

# Portland Public Schools Board of Education



2010-2011

# Agenda

Regular Meeting  
*August 23, 2010*

**BOARD OF EDUCATION**

Portland Public Schools  
 Regular Meeting  
**August 23, 2010**

**Board Auditorium**

Blanchard Education Service Center  
 501 North Dixon Street  
 Portland, Oregon 97227

**Note:** Those wishing to speak before the School Board should sign the citizen comment sheet prior to the start of the regular meeting. No additional speakers will be accepted after the sign-in sheet is removed, but citizens are welcome to sign up for the next meeting. While the School Board wants to hear from the public, comments must be limited to three minutes. All citizens must abide by the Board's Rules of Conduct for Board meetings.

Citizen comment related to an action item on the agenda will be heard immediately following staff presentation on that issue. Citizen comment on all other matters will be heard during the "Remaining Citizen Comment" time.

*This meeting may be taped and televised by the media.*

**AGENDA**

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|----|---|---------|
| 1. | <b><u>STUDENT TESTIMONY</u></b>   | 5:30 pm |
| 2. | <b><u>SUPERINTENDENT'S REPORT</u></b>   | 5:45 pm |
| 3. | <b><u>EXCELLENCE IN OPERATIONS AND SERVICES</u></b>   | 5:50 pm |
|    | <ul style="list-style-type: none"> <li>• Contracting and Purchasing Rules Rewrite (<i>action item</i>)</li> <li>• Amendments to Procurement Policies – First Reading (<i>information item</i>)</li> </ul> |         |
| 4. | <b><u>BUSINESS AGENDA</u></b>   | 6:30 pm |
| 5. | <b><u>OTHER BUSINESS</u></b>  | 6:35 pm |
| 6. | <b><u>CITIZEN COMMENT</u></b>   | 6:45 pm |
| 7. | <b><u>ADJOURN</u></b>   | 7:00 pm |

The next regular meeting of the Board will be held on **September 13, 2010** at 5:30 pm at the Blanchard Education Service Center.

**NOTE: The Board's agendas are focused on the five strategic operatives of the District as found in the 2005-2010 Strategic Plan: Excellence in Teaching and Learning; Excellence in Operations and Services; Strong Partnerships with Families and Community; Leadership for Results; and Continuous Learning Ethic.**

<p><b>Portland Public Schools Nondiscrimination Statement</b></p> <p>Portland Public Schools recognizes the diversity and worth of all individuals and groups and their roles in society. All individuals and groups shall be treated with fairness in all activities, programs and operations, without regard to age, color, creed, disability, marital status, national origin, race, religion, sex, or sexual orientation.</p> <p>Board of Education Policy 1.80.020-P</p>
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# PORTLAND PUBLIC SCHOOLS

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Telephone: (503) 916-3741 • FAX: (503) 916-2724

## BOARD ITEM STAFF REPORT

**TO:** Carole Smith, Superintendent  
**FROM:** Neil Sullivan, Chief Financial Officer  
**DATE:** July 15, 2010  
**RE:** Contracting Rule Rewrite Proposal and Benefits for Portland Public Schools

### STAFF REPORT AND SUPERINTENDENT RECOMMENDATION TO THE BOARD

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#### I. EXECUTIVE SUMMARY

The current contracting rules were last updated in February 2005. This revision of the rules includes legislative changes and establishes a baseline of more detailed policies that balance legal compliance, accountability and operational needs.

The approval of these proposed rules is accomplished by the adoption of the accompanying resolution and findings.

Attachments to this Report include:

1. DRAFT Resolution Adopting Proposed Contracting Rules
2. Exhibit A Proposed Contracting Rules – revision 15
3. Exhibit B Findings
4. DRAFT Hearings Notice

#### II. BACKGROUND

Government entities are authorized under statute to establish their own contracting rules or adopt the Attorney General Model Rules.

Portland Public Schools is the largest K-12 school district in the state and has a unique and extensive infrastructure and operation that benefits more from detailed and customized contracting rules. The new rule structure provides more detailed policies by type of procurement; Personal Services, Goods and Services, Architectural and Engineering Services and Public Improvements/Public Works.

The proposed contracting rules rewrite is intended to ensure legal compliance, incorporate legislative changes, address operational needs, and provide more detailed rules to provide improved balance of operational need and accountability. These proposed rules improve and tighten our standards of public contracting and the PPS processes.

In late 2008, based on need, the Director of Procurement proposed a comprehensive review and rewrite of the current contracting rules. Planning for the rewrite was accomplished during Spring 2009. The rewrite team was established in July 2009 and consisted of the following:

Director of Procurement	Dave Fajer
Assistant Director of Procurement	Elaine Holt
Miller Nash	Jeff Condit
Consultant	Franna Hathaway
Deputy Clerk	Gregory MacCrone
Senior Contracts Analyst	Nancy Edmiston

These more detailed policies are intended to be the foundation for development of comprehensive procedures during the 2010-2011 school year.

### **III. STAFF RECOMMENDATION**

Staff recommends approval of the current proposed rules as submitted.

Approval of the contracting rules in their proposed form involves the following decisions:

1. Incorporation of Ethics statement in our contracting rules (PPS-45-0300)
2. Establishing a foundation authority to utilize Cooperative Contracts that meet legal compliance (PPS-46-0400)
3. Authority to establish Flexible Services Contractor Pools (FSCP)
4. Authority for additional Class Special Procurements (PPS-47-0288) and Class Exemptions (PPS-49-0146)
5. Establishing a requirement for reporting contract activity to the Board \$25,000 - \$150,000 (PPS-45-0200)
6. Establishing a common threshold for Board contract approval at \$150,000 (PPS-45-0200)

### **IV. FISCAL IMPACT**

None

### **V. COMMUNITY OR JURISDICTION INVOLVEMENT**

None

### **VI. LINK TO CURRENT SCHOOL POLICIES (If any)**

8.50.100 – P Contracting and Purchasing Rules	Recommend Combine with 8.50.090 – P Into one Policy
8.50.090 – P Payment of Claims	Recommend Deletion and Combine with 8.50.100 – P
8.90.010 – P Contracts	Recommend Deletion and Replace with Proposed Contracting Rule PPS-46-0200
8.90.015 – P Amendments & Change Orders	Recommend Deletion and Replace with Proposed Contracting Rule PPS-45-0200
8.90.020 – P Personal Services Contracts	Recommend Deletion and Replace with Proposed Contracting Rule PPS-46-0500

**VII. BOARD COMMITTEE REVIEW**

The proposed contracting rule rewrite will be reviewed by the Finance, Audit and Operations committee on July 22, 2010, prior to submittal to the full Board.

**I have reviewed this staff report and concur with the recommendation to the Board.**



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**Carole Smith  
Superintendent  
Portland Public Schools**

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**July 16, 2010  
Date**



**PORTLAND PUBLIC SCHOOLS**

**PUBLIC CONTRACTING RULES**

Portland Public Schools Public Contracting Rules

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**PPS DIVISION 45**

**DISTRICT CONTRACTS GENERALLY**

**PPS-45-0000 Generally**

Except as expressly provided in other School Board Policies, PPS Divisions 45, 46, 47, 48, and 49 (collectively, the "Portland Public Schools Public Contracting Rules") govern all District Contracts. These Division 45 Rules address delegation of contracting authority under ORS 279A.075 and 332.075, Ethics in Contracting, and Procurement from Qualified Rehabilitation Facilities. Divisions 46, 47, 48, and 49 govern Public Contracts as defined in ORS Chapters 279A, 279B, and 279C (the Public Contracting Code). Except as otherwise expressly provided in School Board Policy or these Rules, these Division 45 Rules apply to all District Contracts, including Public Contracts as defined in the Public Contracting Code.

**PPS-45-0100 Definitions**

As used in the Public Contracting Code and Divisions 45, 46, 47, 48, and 49 of these Rules, and except as otherwise provided in School Board Policy:

(1) **"District Contract"** means all Contracts entered into by the District, including Public Contracts subject to the Public Contracting Code and Divisions 46, 47, 48, and 49, and all other Contracts or agreements entered into by the District. For the purpose of these Public Contracting Rules, "District Contract" does not include settlements of lawsuits or other claims against the District which continue to be governed by Board Policy 8.60.021-P, or the purchase, conveyance, acceptance, sale or lease of real property or an interest in real property. .

**AUTHORITY TO APPROVE AND EXECUTE DISTRICT CONTRACTS**

**PPS-45-0200 Authority to Approve District Contracts; Delegation of Authority to Superintendent**

- (1) The District is the Contracting Agency within the meaning of the Public Contracting Code.
- (2) Except as otherwise provided in these Rules, the powers and duties of the Local Contract Review Board under these Rules shall be exercised and performed by the School Board, and the powers and duties of the District under the Rules shall be exercised and performed by the Superintendent.
- (3) Except as provided in Section (4) of this Rule or as otherwise expressly authorized in these Rules, the School Board must approve all District Contracts.
- (4) Pursuant to ORS 279A.075 and 332.075(3), and except as expressly limited by other School Board Policy, the School Board delegates to the Superintendent the authority to enter into and approve payment on District Contracts in the following circumstances:
  - (a) The District Contract is within appropriations made by the School Board and is not a collective bargaining agreement or a Service Contract that includes the provision of labor performed by employees of the School District, as defined in ORS 332.075(3); and
  - (b) In any of the following circumstances:
    - (A) The total amount of the individual District Contract does not exceed \$150,000;
    - (B) The District Contract is for routine and customary expenditures, including, but not limited to, payroll, payroll taxes and benefits, utility bills, and postage;
    - (C) Advance authorization has been given by the School Board for the Superintendent to execute a particular District Contract or class of District Contracts;
    - (D) The District Contract is an Emergency Procurement;

**Portland Public Schools Public Contracting Rules**  
Division 45 – District Contracts Generally

- (E) The District Contract is a Change Order or Contract Amendment to a prior-approved Contract authorized under these Rules; or
  - (F) These Rules otherwise expressly authorize the Superintendent to approve the Contract.
- (5) The Superintendent may designate in Writing any District employee or employees to exercise all or a portion of the Superintendent's powers and duties under these Rules.
- (6) The Superintendent shall submit to the School Board at the School Board's monthly business meeting a list of all Contracts in amounts over \$25,000 and up to \$150,000 approved by the Superintendent or designees within the preceding 30-day period under the Superintendent's delegated authority in Section (4) of this Rule.

**ETHICS IN CONTRACTING**

**PPS-45-0300 Policy**

These Rules supplement and do not replace the Oregon Government Ethics Law (ORS 244.010 through ORS 244.400). These Rules are designed to accomplish the policy of ORS 244.010 that service as a public official is a public trust and that implementation of District contracting under these Rules and the Public Contracting Code should be free of undisclosed conflicts or undue influence.

**PPS-45-0305 Ethics in the Solicitation and Award of District Contracts**

District officers who participated in the process of development, selection, and Award of District Contracts must comply with the following Rules:

**(1) Definitions:**

- (a) **"Business"** means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, and any other legal entity operated for economic gain, but excluding any income producing, not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which the District officer or relative is associated only as a member or board director or in a non-remunerative capacity. If the business is privately held, the District official or relative is "associated with the business" if the Person is a director, officer, owner, or employee, or in which the Person owns or has owned stock, debt instruments, stock options, or other form of equity interest worth more than \$1,000 in the preceding calendar year. If the business is publicly held, the District official or relative is "associated with the business" if the Person is a director or officer or owns or has owned \$100,000 or more of stock, debt instruments, stock options, or other form of equity interest in the preceding calendar year. If the District official is required to file a statement of economic interest, "business" also includes a business listed as a source of income as required under ORS 244.060(3).<sup>1</sup>
- (b) **"Conflict of interest"** means any action, decision, or recommendation by a District officer in the course of participating in a Procurement under these Rules that would ("actual conflict of interest") or could ("potential conflict of interest") be to the private pecuniary benefit or detriment of the District officer, a relative of the District officer, or a business with which the District officer or relative is associated. For the purpose of this requirement:
- (c) **"District officer"** means any person who is serving the District as an elected official, appointed official, employee, or agent, whether or not the person is compensated for those services.

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<sup>1</sup> The only District officials required to file a statement of economic interest are the Superintendent and the chief financial officer.

**Portland Public Schools Public Contracting Rules**  
Division 45 – District Contracts Generally

- (d) **"Gift"** means something of economic value given to a public official or the public official's relative without an exchange of valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, which is not extended to others who are not public officials or the relatives of public officials on the same terms and conditions. "Gift" also includes something of economic value given to a public official or the public official's relative for valuable consideration less than that required from others who are not public officials.
- (e) **"Relative"** means:
  - (A) The District officer's spouse or domestic partner;
  - (B) Children of the District officer, spouse, or domestic partner;
  - (C) Siblings, spouses of siblings, or parents of the public official, spouse, or domestic partner;
  - (D) Any individual for whom the District officer has a support obligation;
  - (E) Any individual for whom the District officer provides benefits related to the public official's public employment or from whom the District officer receives benefits; and
  - (F) Any person who resides with the public official.

**(2) Disclosure of Conflict of Interest Required.** Any District official participating in a District Procurement, whether for Goods and Services, Personal Services, Public Works, Public Improvements, or any other District Contract shall disclose actual or potential conflicts of interest.

- (a) Appointed District Officials. An appointed District official must disclose actual or potential conflicts of interest in Writing to the District official's appointing authority (the person who has hire-and-fire authority over the official). This Writing must disclose the nature of the conflict and request the appointing authority to dispose of the matter. The appointing authority shall respond in Writing by designating an alternate to dispose of the matter or directing the District officer to dispose of the matter as directed by the appointing authority.
- (b) Elected District Official or Officials Who Serve on Advisory Boards or Commissions. Such District officials shall publicly announce an actual or potential conflict of interest prior to taking any action on the matter giving rise to the conflict. If the conflict is an actual conflict of interest, the public official must refrain from participating in the decision or discussion of the issue. If the conflict is only a potential conflict of interest, the public official may participate in the debate and decision following disclosure of the potential conflict.

