

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 Chapters 279A, 279B, and 279C (collectively the "State Public Contracting Code") is the primary source for Oregon's public contracting law;

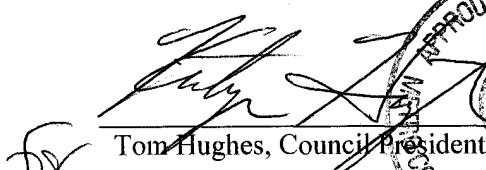
WHEREAS, Metro must comply with the requirements of the State Public Contracting Code and therefore must adopt its own rules of procedure for the procurement of public contracts under ORS 279A.065(5); and

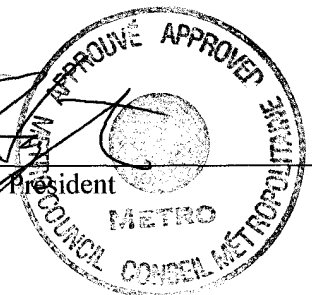
WHEREAS, current Metro Code Section 2.04 (Metro Contract Policies) is in need of immediate updating and revision to (a) ensure compliance with the State Contracting Code and (b) reflect changes to Metro's existing procurement practices; now therefore

THE METRO COUNCIL ORDAINS AS FOLLOWS:

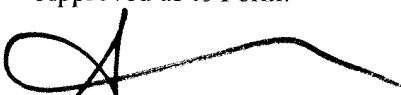
- 1. The Metro Code Section 2.04 is amended and restated in its entirety as attached in Exhibit "A" to this Ordinance;
- 2. That this Ordinance, being necessary for the health, safety, and welfare of the Metro region to ensure compliance with the State Contracting Code and consistency in Metro procurement practices, an emergency is declared to exist, and this Ordinance shall take effect immediately, pursuant to Metro Charter Section 38(1).

ADOPTED by the Metro Council this 6 day of April, 2017.

  
Tom Hughes, Council President



Approved as to Form:

  
Alison R. Kean, Metro Attorney

## CHAPTER 2.04

METRO CONTRACT AND PROCUREMENT POLICIESSection      Title

2.04.010      Definitions

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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:

~~(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.~~

~~(d) "Contract Review Board" or "Board" means the Metro Council, sitting as a local Contract Review Board pursuant to the provisions of ORS 279A.060.~~

~~(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.

~~(l) "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.~~

~~(m) "Public contract" is defined in ORS 279A.010, as now and as it may be amended.~~

"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.~~022-030~~ 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 ~~or require additional conditions in public or personal services contracts not authorized by this chapter.~~

~~(Ordinance No. 96-635B, Sec. 3.)~~

### **2.04.~~024-040~~ 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 it has granted/delegated to the Chief Operating Officer pursuant to Section 2.04.020. The Commission ~~may adopt rules or regulations which delegate to the Chief Operating Officer~~ has the authority to enter into award and execute contracts on behalf of the Commission ~~and may 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.

~~(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.)~~

## **2.04.026-050 Council 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**:

**(a) \_\_\_\_\_ (1)**—Any agreement entered into pursuant to ORS Chapter 190 by which Metro ~~acquires~~ **agrees to acquire** or ~~transfer~~ **transfer** 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) \_\_\_\_\_ (b)**—The Chief Operating Officer shall provide a ~~monthly~~ **quarterly** 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 \$~~25~~10,000.00.

~~(c)~~ ~~\_\_\_\_\_ (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.

~~(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**

### **2.04.035-04090 Metro Council as the Local Contract Provisions Requiring Records Maintenance Review Board**

#### **Pursuant to ORS 279A.060, the Metro Council is designated as the Local Contract Review Board for Metro and Permitting Audits**

~~—————(a) All Metro contracts of \$50,000.00 or moreMERC. The Metro Council, acting as the Local Contract Review Board, shall require contractors and subcontractors to maintainexercise 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~~

~~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 2.04.052Chapter 2.01.~~

~~(Ordinance No. 04-1035, Sec. 2.)  
PERSONAL SERVICES CONTRACTS~~

~~2.04.040 Personal Services Contracts -- General~~

~~(a) Disadvantaged Business Program. All contracting for personal services is subject 2.04.042100 Local Contract Review Board Administrative Rules~~

