation projects that involve renovations for a common purpose, require completion on a related schedule to avoid unnecessary disruption of operations, share common characteristics such as historic building considerations, presence of asbestos or other hazardous substances, or the presence of staff during construction, or otherwise possess characteristics that meet the requirements).
- (7) **Public Hearing**. Before final adoption of findings exempting a Public Improvement Contract or class of Contracts from the requirement of Competitive Bidding, notice must be given and a public hearing held by the Local Contract Review Board as follows:

- (a) Notification of the public hearing must be published in at least one trade newspaper of general statewide circulation a minimum of fourteen (14) Days before the hearing.
- (b) The notice must state that the public hearing is for the purpose of taking comments on Metro's draft findings for an Exemption from the Competitive Bidding requirement. The notice must state that at the hearing, after an opportunity for receipt of comments, the Board will consider adoption of the draft findings and approval of the proposed Alternative Contracting Method. At the time of the notice, copies of the draft findings must be made available to the public.
- (c) At the public hearing, the Board shall offer an opportunity for any interested party to appear and present comment before considering and adopting the findings.
- (d) If Metro is required to act promptly due to circumstances beyond Metro's control that do not constitute an Emergency, notification of the public hearing may be published simultaneously with Metro's Solicitation of contractors for the alternative public contracting method, as long as responses to the Solicitation are due at least five (5) Days after the hearing and approval of the findings.

Stats. Implemented: ORS 279C.335 & 279A.065

49-0640 Competitive Proposals; Procedure

Metro may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS 279C.330 to 279C.337, ORS 279C.400 to 279C.410 and Rule 49-0600 to 49-0690, unless other applicable statutes control Metro's use of competitive Proposals for Public Improvement Contracts. Also see the subdivision of these Rules entitled "Formal Procurement Rules," 49-0200 to 49-0480. For ESPCs, the following RFP process as further specified in 49-0645, 49-0650, 49-0660 and 49-0680 must be utilized if Metro desires the Procurement process to be exempt from the Competitive Bidding requirements of ORS 279C.335. The RFP process for the Alternative Contracting Methods identified in Rule 49-0600 to 49-0690 includes the following steps:

- (1) **Proposal Evaluation**. Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. For ESPC Proposal evaluations, Metro may provide in the RFP that qualifications-based evaluation factors will outweigh Metro's consideration of price-related factors, due to the fact that prices for the major components of the work to be performed during the ESPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors should:
 - (a) Be reasonable estimates based on information available to Metro;
 - (b) Treat all Proposals equitably; and
- (c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to Metro. See ORS 279C.305.

(2) Evaluation Factors.

(a) In basic negotiated construction contracting, where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction,

proposed milestone dates, references, service, sustainability, its efforts to promote diversity in the construction trades in order to reach all of Metro's residents, and other related matters that could affect the cost or quality of the work.

- (b) In CM/GC contracting, in addition to (a) above, those factors may also include the ability to respond to the technical complexity or unique character of the project, analyze and propose solutions or approaches to complex project problems, analyze and propose value engineering options, analyze and propose energy efficiency measures or alternative energy options, coordinate multiple disciplines on the project, effectively utilize the time available to commence and complete the improvement, and related matters that could affect the cost or quality.
- (c) In Design-Build contracting, in addition to (a) and (b) above, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience and related matters that could affect the cost or quality.
- (d) In ESPC contracting, in addition to the factors set forth in subsections (a), (b) and (c) above, those factors may also include sample Technical Energy Audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP, financial statements and related information of joint venturers comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting energy guarantee Contract levels, the specific Person that will provide the Energy Savings Guarantee to be offered by the ESCO, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the work under the ESPC, the ESCO's team members and consultants to be assigned to the project, the ESCO's experience in the Energy Savings Performance Contracting field, the ESCO's experience acting as the prime contractor on previous ESPC projects (as opposed to a subcontractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular project between Metro and the ESCO, the ESCO's equipment performance guarantee policies and procedures, the ESCO's energy savings and cost savings guarantee policies and procedures, the ESCO's project cost guarantee policies and procedures, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the work and the ESCO's fee structure for all phases of the ESPC.

(3) Contract Negotiations.

- (a) Contract terms may be negotiated to the extent allowed by the RFP and Rule 49-0600 to 49-0690, provided that the general work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See Rule 49-0650. Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that could affect the cost or quality of the work.
- (b) For the CM/GC Method, terms that may be negotiated also include the specific scope of preconstruction services, the GC work, any Early Work and other construction work to be performed by the CM/GC, and any other terms that Metro has identified as being subject to negotiation, consistent with the requirements of Rule 49-0690. In ESPC contracting, terms that may be negotiated also include the scope of preliminary design of ECMs to be evaluated by the parties during the Technical Energy Audit

phase of the work, the scope of Personal Services and work to be performed by the ESCO during the Project Development Plan phase of the work, the detailed provisions of the Energy Savings Guarantee to be provided by the ESCO and scope of work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the work, consistent with the requirements of Rule 49-0680.

Stat. Auth.: ORS 279C.335 & 279A.065

Stats. Implemented: ORS 279C.335, 279A.065 & 351.086

49-0645 Requests for Qualifications (RFQ)

As provided by ORS 279C.405(1), Metro may utilize Requests for Qualifications to obtain information useful in the preparation or distribution of a Request for Proposals. When using an RFQ as the first step in a two step solicitation process, in which distribution of an RFP will be limited to the firms identified as most qualified through their submitted statements of qualification, Metro 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. Metro shall also provide within the RFQ a protest provision substantially the same as that described in Rule 49-0450(5) regarding protests of the Competitive Range. After the RFQ process is completed, Metro may distribute RFPs to the selected firms without further advertisement of the solicitation.

Stat. Auth.: ORS 279C.405, 279A.065 Stats. Implemented: ORS 279C.405

49-0650 Requests for Proposals ("RFP")

- (1) **Generally**. When authorized or required by an Exemption granted under Rules 49-0620 and 49-0630, Metro may award a Public Improvement Contract by competitive Proposals. A Contract awarded under this section may be amended only in accordance with Rule 49-0910. Metro may issue a request for information, a request for interest, a Request for Qualifications or other preliminary documents to obtain information useful in the preparation or distribution of a Request for Proposals. If a Contract is awarded, Metro shall award it to the Responsible Proposer whose Proposal is determined in Writing to be the most Advantageous to Metro based on the evaluation factors set forth in the Request for Proposals and, when applicable, the outcome of any negotiations authorized by the Request for Proposals.
- (2) Competitive Proposals are subject to the following requirements of Competitive Bidding (for the purposes of applying the requirements listed below to competitive Proposals, when used in the sections listed "Bids" includes Proposals, and "Bid documents" and "Invitation to Bid" include Requests for Proposals):
 - (a) Advertisement under Rule 49-0210;
 - (b) Requirements for Solicitation Documents under Rule 49-0200;
 - (c) Disqualification due to a Construction Contractors Board listing under Rule 49-0370;
 - (d) Contract execution and bonding requirements under Rules 49-0390 and 49-0460;
 - (e) Determination of responsibility under Rule 49-0390;
 - (f) Rejection of Bids under Rule 49-0440; and

- (g) Disqualification and prequalification under Rules 49-0370 and 49-0220.
- (3) Competitive Proposals are not subject to the following requirements of Competitive Bidding:
 - (a) First-tier subcontractor disclosure under Rule 49-0360; and
 - (b) Reciprocal preference under Rule 46-0310.
- (4) When award of a Public Improvement Contract advertised by the issuance of a Request for Proposals may be made without negotiation, Metro may require Proposal security that serves the same function with respect to Proposals as Bid security serves with respect to Bids as follows:
- (a) Proposal security may be required in a form and amount as may be determined to be reasonably necessary or prudent to protect the interests of Metro.
- (b) Proposal security will be retained if a Proposer who is awarded a Contract fails to promptly and properly execute the Contract and provide any required bonds or insurance.
- (c) Proposal security will be returned to all Proposers upon the execution of the Contract, or earlier in the selection process.
- (5) **Receipt of Proposals**. For each Request for Proposals, Metro shall prepare a list of Proposals submitted. Notwithstanding the public records law, ORS 192.410 to 192.505, Proposals may be opened so as to avoid disclosure of contents to competing Proposers during, when applicable, the process of negotiation. Proposals are not required to be open for public inspection until after the notice of intent to award a Contract is issued. Notwithstanding any requirement to make Proposals open to public inspection after issuance of the notice of intent to award a Contract, Metro may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a Proposal.
- (6) **Solicitation Documents**. In addition to the Solicitation Document requirements of Rule 49-0200, this Rule applies to the requirements for RFPs. RFP Solicitation Documents must conform to the following standards:
- (a) Selection criteria must be set forth 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, warranty provisions, sustainability, its efforts to diversify its workforce in order to reach all of Metro's citizens, and other related matters that could affect the cost or quality of the work. See Rule 49-0640. 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 Metro. 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 Metro is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, Metro 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 Metro has identified as authorized for negotiation. Metro shall describe the evaluation, discussion and negotiation processes, including how Metro 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 that the specified number, or may be increased as provided in Rule 49-0650 (8)(a)(B);
- (d) When Metro intends to award Contracts to more than one Proposer, Metro shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will award. Metro shall also include the criteria it will use to determine how Metro 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.

(7) Evaluation of Proposals.

- (a) **Evaluation**. Metro shall evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. Metro shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.
- A. **Clarifications**. In evaluating Proposals, Metro may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer shall submit Written clarifications and such clarifications shall become part of the Proposer's Proposal.
- B. **Limited Negotiation**. If Metro did not permit negotiation in its RFP, Metro 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 (9)(b) and (10) of this Rule does not apply to this limited negotiation.
- (b) **Discussions; Negotiations**. If Metro permitted discussions or negotiations in the RFP, Metro 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 Metro's discretion, Metro may forego discussions and negotiations and evaluate all Proposals in accordance with this Rule.
- B. If Metro proceeds with discussions or negotiations, Metro shall establish a negotiation team tailored for the acquisition. Metro's team may include legal, technical, auditing and negotiating personnel.
- (c) **Cancellation**. Nothing in this Rule restricts or prohibits Metro from canceling the Solicitation at any time.

(8) Competitive Range; Protest; award.

(a) Determining Competitive Range.

- A. After Opening the Proposals Metro will evaluate the 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, Metro will rank the Proposers based on Metro's scoring and determine the Competitive Range.
- B. Metro may increase the number of Proposers in the Competitive Range if Metro'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 Metro's evaluation of revised Proposals submitted in accordance with the process described in this Rule.

- (b) **Protesting Competitive Range**. Metro shall provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest Metro's evaluation and determination of the Competitive Range in accordance with Rule 49-0450.
- (c) **Intent to award; Discuss or Negotiate**. After the protest period provided in accordance with these Rules expires, or after Metro has provided a final response to any protest, whichever date is later, Metro 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 Metro's intent to award in accordance with Rule 49-0450.
- (ii) After the protest period provided in accordance with Rule 49-0450 expires, or after Metro has provided a final response to any protest, whichever date is later, Metro 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.
- (9) **Discussions; Revised Proposals**. If Metro chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, Metro shall proceed as follows:
- (a) **Initiating Discussions**. Metro 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 Metro identified in the RFP as the subject of discussions. Metro 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 Metro would like additional information; and
- C. Otherwise allowing Proposers to develop revised Proposals that will allow Metro to obtain the best Proposal based on the requirements and evaluation criteria set forth in the RFP.
- (b) **Conducting Discussions**. Metro 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. Metro may terminate discussions with any Proposer in the Competitive Range at any time. However, Metro shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with Metro before Metro notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.
 - A. In conducting discussions, Metro:
 - (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, Metro 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 Metro does not cancel the Solicitation at the conclusion of Metro's discussions with all remaining Proposers in the Competitive Range, Metro 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 Metro's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in Metro's notice.
- A. Upon receipt of the revised Proposals, Metro shall evaluate the revised Proposals based upon the evaluation criteria set forth in the RFP, and rank the revised Proposals based on Metro's scoring.
- B. Metro 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. Metro shall provide Written notice to all Proposers in the Competitive Range of Metro's intent to award the Contract. An unsuccessful Proposer may protest Metro's intent to award in accordance with Rule 49-0450. After the protest period provided in accordance with that Rule expires, or after Metro has provided a final response to any protest, whichever date is later, Metro shall commence final Contract negotiations.

(10) Negotiations.

- (a) **Initiating Negotiations**. Metro may 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. Metro 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 Metro 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 Metro terminates negotiations with a Proposer, Metro may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this Rule until Metro 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 Metro provided for more than one round of discussions or negotiations in the RFP, in which case Metro may proceed with any authorized further rounds of discussions or negotiations.
- (d) **Terminating Discussions or Negotiations**. At any time during discussions or negotiations conducted in accordance with this Rule, Metro may terminate discussions or negotiations with the Proposer with whom it is currently conducting discussions or negotiations if Metro 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.

Stats. Implemented: ORS 279C.400 - 279C.410

49-0660 RFP Pricing Mechanisms

- (1) An RFP may result in a Contract with a lump-sum Contract Price or a fixed Contract Price, as in the case of Competitive Bidding. Alternatively, a cost reimbursement Contract may be negotiated.
- (2) Economic incentives or disincentives may be included to reflect stated Metro purposes related to time of completion, safety or other Public Contracting objectives, including but not limited to total least cost mechanisms such as life cycle costing.
- (3) A Guaranteed Maximum Price may be used as the pricing mechanism for CM/GC Services Contracts (or other Alternative Contracting Methods) where a total Contract Price is provided in the design phase in order to assist Metro in determining whether the project scope is within Metro's budget, and allowing for design changes during preliminary design rather than after final design services have been completed.
- (a) If this collaborative process is successful, the Contractor shall propose a final GMP, which may be accepted by Metro and included within the Contract.
- (b) If this collaborative process is not successful, and no mutually agreeable resolution on the GMP can be achieved with the Contractor, then Metro shall terminate the Contract. Metro may then proceed to negotiate a new Contract (and GMP) with the firm that was next ranked in the original selection process, or employ other means for continuing the project under ORS Chapter 279C.
- (4) When cost reimbursement Contracts are utilized, regardless of whether a GMP is included, Metro shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335

49-0670 Design-Build Contracts

- (1) **General**. The Design-Build form of contracting, as defined in Rule 49-0610(3), has technical complexities that are not readily apparent. Metro may use this contracting method only with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to use the Design-Build process, Metro must be able to reasonably anticipate the following types of benefits:
- (a) Obtaining, through a Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;
- (b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;
- (c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims;
- (d) Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased projects); or
- (e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.
- (2) **Authority**. Metro may utilize the Design-Build form of contracting only in accordance with the requirements of these Rules 49-0600 to 49-0690. See particularly 49-0620 on "Use of Alternative Contracting Methods" and 49-0680 pertaining to ESPCs.
- (3) **Selection**. Design-Build selection criteria may include those factors set forth above in Rule 49-0640(2)(a), (b) and (c).
- (4) **QBS Inapplicable**. Because the value of construction work predominates the Design-Build form of contracting, the qualifications based selection (QBS) process required by ORS 279C.110 is not applicable.
- (5) **Licensing**. If a Design-Build Contractor is not an Oregon licensed design professional, Metro shall require that the Design-Build Contractor disclose in its Written Offer 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(2)(g) regarding the offer of architectural services, and 672.060(11) regarding the offer of engineering services that are appurtenant to construction work.
- (6) **Performance Security**. ORS 279C.380(1)(a) provides that for Design-Build Contracts the surety's obligation on performance bonds, or the Bidder's obligation on cashier's or certified checks accepted in lieu thereof, includes the preparation and completion of design and related Personal Services specified in the Contract. This additional obligation, beyond performance of construction work, extends only to the provision of Personal Services and related design revisions, corrective work and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage.
- (7) **Contract Requirements**. Metro shall conform its Design-Build contracting practices to the following requirements:

- (a) **Design Services**. The level or type of design services required must be clearly defined within the Procurement documents and Contract, along with a description of the level or type of design services previously performed for the project. The Personal Services and work to be performed must be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.
- (b) **Professional Liability**. The Contract must clearly identify the liability of design professionals with respect to the Design-Build Contractor and Metro, as well as requirements for professional liability insurance.
- (c) **Risk Allocation**. The Contract must clearly identify the extent to which Metro requires an express indemnification from the Design-Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty work claims.
- (d) **Warranties**. The Contract must clearly identify any express warranties made to Metro regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.
- (e) **Incentives**. The Contract must clearly identify any economic incentives and disincentives, the specific criteria that apply and their relationship to other financial elements of the Contract.
- (f) **Honoraria**. If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the solicitation process on the basis that Metro is benefited from such deliverables.

Stat. Auth.: ORS 279C.335 & 279A.065 Stats. Implemented: ORS 279C.335, 279A.065, 279C.110 & 351.086

49-0680 Energy Savings Performance Contracts (ESPC)

- (1) **Generally**. Rules 49-0600 to 49-0690 include a limited, efficient method for Metro to enter into ESPCs 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 Metro chooses not to utilize the ESPC Procurement method provided for by Rules 49-0600 to 49-0690, Metro 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 of these Rules.
- (2) **ESPC Contracting Method**. The ESPC form of contracting, as defined in Rule 49-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for Metro, as well as the additional technical complexities associated with a Design-Build Contract. Metro may 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, Metro 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**. Should Metro desire to pursue an exemption from the Competitive Bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086), it shall utilize the ESPC form of contracting only in accordance with the requirements of Rules 49-0600 to 49-0690.
- (4) **No Findings Required**. No findings are required for an ESPC to be exempt from the Competitive Bidding process for Public Improvement Contracts pursuant to 279C.335, unless Metro chooses not to comply with the ESPC contracting procedures set forth in Rules 49-0600 to 49-0690.
- (5) **Selection**. ESPC selection criteria may include those factors set forth above in Rule 49-0640(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 required by ORS 279C.110 is not applicable.
- (7) **Licensing**. If the ESCO is not an Oregon licensed design professional, Metro 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 ORS 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 Metro'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 "design and related services." Nevertheless, Metro 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 Metro so provides in the RFP.

- (9) **Contracting Requirements**. Metro shall conform its 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 Metro, 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, Metro shall conform its Design-Build contracting practices to the Design-Build contracting requirements set forth in Rule 040-0560(7) above.
 - (c) Pricing Alternatives. Metro 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 Metro, the ESCO's M & V services may be terminated prior to the completion of the M &

V/Energy Savings Guarantee period and Metro'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 pay for themselves over the useful life of the ECMs installed. The permitted scope of work for ESPCs resulting from a Solicitation under these Rules 49-0600 to 49-0690 does not include maintenance services for the project facility.

Stat. Auth.: ORS 279C.335 & 279A.065

Stats. Implemented: ORS 279C.335, 279A.065, 279C.110 & 351.086

49-0690 Construction Manager/General Contractor Services ("CM/GC Services")

- (1) **General**. The CM/GC Method is a technically complex project delivery system. Metro may use this contracting method only with the assistance of legal counsel with substantial experience and necessary expertise in using the CM/GC Method, as well as knowledgeable staff, consultants or both staff and consultants who have a demonstrated capability of managing the CM/GC process in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, Public Contracting and project management. Unlike the Design-Build form of contracting, the CM/GC Method does not contemplate a "single point of responsibility" under which the CM/GC is responsible for successful completion of all work related to a performance Specification. The CM/GC has defined contract obligations, including responsibilities as part of the project team along with Metro and design professional, although with the CM/GC Method there is a separate contract between Metro and design professional. In order to utilize the CM/GC Method, Metro must be able to reasonably anticipate the following types of benefits:
- (a) **Time Savings**. With the CM/GC Method, the Public Improvement has significant schedule ramifications, such that concurrent design and construction are necessary in order to meet critical deadlines and shorten the overall duration of construction. Metro may consider operational and financial data that show significant savings or increased opportunities for generating revenue as a result of early completion, as well as less disruption to public facilities as a result of shortened construction periods;
- (b) **Cost Savings**. With the CM/GC Method, early CM/GC input during the design process is expected to contribute to significant cost savings. Metro may consider value engineering, building systems analysis, life cycle costing analysis and construction planning that lead to cost savings. Metro shall specify any special factors influencing this analysis, including high rates of inflation, market uncertainty due to material and labor fluctuations or scarcities, and the need for specialized construction expertise due to technical challenges; or
- (c) **Technical Complexity**. With the CM/GC Method, the Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between Metro, design professionals, any Metro project management or technical consultants and the CM/GC, in which the CM/GC will assist in addressing specific project challenges through pre-construction Personal Services. Metro may consider the need for CM/GC input on issues such as operations of the facility during construction, tenant occupancy, public safety, delivery of an early budget or GMP, financing, historic preservation, difficult remodeling projects, and projects requiring complex phasing or highly coordinated scheduling.

- (2) **Authority**. Metro may use the CM/GC form of contracting only in accordance with the requirements of these Division 49 Rules and ORS 279C.337, when a Competitive Bidding exemption is approved. See particularly Rule 49-0600 on "Purpose" and 49-0620 on "Use of Alternative Contracting Methods."
- (3) **Selection**. CM/GC selection criteria may include those factors set forth above in Rule 49-0640(2)(b).
- (4) **Basis for Payment**. The CM/GC process adds specified construction manager Personal Services to traditional design-bid-build general contractor work, requiring full Contract performance within a negotiated GMP, fixed Contract Price or other maximum Contract Price. For a GMP pricing method, the basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for construction work and Personal Services rendered, which together shall not exceed the GMP. See GMP definition at Rule 49-0610 and Pricing Mechanisms at Rule 49-0660.
- (5) **Contract Requirements**. Metro shall conform its CM/GC contracting practices to the following requirements:
- (a) Nature of the Initial CM/GC Services Contract Document. A Solicitation for CM/GC Services is a Procurement for a Public Improvement, since the scope of the Procurement includes not only preconstruction Personal Services to be performed by the CM/GC, but also construction work that is expected to result in a completed Public Improvement. In the traditional CM/GC Services contracting approach, the text of the resulting CM/GC Services Contract will include comprehensive contract provisions that will not only fully govern the relationship between Metro and the CM/GC for the preconstruction Personal Services, but will also include the general contract provisions that will control the CM/GC's providing of the construction work necessary to complete the project (with any remaining necessary construction-related contract provisions being added through Early Work amendments to the Contract, the GMP amendment to the Contract or, if necessary, a conventional amendment to the Contract). The traditional CM/GC Services contracting approach, however, also contemplates that Metro will only authorize the CM/GC to perform the pre-construction Personal Services when the Contract is first executed unless construction work is specifically included in the initial CM/GC Contract. Under this approach, the construction phase or phases of the CM/GC Services project are not yet authorized and the Contract only becomes a Public Improvement Contract once the parties amend the Contract, through an Early Work or a GMP amendment, to authorize the construction of a portion of the project or the entire project. See also Oregon Administrative Rule 839-025-0020, regarding the Bureau of Labor and Industries' determination of when a Contract for CM/GC Services becomes a "public works" Contract for purposes of paying prevailing wage rates for construction work under the CM/GC Contract.
- (b) Setting the GMP, Fixed Contract Price or Other Maximum Contract Price. The GMP, fixed Contract Price or other maximum Contract Price must be set at an identified time consistent with industry practice and project conditions and after supporting information reasonably considered necessary to its use has been developed, which will normally take place by the end of the design development phase of the project. The supporting information for the GMP must define with particularity both what Personal Services and construction work are included and excluded from the GMP, fixed Contract Price or other maximum Contract Price. A set of project drawings and Specifications shall be produced establishing the scope of construction work contemplated by the GMP, fixed Contract Price or other maximum Contract Price.
- (c) Adjustments to the GMP, Fixed Contract Price or Other Maximum Contract Price. The Contract must clearly identify the standards or factors under which changes or additional construction work will be considered outside of the work scope that warrants an increase in the GMP, fixed Contract

Price or other maximum Contract Price, as well as criteria for decreasing the GMP, fixed Contract Price or other maximum Contract Price. The GMP, fixed Contract Price or other maximum Contract Price shall not be increased without a concomitant increase to the scope of the work defined at the establishment of the GMP, fixed Contract Price or other maximum Contract Price or most recent amendment to the GMP, fixed Contract Price or other maximum Contract Price. An increase to the scope of the work may take the form of conventional additions to the project scope, as well as corrections to the Contract terms and conditions, additions to insurance coverage required by Metro and other changes to the work.

- (d) **Cost Savings**. The Contract must clearly identify the disposition of any Cost Savings resulting from completion of the work below the GMP, fixed Contract Price or other maximum Contract Price; that is, under what circumstances, if any, the CM/GC might share in those Cost Savings, or whether the Cost Savings accrue only to Metro's benefit. Unless there is a clearly articulated reason for sharing the Cost Savings set forth in the Contract, the Cost Savings must accrue to Metro.
- (e) **Cost Reimbursement**. The Contract must clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, fixed Contract Price or other maximum Contract Price, including any category of GC work costs, and may also incorporate a mutually-agreeable cost-reimbursement standard.
- (f) **Audit**. Cost reimbursements must be made subject to final audit adjustment, and the Contract must establish an audit process to ensure that Contract costs are allowable, properly allocated and reasonable.
- (g) **Fee**. Compensation for the CM/GC's Personal Services and construction work, where the Contract uses a GMP, will include a fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee shall be expressly defined in the Contract terms and conditions at the time Metro selects the CM/GC. The fee, which may be expressed as either a fixed dollar amount or as a proposed percentage of all reimbursable costs, must be identified during and become an element of the selection process. It must subsequently be expressed as a fixed amount for particular construction work authorized to be performed, when Early Work is added to the Contract through an amendment and when the GMP is established. The CM/GC fee does not include any fee paid to the CM/GC for performing pre-construction services during a separate pre-construction phase.
- (h) **Incentives**. The Contract must clearly identify any economic incentives, the specific criteria that apply and their relationship to other financial elements of the Contract (including the GMP, fixed Contract Price or other maximum Contract Price).
- (i) **Controlled Insurance Programs**. For projects where an owner-controlled or contractor-controlled insurance program is permitted under ORS 737.602, the Contract must clearly identify whether an owner-controlled or contractor-controlled insurance program is anticipated or allowable. If so, the Contract must clearly identify (1) anticipated cost savings from reduced premiums, claims reductions and other factors, (2) the allocation of cost savings, and (3) safety responsibilities, incentives or both safety responsibilities and incentives.
- (j) **Early Work**. The RFP must clearly identify, whenever feasible, the circumstances under which any Early Work may be authorized and undertaken for compensation prior to establishing the GMP, fixed Contract Price or other maximum Contract Price.
- (k) **Subcontractor Selection**. Subcontracts under the Contract are not Public Contracts within the meaning of the State Code. However, the Contract must include provisions that clearly meet the

requirements of ORS 279C.337(3) and other Metro requirements. Within the scope of 279C.337(3), the CM/GC's subcontractor selection process must meet the following parameters:

- A. Absent a Written justification prepared by the CM/GC and approved by Metro as more particularly provided for in this section, the CM/GC's Subcontractor selection process must be "competitive," meaning that the process should include publicly-advertised subcontractor solicitations and be based on a low-bid competitive method, a low-quote competitive method for contracts in a specified dollar range agreeable to Metro, or a method whereby both price and qualifications of the subcontractors are evaluated in a competitive environment, consistent with the RFP and Contract requirements;
- B. When the Subcontractor selection process for a particular work package will not be "competitive" as provided for in this section, the process must meet the following requirements:
- (i) The CM/GC must prepare and submit a Written justification to Metro, explaining the project circumstances that support a non-competitive Subcontractor selection process for a particular work package, including, but not limited to, Emergency circumstances, the CM/GC's need to utilize a key Subcontractor member of the CM/GC's project team consistent with the CM/GC's project Proposal, the need to meet other specified Contract requirements, the continuation or expansion of an existing Subcontractor agreement that was awarded through a "competitive process" along with facts supporting the continuation or expansion of the Subcontractor agreement, or a "sole source" justification;
- (ii) For a "sole source" selection of a subcontractor to proceed, Metro must evaluate the Written justification provided by the CM/GC and must find that critical project efficiencies require utilization of labor, services or materials from one subcontractor; that technical compatibility issues on the project require labor, services or materials from one subcontractor; that particular labor, services or materials are needed as part of an experimental or pilot project or as part of an experimental or pilot aspect of the project; or that other project circumstances exist to support the conclusion that the labor, services or materials are available from only one subcontractor;
- (iii) The CM/GC must provide an independent cost estimate for the work package that will be subject to the non-competitive process, if required by Metro;
- (iv) The CM/GC must fully respond to any questions or comments submitted to the CM/GC by Metro; and
- (v) Metro must approve the CM/GC's use of the non-competitive Subcontractor selection process prior to the CM/GC's pursuit of the non-competitive process.
- C. A competitive selection process may be preceded by a publicly advertised subcontractor pre-qualification process, with only those subcontractors meeting the pre-qualification requirements being invited to participate in the later competitive process through which the CM/GC will select the subcontractor to perform the construction work described in the selection process;
- D. If the CM/GC or an Affiliate or subsidiary of the CM/GC will be included in the subcontractor selection process to perform particular construction work on the project, the CM/GC must disclose that fact in the selection process documents and announcements. The Contract must also identify the conditions, processes and procedures the CM/GC will utilize in that competitive process in order to make the process impartial, competitive and fair, including but not limited to objective, independent review and opening of bids or proposals for the elements of work involved, by a representative of Metro or another independent third party.

- (I) **Subcontractor Approvals and Protests**. The Contract must establish whether Metro must approve subcontract awards, and to what extent, if any, Metro will resolve or be involved in the resolution of protests of the CM/GC's selection of subcontractors and suppliers. The procedures and reporting mechanisms related to the resolution of subcontractor and supplier protests must be established in the Contract with certainty, including the CM/GC's roles and responsibilities in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, Metro must retain the right to monitor the subcontracting process in order to protect Metro's interests and to confirm the CM/GC's compliance with the Contract and with applicable statutes, Rules and other legal requirements.
- (m) CM/GC Self-Performance or Performance by CM/GC Affiliates or Subsidiaries Without Competition. Consistent with the requirements of ORS 279C.337(3)(c), the Contract must establish the conditions under which the CM/GC or an Affiliate or subsidiary of the CM/GC may perform elements of the construction work without competition from subcontractors, including, for example, job-site GC work. Other than for GC work, in order for the CM/GC or an Affiliate or subsidiary of the CM/GC to perform elements of the construction work without competition from subcontractors, the CM/GC must provide, or must have included in the CM/GC's RFP Proposal to perform CM/GC Services for the project, a detailed proposal for performance of the work by the CM/GC or an Affiliate or subsidiary of the CM/GC. If required by Metro, the CM/GC's proposal to perform the construction work must be supported by at least one independent cost estimate prior to the work being included in the Contract.
- (n) Unsuccessful Subcontractor Briefing. ORS 279C.337(3)(e) is designed to allow a subcontractor who was not selected by the CM/GC to perform a particular element of the construction work to obtain specific information from the CM/GC, and meet with the CM/GC to discuss the subcontractor qualification and selection process involved and the CM/GC's subcontractor selection decisions, in order to better understand why the subcontractor was not successful in being selected to perform the particular element of the work and to improve the subcontractor's substantive qualifications or the subcontractor's methods in competing for elements of the work for the particular project involved, or for future projects. The briefing meetings may be held with individual subcontractors or, if the subcontractors agree, in groups of subcontractors, with those groups established by bid package or other designation agreed to by Metro and the CM/GC. Nevertheless, the CM/GC is not obligated to provide this briefing opportunity unless the CM/GC receives a Written request from a subcontractor to discuss the subcontractor qualification and selection process involved. Unless Metro and the CM/GC agree on a different schedule, the CM/GC Contract should include provisions:
- A. Allowing a subcontractor sixty (60) Days from the CM/GC's notice of award of a subcontract for a particular work package to request, in Writing, a post-selection meeting with the CM/GC under this section; and
- B. Requiring the CM/GC to set a meeting with the subcontractor under this section within forty-five (45) Days of the subcontractor's Written request.
- (o) **Performance and Payment Bonds**. Provided no construction work is included with the preconstruction services to be performed under the initial form of the CM/GC Contract, no performance bond or payment bond is required to be provided by the CM/GC at the time of Contract signing, consistent with ORS 279C.380. Once construction work is included in the Contract and authorized by Metro to be performed by the CM/GC, however, the CM/GC must provide a performance bond and payment bond each in the full amount of any Early Work to be performed by the CM/GC, or the full amount of the GMP, fixed Contract Price or other maximum Contract Price, as applicable. Furthermore, in the event additional Early Work is added to the CM/GC Contract after the initial Early Work or in the

event an amendment to the CM/GC Contract is made so that the GMP, fixed Contract Price or other maximum Contract Price must be increased, the performance bond and the payment bond must each be increased in an amount equal to the additional Early Work or the increased GMP, fixed Contract Price or other maximum Contract Price.