**(3) Gifts.** District officers are prohibited from soliciting or receiving gifts with an aggregate value of in excess of \$50 in a calendar year from any single source that could reasonably be known to have a legislative or administrative interest in any matter subject to the decision or vote of the District official. For the purpose of this Section, a District official is considered a decision-maker in the Procurement process if he or she makes decisions or recommendations in regard to the drafting of the Procurement, the solicitation process, the opening, review, or scoring of the solicitation, or a recommendation or decision to Award, correct, or reject a solicitation, or response to or resolution of a protest.

**(4) Use of Office for Personal Gain Prohibited.** District officers, employees, and agents are prohibited from using their official position for personal gain.

**(5) Use of Confidential District Information for Gain Prohibited.** District officers, employees, and agents are prohibited from using confidential information gained in the course of the screening and selection procedures for personal financial gain.

**Portland Public Schools Public Contracting Rules**  
Division 45 – District Contracts Generally

**PROCUREMENT FROM QUALIFIED REHABILITATION FACILITIES ("QRF")**

**PPS-45-0405 QRF Definitions**

- (1) "QRF" means an activity center or rehabilitation facility, certified as a community rehabilitation program or as a vocational service provider through the Oregon Department of Human Services, that the State Procurement Office has determined to be qualified under OAR 125-055-0015.
- (2) "QRF Procurement List" means a listing of those nonprofit agencies for disabled individuals who currently are qualified, under OAR 125-055-0015, to participate in the program created by ORS 279.835 through 279.850 and includes, as required by ORS 279.850(1), a list of the products and services offered by QRFs and determined by the State Procurement Office, under OAR 125-055-0020, to be suitable for purchase by Contracting Agencies such as the District.

**PPS-45-0410 Required Procurement of QRF Products or Services**

- (1) As required by ORS 279.850(1), if the District intends to procure a Product or Service that is listed on the QRF Procurement List, the District must procure that Product or Service, at the Price determined by the State of Oregon Procurement Office, from a QRF if the Product or Service is of Specifications appropriate to the District's Procurement needs and is available within the time required by the District.
- (2) The most current QRF Procurement List may be reviewed at the State of Oregon Procurement Office Web site at <http://www.oregon.gov/DAS/SSD/SPO/qrf-menu.shtml>.
- (3) The Public Contracting Code does not apply to QRF Procurements pursuant to ORS 279A.025(4). QRF Procurements are therefore exempt from Divisions 46, 47, 48, and 49 of these Rules.

**PPS-45-0500 Contract Extensions**

Except as otherwise provided in these Rules:

- (1) If it appears that a District Contract will expire according to its terms before the Work provided under the Contract will be completed, the Superintendent may extend the Contract for such period of time necessary to complete the Work.
- (2) If a District Contract inadvertently expires according to its terms before the Work provided under the Contract is completed, the Superintendent may extend the Contract for such period of time necessary to complete the Work. The extension shall be deemed to begin upon the expiration of the prior Contract and end upon the termination date set forth in the extension.
- (3) An extension may not be used to amend or change the scope of the Contract or increase the price of the Contract, except as otherwise may be allowed in these Rules.

**END OF DIVISION 45**

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**PPS DIVISION 46**

**PUBLIC CONTRACTING RULES APPLICABLE TO ALL PUBLIC CONTRACTS  
AND PERSONAL SERVICES CONTRACTS**

**PPS-46-0000 Generally**

These Division 46 Rules are intended to implement the provisions of ORS 279A applicable to all public Procurements. Division 46 also addresses delegation of contracting authority under ORS 279A.075 and 332.075, Contracts for Personal Services, and ethics in District Contracting.

**PPS-46-0100 Application; Federal Law Supremacy**

(1) Pursuant to ORS 279A.065(5), the District hereby adopts its own Public Contracting Rules ("Rules" or "a Rule"). Pursuant to ORS 279A.065(1), the Attorney General's Model Rules do not apply to the District. Pursuant to ORS 279A.065(5), the District adopts these Rules. These Rules consist of the following three Divisions:

- (a) Division 46 applies to all Public Contracts and implements ORS 279A.
- (b) Division 47 applies only to Public Contracts for Goods and Services and implements ORS 279B.
- (c) Division 49 applies only to Public Contracts for Public Improvements and implements ORS 279C.

(2) Most of these Rules are adapted from the Attorney General's Model Rules and the numbering generally tracks the numbering in OAR Chapter 137 Divisions 46, 47, and 49. Except where these Rules differ from the Model Rules, the District intends its Rules to be interpreted consistently with the Model Rules.

(3) These Rules apply to Public Contracts first advertised on or after July 1, 2010.

(4) The District shall review the Rules each time the Attorney General modifies the Model Rules to ensure compliance with statutory changes. The District may adopt other Rules, and modify as necessary, to carry out the provisions of the Public Contracting Code pursuant to ORS 279A.070.

(5) Except as otherwise expressly provided in ORS 279C.800 through 279C.870, and notwithstanding ORS 279A, 279B, and 279C.005 through 279C.670, applicable federal statutes and rules govern when federal funds are involved and the federal statutes or regulations conflict with any provision of ORS 279A, 279B, and 279C.005 through 279C.670 or these Rules, or require additional conditions in Public Contracts not authorized by ORS 279A, 279B, and 279C.005 through 279C.670 or these Rules.

**PPS-46-0110 Definitions**

As used in the Public Contracting Code and Divisions 45, 46, 47, 48, and 49 of these Rules, unless the context or a specifically applicable definition requires otherwise:

(1) **"Addendum"** or **"Addenda"** means an addition or deletion to, a material change in, or general interest explanation of a Solicitation Document.

(2) **"Administering Contracting Agency"** means a governmental body in this state or in another jurisdiction that solicits and establishes the Original Contract for Procurement of Goods, Services, or Public Improvements in a Cooperative Procurement. "Administering Contracting Agency" includes, for Interstate Cooperative Procurements, any governmental body, domestic or foreign, that is authorized under the governmental body's laws, rules, or regulations, to enter into Public Contracts.

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- (3) **"Award"** means, as the context requires, either the act or occurrence of the District's identification of the Person with whom the District will enter into a Contract following the resolution of any protest of the District's selection of that Person and the completion of all Contract negotiations.
- (4) **"Bid"** means a Written response to an Invitation to Bid.
- (5) **"Bidder"** means a Person who submits a Bid in response to an Invitation to Bid.
- (6) **"Brand Name or Equal Specification"** is defined in ORS 279B.200(1) and means a Specification that uses one or more manufacturers' names, makes, catalog numbers, or similar identifying characteristics to describe the standard of quality, performance, functionality, or other characteristics needed to meet the District's requirements, and that authorizes Offerors to offer Goods and Services that are equivalent or superior to those named or described in the Specification.
- (7) **"Brand Name Specification"** is defined in ORS 279B.200(2) and means a Specification limited to one or more products, Brand Names, makes, manufacturers' names, catalog numbers, or similar identifying characteristics.
- (8) **"Class Special Procurement"** is defined in ORS 279B.085 and means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065, and 279B.070, and is for the purpose of entering into a series of Contracts over time or for multiple Projects for the acquisition of a specified class of Goods or Services.
- (9) **"Closing"** means the date and time announced in a Solicitation Document as the deadline for submitting Offers.
- (10) **"Code"** or **"Public Contracting Code"** is defined in ORS 279A.010 and means ORS Chapters 279A, 279B, and 279C.
- (11) **"Competitive Sealed Bidding"** is a Procurement process where a Contract is Awarded based on price pursuant to the lowest Responsive and Responsible Bidder.
- (12) **"Competitive Range"** means the Proposers with whom the District will conduct discussions or negotiations if the District intends to conduct discussions or negotiations in accordance with PPS-47-0261 or PPS-49-0650. The size of the Competitive Range must be stated in the Solicitation Document.
- (13) **"Contract Price"** means, as the context requires, the maximum monetary obligation that the District either will or may incur under a Contract, including bonuses, incentives, and contingency amounts, if the Contractor fully performs under the Contract.
- (14) **"Contract Review Board"** or **"Local Contract Review Board"** means the District Board of Directors acting as the Local Contract Review Board for the District under ORS 279A.060.
- (15) **"Contracting Agency"** is defined in ORS 279A.010(1)(b) and means a Public Body authorized by law to conduct a Procurement. "Contracting Agency" includes, but is not limited to, the Director of the Oregon Department of Administrative Services and any Person authorized by a Contracting Agency to conduct a Procurement on the Contracting Agency's behalf. "Contracting Agency" does not include the judicial department or the legislative department.
- (16) **"Contractor"** means the Person with whom the District enters into a Contract and is interchangeable with "Consultant" and "Provider."
- (17) **"Cooperative Procurement"** is defined in ORS 279A.200 and means a Procurement conducted by an Administering Contracting Agency on behalf of one or more governmental bodies. "Cooperative Procurement" includes, but is not limited to, multi-party Contracts and Price Agreements. "Cooperative Procurement" does not include an agreement formed among only governmental bodies under



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ORS Chapter 190 or other legal authority for establishing agreements between or among governmental bodies or agencies or tribal governing bodies or agencies.

**(18) "Cooperative Procurement Group"** means a group of Authorized Contracting Agencies or other governmental body, domestic or foreign, joined through an intergovernmental agreement for the purposes of facilitating Cooperative Procurements pursuant to ORS 279A.200.

**(19) "Days"** means calendar Days.

**(20) "DBE Disqualification"** means a disqualification, suspension, or debarment pursuant to ORS 200.065, ORS 200.075, ORS 279A.110, or PPS-46-0210.

**(21) "District"** means School District No. 1J, Multnomah County, Oregon, doing business as Portland Public Schools.

**(22) "District Price Agreement"** means a Price Agreement issued by the District. Such Agreements may result from a Cooperative Procurement.

**(23) "Designated Procurement Officer"** means the individual designated and authorized by the Superintendent to perform certain Procurement functions described in these Rules.

**(24) "Descriptive Literature"** means the Offeror's materials submitted to provide information concerning the Goods and Services available in response to a solicitation.

**(25) "Electronic Advertisement"** means the District's Solicitation Documents or Request for Quotes, Request for Information, or other document inviting participation in the District's Procurements available over the Internet via (a) the World Wide Web; (b) ORPIN, or (c) an Electronic Procurement System other than ORPIN.

**(26) "Electronic Offer"** means a response to the District's Solicitation Documents or Request for Quotes submitted to the District via (a) the World Wide Web or some other Internet protocol, or (b) an Electronic Procurement System utilized by the District.

**(27) "Electronic Procurement System"** means ORPIN or other system constituting an information system that Persons may access through the Internet, using HTTP (i.e., the World Wide Web), Telnet, or some other Internet protocol, or that Persons may otherwise remotely access using a computer. An Electronic Procurement System enables the District to post Electronic Advertisements, receive Electronic Offers, and conduct any activities related to Procurement.

**(28) "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.

**(29) "Emergency Procurement"** means a sourcing method pursuant to ORS 279B.080.

**(30) "Energy Savings Performance Contract"** means a Public Contract between the District and a Qualified Energy Service Company for the identification, evaluation, recommendation, design, and construction of Energy Conservation Measures, including a Design-Build Contract, that guarantee energy savings or performance.

**(31) "Engineer"** is defined in ORS 279C.100 and means a Person who is registered and holds a valid certificate in the practice of engineering in the State of Oregon, as provided under ORS 672.002 through 672.325, and includes all terms listed in ORS 672.002(2).

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- (32) **"Facsimile"** means an exact reproduction or copy of graphic or verbal material converted into electrical signals that are transmitted via telephone to produce a paper copy of the material on the receiving fax machine.
- (33) **"Findings"** is defined in ORS 279C.330 and means the justification for an exemption from Competitive Bidding for a Contract for a Public Improvement that includes, but is not limited to, information regarding:
- (a) Operational, budget, and financial data;
  - (b) Public benefits;
  - (c) Value engineering;
  - (d) Specialized expertise required;
  - (e) Public safety;
  - (f) Market conditions;
  - (g) Technical complexity; and
  - (h) Funding sources.
- (34) **"Flexible Services Contractor Pool"** or **"FSCP"** is a list of qualified contractors determined pursuant to a Request for Qualifications or other method of competitive solicitation with whom the Superintendent may enter into a contract as provided for in these Rules.
- (35) **"Fringe Benefits"** is defined in ORS 279C.800 and means the amount of:
- (a) The rate of contribution irrevocably made by a Contractor or subcontractor to a trustee or to a third person under a plan, fund, or program; and
  - (b) The rate of costs to the Contractor or subcontractor that may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program that is committed in Writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide Fringe Benefits, but only when the Contractor or subcontractor is not required by other federal, state, or local law to provide any of these benefits.
- (36) **"Good Faith Dispute"** is defined in ORS 279C.580 and means a documented dispute concerning:
- (a) Unsatisfactory job progress;
  - (b) Defective Work not remedied;
  - (c) Third-party claims filed or reasonable evidence that claims will be filed;
  - (d) Failure to make timely payments for labor, equipment, and materials;
  - (e) Damage to the prime Contractor or subcontractor; or
  - (f) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.
- (37) **"Goods"** is defined in ORS 279A.010(1)(i) and means supplies, equipment, materials, personal property, including any tangible, intangible, and intellectual property and rights and licenses in relation thereto, and combinations of any of the items identified herein.

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**(38) "Goods and Services" or "Goods or Services"** is defined in ORS 279A.010(1)(j) and means any combinations of any of the items identified in the definitions of "Goods" and "Services."