~~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.~~

~~(b) Substantive Requirements. All Metro personal services Local Contract 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, the 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) Any the 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~~

~~—————(a)—— Personal servicespublic 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~~

~~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.~~

~~(2) For public improvements, a labor and materials bond and a performance bond, both in an amount equal to 100 percent of the contract price are required for contracts over \$150,000.00.~~

~~(3) Bid security, labor and material bond and performance bond may be required even though the contract is of a class not identified above, if the Chief Operating Officer determines it is in the public interest.~~

~~(c) 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~~



~~the requirements 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 the purchase of zoo gift shop retail inventory and resale items.~~

~~(2) Contracts for management and operation of food, parking or similar concession services at Metro facilities provided that procedures substantially similar to the procedures required for sealed competitive Request for Proposals used by Metro for personal services contracts are followed.~~

~~(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.~~

~~(5) Contracts for warranties, including but not limited to computer software warranties, in which the supplier of the goods or services covered by the warranty has designated an authorized provider for the warranty service.~~

~~(6) Contracts for computer hardware, or computer software.~~

~~(7) Contracts under which Metro is to receive revenue by providing a service.~~

~~(8) Contracts for the lease or use of the convention, trade, and spectator buildings and facilities operated by the Metro Exposition-Recreation Commission.~~

~~(9) Public contracts by the Metro Exposition-Recreation Commission in an amount less than \$100,000.00, which amount shall be adjusted each year to reflect any changes in the Portland SMSA CPI, provided that any rules adopted by the commission which provide for substitute selection procedures are followed.~~

~~(10) Contracts for equipment repair or overhaul, but only when the service and/or parts required are unknown before the work begins and the cost cannot be determined without extensive preliminary dismantling or testing.~~

~~(11) Contracts in the nature of grants to further a Metro purpose provided a competitive Request for Proposal process is followed.~~

~~The procurement of utilities or any other services whose price is regulated by any governmental body, including but not limited to telephone service, electric, natural gas, and sanitary services, provided that if competition is available, a Request for Proposal process is followed.~~

~~Contracts for goods or services when the provider of the procured goods or services is required by the federal government or by the state of Oregon.~~

~~Contracts for co-operative procurements permitted under ORS 279A.220 to 279A.225.~~

~~(15) The procurement of art and art related production and fabrication provided that a Request for Proposal process is followed.~~

~~(16) Sponsorships which are identified and approved in the proposed budget and are not designated by Council as having a significant impact as outlined in Section 2.04.026 need not follow a competitive bidding or proposal process. In order to be eligible for this exemption the sponsorship shall provide Metro with event advertising and/or media releases.~~

~~(17) Sponsorship contracts, provided that quotes are obtained from at least three potential sponsors or that good faith efforts to obtain such quotes are documented. A sponsorship contract is any contract under which the sponsor's name or logo is used in connection with a facility's goods, buildings, parts of buildings, services, systems, or functions in exchange for the sponsor's agreement to pay consideration, including money, goods, services, labor, credits, property or other consideration.~~

~~(18) Contracts for projects that are not public improvements as defined in Metro Code Section 2.04.010(n) in which a contractor provides a material and substantial portion of the funding for such project.~~

~~(19) Contracts with any media outlet for the purchase of classified advertising, display advertising or the placement of public notices to publicize legal notices of public meetings and procurements.~~

~~(20) Contracts not exceeding \$150,000 for personal services or for trade services (and not required as part of a public improvement project) when the provider of the procured services is a not-for-profit organization, and the purpose of the services is to implement Metro~~

~~programs and projects, provided the Metro Council has approved by resolution a process for awarding such contracts.~~

~~(21) Any contract exempt from competitive bidding under any statute of the state of Oregon.~~

~~(b) Description of procurement procedures for class special procurements: Procurements for each of the class special procurements described in subsection (a) shall be performed by means of procedures chosen by the Chief Operating Officer as an appropriate method tailored to and in light of the demands, circumstances and market realities associated with obtaining each of the enumerated goods and services. Such procurement procedures may include but shall not limited to direct negotiations with individual or multiple vendors or suppliers; negotiations with ranked proposers; competitive negotiations; or multiple tiered competitions.~~