- (p) Independent Review of CM/GC Performance; Conflicts of Interest. If Metro requires independent review, monitoring, inspection or other oversight of a CM/GC's performance of preconstruction Personal Services, construction work or both pre-construction Personal Services and construction work, Metro must obtain those independent review services from a Contractor independent of the CM/GC, the CM/GC's Affiliates and the CM/GC's Subcontractors, pursuant to the requirements of ORS 279C.307. However, ORS 279C.307 does not prohibit the following:
- A. The CM/GC's performing both pre-construction Personal Services and construction work that are included within the definition of CM/GC Services, consistent with ORS 279C.307(2); or
- B. The CM/GC's performing internal quality control services, quality assurance services or other internal peer review of CM/GC work product that is intended to confirm the CM/GC's performance of the CM/GC Contract according to its terms.
- (q) **Socio-Economic Programs**. The Contract must clearly identify conditions relating to any required socio-economic programs, including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and Metro.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335, 279C.337 & 279C.380(2)

49-0695 Post Project Evaluation

- (1) In accordance with ORS 279C.355 and Rule 49-0620, upon completion of and final payment for any Public Improvement Contract, or class of Public Improvement Contracts in excess of \$100,000 for which Metro did not use the Competitive Bidding process, Metro shall prepare and deliver to the Local Contract Review Board an evaluation of the Public Improvement Contract or the class of Public Improvement Contracts.
- (2) The evaluation must include but is not limited to the following matters:
 - (a) The actual project cost as compared with original project estimates;
 - (b) The amount of any guaranteed maximum price;
 - (c) The number of project change orders issued;
- (d) A narrative description of successes and failures during the design, engineering and construction of the project;
- (e) An objective assessment of the use of the alternative contracting process as compared to the findings prepared to support the use of the alternative contracting process.

Contract provisions

49-0800 Required Contract Clauses

Metro shall include in all Solicitation Documents for Public Improvement Contracts all of the ORS Chapter 279C required Contract clauses, as set forth in the checklist contained in Rule 49-0200(1)(c) regarding Solicitation Documents. The following series of rules provides further guidance regarding particular Public Contract provisions.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 297C.505 - 279C.545 & 279C.800 - 279C.870

49-0810 Waiver of Delay Damages Against Public Policy

No provision may be placed in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from Metro's unreasonable delay in performing the Contract. However, Contract provisions requiring notice of delay, providing for alternative dispute resolution such as arbitration (where allowable) or mediation, providing other procedures for settling contract disputes, or providing for reasonable liquidated damages, are permissible.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.315

49-0815 BOLI Public works Bond

Pursuant to ORS 279C.830(2), the Specifications for every Public works Contract must contain a provision stating that the Contractor and every subcontractor must have a Public works bond filed with the Construction Contractors Board before starting work on the project, unless otherwise exempt. This bond is in addition to performance bond and payment bond requirements.

Stat. Auth: ORS 279A.065

Stats. Implemented: ORS 279C.830

49-0820 Retainage

(1) Withholding of Retainage. Metro may not retain an amount in excess of five percent (5%) of the Contract Price for work completed. If the Contractor has performed at least 50 percent (50%) of the Contract work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written approval, Metro may, in its discretion, reduce or eliminate retainage on any remaining progress payments. Metro shall respond in Writing to all such applications within a reasonable time. When the Contract work is 97 ½ percent (97.5%) completed, Metro may, at its discretion and without application by the Contractor, reduce the retained amount to 100 percent (100%) of the value of the remaining unperformed Contract work. If retainage has been reduced or eliminated, Metro reserves the right in protecting its interests to reinstate at any time retainage from further progress payments. Retainage will be included in the final payment of the Contract Price.

- (2) **Form of Retainage**. Unless Metro finds in Writing that accepting a bond or instrument described in subsection (a) or (b) below poses an extraordinary risk that is not typically associated with the bond or instrument, Metro, in lieu of withholding moneys from payment, may accept from the Contractor:
- (a) Bonds, securities or other instruments that are deposited and accepted as provided in Section (4)(a) of this Rule; or
 - (b) A surety bond deposited as provided in Section (4)(b) of this Rule.
- (3) **Deposit in interest-bearing accounts**. Upon request of the Contractor, Metro shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of Metro. Earnings on such account accrue to the Contractor. Metro may determine the account into which the retainage is placed.
- (4) **Alternatives to cash retainage**. In lieu of cash retainage to be held by Metro, the Contractor may substitute one of the following:
 - (a) Deposit of bonds, securities or other instruments:
- A. The Contractor may deposit bonds, securities or other instruments with Metro or in any bank or trust company to be held for the benefit of Metro. If Metro accepts the deposit, Metro shall reduce the cash retainage by an amount equal to the value of the bonds and securities. This reduction in retainage will be made in the progress payments made subsequent to the time the Contractor deposits the bonds and securities;
- B. Bonds, securities or other instruments deposited or acquired in lieu of cash retainage must be of a character approved by the Metro Chief Financial Officer, which may include, without limitation:
 - (i) Bills, certificates, notes or bonds of the United States.
 - (ii) Other obligations of the United States or agencies of the United States.
 - (iii) Obligations of a corporation wholly owned by the Federal Government.
 - (iv) Indebtedness of the Federal National Mortgage Association.
- (v) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.
- (vi) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.
- C. Upon Metro's determination that all requirements for the protection of Metro's interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu of retainage.
- (b) **Deposit of surety bond**. Metro, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to Metro in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond shall accept surety bonds from its subcontractors and suppliers in lieu of retainage. In such cases, retainage will be reduced by an amount equal to the value of the bond, and the excess shall be reimbursed.
- (5) **Recovery of Costs**. If Metro incurs additional costs as a result of the exercise of any of the options for retainage, Metro may recover such costs from the Contractor by reduction of the final payment. As work on the Contract progresses, Metro shall, upon request, inform the Contractor of all accrued costs.

(6) Additional Retainage When Certified Payroll Statements Not Filed. Pursuant to ORS 279C.845(7), if a Contractor is required to file certified payroll statements and fails to do so, Metro shall retain 25 percent (25%) of any amount earned by the Contractor on a Public works Contract until the Contractor has filed such statements with Metro. Metro shall pay the Contractor the amount retained under this section within fourteen (14) Days after the Contractor files the certified statements, regardless of whether a subcontractor has filed such statements.

Stat. Auth.: ORS 279A.065 & 279C.845

Stats. Implemented: ORS 279C.560, 279C.570 & 701.420

49-0860 Public Works Contracts

- (1) **Generally**. ORS 279C.800 to 279C.870 regulates Public works Contracts, as defined in ORS 279C.800(6), and requirements for payment of prevailing wage rates. Also see Rules of the Bureau of Labor and Industries (BOLI) at OAR Chapter 839.
- (2) **BOLI Notification**. Metro shall provide notification of award to BOLI as required by ORS 279C.835.
- (3) **Required Contract Conditions**. As detailed in the above statutes and rules, every Public works Contract must contain the following provisions:
- (a) Metro authority to pay certain unpaid claims and charge such amounts to Contractors, as set forth in ORS 279C.515(1).
 - (b) Maximum hours of labor and overtime, as set forth in ORS 279C.520(1).
- (c) Employer notice to employees of hours and days that employees may be required to work, as set forth in ORS 279C.520(2).
- (d) Contractor required payments for certain services related to sickness or injury, as set forth in ORS 279C.530.
- (e) A requirement for filing a public works bond by contractor and every subcontractor, as set forth in ORS 279C.830(2).
 - (f) A requirement for payment of the prevailing wage rate, as set forth in ORS 279C.830.
- A. If no federal funds are being used to fund the work, the wage rates established under ORS 279C.815(2)(a) must be paid.
- B. If federal funds are being used to fund the work, the wage rates established under ORS 279C.815(2)(b) must be paid if both state and federal prevailing rates of wage apply, and the Contract and every Subcontract must provide that all workers must be paid the higher of the applicable state or federal prevailing rate of wage.
- C. The rates may be incorporated into the Specifications by reference, in compliance with OAR 839-025-0020; or, when the rates are available electronically or by Internet access, the rates may be incorporated into the Specifications by referring to the rates and providing adequate information on how to access them in compliance with OAR 839-025-0020 and OAR 839-025-0035.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.800 - 279C.870, OL 2011, ch 458

49-0870 Specifications; Brand Name Products

- (1) Specification content is in the sole discretion of Metro, subject to statutory restrictions on the use of brand names.
- (2) Metro may consult with technical experts, suppliers, prospective contractors and representative of the industries with which Metro will Contract. Metro will take reasonable measure to ensure that no Person who prepares or assists in the preparation of Solicitation Documents, Specifications, plans or scope of work (collectively, "documents"), and that no business with which the Person is associated realizes a material competitive advantage that arises from Metro's use of those documents.
- (3) A "brand name or equal" Specification may be used when it is Advantageous to Metro, because the brand name describes the standard of quality, performance, functionality and other characteristics of the product needed by Metro. Metro's determination of what constitutes a product that is equal or superior to the product specified is final. Unless otherwise specified, the use of a brand name shall mean "brand name or equal."
- (4) A "brand name" Specification may be used requiring a Contractor to provide a specific brand when the Procurement Officer, or designee, makes the following findings:
- (a) The use of a brand name Specification is unlikely to encourage favoritism in the awarding of a Contract or substantially diminish competition for Contracts: or
 - (b) The use of a brand name Specification would result in a substantial cost savings to Metro; or
- (c) There is only one manufacturer or seller of the product of the quality, performance or functionality required; or
- (d) Efficient utilization of existing equipment, or supplies requires the acquisition of compatible equipment or supplies.
- (5) Metro's use of a brand name specification is subject to protest and review only as provided in Rule 49-0260(3).

Stat. Auth.: ORS 279A.065 Stats. Implemented: ORS 279C.345

49-0880 Records Maintenance; Right to Audit Records

- (1) Contractors and Subcontractors shall maintain all fiscal records relating to a Contract executed with Metro in accordance with generally accepted accounting principles. In addition, Contractors and Subcontractors shall maintain any other records necessary to clearly document:
- (a) Their performance. Performance includes, but is not limited to, compliance with plans and Specifications, compliance with fair contracting and employment programs, compliance with Oregon law on payment of wages and accelerated payment provisions, and any and all requirements imposed on the Contractor or Subcontractor under the Contract or subcontract;
 - (b) Any claims arising from or relating to their performance under a Public Contract;
 - (c) Any cost and pricing data; and,
 - (d) Payment to suppliers and Subcontractors.

- (2) Such records shall be maintained for a period of six years from the date of final completion of the Contract or until the conclusion of any audit, controversy or litigation arising out of or related to a Contract, whichever is longer, unless a shorter period of time is authorized in Writing by Metro.
- (3) Contractors and Subcontractors shall make all their records available to Metro within the boundaries of the Metro region, at reasonable times and places regardless of whether litigation has been filed on any claims. If the records are not made available within the boundaries of the Metro region, the Contractor or Subcontractor shall pay all costs for Metro employees, and any necessary consultants hired by Metro, including travel, per diem costs, salary, and any other expenses incurred by Metro in sending its employees or consultants to examine, audit, inspect, and copy those records. If the Contractor elects to have such records outside these boundaries, the costs paid by the Contractor to Metro for inspection, auditing, examining and copying those records are not recoverable costs in any legal proceeding.
- (4) Metro and its Authorized Representatives shall be entitled to inspect, examine, copy and audit the books and records of any Contractor or Subcontractor upon request by Metro for any reason, including any documents that may be placed in escrow according to any Contract requirements. The records that may be inspected and copied include financial documents of the Contractor, including tax returns and financial statements. Metro will keep such documents confidential to the extent permitted by Oregon law, subject to Subsection 5 below.
- (5) Contractors and Subcontractors agree to disclose the records requested by Metro and agree to their admission as evidence in any proceeding between the parties, including, but not limited to a court proceeding, arbitration, mediation or other alternative dispute resolution process.
- (6) In the event that the records disclose that Metro is owed money or establishes that any portion of any claim made against Metro is not warranted, the Contractor or Subcontractor shall pay all costs incurred by Metro in conducting the audit and inspection. Such costs may be withheld from any sum due or that becomes due to the Contractor by Metro.
- (7) Failure of the Contractor or Subcontractor to keep or disclose records as required may result in a finding that the Contractor or Subcontractor is not a Responsible Bidder or Proposer as provided in Subsection 5.34.610 B.

Stats. Implemented: ORS 279A.030, 279C.375, 279C.380 & 279C.440

49-0890 Metro Payment for Unpaid Labor or Supplies

- (1) **Contract incomplete**. If the Contract is still in force, Metro may, in accordance with ORS 279C.515(1), pay a valid claim to the Person furnishing the labor or services, and charge the amount against payments due or to become due to the Contractor under the Contract. If Metro chooses to make such a payment as provided in ORS 279C.515(1), the Contractor and the Contractor's surety are not relieved from liability for unpaid claims.
- (2) **Contract completed**. If the Contract has been completed and all funds disbursed to the prime Contractor, all claims must be referred to the Contractor's surety for resolution. Metro shall not make payments to subcontractors or suppliers for work already paid for by Metro.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.515

49-0900 Contract Suspension; Termination Procedures

- (1) **Suspension of work**. In the event Metro suspends performance of work for any reason considered by Metro to be in the public interest other than a labor dispute, the Contractor is entitled to a reasonable extension of Contract time, and to reasonable compensation for all costs (as defined in the Contract), including a reasonable allowance for related overhead (as defined in the Contract), incurred by the Contractor as a result of the suspension.
- (2) Termination of Contract by mutual agreement for reasons other than default.
- (a) **Reasons for termination**. The parties may agree to terminate the Contract or a divisible portion thereof if:
- A. Metro suspends work under the Contract for any reason considered to be in the public interest (other than a labor dispute, or any judicial proceeding relating to the work filed to resolve a labor dispute); and
- B. Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the work.
- (b) **Payment**. When a Contract, or any divisible portion thereof, is terminated pursuant to this subsection (2), Metro will pay the Contractor a reasonable amount of compensation for preparatory work completed, and for costs and expenses arising out of termination (all as defined in the Contract). Metro will also pay for all work completed, based on the Contract Price. Unless the work completed is subject to unit or itemized pricing under the Contract, payment is calculated based on percent of Contract completed (as may be further defined in the Contract). No claim for loss of anticipated profits is allowed.
- (c) **Public Interest Termination**. Metro may include in its Contracts terms detailing the circumstances under which the Contractor is entitled to compensation as a matter of right in the event Metro unilaterally terminates the Contract for any reason considered by Metro to be in the public interest.
- (d) **Responsibility for Completed work**. Termination of the Contract or a divisible portion thereof pursuant to this Rule does not relieve either the Contractor or its surety of liability for claims arising out of the work performed.
- (e) **Remedies Cumulative**. Metro may, at its discretion, avail itself of any or all rights or remedies set forth in these Rules, in the Contract, or available at law or in equity.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.650, 279C.655, 279C.660, 279C.665 & 279C.670

49-0910 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 Change Orders, within the general scope of the original Procurement that requires mutual agreement between Metro and the Contractor.
- (b) "Change Order" means a mutually agreed upon change order, or a construction change directive or other Written order issued by Metro 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 Orders Generally. Changes Orders are anticipated in construction and, accordingly, Metro shall include changes order provisions in all Public Improvement Contracts that detail the scope of the changes clause, provide pricing mechanisms, authorize Metro or its authorized representatives to issue Changes Orders and provide a procedure for addressing Contractor claims for additional time or compensation. When Change Orders 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 Metro.
- (3) **Contract Amendments Generally.** Contract Amendments to Public Improvement Contracts are not considered to be new Procurements and an exemption from Competitive Solicitation is not required to add work when:
- (a) The work added is within the general scope of the original Contract, or if the work is outside the scope of the original Contract, it can be performed by the Contractor at a cost below what Metro estimates it would cost if a Contract for that work were awarded through Competitive Bidding, Competitive Quotations, or Competitive Proposals. Additional work is "within the general scope of the original Contract" for the purposes of this subsection if the additional work is logically related to the Contract work; prudent Contract management, engineering or construction practices dictate that the additional work ought to be performed in conjunction with the original Contract work; the additional work is located at the same site as the Contract work; and the Contract objectively establishes the prices, or the method of arriving at the price, for the additional work;
- (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.
- (4) **Limits on Contract Increases**. Except as otherwise set forth below in subsections (5) and (6), the aggregate increase resulting from all amendments to a Public Improvement Contract shall not exceed twenty-five percent (25%) of the original Contract Price. For Contracts over \$100,000, increases in excess of the 25% limit shall be treated as Unauthorized Purchases in accordance with Rule 46-0200 and submitted to the Procurement Officer to obtain approval by the Chief Operating Officer prior to authorization of performance of the work.
- (5) **Small or Intermediate Contracts**. Metro may amend a Public Improvement Contract awarded as a small Procurement Metro in accordance with this Rule, provided that the cumulative amendments may not increase the total Contract Price to a sum that exceeds the higher dollar amount of \$5,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Metro may amend a Contract awarded as an Intermediate Procurement pursuant Rule 49-0160(5). Any amendment that causes Contract to exceed the foregoing limits will be treated as an Unauthorized Purchase and shall be subject to the requirements of Rule 46-0200.

(6) **Amendment to Settle Bona Fide Dispute**. The limitation set forth above in Section (4) of this Rule is not applicable if the amendment resolves a bona fide dispute with the Contractor and is within the general scope of the original Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065, 279C.335 & 279C.400

METRO PERSONAL SERVICES CONTRACTING RULES Procurement Administrative Procedures

SUBJECT:	Requirements and Procedures for the Procurement of Personal Services Contracts
PURPOSE:	To establish a uniform process for the acquisition of personal services and rules related to the screening and selection of persons to perform personal services
DEPARTMENT RESPONSIBLE:	Finance Department PROCUREMENT
DEPARTMENTS AFFECTED:	All Metro Departments
LEGAL CITATION/ REFERENCE:	ORS 279A.055, 279A.065 and 279A.070
DATE:	, 2017

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I. POLICY STATEMENT

It is the policy of both the State of Oregon and Metro to provide a screening and selection process for the acquisition of personal services that ensures fair and equal opportunity for all contractors interested and qualified to contract with Metro. Full and open competition shall be used to the maximum extent practicable when procuring Personal Service contractors. As required under Metro Code 2.04, Metro Departments are required to adhere to the policies and procedures established in these Administrative Rules.

II. GENERAL GUIDELINES

These Rules identify various contractor screening and selection methods to be used and steps to be followed when procuring personal services.

- A. For procurements over the small purchase threshold and up to \$150,000 in value, an Intermediate procurement method shall be conducted. For procurements over \$150,000 in value, a formal procurement method shall be conducted.
- B. These Rules do not apply to the selection of Architects, Engineers, Photogrammetrists, Transportation Planners, Land Surveyors and providers of Related Services. See Division 48 of Metro's Local Contract Review Board (LCRB) Rules.
- C. Certain LCRB Rules may pertain to personal services procurements (e.g. Division 46 Rules re Solicitation Document Templates; Contract Forms and Contract Templates; Contract Administrator Accountability, Unauthorized Purchases, Discrimination; Disqualification, and Cooperative Procurements).
- D. The maximum contract term of a personal services contract is five (5) years unless otherwise approved by the Procurement Officer or limited by these Rules.
- E. Exceptions to these Rules shall only be allowed as authorized and specified in Section IX, Exemption from Competitive Procurement Requirements.
- F. There may be more than one method to procure desired personal services, so Metro employees are encouraged to work with Procurement Services, and to the extent necessary the Office of the Metro Attorney, to determine the best method for selecting personal services. The Procurement Officer has the authority to waive minor irregularities and discrepancies, or make situational exceptions that will not affect the overall competitiveness or fairness of the solicitation and selection process, and that will provide significant benefit to Metro.

III. DEFINITIONS AND CONCEPTS

A. **Competitive Range** – A specified number of proposers, as stated in the solicitation document, with whom Metro will conduct discussions and/or negotiations. This number may be decreased if the number of proposers that

- submit proposals is less than the specified number, or may be increased by Metro in accordance with LCRB Rule 47-0261.
- B. **Contract** An agreement between Metro and a contractor describing the work to be performed, the obligations of both parties, etc.
- C. Cost Analysis A process used to develop or assess the reasonableness and validity of contractor cost estimates and resources required by estimating the subelements of cost to deliver a service. Includes a statement or report of the assessment and related conclusions.
- D. **Department** A Metro Department, or any unit therein, that has responsibilities for procuring personal services.
- E. **Emergency** Circumstances that could not have been reasonably foreseen which create a substantial risk of interruption of services or threat to the public health or safety and which require prompt execution of a contract to remedy the situation.
- F. **Exemption** The process used to allow personal services contract formation outside the formal RFP or Intermediate solicitation procedures.
- G. **Formal** The procurement process for purchases greater than \$150,000. These Administrative Rules establish three levels of procurement activity defined by increased funding limitations and required oversight. Other levels are "small" and "intermediate".
- H. Intermediate The procurement process for purchases greater than the small purchase threshold of \$10,000 and less than or equal to \$150,000. These Administrative Rules establish three levels of procurement activity defined by increased funding limitations and required oversight. Other levels are "small" and "formal".
- I. Intermediate RFP A written solicitation for an intermediate procurement. The intermediate RFP is patterned after the formal RFP process, but with fewer requirements.
- J. Local Contract Review Board (LCRB) The Metro Council acting as the local contract review board pursuant to ORS 279A.060, also known as the Board.
- K. **Multi-Step RFP** A formal RFP process that is staged in phases, soliciting technical proposals as a first step, providing the option to conduct interim steps such as Clarification/Discussion phase, followed by a final competitive step.
- L. **Notice** Announcement and distribution of information regarding a current procurement process by mail, email, or posting to ORPIN.
- M. Oral Procurement Method An alternative Intermediate procurement method for purchases valued at \$150,000 or less that may be conducted orally. The oral procurement method may only be utilized as an exception to the standard, written intermediate process with prior approval of Procurement Services.
- N. **ORPIN** The Oregon Department of Administrative Services' Electronic Procurement System, commonly known as the Oregon Procurement Information Network (ORPIN).
- O. **Personal Services** Services which require specialized skills, knowledge, and resources in the application of technical or scientific expertise, or the exercise of

professional, artistic or management discretion or judgment, including, without limitation, services of an accountant, physician, educator, counselors in investment, insurance, advertising, graphics, training, public relations, communications, real estate and property management, information technology or other consultant or artist (including a photographer, filmmaker, painter, weaver, or sculptor) and contracts for human services. Types of services not listed in this definition may also be classified as "personal services." The Procurement Officer has the final determination on what constitutes "personal services" on a case by case basis.

- P. **Procurement Officer** The Metro Director of Finances and Regulatory Services, or the Procurement Manager as his/her delegate.
- Q. **Procurement Services** Refers to the Procurement section of the Finance and Regulatory Services Department of Metro.
- R. **Proposal** An offer, binding on the proposer and submitted in response to formal solicitations.
- S. **Proposer** A person or entity who submits a response to a solicitation.
- T. Request for Information (RFI) A non-competitive process used to gather information, possible approaches, solutions, and technical capabilities from industry experts and organizations. The RFI is designed to gather information that would be used in a subsequent procurement process. No contract award will result from an RFI.
- U. Request for Proposals (RFP) A formal, competitive procurement process used to solicit offers from contractors. The RFP method involves the evaluation and selection of a contractor based upon various factors including, but not limited to the proposer's expertise, experience, social equity contracting/corporate responsibility, licenses or certifications, work history, understanding of the scope of work and ability to resolve the issue or problem identified within the RFP document while providing a quantified cost for completing the work. RFPs are expected to result in selection of the contractor whose proposal offers the best value.
- V. Request for Qualifications (RFQ) A procurement method that consists of two phases, which is intended to limit respondents for complex projects to only the most qualified; and/or to lessen the cost impact to respondents. Contract award is dependent on both phases being completed. The issuance of an RFQ is the first phase of the process and is used to short list the most qualified (highest scored) respondents. The first phase does not include cost as an evaluation criterion. The second phase is the issuance of a modified RFP to the short listed respondents and generally results in a contract award.
- W. Small The procurement process for purchases less than or equal to \$10,000. These Administrative Rules establish three levels of procurement activity defined by increased funding limitations and required oversight. Other levels are "intermediate" and "formal".
- X. **Solicitation Document** A document issued by Metro to invite offers from prospective contractors.
- Y. **Statement of Work** Written detailed description of agreed upon work, typically including performance measures, deliverables and pricing, found in a contract

and derived from the solicitation documents to generally describe the desired work objectives.

IV. AUTHORIZATION FOR PROCUREMENT/UNAUTHORIZED PURCHASES

A. Prior Authorization to Conduct Procurement Required

Procurement authorization is required prior to conducting a procurement. Authorization represents Department management approval to expend funds for the project under the Department's adopted or proposed (in the case of a pending program offer) budget.

B. Unauthorized Purchases

Unauthorized Purchases are the purchases of goods or services, including personal services, made without following Metro Procurement requirements or without delegated authority. Processing of payments for Unauthorized Purchases shall be in accordance with LCRB Rule 46-0200.

V. SMALL PROCUREMENT PROCESS FOR PERSONAL SERVICES CONTRACTS

Personal services purchases less than or equal to the small purchase threshold of \$10,000 may made without soliciting competitive offers. Purchases may not be artificially divided or fragmented in order to reduce the transaction value below the threshold requiring competition.

VI. INTERMEDIATE PROCUREMENT PROCESS FOR PERSONAL SERVICES CONTRACTS

A. General Information

- 1. Metro may utilize an Intermediate procurement process for the selection and award of Personal Service contracts over \$10,000 and up to and including \$150,000 in value.
- 2. Metro must solicit from a minimum of three vendors (when available) who can reasonably be expected to provide the services. Solicitation shall be through issuance of a written, intermediate RFP, although in some cases an oral procurement method may be approved. See Section VI(C) below for more information regarding the oral procurement method.
- 3. Metro is required to directly solicit at least one minority-owned business, one woman-owned business, one business that a service-disabled veteran owns and one emerging small business. See the Metro Equity in Contracting Administrative Rules for more information regarding compliance.
- 4. Intermediate proposals should be solicited from entities that can reasonably be expected to perform the required services. Metro uses ORPIN as a primary tool for contacting proposers. In the event a potential contractor is not registered on ORPIN, Metro may email or otherwise directly distribute the intermediate RFP to such potential contractor.
- 5. An intermediate RFP solicitation may be canceled at any point in time prior to contract execution if it is determined to be in the best interest of Metro.
- 6. There is no protest process for Intermediate procurements.

- 7. Metro shall retain Intermediate procurement information in accordance with State and Metro record retention requirements, including:
 - a. The date advertised on ORPIN and/or a record of all proposers contacted;
 - b. The original written solicitation document and any addenda. If the
 Department received prior approval from the Procurement Officer to do an
 oral procurement method, a summary of the oral information provided by
 Metro; and
 - c. Scoring summaries, documentation and notice letters.
- 8. Metro may award contracts to more than one vendor with a single Intermediate procurement process. The total value of all contracts issued under an Intermediate solicitation may not exceed \$150,000.
- B. Written Solicitations Required for Intermediate Personal Services Procurements
 - 1. The intermediate RFP is a written solicitation process. The Intermediate solicitation process can be conducted simply or can be structured with multiple steps to address complex requirements.
 - 2. Intermediate RFPs shall be procured using template solicitation documents provided by Procurement Services. The content shall include:
 - a. A clear and concise scope of work identifying deliverables, including what, when, where, and potentially how the personal services will be provided.
 - b. Performance measures, if applicable, to assess receipt of satisfactory services.
 - c. Notice of whether multiple contracts are expected to be awarded.
 - d. The period of time for contract performance.
 - e. A statement that the contract(s) will be awarded to the responsive, responsible proposer(s) with the highest scoring intermediate proposal(s).
 - f. All minimum requirements, such as required contractor licenses, insurance, etc.
 - g. The time and location of a pre-proposal meeting, if applicable.
 - h. Any evaluation factors Metro will consider when making the award, including (without limitation): (i) a list of all criteria to be used to evaluate intermediate proposals; (ii) the points assigned to each criterion; and (iii) the minimum total score that must be achieved (if any) to be eligible for contract award.
 - i. The questions to which proposers must respond and any additional information or documents that must be submitted.
 - 3. Metro shall respond in writing to questions received, providing any clarifications or changes to all proposers who were sent the intermediate RFP.
 - 4. Any changes or addenda to the intermediate RFP documents must be provided to all proposers who received the original solicitation. Those proposers must be notified in the same manner and method used for the notification of the original solicitation or as otherwise specified in the intermediate RFP.

5. Evaluation and Scoring Intermediate Proposals

Metro must describe the evaluation process that will be utilized to score intermediate proposals in the solicitation document. Metro may choose to establish an evaluation committee with various experts from within and outside Metro. For contracts under \$50,000 there is no required minimum number of evaluators on the panel. Contracts over \$50,000 shall be evaluated by at least 3 evaluators. To maintain a fair and consistent process, all intermediate proposals should be evaluated by the same evaluators and in the same manner.

C. Process for Using Oral Procurement Method

- 1. In cases where the Department and Procurement Officer reasonably conclude that a written Intermediate solicitation process will not result in a robust, competitive procurement, an Intermediate procurement may be via an oral procurement method. A previous failed written intermediate RFP is an example of when an oral procurement method may be appropriate, although a previously failed procurement is not a prerequisite for applying the exception.
- 2. If preapproved by the Procurement Officer, the oral procurement method procurement must be documented in a form provided by Procurement Services. Use of emails or other written correspondence is also allowable; when used this documentation should be retained in the Procurement File.
- 3. The Department shall develop a written description of vendor services to be performed and evaluation criteria that will be used to evaluate oral offers.
- 4. To ensure consistency and fairness, Metro shall present each vendor with the same information. The information provided to vendors may include:
 - a. Description of work
 - b. Estimated cost
 - c. Performance schedules
 - d. Deliverables/outcomes
 - e. Performance requirements
 - f. Minimum contractor qualifications
 - g. Performance measures
 - h. Sustainability considerations
 - i. Equity in contracting considerations

VII.FORMAL PROCUREMENT PROCESS FOR PERSONAL SERVICES CONTRACTS

A formal procurement process, such as an RFP, must be used to competitively acquire Personal Services contracts over \$150,000. A clear and concise RFP or other appropriate solicitation promotes full and open competition, enables proposers to offer innovative solutions, and allows Metro to determine which proposal offers the best value.

A. Formal Procurement Solicitation Types

The formal procurement methods include, but are not limited to the following types of competitive solicitations:

- 1. A basic RFP that provides for determination of contractor award(s) based solely on the ranking of proposals.
- 2. An RFP that results in serial negotiations beginning with the highest ranking proposer or competitive simultaneous negotiations with eligible proposers.
- 3. A multi-step RFP designed to identify, at each level, a class of proposers determined to be within competitive range, or to otherwise eliminate from consideration a class of lower ranked proposers.
- 4. A multi-step or two-step RFP that initially solicits unpriced technical proposals and subsequently invites proposers whose technical proposals are determined to be qualified under the criteria set forth in the RFP to submit price proposals.

B. Solicitation Document Content

The solicitation document must include the following:

- 1. A statement of work, including a clear description of the services to be provided, standards by which performance of the services will be measured, and conditions affecting delivery of the services.
- 2. Minimum standards and qualifications required to be met by the proposers to be eligible to provide the services such as licensing, experience, etc. Minimum requirements should be carefully established so that qualified vendors are not inadvertently precluded from proposing. It is not necessary in all cases to establish minimum requirements.
- 3. Information required to be submitted as part of the proposal to support proposer capability, such as references showing experience providing the same or similar services, copies of license(s), etc.
- 4. Notice of pre-proposal meeting, if any, including date, time, place and whether the meeting is mandatory or optional.
- 5. The evaluation process and criteria to be used to select the contractor(s), including the weight or points applicable to each criterion.
- 6. Identification of oral interviews, demonstrations, or other additional procurement process that may be contemplated, along with a description of the purpose of the process, the criteria for selecting proposers to participate, and how the process will affect the scoring.
- 7. The proposal structure, such as page limitations, content organization, supplemental information, and limitations, etc.
- 8. A copy of Metro services contract (or other contract if approved by the Office of Metro Attorney) that will be applicable to the resultant contract(s).
- A description of minimum insurance requirements and, if applicable, a statement that insurance requirements may be increased or decreased depending on the solution proposed.

C. Advertisement, Public Notice, and Solicitation Documentation

Public notice of a formal procurement must be made at the time a solicitation is issued. Metro will post notice of the procurement on ORPIN, where potential proposers can download the solicitation documents. Metro may give additional notice using any method appropriate to foster and promote competition, including:

- 1. Advertise the procurement in a publication of general circulation and in as many other publications as may be appropriate.
- 2. Printing copies of the solicitation, upon request, available for pick-up at the Procurement Services office.
- 3. Mailing or emailing the solicitation document or notice of procurement to the mailing list provided by the Department.
- 4. Providing copies of the solicitation document to other interested parties, as requested.