**(39) "Grant"** is defined in ORS 279A.010(k) and means:

- (a)** An agreement under which the District receives money, property, or other assistance including, but not limited to, federal assistance that is characterized as a Grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities, or other assets, from a grantor for the purpose of supporting or stimulating a program or activity of the District and in which no substantial involvement by the grantor is anticipated in the program or activity other than involvement associated with monitoring compliance with the Grant conditions; or
- (b)** An agreement under which the District provides money, property, or other assistance including, but not limited to, federal assistance that is characterized as a Grant by federal laws or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities, or other assets, to a recipient for the purpose of supporting or stimulating a program or activity of the recipient, and in which no substantial involvement by the District is anticipated in the program or activity other than involvement associated with monitoring compliance with the Grant conditions.
- (c)** "Grant" does not include a Public Contract:
  - (A)** For a Public Improvement or Public Works, as defined in ORS 279C.800, or
  - (B)** For Emergency Work, minor alterations, or ordinary repair or maintenance necessary to preserve a Public Improvement, when under the Public Contract:
    - (i)** The District pays moneys that the District has received under a Grant, and
    - (ii)** Such payment is made in consideration for Contract performance intended to realize or to support the realization of the purposes for which Grant funds were provided to the District.

**(40) "Interstate Cooperative Procurement"** is defined in ORS 279A.200 and means a Permissive Cooperative Procurement in which the Administering Contracting Agency is a governmental body, domestic or foreign, that is authorized under the governmental body's laws, rules, or regulations to enter into Public Contracts and in which one or more of the participating governmental bodies are located outside of their state.

**(41) "Invitation to Bid" or "ITB"** means the Solicitation Document issued to invite Offers from prospective Contractors pursuant to either ORS 279B.055 or 279C.335.

**(42) "Joint Cooperative Procurement"** is defined in ORS 279A.200 and means a Cooperative Procurement that identifies:

- (a)** The participating governmental bodies or the Cooperative Procurement Group;
- (b)** The Contract requirements or estimated Contract requirements for Price Agreements.

**(43) "Land Surveyor"** is defined in ORS 279C.100(4) and means a Person who is registered and holds a valid certificate in the practice of land surveying in the State of Oregon, as provided under ORS 672.002 through 672.325, and includes all terms listed in ORS 672.002(5).

**(44) "Life-Cycle Cost"** means the total cost to the District of acquiring, operating, supporting, and (if applicable) disposing of the items being acquired.

**(45) "Life-Cycle Costing "** means the various quantifiable cost factors, in addition to the acquisition cost of Goods and Services (also referred to in this Rule as "product, equipment, and service, separately or in any combination thereof").

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- (46) **"Locality"** is defined in ORS 279C.800 and means the following district in which the Public Works, or the major portion thereof, is to be performed: District 2, composed of Clackamas, Multnomah, and Washington Counties.
- (47) **"Lowest Responsible Bidder"** means the lowest Bidder who:
- (a) Has substantially complied with all prescribed Public Contracting procedures and requirements;
  - (b) Has met the standards of responsibility set forth in ORS 279B.110 or 279C.375;
  - (c) Has not been debarred or disqualified by the District under ORS 279B.130 or 279C.440; and
  - (d) Is not on the list created by the Oregon Construction Contractors Board under ORS 701.227, if the advertised Contract is a Public Improvement Contract.
- (48) **"Model Rules"** means the Attorney General's Model Rules of procedure for Public Contracting as required under ORS 279A.065.
- (49) **"Nonprofit Procurement Organization"** means a local, state, or national organization formed as a tax-exempt entity under the United States Internal Revenue Code for the purpose of conducting large-scale or volume-competitive Procurements as an agent for its governmental and/or nonprofit members in order to obtain the most favorable pricing or terms.
- (50) **"Nonresident Bidder"** is defined in ORS 279A.120 and means a Bidder who is not a resident Bidder.
- (51) **"OAR"** means the Oregon Administrative Rules.
- (52) **"Offer"** means a Written Offer to provide Goods or Services in response to a Solicitation Document.
- (53) **"Offeror"** means a Person who submits an Offer.
- (54) **"Opening"** means the date, time, and place announced in the Solicitation Document for the public opening of Offers.
- (55) **"ORPIN"** means the on-line electronic Oregon Procurement Information Network administered by the State Procurement Office.
- (56) **"ORS"** means the Oregon Revised Statutes.
- (57) **"Original Contract"** is defined in ORS 279A.200(f) and means the initial Contract or Price Agreement solicited and Awarded during a Cooperative Procurement by an Administering Contracting Agency.
- (58) **"Permissive Cooperative Procurement"** is defined in ORS 279A.200 and means a Cooperative Procurement in which the Purchasing Contracting Agencies are not identified.
- (59) **"Person"** means any of the following with legal capacity to enter into a Contract: individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity. "Person" is also defined in ORS 279C.500 and 279C.815 and means any employer, labor organization, or any official representative of an employee or employer association.
- (60) **"Personal Services"** means the Services or type of Services performed under a Personal Services Contract as defined in PPS-46-0500.
- (61) **"Personal Services Contract" or "PSC"** is a Contract primarily for Personal Services.
- (62) **"Prevailing Rate of Wage"** is defined in ORS 279C.800 and means the rate of hourly wage, including all Fringe Benefits, paid in the Locality to the majority of workers employed on projects of similar

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character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries.

**(63) "Price Agreement"** means a Public Contract for the Procurement of Goods and Services at a set price with:

- (a)** No guarantee of a minimum or maximum purchase; or
- (b)** An initial order or minimum purchase combined with a continuing Contractor obligation to provide Goods and Services in which the District does not guarantee a minimum or maximum additional purchase.

**(64) "Procurement"** is defined in ORS 279A.010(1)(w) and means the act of purchasing, leasing, renting, or otherwise acquiring Goods or Services. "Procurement" includes each function and procedure undertaken or required to be undertaken by a Contracting Agency to enter into a Public Contract, administer a Public Contract, and obtain the performance of a Public Contract under the Public Contracting Code.

**(65) "Procurement Description"** is defined in ORS 279B.005(1)(b) and means the words used in a solicitation to describe the Goods or Services to be procured. "Procurement Description" includes Specifications attached to or made a part of the solicitation.

**(66) "Procurement File"** is a file containing documents relating to a specific Procurement or Procurements which is maintained in the District's Procurement Division or in another District department or division that is responsible for the Procurement.

**(67) "Product Sample"** means the exact Goods or a representative portion of the Goods offered in an Offer, or the Goods requested in the Solicitation Documents as a sample.

**(68) "Proposal"** means a Written response to a Request for Proposals.

**(69) "Proposer"** means a Person who submits a Proposal in response to a Request for Proposals.

**(70) "Public Agency"** is defined in ORS 279C.800(5) and means the State of Oregon or any political subdivision thereof, or any county, city, district, authority, public corporation, or entity, and any instrumentality thereof organized and existing under law or charter.

**(71) "Public Body"** is defined in ORS 279A.010(1)(y) and has the meaning given that term in ORS 174.109.

**(72) "Public Contract" or "Contract"** means, except where these Rules otherwise expressly indicate, a "Public Contract" as defined in ORS 279A.010 and means a sale or other disposal, or a purchase, lease, rental, or other acquisition by the District of personal property, Services, including Personal Services, Public Improvements, Public Works, minor alterations, or ordinary repair or maintenance necessary to preserve a Public Improvement. "Public Contract" does not include grants.

**(73) "Public Contracting"** is defined in ORS 279A.010(1)(aa) and means Procurement activities described in the Public Contracting Code relating to obtaining, modifying, or administering Public Contracts or Price Agreements.

**(74) "Public Improvement"** is defined in ORS 279A.010 and means a Project for construction, reconstruction, or major renovation on real property by or for the District. "Public Improvement" does not include:

- (a)** Projects for which no funds of the District are directly or indirectly used, except for participation that is incidental or related primarily to Project design or inspection; or
- (b)** Emergency Work, minor alteration, or ordinary repair or maintenance necessary to preserve a Public Improvement.

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**(75) "Public Improvement Contract"** means a Public Contract for a Public Improvement. "Public Improvement Contract" does not include a Public Contract for Emergency Work, minor alterations, or ordinary repair or maintenance necessary to preserve a Public Improvement.

**(76) (a) "Public Works"** is defined in ORS 279C.800 and includes, but is not limited to:

- (A)** Roads, highways, buildings, structures, and improvements of all types, the construction, reconstruction, major renovation, or painting of which is carried on or contracted for by any Public Agency to serve the public interest;
- (A)** A Project for the construction, reconstruction, major renovation, or painting of a privately owned road, highway, building, or structure of any type that uses funds of a private entity and \$750,000 or more of funds of a Public Agency; or
- (B)** A Project for the construction of a privately owned road, highway, building, structure, or improvement of any type that uses funds of a private entity and in which 25% or more of the square footage of the completed Project will be occupied or used by a Public Agency.

**(b)** "Public Works" does not include:

- (A)** The reconstruction or renovation of privately owned real property that is leased by a Public Agency; or
- (B)** The renovation by a private nonprofit entity of publicly owned real property that is more than 75 years old if:
  - (i)** The real property is leased to the private nonprofit entity for more than 25 years;
  - (ii)** Funds of a Public Agency used in the renovation do not exceed 15% of the total cost of the renovation; and
  - (iii)** Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 13, 2007.

**(77) "Purchase Order"** means the District's document to formalize a purchase transaction with a Provider. Acceptance of a Purchase Order constitutes a Public Contract. The District's use of a Purchase Order must comply with the Public Contracting Code and these Rules.

**(78) "Purchasing Contracting Agency"** is defined in ORS 279A.200(1)(h) and means a governmental body that procures Goods, Services, or Public Improvements from a Contractor based on the Original Contract established by an Administering Contracting Agency.

**(79) "QBS"** means the qualifications-based selection process mandated by ORS 279C.110 for Architectural, Engineering and Land Surveying Services and Related Services Contracts under certain circumstances.

**(80) "Recycled Material"** means any material that would otherwise be a useless, unwanted, or discarded material except for the fact that the material still has useful physical or chemical properties after serving a specific purpose and can, therefore, be reused or recycled.

**(81) "Recycled Product"** is defined in ORS 279A.010(1)(ii) and means all materials, Goods, and supplies, not less than 50% of the total weight of which consists of Secondary and Post-consumer Waste, with not less than 10% of its total weight consisting of Post-consumer Waste. "Recycled Product" includes any product that could have been disposed of as solid waste, having completed its life cycle as a consumer item, but otherwise is refurbished for reuse without substantial alteration of the product's form.

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- (82) **"Request for Proposals"** or **"RFP"** is defined in ORS 279B.005 and means all documents, either attached or incorporated by reference, and any Addenda thereto, used for soliciting Proposals in accordance with either ORS 279B.060 or 279C.405 and related rules.
- (83) **"Request for Qualifications"** or **"RFQ"** means a Written document issued by the District to which Contractors respond in Writing by describing their experience with and qualifications for the Work described in the Solicitation Documents.
- (84) **"Request for Quotes"** means a Written or oral request for prices, rates, or other conditions under which a potential Contractor would provide Goods or perform Services, Personal Services, or Public Improvements described in the request.
- (85) **"Responsible"** means meeting the standards set forth in OAR 137-047-0640 or 137-049-0390(2), and not debarred or disqualified by the Contracting Agency under OAR 137-047-0575 or 137-049-0370.
- (86) **"Resident Bidder"** is defined in ORS 279A.120 and means a Bidder that has paid unemployment taxes or income taxes in this state during the 12 calendar months immediately preceding submission of the Bid, has a business address in this state, and has stated in the Bid whether the Bidder is a "resident Bidder."
- (87) **"Responsible Offeror"**(also **"Responsible Bidder"** or **"Responsible Proposer"** as applicable) means a Person who has submitted an Offer and met the standards set forth in PPS-47-0500 or PPS-49-0390(2), and who has not been debarred or disqualified by the District under PPS-47-0575 or PPS-49-0370, respectively. When used alone, "Responsible" means meeting the aforementioned standards.
- (88) **"Responsive"** means having the characteristics of substantial completion in all material respects with applicable solicitation requirements.
- (89) **"Responsive Offer"** (also, **"Responsive Bid"** or **"Responsive Proposal,"** as applicable) means an Offer that substantially complies in all material respects with applicable solicitation requirements.
- (90) **"Retainage"** is defined in ORS 279C.550 and means the difference between the amount earned by a Contractor on a Public Contract and the amount paid on the Contract by the District.
- (91) **"School Board"** means the District Board of Directors acting as the governing body of the District pursuant to ORS Chapter 332.
- (92) **"Secondary Waste Content"** or **"Secondary Waste Materials"** is defined in ORS 279A.010(1)(jj) and means fragments of products or finished products of a manufacturing process that has converted a virgin resource into a commodity of real economic value. "Secondary Waste Materials" includes Post-consumer Waste. "Secondary Waste Materials" does not include excess virgin resources of the manufacturing process. For paper, "Secondary Waste Materials" does not include fibrous waste generated during the manufacturing process, such as fibers recovered from waste water or trimmings of paper machine rolls, mill broke, wood slabs, chips, sawdust, or other wood residue from a manufacturing process.
- (93) **"Services"** is defined in ORS 279A.010(1) and means Services other than Personal Services designated under PPS-46-0500 and ORS 279A.055.
- (94) **"Signature"** means any Written mark, word, or symbol that is made or adopted by a Person with the intent to be bound and that is attached or logically associated with a Written document to which the Person intends to be bound.
- (95) **"Signed"** means, as the context requires, that a Written document contains a Signature or that the act of making a Signature has occurred.
- (96) **"Solicitation Document"** means an Invitation to Bid, a Request for Proposals, Request for Quotes, or other similar document issued to invite Offers from prospective Contractors pursuant to ORS Chapters 279B or 279C. The following are not "Solicitation Documents" if such documents and processes do not invite

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Offers from prospective Contractors: a Request for Qualifications, a prequalification of Bidders, a request for information, or a request for product prequalification.