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

~~(Ordinance No. 04-1065A, Sec. 11; Ordinance No. 06-1123A, Sec. 4; Ordinance No. 11-1256, Sec. 2; and Ordinance No. 14-1345, Sec. 3.)~~

#### ~~2.04.054 Competitive Bidding Exemptions for Public Improvements~~

~~Subject to the policies and provisions of ORS 279A.015 and 279C.300 and the Metro Code, all Metro and Metropolitan Exposition-Recreation Commission public improvement contracts shall be based upon competitive bids except:~~

~~(a) State Law. Classes of public improvement contracts specifically exempted from competitive bidding requirements by state law.~~

~~(b) Board Rule. The following class of public improvement contracts is exempt from the competitive bidding process based on the legislative finding by the Metro Council, sitting pursuant to ORS 279A.060 as a local Contract Review Board, that the exemption will not encourage favoritism or substantially diminish competition for public contracts and that such exemption will result in substantial cost savings: contracts for public improvements in which a contractor agrees to provide a material and substantial portion of the funding for such public improvement project.~~

~~(c) Board Resolution. Specific contracts, not within the classes exempted in subsections (a) and (b) above, may be exempted by the Metro Council, sitting pursuant to ORS 279A.060 as a local Contract Review Board by resolution subject to the requirements of ORS 279C.335. The Board shall, where appropriate, direct the use of alternate contracting and purchasing practices that take account of market realities and modern innovative contracting and purchasing methods, which are consistent with the public policy of encouraging competition.~~

~~(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 97-677B, Sec. 2; Ordinance No. 98-768, Sec. 2; Ordinance No. 99-822, Sec. 7; Ordinance No. 02-966A, Sec. 1; Ordinance No. 03-994A, Sec. 2; and Ordinance No. 04-1065A, Sec. 12.)~~

#### ~~2.04.056 Procurement of Public Contracts~~

~~(a) Any procurement of a public contract not exceeding \$10,000.00 may be awarded in any manner deemed practical or convenient by the Chief Operating Officer.~~

~~(b) Any procurement of a public contract 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 a public contract exceeding \$150,000.00 shall be awarded in accordance with the provisions of either ORS 279B.055, ORS 279B.060, or ORS 279B.085.~~

~~(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 97-692A, Sec. 21; Ordinance No. 99-822, Sec. 8; repealed and replaced by Ordinance No. 04-1065A, Sec. 14; and Ordinance No. 14-1345, Sec. 4).~~

#### ~~2.04.058 Public Contract Amendments~~

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

~~(1) The original contract was let by a formal competitive procurement process, the amendment is for the purpose of authorizing additional work for which unit prices or alternates were provided that established~~

~~the cost for the additional work and the original contract governs the terms and conditions of the additional work; or~~

- ~~(2) The amendment is a change order that resolves a bona fide dispute with the contractor regarding the terms and conditions of a public contract or public improvement contract and the amendment does not materially add to or delete from the original scope of work included in the original contract; or~~
- ~~(3) The amendment is for a public improvement contract and increases the total obligation of the contract by no more than 20 percent. In computing the dollar amount of any amendment for the purpose of this subsection, the amount of original contract obligation shall be used. In addition, only the amount of additional work or extra cost shall be considered and such work or cost may not be offset by the amount of any deletions; amendments made under subsection (1) or (2) are not included in computing the aggregate amount under this subsection; or~~
- ~~(4) The amount of the aggregate cost increase resulting from all amendments to a public contract other than a public improvement contract does not exceed 20 percent of the initial contract if the face amount is less than or equal to \$1,000,000.00 or 10 percent if the face amount is greater than \$1,000,000.00; amendments made under subsection (1) or (2) are not included in computing the aggregate amount under this subsection; or~~
- ~~(5) The amendment is for a change order to a public improvement contract in order to meet an emergency; or~~
- ~~(6) The Metro Contract Review Board has authorized the extension of the contract amendment.~~

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

~~(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 99-822, Sec. 9; Ordinance No. 02-966A, Sec. 1, Ordinance No. 06-1123A, Sec. 5; and Ordinance No. 11-1256, Sec. 3.)~~