D. Addenda

- 1. All changes to a solicitation must be formalized by the issuance of a written addenda. Except to the extent justified by a countervailing public interest, Metro may not issue addenda less than 72 hours before the closing unless the addenda also extends the closing.
- Metro may notify prospective proposers of addenda in a manner intended to foster competition and to make prospective proposers aware of the addenda. The original solicitation document must specify how Metro will provide notice of addenda and how Metro will make the addenda available before closing
- E. Proposer Questions, Requests for Clarification/Change, and Protests of Specifications

The solicitation document shall require proposers to submit in writing to Procurement Services all questions, protests of specifications or requests for clarification or change to the solicitation. Questions may also be presented verbally at a pre-proposal meeting. All questions, requests for change or protests of specifications must be received by Metro by the date and time, and in the manner stated in the solicitation. If a change or substantive clarification is necessary, Metro will issue a written addenda by the date required in the solicitation.

F. Pre-Proposal Conference

- 1. A pre-proposal conference allows prospective proposers to meet with Metro after the solicitation is issued in order to discuss the procurement and obtain greater understanding of the requirements.
- 2. If held, the pre-proposal conference may be mandatory or optional. If mandatory, only proposers who have a representative attend and sign the attendance roster at the pre-proposal conference may submit a proposal. Mandatory pre-proposal conferences should be required only where there is a compelling reason to have all those who plan to propose be present. Requiring a mandatory conference may result in a qualified proposer being unable to participate if the proposer failed to receive a copy of the solicitation document or inadvertently missed the conference. All information regarding time,

location, and whether the pre-proposal conference is optional or mandatory must appear in the solicitation document and in all advertisements.

G. Rules Governing Receipt of Proposals

- 1. Proposers are responsible for delivering sealed proposals to the Metro by the date and time specified in the solicitation.
- 2. Metro is responsible for receiving, time-stamping, and enforcing the submittal deadline for each proposal.
- 3. The Metro time-stamp shall be used to determine the timeliness of a proposal submission.
- 4. Metro shall record and make available the identity of all proposers as part of Metro's public records after the proposals are opened. Notwithstanding ORS 192.410 to 192.505, proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued.
- 5. If, on the date proposals are due, Metro is officially closed for part or all of the day, preventing delivery of proposals, then the due date will automatically extend to the next business day that Metro is re-opened for business, at the same time as indicated in the solicitation. Closure may be due to inclement weather or other unplanned and unforeseen exigencies.

H. Evaluation Committee

- 1. Metro shall establish an evaluation committee comprised of at least three (3) members to evaluate proposals.
- 2. Committee members must not have a conflict of interest with any person or organization responding to the procurement.
- 3. The Procurement Officer must approve in advance the composition of any evaluation committee that does not comply with the above requirements.
- I. Proposal Evaluation and Selection of Contractor(s) for Award

Purpose: A proposal evaluation process is conducted to determine which proposal offers the best overall value in accordance with criteria set forth in the solicitation. The following procedures outline the proposal evaluation process.

1. Evaluation of Proposals:

- a. Proposal evaluators shall evaluate and score proposals using only the evaluation method described in the solicitation. Evaluator comments and scores shall be documented on the evaluation score sheets and forms provided. Evaluators should be cautioned that information contained on the rating sheets will become public information and evaluators should be identified only by alpha designations and not by name or by signature.
- b. Metro may seek clarification of any proposal. Information obtained shall be shared with all evaluators and all such contacts with proposers seeking clarification shall be documented.
- c. The evaluation committee may consult with Metro employees who have technical expertise in a specific area of evaluation such as finance or budget.

d. If the solicitation requires proposers to provide references and other supporting documentation (such as previous work history, projects that are similar to the one proposed) these references may be checked by the project manager, or a person(s) designated by the project manager and/or evaluation committee. Metro is not restricted to using only those references provided by the proposers, but may also check other references as they become available through the original reference check or as provided by the proposer during the interview phase. Comments and information provided by the reference checks will be documented, shared with the evaluation committee members, and become a part of the permanent procurement file.

2. Conducting Interviews

- a. After deliberation and discussion of the written proposals, the evaluation committee may not be able to determine a single apparent successful proposer and thus may elect to focus on only a limited number of the highest scored proposals by developing a "short list" based on the scores from the written proposals. The number of proposals on the "short list" will depend upon whether the committee believes such proposals have a reasonable chance of receiving the award.
- b. Interviews or presentations will be conducted as indicated in the solicitation document. Each proposer will be allowed an equal amount of time for their interviews or presentations and will be treated fairly and equitably by Metro. The project manager and the Evaluation Committee will discuss each proposal on the short list and will (i) determine which areas of their proposal may need clarification, (ii) develop interview questions for each proposer, and (iii) provide the agenda and questions far enough in advance of the oral interviews to allow the proposers enough time to adequately prepare and to make reasonable travel arrangements.
- c. The evaluation committee will utilize the scoring method identified within the solicitation document as they proceed to score the interview; interview scores will either stand alone, or the scores for the written proposals will be adjusted according to the procedure stipulated in the solicitation document.

3. Completing the Evaluation

- a. If Metro determines after the scoring of proposals that two or more proposers are equally qualified, Metro may select a candidate through any process that Metro believes will result in the best value for Metro taking into account the scope, complexity, and nature of the personal services. The process shall instill public confidence through ethical and fair dealing, honesty, and good faith on the part of Metro and proposers, and shall protect the integrity of the public contracting process. Once a tie is broken, Metro and the selected proposer shall proceed with negotiations.
- b. If it is recommended that a proposer other than the highest scoring proposer(s) be awarded, the contract award must be approved by the Metro Chief Operating Officer. In such event, the following information shall be submitted to support the recommendation:
 - i. A detailed explanation of the reasons for award recommendation and justification for deviating from required procedures.

- ii. Findings that the award procedure does not violate any applicable law or regulation.
- iii. A statement that explains why the proposed award would be in the best interest of the public and Metro.

4. Contract Negotiation and Development

After determining the highest scoring proposer, Metro shall enter into and complete contract negotiations with the selected proposer(s) as provided for in the solicitation document:

5. Contractor Notification and Protest

- a. Following verification of contractor award selection, and only after contract negotiations have concluded, Metro shall provide proposers with notice of intent to award the contract(s). Such notice shall be via the method identified in the Solicitation documents. The notification date will establish the beginning of the protest period. In the event that contract negotiations are prolonged, Procurement Services may informally notify the proposers that a selection has been made before the formal notice of intent to award the contract is distributed.
- b. Protests of contract award shall be received by Procurement Services and reviewed with the Department and the Metro Attorney. The Procurement Officer shall respond in a timely manner to any valid protests received.

6. Special Circumstances

a. Proposal Modification or Withdrawal

A proposer may modify or withdraw its proposal as described herein. A record of withdrawal or modification of a proposal by the proposer shall be kept in the Procurement File.

i. Proposal Modification

- (1) A proposer may modify its proposal by submitting a proposal modification request to Procurement Services in writing prior to the date and time that proposals are due.
- (2) Any modification shall include the proposer's statement that the modification amends and supersedes the prior proposal and must be identified as such including the solicitation number.

ii. Proposal Withdrawal

A proposer may withdraw its proposal by written notice signed by an authorized representative of the proposer and delivered to Procurement Services prior to the date and time that proposals are due.

iii. Late Modification or Withdrawal of a Proposal

A proposer's request for modification of a proposal received after the due date and time stated in the solicitation document is late and may not be considered. A proposer's request for withdrawal of a proposal received after the due date and time stated in the solicitation document may not be considered.

- b. Cancellation, Rejection, Delay, or Suspension of a Procurement
 - i. Any procurement may be canceled or any or all proposals may be rejected in whole or in part, as determined by the Procurement Officer, when the cancellation or rejection is deemed to be in the best interest of Metro. The reason for the cancellation or rejection shall be made part of the Procurement File. Metro shall not be liable to any proposer or its subcontractor(s) for any loss or expense caused by or resulting from the cancellation or rejection of a procurement.
 - ii. Any procurement may be delayed or suspended, as determined by the Procurement Officer, when the delay or suspension is in the best interest of Metro. Metro shall make the reasons for the delay or suspension part of the Procurement File. Metro shall not be held liable to any proposer or its subcontractor(s) for any loss or expense caused by or resulting from the delay or suspension of the procurement.
 - iii. If a procurement is canceled prior to the proposal due date,
 Procurement Services shall provide written notice of cancellation in the
 same manner as was used for the notice of the procurement except
 that advertisement of a cancellation is not required.
 - iv. If a procurement is canceled prior to the proposal due date, all proposals that were received prior to the solicitation close will be returned unopened to the proposer(s).
 - v. If a procurement is canceled after the proposal due date, proposals may either be returned to the proposer(s) or kept in the Procurement File.
 - vi. If all proposals are rejected, all proposals shall be kept in the Procurement File.

VIII. REQUEST FOR INFORMATION

Metro may consider using a Request for Information (RFI) process to solicit preliminary information from the marketplace or to assess the availability of a desired service. An RFI is not a source selection method to procure services; however, information received in response to an RFI may be used to develop a statement of work for an RFP that may be subsequently issued. Responses to an RFI will be reviewed but not scored and no contract award(s) shall be made.

Interested parties will be asked to respond with some or all of the following information depending on the circumstances:

- A. Their interest in providing the service or solution to a problem.
- B. A brief description of past experience providing similar services or solutions.
- C. A description of services offered that will meet the needs of Metro.
- D. Any potential problems or risks Metro may encounter in utilizing the service or implementing the solution, along with suggestions to mitigate potential problems or reduce risk.
- E. An estimated price range to provide the proposed services.
- F. An estimated timeframe to complete the project, if applicable.

IX. NEGOTIATIONS

- A. One of the particular advantages of the RFP process is the ability of Metro to negotiate with the successful proposer to provide services at the price level that provides Metro with the best fair market value. The importance of negotiating with the selected proposer in order to obtain the best possible value for Metro and thereby assuring the best use of public funds cannot be overemphasized. During the negotiations, Metro will in good faith dedicate the necessary time and effort in order to reach a final agreement with the selected proposer. Negotiations typically occur prior to Metro issuing its notice of intent to award so that Metro may rely on the public record exemptions provided for under ORS 279B.060(6).
- B. Following principled negotiation efforts, if agreement with the highest scoring proposer cannot be reached within a reasonable period of time, Metro may, in its sole discretion, terminate negotiations and thereby reject the highest scored proposal. Metro may then attempt to reach a final agreement with the second highest scoring proposer and may continue on, in the same manner, with remaining proposers until an agreement is reached. If negotiations with any proposer do not result in a contract within a reasonable period of time, as determined by Metro in its sole discretion, Metro may cancel the particular formal solicitation. Nothing in these Rules precludes Metro from proceeding with a new solicitation.

X. PROTESTS

- A. A proposer may protest a formal contract award, or notice of intent to award a contract over \$150,000, as follows:
 - 1. A proposer may protest the award of a contract, or the notice of intent to award a contract, whichever occurs first, if:
 - a. The proposer is adversely affected because the proposer would be eligible to be awarded the contract in the event that the protest were successful;
 and
 - b. The protest is based on at least one of the following reasons:
 - i. All higher scoring proposals are non-responsive.
 - ii. The proposal evaluation process was not conducted in accordance with the criteria or method described in the solicitation document.
 - iii. Metro has abused its discretion in rejecting the protestor's proposal as non-responsive.
 - iv. The proposal evaluation process is in violation of applicable rule or law.
 - 2. The evaluator's judgment applied in the scoring of proposals, including the use of outside expertise, is not a permitted basis for protest.
- B. A proposer may protest its exclusion from the competitive range or exclusion from a tier or step of formal competition if the proposer:
 - 1. Submitted a responsive offer.
 - 2. Is deemed responsible.

- 3. Establishes that but for a substantial violation of a provision in the solicitation document or of an applicable procurement statute or administrative rule, the protesting proposer would have been included in the competitive range or in the next tier or step of competition.
- C. A proposer may appeal a decision that the proposer is not qualified under an RFQ process if the proposer can establish that it complied with all of the following conditions:
 - 1. Submitted a responsive offer.
 - 2. Is deemed responsible.
 - 3. Establishes that but for a substantial violation of a provision in the solicitation document or of an applicable procurement statute or administrative rule, the protesting proposer would have been included in the competitive range or in the next tier or step of competition.
- D. Unless otherwise specified in the solicitation document, a proposer shall deliver its written protest to the Procurement Officer by close of business within seven (7) calendar days after the date shown on the notice of the decision that is the subject of the protest.
- E. The protest must specifically state the reason for the protest, identify how its proposal or the winning proposal was mis-scored or show how the selection process deviated from that described in the solicitation document, and identify the remedy requested.
- F. Depending upon the substance of the protest, the Procurement Officer has a number of options available in resolving the protest. The Procurement Officer may: 1) waive any procedural irregularities that had no material effect on the selection of the proposed contractor; 2) invalidate the proposed award or amend the award decision; 3) request the evaluation committee re-evaluate any proposal; 4) develop an entirely new evaluation committee and re-evaluate the proposals; or 5) cancel the solicitation and begin again to solicit new proposals. In the event the matter is returned to the evaluation committee, the Procurement Officer shall issue a notice canceling the notice of intent to award.
- G. Decisions of the Procurement Officer are final and conclude the administrative appeals process. Any further redress sought by the proposer must be pursuant to state law.

XI. EXEMPTIONS FROM COMPETITIVE PROCUREMENT REQUIREMENTS

A. Exemptions by Rule

The services listed in paragraphs 1 through 9 below are designated as Personal Service and are exempt from competitive procurement requirements set forth in these Administrative Rules.

- 1. Contracts for the modification by the licensor of intellectual property licensed to Metro.
- 2. Contracts for legal services (e.g expert witnesses, outside legal counsel, and bond counsel), if approved by the Metro Attorney.

- 3. Contracts with speakers, lecturers and performing artists (whether vocal, instrumental, or visual) to provide a paid speech, lecture, or performance for an audience determined by Metro.
- 4. Contracts in which the rates for the services being purchased are established by federal, state, county, or other local regulatory authority where an alternate selection process has been approved in advance by the Procurement Officer.
- 5. Contracts for which a non-Metro funding source (e.g. a grant or contract awarded by a government agency or private foundation) identifies the contractor in the funding award or makes a funding award conditioned upon the service being performed by a specific contractor.
- 6. Contracts for determining any prospective or current Metro employee's ability to work or return to work.
- 7. Contracts for processing any claim for workers' compensation benefits.
- 8. Contracts for determining any reasonable accommodation that may be made to any job classification at Metro.
- 9. Contracts for services provided by those in the medical community including, but not limited to, doctors, physicians, psychologists, nurses, veterinarians, laboratory technicians and those with specific license or unique skill to administer treatments for the health and well-being of people or animals.
- B. Specific Exemptions from the Competitive Procurement Requirements:
 - 1. Sole Source Contractor Exemption

A sole source procurement is one that awards a contract without an open competitive environment. It is a declaration that the personal services being contracted for are of such a unique nature, or the contractor possesses such a singular capability to perform the work that proceeding without competition is likely to provide a significant benefit to Metro. Contracting by this method requires complete explanation and justification of: 1) the unique nature of the services; 2) the unique qualifications of the contractor; and 3) the basis upon which it was determined that there is only one known contractor able to meet the service needs.

The Procurement Officer is authorized to approve sole source requests. However, sole source procurements greater than \$50,000 will require a public notice be posted on ORPIN for at least seven (7) calendar days prior to the award. Contractors who feel they are adversely affected by the award of the sole source procurement will have seven (7) calendar days from the issuance of the sole source notice to file a protest in accordance with Section X.D of these Administrative Rules. If a protest is received, the matter must be resolved before the Procurement Officer will review the Sole Source Request.

2. Emergency Exemption

Metro may award a contract as an emergency procurement without the use of competitive proposals if circumstances exist that (i) could not have been reasonably foreseen, (ii) create a substantial risk of loss, damage or interruption of services or a threat to property, public health, welfare or safety, and (iii) require prompt execution of a contract is required to remedy the situation.

The authority to declare an emergency and authorize an emergency procurement is as follows:

- a. The Procurement Officer may declare the existence of an emergency and authorize Metro or any of its Departments to enter into an emergency contract under \$150,000;
- b. The director of a Department may declare the existence of an emergency and authorize that Department to enter into an emergency contract under \$150,000 only if the Procurement Officer is not available when the contract needs to be executed.
- c. The Chief Operating Officer may declare the existence of an emergency and authorize emergency contracts that exceed \$150,000.

XII. AMENDMENTS TO PERSONAL SERVICES CONTRACTS

- A. A Department shall have authority to authorize an amendment to a contract for personal services in any amount to add additional services which are reasonably related to the scope of work under the original contract without competitive procurement, subject to the following conditions:
 - 1. The original contract was let by formal procurement process and cost per unit of services was provided for in the original proposal that establishes the cost basis for additional services; or
 - 2. The original contract was let pursuant to a declaration of emergency; if the emergency justification for entering into the contract still exists and the amendment is necessary to address the continuing emergency; or
 - 3. The additional services are required by reason of existing or new laws, rules, regulations, or ordinances of federal, state, or local agencies that affect performance of the original contract; or
 - 4. The aggregate increase resulting from all amendments to such personal services contract does not exceed twenty-five percent (25%) of the original contract price. Escalation clauses agreed to in the original contract (e.g. COLA increases) are excluded from the 25% calculation.
- B. If the conditions in XII. A.1-A.4 do not apply, Metro may still amend a personal services contract upon finding that the amendment is advantageous to Metro. For contracts \$150,000 and under the Procurement Officer has the authority to approve the amendment. For contracts over \$150,000 the Metro Chief Operating Officer has the authority to approve the amendment.
- C. Notwithstanding the limit set forth in XII. A.4, (i) contracts awarded as small procurements may be amended to increase the contract price to \$10,000 or one hundred twenty-five percent (125%) of the original contract price, whichever is greater and (ii) contracts awarded as a intermediate procurements may amended to increase the total contract price to \$150,000 or one hundred twenty-five percent (125%) of the original contract price, whichever is greater.
- D. Any amendment increasing the contract amount beyond the thresholds set forth in this section, or any amendment that has not received the required authorization, will be treated as an unauthorized purchase and will be subject to the provisions of LCRB Rule 46-0200.

XIII. IMPLEMENTATION AND INTERPRETATION

Any questions relative to the intent or application of these Administrative Rules should be directed to the Procurement Officer who is delegated the responsibility for interpreting and implementing these procedures.

METRO EQUITY IN CONTRACTING RULES Procurement Administrative Rules

SUBJECT:	Rules and Requirements for Metro's Equity in Contracting Program
PURPOSE:	To adopt rules of procedure to advance equity in public contracting that promote economic growth of disadvantaged business enterprises, minority-owned businesses, woman-owned businesses, businesses that service-disabled veterans own and emerging small businesses
DEPARTMENT RESPONSIBLE:	Finance Department PROCUREMENT
DEPARTMENTS AFFECTED:	All Metro Departments
DATE:	, 2017

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 17-4779, FOR THE PURPOSE OF ADOPTING LOCAL CONTRACT REVIEW BOARD ADMINISTRATIVE RULES AND INTERIM EQUITY IN CONTRACTING ADMINISTRATIVE RULES

Date: April 6, 2017 Prepared by: Cary Stacey, x1619

BACKGROUND

This comprehensive set of administrative rules includes Local Contract Review Board Administrative Rules (the "LCRB Contracting Rules), the Personal Services Contracting Rules, and Equity in Contracting Rules and was developed to meet the different contracting and procurement needs of Metro's departments and venues and to advance equity in contracting.

Development of rules

The administrative rules were collaboratively developed by a team led by the Office of Metro Attorney and Procurement. The team included representatives from the Oregon Zoo, Portland'5 Centers for the Arts, Metro's Construction Project Management Office and the Communications, Parks and Nature, Parks and Environmental Services, and Planning and Development departments. Staff also consulted with Department Procurement Coordinators, Department Procurement Specialists and staff from the Diversity, Equity and Inclusion team, Portland Expo Center, Oregon Convention Center, Research Center, Finance and Regulatory Services, and Human Resources departments.

These rules largely document many current policies while making some changes based on the following guiding principles set by the project team:

- Clarity: The new rules will help staff do the right thing in handling public dollars responsibly and transparently
- Consistency: The new rules apply similar practices to areas such as amendment thresholds and solicitation methods
- Flexibility: The new rules meet the needs of different internal clients by providing more than one way to meet business goals
- Accountability: The new rules increase transparency for external stakeholders and delineate authority in decision-making for staff
- Legality: The new rules provide definitions and rules where Oregon statute is silent and bridge gaps in policies currently in Metro Code
- Simplicity: The new rules reduce the burden on the Contract Review Board for certain approvals and provide for shorter business processes and forms

Efficiency of rules

The administrative rules will make it easier for staff to carry out the business of contracting and procurement across the agency. Because the rules apply to both MERC and Metro, current discrepancies in separate policies will be eliminated and staff can more efficiently serve both MERC and Metro facilities with one set of rules.

The new rules fill gaps between current Metro policy and state law and reduce the need for staff to interpret contracting and procurement law. Project team and stakeholder staff recognize the efficiency of updating administrative rules and the need for regular review based on changes to state model rules as well as evolving business needs.

Summary of changes in LCRB Contracting Rules and Personal Services Contracting Rules
The new rules apply to all Metro contracts for Goods and Services, Public Improvement, Personal Services and Qualifications Based Selection.

Terms

- "Informal" contracts will now be called "intermediate" contracts
- "Professional services," which includes architecture, engineering, photogrammetric mapping, transportation planning, land use surveying and related services, will now be called "Qualifications Based Selection"
- "Request for Bid (RFB)" will now be called "Invitation to Bid (ITB)"
- "Sheltered Market" will now be called "COBID Marketplace" ("COBID" refers to minority-owned, women-owned, service-disabled veteran-owned and emerging small businesses certified by the state of Oregon's Certification Office of Business Inclusion and Diversity)

Solicitations

- Solicitation of intermediate Goods and Services, Personal Services and Qualifications Based Selection contracts will now use a short form Request for Proposal (RFP)
- Solicitation of intermediate Goods and Services and Public Improvement bids will now use a short form Request for Quote (RFQ)
- Notice for formal contracts will now be published on ORPIN or an electronic bidding system as approved by Metro's Local Contract Review Board

Amendments

- Amendments to contracts are now consistently applied in all categories
- Unauthorized amendments require director sign-off; Metro's Chief Operating Officer makes decisions regarding contract amendments or opts to send to the Local Contract Review Board

Non-Standard Methods

- Sole source determination findings for Goods and Services, Personal Services and Qualifications Based Selection contracts under \$150,000 may now be made by the Procurement Officer; findings for contracts over \$150,000 will continue to be made by the Local Contract Review Board
- Consolidation and update of current class special procurement categories (see findings attached to Resolution as Exhibit A-1)

Summary of new Equity in Contracting Rules

The new rules apply to all Metro contracts and will increase COBID participation through formalizing and strengthening existing policies and adding two new policies:

- Consider COBID firms in small procurements
- Contact a COBID firm from each state-certified category for intermediate procurements
- Advertise for formal procurements in a minority publication
- Scoring requirements for diversity total 20% in evaluating intermediate and formal proposals
- Required COBID Marketplace allows for quotes accepted only from COBID firms for Public Improvement contracts up to \$50,000

- Subcontractor equity program requires that contractors conduct outreach and negotiation with COBID subcontractors in formal Public Improvement contracts
- New: Optional COBID Marketplace allows for direct award to a COBID firm for Personal Services and Qualifications Based Selection contracts under \$50,000 (only one direct award allowed per vendor per department/venue)
- *New:* Required pre-solicitation equity strategy meeting with Procurement Services for formal procurements

Availability of rules

The LCRB Contracting Rules, Personal Services Contracting Rules and Equity Contracting Rules will be posted on Metro's website for ease of staff and stakeholder access.

Equity in Contracting administrative rules are written to support the goals outlined in Metro's Diversity Action Plan and Equity in Contracting data is reported through the Equity in Contracting Annual Report; both these documents are also available on Metro's website.

ANALYSIS/INFORMATION

- 1. **Known Opposition:** None
- 2. **Legal Antecedents** Metro Code 2.04, State of Oregon Revised Statutes (ORS) Chapters 279A, 279B and 279C
- 3. **Anticipated Effects:** Interim rules will go into effect in Metro's business practices immediately. A promulgation period will allow for persons likely to be affected by the permanent adoption of these rules with an opportunity to provide public comment on the interim rules prior to final adoption by the Local Contract Review Board.
- 4. Budget Impacts: None

RECOMMENDED ACTIONS

Local Contract Review Board adoption of the LCRB Contracting Rules; adoption of findings in Exhibit A-1 to approve classes of special procurements; adoption of the Personal Services Contracting rules; and adoption of the Equity in Contracting Rules.

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I. POLICY STATEMENT

Metro expresses its strong commitment to provide contracting opportunities to State of Oregon certified minority-owned businesses, woman-owned businesses, businesses that service-disabled veterans own and emerging small businesses (collectively referred to herein as "COBID Certified Businesses"). Metro hereby creates its Equity in Contracting Program (the "Program") to advance equity in public contracting, promote economic growth of COBID Certified Businesses and provide additional competition for Metro contracts. The Program is intended to function in addition to the general rules and procedures applicable to Metro procurements.

II. DEFINITIONS

- A. **COBID** The State of Oregon's Certification Office for Business Inclusion and Diversity, created within the Oregon Business Development Department or such state agency, department or entity to which has been delegated the responsibility to certify minority-owned businesses, woman-owned businesses, businesses that service-disabled veterans own and emerging small businesses.
- B. **Department** A Metro Department or any unit or staff within a Department that has responsibilities for procuring public contracts.
- C. **Emerging small business** Meaning set forth in ORS 200.005(5).
- D. "Minority-owned business", "woman-owned business" or "business that a service-disabled veteran owns" Meanings set forth in ORS 200.005(7).
- E. Oregon Procurement Information Network (ORPIN) The online procurement solicitation system operated by the State of Oregon, and utilized by the State and other local governments and political subdivisions to issue procurement and contracting opportunities and information.
- F. **Procurement Officer** The Metro Director of Finances and Regulatory Services, or the Procurement Manager as his/her delegatee.

III. PROGRAM ADMINISTRATION

The Procurement Officer shall be responsible for administering and implementing the Program on behalf of the Chief Operating Officer. Procedural rules created to implement the Program shall be promulgated for Department comment prior to their adoption by the Metro Local Contract Review Board. When deemed appropriate by the Metro Chief Operating Officer, Metro may seek public input before adopting, amending, or repealing such rules.

In administering the Program, the Procurement Officer shall advise all potential contractors that COBID is the sole agency that may certify enterprises and businesses as minority-owned businesses, woman-owned businesses, businesses that service-disabled veterans own and emerging small businesses. In the event the Procurement Officer determines that ORPIN is no longer the preferred electronic procurement system to solicit COBID Certified Businesses, all references to ORPIN in these Administrative

Rules shall be construed to mean whatever replacement electronic procurement solicitation system chosen by the Procurement Officer.

IV. GENERAL PROGRAM ACTIVITIES

The Procurement Officer shall engage in the following activities with the goal of increasing Metro business with COBID Certified Businesses:

- A. **Outreach** Engage in additional outreach procedures, including electronic notices of public contract solicitations, newsletters, attending regularly-scheduled contractor orientation programs, open houses, and participation in local and regional outreach opportunities.
- B. **Technical Assistance** Provide technical assistance and information to outside third parties on feasible options for management assistance, bonding, insurance, certification, and Metro procurement processes.
- C. **Package Contracting Opportunities** Examine alternatives for arranging public contract solicitations by type of work, subcontracting opportunities and partnerships so as to enhance the possibility of participation by COBID Certified Businesses.
- D. **Internal Education** Provide periodic training and continuing education to Departments to ensure awareness of Program objectives and desired activities.

V. PROGRAM SOLICITATION AND SCORING REQUIREMENTS FOR PUBLIC CONTRACTS OTHER THAN PUBLIC IMPROVEMENTS

- A. **Small Procurements** For small procurements (\$10,000 and under), Departments are strongly encouraged to review the COBID certification directory for firms in the category of work being solicited before awarding the contract.
- B. Intermediate Procurements For intermediate procurements (exceeding \$10,000 but not exceeding \$150,000), Departments are required to directly solicit at least one minority-owned business, one woman-owned business, one business that a service-disabled veteran owns and one emerging small business. The Procurement Officer may waive the foregoing direct solicitation requirement if, upon review of the COBID certification directory, there are no such businesses qualified in the category of work being solicited. As an alternative to the direct solicitation requirement, Departments may instead advertise the intermediate contracting opportunity broadly on ORPIN.
- C. Formal Procurements For formal procurements (over \$150,000), Departments are required to broadly advertise the competitive contracting opportunity on ORPIN. In addition, all formal procurements shall also be advertised in at least one minority-focused publication.
- D. Proposal Scoring For requests for proposals procuring contracts for goods and services or personal services, 20% of the total available scoring points shall be based on the following Program criteria: COBID certification, firm demographics, support for workforce diversity, and, if applicable, utilization of COBID-certified subcontractors.

E. **Exceptions to Requirements** - The Program solicitation and scoring requirements set forth in this Section V are not applicable to emergency procurements, sole source procurements, or any other special procurements that allow for direct award of a contract without competitive solicitation.

VI. PROGRAM SOLICITATION AND SCORING REQUIREMENTS FOR PUBLIC IMPROVEMENT CONTRACTS

- A. **Small Procurements** For procurements of small public improvement contracts (\$5,000 and under), Departments are strongly encouraged to review the COBID certification directory for firms in the category of work being solicited before directly awarding the contract.
- B. Intermediate Procurements (Competitive Quotes) Subject to the applicable Mandatory COBID Marketplace rule provided for below in Section VII(B), for intermediate procurement of public improvement contracts based off competitive quotes (exceeding \$5,000 but not exceeding \$100,000), Departments are required to directly solicit at least one minority-owned business, one woman-owned business, one business that a service-disabled veteran owns and one emerging small business. The Procurement Officer may waive the direct solicitation requirement if, upon review of the COBID certification directory, there are no such businesses qualified in the category of work being solicited. As an alternative to the direct solicitation requirement, Departments may instead advertise the intermediate contracting opportunity broadly on ORPIN.
- C. Formal Procurements For formal procurements of public improvement contracts (over \$100,000), Departments are required to advertise the competitive contracting opportunity broadly on ORPIN. In addition, all formal procurements of public improvement contracts (over \$100,000) shall also be advertised in at least one minority-focused publication.
- D. **Proposal Scoring** For public improvement contracts procured through alternative contracting methods, 20% of the total available scoring points will be based on the following Program criteria: COBID certification, firm demographics, support for workforce diversity, and, if applicable, utilization of COBID-certified subcontractors.
- E. **Exceptions to Requirements** The Program solicitation and scoring requirements set forth in this Section VI are not applicable to emergency procurements or any other special/alternative procurements that allow for direct award of a public improvement contract without competitive solicitation.

VII. COBID MARKETPLACE

A. Elective Direct Award for Personal Services Contracts - Departments may directly award a personal services contract that exceeds \$10,000 without following otherwise required competitive solicitation procedures if (i) the contractor is a COBID Certified Business, and (ii) the contract is for an amount that does not exceed \$50,000. All other rules and procedures applicable to personal services procurements set forth in the Metro Personal Services Contracting Manual remain applicable (e.g., contractor compliance, insurance, non-conflict of interest, etc.). A

Department cannot enter into more than one direct award contract with an individual COBID Certified Business at a time. Once a Department has awarded a direct contract to a COBID Certified Business, they cannot award another direct contract to the same contractor until the work of the first directly-awarded contract is completed.

B. Mandatory Procedures for Public Improvement Contracts Under \$50,000 - For public improvement contracts that exceed \$5,000 but are less than \$50,000, Metro shall only consider competitive quotes, bids, and proposals from COBID Certified Businesses. The Procurement Officer may waive this requirement after making a written determination that there is not a competitive pool of businesses on COBID's certification list available and qualified to perform the work in accordance with reasonably required standards. The mandatory procedures set forth in this Section VII(B) shall not apply to emergency procurements or any other alternative procurements that allow for direct award of a public improvement contract without competitive solicitation.

VIII. SUBCONTRACTOR EQUITY PROGRAM

Metro's Subcontractor Equity Program is intended to incorporate the standards for good faith efforts described in ORS 200.045. The purpose of the Subcontractor Equity Program is to provide equitable opportunities for COBID Certified Businesses to participate in subcontract opportunities created through Metro public improvement contracts.