**(97) "Specifications"** means, with respect to Goods or Services, any description of the physical or functional characteristics of, or of the nature of, Goods and Services to be procured by the District, including any requirement for inspecting, testing, or preparing Goods or Services for delivery and the quantities or qualities of materials to be furnished under the Contract. See ORS 279B.200(3). With respect to Public Improvements, "Specifications" generally means any description of the result to be obtained and may, on occasion, describe the method and manner of doing the Work to be performed.

**(98) "Superintendent"** means the District Superintendent or the Superintendent's designee.

**(99) "Work"** means the furnishing of all materials, equipment, labor, and incidentals necessary to successfully complete any individual item or the entire Contract, and successful completion of all duties and obligations imposed by the Contract.

**(100) "Writing"** means letters, characters, and symbols inscribed on paper by hand, print, type, or other method of impression, intended to represent or convey particular ideas or meanings. "Writing," when required or permitted by law, or required or permitted in a Solicitation Document, also means letters, characters, and symbols made in electronic form and intended to represent or convey particular ideas or meanings.

**(101) "Written"** means existing in Writing.

**PPS-46-0120 Policy**

The District shall conduct Public Contracting to further the policies set forth in ORS 279A.015, elsewhere in the Code, and in these Rules.

**PPS-46-0130 Application of the Code and Rules; Exceptions**

**(1)** Except as set forth in this Section, the District must exercise all rights, powers, and authority related to Public Contracting in accordance with the Public Contracting Code and these Rules.

**(2)** The District may make a Procurement without Competitive Sealed Bidding, Competitive Sealed Proposals, or other competition required under ORS 279B.050 through ORS 279B.085 or PPS-47-0255 through PPS-47-0670, provided that the Procurement is made under 10 U.S.C. 381, the Electronic Government Act of 2002 (P.L. 107-347), or other federal law that is, as determined by the Local Contract Review Board, similar to 10 U.S.C. 381 or section 211 of the Electronic Government Act of 2002, in effectuating or promoting transfers of property to Contracting Agencies.

**(3)** Except as expressly provided herein, these Rules do not apply to the Contracts or classes of Contracts described in ORS 279A.025(2), including the following District Contracts:

**(a)** Contracts between the District and:

**(A)** Another Contracting Agency;

**(B)** The Oregon Health and Science University;

**(C)** The Oregon State Bar;

**(D)** A governmental body of another state;

**(E)** The federal government;

**(F)** An American Indian tribe or an agency of an American Indian tribe;

**(G)** A nation, or a governmental body in a nation, other than the United States; or



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- (H)** An intergovernmental entity formed between or among:
    - (i)** Governmental bodies of this or another state;
    - (ii)** The federal government;
    - (iii)** An American Indian tribe or an agency of an American Indian tribe;
    - (iv)** A nation other than the United States; or
    - (v)** A governmental body in a nation other than the United States.
  - (b)** Agreements authorized by ORS Chapter 190 or by a statute, charter provision, ordinance, or other authority for establishing agreements between or among governmental bodies or agencies or tribal governing bodies or agencies;
  - (c)** Insurance and Service Contracts as provided for under ORS 414.115, 414.125, 414.135, and 414.145 for purposes of source selection;
  - (d)** Grants;
  - (e)** Contracts for professional or expert witnesses or Consultants to provide Services or testimony relating to existing or potential litigation or legal matters in which a Public Body is or may become interested;
  - (f)** Acquisitions or disposals of real property or interest in real property;
  - (g)** Sole-source expenditures when rates are set by law or ordinance for purposes of source selection;
  - (h)** Contracts for the Procurement or distribution of textbooks;
  - (i)** Procurements by the District from an Oregon Corrections Enterprises program;
  - (j)** Contracts, agreements, or other documents entered into, issued, or established in connection with:
    - (A)** The issuance of obligations, as defined in ORS 286A.100 and 287A.310, of a Public Body;
    - (B)** The making of program loans and similar extensions or advances of funds, aid, or assistance by a Public Body to a public or private body for the purpose of carrying out, promoting, or sustaining activities or programs authorized by law; or
    - (C)** The investment of funds by a Public Body as authorized by law, and other financial transactions of a Public Body that by their character cannot practically be established under the competitive Contractor selection procedures of ORS 279B.050 through 279B.085;
  - (k)** Contracts for employee benefit plans as provided in ORS 243.105 (1), 243.125 (4), 243.221, 243.275, 243.291, 243.303, and 243.565;
  - (l)** Contracts for employee benefit plans as provided in ORS 243.860 through 243.886; or
  - (m)** Any other Public Contracting of a Public Body specifically exempted from the Code by another provision of law.
- (4)** Except as expressly provided herein, these Rules do not apply to Contracts entered into pursuant to ORS 279.835 through 279.855.

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**MINORITIES, WOMEN AND EMERGING SMALL BUSINESSES**

**PPS-46-0210 Subcontracting to and Contracting with Emerging Small Businesses; DBE Disqualification**

- (1) As set forth in ORS 279A.105, the District may require a Contractor to subcontract some part of a Contract to, or to obtain materials to be used in performing the Contract from:
- (a) A business enterprise that is certified under ORS 200.055 as an emerging small business; or
  - (b) A business enterprise that is:
    - (A) Certified under ORS 200.055 as an emerging small business; and
    - (B) Is located in or draws its workforce from economically distressed areas, as designated by the Oregon Economic and Community Development District.
- (2) A subcontractor certified under ORS 200.055 as an emerging small business is located in or draws its workforce from economically distressed areas if:
- (a) Its principal place of business is located in an area designated as economically distressed by the Oregon Economic and Community Development District pursuant to administrative rules adopted by the Oregon Economic and Community Development District; or
  - (b) The Contractor certifies in Writing to the District that a substantial number of the subcontractor's employees, or subcontractors that will manufacture the Goods or complete the Services under the Contract, reside in an area designated as economically distressed by the Oregon Economic and Community Development District pursuant to administrative rules adopted by the Oregon Economic and Community Development District. For the purposes of making the foregoing determination, the District must determine in each particular instance what proportion of a Contractor's or subcontractor's employees or subcontractors constitutes a substantial number.
- (3) The District must include in each Solicitation Document a requirement that Offerors certify in their Offers, in a form prescribed by the District, that the Offeror has not and will not discriminate against a subcontractor in the Awarding of a subcontract because the subcontractor is a minority, women or emerging small business enterprise certified under ORS 200.055, or against a business enterprise that is owned or controlled by or that employs a disabled veteran as defined in ORS 408.225.
- (4) **DBE Disqualification.**
- (a) The District may disqualify a Person from consideration of Award of the District's Contracts under ORS 200.065(5), or suspend a Person's right to Bid on or participate in any Public Contract pursuant to ORS 200.075(1), after providing the Person with Notice and a reasonable opportunity to be heard in accordance with Sections (4)(d) and (e) of this Rule.
  - (b) As provided in ORS 200.065 and 200.075, the District may disqualify or suspend a Person's right to submit an Offer or to participate in a Contract (e.g., act as a subcontractor) as follows:
    - (A) For a DBE Disqualification under ORS 200.065, the District may disqualify a Person upon finding that the Person engaged in any of the activities made unlawful by ORS 200.065(1) or (2), or if the Person has been disqualified by another district pursuant to ORS 200.065.
    - (B) For a DBE Disqualification under ORS 200.075, the District may suspend a Person upon finding that the Person engaged in any of the acts prohibited by ORS 200.075(2)(a) through (c).
  - (c) The District may disqualify or suspend a Person's right to submit Offers or participate in Public Contracts only for the length of time permitted by ORS 200.065 or ORS 200.075, as applicable.

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- (d) The District must notify the Person in Writing of a proposed DBE Disqualification pursuant to this Section, served personally or by registered or certified mail, return receipt requested. This Notice must:
  - (A) State that the District intends to disqualify or suspend the Person;
  - (B) Set forth the reasons for the DBE Disqualification;
  - (C) Include a statement of the Person's right to a hearing if requested in Writing within the time stated in the Notice and that if the District does not receive the Person's Written request for a hearing within the time stated, the Person must have waived its right to a hearing;
  - (D) Include a statement of the authority and jurisdiction under which the hearing will be held;
  - (E) Include a reference to the particular Sections of the statutes and rules involved;
  - (F) State the proposed DBE Disqualification period; and
  - (G) State that the Person may be represented by legal counsel.
- (e) Hearing. The District must schedule a hearing upon the District's receipt of the Person's timely request. The District must notify the Person of the time and place of the hearing and provide information on the procedures, right of representation, and other rights related to the conduct of the hearing prior to the hearing. The Contract Review Board may hold the hearing or may designate a hearings officer to conduct the hearing.
- (f) Notice of DBE Disqualification. The District will notify the Person in Writing of its DBE Disqualification, served personally or by registered or certified mail, return receipt requested. The Notice shall contain:
  - (A) The effective date and period of DBE Disqualification;
  - (B) The grounds for DBE Disqualification; and
  - (C) A statement of the Person's appeal rights and applicable appeal deadlines.

## **CONTRACT PREFERENCES**

### **PPS-46-0300 Preference for Oregon Goods and Services; Nonresident Bidders**

- (1) **Award When Offers Identical**. When the District receives Offers that are identical in price, fitness, availability, and quality and chooses to Award a Contract, the District must Award the Contract based on the following order of precedence:
  - (a) The District must Award the Contract to the Offeror among those submitting identical Offers that is offering Goods and Services that have been manufactured or produced in Oregon.
  - (b) If two or more Offerors submit identical Offers, and they all offer Goods or Services, or both, or Personal Services, that have been manufactured or produced in Oregon, the District must Award the Contract by drawing lots among the identical Offers. The District will provide to the Offerors who submitted the identical Offers Notice of the date, time, and location of the drawing of lots, and an opportunity for these Offerors to be present when lots are drawn.
  - (c) If the District receives identical Offers and none of the identical Offers offer Goods or Services, or both, or Personal Services, that have been manufactured or produced in Oregon, then the District must Award the Contract by drawing lots among the identical Offers. The District will provide to the Offerors who submitted the identical Offers Notice of the date, time, and location of the drawing of lots, and an opportunity for these Offerors to be present when lots are drawn.

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**(2) Determining if Offers are Identical.** The District will consider Offers identical in price, fitness, availability, and quality as follows:

- (a)** Bids received in response to an Invitation to Bid are identical in price, fitness, availability, and quality if the Bids are Responsive and offer the Goods or Services, or both, or Personal Services, described in the Invitation to Bid at the same price.
- (b)** Proposals received in response to a Request for Proposals are identical in price, fitness, availability, and quality if they are Responsive and achieve equal scores when scored in accordance with the evaluation criteria set forth in the Request for Proposals.
- (c)** Offers received in response to a Special Procurement conducted pursuant to ORS 279B.085 are identical in price, fitness, availability, and quality if, after completing the contracting procedure approved by the Contract Review Board, the District determines, in Writing, that two or more Proposals are equally advantageous to the District.
- (d)** Offers received in response to an Intermediate Procurement conducted pursuant to ORS 279B.070 are identical if the Offers equally best serve the interests of the District in accordance with 279B.070(4).

**(3) Determining if Goods or Services or Personal Services are Manufactured or Produced in Oregon.** For the purposes of complying with Section (1) of this Rule, the District will determine whether a Contract is predominantly for Goods, Services, or Personal Services and then use the predominant purpose to determine if the Goods, Services, or Personal Services are manufactured or produced in Oregon. The District may request, either in a Solicitation Document, following Closing, or at any other time the District determines is appropriate, any information the District may need to determine if the Goods, Services, or Personal Services are manufactured or produced in Oregon. The District may use any reasonable criteria to determine if Goods, Services, or Personal Services are manufactured or produced in Oregon, provided that the criteria reasonably relate to that determination, and provided that the District applies those criteria equally to each Offeror.

**(4) Procedure for Drawing Lots.** When this Rule calls for the drawing of lots, the District shall draw lots by a procedure that affords each Offeror subject to the drawing a substantially equal probability of selection and that does not allow the Person making the selection the opportunity to manipulate the drawing of lots to increase the probability of selecting one Offeror over another.

**PPS-46-0310 Reciprocal Preferences**

**(1)** When evaluating Bids pursuant to PPS-47-0255 through PPS-47-0264, PPS-49-0390, or PPS-49-0640 through PPS-49-0660, the District must add a percentage increase to the Bid of a Nonresident Bidder equal to the percentage, if any, of the preference that would be given to that Bidder in the state in which the Bidder resides. The District may rely on the list prepared and maintained by the state pursuant to ORS 279A.120(4) to determine both whether the Nonresident Bidder's state gives preference to in-state Bidders, and the amount of such preference.

**PPS-46-0320 Preference for Recycled Materials**

**(1)** Notwithstanding provisions of law requiring the District to Award a Contract to the lowest or best Offeror, and in accordance with Section (2) of this Rule, the District may give preference to the Procurement of Goods manufactured from Recycled Materials whenever the District uses Competitive Sealed Bidding or Competitive Sealed Proposals and as set forth in this Rule.

**(2)** In comparing Goods from two or more Offerors, if at least one Offeror Offers Goods manufactured from Recycled Materials and at least one Offeror does not, the District may select the Offeror offering Goods manufactured from Recycled Materials if each of the following four conditions exists:

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- (a) The Recycled Product is available;
  - (b) The Recycled Product meets applicable standards;
  - (c) The Recycled Product can be substituted for a comparable non-recycled product; and
  - (d) The Recycled Product's costs do not exceed the costs of non-recycled products by more than 5%, or a higher percentage if a Written determination is made by the District and set forth in the Solicitation Document. For purposes of making the foregoing determination, the District must consider the costs of the Goods following any adjustments the District makes to the price of the Goods for purposes of evaluation pursuant to PPS-46-0310.
- (3) Offerors must certify in their Offers:
- (a) The minimum, if not exact, percentage of Recycled Product in all materials and supplies offered; and
  - (b) Both the post-consumer and Secondary Waste Content thereof.
- (4) To be eligible for a preference under ORS 279A.125 and this Rule:
- (a) The Offeror must indicate which materials and supplies contain verifiable recycled content; and
  - (b) Such products must meet the requirements of ORS 279A.125 and this Rule.
- (5) A preference under ORS 279A.125 will only be applied to those products in the Offer that contain verifiable recycled content.
- (6) Offers that contain false information about (i) the percentage of Recycled Product, post-consumer, and Secondary Waste Content or (ii) verifiable recycled content, must be rejected as non-responsive, and the Offeror offering false information may be deemed non-responsible.