~~(2.04.060—Food Products. Repealed Ord. 04-1065A §15)~~

#### ~~2.04.062 Sole Source Procurements~~

~~A contract for goods or services may be awarded without competition when the Metro Council, sitting pursuant to ORS 279A.060 as a local Contract~~

~~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.~~

~~(1) All appeals shall be made in writing and shall be delivered to the Procurement Officer at Metro's main office within seven (7) working days of the postmarked date on the notice of award. The written appeal must describe the specific citation of law, rule, regulation, or procedure upon which the appeal is based.~~

- ~~(2) The Procurement Officer shall forthwith notify the appropriate Department Director and the Chief Operating Officer of the appeal. In the case of an appeal of an award by a Commission or the Metro Auditor, the appeal shall be forwarded to the Commission or Metro Auditor. Within 10 working days of the receipt of the notice of appeal, the Chief Operating Officer, Commission or Metro Auditor shall send a notice of rejection of the appeal or a notice of acceptance of the appeal, as applicable, to the appellant. The appellant may appeal the Chief Operating Officer's, Commission's, or Metro Auditor's decision to reject the appeal in writing to the Board within five (5) working days from the postmarked date on the notice of rejection.~~
- ~~(3) The Board will review the grounds for appeal, all pertinent information, and the Chief Operating Officer's, Commission's or Metro Auditor's recommendation, and make a decision. The decision of the Board is final.~~
- ~~(4) No contract, which is the subject of a pending appeal, may be executed unless the Board shall have given its approval. The Chief Operating Officer, Commission or Metro Auditor may request the Board to determine a matter without waiting for the expiration of the time periods provided for herein.~~
- ~~(5) In the event Council authorization of execution of the contract is required under Section 2.04.026 of this Code, the appeal shall be heard before the Council considers authorization of the contract.~~

~~(c) Appeals from Debarment or Denial of Prequalification~~

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

~~promptly notify the Board of the appeal by providing notice to the Council President.~~

- ~~(3) Promptly upon receipt of notice of appeal, the Council President shall notify the appellant and the Metro Attorney of the time and place of the appeal proceeding.~~
- ~~(4) The Board shall conduct the appeal proceeding in accordance with the provisions of ORS 279B.425 and decide the appeal within 30 days after receiving notification of the appeal from the Metro Attorney. The Board shall set forth in writing the reasons for the decision.~~
- ~~(5) Appeal Proceeding.~~
  - ~~(A) The Council President shall preside over the appeal proceeding. The general order shall be as follows:
    - ~~(i) Presentation by Metro of documentation and testimony supporting the disqualification.~~
    - ~~(ii) Presentation by the appellant of documentation and testimony opposing the disqualification.~~~~
  - ~~(B) Members of the Board shall have the right to ask both Metro and the appellant questions and to review documentation referred to and presented by the parties.~~
  - ~~(C) Formal court rules of evidence shall not apply.~~
  - ~~(D) The Board shall consider de novo the notice of debarment or denial of prequalification, and record of investigation made by Metro and any evidence provided by Metro and the appellant prior to or at the appeal proceeding. There shall be no continuance or reopening of the appeal proceeding to offer additional evidence unless the appellant can demonstrate to the Council President that the additional evidence was not known to the appellant at the time of the proceeding or that with reasonable diligence the appellant would not have discovered the evidence prior to the appeal proceeding.~~
  - ~~(E) A tape recording will be made of the appeal proceeding which shall be made available to the appellant upon payment of costs to Metro of making the tape.~~
  - ~~(F) The Board shall render a decision which shall be reviewed only upon petition in the Circuit Court of Multnomah County. The petition must be~~



~~filed within 15 days after the date of the decision in accordance with the provisions of ORS 279B.425.~~

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

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

~~(Ordinance No. 96-635B, Sec. 3. Amended by Ordinance No. 99-822, Sec. 10; Ordinance No. 02-966A, Sec. 1; Ordinance No. 04-1065A, Sec. 19; Ordinance No. 11-1256, Sec. 4.; and Ordinance No. 14-1345, Sec. 5.)~~

~~METRO ESB, MBE AND WBE PROGRAM~~

~~2.04.100 Findings~~

~~(a) The Metro Council finds:~~

~~(a) (1) The opportunity for full participation in our free enterprise system by emerging small businesses, minorities and women minority-owned businesses, woman-owned businesses, and businesses owned by service disabled veterans is essential;~~