Prime contractors are required to fulfill the following actions in order to comply with the Subcontractor Equity Program:

- A. Contractor contacts all COBID Certified Businesses who attend the project's presolicitation or prebid meeting to solicit bids for subcontracting or material supply opportunities;
- B. Contractor identifies and selects specific economically feasible units of the public improvement contract that COBID Certified Businesses may perform in order to increase the likelihood that COBID certified subcontractors will participate in the public improvement contract;
- C. Contractor advertises the project subcontracting opportunities in general circulation publications, trade association publications and publications that serve an audience or readership that consists primarily of minorities, women, servicedisabled veterans and emerging small businesses;
- D. Contractor provides written notice of the subcontracting opportunities to a reasonable number of specific COBID Certified Businesses in sufficient time to allow such enterprises or businesses to participate effectively;
- E. Contractor follows up on its initial solicitations of interest by contacting the enterprises or businesses to which the bidder or proposer provided notice to

determine with certainty whether the enterprises or businesses are interested in the subcontracting opportunities;

- F. Contractor provides interested COBID Certified Businesses with adequate information about plans, specifications and requirements for subcontracting or material supply work in connection with the public improvement contract;
- G. Contractor negotiates with interested COBID certified subcontractors, and does not without justifiable reason reject as unsatisfactory bids or proposals that COBID enterprises or businesses prepare;
- H. Contractor advises and assists interested COBID certified subcontractors to obtain, when necessary, bonding, lines of credit or insurance that the contracting agency or contractor requires; and
- I. Contractor uses the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations that Metro identifies as providing assistance in recruiting COBID Certified Businesses for participation in public improvement contracts.

The Procurement Officer shall determine if any offer or proposal complies with requirements of the Subcontractor Equity Program. If the Subcontractor Equity Program documentation submitted by the offeror fails to substantially comply with the requirements of the solicitation document, the bidder/proposer shall be deemed non-responsible and shall be rejected by the Procurement Officer. Compliance with the Subcontractor Equity Program must be maintained during the entire period of the contract. Non-compliance may constitute a breach of contract.

IX. PRESOLICITATION EQUITY STRATEGY MEETING

For all formal, competitive procurements (personal services contracts and goods and services contracts over \$150,000; public improvement contracts over \$100,000), the Department project manager shall meet with the Procurement Officer prior to releasing a solicitation to discuss opportunities for setting aspirational goals for equity and diversity. Such aspirational goals may include, but are not limited to, focus on COBID certified prime contracting, subcontractor utilization, workforce diversity, mentorship, training, and any other areas identified by the Procurement Officer which will likely result in the advancement of equity and diversity related to the procurement.

Ordinance No. 17-1398, For the Purpose of Amending Metro Code Section 2.04 and Declaring an Emergency

Ordinances

Metro Council Meeting Thursday, April 6, 2017 Metro Regional Center, Council Chamber

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AMENDING METRO CODE SECTION 2.04 AND DECLARING AN EMERGENCY	 ORDINANCE NO. 17-1398 Metro Attorney Alison R. Kean in concurrence with Council President Tom Hughes
WHEREAS, Oregon Revised Statutes Cha Public Contracting Code") is the primary source for	apters 279A, 279B, and 279C (collectively the "State or Oregon's public contracting law;
WHEREAS, Metro must comply with the therefore must adopt its own rules of procedure for 279A.065(5); and	requirements of the State Public Contracting Code and the procurement of public contracts under ORS
	2.04 (Metro Contract Policies) is in need of immediate the State Contracting Code and (b) reflect changes to fore
THE METRO COUNCIL ORDAINS AS I	FOLLOWS:
"A" to this Ordinance;That this Ordinance, being necessary f ensure compliance with the State Cont	ded and restated in its entirety as attached in Exhibit for the health, safety, and welfare of the Metro region to tracting Code and consistency in Metro procurement exist, and this Ordinance shall take effect immediately, 1).
ADOPTED by the Metro Council this day o	of April, 2017.
	Tom Hughes, Council President
Approved as to Form:	
Alison R. Kean, Metro Attorney	-

EXHIBIT A

CHAPTER 2.04

METRO CONTRACT AND PROCUREMENT POLICIES

C	m·.1
Section	Title
JCCHOII	11110

2.04.010 Definitions

CONTRACTS IN GENERAL

2.04.020	Authority to Award and Execute Contracts; Budget Limitations
2.04. 022 <u>03</u>	<u>0 </u>
2.04. 024 _ <u>04</u>	Metropolitan Exposition Recreation Commission
2.04. 026 <u>05</u>	O Council Approval of Contracts
2.04. 028_ 06	O Grant Funding; Council Information Reports

DISPOSITION OF SURPLUS PROPERTY

2.04. 030 <u>070</u>	Other Governmental Entity Requests
2.04. 032_ 080	Disposition by Donation, Sale, Lease or Exchange

METRO LOCAL CONTRACT REVIEW BOARD

2.04. 040 <u>090</u>	Metro Council as the Local Contract Review Board
2.04. 042 _100	Local Contract Review Board Administrative Rules

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2.04. 050 – <u>1120</u>	Findings
2.04. 052 _ <u>1320</u>	Policy Statement
2.04. 054 – <u>1430</u>	Equity in Contracting Administrative Rules
2.04. 056 – <u>1540</u>	Annual Equity in Contracting Reports

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2.04. 060 – <u>1650</u>	Purpose and Intent
2.04. 062 1 760 Sus	stainable Procurement Administrative Rules
2.04. 064<u>1870</u>An	nual Sustainable Procurement Program Reports

Repealed (Ord. 17-1398)

<u>2.04.030</u>	<u>Contracts in General - Regulations</u>
2.04.042	Personal Services Contracts - Procurement of Personal Services Contracts
2.04.046	Personal Services Contracts - Personal Services Contract Amendments

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2.04.048	Personal Services Contracts - Notice of Award and Appeals of Personal
	Services Contracts
2.04.052	Contract Review Board - Public Contracts - Public Improvement Contracts
2.04.053	Contract Review Board - Special Procurements
2.04.054	Contract Review Board - Competitive Bidding Exemptions for Public
	<u>Improvements</u>
2.04.056	Contract Review Board - Procurement of Public Contracts
2.04.058	Contract Review Board - Public Contract Amendments
2.04.062	Contract Review Board - Sole Source Procurements
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2.04.070	Contract Review Board - Notice of Award and Appeals
2.04.110	Metro ESB, MBE and WBE Program – Definitions
2.04.115	Metro ESB, MBE and WBE Program – Program Administration
2.04.120	Metro ESB, MBE and WBE Program – Program Activities
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2.04.162	Metro ESB, MBE and WBE Program – Contractor Work Force Efforts at
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2.04.300	Metro Disadvantaged Business Enterprise Program for Federally-funded
	Contracts - Metro Disadvantaged Business Enterprise Program (DBE
	Program) for Federally-funded Contracts, Findings, Purpose and Authority
2.04.305	Metro Disadvantaged Business Enterprise Program for Federally-funded
	<u>Contracts – Policy Statement</u>
2.04.310	Metro Disadvantaged Business Enterprise Program for Federally-funded
	<u>Contracts – Definitions</u>
2.04.315	Metro Disadvantaged Business Enterprise Program for Federally-funded
	Contracts - Notice to Contractors, Subcontractors and Sub-recipients
2.04.320	Metro Disadvantaged Business Enterprise Program for Federally-funded
	<u>Contracts – DBE Liaison Officer</u>
2.04.325	Metro Disadvantaged Business Enterprise Program for Federally-funded
	<u>Contracts – Directory</u>
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	<u>Contracts – Counting Disadvantaged Business Participation Toward Meeting</u>
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2.04.540	Metro's Sustainable Procurement Program – Report to Metro Council
2.04.510	Contracts – Compliance and Enforcement Metro's Sustainable Procurement Program – Definitions

2.04.010 Definitions

For the purposes of this chapter unless the context requires otherwise the following terms shall have the meanings indicated:

- (a) "Auditor" means the Metro Auditor provided for in Section 18 of the Metro Charter.
- (b) "Chief Operating Officer" means the person holding the position of Chief Operating Officer established by Section 2.20.010 of the Metro Code.
- (c) "Competitive bidding" means an advertised solicitation of sealed bids.
- (e) "Commission" means the Metropolitan Exposition Recreation Commission established by Section 6.01 of the Metro Code.

"Council President" means the Council President provided for in Section 16(4) of the Metro Charter.

- (f) "Emergency" means circumstances that: (A) could not have been reasonably foreseen; (B) create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and (C) require prompt execution of a contract to remedy the condition.
- (g) "Emergency contract" means a contract whose purpose is limited to remedying an emergency situation.
- (h) "Intergovernmental agreement" means a written agreement with any other unit or units of federal, state or local government providing for the acquisition of goods or services by Metro, for the provision of goods or services by Metro or for the payment or receipt of funds in order to promote or carry out a common purpose.
- (i) "Notice of award" means written communication to a responsive, responsible bidder or proposer stating that their bid or proposal has been conditionally determined to be the lowest, responsive, responsible bid or most responsive proposal

and that Metro intends to enter into a contract upon completion by the bidder/proposer of all required conditions.

- (j) "Personal services contract" means any contract by which Metro acquires a professional, artistic, creative, consulting, educational, or management service. Contracts which are predominately for the purpose of obtaining a product, labor or materials, or the services of a construction trade are not a personal services contract.
- (k) "Metro Attorney" means the person holding the position of Metro Attorney established by provided for in Section 2.08 of the Metro Code.

"Procurement Officer" means the person designated by the Chief Operating Officer to carry out the functions required of such person by this chapter.

- (1) "Public agency" means any agency of the federal government, State of Oregon, or any political subdivision thereof, authorized by law to enter into public contracts and any public body created by intergovernmental agreement.

"Surplus property" means any purchase, lease or sale by Metro of tangible personal property, public improvement or services owned by Metro, including those transacted by purchase order, other than agreements equipment and materials, which are for personal services is no longer needed by Metro. Examples include inventoried and non-inventoried office furniture, specialized equipment, and items that are obsolete or overstocked.

- (n) "Public improvement" means projects for construction, reconstruction or major renovation on real property by or for a contracting agency. "Public improvement" does not include (i) projects for which no funds of a contracting agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection, or (ii) emergency work, minor alteration, ordinary repair or maintenance in order to preserve a public improvement.
- ——— (o) "Request for Proposals or RFP" means the issuance of a request for offers that will be evaluated based on factors that are not limited to price alone.

— (p) "Sole source contract" means a contract for which it can be documented that the goods or services or class of goods or services are available from only one source.

(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 02-966A, Sec. 1; Ordinance No. 04-1065A, Sec. 1.)

CONTRACTS IN GENERAL

2.04.020 Authority to Award and Execute Contracts; Budget Limitations

The Chief Operating Officer, the Metro Attorney and the Auditor have the authority to award and execute contracts that are necessary to carry out their administrative responsibilities. These officers may delegate authority to award and execute contracts on their behalf by doing so in writing. The Auditor shall be subject to the same limitations and have the same authority as provided for the Chief Operating Officer by this Code Chapter.in writing. Unless the Council expressly approves a contract containing a requirement to the contrary, no contract may obligate Metro to the payment of funds not appropriated for that purpose by the Council.

(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 02-966A, Sec. 1.)

2.04.<u>022</u> <u>030</u> Federal Law and Rules

Notwithstanding any provision of this chapter, the applicable federal laws, rules and regulations shall govern in any case where federal funds are involved and the federal laws, rules and regulations conflict with any of the provisions of this chapter—or require additional conditions in public or personal services contracts not authorized by this chapter.

(Ordinance No. 96-635B, Sec. 3.)

2.04.024 O40 Metropolitan Exposition Recreation Commission

The Metro Council delegates to the Commission the authority to approve contracts,—<u>for the facilities it manages</u>. This approval authority is independent of the <u>approval</u> authority <u>it has granteddelegated</u> to the Chief Operating Officer pursuant to Section 2.04.020. The <u>Commission may adopt rules or regulations which delegate to the Chief Operating Officer has the authority to <u>enter intoaward and execute</u> contracts on behalf of the Commission <u>and may that are necessary to carry out its administrative responsibilities</u>. The <u>Commission may require Commission approval of certain contracts</u>. The Metro Council is the local Contract Review Board for the Commission.</u>

(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 02-966A, Sec. 1; Ordinance No. 04-1065A, Sec. 2.; and Ordinance No. 09-1229, Sec. 3.)

2.04.026 Ocouncil Approval of Contracts

- (a) Notwithstanding any other provisions of this chapter, the Chief Operating Officer, Metro Attorney, or Auditor must obtain authorization by the Council prior to execution of must approve the following types of contracts prior to execution:
- (1)—Any agreement entered into pursuant to ORS Chapter 190 by which Metro acquires agrees to acquire or transferstransfer any interest in real property, assumes any function or duty of another governmental body, or transfers any function or duty of Metro to another governmental unit; or
- (b) (2)—Any contract for the purchase, sale, lease or transfer of real property owned by Metro. However, the Chief Operating Officer may execute options to purchase real property without prior Council approval, so long as the Council approves the exercise of the option.

(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 99-822, Sec. 1; Ordinance No. 02 966A, Sec. 1; Ordinance 04 1065A, Sec. 3; Ordinance No. 06 1123A, Sec. 1.)

2.04.028 060 Grant Funding: Council Information Reports

- (a) (a) Prior to adoption of the annual budget, the Chief Operating Officer shall provide the Council with a list of Metro-proposed contracts and proposed applications of Metro for grant funding over \$50,000.00 to be entered into or sought during the next fiscal year. Following the adoption of the annual budget, if the Chief Operating Officer proposes (1) to enter into a contract that will commit Metro to the expenditure of appropriations not provided for in the current fiscal year budget in an amount greater than \$50,000.00 that the Council has not considered during the annual budget process; or (2) to seek any individual grant funding in an amount greater than \$50,000.00 that the Council has not considered during the annual budget process, the Chief Operating Officer shall inform the Council President in writing of such contract or grant proposal.
- (b) The Chief Operating Officer shall provide a monthlyquarterly report to Council showing all contracts awarded, amended or completed during the preceding month, all Metro applications for grant funding

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greater than \$50,000.00, and all grants awarded by Metro greater than $\frac{2510}{000.00}$.

(c) ——(c) ——The Chief Operating Officer shall make available to the Council on request information showing the status of all contracts <u>and grants</u> whether listed in the adopted budget or not.

(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 02-966A, Sec. 1, Ordinance No. 06-1123A, Sec. 2.)

2.04.030 Regulations

The Chief Operating Officer may establish by executive order additional regulations consistent with this chapter.

(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 02-966A, Sec. 1.)

(2.04.032 Prohibition Against Doing Business With Certain Former Metro Officials. Repealed Ord. 99-822 §2)

DISPOSITION OF SURPLUS PROPERTY

2.04.03070 Other Governmental Entity Requests

Metro may donate, sell, lease, exchange, transfer or otherwise dispose of Metro-owned surplus property to another government agency that has requested such surplus property for public use, as authorized by state law.

2.04.03280 Disposition by Donation, Sale, Lease or Exchange

Metro may donate, sell, lease, exchange, transfer or otherwise dispose of Metro-owned surplus property not needed for public use as authorized under state law. The Chief Operating Officer will adopt a policy to effect the provisions of this subchapter.

METRO LOCAL CONTRACT REVIEW BOARD

2.04.035 <u>04090 Metro Council as the Local</u> Contract Provisions Requiring Records MaintenanceReview Board

<u>Pursuant to ORS 279A.060, the Metro Council is designated as the Local Contract</u> <u>Review Board for Metro</u> and Permitting Audits

- (a) All Metro contracts of \$50,000.00 or more MERC. The Metro Council, acting as the Local Contract Review Board, shall require contractors and subcontractors to maintain exercise all fiscal records relating to such contracts in accordance with generally accepted accounting principles. In addition, such contracts also shall require contractors and subcontractors to maintain any other records necessary to clearly document:
- (1) The performance of the contractor, including, but not limited to, the contractor's compliance with contract plans and specifications, compliance with fair the public contracting and employment programs, compliance with Oregon law on the payment of wages and accelerated payment provisions; and compliance with any and all requirements imposed on the contractor or subcontractor under the terms powers and duties conferred upon it by state law. The procedural rules of the contract or subcontract;
- (2) Any claims arising from or relating to the performance of Metro Council sitting as the contractor or subcontractor under a public contract;
- (3) Any cost and pricing data relating to the contract; and
- (4) Payments made to all suppliers and subcontractors.
- (b) All Metro contracts of \$50,000.00 or more shall require contractors and subcontractors to maintain records for the longer period of (i) six years from the date of final completion of the contract to which the records relate or (ii) until the conclusion of any audit, controversy or litigation arising out of or related to the contract.
- (c) All Metro contracts of \$50,000.00 or more shall contain provisions requiring contractors and subcontractors to make records available to Metro and its authorized representatives, including, but not limited to, the staff of any Metro department and the staff of the Metro Auditor, within the boundaries of the Metro region, at reasonable times and places regardless of whether litigation has been filed on any claims. Such

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contracts shall also provide that if the records Local Contract Review Board are not made available within the boundaries of Metro, the contractor or subcontractor agrees to bear all of the costs for Metro employees, and any necessary consultants hired by Metro, including, but not limited to, the costs of travel, per diem sums, salary, and any other expenses that Metro incurs, in sending its employees or consultants to examine, audit, inspect, and copy the same as those records. Such contracts shall further provide that if the contractor elects to have such records outside these boundaries, the costs paid by the contractor to Metro for inspection, auditing, examining and copying those records shall not be recoverable costs in any legal proceeding.

(d) All Metro contracts of \$50,000.00 or more shall contain provisions by which contractors and subcontractors authorize and permit Metro and its authorized representatives, including, but not limited to, the staff of any Metro department and the staff of the Metro Auditor, to inspect, examine, copy and audit the books and records of any contractor or subcontractor, including tax returns, financial statements, other financial documents and any documents that may be placed in escrow according to any contract requirements. Metro shall keep any such documents confidential to the extent permitted by Oregon law, subject to the provisions of subsection (e).

(e) All Metro contracts of \$50,000.00 or more shall contain provisions by which contractors and subcontractors agree to disclose the records requested by Metro and agree to the admission of such records as evidence in any proceeding between Metro and the contractor or subcontractor, including, but not limited to, a court proceeding, arbitration, mediation or other alternative dispute resolution process.

(f) All Metro contracts of \$50,000.00 or more shall contain provisions by which contractors and subcontractors agree that in the event such records disclose that Metro is owed any sum of money or establish that any portion of any claim made against Metro is not warranted, the contractor or subcontractor shall pay all costs incurred by Metro in conducting the audit and inspection. Such contracts shall further provide that such costs may be withheld from any sum that is due or that becomes due from Metro.

(g) Failure of the contractor or subcontractor to keep or disclose records as required by this code section or any solicitation document may result in disqualification as a bidder or proposer for future Metro contracts that apply to the Metro Council as provided in Metro Code Section 2.04.070(c), or may result in a finding that the contractor or subcontractor is not a responsible bidder or proposer as provided in Metro Code Section 2.04.052 Chapter 2.01.

(Ordinance No. 04-1035, Sec. 2.)
PERSONAL SERVICES CONTRACTS
2.04.040 Personal Services Contracts General

(a) <u>Disadvantaged Business Program</u>. All contracting for personal services is subject 2.04.042100 Local Contract Review Board Administrative Rules

<u>To carry out its powers and duties and to comply with state law, 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.</u>

(b) <u>Substantive Requirements</u>. All Metro personal services<u>Local Contract</u> Review Board will adopt administrative rules for public contracts shall contain all provisions required of local contracting agencies by ORS Chapter 279A and ORS Chapter 279B and shall be construed. Upon adoption of said rules, Tthe Attorney General's Model Public Contracting Rules do not apply to be consistent with all relevant provisions of such chapters.

(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 04-1065A, Sec. 4.)

2.04.042 Procurement of Personal Services Contracts

- (a) Anythe Metro's procurement of personal services not exceeding \$10,000.00 may be awarded in any manner deemed practical or convenient by the Chief Operating Officer.
- (b) Any procurement of personal services exceeding \$10,000.00 but not exceeding \$150,000.00 shall be awarded in accordance with the provisions of ORS 279B.070. In addition, the contracting department shall notify the Procurement Officer of the nature of the proposed contract, the estimated cost of the contract, and the name of the contact person.
- (c) Any procurement of personal services exceeding \$150,000.00 shall be awarded in accordance with the provisions of ORS 279B.060.

(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 97-692A, Sec. 20; Ordinance No. 99-822, Sec. 3; Ordinance No. 04-1065A, Sec. 5.; and Ordinance No. 14-1345, Sec. 1)

(2.04.044 Personal Services Contracts of More than \$50,000.00. Repealed Ord. 04-1065A §6)

2.04.046 Personal Services Contract Amendments

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(a) Personal services public contracts may be amended to increase the amount of the contract to no more than twice the original contract amount. The limit provided in this subsection is cumulative and includes any and all contract amendments or extensions. Any contract amendment(s) in excess of this limit shall require approval by the Metro Council. The Metro Council shall determine whether it is appropriate to amend the contract in light of the policies set forth in ORS 279A.015 and ORS 279B.010.

(b) Notwithstanding the provisions of subsection (a) of this section, personal service contracts may be amended to increase the amount of the contract to an amount more than twice the original contract amount if the original personal services contract was let by a formal competitive procurement, the amendment is for the purpose of authorizing additional work for which unit prices were provided that established the cost for the additional work and the original contract governs the terms and conditions of the additional work.

(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 99-822, Sec. 5; Ordinance No. 04-1065A, Sec. 7; Ordinance No. 06-1123A, Sec. 3.)

2.04.048 Notice of Award and Appeals of Personal Services Contracts

Notice of award and any appeal thereof shall be subject to the rules and procedures established in Section 2.04.070 except that the final determination of any appeal shall be made by the Council and not the Contract Review Board.

(Ordinance No. 96-635B, Sec. 3.)

(EQUITY IN CONTRACTING

2.04.0501210 Public Contract Review Board. Repealed Ord. 04-1065A §8) CONTRACT REVIEW BOARD

2.04.052 Public Contracts -- Public Improvement Contracts

(a) Procedural Requirements.

The procedures for sealed competitive bidding, sealed competitive proposals, and all other methods of procurement of public contracts used by Metro shall

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comply with all requirements that are generally applicable to local governments as set forth in ORS Chapters 279A and 279B.

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.

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.

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.

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 \$150,000.00 or less.

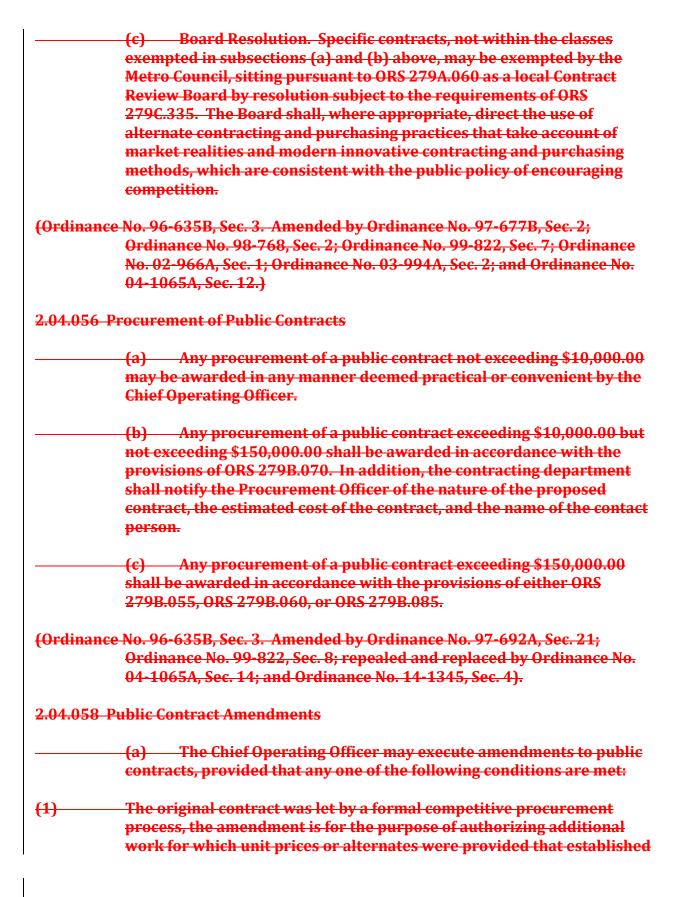
For public improvements, a labor and materials bond and a $\left(2\right)$ performance bond, both in an amount equal to 100 percent of the contract price are required for contracts over \$150,000.00. Bid security, labor and material bond and performance bond may be (3)required even though the contract is of a class not identified above, if the Chief Operating Officer determines it is in the public interest. 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. (Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 99-822, Sec. 6; Ordinance No. 02-966A, Sec. 1; Ordinance No. 04-1065A, Sec. 9; and Sec. 1, Ordinance No. 11-1256; and Ordinance No. 14-1345, Sec. 2.) **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

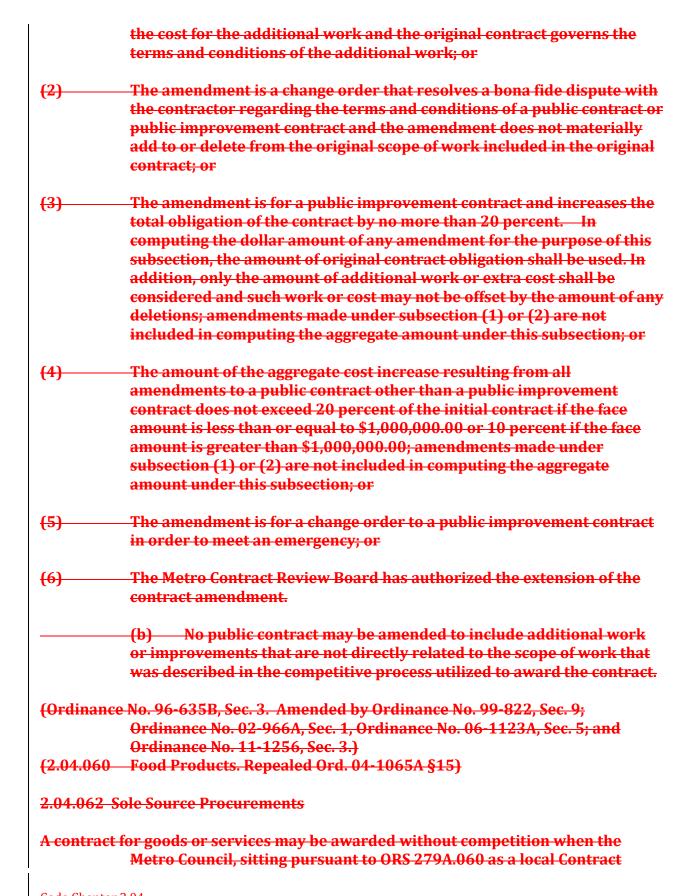
contracts and will result in substantial cost savings to Metro or the public or will otherwise substantially promote the public interest in a manner that could not practicably be realized by complying with

-	ents that are applicable under ORS 279B.055, ORS 279B.060, ORS 279B.065, ORS 279B.070:
	(1) Food for zoo animals, the purchase and sale of zoo animals, and he purchase of zoo gift shop retail inventory and resale items.
s s #	(2) Contracts for management and operation of food, parking or imilar 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 ollowed.
2	(3) 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.
	(4) Purchase of food items for resale at facilities owned or operated by Metro.
s €	(5) Contracts for warranties, including but not limited to computer of tware warranties, in which the supplier of the goods or services evered by the warranty has designated an authorized provider for the warranty service.
	(6) Contracts for computer hardware, or computer software.
	(7) Contracts under which Metro is to receive revenue by providing a ervice.
s	(8) Contracts for the lease or use of the convention, trade, and pectator buildings and facilities operated by the Metro Exposition-Recreation Commission.
i e a	(9) Public contracts by the Metro Exposition-Recreation Commission nan 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 relection procedures are followed.
s ŧ	(10) Contracts for equipment repair or overhaul, but only when the ervice and/or parts required are unknown before the work begins and he cost cannot be determined without extensive preliminary lismantling or testing.

	Contracts in the nature of grants to further a Metro purpose ded a competitive Request for Proposal process is followed.
gover electr	of utilities or any other services whose price is regulated by any rnmental body, including but not limited to telephone service, ric, natural gas, and sanitary services, provided that if competition tilable, a Request for Proposal process is followed.
	ds or services when the provider of the procured goods or services uired by the federal government or by the state of Oregon.
Contracts for co-o	perative procurements permitted under ORS 279A.220 to .225.
	The procurement of art and art related production and cation provided that a Request for Proposal process is followed.
budge as ou prope	Sponsorships which are identified and approved in the proposed et and are not designated by Council as having a significant impact thined in Section 2.04.026 need not follow a competitive bidding or osal process. In order to be eligible for this exemption the sorship shall provide Metro with event advertising and/or media ses.
least quote which goods excha	Sponsorship contracts, provided that quotes are obtained from at three potential sponsors or that good faith efforts to obtain such es are documented. A sponsorship contract is any contract under a the sponsor's name or logo is used in connection with a facility's s, buildings, parts of buildings, services, systems, or functions in large for the sponsor's agreement to pay consideration, including ey, goods, services, labor, credits, property or other consideration.
defin	Contracts for projects that are not public improvements as ed in Metro Code Section 2.04.010(n) in which a contractor des a material and substantial portion of the funding for such et.
adver	Contracts with any media outlet for the purchase of classified rtising, display advertising or the placement of public notices to cize legal notices of public meetings and procurements.
trade proje	Contracts not exceeding \$150,000 for personal services or for services (and not required as part of a public improvement ct) when the provider of the procured services is a not for-profit nization, and the purpose of the services is to implement Metro

	ams and projects, provided the Metro Council has approved by ution a process for awarding such contracts.
	Any contract exempt from competitive bidding under any statute state of Oregon.
procu descri chose to and associ Such p direct negot	Description of procurement procedures for class special rements: Procurements for each of the class special procurements ibed in subsection (a) shall be performed by means of procedures in by the Chief Operating Officer as an appropriate method tailored lin light of the demands, circumstances and market realities lated with obtaining each of the enumerated goods and services. Procurement procedures may include but shall not limited to enegotiations with individual or multiple vendors or suppliers; lations with ranked proposers; competitive negotiations; or ple tiered competitions.
(a) ma	Specific contracts not within the classes described in subsection by be procured by special procurements subject to the rements of ORS 279B.085.
•	-1065A, Sec. 11; Ordinance No. 06-1123A, Sec. 4; Ordinance No. 11-Sec. 2; and Ordinance No. 14-1345, Sec. 3.)
2.04.054 Competi	tive Bidding Exemptions for Public Improvements
Code,	cies and provisions of ORS 279A.015 and 279C.300 and the Metro all Metro and Metropolitan Exposition-Recreation Commission improvement contracts shall be based upon competitive bids t:
	State Law. Classes of public improvement contracts specifically pted from competitive bidding requirements by state law.
is exe findin Contr favori and th contra provid	Board Rule. The following class of public improvement contracts mpt from the competitive bidding process based on the legislative g by the Metro Council, sitting pursuant to ORS 279A.060 as a local act Review Board, that the exemption will not encourage tism or substantially diminish competition for public contracts nat such exemption will result in substantial cost savings: acts for public improvements in which a contractor agrees to de a material and substantial portion of the funding for such public exement project.





Review Board determines in writing by resolution and in accordance with the provisions of ORS 279B.075 that the goods or services or class of goods or services are available from only one source.

(Ordinance No. 96-635B, Sec. 3. Repealed and replaced by Ordinance No. 04-1065A, Sec. 17.)

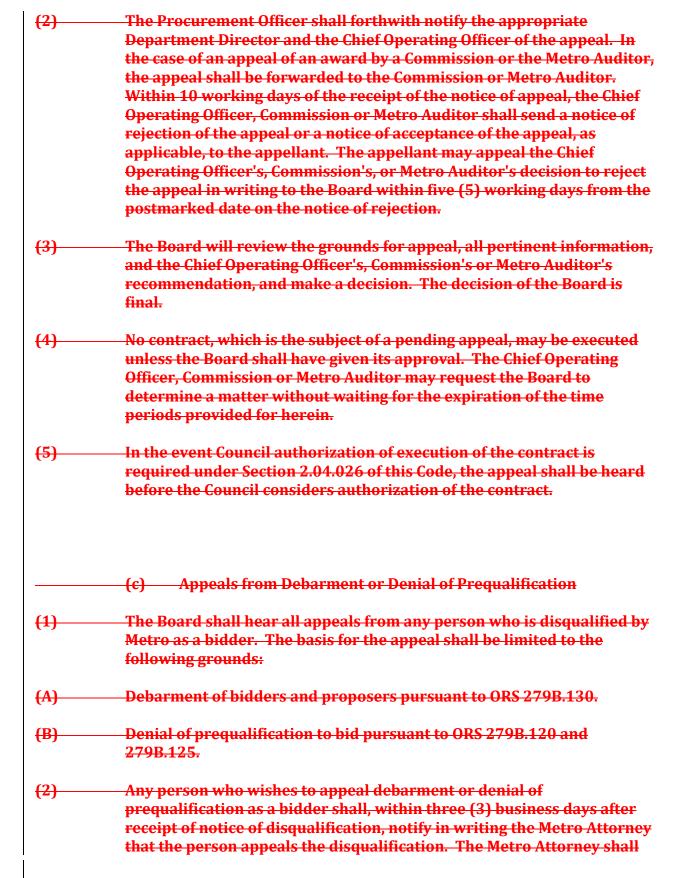
2.04.064 Sale of Surplus Property

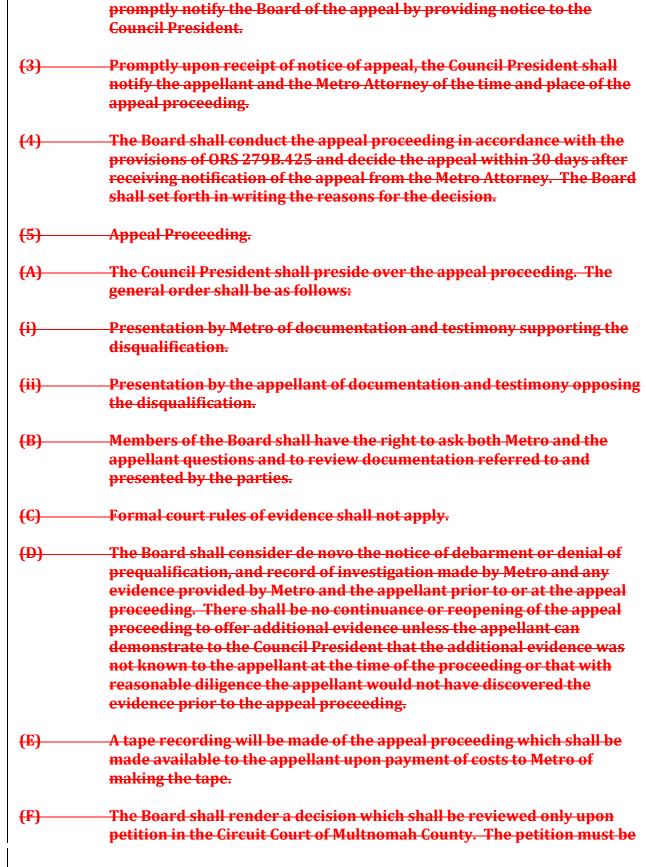
- (a) Contracts for sale of surplus property may be executed without competitive sealed bids or proposals only when the Chief Operating Officer determines in writing that the number, value and nature of the items to be sold make it probable that the cost of conducting a sale by bid will be such that a liquidation sale will result in substantially greater net revenue to Metro.
- (b) Contracts for the sale of personal property shall be performed in accordance with ORS 279A.185.

