

BEFORE THE METRO LOCAL CONTRACT REVIEW BOARD

FOR THE PURPOSE OF ADOPTING
CONTRACTING AND PROCUREMENT
ADMINISTRATIVE RULES

) RESOLUTION NO. 17-4814
)
) Introduced by Director of Finance and
) Regulatory Service Tim Collier in
) concurrence with Council President
) Tom Hughes

WHEREAS, on April 6, 2017 (Resolution 17-4779), the Metro Local Contract Review Board adopted (a) interim rules of procedure for public contracting (the "LCRB Contracting Rules"), (b) interim rules of procedure for screening and selecting persons to perform personal services for Metro the ("Personal Services Contracting Rules"), (c) and interim rules of procedure to advance equity in public contracting at Metro ("Equity in Contracting Rules");

WHEREAS, following adoption of the above-referenced interim contracting and procurement administrative rules, the Metro Local Contract Review Board directed staff to provide notice of such interim rules to persons likely to be affected by the permanent adoption, along with an opportunity to comment;

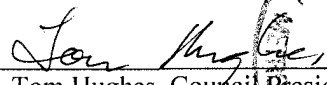
WHEREAS, following the notice and comment period, Metro has received no public comment to the interim rules; and

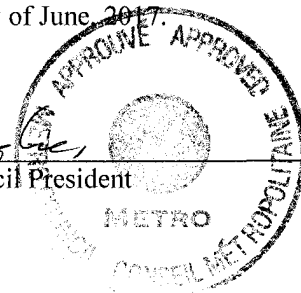
WHEREAS, the majority of staff-proposed revisions made are editorial and nonsubstantive in nature; now therefore

BE IT RESOLVED THAT THE METRO LOCAL CONTRACT REVIEW BOARD:

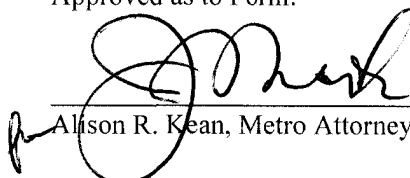
1. Adopts the LCRB Contracting Rules as its final rules of procedure for public contracting, incorporating in the revisions shown on the attached Exhibit A;
2. In accordance with ORS 279A.065(6)(b), directs Metro staff to review the LCRB Contracting Rules each time the Attorney General modifies the Model Rules in order to determine whether amendments to the LCRB Contracting Rules are necessary for statutory compliance;
3. Adopts the Personal Services Contracting Rules as its final rules of procedure for screening and selecting persons to perform personal services for Metro, incorporating in the revisions shown on the attached Exhibit B; and
4. Adopts the Equity in Contracting Rules as its final rules of procedure to advance equity in public contracting at Metro.

ADOPTED by the Metro Local Contract Review Board this 15 day of June, 2017


Tom Hughes, Council President



Approved as to Form:


Alison R. Kean, Metro Attorney

DIVISION 47

PUBLIC PROCUREMENTS FOR GOODS OR SERVICES

General Provisions

47-0000 Application

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.015

Source Selection

47-0250 Methods of Source Selection

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

~~**47-0253 Feasibility Determination; Cost Analysis**~~

~~(1) **Written Cost Analysis for Contracts for Services.** In accordance with ORS 279B.030, before conducting the Procurement of a Contract for Services (other than Personal Services) with an estimated Contract Price that exceeds \$250,000, Metro must, in the absence of a determination that performing the Services with Metro's own personnel and resources is not feasible, conduct a Written cost analysis.~~

~~(1) **Feasibility Determination for Contracts for Services.** Metro may proceed with the procurement of a Contract for Services without conducting the cost analysis required under ORS 279B.030 if Metro makes Written findings that one or more of the special circumstances described ORS 279B.036 make Metro's use of its own personnel and resources to provide the Services not feasible.~~

~~(2) **Special Circumstances.** The special circumstances identified in ORS 279B.036 that require Metro to procure the Services by Contract include any circumstances, conditions or occurrences that would make the Services, if performed by Metro's employees, incapable of being managed, utilized or dealt with~~

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

~~(3) — **Written Cost Analysis under ORS 279B.033.**~~

~~(a) — **Basic Comparison.** The Written cost analysis must compare an estimate of Metro's cost of performing the Services with an estimate of the cost a potential Contractor would incur in performing the Services. However, Metro may proceed with the Procurement for Services only if it determines that Metro would incur more cost in performing the Services with Metro's own personnel than it would incur in procuring the Services from a Contractor. In making this determination, the cost Metro would incur in procuring the Services from a Contractor includes the fair market value of any interest in equipment, materials or other assets Metro will provide to the Contractor for the performance of the Services.~~