~~(b) (2) Greater economic opportunity for emerging small businesses, minorities and women minority-owned businesses, woman-owned businesses, and businesses owned by service disabled veterans is essential;~~

~~(c) (3) 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) (4) It is in the best interest of Metro and the community to do business with emerging small businesses, minority and women-owned businesses, woman-owned businesses, and businesses owned by service disabled veterans, resulting in increased competition and a stronger local economy;.~~

~~(5) In cooperation with the private sector, the affected populations, 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 federally-funded 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~~

~~(a)~~

#### ~~2.04.0521320 Policy Statement~~

~~(a) Metro expresses its strong commitment to provide maximum opportunity to do business with ESBs, MBEs and WBEs emerging small businesses, minority-owned 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. 2; all 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.~~

~~(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) Outreach. 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) Technical Assistance. 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) Education. Periodic training for staff to ensure awareness of program objectives and desired activities on their part.~~

~~\_\_\_\_\_ (e) Plan Centers. Ensuring ESB, MBE and WBE plan centers and contractors are receiving requests for bids, proposals and quotes.~~

~~\_\_\_\_\_ (f) Advertising. 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) Informal Construction Opportunities. 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~~

~~WBEs on the certification list capable of providing the project needed. Any such waivers shall be in writing, and shall be kept as supporting documentation.~~

~~(i) **Additional Activities.** The Procurement Officer may establish and implement additional techniques which are consistent with this Program and designed to facilitate participation of ESBs, MBEs and WBEs in Metro purchasing and contracting activities.~~

~~(Ordinance No. 83-165, Sec. 5. 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; repealed by Ordinance No. 97-692A, Sec. 7; replaced by Ordinance No. 97-692A, Sec. 9; amended by Ordinance No. 02-966A, Sec. 1.; Ordinance No. 10-1240, Sec. 4.; and Ordinance No. 14-1345, Sec. 6.)~~

~~(2.04.125 Directory. Repealed Ord. 97-692A §10)~~

### **~~2.04.130 Minority-Owned Banks~~**

~~Metro will seek to identify minority-owned banks and banks utilizing equal opportunity banking practices, including community reinvestment, and, to the greatest extent permitted by law, use their services. In addition, Metro will encourage prime contractors, subcontractors and consultants to utilize such services by sending them brochures and service information on such banks.~~

~~(Ordinance No. 83-165, Sec. 7. Amended by Ordinance No. 84-181, Sec. 3; 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.)~~

~~(2.04.135 Affirmative Action and Equal Opportunity Procedures. Repealed Ord. 97-692A §11)~~

~~(2.04.140 Certification of Minority Business Eligibility. Repealed Ord. 97-692A §11)~~

~~(2.04.145 Annual Minority Business Goals. Repealed Ord. 97-692A §11)~~

### **~~2.04.150 Good Faith Efforts at Maximizing ESB, MBE and WBE Opportunities~~**

~~The Procurement Officer shall establish procedures relating to good faith opportunities for formal construction projects. Procedures shall be consistent in nature and scope with those of other local public bodies for ease in understanding for contractors.~~

~~(a) Good faith efforts for maximizing ESB, MBE and WBE subcontracting opportunities shall be required for construction contracts over \$150,000.00.~~

~~(b) At the discretion of the Procurement Officer, good faith efforts may be required for any other contract, including architects and engineers. This requirement shall be made in writing prior to the solicitation of bids or proposals for such contract.~~

~~(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**

~~\_\_\_\_\_ (a) \_\_\_\_\_ The provisions of Metro Code Sections 2.04.100 to 2.04.190 shall be effective in all cases unless otherwise provided for by state or federal law. The provisions of Metro Code Sections 2.04.100 to 2.04.190 are separate and severable. The invalidity of any clause, sentence, paragraph, subdivision, section or portion of Metro Code Sections 2.04.100 to 2.04.190 or the invalidity of the application thereof to any person or circumstances shall not affect the validity of the remainder of Metro Code Sections 2.04.100 to 2.04.190, or the validity of their application to other persons or circumstances.~~