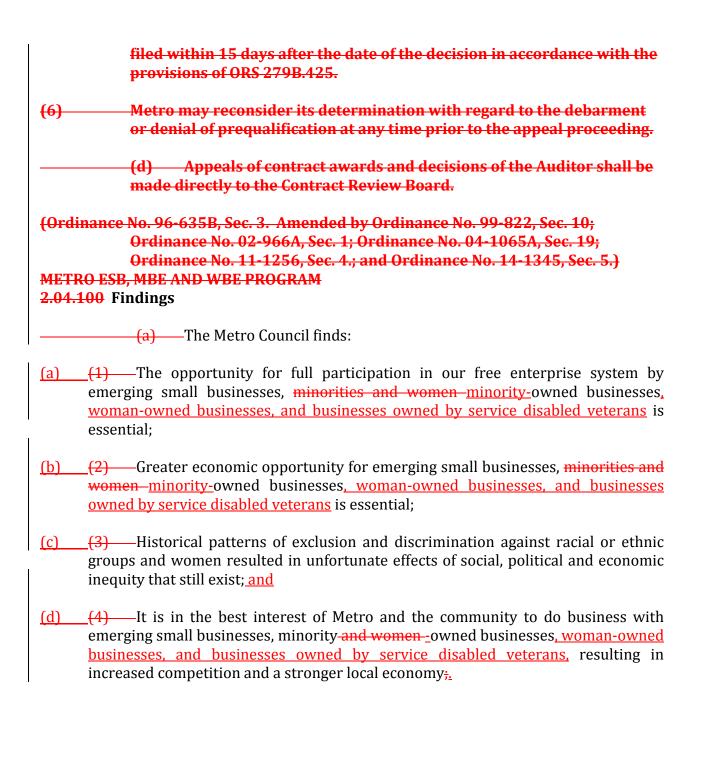
(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 02-966A, Sec. 1; Ordinance No. 04-1065A, Sec. 18.)

2.04.070 Notice of Award and Appeals

- (a) At least seven (7) days prior to the execution of any public contract over \$150,000.00 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. 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.
- 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.







In cooperation with the private sector, the affected populations, (5)interested groups and appropriate governmental entities, a program should be established to recommend remedies. (b) It is the purpose of this policy to establish and implement a program to encourage the utilization by Metro of emerging small businesses, minority and women owned businesses, to the greatest extent permitted by law, by creating for such businesses the maximum possible opportunity to compete for and participate in locally-funded Metro contracting activities. This program does not apply to federallyfunded contracts, which are governed by Metro Code 2.04.300, et seq. (Ordinance No. 83-165, Sec. 1. Amended by Ordinance No. 84-181, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231. Sec. 1: all previous Ordinances repealed by Ordinance No. 92-466A, Sec. 2; repealed by Ordinance No. 97-692A, Sec. 1; replaced by Ordinance No. 97-692A, Sec. 2.) 2.04.105 Policy Statement 2.04.0521320 Policy Statement Metro expresses its strong commitment to provide maximum opportunity to do business with ESBs, MBEs and WBEsemerging small businesses, minorityowned businesses, woman-owned businesses, and businesses owned by service disabled veterans. (b) (b)—It is the policy of Metro to provide equal opportunity to all persons to access and participate in the locally-funded projects, programs and services of Metro. Metro and Metro contractors shall not discriminate against any person or firm on the basis of race, color, national origin, sex, sexual orientation, age, religion,

physical handicap, political affiliation or marital status.

(Ordinance No. 83-165, Sec. 2. Amended by Ordinance No. 84-181, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1; all previous Ordinances repealed by Ordinance No. 92-466A, Sec. 2; amended by Ordinance No. 97-692A. Sec. 1; and Ordinance No. 10-1240, Sec. 1.) 2.04.110 Definitions For purposes of Metro Code Sections 2.04.100 to 2.04.190, unless the context requires otherwise, the following definitions shall apply: a) "Department" means the State of Oregon's Department of Business Development, Office of Minority, Women and Emerging Small Business or such state agency, department or entity to which has been delegated the responsibility to certify a Emerging Small Business Enterprise, Minority Business Enterprise, Women Business Enterprise, or a Disadvantaged Business Enterprise and to engage 0541430 Equity in related activities. Contracting Administrative Rules (b) "Emerging Small Business" or "ESB" means a small business concern which is certified as such by the Department. (c) "Minority Business Enterprise" or "MBE" means a business concern which is certified as such by the Department. (d) "Public Improvement" has the meaning specified in Metro Code Section 2.04.010 (n). (e) "Women Owned Business Enterprise" or "WBE" means a business concern which is certified as such by the Department. (Ordinance No. 165, Sec. 3. Amended by Ordinance No. 84-181, Sec. previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1; and Ordinance No. 88-252, Sec. 1; all previous Ordinances repealed by Ordinance No. 92-466A, Sec. 2; amended by Ordinance No. 96 635B, Sec. 4.; repealed by Ordinance No. 97 692A, Sec. 4; replaced by Ordinance No. 97-692A, Sec. 5; amended by Ordinance No. 10-1240, Sec. 2.) 2.04.115 Program Administration (a) The Procurement Officer shall be responsible for administering this program on behalf of the Chief Operating Officer. (b) In administering this program, the Procurement Officer shall advise potential ESB, MBE and WBE vendors that Metro does not certify ESBs, MBEs and WBEs, and shall direct them to the Department.

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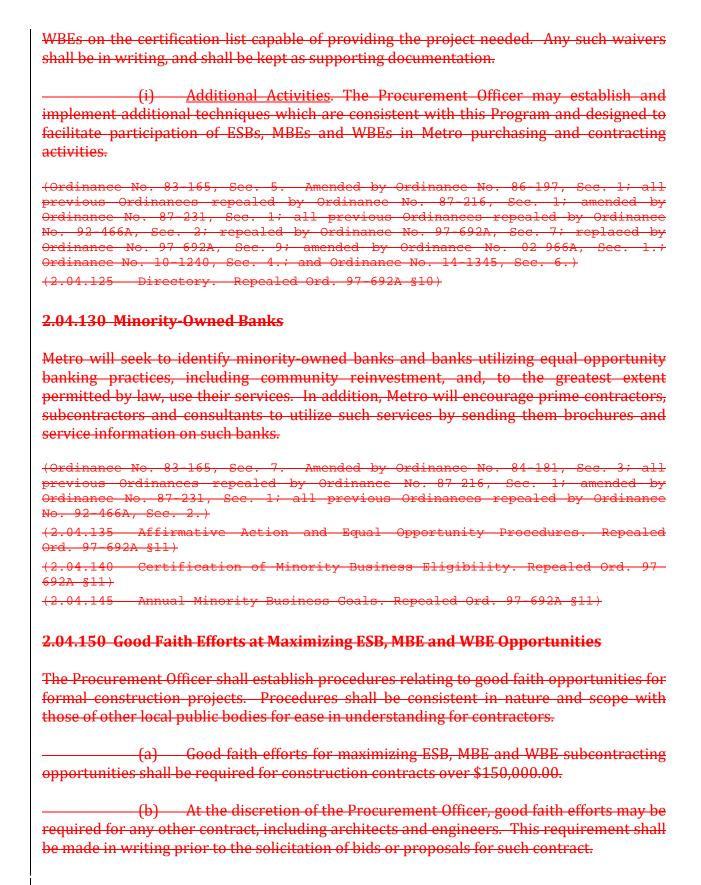
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(Ordinance No. 83-165, Sec. 4. All previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1; all previous Ordinances repealed by Ordinance No. 92-466A, Sec. 2; repealed by Ordinance No. 97-692A, Sec. 6; replaced by Ordinance No. 97-692A, Sec. 8; amended by Ordinance No. 02-966A, Sec. 1.; and amended by Ordinance No. 10-1240, Sec. 3.)

2.04.120 Program Activities	
The Procurement Officer shall develop procedures in the following areas leading to increased business with ESBs, MBEs, and WBEs:	
(a) <u>Outreach</u> . Such procedures may include electronic notices, annual contract lists, newsletters, attending regularly-scheduled contractor orientation programs, and participation in local and regional outreach opportunities.	
(b) <u>Technical Assistance</u> . Provide information on feasible options for management assistance, bonding, insurance, certification and financial assistance.	
(c) Reduce Contract Size. Examining alternatives for arranging contracts by size and type of work so as to enhance the possibility of participation by ESBs, MBEs and WBEs.	
(d) <u>Education</u> . Periodic training for staff to ensure awareness of program objectives and desired activities on their part.	
(e) <u>Plan Centers</u> . Ensuring ESB, MBE and WBE plan centers and contractors are receiving requests for bids, proposals and quotes.	
(f) <u>Advertising</u> . Advertise formal purchases and contracting opportunities in at a minimum, one newspaper of general circulation and one minority-oriented publication. Additional advertising may be used in order to increase outreach to the MWESB community.	
(g) Informal Purchasing Opportunities. Requiring that at least one ESB and one MBE and one WBE vendor or contractor be contacted for all purchases and contracts more than \$10,000.00 and less than \$150,000.00. The program coordinator may waive this requirement if he/she determines that there are no certified ESBs, MBEs and WBEs on the certification list capable of providing the service or item. Any such waivers shall be in writing, and shall be kept as supporting documentation.	
(h) <u>Informal Construction Opportunities</u> . Requiring all public improvement construction opportunities for contracts more than \$10,000.00 and less than \$50,000.00 to be bid only by qualified ESBs, MBEs and WBEs. The Procurement Officer may waive this requirement if he/she determines that there are no certified ESBs, MBEs and	

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(c) When construction projects using a proposal process are approved by Council, the staff shall consider past ESB, MBE and WBE utilization as part of the selection criteria. The program coordinator shall provide the awarded contractor with ESB, MBE and WBE targets for subcontracting.

(d) Compliance with good faith efforts during the bidding process is required. Contractors failing to comply will be considered non-responsive.

(Ordinance No. 83-165, Sec. 11. Repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1; Ordinance No. 88-252, Sec. 1; all previous Ordinances repealed by Ordinance No. 92-466A, Sec. 2; amended by Ordinance No. 97-692A, Sec. 12; Ordinance No. 02-966A, Sec. 1.; Ordinance No. 10-1240, Sec. 5.; and Ordinance No. 14-1345, Sec. 7.)

(2.04.155 Contract Award Criteria. Repealed Ord. 97-692A §13)

(2.04.160 Definition and Determination of Good Faith Efforts. Repealed Ord. 97-692A §13)

2.04.162 Contractor Work Force Efforts at Maximizing Minority and Women Opportunities

- (a) Metro contractors shall not discriminate against any person or firm on the basis of race, color, national origin, sex, sexual orientation, age, religion, physical handicap, political affiliation or marital status.
- (b) Assuring that minorities and women have access to employment opportunities in the construction industry is critical. The Procurement Officer shall establish procedures relating to work apprenticeships for minorities and women for Metro major construction projects. Procedures may include participation in a workforce clearing house providing opportunities for minorities and women.

(Ordinance No. 97 692A, Sec. 14 15. Amended by Ordinance No. 02 966A, Sec. 1.; and amended by Ordinance No. 10-1240, Sec. 6.)

2.04.165 Replacement of ESB, MBE or WBE Subcontractors

Prime contractors shall not replace an ESB, MBE or WBE subcontractor with another subcontractor, either before contract award or during contract performance, without the prior written consent of Metro. Prime contractors who replace an ESB, MBE or WBE subcontractor shall make good faith efforts as described in the preceding section in selecting a replacement.

(Ordinance No. 83-165, Sec. 14. Amended by Ordinance No. 86-197, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1; all previous Ordinances repealed by Ordinance No. 92-466A, Sec. 2; amended by Ordinance No. 97-692A, Sec. 28; and amended by Ordinance No. 10-1240, Sec. 7.)

2.04.170 Council Information The Metro Council acting as the Local Contract Review Board will adopt Equity in Contracting Administrative Rules to establish and implement a program to encourage the utilization by Metro of emerging small businesses, minority-owned businesses, woman-owned businesses, and businesses owned by service disabled veterans, by creating for such businesses the maximum possible opportunity to compete for and participate in Metro contracting activities. Metro's Equity in Contracting Administrative Rules will apply in addition the Local Contract Review Board Administrative Rules adopted in accordance with Section 2.04.0342 of this chapter. The Equity in Contracting Administrative Rules will not apply to federally-funded contracts, which are governed by federal rules and regulations.

2.04.0561540 Annual Equity in Contracting Reports

On behalf of the Chief Operating Officer, the Procurement Officer shall provide an annual report to Council showing Metro's utilization of ESBs, MBEs and WBEs in the procurement and contracting process.emerging small businesses, minority-owned businesses, woman-owned businesses, and businesses owned by service disabled veterans in the procurement and contracting process. The Chief Operating Officer shall refer to the annual reports when evaluating the performance of Metro's Equity in Contracting Program and of Department Directors.

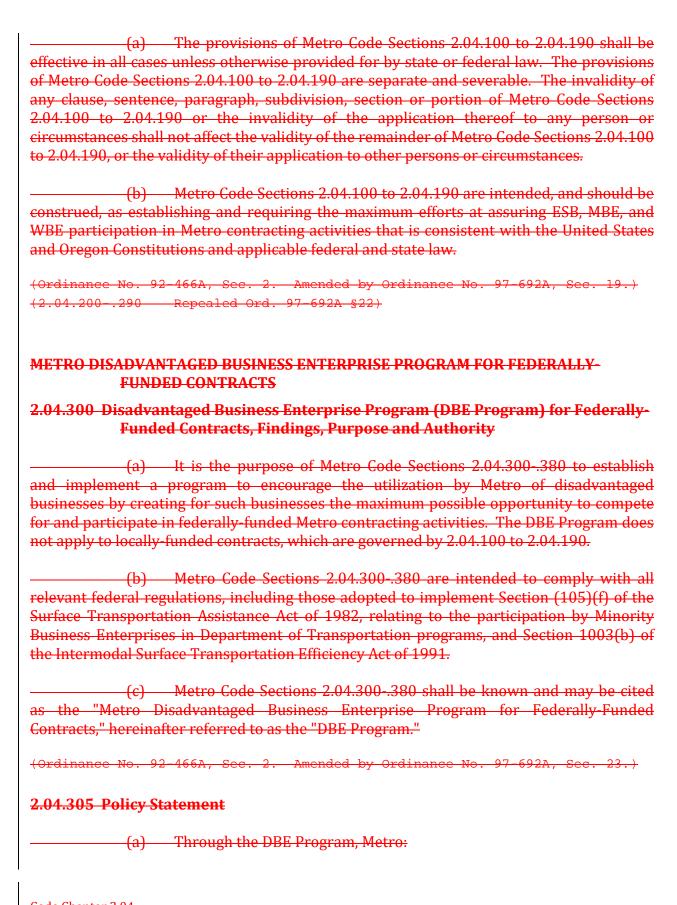
The Chief Operating Officer shall use MWESB utilization when evaluating the performance of this program and of Department Directors.

(Ordinance No. 83-165, Sec. 15. Amended by Ordinance No. 84-181, Sec. 7, and Ordinance No. 86-197, Sec. 1; all previous Ordinances repealed by Ordinance No. 87-216, Sec. 1; amended by Ordinance No. 87-231, Sec. 1; all previous Ordinances repealed by Ordinance No. 92-466A, Sec. 2; repealed by Ordinance No. 97-692A, Sec. 16; replaced by Ordinance No. 97-692A, Sec. 17; amended by Ordinance No. 02-966A, Sec. 1.; and amended by Ordinance No. 10-1240, Sec. 8.)

(SUSTAINABLE PROCUREMENT

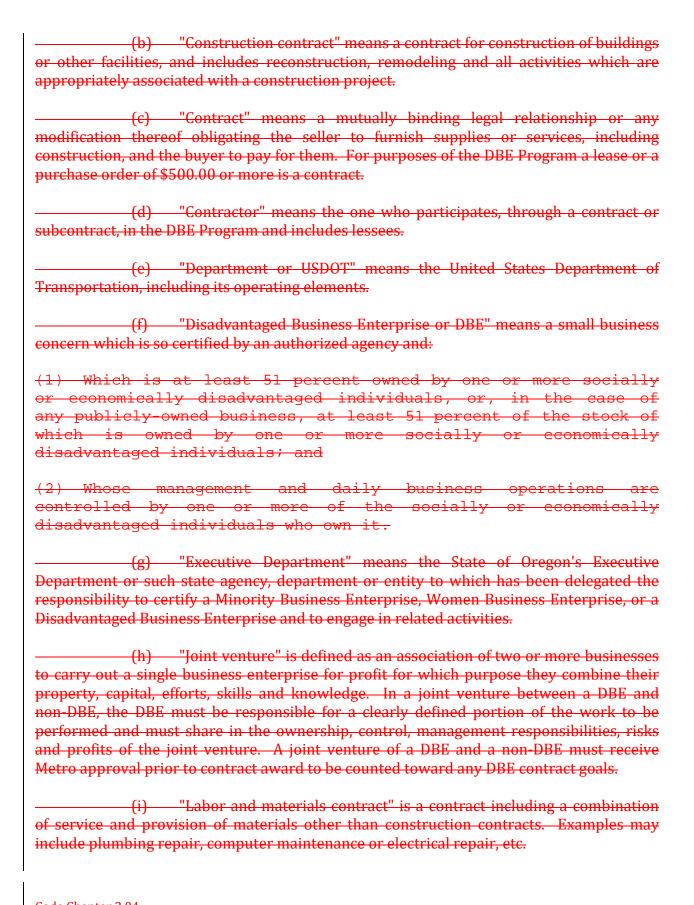
2.04.180 Compliance. Repealed Ord. 97-692A §18)

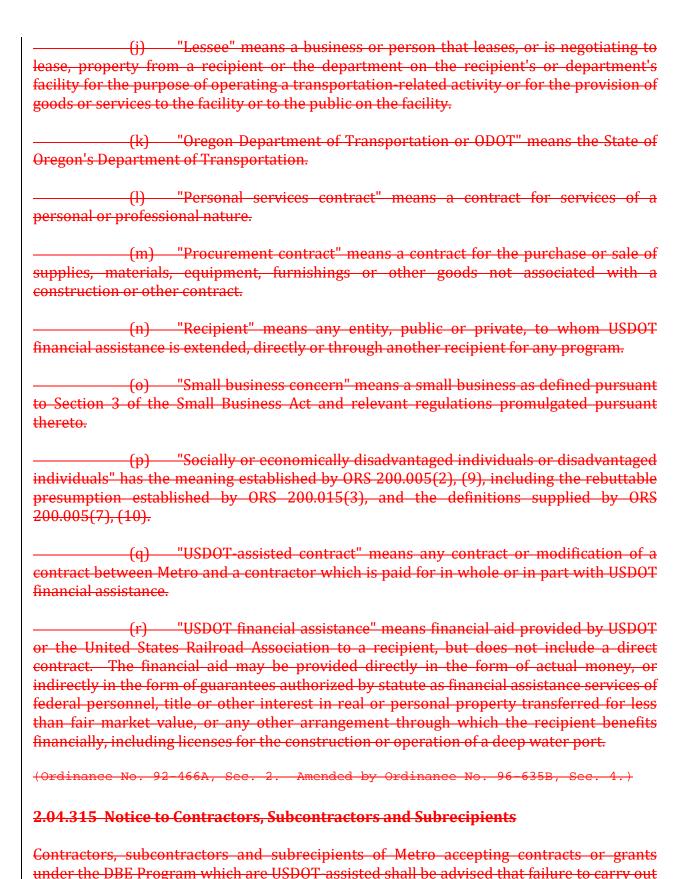
2.04.190 Severability 0601650 Purpose and Intent



(1) Expresses its strong commitment to provide maximum
opportunity to disadvantaged businesses in contracting;
(2) Informs all employees, governmental agencies and the general public of its intent to implement this policy statement; and
(3) Assures conformity with applicable federal regulations as they exist or may be amended.
(b) It is the policy of Metro to provide equal opportunity to all persons to access and participate in the projects, programs and services of Metro, in accordance with Title VI of the Civil Rights Act of 1964. Metro and Metro contractors will not discriminate against any person or firm on the basis of race, color, national origin, sex, sexual orientation, age, religion, physical handicap, political affiliation or marital status.
(c) The policies, practices and procedures established by the DBE Program shall apply to all Metro departments and project areas except as expressly provided in the DBE Program.
(d) The objectives of the DBE Program shall be:
(1) To assure that provisions of the DBE Program are adhered to by all Metro departments, contractors, employees and USDOT subrecipients and contractors; and
(2) To initiate and maintain efforts to increase DBE Program participation by disadvantaged businesses.
(e) Metro accepts and agrees to the statements of 49 CFR §23.43 (a)(1) and (2), and said statements shall be included in all USDOT agreements with USDOT subrecipients and in all USDOT-assisted contracts between Metro or USDOT subrecipients and any contractor.
(Ordinance No. 92-466A, Sec. 2. Amended by Ordinance No. 97-692A, Sec. 21.)
2.04.310 Definitions
For purposes of the DBE Program, the following definitions shall apply:
(a) "Applicant" means one who submits an application, request or plan to be approved by a USDOT official or by Metro as a condition to eligibility for Department of Transportation (USDOT) financial assistance; and "application" means such an application, request or plan.

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the requirements set forth in 49 CFR 23.43(a) shall constitute a breach of contract and, after notification by Metro, may result in termination of the agreement or contract by Metro or such remedy as Metro deems appropriate.

(Ordinance No. 92-466A, Sec. 2.)

2.04.320 DBE Liaison Officer

(a) The Chief Operating Officer shall, by executive order, designate a DBE liaison officer and, if necessary, other staff adequate to administer the DBE Program. The DBE liaison officer shall report directly to the Chief Operating Officer on matters pertaining to the DBE Program.

(b) The DBE liaison officer shall be responsible for developing, managing and implementing the DBE Program, and for disseminating information on available business opportunities so that DBEs are provided an equitable opportunity to bid on Metro contracts. In addition to the responsibilities of the DBE liaison officer, all Department Directors and program managers shall have responsibility to assure implementation of the DBE Program.

(Ordinance No. 92-466A, Sec. 2. Amended by Ordinance No. 97-692A, Sec. 25; Ordinance No. 02-966A, Sec. 1.)

2.04.325 Directory

A directory of DBEs as certified by ODOT or the Executive Department, as applicable, shall be maintained by the Liaison Officer to facilitate identifying such businesses with capabilities relevant to general contracting requirements and particular solicitations. The directory shall be available to contract bidders and proposers in their efforts to meet DBE Program requirements.

(Ordinance No. 92-466A, Sec. 2.)

2.04.330 DBE-Owned Banks

Metro will seek to identify DBE-owned banks within the policies adopted by the Metro Council and make the greatest feasible use of their services. In addition, Metro will encourage prime contractors, subcontractors and consultants to utilize such services by sending them brochures and service information on certified DBE banks.

(Ordinance No. 92-466A, Sec. 2.)

2.04.335 Affirmative Action and Equal Opportunity Procedures

Metro shall use affirmative action techniques to facilitate DBE and participation in contracting activities. These techniques include:

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(a) Arranging solicitations, time for the presentation of bids, quantities specifications and delivery schedules so as to facilitate the participation of DBEs.
(b) Referring DBEs in need of management assistance to established agencies that provide direct management assistance to such businesses.
(c) Carrying out information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual where appropriate.
(d) Distribution of copies of the DBE Program to organizations and individuals concerned with DBE programs.
(e) Periodic reviews with Department Directors to ensure that they are aware of the DBE Program goals and desired activities on their parts to facilitate reaching the goals. Additionally, departmental efforts toward and success in meeting DBE goals for department contracts shall be factors considered during annual performance evaluations of the Department Directors.
(f) Monitor and ensure that disadvantaged planning centers and likely DBE contractors are receiving requests for bids, proposals and quotes.
(g) Study the feasibility of certain USDOT-assisted contracts and procurements being set aside for DBE participation.
(h) Distribution of lists to potential DBE contractors of the types of goods and services which Metro regularly purchases.
(i) Advising potential DBE vendors that Metro does not certify DBEs, and directing them to ODOT until December 31, 1987, and, thereafter, to the Executive Department.
(j) Specifying purchases by generic title rather than specific brand name whenever feasible.
(k) Establishing an interdepartmental contract management committee which will meet regularly to monitor and discuss, among other issues, potential DBE participation in contracts. In an effort to become more knowledgeable regarding DBE resources, the committee shall also invite potential DBE contractors to attend selected meetings.
(l) Requiring that at least one DBE vendor or contractor be contacted for all contract awards which are not exempt from Metro's contract selection procedures and which are 1) for more than \$500.00 but not more than \$25,000.00 in the case of
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non-personal services contracts; and 2) for more than \$2,500.00 but not more than \$25,000.00 for personal services contracts. The liaison officer may waive this requirement if he/she determines that there are no DBEs on the certification list capable of providing the service or item. For contracts over the dollar amounts indicated in this section, all known DBEs in the business of providing the service(s) or item(s) required shall be mailed bid or proposal information.
(m) The Chief Operating Officer or his/her designee may establish and implement additional affirmative action techniques which are designed to facilitate participation of DBEs in Metro contracting activities.
(Ordinance No. 92 466A, Sec. 2. Amended by Ordinance No. 94 554B; Ordinance No. 02-966A, Sec. 1.)
2.04.340 Certification of Disadvantaged Business Eligibility (a) To participate in the DBE Program as a DBE, contractors subcontractors and joint ventures must have been certified by an authorized certifying agency as described in subsection (b) of this section.
(b) Metro will not perform certification or recertification of businesses of consider challenges to socially and economically disadvantaged status. Rather Metro will rely upon the certification and recertification processes of ODOT and will utilize ODOT's certification list until December 31, 1987, and, thereafter, the Executive Department's list in determining whether a prospective contractor or subcontractor is certified as a DBE. A prospective contractor or subcontractor must be certified as a DBE by one of the above agencies, as applicable, and appear on the respective certification list of said agency, prior to the pertinent bid opening or proposal submission date to be considered by Metro to be an eligible DBE and be counted toward meeting goals. Metro will adhere to the recertification rulings resulting from 105(f) or state law, as applicable.
(c) Prospective contractors or subcontractors which have been denied certification by one of the above agencies may appeal such denial to the certifying agency pursuant to applicable law. However, such appeal shall not cause a delay in any contract award by Metro. Decertification procedures for USDOT-assisted contractor or potential contractors will comply with the requirements of Appendix A "Section by Section Analysis' of the July 21, 1983, Federal Register, Vol. 45, No. 130, p. 45287, and will be administered by the agency which granted certification.
(d) Challenges to certification or to any presumption of social or economic disadvantage with regard to the USDOT-assisted portion of the DBE Program, as provided for in 49 CFR 23.69, shall conform to and be processed under the procedures prescribed by each agency indicated in paragraph (b) of this section. That challenge procedure provides that:

- (1) Any third party may challenge the socially and economically disadvantaged status of any individual (except an individual who has a current 8(a) certification from the Small Business Administration) presumed to be socially and economically disadvantaged if that individual is an owner of a firm certified by or seeking certification from the certifying agency as a disadvantaged business. The challenge shall be made in writing to the recipient.
- (2) With its letter, the challenging party shall include all information available to it relevant to a determination of whether the challenged party is in fact socially and economically disadvantaged.
- (3) The recipient shall determine, on the basis of the information provided by the challenging party, whether there is reason to believe that the challenged party is in fact not socially and economically disadvantaged if the recipient determines:
 - (i) That there is no reason to believe that the challenged party is not socially and economically disadvantaged, the recipient shall so inform the challenging party in writing. This terminates the proceeding.
 - (ii) That there is reason to believe that the challenged party is not socially and economically disadvantaged, the recipient shall begin a proceeding as provided in paragraphs (d), (4), (5) and (6) of this paragraph.
- (4) The recipient shall notify the challenged party in writing that his or her status as a socially and economically disadvantaged individual has been challenged. The notice shall identify the challenging party and summarize the grounds for the challenge. The notice shall also require the challenged party to provide to the recipient, within a reasonable time, information sufficient to permit the recipient to evaluate his or her status as a socially and economically disadvantaged individual.
- (5) The recipient shall evaluate the information available to it and make a proposed determination of the social and economic disadvantage of the challenged party. The recipient shall

notify both parties of this proposed determination in writing, setting forth the reasons for its proposal. The recipient shall provide an opportunity to the parties for an informal hearing, at which they can respond to this proposed determination in writing and in person.

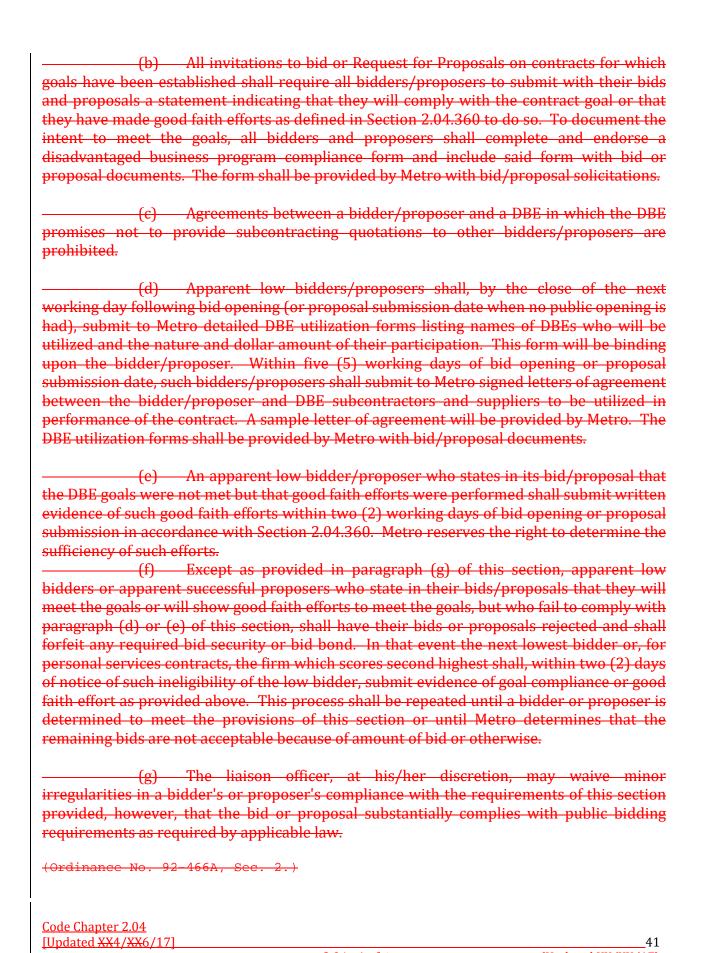
- (6) Following the informal hearing, the recipient shall make a final determination. The recipient shall inform the parties in writing of the final determination, setting forth the reasons for its decision.
- (7) In making the determinations called for in paragraphs (d)(3)(5) and (6) of this paragraph, the recipient shall use the standards set forth in Appendix C of this subpart.
- (8) During the pendency of a challenge under this section, the presumption that the challenged party is a socially and economically disadvantaged individual shall remain in effect.
 49 CFR 23.69.