**PPS-46-0330 Solicitations and Specifications to Comply with School Board Environmental and Sustainability Policies.**

The District shall develop specifications for and procure goods, services, and public improvements in compliance with the applicable School Board environmental and sustainability policies, including, but not limited to Board Policy 3.30.080-P (Resource Conservation), 3.30.082-P (Environmentally Sustainable Business Practices), and 8.80.010-P (High Performance Facility Design), and related Administrative Directives adopted by the Superintendent.

**COOPERATIVE PROCUREMENT**

**PPS-46-0400 Authority for Cooperative Procurements**

- (1) The District may participate in, sponsor, conduct, or administer any of the following:
- (a) Joint Cooperative Procurements to establish Original Contracts or Contracts for the acquisition of Goods and Services using a source selection method substantially equivalent to those set forth in ORS 279B.055, 279B.060, or 279B.085, or to establish Original Contracts or Contracts for Public Improvements that use a Competitive Bidding process substantially equivalent to that set forth in ORS 279C.005 through 279C.870.
  - (b) Permissive Cooperative Procurements to establish Original Contracts or Contracts for the acquisition of Goods and Services only, using a source selection method substantially equivalent to those set forth in ORS 279B.055 or 279B.060.

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- (c) Interstate Cooperative Procurements to establish Original Contracts or Contracts for the acquisition of Goods and Services only, using a source selection method substantially equivalent to those set forth in ORS 279B.055 or 279B.060.

(2) The District must determine, in Writing, whether the solicitation and Award process for an Original Contract arising out of a Cooperative Procurement is substantially equivalent to those identified in ORS 279B.055, ORS 279B.060, or ORS 279B.085 in accordance with ORS 279A.200(2). This Written documentation must be maintained in the District's Procurement File.

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

(1) If the District is an Administering Contracting Agency of a Cooperative Procurement, the District may establish the conditions under which Persons may participate in the Cooperative Procurement administered by the District. Such conditions may include, without limitation, whether each Person who participates in the Cooperative Procurement must pay administrative fees to the Administering Contracting Agency, whether each Person must enter into a Written agreement with the District, and any other matters related to the administration of the Cooperative Procurement and the resulting Original Contract. When acting as an Administering Contracting Agency, the District may, but is not required to, include provisions in the Solicitation Document for a Cooperative Procurement and advertise the Solicitation Document in a manner to assist Purchasing Contracting Agencies' compliance with the Code or these Rules.

(2) If the District is acting as a Purchasing Contracting Agency and enters into a Contract based on a Cooperative Procurement, the District shall comply with the Code and these Rules, including, without limitation, those Sections of the Code and these Rules that govern:

- (a) The extent to which the Purchasing Contracting Agency may participate in the Cooperative Procurement;
- (b) The advertisement of the Solicitation Document related to the Cooperative Procurement; and
- (c) Public Notice of the Purchasing Contracting Agency's intent to establish Contracts based on a Cooperative Procurement.

**PPS-46-0420 Joint Cooperative Procurements**

(1) **Applicability.** The District may participate in, sponsor, conduct, or administer a Joint Cooperative Procurement for the purchase of Goods or Services or Public Improvements. The District must comply with the procedures set out in ORS 279A.210 and these Rules to procure Goods and Services or Public Improvements using a Joint Cooperative Procurement. Only the Participating District(s) listed in the solicitation and original Contract Documents may enter into a Contract through a Joint Cooperative Procurement. A Joint Cooperative Procurement may not be a Permissive Cooperative Procurement.

(2) **Solicitation Requirements.** The District may administer or participate in a Joint Cooperative Procurement only if:

- (a) The Administering Contracting Agency's solicitation and Award process for the Original Contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055, 279B.060, or 279B.085, or uses a Competitive Bidding process substantially equivalent to the Competitive Bidding process in ORS 279C;
- (b) The Administering Contracting Agency's solicitation and the Original Contract or Price Agreement identifies the Cooperative Procurement Group or each participating Purchasing Contracting Agency and specifies the estimated Contract requirements; and

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- (c) No material change is made in the terms, conditions, or prices of the Contract between the Contractor and the Purchasing Contracting Agency from the terms, conditions, and prices of the Original Contract between the Contractor and the Administering Contracting Agency.

**PPS-46-0430 Permissive Cooperative Procurements**

**(1) Applicability.** The District may only participate in, sponsor, conduct, or administer a Permissive Cooperative Procurement for the purchase of Goods or Services, but not for Public Improvements. The District must comply with the procedures set out in ORS 279A.215 and these Rules to procure Goods and Services using a Permissive Cooperative Procurement. A Permissive Cooperative Procurement is not a Joint Cooperative Procurement.

**(2) Solicitation Requirements.** The District may establish or participate in a Contract or Price Agreement through a Permissive Cooperative Procurement only if:

- (a) The Administering Contracting Agency's solicitation and Award process for the Original Contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055 or 279B.060;
- (b) The Administering Contracting Agency's solicitation and the Original Contract allow other Contracting Agencies to establish Contracts or Price Agreements under the terms, conditions, and prices of the Original Contract;
- (c) The Contractor agrees to extend the terms, conditions, and prices of the Original Contract to the Purchasing Contracting Agency; and
- (d) No material change is made in the terms, conditions, or prices of the Contract or Price Agreement between the Contractor and the Purchasing Contracting Agency from the terms, conditions, and prices of the Original Contract between the Contractor and the Administering Contracting Agency.

**PPS-46-0440 Required Public Notice if Permissive Cooperative Procurement is Over \$250,000**

**(1)** The District must publish a Notice of its intent to enter into a Contract through a Permissive Cooperative Procurement if the District estimates that it will spend in excess of \$250,000 for the purchase of the Goods and Services to be acquired under the Contract.

**(2)** For purposes of determining if the District must give a Notice of Intent, the District will spend in excess of \$250,000 for Goods and Services procured under the Contract if:

- (a) The District intends to make payments, in aggregate, over the term of the Contract in excess of \$250,000, whether or not the total amount or value of the payments is expressly stated in the Contract;
- (b) The District's Contract expressly provides for payment, whether a fixed or maximum price, in excess of \$250,000; or,
- (c) At the time the District enters into the Contract, the District reasonably contemplates, based on historical or other data available to the District, that the total payments it will make for the Goods or Services, or Personal Services, under the Contract will, in aggregate, exceed \$250,000 over the anticipated duration of the Contract.

**(3)** The Notice of Intent must contain the following information:

- (a) A description of the Procurement;
- (b) An estimated amount of the Procurement;

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- (c) The name of the Administering Contracting Agency, and;
  - (d) A time, place, and date by which comments must be submitted to the District regarding the Notice of Intent to establish a Contract or Price Agreement through the Permissive Cooperative Procurement.
- (4) The Notice must be published:
- (a) At least once in at least one newspaper of general circulation in the District or electronically in the same manner as the District publishes electronic Notices of Invitations to Bid or Requests for Proposals; and
  - (b) No fewer than seven Days before the deadline for submission of comments regarding the Notice of Intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement.
- (5) Vendors must submit comments within seven Days after the Notice of Intent is published.
- (6) If the District receives comments on its Intent to establish a Contract, the District must, prior to establishing a Contract or Price Agreement:
- (a) Make a Written determination that establishing a Contract is in the best interest of the District.
  - (b) Provide a copy of the Written determination to all vendors that submitted comments.

**PPS-46-0450 Interstate Cooperative Procurements**

- (1) **Applicability.** The District may only participate in an Interstate Cooperative Procurement for the purchase of Goods and Services pursuant to ORS 279A.220 and these Rules to procure Goods or Services, but not Public Improvements.
- (2) **Solicitation Requirements.** The District may establish a Contract or Price Agreement through an Interstate Cooperative Procurement only if:
- (a) The Administering Contracting Agency's solicitation and Award process for the Original Contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055 or 279B.060;
  - (b) The Administering Contracting Agency's solicitation and the Original Contract allows other governmental bodies to establish Contracts or Price Agreements under the terms, conditions, and prices of the Original Contract; and
  - (c) The Administering Contracting Agency permits the Contractor to extend the use of the terms, conditions, and prices of the Original Contract to the Purchasing Contracting Agency.

**PPS-46-0460 Advertisements of Interstate Cooperative Procurements**

The District may only participate in an Interstate Cooperative Procurement if at least one of the following occurs:

- (1) The Solicitation Document for the Interstate Cooperative Procurement lists the District, or the Cooperative Procurement Group of which the District is a member, as a party that may establish Contracts or Price Agreements under the terms, conditions, and prices of the Original Contract, and the Solicitation Document is advertised in Oregon in compliance with 279B.055(4) or 279B.060(4) by:
- (a) The Administering Contracting Agency;
  - (b) The District;



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- (c) The Cooperative Procurement Group, or a member of the Cooperative Procurement Group of which the District is a member; or
  - (d) Another Purchasing Contracting Agency that is subject to the Code, so long as such advertisement would, if given by the Purchasing Contracting Agency, comply with ORS 279B.055(4) or 279B.060(4) with respect to the Purchasing Contracting Agency.
- (2) If the Solicitation Document issued by the Administering Contracting Agency was not advertised in accordance with PPS-46-0460(1), the District gives Notice of its Intent to enter into a Public Contract or Price Agreement based on the terms of the Interstate Cooperative Procurement.
- (a) The Notice of Intent must contain the following information:
    - (A) A description of the Procurement;
    - (B) An estimated amount of the Procurement;
    - (C) The name of the Administering Contracting Agency, and;
    - (D) A time, place, and date by which comments must be submitted to the District regarding the Notice of Intent to establish a Contract or Price Agreement through the Interstate Cooperative Procurement.
  - (b) The Notice must be published:
    - (A) At least once in at least one newspaper of general circulation in the District or electronically in the same manner as the District publishes electronic Notices of Invitations to Bid or Requests for Proposals; and
    - (B) No fewer than seven Days before the deadline for submission of comments regarding the Notice of Intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement.
  - (c) Vendors must submit comments within seven Days after the Notice of Intent is published.
  - (d) If the District receives comments on its Intent to establish a Contract, the District must, prior to establishing a Contract or Price Agreement:
    - (A) Make a Written determination that establishing a Contract is in the best interest of the District.
    - (B) Provide a copy of the Written determination to all vendors that submitted comments.

**PPS-46-0470 Protest and Disputes; Cooperative Procurements**

- (1) An Offeror or potential Offeror wishing to protest the Procurement process, the contents of a Solicitation Document related to a Cooperative Procurement, or the Award or proposed Award of an Original Contract shall make the protest in accordance with ORS 279B.400 through 279B.425, unless the Administering Contracting Agency is not subject to the Code. If the Administering Contracting Agency is not subject to the Code, then the Offeror or potential Offeror shall make the protest in accordance with the processes and procedures established by the Administering Contracting Agency.
- (2) Any other protests related to a Cooperative Procurement, or disputes related to a Contract arising out of a Cooperative Procurement, shall be made and resolved as set forth in ORS 279A.225.
- (3) The failure of the District or other Purchasing Contracting Agency to exercise any rights or remedies it has under a Contract entered into through a Cooperative Procurement shall not affect the rights or remedies of the District or any other Contracting Agency that participates in the Cooperative Procurement, including the Administering Contracting Agency, and shall not prevent any other Purchasing Contracting Agency from

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exercising any rights or seeking any remedies that may be available to it under its own Contract arising out of the Cooperative Procurement.

**PPS-46-0480 Contract Amendments; Cooperative Procurements**

The District may Amend a Contract entered into pursuant to a Cooperative Procurement as set forth in PPS-47-0800 or PPS-49-910, as applicable.

**PERSONAL SERVICES CONTRACTS**

**PPS-46-0500 Personal Services Contract Definition**

(1) Pursuant to ORS 279A.055(2), a Contract for Personal Services ("PSC") is a Contract primarily for the provision of Services that require specialized technical, creative, professional, or communication skills or talents, unique and specialized knowledge, or the exercise of discretionary judgment skills, and for which the quality of Services depends on attributes that are unique to the Service Provider. "Personal Services" do not include Architectural, Engineering, and Land Surveying Services and Related Services subject to Division 48 of these Rules.

(2) PSCs that fall within the definition in Section (1) of this Rule include, but are not limited to, the following:

- (a) Contracts for Services performed in a professional capacity, including services of an accountant, attorney, medical professional (e.g., doctor, dentist, nurse, counselor), information technology consultant, or broadcaster;
- (b) Contracts for Services as an artist in the performing or fine arts, including any Person identified as a photographer, filmmaker, actor, director, painter, weaver, or sculptor;
- (c) Contracts for Services that are specialized, creative, or research-oriented;
- (d) Contracts for Services as a Consultant;
- (e) Contracts for educational services; and
- (f) Contracts for human custodial care, child care, mental health care, health services, social and emergency services, and other human services.

(3) The Contract Review Board delegates to the Superintendent the discretion to decide whether a particular type of Contract or Service falls within the definition of "Personal Services Contract" as set forth in Sections (1) and (2) of this Rule.

(4) The District may not use PSCs to obtain and pay for the Services of an employee. A PSC may be used only to obtain and pay for the Services of an independent Contractor.