~~\_\_\_\_\_ (b) \_\_\_\_\_ Metro Code Sections 2.04.100 to 2.04.190 are intended, and should be construed, as establishing and requiring the maximum efforts at assuring ESB, MBE, and WBE participation in Metro contracting activities that is consistent with the United States and Oregon Constitutions and applicable federal and state law.~~

~~(Ordinance No. 92-466A, Sec. 2. Amended by Ordinance No. 97-692A, Sec. 19.)  
(2.04.200-.290 Repealed Ord. 97-692A §22)~~

## **METRO DISADVANTAGED BUSINESS ENTERPRISE PROGRAM FOR FEDERALLY-FUNDED CONTRACTS**

### **2.04.300 Disadvantaged Business Enterprise Program (DBE Program) for Federally-Funded Contracts, Findings, Purpose and Authority**

~~\_\_\_\_\_ (a) \_\_\_\_\_ It is the purpose of Metro Code Sections 2.04.300-.380 to establish and implement a program to encourage the utilization by Metro of disadvantaged businesses by creating for such businesses the maximum possible opportunity to compete for and participate in federally-funded Metro contracting activities. The DBE Program does not apply to locally-funded contracts, which are governed by 2.04.100 to 2.04.190.~~

~~\_\_\_\_\_ (b) \_\_\_\_\_ Metro Code Sections 2.04.300-.380 are intended to comply with all relevant federal regulations, including those adopted to implement Section (105)(f) of the Surface Transportation Assistance Act of 1982, relating to the participation by Minority Business Enterprises in Department of Transportation programs, and Section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991.~~

~~\_\_\_\_\_ (c) \_\_\_\_\_ Metro Code Sections 2.04.300-.380 shall be known and may be cited as the "Metro Disadvantaged Business Enterprise Program for Federally-Funded Contracts," hereinafter referred to as the "DBE Program."~~

~~(Ordinance No. 92-466A, Sec. 2. Amended by Ordinance No. 97-692A, Sec. 23.)~~

### **2.04.305 Policy Statement**

~~\_\_\_\_\_ (a) \_\_\_\_\_ Through the DBE Program, Metro:~~



~~(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. 24.)~~

## **~~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.~~

~~(b) "Construction contract" means a contract for construction of buildings or other facilities, and includes reconstruction, remodeling and all activities which are appropriately associated with a construction project.~~

~~(c) "Contract" means a mutually binding legal relationship or any modification thereof obligating the seller to furnish supplies or services, including construction, and the buyer to pay for them. For purposes of the DBE Program a lease or a purchase order of \$500.00 or more is a contract.~~

~~(d) "Contractor" means the one who participates, through a contract or subcontract, in the DBE Program and includes lessees.~~

~~(e) "Department or USDOT" means the United States Department of Transportation, including its operating elements.~~

~~(f) "Disadvantaged Business Enterprise or DBE" means a small business concern which is so certified by an authorized agency and:~~

~~(1) Which is at least 51 percent owned by one or more socially or economically disadvantaged individuals, or, in the case of any publicly-owned business, at least 51 percent of the stock of which is owned by one or more socially or economically disadvantaged individuals; and~~

~~(2) Whose management and daily business operations are controlled by one or more of the socially or economically disadvantaged individuals who own it.~~

~~(g) "Executive Department" means the State of Oregon's Executive Department or such state agency, department or entity to which has been delegated the responsibility to certify a Minority Business Enterprise, Women Business Enterprise, or a Disadvantaged Business Enterprise and to engage in related activities.~~

~~(h) "Joint venture" is defined as an association of two or more businesses to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills and knowledge. In a joint venture between a DBE and non-DBE, the DBE must be responsible for a clearly defined portion of the work to be performed and must share in the ownership, control, management responsibilities, risks and profits of the joint venture. A joint venture of a DBE and a non-DBE must receive Metro approval prior to contract award to be counted toward any DBE contract goals.~~

~~(i) "Labor and materials contract" is a contract including a combination of service and provision of materials other than construction contracts. Examples may include plumbing repair, computer maintenance or electrical repair, etc.~~

~~(j) "Lessee" means a business or person that leases, or is negotiating to lease, property from a recipient or the department on the recipient's or department's facility for the purpose of operating a transportation-related activity or for the provision of goods or services to the facility or to the public on the facility.~~