(Ordinance No. 92-466A, Sec. 2. Amended by Ordinance No. 02-966A, Sec. 1.)

2.04.345 Annual Disadvantaged Business Goals

- (a) Metro Council shall, by resolution each August, establish annual DBE goals for the ensuing fiscal year. Such annual goals shall be established separately for construction contracts, labor and materials contracts, personal services contracts, procurement contracts and USDOT assisted contracts regardless of type.
- (b) Annual goals will be established taking into consideration the following factors:
- (1) Projection of the number and types of contracts to be awarded by Metro;
- (2) Projection of the number, expertise and types of DBEs likely to be available to compete for the contracts;
- (3) Past results of Metro's efforts under the DBE Program; and
- (4) Existing goals of other local USDOT recipients and their experience in meeting these goals.

(c) Annual goals for USDOT-assisted contracts must be approved by the United States Department of Transportation. 49 CFR §23.45(g)(3).
(d) Metro will publish notice that the USDOT-assisted contract goals are available for inspection when they are submitted to USDOT or other federal agencies. They will be made available for 30 days following publication of notice. Public comment will be accepted for 45 days following publication of the notice.
(Ordinance No. 92-166A, Sec. 2. Amended by Ordinance No. 97-692A, Sec. 26.)
2.04.350 Contract Goals
(a) The annual goals established for construction contracts shall apply as individual contract goals for construction contracts over \$50,000.00.
(b) The liaison officer may set a contract goal for any contract other than construction contracts over \$25,000.00. The setting of such contract goal shall be made in writing prior to the solicitation of bids for such contract. Contract goals for contracts other than construction contracts over \$50,000.00 shall be set at the discretion of the liaison officer and shall not be tied, necessarily, to the annual goal for such contract type.
(c) Even though no DBE goals are established at the time that bid/proposal documents are drafted, the liaison officer may direct the inclusion of a clause in any RFP or bid documents for any contract described in this section which requires that the prime contractor, prior to entering into any subcontracts, make good faith efforts, as that term is defined in Section 2.04.360, to achieve DBE participation in the same goal amount as the current annual goal for that contract type.
(d) Contract goals may be complied with pursuant to Section 2.04.360 or 2.04.375. The extent to which DBE participation will be counted toward contract goals is governed by the latter section.
(Ordinance No. 92-466A, Sec. 2.)
2.04.355 Contract Award Criteria
(a) To be eligible for award of contracts containing a DBE goal, prime contractors must either meet or exceed the specific goal for DBE participation, or prove that they have made good faith efforts to meet the goal prior to the time bids are opened or proposal are due. Bidders/Proposers are required to utilize the most current list of DBEs certified by the Executive Department in all of the bidders'/proposers' good faith efforts solicitations. The address where certified lists may be obtained shall be included in all applicable bid/proposal documents.



2.04.360 Determination of Good Faith Efforts

- (a) Bidders or Proposers on USDOT-assisted contracts to which DBE goals apply must, to be eligible for contract award, comply with the applicable contract goal or show that good faith efforts have been made to comply with the goal. Good faith efforts should include at least the following standards established in the amendment to 49 CFR §23.45(h), Appendix A, dated Monday, April 27, 1981. A showing of good faith efforts must include written evidence of at least the following:
- (1) Attendance at any pre solicitation or prebid meetings that were scheduled by Metro to inform disadvantaged business enterprises of contracting and subcontracting or material supply opportunities available on the project.
- (2) Advertisement in trade association, general circulation, disadvantaged and trade-oriented, if any and through a disadvantaged-owned newspaper or disadvantaged-owned trade publication concerning the subcontracting or material supply opportunities at least 10 days before bids or proposals are due. (3) Written notification to a reasonable number but no less than five DBE firms that their interest in the contract is solicited. Such efforts should include the segmenting of work to be subcontracted to the extent consistent with the size and capability of DBE firms in order to provide reasonable subcontracting opportunities. Each bidder should send solicitation letters inviting quotes or proposals from DBE firms, segmenting portions of the work and specifically describing, as accurately as possible, the portions of the work for which quotes or proposals are solicited from DBE firms and encouraging inquiries for further details. Letters that are general and do not describe specifically the portions of work for which quotes or proposals are desired are discouraged, as such letters generally do not bring responses. It is expected that such letters will be sent in a timely manner so as to allow DBE sufficient opportunity to develop quotes or proposals for the work described.
- (4) Evidence of follow up to initial solicitations of interest, including the following:
 - (A) The names, addresses, telephone numbers of all DBE contacted;

- (B) A description of the information provided to

 DBE firms regarding the plans and

 specifications for portions of the work to

 be performed; and
- (C) A statement of the reasons for non-utilization of DBE firms, if needed to meet the goal.
- (5) Negotiation in good faith with DBE firms. The bidder shall not, without justifiable reason, reject as unsatisfactory bids prepared by any DBE firms.
- (6) Where applicable, the bidder must provide advice and assistance to interested DBE firms in obtaining bonding, lines of credit or insurance required by Metro or the bidder.
- (7) Overall, the bidder's efforts to obtain DBE participation must be reasonably expected to produce a level of participation sufficient to meet Metro's goals.
- (8) The bidder must use the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Executive Department's Advocate for Minority and Women and Emerging Small Business that provide assistance in the recruitment and placement of DBEs.

(Ordinance No. 92-466A, Sec. 2.)

2.04.365 Replacement of DBE Subcontractors

Prime contractors shall not replace a DBE subcontractor with another subcontractor, either before contract award or during contract performance, without prior Metro approval. Prime contractors who replace a DBE subcontractor shall replace such DBE subcontractor with another certified DBE subcontractor or make good faith efforts as described in the preceding section to do so.

(Ordinance No. 92-466A, Sec. 2.)

2.04.370 Records and Reports

(a) Metro shall develop and maintain a record keeping system to identify and assess DBE contract awards, prime contractors' progress in achieving goals and affirmative action efforts. Specifically, the following records will be maintained:

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(1) Awards to DBEs by number, percentage and dollar amount; (2) A description of the types of contracts awarded; and (3) The extent to which goals were exceeded or reasons therefor. (b) All DBE records will be separately maintained. Required DBE information will be provided to federal agencies and administrators on request. (c) The liaison officer shall prepare reports, at least semiannually, on DBE participation to include the following: (1) The number of contracts awarded; (2) Categories of contracts awarded; (3) Dollar value of contracts awarded; (4) Percentage of the dollar value of all contracts awarded DBE firms in the reporting period; and (5) The extent to which goals have been met or exceeded. (Ordinance No. 92-466A, Sec. 2.) 2.04.375 Counting Disadvantaged Business Participation Toward Meeting Goals (a) DBE participation shall be counted toward meeting the goals on each contract as follows: (1) Subject to the limitations indicated in paragraphs (2) through (8) below, the total dollar value of a prime contract or subcontract to be performed by DBEs is counted toward the applicable goal for contract award purposes as well as annual goal compliance purposes. (2) The total dollar value of a contract to a disadvantaged business owned and controlled by both disadvantaged males and non-disadvantaged females is counted toward the goals for disadvantaged businesses and women, respectively, in proportion to the percentage of ownership and control of each group in the business.

business owned and controlled by disadvantaged women is counted toward either the disadvantaged business goal or the goal for

The total dollar value of a contract with a disadvantaged

women, but not to both. Metro shall choose the goal to which the contract value is applied.

- (3) Metro shall count toward its goals a portion of the total dollar value of a contract with an eligible joint venture equal to the percentage of the ownership and control of the disadvantaged business partner in the joint venture.
- (4) Metro shall count toward its goals only expenditures to DBEs that perform a commercially useful function in the work of a contract. A DBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. To determine whether a DBE is performing a commercially useful function, Metro shall evaluate the amount of work subcontracted, industry practices and other relevant factors.
- (5) Consistent with normal industry practices, a DBE may enter into subcontracts. If a DBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the DBE shall be presumed not to be performing a commercially useful function. The DBE may present evidence to Metro to rebut this presumption. Metro's decision on the rebuttal of this presumption is subject to review by USDOT for USDOT assisted contracts.
- (6) A DBE which provides both labor and materials may count toward its disadvantaged business goals expenditures for materials and supplies obtained from other than DBE suppliers and manufacturers, provided that the DBE contractor assumes the actual and contractual responsibility for the provision of the materials and supplies.
- (7) Metro shall count its entire expenditure to a DBE manufacturer (i.e., a supplier that produces goods from raw materials or substantially alters them before resale).
- (8) When USDOT funds are passed-through by Metro to other agencies, any contracts made with those funds and any DBE participation in those contracts shall only be counted toward Metro's goals. Likewise, any USDOT funds passed-through to Metro from other agencies and then used for contracting shall count only toward that agency's goals. Project managers

responsible for administration of pass through agreements shall include the following language in those agreements:

- (A) Policy. It is the policy of the Department of Transportation that disadvantaged business enterprises as defined in 49 CFR Part 23 shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with federal funds under this agreement. Consequently, the DBE requirements of 49 CFR Part 23 apply to this agreement.
- (B) DBE Obligation. The recipient or its contractor agrees to ensure that disadvantaged business enterprises as defined in 49 CFR Part 23 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with federal funds provided under this agreement. In this regard, all recipients or contractors shall take all necessary and reasonable steps in accordance with 49 CFR Part 23 to ensure that disadvantaged business enterprises have the maximum opportunity to compete for and perform contracts. Recipients and their contractors shall not discriminate on the basis of race, color, national origin or sex in the award and performance of USDOT assisted contracts.
- (b) DBE participation shall be counted toward meeting annual goals as follows:
- (1) Except as otherwise provided below, the total dollar value of any contract which is to be performed by a DBE is counted toward meeting annual goals.
- (2) The provisions of paragraphs (a)(2) through (a)(8) of this section, pertaining to contract goals, shall apply equally to annual goals.

(Ordinance No. 92-466A, Sec. 2. Amended by Ordinance No. 97-692A, Sec. 27.)

2.04.380 Compliance and Enforcement (a) Metro shall reserve the right, at all times during the period of any contract, to monitor compliance with the terms of this chapter and the contract and with any representation made by a contractor prior to contract award pertaining to DBE participation in the contract. (b) The liaison officer may require, at any stage of contract completion, documented proof from the contractor of actual DBE participation. (Ordinance No. 92-466A, Sec. 2.) METRO'S SUSTAINABLE PROCUREMENT PROGRAM 2.04.500 Purpose and Intent Metro's Sustainable Procurement Program is created to achieve the following: (a) Ensure that Metro's procurement activities meet the Sustainability goals established by the Metro Council. (b) Ensure that Metro's procurement activities support the definition of Sustainability adopted by the Metro Council. (c) Support Metro expresses its strong commitment to support a sustainable environment, economy, and community by: $\frac{(1)}{(a)}$ Reducing the environmental impact of Metro government operations and setting the standard for sustainable public purchasing in the region; (2)(b) Supporting businesses and markets located in the Portland Metro region; and (3)(c) Ensuring equitable inclusion of diverse members of our community in our Sustainable Procurement sustainable procurement efforts. Metro's Sustainable Procurement Program applies to all purchases made by Metro. (Ordinance No. 10-1247.) 2.04.510 Definitions As used in Section 2.04.500 through the end of this chapter: Code Chapter 2.04

[Updated XX4/XX6/17]

- (a) "Certified Organic" means the item has been grown according to strict uniform standards that are verified by independent state or private organizations.
- (b) "Contractor" means any person, group of persons, consultant, designing architect, association, partnership, corporation, or other business entity that has a contract with Metro (including suppliers) or serves in a subcontracting capacity with an entity having a contract with Metro for the provision of goods or services.
- (c) "Designated Products" means Recovered and Sustainable Products designated in Metro's 02.04.0621760 Sustainable Procurement Administrative Rules:
 - (d) "Ecolabel" means a label that identifies overall environmental preference of a product or service within a specific product/service category based on Life Cycle Cost Assessment considerations and that is awarded Third Party Certification.
 - (e) "Fair Trade" means a trading partnership, based on dialogue, transparency and respect, which seeks greater equity and contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalized producers and workers.
 - (f) "Green Building Practices" means a whole systems approach to the design, construction, and operation of buildings and structures that helps mitigate the environmental, economic, and social impacts of construction, demolition, and renovation, and includes Third Party Certification.
 - (g) "Habitat Friendly" means development practices that reduce the impact of development on natural resources, look beyond the building envelope and focus on land development and site design that mimic nature's processes, and conserve the natural systems and hydrologic functions of a site.
 - (h) "Least Toxic" means that no additives that are chemicals of high concern to human or environmental health may constitute part of the product except at levels consistent with background levels in the environment.

- (i) "Life Cycle Cost Assessment" means the comprehensive accounting of the total cost of ownership, including the initial costs, energy and operational costs, longevity and efficacy of service, and disposal costs.
- (j) "Locally Available" means grown, manufactured, or assembled within 400 miles of the Metro Region or sold from a vendor located within 400 miles of the Metro Region.
- (k) "Minimum Recovered Content Standards" means standards established by Metro's Sustainable Procurement Administrative Rules specifying the minimum level of Recovered Material necessary for designated products to qualify as Recovered and Sustainable Products.
- (1) "Post-Consumer Material" means a material or finished product that has served its intended use and has been discarded for disposal or recovery, having completed its life as a consumer item. Post Consumer Material is a part of the broader category of Recovered Material.
- (m) "Practicable" means satisfactory in performance and available at a fair and reasonable price.
- (n) "Pre Consumer Material" means material or waste remaining after manufacture of a product.
- (o) "Product Stewardship" means whoever designs, produces, sells, or uses a product takes responsibility for minimizing the product's environmental impact throughout all stages of the product's life cycle.
- (p) "Recovered Material" means waste material and by products which have been recovered or diverted from solid waste and includes both Post-Consumer Material and manufacturing or Pre-Consumer Material.
- (q) "Recovered Product" means a product manufactured using Recovered Material and meeting the Minimum Recovered Content Standards established by Metro's Sustainable Procurement Administrative Rules.
- (r) "Recycled Paper" means paper meeting the Minimum Recovered Content Standards established by Metro's Sustainable Procurement Administrative Rules.

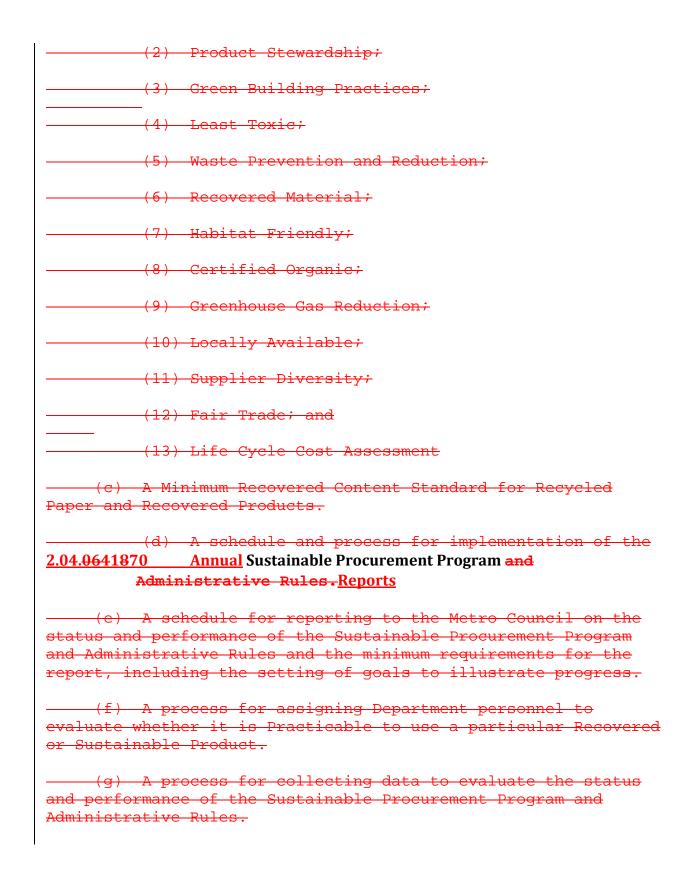
- (s) "Supplier Diversity" means a Sustainable Business
 Practice that encourages the use of previously
 underutilized vendors as suppliers.
- (t) "Sustainability" means using, developing and protecting resources in a manner that enables people to meet current needs and provides that future generations can also meet future needs, from the joint perspective of environmental, economic and community objectives.
- (u) "Sustainable Procurement" means purchasing materials, products, and services in a manner that integrates fiscal responsibility, social equity, and community and environmental stewardship.
- (v) "Sustainable Products" means products that have a lesser or reduced effect on human health and the environment when compared with competing products that serve the same purpose. This comparison may consider Life Cycle Cost Assessment.
- (w) "Third Party Certification" means an independent, objective assessment of a service or product completed by someone other than the service provider or product manufacturer.

(Ordinance No. 10-1247.)

2.04.520 Metro's Sustainable Procurement Administrative Rules

The Chief Operating Officer shallwill establish Sustainable Procurement Administrative Rules consistent with this Section to implement thea Sustainable Procurement Program. The Metro's Sustainable Procurement Administrative Rules shall include: Program applies to all purchases made by Metro.

- (a) Guidance on maintaining or referencing lists of preferred Recovered and Sustainable Products as Designated Products.
- (b) Guidance for procurement of goods that meet the Sustainability goals established by the Metro Council and that include without limitation where available and Practicable the following attributes:
 - (1) Third Party Certification;



- (h) Direction to the Procurement Officer for revising procurement procedures to comply with the Sustainable Procurement Program and Administrative Rules.
- (i) A plan for implementing the joint purchase of Recovered and Sustainable Products and Materials, within Metro and with other public agencies, to reduce the price of these goods.

(Ordinance No. 10-1247.)

<u>2.04.530 Metro's Sustainable Procurement Program</u> Responsibilities

(a) The Chief Operating Officer shall support and implement Metro's Sustainable Procurement Program and Administrative Rules.

- (b) The Procurement Officer shall:
 - (1) Ensure that procurement procedures are revised for consistency with the Sustainable Procurement Program and Administrative Rules.
 - (2) Provide Departments with information to facilitate their evaluation and procurement of Recovered and Sustainable Products.
 - (3) Inform and advise Departments of their responsibilities under the Sustainable Procurement Program and Administrative Rules; provide training on and ensure compliance with the same.
 - (4) Provide information to the Chief Operating
 Officer to assist with creating and revising
 Sustainable Procurement Administrative Rules to
 achieve Metro's Sustainability goals.
 - (5) Ensure that Recovered and Sustainable Products are designated whenever Practicable.
 - (6) Revise existing procurement standards and specifications to eliminate, where Practicable, discrimination against the procurement of Sustainable Products.

- (7) Transmit Sustainable Procurement Program and Administrative Rules to each Department.
- (8) Establish a strong connection between Metro's Sustainable Procurement Program and Metro's ESB, MBE, and WBE Program.
- (9) Ensure that all invitations to bid or requests for proposal comply with the Sustainable Procurement Program and Administrative Rules.
- (10) Ensure that when considering bids and proposals submitted by Contractors, Metro evaluates compliance with the Sustainable Procurement Program and Administrative Rules.
- (11) Develop a system for tracking Metro's compliance with its Sustainable Procurement Program and Administrative Rules.
- (12) Assist the Chief Operating Officer in compiling the report required in Section 2.04.540.
- (c) Department Directors shall ensure that their departments comply with the Sustainable Procurement Program and Administrative Rules.

(Ordinance No. 10-1247.)

2.04.540 Report to Metro Council

Each year the Chief Operating Office shall submit a report to the Metro Council that details the status and performance of the Sustainable Procurement Program and Administrative Rules.

(Ordinance No. 10-1247.) —

CHAPTER 2.04

METRO CONTRACT AND PROCUREMENT POLICIES

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2.04.010 Definitions

For the purposes of this chapter unless the context requires otherwise the following terms shall have the meanings indicated:

"Auditor" means the Metro Auditor provided for in Section 18 of the Metro Charter.

"Chief Operating Officer" means the person holding the position of Chief Operating Officer established by Section 2.20.010 of the Metro Code.

"Commission" means the Metropolitan Exposition Recreation Commission established by Section 6.01 of the Metro Code.

"Council President" means the Council President provided for in Section 16(4) of the Metro Charter.

"Metro Attorney" means the person holding the position of Metro Attorney established by Section 2.08 of the Metro Code.

"Procurement Officer" means the person designated by the Chief Operating Officer to carry out the functions required of such person by this chapter.

"Public contract" is defined in ORS 279A.010, as now and as it may be amended.

"Surplus property" means tangible personal property owned by Metro, including equipment and materials, which is no longer needed by Metro. Examples include inventoried and non-inventoried office furniture, specialized equipment, and items that are obsolete or overstocked.

CONTRACTS IN GENERAL

2.04.020 Authority to Award and Execute Contracts; Budget Limitations

The Chief Operating Officer, the Metro Attorney and the Auditor have the authority to award and execute contracts that are necessary to carry out their administrative responsibilities. These officers may delegate authority to award and execute contracts in writing. Unless the Council expressly approves a contract containing a requirement to the contrary, no contract may obligate Metro to the payment of funds not appropriated for that purpose by the Council.

2.04.030 Federal Law and Rules

Notwithstanding any provision of this chapter, the applicable federal laws, rules and regulations shall govern in any case where federal funds are involved and the federal laws, rules and regulations conflict with any of the provisions of this chapter.

2.04.040 Metropolitan Exposition Recreation Commission

The Metro Council delegates to the Commission the authority to approve contracts for the facilities it manages. This approval authority is independent of the approval authority delegated to the Chief Operating Officer pursuant to Section 2.04.020. The Chief Operating Officer has the authority to award and execute contracts on behalf of the Commission that are necessary to carry out its administrative responsibilities. The Commission may require Commission approval of certain contracts. The Metro Council is the local Contract Review Board for the Commission.

2.04.050 Council Approval of Contracts

Notwithstanding any other provisions of this chapter, Council must approve the following types of contracts prior to execution:

- (a) Any agreement entered into pursuant to ORS Chapter 190 by which Metro agrees to acquire or transfer any interest in real property, assumes any function of another governmental body, or transfers any function of Metro to another governmental unit; or
- (b) Any contract for the purchase, sale, lease or transfer of real property owned by Metro. However, the Chief Operating Officer may execute options to purchase real property without prior Council approval, so long as the Council approves the exercise of the option.

2.04.060 Grant Funding; Council Information Reports

- (a) Prior to adoption of the annual budget, the Chief Operating Officer shall provide the Council with a list of Metro-proposed applications for grant funding over \$50,000.00 to be sought during the next fiscal year.
- (b) The Chief Operating Officer shall provide a quarterly report to Council showing all Metro applications for grant funding greater than \$50,000.00, and all grants awarded by Metro greater than \$10,000.00.
- (c) The Chief Operating Officer shall make available to the Council on request information showing the status of all contracts and grants whether listed in the adopted budget or not.

DISPOSITION OF SURPLUS PROPERTY

2.04.070 Other Governmental Entity Requests

Metro may donate, sell, lease, exchange, transfer or otherwise dispose of Metro-owned surplus property to another government agency that has requested such surplus property for public use, as authorized by state law.

2.04.080 Disposition by Donation, Sale, Lease or Exchange

Metro may donate, sell, lease, exchange, transfer or otherwise dispose of Metro-owned surplus property not needed for public use as authorized under state law. The Chief Operating Officer will adopt a policy to effect the provisions of this subchapter.

METRO LOCAL CONTRACT REVIEW BOARD

2.04.090 Metro Council as the Local Contract Review Board

Pursuant to ORS 279A.060, the Metro Council is designated as the Local Contract Review Board for Metro and MERC. The Metro Council, acting as the Local Contract Review Board, shall exercise all the public contracting powers and duties conferred upon it by state law. The procedural rules of the Metro Council sitting as the Local Contract Review Board are the same as those that apply to the Metro Council as provided in Metro Code Chapter 2.01.

2.04.100 Local Contract Review Board Administrative Rules

To carry out its powers and duties and to comply with state law, the Metro Local Contract Review Board will adopt administrative rules for public contracts. Upon adoption of said rules, the Attorney General's Model Public Contracting Rules do not apply to the Metro's procurement of public contracts.

EQUITY IN CONTRACTING

2.04.110 Findings

The Metro Council finds:

- (a) The opportunity for full participation in our free enterprise system by emerging small businesses, minority-owned businesses, woman-owned businesses, and businesses owned by service disabled veterans is essential;
- (b) Greater economic opportunity for emerging small businesses, minority-owned businesses, woman-owned businesses, and businesses owned by service disabled veterans is essential;
- (c) Historical patterns of exclusion and discrimination against racial or ethnic groups and women resulted in unfortunate effects of social, political and economic inequity that still exist; and
- (d) It is in the best interest of Metro and the community to do business with emerging small businesses, minority-owned businesses, woman-owned businesses, and businesses owned by service disabled veterans, resulting in increased competition and a stronger local economy.

2.04.120 Policy Statement

- (a) Metro expresses its strong commitment to provide maximum opportunity to do business with emerging small businesses, minority-owned businesses, womanowned businesses, and businesses owned by service disabled veterans.
- (b) It is the policy of Metro to provide equal opportunity to all persons to access and participate in the locally-funded projects, programs and services of Metro. Metro and Metro contractors shall not discriminate against any person or firm on the basis of race, color, national origin, sex, sexual orientation, age, religion, physical handicap, political affiliation or marital status.

2.04.130 Equity in Contracting Administrative Rules

The Metro Council acting as the Local Contract Review Board will adopt Equity in Contracting Administrative Rules to establish and implement a program to encourage the utilization by Metro of emerging small businesses, minority-owned businesses, woman-owned businesses, and businesses owned by service disabled veterans, by creating for such businesses the maximum possible opportunity to compete for and participate in Metro contracting activities. Metro's Equity in Contracting Administrative Rules will apply in addition the Local Contract Review Board Administrative Rules adopted in accordance with Section 2.04.042 of this chapter. The Equity in Contracting Administrative Rules will not apply to federally-funded contracts, which are governed by federal rules and regulations.

2.04.140 Annual Equity in Contracting Reports

On behalf of the Chief Operating Officer, the Procurement Officer shall provide an annual report to Council showing Metro's utilization of emerging small businesses, minority-owned businesses, woman-owned businesses, and businesses owned by service disabled veterans in the procurement and contracting process. The Chief Operating Officer shall refer to the annual reports when evaluating the performance of Metro's Equity in Contracting Program and of Department Directors.

SUSTAINABLE PROCUREMENT

2.04.150 Purpose and Intent

Metro expresses its strong commitment to support a sustainable environment, economy, and community by:

- (a) Reducing the environmental impact of Metro government operations and setting the standard for sustainable public purchasing in the region;
- (b) Supporting businesses and markets located in the Portland Metro region; and

(c) Ensuring equitable inclusion of diverse members of our community in our sustainable procurement efforts.

02.04.160 Sustainable Procurement Administrative Rules

The Chief Operating Officer will establish Sustainable Procurement Administrative Rules to implement a Sustainable Procurement Program. Metro's Sustainable Procurement Program applies to all purchases made by Metro.

2.04.170 Annual Sustainable Procurement Program Reports

Each year the Chief Operating Office shall submit a report to the Metro Council that details the status and performance of the Sustainable Procurement Program and Administrative Rules.

STAFF REPORT

IN CONSIDERATION OF ORDINANCE NO. 17-1398, FOR THE PURPOSE OF AMENDING METRO CODE CHAPTER 2.04 AND DECLARING AN EMERGENCY

Date: April 6, 2017 Prepared by: Office of Metro Attorney

Metro Code 2.04 establishes Contract Policies for Metro. State law on procurement and public contracting is found in ORS Chapters 279A, 279B, and 279C (collectively, the "State Contracting Code"). Existing Metro Code Chapter 2.04 was last updated in October 23 of 2014. As such, amending Metro Code 2.04 is needed immediately to ensure consistency with the State Contracting Code. The revisions are also needed immediately to prevent further confusion and add clarity to Metro procurement and contracting practices, both for outside vendors and Metro staff.

ANALYSIS/INFORMATION

- 1. **Known Opposition.** None known.
- 2. **Legal Antecedents.** Oregon Revised Statutes Chapters 279A, 279B, 279C; Metro Code 2.04.
- 3. **Anticipated Effects.** Updates Metro Contract Policies to comply with State Contracting Code and makes various changes to reflect current Metro procurement practices and policies
- 4. **Budget Impacts.** None.

RECOMMENDED ACTION

Approve proposed ordinance revising Metro Code 2.04

Findings in Support of Ordinance No. 17-1398

ORS 279B.085 provides that a Local Contract Review Board may approve "class special procurements" subject to different contracting procedures than those otherwise required by ORS 279B.055 (Competitive Sealed Bidding), ORS 279B.060 (Competitive Sealed Proposals), ORS 279B.065 (Small Procurements) and ORS 279B.070 (Intermediate Procurements). In order to approve a class special procurement the Local Contract Review Board must find that the use of a special procurement:

- (1) Is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts; and
- (2) (a) Is reasonably expected to result in substantial cost savings to the contracting agency or to the public; or
 - (b) Otherwise substantially promotes the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under ORS 279B.055, 279B.060, 279B.065 or 279B.070.
- 1. **Manufacturer Direct Supplies**: Metro may purchase Goods directly from a manufacturer if the cost from the manufacturer is the same or less than the cost the manufacturer charges to its distributor(s).
 - a. In large volume purchases, Goods are sometimes available directly from a manufacturer at the same or less than the cost the manufacturer charges to its distributors. In some cases, purchasing Goods directly from a manufacturer also provides opportunity to tailor and/or customize the Goods to a purchaser's specific needs.
 - b. Purchasing Goods directly from a manufacturer, instead of through a distributor, is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement reasonably expected to result in substantial cost savings to Metro because it allows Metro to avoid the cost of an unnecessary solicitation process when such Goods are for sale directly from the manufacturer at a competitive price.
- 2. **Advertisements**: Metro may directly purchase media advertising, including print (e.g. newspaper), broadcast (e.g. television, radio), display (e.g. billboard), internet (e.g. web based publications) and other electronic media formats.
 - a. By their nature, media sources are generally unique. Advertisements are placed in a particular source because of the specific audience that source serves. Cost savings are difficult to quantify where the sources are unique and not interchangeable. Competition to furnish advertising space in daily newspapers of general, trade, or business circulation in Metro region is limited; not all advertisers work in every market. Choice of advertising medium is somewhat price sensitive, but primarily driven by location and size of circulation compared to Metro's target audience.
 - b. Due to limited competition and unique nature of media sources, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special

procurement results in substantial cost savings to Metro because it avoids an unnecessary solicitation expense and otherwise substantially promotes the public interest.

- 3. Intellectual Property (Periodicals, Books, Proprietary Software Licenses, Art, and Other Products of the Creative Process): Metro may directly purchase intellectual property (including, but not be limited to, periodicals, books, proprietary software licenses, reference materials, audio and visual media, and other products of the creative process) when the product is protected under intellectual property law (e.g. copyright, patent). If there is more than one source of the intellectual property, and the product is not being purchased directly from the creator or other original source, every attempt should be made to establish a competitive selection process to achieve the greatest economy.
 - a. Intellectual property is regulated and protected under federal law. By design, intellectual property is controlled by the original creator or owner. Intellectual property may not be duplicated by others without the express permission or license of the original creator or owner. Often intellectual property is produced by only one supplier, who may be the owner of the copyright or the licensee.
 - b. Based on the foregoing, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement results in substantial cost savings to Metro because it avoids an unnecessary solicitation expense and otherwise substantially promotes the public interest.
- 4. **Financial Products**: Metro may directly purchase financial products such as bond insurance, surety bonds for Metro bond reserves and liquidity facilities such as letters of lines of credit. Metro may pay fees associated with such transactions, including, but not limited to, registrar, paying agent, and escrow agent fees and fees associated with outstanding debt issues.
 - a. Metro invests, borrows funds, and purchases other financial products in accordance with Metro policies and state law in order to achieve Metro's fiscal management goals. Metro's primary goals are to maximize investment performance, safely guard public funds, and minimize the cost of borrowings. Metro investment and borrowing activities are also regulated by various state laws and monitored by Metro Chief Financial Officer and Metro Auditor. Financial products do not lend themselves well to traditional methods of public sector competitive procurement processes. For example, rates of return on particular maturities and allowable types of investment instruments offered by any one financial institution may change within minutes or hours.
 - b. Based on the foregoing, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement is reasonably expected to substantially promote the public interest by ensuring that Metro's confidence in the financial institution and product is placed as the highest priority.
- 5. **Employee Benefits Contracts:** Metro may purchase employee benefit insurance, and other taxable employee benefits, without a competitive Solicitation process, regardless of dollar amount.
 - a. The nature, type, and specific services to be provided and timing and employee benefit insurance are dictated by labor contracts between Metro and represented labor groups. Metro must fulfill its contractual obligations to represented employee labor groups to

- provide appropriate employee benefits. Metro acquires employee benefit insurance through third-party brokers whose personal services are selected through competitive means. Metro is able to obtain more favorable terms through such brokers who, because they represent groups of employers, have more leverage to negotiate better rates on Metro's behalf.
- b. Given the nature of the services provided, and Metro's use of third-party brokers to negotiate contracts on Metro's behalf through a competitive process used in the industry, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Metro's practice will be to continue to use procurement methods that foster competition among sufficient number of potential providers that will provide the best overall value to Metro given the requirement specified by Metro's agreement with represented labor groups. Use of this special procurement is reasonably expected to result in substantial cost savings to Metro because Metro is able to obtain better rates and terms by joining a pool of employers represented by a shared broker.
- obtains Proposals from an insurance consultant. The insurance consultant will be selected in accordance with the applicable procedures set forth in the Personal Services Contracting Rules. Among the services to be provided by the consultant is the securing of competitive Proposals from insurance carriers for all coverages for which the insurance consultant is given responsibility and advice to Metro about the costs and benefits of the various Proposals. Metro may then negotiate or enter into the insurance Contract that appears most Advantageous to Metro without advertisement or issuance of its own Request for Proposals.
 - a. Similar to employee benefit insurance, the insurance market is a specialized industry where brokers often obtain more favorable terms using their expertise and knowledge to negotiate rates on Metro's behalf.
 - b. Due to nature of the insurance market, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement is reasonably expected to result in substantial cost savings to Metro because Metro is able to obtain better rates and terms by using a broker with specialized knowledge and expertise to negotiate in Metro's best interest.
- 7. **Used Personal Property or Equipment**: Metro may directly purchase used personal property and equipment. Used property and used equipment is property or equipment that has been placed in use by a previous owner or user for a period of time, and which is recognized in the relevant trade or industry, if there is one, as qualifying the personal property or equipment as "used".
 - a. Used equipment and personal property becomes available sporadically and sometimes with little notice. Used equipment and property is often sold on a first come, first served basis. The sale of used personal property or equipment often occurs through an auction or other spot sales, where it is impractical to utilize competitive procurement procedures. The cost of used equipment or property is generally substantially less than the costs of new equipment/personal property. When a used item is available, there is often little competition available.
 - b. Given that the sale of used property or equipment often occurs through an inconsistent, sporadic market, use of this special procurement is unlikely to encourage favoritism in the

awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement is reasonably expected to result in substantial cost savings to Metro because allowing Metro to access and participate in the used good market may save costs that would otherwise be incurred as a result of only acquiring new equipment/goods.