~~(a) — **Costs of Using Metro's Own Personnel and Resources.** When estimating Metro's cost of performing the Services, Metro shall consider cost factors that include:~~

~~A. — The salary or wage and benefit costs for the employees of Metro who would be directly involved in performing the Services, to the extent those costs reflect the proportion of the activity of those employees in the direct provision of the Services. These costs include those salary or wage and benefit costs of the employees who inspect, supervise or monitor the performance of the Services, to the extent those costs reflect the proportion of the activity of those employees in the direct inspection, supervision, or monitoring of the performance of the subject Services.~~

~~B. — The material costs necessary to the performance of the Services, including the costs for space, energy, transportation, storage, equipment and supplies used or consumed in the provision of the Services.~~

~~C. — The costs incurred in planning for, training for, starting up, implementing, transporting and delivering the Services.~~

~~D. — Any costs related to stopping and dismantling a project or operation because Metro intends to procure a limited quantity of Services or to procure the Services within a defined or limited period of time.~~

~~E. — The miscellaneous costs related to performing the Services. These costs exclude Metro's indirect overhead costs for existing salaries or wages and benefits for administrators, and exclude costs for rent, equipment, utilities and materials, except to the extent the cost items identified in this sentence are attributed solely to performing the Services and would not be incurred unless Metro performed the Services.~~

~~F. — Oregon Revised Statute Chapter 279B.033 (1)(a) provides that an estimate of Metro's costs of performing the Services include the costs described in subsections (4)(b)A through E of this Administrative Rule. Therefore, those costs do not constitute an exclusive list of cost information. Metro may consider other reliable information that bears on the cost to Metro of performing the Services. For example, if Metro has accounted for its actual costs of performing the Services under consideration, or reasonably comparable Services, in a relatively recent Services project, Metro may consider those actual costs in making its estimate.~~

~~(b) — **Costs a Potential Contractor Would Incur.** When estimating the costs a potential Contractor would incur in performing the Services, Metro shall consider cost factors that include:~~

~~A. — The average or actual salary or wage and benefit costs for contractors and contractor employees:~~

~~(i) Who work in the business or industry most closely involved in performing the Services; and~~

~~(ii) Who would be necessary and directly involved in performing the Services or who would inspect, supervise or monitor the performance of the Services.~~

~~B. The material costs necessary to the performance of the Services, including the costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies used or consumed in the provision of the Services.~~

~~C. The miscellaneous costs related to performing the Services. These miscellaneous costs include reasonably foreseeable fluctuations in the costs listed in subsections (4)(c)(A) and (B) of this Administrative Rule over the expected duration of the Procurement.~~

~~D. Oregon Revised Statute Chapter 279B.033 (1)(b) provides that an estimate of the costs a potential Contractor would incur in performing the Services includes the costs described in subsections (4)(c)A through C of this Rule. Therefore, those costs do not constitute an exclusive list of cost information. Metro may consider other reliable information that bears on the costs a potential Contractor would incur. For example, if Metro, in the reasonably near past, received Bids or Proposals for the performance of the Services under consideration, or reasonably comparable Services, Metro may consider the pricing offered in those Bids or Proposals in making its estimate. Similarly, Metro may consider what it actually paid out under a Contract for the same or similar Services. For the purposes of these examples, the reasonably near past is limited to Contracts, Bids or Proposals entered into or received within the five years preceding the date of the cost estimate. Metro must take into account, when considering the pricing offered in previous Bids, Proposals or Contracts, adjustments to the pricing in light of measures of market price adjustments like the consumer price indexes that apply to the Services.~~

~~(4) **Decision Based on Cost Comparison.** After comparing the difference between the costs estimated for Metro to perform the Services under section (4)(b) and the estimated costs a potential Contractor would incur in performing the Services under section (4)(c), Metro may proceed with the Procurement only if Metro would incur more cost in performing the Services with the agency's own personnel and resources than it would incur in procuring the Services from a Contractor.~~

~~(5) **Exception Based on Salaries or Wages and Benefits.** If the sole reason that the costs estimated for Metro to perform the Services under section (4)(b) exceed the estimated costs a potential Contractor would incur in performing the Services under section (4)(c) is because the average or actual salary or wage and benefit costs for Contractors and their employees estimated under subsection (4)(c)A are lower than the salary or wage and benefit costs for employees of Metro under subsection (4)(b)A, then Metro may not proceed with the Procurement.~~