**PPS-46-0505 Personal Service Contract Formal Selection Procedures**

The District will use a formal selection procedure whenever the Superintendent determines that the amount of the Contract or complexity of the Project requires use of the formal process. All formal RFP and RFQ solicitations must comply with the requirements for Competitive Sealed Proposals contained in ORS 279B.060 and may be solicited, processed, and reviewed through any of the Sealed Proposal Procurement methods set forth in PPS-47-0260 to PPS-47-0263.

**PPS-46-0510 PSC Informal Selection Procedures**

The District may use an informal selection process to obtain Personal Services when a formal selection process is not required.

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- (1) The informal selection process must solicit responses/Proposals from at least three qualified Contractors offering the required Services. If three Proposals are not reasonably available, fewer will suffice, but the District shall make a Written record of the effort made to obtain at least three Proposals.
- (2) The informal selection process is intended to be competitive. The selection and ranking may be based on criteria including, but not limited to, each Proposer's:
  - (a) Particular capability to perform the Services required;
  - (b) Experienced staff available to perform the Services required, including each Proposer's recent, current, and projected workloads;
  - (c) Performance history;
  - (d) Approach and philosophy used in providing Services;
  - (e) Fees or costs;
  - (f) Geographic proximity to the Project or the area where the Services are to be performed; and
  - (g) Work volume previously Awarded by the District, with the object of effecting an equitable distribution of Contracts among qualified Contractors. But distribution must not violate the policy of selecting the most highly qualified Contractor to perform the Services at a fair and reasonable price.

Written confirmation of solicitation attempts and responses with Contractor names and addresses shall be maintained in the District's Procurement File.

**PPS-46-0515 Other Approved Solicitation Methods**

- (1) **Request for Qualifications.** An RFQ may be used to determine that competition does not exist for a particular Service, to establish a list of qualified Contractors for RFPs or for informal solicitations under these Rules, or to establish an FSCP as provided in PPS-46-0520.
  - (a) The RFQ must at least describe the particular specialty desired, the qualifications the Contractor must have in order to be considered, and the evaluation factors and their relative importance. The RFQ may require information including, but not limited to, the Contractor's particular capability to perform the required Services; the number of experienced staff available to perform the required Services, including specific qualifications and experience of personnel; a list of similar Services the Contractor has completed, with references concerning past performance; and any other information necessary to evaluate Contractor qualifications.
  - (b) A qualifications pre-submission meeting (voluntary or mandatory) may be held for all interested Contractors to discuss the proposed Services. The RFQ must include the date, time, and place of the meeting.
  - (c) Unless the RFQ establishes that competition does not exist or that Contracts will be individually negotiated with Contractors in an FSCP, each Contractor qualified under an RFQ will receive a Notice (or other materials as appropriate) of any required Services and have an opportunity to submit a Proposal or Price Quote in response to the District's subsequent RFP.
- (2) **Price Agreements.** The District may enter into Price Agreements for Personal Services. Such Price Agreements shall be solicited as otherwise required by these Rules based on the maximum Contract amount.
- (3) **Cooperative Procurement.** The District may contract for Personal services pursuant to a Cooperative Procurement in compliance with PPS-46-0400 to PPS-46-0480.

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**PPS-46-0520 Flexible Services Contractor Pool**

The Superintendent may establish an FSCP for a particular class of Services, where the need for such Services is ongoing in nature, where it is difficult to anticipate the Service need, time, amount, or availability of Contractors, or where Service needs arise so quickly that it is not practical or cost-effective to conduct individual solicitations under these Rules. An FSCP shall comply with the following requirements:

- (1) Solicitation to Create an FSCP.** An FSCP can be established pursuant to an RFQ, an RFP, Competitive Quotes, or such other method of competitive Procurement as the Superintendent deems to be appropriate given the Services to be procured.
- (a)** The Superintendent shall document in the Procurement File the reasons for establishing an FSCP consistent with this Rule. This documentation must be reviewed and approved by the Director of Procurement as demonstrating that the Procurement qualifies for use of an FSCP under these Rules.
  - (b)** The solicitation shall describe the class of Contracts that can be Awarded to Contractors in the FSCP. The District may not Award Contracts outside of the designated class of Contracts to the FSCP.
  - (c)** The solicitation shall set forth the number of Contractors that will be appointed to the FSCP, the selection criteria, and the methodology for ranking the requests and selecting the Contractors to be appointed to the pool.
  - (d)** The Solicitation may request a binding Price Quote or rate that will become part of a subsequent Contract or may establish the pool based on qualification alone.
  - (e)** The Solicitation may set or limit the value of the Work performed by the FSCP.
- (2) Contracting for Work from an FSCP.**
- (a)** Once an FSCP has been established, the Superintendent may negotiate Contracts directly with Contractors in the pool to perform individual Projects within the established scope of the Work. Upon creation of the FSCP, the Superintendent will generate a random list of names of the Contractors appointed to the FSCP. Contracts for individual Projects will be offered, negotiated, and Awarded sequentially to Contractors on the FSCP list. Once the superintendent has offered Work to all the Contractors in the FSCP (whether or not some or all of the Contractors have accepted the Offer), a new random FSCP list will be generated. The Superintendent may Offer Work out of sequence in the following circumstances:
    - (A)** The Contractor that is next on the list declines or is unavailable during the time period needed.
    - (B)** Contract negotiations with the next-listed Contractor are not successful.
    - (C)** The Project is for Work that is a continuation of, addition to, or connected with Work previously performed by a Contractor on the list, and such prior experience means that it is in the best interest of the District to Award the Contract to the Contractor that performed the prior Work.
    - (D)** The nature of the Project is such that the Superintendent determines that an additional analysis of Contractor capability is required. In order to make this determination, the Superintendent shall conduct an informal Procurement pursuant to PPS-46-0510 limited to Contractors in the FSCP.

If a Contractor is selected outside of the sequence, the reason shall be documented in Writing in the Procurement File.

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- (b) An FSCP established under this Section will expire after three years from the date of Closing of the solicitation, unless reestablished as provided in this Rule.
- (c) Appointment to an FSCP does not guarantee that a Contractor will receive a particular amount of Work or any Work at all.
- (d) The establishment of an FSCP does not preclude the Superintendent from procuring Work that would otherwise fall within the FSCP class of Work from other contractors through any other Procurement method authorized under these Rules.
- (e) At any time during the term of an FSCP, the Superintendent may request confirmation from a Contractor or Contractors in the pool that the Contractor continues to maintain the skills, personnel, or other capability needed to perform the class of Work.

**PPS-46-0525 PSC Selection by Negotiation**

The Superintendent may procure Personal Services with Contractors through direct negotiation in any of the following circumstances:

- (1) The Contract Price is not more than \$50,000.
- (2) The Superintendent has established an FSCP pursuant to PPS-46-0515(2) for a particular class of Projects, and the Contractor is on the FSCP list.
- (3) The nature of the Work is not Project-driven but requires an ongoing, long-term relationship of knowledge and trust. Examples of such Work include legal services, insurance brokerage/agent of record services, medical services, and audit services.
- (4) The Contractor possesses unique knowledge and/or expertise in a specialized service area, making competition impractical. Such Services can include, but are not limited to, education Services, academic and staff coaching, school sports officiation, and community relations.
- (5) The Contract is for the purpose of supporting the Benson Polytechnic High School Building Construction Class, and all or a portion of the Contract Price is discounted or donated to the District.
- (6) A Contract for which a non-District funding source, e.g., a Grant or a federal, state, or city contract, identifies the Contractor in the funding award or makes a funding award conditioned upon the Service being performed by a specific Contractor. The following must be documented to the Procurement File:
  - (a) The name of the external funding source;
  - (b) The background on how the funding source selected the Contractor(s); and
  - (c) A copy of the funder's document naming the Contractor.
- (7) A Contract where the student, parent, or other third-party participant selects the service provider and the process for selecting qualified Contractors has been approved in advance by the Director of Procurement.
- (8) The Contract is entered into pursuant to an Emergency declared by the Superintendent.

**PPS-46-0530 PSC Contract Requirements**

District PSCs must contain the mandatory Contract provisions set forth in ORS 279B.020(5), 279B.220, 279B.230, 279B.235(3), and, if the Contract involves lawn or landscape maintenance, 279B.225.

**END OF DIVISION 46**

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**PPS DIVISION 47**

**PUBLIC CONTRACTING RULES FOR CONTRACTS FOR GOODS AND/OR  
SERVICES OTHER THAN PERSONAL SERVICES**

**PPS-47-0000 Generally**

These Division 47 Rules implement ORS 279B applicable to public Procurements for Goods or Services, or both.

**PPS-47-0250 Methods of Source Selection**

- (1) Except as permitted in these Rules, the District must Award a Public Contract for Goods or Services, or both, by one of the following sourcing methods:
- (a) Competitive Sealed Bidding (also known as Invitation to Bid or ITB) pursuant to ORS 279B.055 and PPS-47-0255 and -0257;
  - (b) Competitive Sealed Proposals (also known as Request for Proposals or RFP) pursuant to ORS 279B.060 and PPS-47-0260 through 0263;
  - (c) Small Procurements (\$5,000 or less) pursuant to ORS 279B.065 and PPS-47-0265;
  - (d) Intermediate Procurements (more than \$5,000 to \$150,000) pursuant to ORS 279B.070 and PPS-47-0270;
  - (e) Sole-Source Procurement pursuant to ORS 279B.075 and PPS-47-0275;
  - (f) Emergency Procurement pursuant to ORS 279B.080 and PPS-47-0280;
  - (g) Special Procurement pursuant to ORS 279B.085 and PPS-47-0285, including the Class Special Procurements set forth in PPS-47-0288;
  - (h) Cooperative Procurement pursuant to ORS 279A.200 and PPS-47-0290.

**PPS-47-0252 Procurement of Service Contracts Over \$250,000 in Compliance with ORS 279B.030 through ORS 279B.036**

(1) Unless the District determines that it is not feasible to perform the Services with the District's own personnel and resources pursuant to Section (4) of this Rule, before conducting a Procurement of a Contract for Services with an estimated Contract Price that exceeds \$250,000, the District shall conduct a Written cost analysis in accordance with Section (2) of this Rule. The cost analysis must compare an estimate of the District's cost in performing the Services with an estimate of the cost a potential Contractor would incur in performing the Services. The District may proceed with the Procurement only if it determines that the District would incur more cost in performing the Services with its own personnel and resources than in procuring the Services from a Contractor. For the purposes of this Section, "Contract for Services" does not include:

- (a) Contracts for Personal Services as defined in PPS-46-0500.
- (b) Contracts for Services exempted from compliance with the Public Contracting Code by ORS 197.025 or other state statute.
- (c) Procurements for Client Services as defined in OAR 125-246-0110. "Client Services" means any Services that directly or primarily support a Client, whether or not the Client is the recipient through the provision of voluntary or mandatory Services. Client Services also means any Goods

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that are incidental or specialized in relation to any Services defined in this Section. Client Services may include, but are not limited to (where these terms are used in another statute, they must have that meaning):

- (A) Housing, including utilities, rent, or mortgage, or assistance to pay rent, mortgage, or utilities;
- (B) Sustenance, including clothing;
- (C) Employment training or skills training to improve employability;
- (D) Services for people with disabilities;
- (E) Foster care or foster care facilities;
- (F) Residential care or residential care facilities;
- (G) Community housing;
- (H) In-home care, including home delivered meals;
- (I) Medical care, services, and treatment, including, but not limited to:
  - (i) Medical, dental, hospital, psychological, psychiatric, therapy, vision;
  - (ii) Alcohol and drug treatment;
  - (iii) Smoking cessation;
  - (iv) Drugs, prescriptions, and non-prescriptions; or
  - (v) Nursing services and facilities.
- (J) Transportation or relocation;
- (K) Quality of life, living skills training;
- (L) Personal care;
- (M) Legal services and expert witnesses services;
- (N) Religious practices, traditions, and services, separately or in any combination thereof; and
- (O) Educational services. The term "Client Services" does not include benefits or services provided as a condition of employment with an Agency.

(2) In the cost analysis required under Section (1) of this Rule, the District shall consider cost factors that include the following:

- (a) Cost of Using the District's Own Personnel and Resources. When estimating the District's costs of performing the Services, the District will consider cost factors that include:
  - (A) Salary or wage and benefit costs for District employees who are directly involved in performing the Services, including 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 for the performance of the Services, including costs for the space, energy, transportation, storage, raw and finished materials, equipment, and supplies used or consumed in the provision of the Services.

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- (C) 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 the District intends to procure a limited quantity of Services or procure the Services within a defined or limited period of time.
  - (E) The miscellaneous costs related to performing the Services. These costs exclude the District'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 that the costs are attributable solely to performing the Services and would not exist unless the District performs the Services.
  - (F) Oregon Laws 2009, chapter 880, section 3(1)(a) provides that an estimate of the District's costs of performing the Services includes the costs described in Sections (A) through (E) of this Rule. Therefore, those costs do not constitute an exclusive list of cost information. The District may consider other reliable information that bears on the cost to the District of performing the Services. For example, if the District has accounted for its actual costs for performing the Services under consideration, or reasonably comparable Services in a relatively recent Services Project, the District may consider those actual costs in making its estimate.
- (b) Costs of a Potential Contractor. When estimating a Contractor's costs of performing the Services, the District will consider cost factors that include:
- (A) The average or actual salary or wage and benefit costs for Contractors and employees:
    - (i) Who work in the industry or business 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 costs for space, energy, transportation, storage, raw and finished materials, equipment, and supplies used or consumed in the provision of the Services; and
  - (C) The miscellaneous costs related to performing the Services, including, but not limited to, reasonably foreseeable fluctuations in the costs for the items in Sections (A) through (C) of this Rule.
  - (D) Oregon Laws 2009, chapter 880, section 3(1)(a) provides that an estimate of the District's costs of performing the Services includes the costs described in Sections (A) through (E) of this Rule. Therefore, those costs do not constitute an exclusive list of cost information. The District may consider other reliable information that bears on the cost to the District of performing the Services. For example, if the District, in the reasonably near past, received Bids or Proposals for the performance of Services under consideration, or reasonably comparable Services, the District may consider the pricing offered in those Bids or Proposals in making its estimate. Similarly, the District may consider what it actually paid out under a Contract for the same or similar Services.
- (3) **Exceptions.**
- (a) Exception Based on Salaries or Wages and Benefits. If the sole reason that the costs estimated in Section (2)(b) of this Rule are lower than the costs estimated in Section (2)(a) of this Rule is because the average or actual salary or wage and benefit costs for Contractors and employees



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estimated in Section (2)(b)(A) of this Rule are lower than the salary or wage and benefit costs for employees of the District estimated in Section (2)(a)(A) of this Rule, the District may not proceed with the Procurement.