- 8. **Hazardous Material Removal and Oil Clean-up:** Metro may enter into a Public Contract without competitive Solicitation when ordered to clean up oil or other hazardous waste pursuant to the authority granted the Oregon Department of Environmental Quality under ORS Chapter 466, and such DEQ order necessitates the prompt establishment and performance of the Contract in order to comply with the statutes regarding spill or release of oil or hazardous materials. Metro shall not contract pursuant to this section in the absence of an order from DEQ to clean up a site with a time limitation that would not permit hiring a Contractor under the usual, required Procurement processes.
 - a. When DEQ orders a public agency to remove or clean up hazardous material or oil, the public agency must respond within a very short time, which is typically stated in the DEQ order. This time period does not generally allow the agency to take the time necessary to solicit written bids or proposals for the work to be performed. Any delay in responding to DEQ orders to perform hazardous material removal or clean up would be borne by Metro.
 - b. Use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. If Metro is under DEQ order to act immediately, the situation would likely be considered an emergency situation, exempt from otherwise requirement competitive processes. Furthermore, use of this special procurement is reasonably expected to result in substantial cost savings given that failure to immediately begin cleanup work could result in additional penalties and fines imposed upon Metro. Furthermore, responding immediately to DEQ's order would avoid additional potential risk to persons and property, thus otherwise substantially promoting the public interest.
- 9. **Rating Agency Contracts:** Metro may purchase the services of Moody's Investors Service, Standard and Poors, or similar rating agencies without competitive Solicitation.
 - a. The services of rating agencies are only available from a small, limited number of vendors who charge standardized fees for their services.
 - b. Given the limited market, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement is reasonably expected to result in substantial cost savings to Metro, avoiding the costs of competitively soliciting bids and proposals when such a process is unlikely to result in responses.
- 10. **Information Technology (Software and Hardware Maintenance, Licenses, Subscriptions and Upgrades):** Metro may directly enter into a Contract or renew existing Contracts for information technology (including hardware or software maintenance, licenses, subscriptions, and upgrades) where the maintenance, upgrades, subscriptions and licenses are either available from only one source or, if available from more than one source, are obtained from Metro's current provider in order to utilize the pre-existing knowledge of the provider regarding the specifics of Metro's information technology system. Metro shall document in the Procurement file the facts that justify either that maintenance, license(s), subscriptions and upgrades were available from only one source

or, if from more than one source, that obtaining such Goods and Services from the current vendor is most Advantageous to Metro.

- a. Information technology is often protected by intellectual property laws that prohibit others from duplicating or selling such products without the express permission or license of the original creator or owner. There are also times when Metro needs to purchase specific information technology that is compatible with current equipment or to utilize certain vendors who provide the best and most efficient goods and services based on the existing familiarity with Metro's information technology systems. Information technology is often proprietary and upgrades and maintenance are not available except from the original provider.
- b. Use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Competition will be encouraged at all dollar levels of purchase of information technology. Use of this special procurement also otherwise substantially promotes the public interest by giving Metro flexibility to select the method of procurement most Advantageous to Metro on a case by case basis, while still requiring justifications be made if competition not used.
- 11. **Equipment Maintenance, Repair and Overhaul:** Metro may directly award a Contract for equipment maintenance, repair and/or overhaul if:
 - Service and/or parts required are unknown, and the cost cannot be determined without extensive preliminary dismantling or testing;
 - Service and/or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source; or
 - Services and/or parts must be acquired from the provider of the equipment and/or software being maintained in order to be valid, preserve warranties, provide the best possible service, or conform to other similar agreements being provided by the same provider for maximizing economy and/or servicing functions.
 - a. The need for equipment repair or overhaul cannot always be anticipated by Metro staff and pre-contract pricing is often impossible. If a piece of equipment is broken or not working properly, Metro may incur cost of downtime, possible replacement equipment rental fees, staff time and other inconveniences or liabilities to its programs. Generally, there are a limited number of vendors able to perform repair or overhaul on a particular piece of equipment because of its make or manufacture. Sophisticated equipment may require specially trained personnel available from only one source.
 - b. Based on the foregoing, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement is reasonably expected to result in substantial cost savings in that allowing Metro to proceed quickly and commence with repair limits the direct and indirect costs that begin to incur the moment equipment breaks down or becomes unusable.
- 12. **Price-regulated Goods and Services, utilities and utility related services**: Metro may directly purchase, without a competitive Solicitation process, goods, services, repair, equipment and/or maintenance work, where the rate or price for such Goods and Services is established by federal, state, or local regulatory authority or when the Services can be provided only by a specific utility.

- a. Competition is not generally a relevant issue in the procurement of goods or services where the provider's rate or price of the goods or services being purchased is established by federal, state, or local regulatory authority, and the goods or services are provided through a sole source. Examples include: Postage, Sewer/Water Service, Garbage Service, Electricity, etc.
- b. Due to the limited competition available within these price regulated items, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement may otherwise substantially promote the public interest.
- 13. **Goods, Services or Equipment Required by a Federal or State Grant Agreement:** Metro may directly purchase, without a competitive Solicitation process, Goods, Services or equipment when they are required in the federal or state grant agreement to be purchased from a specific source or when a specific brand name is required and no competition is otherwise available.
 - a. Federal and State contracts for Goods and/or Services are established by agencies with private vendors through competitive processes, which meet the standards of the State Contracting Code. These processes include open competitive bidding, to which all interested vendors are invited to participate.
 - b. Use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts given that competitive procurement processes have often already been used prior to Metro's receipt of the grant funding. Furthermore, use of this special procurement is reasonably expected to result in substantial cost savings to Metro because Metro benefits from the efficiencies that result from not having to duplicate a solicitation process followed by its federal and state partners.
- 14. **Membership Dues**: Metro may directly purchase, without a competitive Solicitation process, dues or memberships in professional or community organizations for the benefit of Metro.
 - a. Membership dues are often unique to the organization in which membership is maintained and there is usually only one organization focused on such membership. Competition is not relevant when membership in a given organization is determined by factors such as an employee's individual trade or profession (examples include membership in the Oregon Bar Association for lawyers, membership in the Society of Human Resource Management for HR professionals, among others). Furthermore, membership decisions are sometimes made to meet and further develop Metro's organizational goals, program needs, and values, which should not be decided or evaluated through a procurement filter. In many respects, membership dues are essentially "sole source" procurements in that there is often only one option if Metro wishes to belong to a particular organization.
 - b. Due to the unique nature of professional and community organizations and the limited number of professional and community organizations that operate in one market, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement is reasonably expected to result in substantial cost savings to Metro because given the limited/nonexistent competition, Metro will save costs by directly contracting with such organizations without having to advertise for bids and proposals. Use of this special procurement also substantially promotes the public interest in that Metro staff

may continue to maintain high professional standards established by industry organizations, many of which are accrediting bodies.

- 15. **Services Related to Legal Advice:** Metro may directly enter into a Contract, without a competitive Solicitation process, Services related to the provision of legal advice to Metro.
 - a. When Metro is involved in litigation, certain services related to legal advice may be necessary (e.g. court reporter or copy service). Sometimes the contractor providing the services will be selected by another party and Metro must bear a portion of the cost in order to receive the benefit of the contractor's work (e.g. deposition transcripts or photocopies). Sometimes the contractor (e.g. a mediator, arbitrator, referee or court-appointed individual) is selected either by a court, or by joint agreement between Metro and another person, in an effort to resolve a claim or dispute that has been or will be asserted by or against Metro, regardless of whether litigation has been filed. Timing and the control asserted by the other parties involved make it difficult to apply normal competitive procurement processes.
 - b. Due to limitations often imposed upon Metro during litigation, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement substantially promotes the public interest by allowing Metro to comply with decisions imposed upon Metro through a court process, select contractors by mutual agreement, which can save costs and can provide for good will in an otherwise adversarial process, and otherwise resolve disputes through normal litigation processes.
- 16. **Seminar, Training Registration and Conference Fees:** Metro may directly purchase, without a competitive Solicitation process, seminar registrations and training session fees for attendance at seminars, conferences and training courses hosted by outside entities.
 - a. Seminars, training, and conferences are often unique in their content, are proprietary by nature, and often are organized, produced and controlled by a sole provider.
 - b. Due to limited competition and unique nature of seminars, trainings, and conferences, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement is reasonably expected to result in substantial cost savings to Metro because given the limited/nonexistent competition, Metro will save costs by directly contracting with provider organizations without having to advertise for bids and proposals.
- 17. **Event Sponsorship Agreements:** Metro may directly pay to sponsor an event, whether or not Metro receives Goods or Services in return for its payment.
 - a. Metro occasionally elects to support events of various organizations when it aligns with Metro's mission, and/or advance work program goals. Such events and/or activities typically engage a diverse cross-section of the public, and inspire inclusive and innovative solutions to the challenges of making Metro region a great place. Sponsorships are unique and are only available from the organization or the organizer of the event. Metro may receive publicity as an acknowledged sponsor of an event and may receive certain tangible benefits as a result of its sponsorship. Metro reviews and approves sponsorship requests in accordance with an agency-wide policy adopted by the Chief Operating Officer. This process requires applicants to explain how the event helps Metro connect with a specific

- audience, educates stakeholders on a key issue of importance to Metro or provides the public with an opportunity to learn about and engage with Metro.
- b. Based on the foregoing, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement is reasonably expected to otherwise substantially promote the public interest by allowing Metro to build partnerships and synergies with entities that directly or indirectly advance Metro's mission, work and goals.
- 18. **Sponsorship Agreements:** Sponsorship Agreements, under which Metro receives a gift or donation in exchange for recognition of the donor, may be awarded in any manner which Metro deems appropriate to meet its needs, including by direct award.
 - a. Sponsorships often result from the match between a unique attribute of Metro and equally unique characteristics of the sponsor, for which no competitive market exists. Sponsorship agreements allow Metro to create revenue opportunities that would otherwise be unknown or unavailable.
 - b. Due to their unique nature, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement is reasonably expected to result in substantial cost savings and otherwise substantially promotes the public interest by allowing Metro to cultivate revenue opportunities that would not otherwise be procured through competitive solicitation methods.
- 19. **Contractor Provided Funding:** Metro may directly award contracts for Goods or Services to a Contractor who provides substantial materials or a substantial portion of the funding for a project.
 - a. Individuals and community groups from time to time offer to donate all or a portion of their skilled services or materials to help Metro meet its facility needs or otherwise support Metro programs. The ability to take advantage of such donated services enables Metro to use its funds in other areas and frequently results in improvements or services that Metro would not otherwise be able to afford.
 - b. Given the limited use of this special procurement category, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Due to the budgetary, operational and public benefits related to accepting charitable donations set forth above, use of this special procurement is reasonably expected to result in substantial cost savings to Metro and will otherwise substantially promote the public interest.
- 20. **Maintenance and Training Services from the Contractor Supplying Goods**: Metro may directly purchase, without a competitive Solicitation process, maintenance or training services directly from a Contractor from whom Metro has previously acquired Goods and the services or training is directly related to such Goods.
 - a. A Contractor that has supplied Goods is often the expert in such Goods, with in-depth knowledge of how they operate and their benefits and limitations. Especially when such Goods have been tailored or customized for a user's particular use, the supplying Contractor is sometimes the only vendor to efficiently provide maintenance or training services. On occasion, using a Contractor from whom Metro acquired Goods is necessary to preserve warranties.

- b. Use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement is reasonably expected to result in substantial cost savings to Metro and otherwise substantially promotes the public interest.
- 21. **Nonprofit Partnerships:** Metro may directly award Contracts for Goods and Services when the Contractor is a not-for-profit organization and where both parties share in the decision-making process work together to define a scope of work, contribute resources, share responsibilities, and accept risk and benefits according to a mutually agreed upon arrangement.
 - a. This special procurement category is designed to facilitate Metro's work with nonprofit organizations, particularly in the areas of equity and community outreach. In identifying partner-nonprofit organizations, a typical competitive procurement process is not effective, in part because the contract scope of work is often crafted collaboratively by Metro and the participating nonprofit.
 - b. For the reasons stated above, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Use of this special procurement is reasonably expected to result in substantial cost savings to Metro and otherwise substantially promote the public interest.
- 22. **Zoos and Animal Conservation Organizations:** Metro may directly award Contracts for Goods and Services when the contractor is (a) a not-for-profit entity and (b) a zoo or other organization dedicated to the study, conservation, or care of zoo animals.
 - a. This special procurement category is designed to support and facilitate Metro's local, national and international cooperative relationships with nonprofit organizations dedicated to the study, conservation and care of zoo animals. There is also not a competitive market for the Goods or Services offered by these organizations dedicated to the study, conservation and care of zoo animals, and when such organizations offer Goods or Services a typical competitive procurement process is not effective.
 - b. Due to unique nature of the Goods or Services provided by nonprofit organizations working in this area and the lack of a competitive market, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Use of this special procurement is reasonably expected to result in substantial cost savings to Metro and may otherwise substantially promote the public interest by promoting and enhancing cooperation, synergy and a free exchange of information, techniques and protocols among zoos and conservation organizations.

23. Concession Services Agreements:

• <u>Small Concessions</u>. Small Concessions are Concession Services Agreements to sell or promote food, beverages, merchandise or Services, including but not limited to performances and entertainment, to the public for which the concessionaire's projected annual gross revenues are estimated to be \$500,000 or less. Small Concessions shall be awarded based on any method determined by Metro to provide an opportunity to all persons desiring to operate a concession, including without limitation, by direct award, private negotiation, or using a competitive process.

- <u>Major Concessions</u>. Major Concessions are Concessions Services Agreements to sell or promote food, beverages, merchandise or Services, including but not limited to performances and entertainment, to the public for which the concessionaire's projected annual gross revenues under the Contract are estimated to exceed \$500,000 annually. Major Concessions shall be awarded using a Request for Proposals under these Rules.
 - a. This special procurement allows Metro to take advantage of unique revenue opportunities. Concession agreements are opportunities for which the number of competitors may range from zero to many. As a revenue generating contract, Concession Services Agreements are technically not within the ORS 279A definition of a "public contract" thus the competitive procurement requirements likely are not applicable. Because most concessions are offered at Metro venues, much like "items for resale", Metro must equally consider venue customer trends, wants, tastes and desires in addition to price. Given the fluctuating nature of these considerations, this special procurement category imposes a more traditional solicitation method on larger sized Concession Services Contracts.
 - b. Due to the unique nature of concessions and the changing consumer market they are designed to serve, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement substantially promotes the public interest by allowing Metro to take advantage of unique revenue opportunities while at the same time meeting the needs of its customers and visitors and promoting the financial well-being of its venues.
- 24. **Animals and Animal Transportation:** Contracts for the acquisition or transport of animals may be awarded in any manner which Metro deems appropriate to meet Metro's needs, including by direct award.
 - a. Each animal and transport system is unique and when making an animal acquisition or selecting a transportation provider, price is not the most important factor. Especially when considering the threatened or endangered nature of many zoo animals, traditional competitive processes will not meet Metro's needs. Furthermore, Metro does not want to adopt procurement methods that essentially encourage the development of a competitive market for threatened and endangered species. The market for zoo animals and zoo animal transport is essentially nonexistent and animal care and well-being are the primary factors when making contracting decisions. Often, the animal acquisition agreement will require Metro to use a transportation agent selected by the transferring institution.
 - b. Due to lack of market and uniqueness of each individual animal, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement is reasonably expected to substantially promote the public interest because it prioritizes the health and well-being of the animal over all other factors.
- 25. **Perishables (e.g. Medication, Food, Plants, Chemicals and Laboratory Supplies):** Metro may directly purchase, without a competitive Solicitation process, perishables, including (without limitation) animal medication, animal food, human food, plants, chemicals and laboratory supplies upon the department's determination that the quality of the desired perishable item is of greater importance than the cost. However, if longevity is not an issue and multiple sources exist of equivalent quality, standard Procurement practices shall be utilized to the extent possible.

- a. Purchases for perishable items are often made on an immediate, as-needed basis. To require a competitive process for such purchases would increase costs and could delay the purchase when time is typically of the essence. The quality of such perishable items, as well as the timeliness of delivery, can vary greatly from vendor to vendor independent of cost. Perishables also have definitive shelf lives, which make it difficult to compare associated attributes such as quality and longevity. Often, perishables are made with proprietary formulas which uniquely meet Metro's needs. This special procurement will enable Metro to decide on a source based upon time since manufactured, remaining shelf life, and interim quality, since various states of decay can affect the product being acquired.
- b. For the reasons stated above, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Use of this special procurement is reasonably expected to result in substantial cost savings to Metro and otherwise substantially promotes the public interest.
- 26. **Items for Resale**: Metro may directly purchase, without a competitive Solicitation process, Goods and Services being purchased for resale (including, without limitation, Zoo gift shop retail inventory and food for resale). This Special Procurement category applies to Goods and Services that are specifically for resale as opposed to internal use or consumption.
 - a. Metro venues, including but not limited to the Oregon Zoo, compete in the open market for guests and need to be able to purchase products or services for resale without undue restrictions. In order to compete in the open market, these venue operations must be knowledgeable, proactive, and stay abreast of current trends, consumer wants, tastes and desires, and be able to meet those needs in their offerings. The venues must be free to purchase particular products for resale that are uniquely attractive to consumers and stimulate sales, even if it means having a limiting factor such as brand, functionality, price, or quality. These operations must work as efficiently as possible to hold down their own costs as well as to present the goods or services to the public at a price that reflects the quality, attractiveness, and revenue-generating ability of the goods and services.
 - b. For the reasons stated above, use of this special procurement is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts. Furthermore, use of this special procurement is reasonably expected to result in substantial cost savings to Metro and otherwise substantially promote the public interest by recognizing that the attractiveness and desirability of the venue offerings has a direct impact of venue revenues.

Materials following this page were distributed at the meeting.

Metro

600 NE Grand Ave.
Portland, OR 97232-2736
oregonmetro.gov



Minutes

Thursday, March 23, 2017 2:00 PM

AGENDA REVISED 03/23/17

Metro Regional Center, Council chamber

Council meeting

1. Call to Order and Roll Call

Council President Tom Hughes called the regular council meeting to order at 2:04 p.m.

Present: 7 - Council President Tom Hughes, Councilor Sam Chase,
Councilor Carlotta Collette, Councilor Shirley Craddick,
Councilor Craig Dirksen, Councilor Kathryn Harrington, and
Councilor Bob Stacey

2. Citizen Communication

Eric Wentland, City of Portland: Mr. Wentland of Greenway Recycling testified in opposition to Ordinance No. 17-1395. Mr. Wentland explained that Greenway Recycling and other industry stakeholders felt that rates proposed were unfair and unlawful. (Mr. Wentland also provided written testimony; please see the March 23 meeting packet.)

Art Lewellan, City of Portland: Mr. Lewellan shared a pamphlet with proposals for a bridge crossing the Columbia River and a corresponding MAX light rail. He noted that he had asked for the proposal to be reviewed at the City of Portland as well and emphasized the importance of additional transportation options. (Mr. Lewellan also provided written testimony; please see the March 23 meeting packet.)

3. Consent Agenda

3.1 Consideration of the Council Meeting Minutes for March 16, 2017

Approval of the Consent Agenda

A motion was made by Councilor Dirksen, seconded by Councilor Stacey, to adopt items on the consent agenda. The motion passed by the following vote:

Aye: 7 - Council President Hughes, Councilor Chase, Councilor Collette, Councilor Craddick, Councilor Dirksen, Councilor Harrington, and Councilor Stacey

4. Ordinances (Second Reading)

4.1 Ordinance No. 17-1395, For the Purpose of Adopting Solid Waste Charges and User Fees for FY 2017-18

Council President Hughes stated that the first reading and public hearing for Ordinance No. 17-1395 took place on Thursday, March 16. He informed the Metro Council that Mr. Tim Collier, Metro's Director of Finance and Regulatory Services, was available for questions.

Council Discussion

There was none.

A motion was made by Councilor Harrington, seconded by Councilor Stacey, that this item be adopted. The motion passed by the following vote:

Aye: 7 - Council President Hughes, Councilor Chase, Councilor Collette, Councilor Craddick, Councilor Dirksen, Councilor Harrington, and Councilor Stacey

5. Public Hearings

5.1 Public Hearing on the Powell-Division Locally-Preferred Alternative (LPA) and Regional Transportation Plan (RTP) Amendment

Council President Hughes called on Ms. Elizabeth Mros-O'Hara, Metro staff, for a brief presentation on the hearing. Ms. Mros-O'Hara noted that the project was a partnership between Metro, local communities, TriMet, the Cities of Portland and Gresham, Multnomah County, and the Oregon Department of Transportation (ODOT). She invited Ms. Leah Treat, City of Portland, Ms. Katherine Kelly, City of Gresham, and Mr. Neil McFarlane, TriMet, to present with her as project partner representatives. Ms. Treat, Ms. Kelly, and Mr. McFarlane expressed support for the proposed LPA and noted that they were excited to move forward with the project.

Ms. Mros-O'Hara provided an update on the Powell-Division locally-preferred alternative (LPA). She stated that the public comment period would be open until March 31 and explained that once it closed, staff would take the comments provided and incorporate them into legislation that would be brought before the Metro Council for consideration and adoption in June. She informed the Council that the project focused on bus rapid transit (BRT) that would connect the Cities of Portland and Gresham with a 14-mile improvement, tailored to the different neighborhoods it spanned. Ms. Mros-O'Hara provided an overview of the projects in-depth public engagement approach that focused on bringing the community in early to help shape the outcome and address their concerns. She explained that the outreach helped identify the community's strong interests in equitable housing, safety, and community development in addition to transit improvements.

Ms. Mros-O'Hara emphasized that the Division corridor was high transit-demand corridor with strong ridership and a demand that exceeded its capacity. She explained that the LPA identified the most suitable mode of transportation for the corridor, the route, and the general station locations. She stated that the BRT was chosen because its flexibility would make it easier for the route to access downtown Portland and downtown Gresham.

Ms. Mros-O'Hara provided an overview of the BRT busses and the new features that would be included, including station improvements and transit signal priority. She noted that the improvements would help improve safety, manage congestion, and provide better transit options to local residents.

Ms. Mros-O'Hara explained that Metro's project partners had adopted the LPA and ODOT had shared a letter of support. She discussed how the LPA would fit into Metro's Regional Transportation Plan (RTP) and noted that staff recommended that the evaluation of future Powell corridor improvements be included in the 2018 RTP. She added that in response to concerns that the BRT would not reach Mount Hood Community College, the project partners had agreed to support enhancements to TriMet Line 20 that served the area. Ms. Mros-O'Hara then shared the project's next steps, noting that the public comment period would end on March 31.

Council President Hughes opened a public hearing on the Powell-Division Locally-Preferred Alternative (LPA) and Regional Transportation Plan (RTP) Amendment and requested that those wishing to testify come forward to speak.

Michael Harnson, City of Portland: Mr. Harnson, speaking on behalf of Oregon Health & Science University (OHSU) and Portland State University (PSU), testified in support of the project. He noted that the project had the potential to make significant transit improvements in the region and would benefit both institutions. He urged the Council to support the Powell-Division project with the alignment that utilized Tilikum Crossing. (Mr. Harnson also provided written testimony; please see the March 23 meeting packet.)

Council President Hughes gaveled out of the public hearing. He noted that the vote on Resolution No. 17-4776 and first read and public hearing on Ordinance No. 17-1396 were scheduled for Thursday, May 25.

Councilor Discussion

Councilors thanked Metro staff and their project partners for all their efforts. Councilors discussed how the Powell corridor would be addressed in the future and how the RTP would be amended.

6. Chief Operating Officer Communication

Chief Operating Officer Pro Tem Scott Cruikshank provided an update on the following events or items: the Small Business Open House, a Community Placemaking Session on April 28, Shen Yun at the Keller Auditorium, and the retirement of Mr. Tom Bugas, an employee of Metro for forty years. Mr. Cruikshank thanked Mr. Bugas for his contributions to the agency.

7. Councilor Communication

Councilors provided updates on the following meetings or events: a discussion on brownfield development at OHSU, the Bi-State Coordinating Committee meeting, the Outer Powell Safety Project open house, a report on greenhouse gas emissions, Metro's Regional Partnership Forum at the Oregon Zoo Education Center, community participation organization (CPO) meetings, and speaking events with Mr. Tony Pickett of Denver's Urban Land Conservancy.

8. Adjourn

There being no further business, Council President Hughes adjourned the Metro Council meeting at 3:26 p.m. The Metro Council will convene the next regular council meeting on April 6 at 2:00 p.m. at the Metro Regional Center in the council chamber.

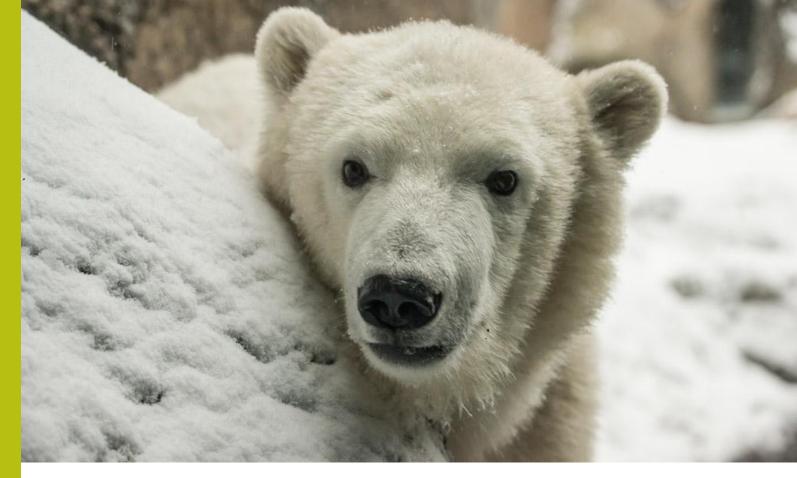
Respectfully submitted,

Not Paper

Nellie Papsdorf, Legislative and Engagement Coordinator

ATTACHMENTS TO THE PUBLIC RECORD FOR THE MEETING OF MARCH 23, 2017

ITEM	DOCUMENT TYPE	DOC DATE	DOCUMENT DESCRIPTION	DOCUMENT NO.
2.0	Testimony	03/23/17	Eric Wentland Ordinance No. 17-1395 Testimony	032317c-01
2.0	Testimony	03/23/17	Art Lewellan Columbia River MAX Light Rail Proposal	032317c-02
3.1	Handout	03/23/17	Exhibit A (Amended) to Ordinance No. 17-1395	032317c-03
5.1	Testimony	03/23/17	Michael Harnson Powell-Division Project Testimony on Behalf of OHSU and Portland State University	032317c-04

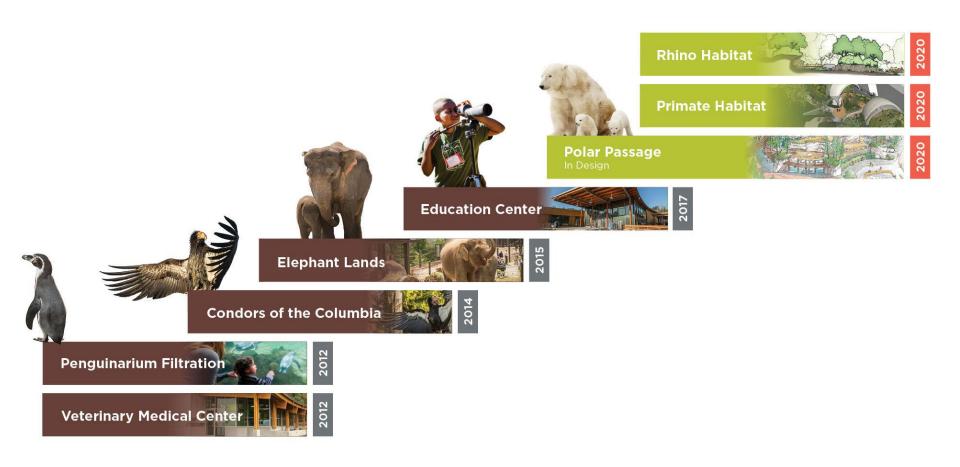




Oregon Zoo Bond Construction Contract

April 6, 2017

Bond Program Status



Combined Project Construction



Combined Project Construction

- Reduce total construction schedule
- Save construction costs (est. \$1.3M)
- Minimize negative impact on zoo operations and guest experience

Cost savings from the construction coordination of the three remaining projects will support animal welfare, conservation education, and sustainable infrastructure.

Combined Project Construction

- CMGC contractor selected through formal, competitive process
- Competitive bidding required for all sub contracted work
- Workforce diversity and contracting plan required prior to seeking subcontractor bids

The exemption is unlikely to encourage favoritism or substantially diminish competition.

Recommendation

 Approve a new exemption from competitive bidding, authorizing Metro to contract directly with Lease Crutcher Lewis for the simultaneous construction of the Primate Habitat and the Polar Habitat projects, via amendment to the Polar Bear Habitat CM/GC Contract.

Procurement Services

Passport to Procurement

Procurement Services

Passport to Procurement

Passport to Procurement



Procurement Services 2017

Name:			
·			
Title:			
Division:			
Department:			

Equity in Contracting COBID Marketplace Personal Services: Optional direct award for personal services up to \$_____. Limited to #____ open contract per firm, per department.

Public Improvement: Required for public improvement up to \$_____.

Quotes	are	accepted	only fro
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Equity Strategy Meeting

Required pre-solicitation meeting with Procurement for all _____-level projects.