~~(6) **Exception Based on Lack of Metro Personnel and Resources; Reporting.** In cases in which Metro determines that it would incur less cost in providing the Services with its own personnel and resources, Metro nevertheless may proceed with the Procurement if, at the time Metro intends to conduct the Procurement, Metro determines that it lacks personnel and resources to perform the Services within the time Metro requires them. When Metro conducts a Procurement under this section, Metro must:~~

~~(a) Make and keep a Written determination that it lacks personnel and resources to perform the Services within the time Metro requires them and of the basis for Metro's decision to proceed with the Procurement.~~

~~(a) Provide to the Local Contract Review Board, each calendar quarter, copies of each Written cost analysis and Written determination.~~

47-0255 Competitive Bidding

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

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

(a) **General Information.**

- A. Notice of any pre-Offer conference as follows:
 - (i) The time, date and location of any pre-Offer conference;
 - (ii) Whether attendance at the conference will be mandatory or voluntary; and
 - (iii) A provision that provides that statements made by Metro's representatives at the conference are not binding upon Metro unless confirmed by Written Addenda.
- B. The form and instructions for submission of Bids and any other special information, e.g., whether Bids may be submitted by Electronic means (See Administrative Rule 47-0330 for required provisions of Electronic Bids);
- C. The time, date and place of Opening;
- D. The office where the Solicitation Document may be reviewed;
- E. A statement that each Bidder must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120(1);
- F. Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See Administrative Rule 46-0210(2)); and
- G. How Metro will notify Bidders of Addenda and how Metro will make Addenda available (See Administrative Rule 47-0430).

(b) **Metro's Need to Purchase.** The character of the Goods or Services Metro is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.055, Metro's description of its need to purchase must:

- A. Identify the scope of the work to be performed under the resulting Contract, if Metro awards one;
 - B. Outline the anticipated duties of the Contractor under any resulting Contract;
 - C. Establish the expectations for the Contractor's performance of any resulting Contract;
- and

METRO
PERSONAL SERVICES CONTRACTING RULES
Procurement Administrative Procedures

SUBJECT: Requirements and Procedures for the Procurement of Personal Services Contracts

PURPOSE: To establish a uniform process for the acquisition of personal services and rules related to the screening and selection of persons to perform personal services

DEPARTMENT RESPONSIBLE: Finance Department
PROCUREMENT

DEPARTMENTS AFFECTED: All Metro Departments

LEGAL CITATION/
REFERENCE: ORS 279A.055, 279A.065 and 279A.070

DATE: _____, 2017

3. Establishes that but for a substantial violation of a provision in the solicitation document or of an applicable procurement statute or administrative rule, the protesting proposer would have been included in the competitive range or in the next tier or step of competition.
- C. A proposer may appeal a decision that the proposer is not qualified under an RFQ process if the proposer can establish that it complied with all of the following conditions:
1. Submitted a responsive offer.
 2. Is deemed responsible.
 3. Establishes that but for a substantial violation of a provision in the solicitation document or of an applicable procurement statute or administrative rule, the protesting proposer would have been included in the competitive range or in the next tier or step of competition.
- D. Unless otherwise specified in the solicitation document, a proposer shall deliver its written protest to the Procurement Officer by close of business within seven (7) calendar days after the date shown on the notice of the decision that is the subject of the protest.
- E. The protest must specifically state the reason for the protest, identify how its proposal or the winning proposal was mis-scored or show how the selection process deviated from that described in the solicitation document, and identify the remedy requested.
- F. Depending upon the substance of the protest, the Procurement Officer has a number of options available in resolving the protest. The Procurement Officer may: 1) waive any procedural irregularities that had no material effect on the selection of the proposed contractor; 2) invalidate the proposed award or amend the award decision; 3) request the evaluation committee re-evaluate any proposal; 4) develop an entirely new evaluation committee and re-evaluate the proposals; or 5) cancel the solicitation and begin again to solicit new proposals. In the event the matter is returned to the evaluation committee, the Procurement Officer shall issue a notice canceling the notice of intent to award.
- G. Decisions of the Procurement Officer are final and conclude the administrative appeals process. Any further redress sought by the proposer must be pursuant to state law.

XI. EXEMPTIONS FROM COMPETITIVE PROCUREMENT REQUIREMENTS

A. Exemptions by Rule

The services listed in paragraphs 1 through 9 below are designated as Personal Service and are exempt from competitive procurement requirements set forth in these Administrative Rules.