- (b) Exception Based on Lack of District Personnel and Resources; Reporting. In cases where the District determines that it would incur less cost in providing the services with the District's own personnel and resources, the District may nevertheless proceed with the Procurement if, at the time the District intends to conduct a Procurement, the District determines that it lacks personnel and resources that are necessary to perform the services within the time in which the services are required. If the District conducts a Procurement under this Section, the District will:
- (A) Make and keep a Written determination that it lacks personnel and resources to perform the Services within the time the District requires them and of the basis for the District's decision to proceed with the Procurement.
  - (B) Provide to the Contract Review Board, each calendar quarter, copies of each Written cost analysis and Written determination.
- (4) **Provision of Services by District not Feasible.** The District may proceed with a Procurement of a Contract for Services without conducting a cost analysis required under Sections (1) and (2) of this Rule if the District makes Written Findings that use of the District's own personnel or resources to perform the Services is not feasible. Reasons include, but are not limited to, the following.
- (a) The District lacks the specialized capabilities, experience, or technical or other expertise necessary to perform the Services. In making the Finding, the District shall compare the District's capability, experience, or expertise in the field most closely involved in performing the Services with a potential Contractor's capability, experience, or expertise in the same or a similar field.
  - (b) Special circumstances require the District to procure the Services by Contract. Special circumstances may include, but are not limited to, the following:
    - (A) The terms under which the District receives a Grant or other funds for use in a Procurement require the District to obtain services through an independent contractor;
    - (B) Other state or federal law requires the District to procure services through an independent contractor;
    - (C) The Procurement is for Services that are incidental to a Contract for purchasing or leasing real or personal property, including service and maintenance agreements for equipment that is leased or rented;
    - (D) The District cannot accomplish policy, administrative, or legal goals, including, but not limited to, avoiding conflicts of interest or ensuring independent or unbiased Findings in cases when using the District's existing personnel or Persons the District could hire through a regular or ordinary process would not be suitable;
    - (E) The Procurement is for Emergency Services pursuant to PPS-47-0280;
    - (F) The Procurement is for Services, the need for which is so urgent, temporary, or occasional that attempting to perform the Services with the District's own personnel or resources would cause a delay that would frustrate the purpose for obtaining the Services;
    - (G) The Services that the District intends to procure will be completed within six months after the date on which the Contract for the Services is executed; or

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- (H) Any other circumstances, conditions, or occurrences that would make the Services, if performed by the District's own employees and resources, incapable of being managed, utilized, or dealt with successfully in terms of the quantity, timeliness of completion, success in obtaining desired results, or other reasonable needs of the District.

**PPS-47-0255 Competitive Sealed Bidding; One-Step Solicitations**

(1) **Generally.** The District may procure Goods and Services by Competitive Sealed Bidding as set forth in ORS 279B.055. An Invitation to Bid is used to initiate a Competitive Sealed Bidding solicitation and must contain the information required by ORS 279B.055(2) and by Section (2) of this Rule. The District must provide public Notice of the Competitive Sealed Bidding solicitation as set forth in PPS-47-0300.

(2) **Invitation to Bid.** In accordance with ORS 279B.055(2), an 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 the District's representatives at the conference are not binding on the District unless confirmed by Written Addendum.

(B) A Procurement description;

(C) The form and instructions for submission of Bids, including the time, date, and place that Bids are due, and any other special information, e.g., whether Bids may be submitted by electronic means (see PPS-47-0330 for required provisions of electronic Bids);

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

(E) Key contact information, as follows:

- (i) The office or location where the Solicitation Documents may be reviewed;
- (ii) The name of the person designated for receipt of Bids;
- (iii) The name and title of the person designated by the District as the contact person for the Procurement, if different from the person designated to receive Bids.

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

(G) Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4);

(H) How the District will notify Bidders of Addenda, and how the District will make Addenda available (see PPS-47-0430);

(I) A time, date, and place that prequalification applications, if any, must be filed, and the classes of work, if any, for which Bidders must be prequalified in accordance with ORS 279B.120;

(J) The following statements:

- (i) "The District may cancel the Procurement or reject any or all Bids in accordance with ORS 279B.100."

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- (ii) A statement that requires the Contractor or subcontractor to possess an asbestos abatement license if required under ORS 468A.710.
- (b) District Need to Purchase. The character of the Goods or Services the District is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection, and acceptance requirements. As required by Oregon Laws 2009, chapter 880, section 5, the District's description of its need to purchase must:
  - (A) Identify the scope of the Work to be performed under the resulting Contract, if the District Awards one;
  - (B) Outline the anticipated duties of the Contractor under any resulting Contract;
  - (C) Establish the expectations for the Contractor's performance of any resulting Contract; and
  - (D) Unless the District for Good Cause specifies otherwise, the scope of Work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the District is purchasing.
- (c) Bidding and Evaluation Process.
  - (A) The anticipated solicitation schedule, deadlines, and protest process;
  - (B) The District must set forth objective evaluation criteria in the Solicitation Document in accordance with the requirements of ORS 279B.055(6)(a). Evaluation criteria need not be precise predictors of actual future costs, but to the extent possible, the evaluation factors shall be reasonable estimates of actual future costs based on information the District has available concerning future use; and
  - (C) If the District intends to Award Contracts to more than one Bidder pursuant to PPS-47-0600(4)(c), the District must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. This may be left to the District's discretion at the time of the Award, provided it is so described in the Solicitation Document.
- (d) Applicable Preferences Pursuant to ORS 279B.055(6)(b).
  - (A) Preference for Oregon Goods and Services, pursuant to ORS 279A.120 and PPS-46-0300 and PPS-46-0310; and
  - (B) Preference for Recycled Materials, pursuant to ORS 279A.125 and PPS-46-0320 through PPS-46-0324.
- (e) Terms and Conditions. All contractual terms and conditions in the form of Contract provisions the District determines are applicable to the Procurement. As required by Oregon Laws 2009, chapter 880, Section 5, the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of Work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:
  - (A) The District's reduction or withholding of payment under the Contract;
  - (B) The District's right to require the Contractor to perform, at the Contractor's expense, any additional Work necessary to perform the statement of Work or to meet the performance standards established by the resulting Contract; and
  - (C) The District's rights, which the District may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available under the resulting Contract or applicable law.

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- (f) Whether Bid Security is Required.
- (g) Good Cause. For the purposes of this Rule, "Good Cause" means a reasonable explanation for not requiring Contractor to meet the highest standards, and may include an explanation of circumstances that support a Finding that the requirement would unreasonably limit competition or is not in the best interest of the District. The District shall document in the Procurement File the basis for the determination of Good Cause for specification otherwise. The District will have Good Cause to specify otherwise under the following circumstances:
  - (A) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;
  - (B) Imposing express technical, standard, dimensional, or mathematical specifications will better ensure that the Goods or Services will be compatible with or will operate efficiently or effectively with components, equipment, parts, Services, or information technology including hardware, Services, or software with which the Goods or Services will be used, integrated, or coordinated;
  - (C) The circumstances of the industry or business that provides the Goods or Services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, or scientific developments that a reliable highest prevalent standard does not exist or has not been developed;
  - (D) Any other circumstances in which the District's interest in achieving economy, efficiency, compatibility, or availability in the Procurement of the Goods or Services reasonably outweighs the District's practical need for the highest prevalent standard in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract.

**PPS-47-0257 Competitive Sealed Bidding; Multi-Step Solicitations**

- (1) **Generally**. The District may procure Goods or Services by using multi-step Competitive Sealed Bids pursuant to ORS 279B.055(12).
- (2) **Phased Process**. Multi-step Bidding is a phased process that seeks necessary information or un-priced technical Bids in the initial phase, and regular Competitive Sealed Bidding, inviting Bidders who submitted technically eligible Bids in the initial phase to submit Competitive Sealed Price Bids on the technical Bids in the final phase. The Contract shall be Awarded to the lowest Responsible Bidder. If time is a factor, the District may require Bidders to submit a separate Sealed Price Bid during the initial phase to be opened after the technical evaluation.
- (3) **Public Notice**. Whenever multi-step Sealed Bids are used, public Notice for the first phase shall be given in accordance with PPS-47-0300. Public Notice is not required for the subsequent phases. However, the District shall give Notice of subsequent phases to all Bidders and inform Bidders of the right to protest Addenda issued after initial Closing pursuant to PPS-47-0430 and inform Bidders excluded from the subsequent phases of the right, if any, to protest exclusion pursuant to PPS-47-0720.
- (4) **Procedures Generally**. In addition to the procedures set forth in PPS-47-0300 through PPS-47-0490, the District shall employ the procedures set forth in this Rule for multi-step Bidding:
  - (a) Solicitation Protest. Prior to the Closing of phase one, the District shall provide an opportunity to protest the solicitation under ORS 279B.405 and PPS-47-0730.
  - (b) Addenda Protest. The District may provide an opportunity to protest any Addenda issued during phase two pursuant to PPS-47-0430(3)(b).

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- (c) Exclusion Protest. The District may, but is not required to, provide an opportunity for a Bidder to protest exclusion from the second round of multi-step Sealed Bids as set forth in PPS-47-0720.
- (d) Administrative Remedy. Proposers may submit a protest to any Addenda or to any action by the District that has the effect of excluding the Proposer from the second phase of multi-step Bidding to the extent that such protests are provided for in the Solicitation Document or required by this Section. Failure to so protest shall be considered the Bidder's failure to pursue an administrative remedy made available to the Bidder by the District.
- (e) Award Protest. The District shall provide an opportunity to protest its Intent to Award a Contract pursuant to ORS 279B.410 and PPS-47-0740. An affected Bidder may protest, for any of the bases set forth in PPS-47-0720(2), its exclusion from the second phase of a multi-step Sealed Bid, or an Addendum issued following initial Closing, if the District did not previously provide Bidders the opportunity to protest such exclusion or Addendum.

**(5) Procedure for Phase One of Multi-step Sealed Bids.**

- (a) Form. Multi-step Sealed Bidding shall be initiated by the issuance of an Invitation to Bid in the form and manner required for Competitive Sealed Bids except as hereinafter provided. In addition to the requirements set forth in PPS-47-0255(2), the multi-step Invitation to Bid shall state:
  - (A) That un-priced technical Bids are requested;
  - (B) Whether Price Bids are to be submitted at the same time as un-priced technical Bids; if they are, that such Price Bids shall be submitted in a separate sealed envelope;
  - (C) That the solicitation is a multi-step Sealed Bid Procurement, and priced Bids will be considered only in the second phase and only from those Bidders whose un-priced technical Bids are found eligible in the first phase;
  - (D) The criteria to be used in the evaluation of un-priced technical Bids;
  - (E) That the District, to the extent it finds necessary, may conduct oral or Written discussions for the purposes of clarification of the un-priced technical Bids;
  - (F) That the Goods or Services being procured shall be furnished generally in accordance with the Bidder's technical Bid as found to be finally eligible and shall meet the requirements of the Invitation to Bid;
  - (G) Whether Bidders excluded from subsequent phases have a right to protest the exclusion before the Notice of Intent to Award. Such information can be given or Changed by Addenda.
- (b) Addenda to the Invitation to Bid. After receipt of un-priced technical Bids, Addenda to the Invitation to Bid shall be distributed only to Bidders who submitted un-priced technical Bids.
- (c) Receipt and Handling of Un-priced Technical Bids. Un-priced Technical Bids need not be opened publicly.
- (d) Evaluation of Un-priced Technical Bids. Un-priced Technical Bids submitted by Bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation to Bid. Un-priced technical Bids shall be categorized as:
  - (A) Eligible;
  - (B) Potentially eligible; that is, reasonably susceptible of being made eligible; or

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- (C) Ineligible. The District shall record in Writing the basis for determining a Bid ineligible and make it part of the Procurement File. The District may initiate phase two of the procedure if, in the District's opinion, there are sufficient eligible un-priced technical Bids to assure effective price competition in the second phase without technical discussions. If the District finds that such is not the case, the District may issue an Addendum to the Invitation to Bid or engage in technical discussions as set forth in Section (5)(e) of this Rule.
- (e) Discussion of Un-priced Technical Bids. The District may seek clarification of a technical Bid by any eligible or potentially eligible Bidder. During the course of such discussions, the District shall not disclose any information derived from one un-priced technical Bid to any other Bidder. Once discussions are begun, any Bidder who has not been notified that its Bid has been finally found ineligible may submit supplemental information amending its technical Bid at any time until the Closing of the final step established by the District. Such submission may be made at the request of the District or at the Bidder's own initiative.
- (f) Notice of Ineligible Un-priced Technical Bid. When the District determines a Bidder's un-priced technical Bid to be ineligible, such Bidder shall not be afforded an additional opportunity to supplement its technical Bids.
- (g) Mistakes During Multi-step Sealed Bidding. Mistakes may be corrected or Bids may be withdrawn during phase one:
- (A) Before un-priced technical Bids are considered;
  - (B) After any discussions have commenced under Section (5)(e) of this Rule;
  - (C) When responding to any Addenda of the Invitation to Bid; or
  - (D) In accordance with PPS-47-0470.
- (6) **Revisions to Solicitation Specifications**. After Closing of phase one, the District may issue Addenda that modify the Specifications for the Goods or Services being procured or that modify other terms and conditions of the Invitation to Bid. The District shall provide such Addenda to all Bidders who initially submitted un-priced technical Bids. The District may then require Bidders to submit revised un-priced technical Bids.
- (7) **Procedure for Phase Two of Multi-step Sealed Bids**.
- (a) Initiation. Upon the completion of phase one, the District shall invite each eligible Bidder to submit a Price Bid.
  - (b) The District shall conduct phase two as any other Competitive Sealed Bid Procurement except:
    - (A) As specifically set forth in this Rule;
    - (B) No public Notice need be given of this Invitation to submit Price Bids because such Notice was previously given.