~~(k) "Oregon Department of Transportation or ODOT" means the State of Oregon's Department of Transportation.~~

~~(l) "Personal services contract" means a contract for services of a personal or professional nature.~~

~~(m) "Procurement contract" means a contract for the purchase or sale of supplies, materials, equipment, furnishings or other goods not associated with a construction or other contract.~~

~~(n) "Recipient" means any entity, public or private, to whom USDOT financial assistance is extended, directly or through another recipient for any program.~~

~~(o) "Small business concern" means a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.~~

~~(p) "Socially or economically disadvantaged individuals or disadvantaged individuals" has the meaning established by ORS 200.005(2), (9), including the rebuttable presumption established by ORS 200.015(3), and the definitions supplied by ORS 200.005(7), (10).~~

~~(q) "USDOT-assisted contract" means any contract or modification of a contract between Metro and a contractor which is paid for in whole or in part with USDOT financial assistance.~~

~~(r) "USDOT financial assistance" means financial aid provided by USDOT or the United States Railroad Association to a recipient, but does not include a direct contract. The financial aid may be provided directly in the form of actual money, or indirectly in the form of guarantees authorized by statute as financial assistance services of federal personnel, title or other interest in real or personal property transferred for less than fair market value, or any other arrangement through which the recipient benefits financially, including licenses for the construction or operation of a deep water port.~~

~~(Ordinance No. 92-466A, Sec. 2. Amended by Ordinance No. 96-635B, Sec. 4.)~~

#### **2.04.315 Notice to Contractors, Subcontractors and Subrecipients**

~~Contractors, subcontractors and subrecipients of Metro accepting contracts or grants under the DBE Program which are USDOT-assisted shall be advised that failure to carry out~~

~~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:~~

~~(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~~

~~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 or 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. 92-466A, 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.~~

~~(b) All invitations to bid or Request for Proposals on contracts for which goals have been established shall require all bidders/proposers to submit with their bids and proposals a statement indicating that they will comply with the contract goal or that they have made good faith efforts as defined in Section 2.04.360 to do so. To document the intent to meet the goals, all bidders and proposers shall complete and endorse a disadvantaged business program compliance form and include said form with bid or proposal documents. The form shall be provided by Metro with bid/proposal solicitations.~~

~~(c) Agreements between a bidder/proposer and a DBE in which the DBE promises not to provide subcontracting quotations to other bidders/proposers are prohibited.~~

~~(d) Apparent low bidders/proposers shall, by the close of the next working day following bid opening (or proposal submission date when no public opening is had), submit to Metro detailed DBE utilization forms listing names of DBEs who will be utilized and the nature and dollar amount of their participation. This form will be binding upon the bidder/proposer. Within five (5) working days of bid opening or proposal submission date, such bidders/proposers shall submit to Metro signed letters of agreement between the bidder/proposer and DBE subcontractors and suppliers to be utilized in performance of the contract. A sample letter of agreement will be provided by Metro. The DBE utilization forms shall be provided by Metro with bid/proposal documents.~~

~~(e) An apparent low bidder/proposer who states in its bid/proposal that the DBE goals were not met but that good faith efforts were performed shall submit written evidence of such good faith efforts within two (2) working days of bid opening or proposal submission in accordance with Section 2.04.360. Metro reserves the right to determine the sufficiency of such efforts.~~

~~(f) Except as provided in paragraph (g) of this section, apparent low bidders or apparent successful proposers who state in their bids/proposals that they will meet the goals or will show good faith efforts to meet the goals, but who fail to comply with paragraph (d) or (e) of this section, shall have their bids or proposals rejected and shall forfeit any required bid security or bid bond. In that event the next lowest bidder or, for personal services contracts, the firm which scores second highest shall, within two (2) days of notice of such ineligibility of the low bidder, submit evidence of goal compliance or good faith effort as provided above. This process shall be repeated until a bidder or proposer is determined to meet the provisions of this section or until Metro determines that the remaining bids are not acceptable because of amount of bid or otherwise.~~

~~(g) The liaison officer, at his/her discretion, may waive minor irregularities in a bidder's or proposer's compliance with the requirements of this section provided, however, that the bid or proposal substantially complies with public bidding requirements as required by applicable law.~~