Personal Services

Procurement Thresholds

Small: \$	
Intermediate: \$	

Amendment Limits

Formal: \$_____

Small:	Which	never	is	greater	of

Up to\$	or	9

Intermediate:	Whichever	is	greater	0
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Up to \$	or	%

Formal	0,
ronnai	/

Specialized Personal Services

Architecture, Engineering, Photogrammetric Mapping, Transportation Planning, Land Surveying and Related Services are referred to as:

Public Improvement

Procurement Thresholds

3maii: 5	
Intermediate: \$	
Formal: ¢	

Amendment Limits

Small: Whiche	ver is grea	ter of
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Up to \$ or %

Procurement Services

Passport to Procurement

Procurement Services

Passport to Procurement



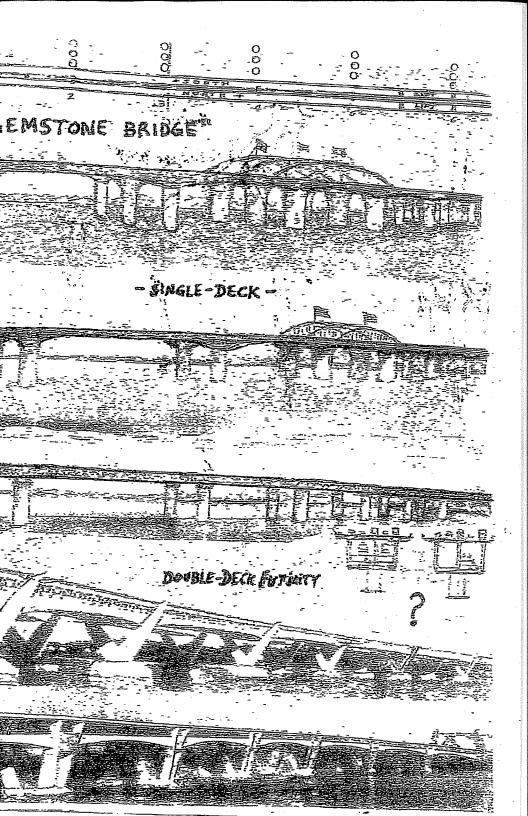
Membership level: Fundamentals

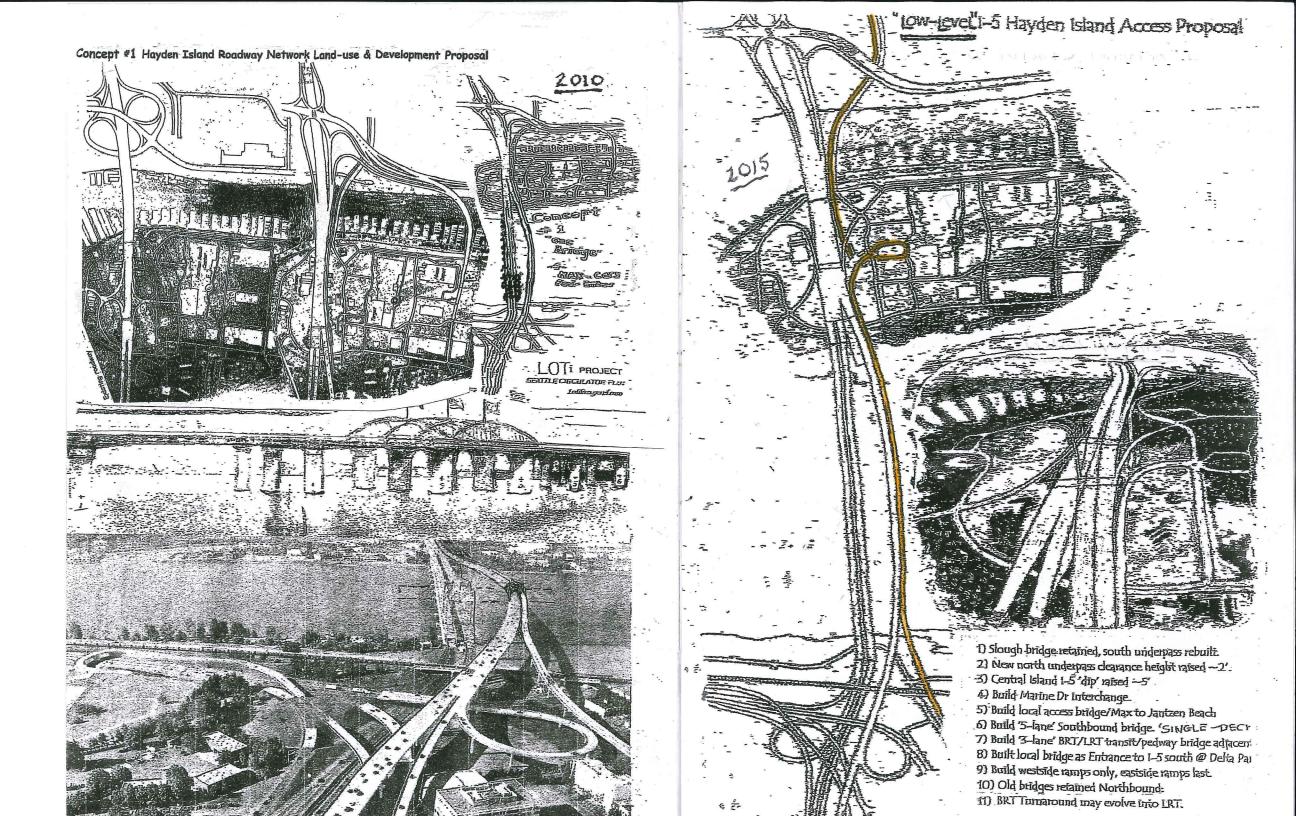
This card certifies that

Has completed Procurement Fundamentals and is trained to perform procurement functions at Metro.

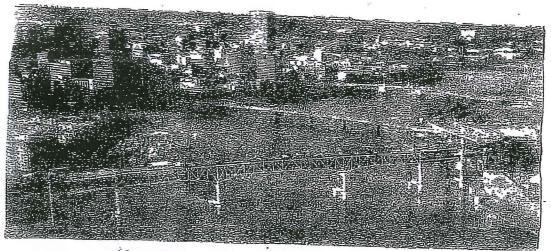
Expires July1, 2019

	Additional endorsements:
7	Best practices for equity in contracting
	Guide to MetroNet resources
	How to write a scope of work
	Scope of Work: advanced workshop
	Evaluating bids and proposals
	Sustainable procurement program
	Sustainable procurement: advanced specs
	Contract performance management
	Planning your procurement needs

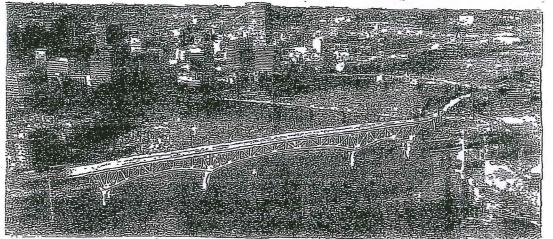


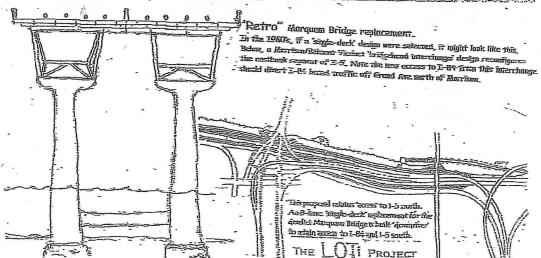


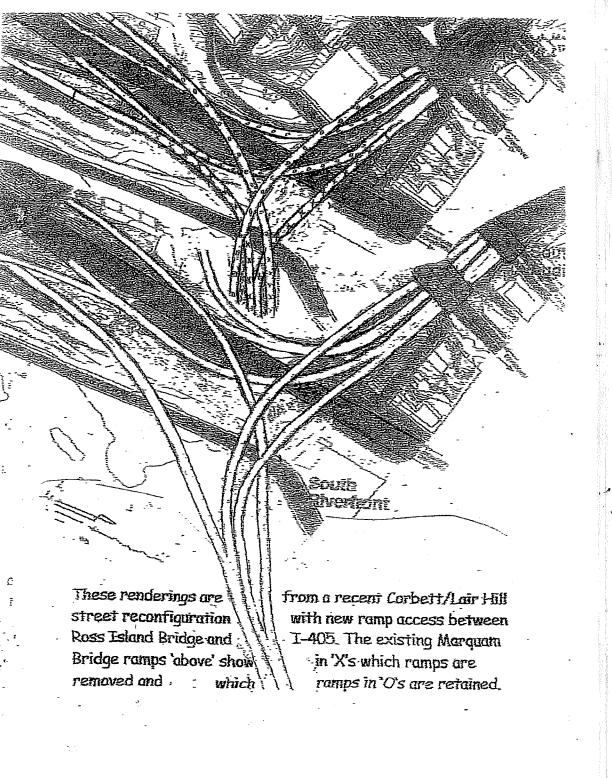


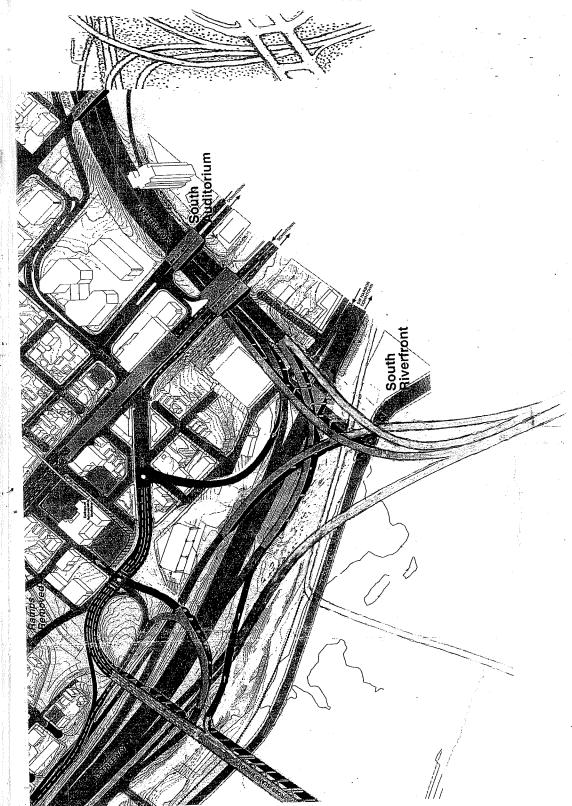


MARQUAM REPLACEMENT "Single-deck"

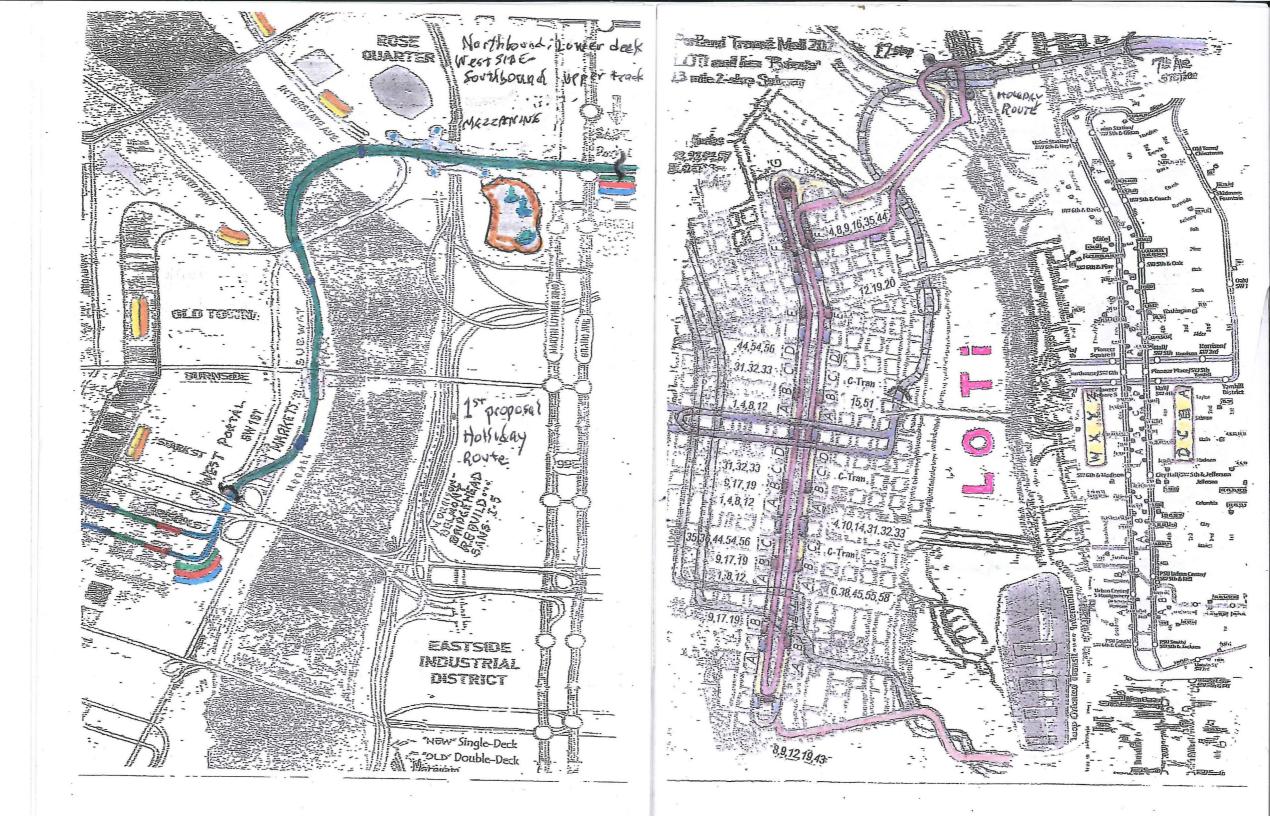


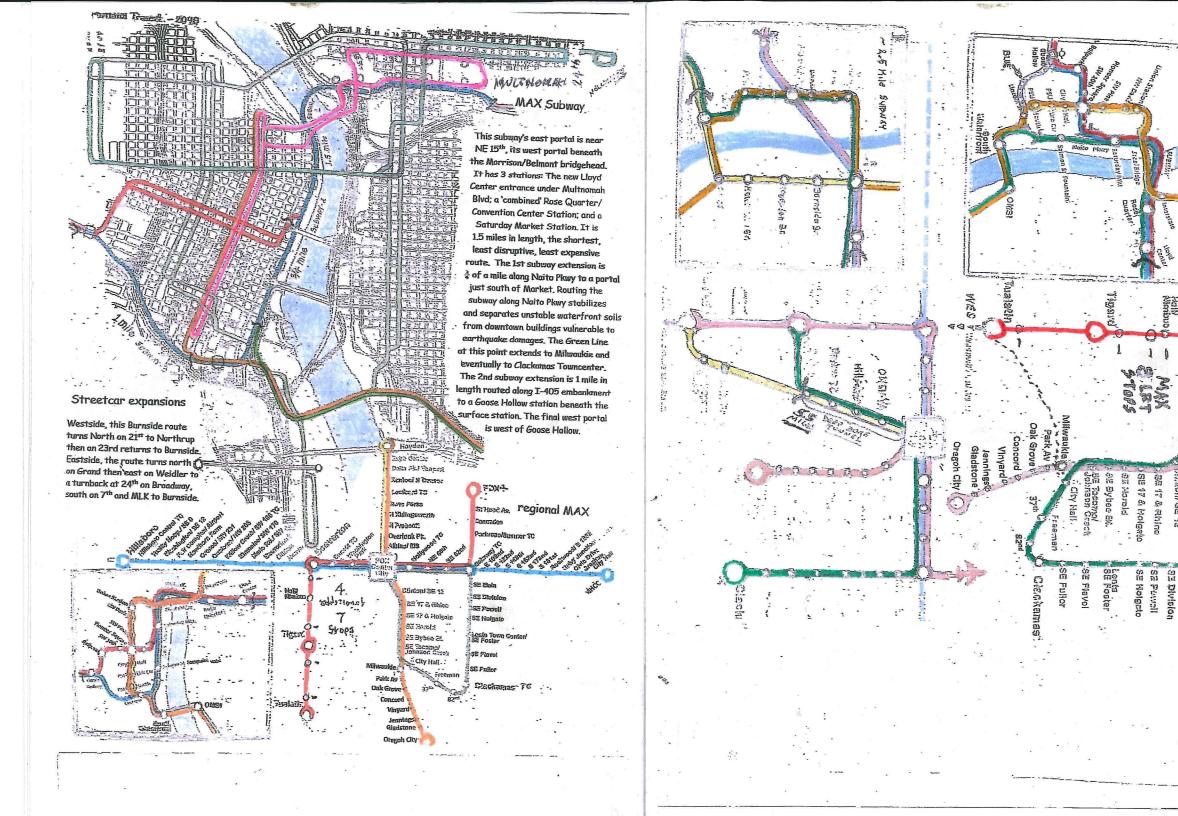


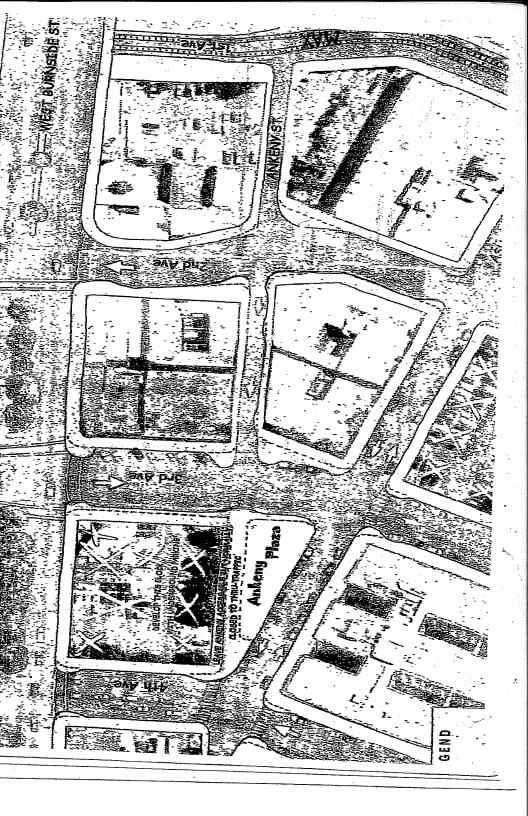


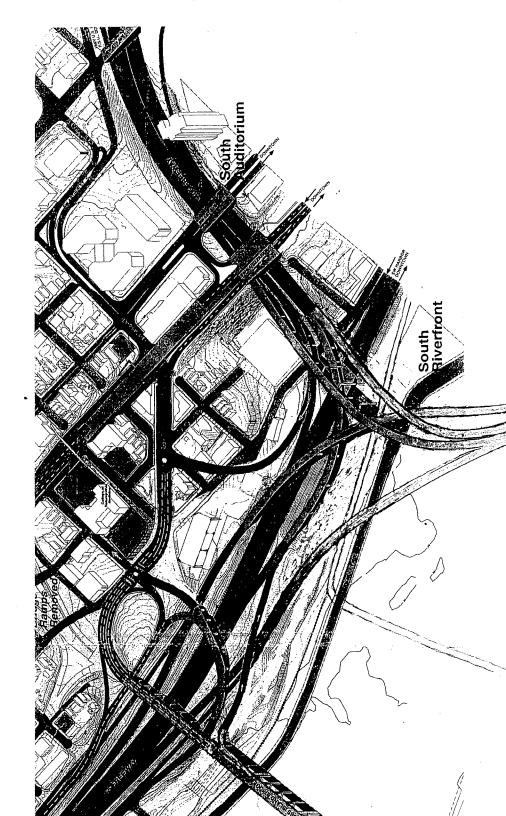


combined presentation info: Eastbank I-3 Re-alignment MORRISON/BELMONT
BRIDGEHEAD
REDO







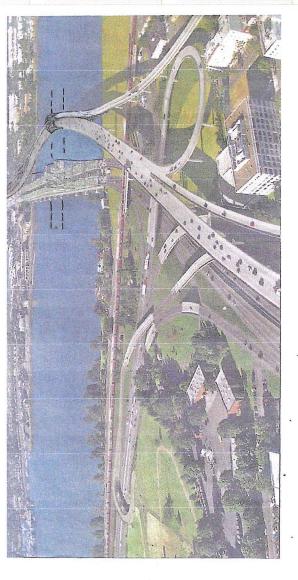


The main concern I have with self-driving cars is how people can honestly believe that directing the driver's attention away from road conditions makes sense or empty robocars cruising about isn't even more stupid.

There are good reasons to promote whole fleets of electric and hybrid-electric cars sooner to prevent tragic accidents. Their battery packs are your household backup power supply, especially important in grid failure. An iPhone call for a robocar you pray shows up may get there too late. I could go on.

Please publish a companion minority report on this trendy Tom Cruise fiction that actually is more a corporate ruse than a solution.

> Art Lewellan NW Ninth Ave.



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To Whom It May Concern,

BLUF-We need some assistance in getting these HOV lanes implemented on I-5 and I-205. This petition is being presented to the Regional Transportation Council (RTC) 4/4/2017. If collaboration between others like WSDOT, ODOT, Metro and C-Tran is required, please provide us with the names so that we can start this negotiation.

Details

Back in November of 2015, Natalie Richards requested that an HOV lane be implemented on I-5 SB for the morning commute. The response is provided below from Rick Keniston, WSDOT.

We feel that the 1990's HOV decision is irrelevant in 2017 for several reasons:

- -The Columbia River Crossing was cancelled.
- -Gas prices have gone down sending many more cars to the Interstate system, I-5 and I-205. The backup is starting earlier like at 5:15 am when it used to be 7:00 am.
- -The Vancouver growth rate is 8% per year which translates to I-205 increase in ADT from 2000 65302 NB, 64277 SB to 2014-77021 and 75878; I-5 2000-62539, 64330 to 2014-64019 NB & 68307 SB.
- -With the current high flow in the Columbia, there have been more disruptive bridge lifts just before 6:00 am backing up traffic for example on 3/24/2017, this occurred with a concurrent accident on the Glen Jackson Bridge tying up traffic for hours.
- -Parking in downtown Portland has increased from \$8/day to \$12/day or \$1.6 to \$2.0/hour moving more people onto buses.
- -Most of us work at 1st and Oak in downtown Portland or the Lloyd District or Troutdale taking the 65 to Red-MAX Line, 164, 105, 134, 157, 177 and 199 buses in daily. Dealing with the commute every day adds 1 to 1-1/2 each way to our days.
- -Lastly, Oregon is the fastest growing state with more transplants moving here than any other state. This trend will only continue, underscoring the need for fewer one-passenger cars and more ridesharing-friendly HOV lanes.

Best Regards, Natalie Richards, PE PMP Vancouver, WA 98662



Response from WSDOT On Friday, November 13, 2015 8:29 AM, "Keniston, Rick" <KenistR@wsdot.wa.gov> wrote: Hi Natalie:

Thank you for contacting the Washington State Department of Transportation (WSDOT) regarding your request to install High Occupancy Vehicle (HOV) lanes on I-5 in Vancouver.

HOV lanes along I-5 between Vancouver and Portland have a long history. As you are aware, there is currently a northbound HOV lane in Portland, but not a southbound HOV lane. A pilot southbound HOV lane project was implemented in Vancouver, I believe in the late 1990's. The HOV lane extended from NE 99th St south to the I-5 Columbia River Bridge, where it ended.

The results of the pilot project were mixed. While the HOV lane did carry more people in fewer vehicles (using buses and 2+ HOV vehicles), the 2 general purpose lanes travel time increased by 9 minutes, which caused public negativity. Others complained that the HOV lane was too short to be effective, and there was a general lack of public support overall.

The Regional Transportation Council (RTC) was the sponsor of this pilot project. After reviewing the pilot project results and weighing it with the public comments, the RTC voted to end the pilot project and convert the HOV lane back to a general purpose lane in the early 2000's.

Much of the discussion about HOV implementation centered around the schedules of the two large capacity improvement projects that were in various phases of development back then. The Delta Park I-5 widening in Portland was being designed, and the Columbia River Crossing project was just getting under way in its early environmental phase. Much of the discussion led to a general agreement that when both of those projects were completed, HOV lanes would likely be implemented throughout the corridor. Of course now, the CRC has been shut down, and HOV discussions have not been addressed since that occurrence.

WSDOT and ODOT are now looking at the I-5 corridor in terms of what lower cost operational improvements can be made in lieu of billion dollar lane addition projects. We are committed to Intelligent Transportation Systems (ITS) improvements, Practical Design, and Least Cost Planning, and are continuously looking for new ways to move more people with the current freeway infrastructure. Ramp metering is a definite tool that we will likely use, and HOV lane implementation may be part of that solution, but is not on the table right now.

Any decisions regarding a renewed HOV lane system will require much collaboration between WSDOT, RTC, ODOT, Metro and C-Tran. Oh, and some of our elected officials are on some of those boards, and they have a say as well. Politics is definitely a part of this discussion. It is not a WSDOT decision alone.

I hope this helps your understanding of the HOV lane history and discussions

Rick Keniston, P.E.
WSDOT SW Region Traffic Engineer
(360) 905-2240 (office)
(360) 869-8644 (cell)
kenistr@wsdot.wa.gov mailto:kenistr@wsdot.wa.gov

The following is the contents of a form submitted on 11/4/2015 6:12:50 PM =====My Contact information===== Name: Natalie Richards E-mail: narich_fp@yahoo.com <mailto:narich_fp@yahoo.com> Phone: 360-601-5778 Street Address: 7900 NE Loowit Loop, #57 City: Vancouver State: WA Zip Code: 98662 ==== My Question/Comment/Complaint ===== I travel to Portland every week day for work on Mass Transit (Express C-trans bus #157) With the low gas prices, the I-5 southbound bridge is backed up all the way to main street at 6:00 am. We would like to request the implementation of an HOV a lane from 134 to the bridge to assist the buses getting in to Portland. Best Regards, Natalie Richards, PE PMP

	Name	Signature	Date
2	Manuel Bejarano	See a Hacked	
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7	Benjamin Filan	Jagun J Ota	3/27 2017
12	Courtney Jones	Countrey) ~	3/30/2017
14	Fenton Khan	ante	3/29/17
15	Sarah Knowles	See attached	71511
16	Lori Korab	don Cus	3.29.1
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24	Laurie Nicholas	Jan Nichetter	3/28/17
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42	Violet Albright	See all 1	
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1	Kristi Anliker		
2	Manuel Bejarano	BEJARANO.MANUELA.1253443622 Biological and the second and the seco	3/28/2017
3	Bryan Bodie	*	
4	Merisa Carruth		
5	Daly Doucet		
6	Brad Eppard		
7	Benjamin Filan		
8	Todd Hash		
9	Patricia Hendrickson		
10	Robert Hoffman		
11	Brandi Hyland		
12	Courtney Jones		
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14	Fenton Khan		
15	Sarah Knowles		
16	Lori Korab		
17	Chelsea Kunze	Y Y	
18	Louis Landre		
	Aldo Reyes-Lopez		
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	Josh Mattison		1
	Barbara Morrow		
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24	Laurie Nicholas		
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	Trista Palmer		
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	Natalie Richards		
	Virgil Salcedo		
	Terry Salcedo		
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32	Michelle Sanders		
33	Mary Karen Scullion		
34	Steve Straw		
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36	Ricardo Walker		
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39	Paul Ockers		
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41	Mike Magee	1	
42	Violet Albright		
43	Pat Collins		-
44	Karen Garmire		<u> </u>
-1-4	Ron Malmgren	1	

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SUPPORT

DATA

FOR

HOU REQUEST

3/24/2017

Richards, Natalie A CIV CENWP CENWD (US)

From:

Natalie Richards <narich_fp@yahoo.com>

Sent:

Sunday, May 19, 2013 1:43 PM

To:

Richards, Natalie A NWP

Subject:

CRC update-TM Speech- off the cuff info

Attachments:

Preview of "Columbia River Crossing- Columbia River Bridge Design".pdf; Preview of

"Project Schedule".pdf

CRC- 9/2011- Final EIS available

8/2012- US DOT provides \$3.3 M Grant for preliminary Engineering and Final design

11/2012- Utility works starts along with on-going geotechnical and construction testing.

late 2012- Interstate tolling intergovernmental agreement for tolling--> subcommittee on tolls created.

1/30/2013- Coast Guard Permit submitted- expect notification Sept 30, 2013

3/18/2013- Governor Kitzhaber signs bill to provide \$450 million with 4 conditions- 1) WA does the same, 2) review of Investment Grade Analysis and Finance plan, 3) coast guard permit, 4) FTA submits new start grant for \$850 million-->support of Lightrail

Funding is \$850 M FTA, \$400 M FHWA, \$900 M- 1.3 Billion Tolls, \$450 from each state- \$3.08 billion (60% confidence level)

Washington has several bills in special session related to tolls and funding. (HB 1975, SB 5090- preventing light rail)

Columbia River CROSSING Project Schedule

/ Cancelle

- Final Environmental Impact Statement
- Federal Record of Decision
 - Legislative review (2012)
 - Transportation commissions sign agreement for bi-state toll setting process
 - Legislative review (2013)
 - Project permitting
 - Property acquisition process begins
 - Submit application for transit Full Funding Grant Agreement
 - Begin early construction activities
 - Begin bridge construction
 - Earliest pre-completion tolling could begin
 - New southbound I-5 bridge opens
 - Light rail service begins
 - New northbound I-5 bridge opens
 - Demolition of old bridges begins

PUBLIC OUTREACH

2011 2012 2013 2014 2015 2018 2019 2020

DRAFT: 01/30/13

The New I-5 Bridge Project (2/15/2011)

Toastmasters and Guests
The I-5 bridge or Columbia River Crossing (CRC) is

one of the most significant anticipated construction

events of our time in the Pacific Northwest.

Back in February 2011, I provided the History of the I-5 bridge. Today, I would like to summarize that history, tell you where the project is currently at and in conclusion, encourage you to be part of this history making event by applying to be on the Bi-State Citizen Advisory Committee.

1st a brief History-According to McKenzie Cullen's, the history of the I-5 Bridge was a fascinating drama of people versus politics started in 1905 @ the Clark County Day of the World Fair in Portland. Picture a time of few automobiles with a single ferry. In 1912, the Vancouver Commercial Club raised \$2500 for a preliminary survey and marched into the Portland Commercial club demanding they get on board with the idea of a bridge. They did and chipped in funds for the survey. Tension rose as Governor Lister vetoed 3 bridge funding bills. In response, Clark county citizens started a toll bridge movement. In August 1913, Clark county voters, who were mostly farmers, voted to provide a \$0.5 million dollar bond for bridge construction. Multnomah County followed suit in Nov 1913 and passed a \$1.25 million dollar

bond. (Pause) With \$1.75 million dollars, Harrington, Howard and Ash engineering firm was hired to survey and build the bridge. They broke ground March 6, 1915 and on Feb 14, 1917, 2 years later -If it was only so simple in 2011- the bridge opening ceremony occurred with speeches, parades with bands from both sides of the river. The event was so significant that each city provided a ½ day holiday for workers.

New Years Day 1929, the bridge became toll free as the states legislatures of Clark and Multnomah Counties paid off the debt and agreed to share the upkeep.

After World War II (approximately 1945), a second parallel span was discussed then in 1956, the new northbound span construction began just west of the old bridge including the "humpback "feature for vessels going underneath and was completed in 1958. (Just for perspective, in 1973, the Glen Jackson I-205 Bridge construction was started and was then completed in 1983.)

In 2001, the I-5 bridge carried 120,000 vehicles including 10,000 trucks daily.

In late 2006, 4 bridge plans were brought forward for the CRC with replacement cost around \$2 to \$4 Billion. (Yes that's Billion with a B.) At one point, the bridge design was 6 lanes in each direction.

On February 17, 2011, 3 bridges alternatives were presented. Factors influencing the decision were affordability, reducing risk to schedule and budget and ability to secure funding with the final recommendation being a deck truss structure. (Shown in your handout)

Today, this I-5 bridge carries approximately 150,000 cars per day and about \$40 billion in freight annually and is expected to grow to \$70 billion by 2030. There are currently shoulders, 3 through lanes and add-in lanes planned with MAX underneath at a current price tag of between \$3.1 and \$3.5 billion. (PAUSE)

Next, I'd like to tell you where the CRC project currently is at:

There are 5 aspects analyzing effects, finance, Engineering, field work and construction phasing, which I would like to go through briefly:

1) Analyzing community and environmental effects

The CRC project recently completed this for the Final Environmental Impact Statement (EIS). The Final EIS is expected to be followed by a federal Record of Decision in late 2011. The Record of Decision signals that the project is eligible for federal funding

2) Developing a finance plan

The CRC project is expected to receive funding from three major sources: the federal government, the states of Washington and Oregon, and tolling. CRC will continue to refine its financial plan to reflect updated cost information, timing and amount of funding contributions to the project.

- 3) Engineering and design and planning are combining efforts to advance the technical designs for the replacement bridge, light rail stations, highway improvements and bicycles and pedestrian pathways.
- 4) Fieldwork is ongoing for Geotechnical surveys and Location of underground utilities
- 5) Preparing for the construction phase

The CRC project construction is planned to begin in 2013. CRC is preparing for the construction phase of the project, including development of approaches to construction staging and sequencing. Important construction phase schedule details consist of

Early 2012: Issue Design-Build Request for Qualifications

Fall 2012: Complete Request for Qualifications process, select shortlist of submittals

Late 2012: Request for Proposal anticipated

Late 2013: Complete Request for Proposal process, select contractor. (The whole schedule provided in your handout.)

In conclusion, the fascinating drama of people versus politics continues. In my opinion as a Licensed Civil Engineer due to so much funding struggles in this country sadly the days of large infrastructure construction projects maybe gone and this may be one of the last in the Pacific Northwest. As you make your way north to Seattle or even to the Hazel Dell Brew Pub at the corner of Washington and Evergreen streets, I hope you will take a moment to ponder this anticipated important historical event. And, I encourage you to use your knowledge skills and abilities to help make this process successful by getting volunteering for the Bi-State Citizen Advisory Committee. (See me for applications.)

Thank you!

References-

Vancouver Voice-Working Together- McKenzie Cullen (http://www.absoluteastronomy.com/topics/Interstate_Bridge) http://www.columbiarivercrossing.org/
Oregonian-Dec 9, 2010
Columbian- February 12, 2011
Clark County- Volume II 1950-1999
Proposed 2011-2013 Budget and Policy Highlights pdf from http://www.ofm.wa.gov/budget/highlights