1. Contracts for the modification by the licensor of intellectual property licensed to Metro.
2. Contracts for legal services (e.g. expert witnesses, outside legal counsel, and bond counsel), if approved by the Metro Attorney.

3. Contracts with speakers, lecturers and performing artists (whether vocal, instrumental, or visual) to provide a paid speech, lecture, or performance for an audience determined by Metro.
4. Contracts in which the rates for the services being purchased are established by federal, state, county, or other local regulatory authority where an alternate selection process has been approved in advance by the Procurement Officer.
5. Contracts for which a non-Metro funding source (e.g. a grant or contract awarded by a government agency or private foundation) identifies the contractor in the funding award or makes a funding award conditioned upon the service being performed by a specific contractor.
6. Contracts for determining any prospective or current Metro employee's ability to work or return to work.
7. Contracts for processing any claim for workers' compensation benefits.
8. Contracts for determining any reasonable accommodation that may be made to any job classification at Metro.
9. Contracts for services provided by those in the medical community including, but not limited to, doctors, physicians, psychologists, nurses, veterinarians, laboratory technicians and those with specific license or unique skill to administer treatments for the health and well-being of people or animals.

10. Contracts for 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.

B. Specific Exemptions from the Competitive Procurement Requirements:

1. Sole Source Contractor Exemption

A sole source procurement is one that awards a contract without an open competitive environment. It is a declaration that the personal services being contracted for are of such a unique nature, or the contractor possesses such a singular capability to perform the work that proceeding without competition is likely to provide a significant benefit to Metro. Contracting by this method requires complete explanation and justification of: 1) the unique nature of the services; 2) the unique qualifications of the contractor; and 3) the basis upon which it was determined that there is only one known contractor able to meet the service needs.

The Procurement Officer is authorized to approve sole source requests. However, sole source procurements greater than \$50,000 will require a public notice be posted on ORPIN for at least seven (7) calendar days prior to the award. Contractors who feel they are adversely affected by the award of the sole source procurement will have seven (7) calendar days from the issuance of the sole source notice to file a protest in accordance with Section X.D of these Administrative Rules. If a protest is received, the matter must be resolved before the Procurement Officer will review the Sole Source Request.

2. Emergency Exemption

Metro may award a contract as an emergency procurement without the use of competitive proposals if circumstances exist that (i) could not have been

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 17- 4814 FOR THE PURPOSE OF ADOPTING CONTRACTING AND PROCUREMENT ADMINISTRATIVE RULES

Date: May 31, 2017

Prepared by: Cary Stacey, x1619

BACKGROUND

A comprehensive set of administrative procurement rules including Local Contract Review Board Administrative Rules (the “LCRB Contracting Rules), Personal Services Contracting Rules, and Equity in Contracting Rules has been in effect at Metro on an interim basis since April 6, 2017. A public comment period that ran from April 7 through May 31, 2017 concluded with no comments received.

Informal feedback from staff and external stakeholders has been positive, with the Equity in Contracting rules especially well-received. An important goal of these rules was to fill gaps between current Metro policy and state law and reduce the need for staff to interpret contracting and procurement law. Procurement staff has had positive interactions with internal customers in using the rules to address issues that were formerly gray areas.

During the interim review period, staff made two substantive changes to the rules: 1) removal of LCRB Contracting Rule 47-0253, which would have required an internal cost and feasibility analysis for certain contracts; and 2) the inclusion of a new class of contracts in Section XI of the Personal Services Contract Rules (Exemptions from Competitive Procurement Requirements). The basis for removing Rule 47-0253 is that the state law requiring such a process is not applicable to Metro. The reason for including the new class exemption in the Personal Services Contracting Rules is that it mirrors the already existing special procurement category set forth in LCRB Contracting Rule 47-0288(21). These two minor changes ensure consistency within Metro’s procurement administrative rules and Oregon law.

The LCRB Contracting Rules, Personal Services Contracting Rules and Equity Contracting Rules will be posted on Metro’s website for ease of staff and stakeholder access.

ANALYSIS/INFORMATION

1. **Known Opposition:** None
2. **Legal Antecedents** Metro Code 2.04, State of Oregon Revised Statutes (ORS) Chapters 279A, 279B and 279C
3. **Anticipated Effects:** None
4. **Budget Impacts:** None

RECOMMENDED ACTIONS

Local Contract Review Board formal adoption of the LCRB Contracting Rules; Personal Services Contracting rules; and Equity in Contracting Rules.