~~(Ordinance No. 92-466A, Sec. 2.)~~

## ~~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:~~

- ~~(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 not met and 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 to 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.~~

~~\_\_\_\_\_ The total dollar value of a contract with a disadvantaged business owned and controlled by disadvantaged women is counted toward either the disadvantaged business goal or the goal for~~

~~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:

~~(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:**



~~(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.~~

~~(l) "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 ~~shall~~will establish Sustainable Procurement Administrative Rules ~~consistent with this Section to implement the~~a 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;~~

- ~~(2) Product Stewardship;~~
  - ~~(3) Green Building Practices;~~
  - ~~(4) Least Toxic;~~
  - ~~(5) Waste Prevention and Reduction;~~
  - ~~(6) Recovered Material;~~
  - ~~(7) Habitat Friendly;~~
  - ~~(8) Certified Organic;~~
  - ~~(9) Greenhouse Gas Reduction;~~
  - ~~(10) Locally Available;~~
  - ~~(11) Supplier Diversity;~~
  - ~~(12) Fair Trade; and~~
  - ~~(13) Life Cycle Cost Assessment~~
- ~~(c) A Minimum Recovered Content Standard for Recycled Paper and Recovered Products.~~
- ~~(d) A schedule and process for implementation of the~~  
**2.04.0641870 Annual Sustainable Procurement Program and**  
**Administrative Rules-Reports**
- ~~(e) A schedule for reporting to the Metro Council on the status and performance of the Sustainable Procurement Program and Administrative Rules and the minimum requirements for the report, including the setting of goals to illustrate progress.~~
- ~~(f) A process for assigning Department personnel to evaluate whether it is Practicable to use a particular Recovered or Sustainable Product.~~
- ~~(g) A process for collecting data to evaluate the status and performance of the Sustainable Procurement Program and Administrative Rules.~~

~~(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.)~~

#### 2.04.530 Metro's Sustainable Procurement Program 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.)~~

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## CHAPTER 2.04

### METRO CONTRACT AND PROCUREMENT POLICIES

Section Title

2.04.010 Definitions

#### CONTRACTS IN GENERAL

2.04.020 Authority to Award and Execute Contracts; Budget Limitations

2.04.030 Federal Law and Rules

2.04.040 Metropolitan Exposition Recreation Commission

2.04.050 Council Approval of Contracts

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#### DISPOSITION OF SURPLUS PROPERTY

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#### METRO LOCAL CONTRACT REVIEW BOARD

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#### EQUITY IN CONTRACTING

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#### SUSTAINABLE PROCUREMENT

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Repealed (Ord. 17-1398)

2.04.030 Contracts in General - Regulations

2.04.042 Personal Services Contracts - Procurement of Personal Services Contracts

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- 2.04.052 Contract Review Board - Public Contracts – Public Improvement Contracts
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- 2.04.054 Contract Review Board - Competitive Bidding Exemptions for Public Improvements
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- 2.04.110 Metro ESB, MBE and WBE Program – Definitions
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- 2.04.165 Metro ESB, MBE and WBE Program – Replacement of ESB, MBE or WBE Subcontractors
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- 2.04.190 Metro ESB, MBE and WBE Program – Severability and Intent
- 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 Contracts – Policy Statement
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- 2.04.335 Metro Disadvantaged Business Enterprise Program for Federally-funded Contracts – Affirmative Action and Equal Opportunity Procedures
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- 2.04.365 Metro Disadvantaged Business Enterprise Program for Federally-funded Contracts – Replacement of DBE Subcontractors
- 2.04.370 Metro Disadvantaged Business Enterprise Program for Federally-funded Contracts – Records and Reports
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- 2.04.380 Metro Disadvantaged Business Enterprise Program for Federally-funded Contracts – Compliance and Enforcement
- 2.04.510 Metro’s Sustainable Procurement Program – Definitions
- 2.04.540 Metro’s Sustainable Procurement Program – Report to Metro Council

### **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, woman-owned 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.

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## STAFF REPORT

### IN CONSIDERATION OF ORDINANCE NO. 17-1398, FOR THE PURPOSE OF AMENDING METRO CODE CHAPTER 2.04 AND DECLARING AN EMERGENCY

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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.

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.

- 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:**
  - Small Concessions. 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.

- **Major Concessions.** 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.