**PPS-47-0260 Competitive Sealed Proposals; One-Step Solicitations**

- (1) **Generally**. The District may procure Goods and Services by Competitive Sealed Proposals as set forth in ORS 279B.060. A Request for Proposal is used to initiate a Competitive Sealed Proposal solicitation and must contain the information required by ORS 279B.060(2) and by Section (2) of this Rule. The District must provide public Notice of the Competitive Sealed Proposals as set forth in PPS-47-0300.

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**(2) Request for Proposal.** In accordance with the provisions required by ORS 279B.060(2), the Request for Proposal 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; and
- (ii)** Whether attendance at the conference will be mandatory or optional; and
- (iii)** A provision that provides that statements made by the District's representatives at the conference are not binding on the District unless confirmed by Written Addendum.

**(B)** A Procurement description.

**(C)** A time, date, and place that prequalification applications, if any, must be filed, and the classes of work, if any, for which Bidders must be prequalified in accordance with ORS 279B.120.

**(D)** The form and instructions for submission of Proposals, including the time, date, and place that Proposals are due, and any other special information, e.g., whether Proposals may be submitted by electronic means;

**(E)** The time, date, and place of Opening;

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

**(G)** Key contact Information, as follows:

- (i)** The office or location where the Solicitation Documents may be reviewed;
- (ii)** The name of the person designated for receipt of Proposals.
- (iii)** The name and title of the person designated by the District as the contact person for the Procurement, if different from the person designated to receive Proposals.

**(H)** Proposers' certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4); and

**(I)** How the District will notify Proposers of Addenda and how the District will make Addenda available. (See PPS-47-0430).

**(J)** The following statements:

- (i)** "The District may cancel the Procurement or reject any or all Bids in accordance with ORS 279B.100."
- (ii)** A statement that requires the Contractor or subcontractor to possess an asbestos abatement license if required under ORS 468A.710.

**(b) District Need to Purchase.** The character of the Goods or Services the District is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection, and acceptance requirements. As required by Oregon Laws 2009, chapter 880, section 6, the District's description of its need to purchase must:

**(A)** Identify the scope of the Work to be performed under the resulting Contract, if the District Awards one; and

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

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

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- (D) Unless the Contractor under any resulting Contract will provide Architectural, Engineering, and Land Surveying Services or Related Services that are subject to ORS 279C.100 through 279C.125 or PPS-46-0500 through 46-0525, or the District for Good Cause specifies otherwise, the scope of Work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that the District is purchasing.
- (c) Proposal and Evaluation Process.
- (A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process.
- (B) The District must set forth selection criteria in the Solicitation Document in accordance with the requirements of ORS 279B.060(2)(h)(E), including the relative importance of price and any other evaluation factors used to rate the Proposals in the first tier of competition, and if more than one tier of competitive evaluation may be used, a description of the process under which the Proposals will be evaluated in the subsequent tiers. Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, the factors must be reasonable estimates of actual future costs based on information available to the District.
- (C) If the District's solicitation process calls for the District to establish a Competitive Range, the District shall state the size of the Competitive Range in the Solicitation Document. However, the District may increase or decrease the number of Proposers in the Competitive Range in accordance with PPS-47-0262(1)(a)(B).
- (D) If the District intends to Award Contracts to more than one Proposer pursuant to PPS-47-0600(4)(d), the District must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. This may be left to the District's discretion at the time of the Award, provided it is so described in the solicitation.
- (d) Applicable Preferences described in ORS 279A.120, 279A.125(2), and 282.210.
- (A) Preference for Oregon Goods and Services, pursuant to ORS 279A.120 and PPS-46-0300 and PPS-46-0310;
- (B) Preference for Recycled Materials, pursuant to ORS 279A.125 and PPS-46-0320 through PPS-46-0324; and
- (C) Performance within the state of public printing, binding, and stationery Work, pursuant to ORS 282.210.
- (e) Terms and Conditions. All contractual terms and conditions the District determines are applicable to the Procurement. As required by Oregon Laws 2009, chapter 880, section 6, the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of Work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:
- (A) The District's reduction or withholding of payment under the Contract;
- (B) The District's right to require the Contractor to perform, at the Contractor's expense, any additional Work necessary to perform the scope of Work or to meet the performance standards established by the resulting Contract; and
- (C) The District's rights, which the District may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available under the resulting Contract or applicable law.



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(f) The RFP may:

- (A) Identify those contractual terms or conditions the District reserves, in the Request for Proposals, for negotiation with Proposers;
- (B) Request that Proposers propose contractual terms and conditions that relate to subject matter reasonably identified in the Request for Proposals;
- (C) Contain or incorporate the form and content of the Contract that the District will accept, or suggested Contract terms and conditions that nevertheless may be the subject of negotiations with Proposers; and
- (D) Announce the method of Contractor selection that may include, but is not limited to, negotiation with the highest-ranked Proposer, competitive negotiations, multiple-tiered competition designed to identify a class of Proposers that fall within a Competitive Range or to otherwise eliminate from consideration a class of lower-ranked Proposers, or any combination of methods, as authorized or prescribed by these Rules.

(g) Whether Proposal security is required.

(3) The District may include the applicable contractual terms and conditions in the form of Contract provisions or legal concepts to be included in the resulting Contract. Further, the District may specify that it will include or use Proposer's terms and conditions that have been pre-negotiated under OAR 137-047-550(3), but the District may only include or use a Proposer's pre-negotiated terms and conditions in the resulting Contract to the extent that those terms and conditions do not materially conflict with the applicable Contract terms and conditions. The District shall not agree to any Proposer's terms and conditions that were expressly rejected in a solicitation protest under OAR 137-047-0420.

(4) For multiple Award Contracts, the District may enter into Contracts with different terms and conditions with each Contractor to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. The District shall not agree to any Proposer's terms and conditions that were expressly rejected in a solicitation protest under OAR 137-047-020.

(5) **Good Cause.** For the purposes of this Rule, "Good Cause" means a reasonable explanation for not requiring the Contractor to meet the highest standards, and may include an explanation of circumstances that support a Finding that the requirement would unreasonably limit competition or is not in the best interest of the District. The District shall document in the Procurement File the basis for the determination of Good Cause for specification otherwise. The District will have Good Cause to specify otherwise under the following circumstances:

- (a) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;
- (b) Imposing express technical, standard, dimensional, or mathematical specifications will better ensure that the Goods or Services will be compatible with, or will operate efficiently or effectively with, associated information technology, hardware, software, components, equipment, parts, or ongoing Services with which the Goods or Services will be used, integrated, or coordinated;
- (c) The circumstances of the industry or business that provides the Goods or Services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, or scientific developments, that a reliable highest prevalent standard does not exist or has not been developed;
- (d) Any other circumstances in which the District's interest in achieving economy, efficiency, compatibility, or availability in the Procurement of the Goods or Services reasonably outweighs

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

**(6) Optional Proposal Requirements.**

- (a)** As provided in the Request for Proposals or in Written Addenda issued thereunder, the District may conduct site tours, demonstrations, individual or group discussions, and other informational activities with Proposers before or after the opening of Proposals for the purpose of clarification to ensure full understanding of, and responsiveness to, the solicitation requirements or to consider and respond to Requests for modifications of the Proposal requirements. The District shall use procedures designed to accord Proposers fair and equal treatment with respect to any opportunity for discussion and revision of Proposals.
- (b)** For purposes of evaluation, when provided for in the Request for Proposals, the District may employ methods of Contractor selection that include, but are not limited to:

  - (A)** An Award or Awards based solely on the ranking of Proposals;
  - (B)** Discussions leading to Best and Final Offers, in which the District may not disclose private discussions leading to Best and Final Offers;
  - (C)** Discussions leading to Best and Final Offers, in which the District may not disclose information derived from Proposals submitted by competing Proposers;
  - (D)** Serial negotiations, beginning with the highest-ranked Proposer;
  - (E)** Competitive simultaneous negotiations;
  - (F)** Multi-tiered competition designed to identify, at each level, a class of Proposers that fall within a Competitive Range or to otherwise eliminate from consideration a class of lower-ranked Proposers;
  - (G)** A multi-step Request for Proposals requesting the submission of un-priced technical submittals, and then later issuing a Request for Proposals limited to the Proposers whose technical submittals the District had determined to be qualified under the criteria set forth in the initial Request for Proposals; or
  - (H)** Any combination of methods described in this paragraph, as authorized or prescribed by these Rules.
- (c)** Revisions of Proposals may be permitted after the submission of Proposals and before Award for the purpose of obtaining best Offers or Best and Final Offers.
- (d)** After the opening of Proposals, the District may issue or electronically post an Addendum to the Request for Proposals that modifies the criteria, rating process, and procedure for any tier of competition before the start of the tier to which the Addendum applies. The District shall send an Addendum that is issued by a method other than electronic posting to all Proposers who are eligible to compete under the Addendum. The District shall issue or post the Addendum at least five Days before the start of the subject tier of competition or as otherwise determined by the District to be adequate to allow eligible Proposers to prepare for the competition in accordance with rules adopted under ORS 279A.065.
- (7)** The cancellation of Requests for Proposals and the rejection of Proposals must be in accordance with ORS 279B.100.

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- (8) In the Request for Proposals, the District shall describe the methods by which the District will make the results of each tier of competitive evaluation available to the Proposers who competed in the tier. The District shall include a description of the manner in which the Proposers who are eliminated from further competition may protest or otherwise object to the District's decision.
- (9) The District shall issue or electronically post the Notice of Intent to Award described in ORS 279B.135 to each Proposer who was evaluated in the final competitive tier.
- (10) If a Contract is Awarded, the District shall Award the Contract to the responsible Proposer whose Proposal the District determines in Writing to be the most advantageous to the District based on the evaluation process and evaluation factors described in the Request for Proposals, any applicable preferences described in ORS 279A.120 and 279A.125, and, when applicable, the outcome of any negotiations authorized by the Request for Proposals. Other factors may not be used in the evaluation. When the Request for Proposals specifies or authorizes the Award of multiple Public Contracts, the District shall Award Public Contracts to the responsible Proposers who qualify for the Award of a Contract under the terms of the Request for Proposals.
- (11) The District may issue a request for information, a request for interest, a Request for Qualifications, or other preliminary documents to obtain information useful in the preparation of a Request for Proposals.

**PPS-47-0261 Procedures for Competitive Range; Multi-tiered and Multi-step Solicitations**

- (1) **Generally.** The District may procure Goods and Services employing any combination of the methods of Contractor selection as set forth in PPS-47-0260(3)(b). In addition to the procedures set forth in PPS-47-0300 through PPS-47-0490 for methods of Contractor selection, the District may provide for a multi-tiered or multi-step selection process that permits Award to the highest-ranked Proposer at any tier or step, calls for the establishment of a Competitive Range, or permits either serial or competitive simultaneous discussions or negotiations with one or more Proposers. The District may employ one or more or any combination of the procedures set forth in this Rule for Competitive Range, multi-tiered, and multi-step Proposals.
- (2) **Solicitation Protest.** Prior to the initial Closing, the District must provide an opportunity to protest the solicitation under ORS 279B.405 and PPS-47-0730.
- (3) **Addenda Protest.** Pursuant to PPS-47-0430(4), the District may provide an opportunity in accordance with PPS-47-0730 to protest any Addenda issued under PPS-47-0260(3)(d).
- (4) **Exclusion Protest.** Before the Notice of Intent to Award, the District may provide an opportunity for a Proposer to protest exclusion from the Competitive Range or from subsequent phases of multi-tiered or multi-step Sealed Proposals as set forth in PPS-47-0720.
- (5) **Administrative Remedy.** Proposers may submit a protest to any Addenda or to any action by the District that has the effect of excluding the Proposer from subsequent phases of a multi-tiered or multi-step Request for Proposals to the extent that such protests are provided for in the Solicitation Document. Failure to so protest must be considered the Proposer's failure to pursue an administrative remedy made available to the Proposer by the District.
- (6) **Award Protest.** The District must provide an opportunity to protest its Intent to Award a Contract pursuant to ORS 279B.410 and PPS-47-0740. An affected Proposer may protest, for any of the bases set forth in PPS-47-0720(2), its exclusion from the Competitive Range or any phase of a Technical Proposal, multi-tiered Proposal, or multi-step Sealed Proposal, or an Addendum issued following initial Closing, if the District did not previously provide Proposers the opportunity to protest such exclusion or Addendum.

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**PPS-47-0262 Competitive Range: Discussions and Negotiations for Multi-tiered or Multi-step Proposals**

**(1) Competitive Range.** When the District's solicitation process conducted pursuant to PPS-47-0260(3)(b) calls for the District to establish a Competitive Range at any stage in the Procurement process, the District must comply with the following procedures:

**(a) Determining Competitive Range.**

**(A)** The District will establish a Competitive Range after evaluating all Responsive Proposals in accordance with the evaluation criteria set forth in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria set forth in the Request for Proposals, the District must determine and rank the Proposers in the Competitive Range. Notwithstanding the foregoing, the District may establish a Competitive Range of all Proposers to enter into discussions with Proposers for the purpose of correcting deficiencies in Proposals under Section (2) of this Rule.

**(B)** The District may increase or decrease the number of Proposers in the Competitive Range if the District's evaluation of Proposals establishes a natural break in the scores of Proposers indicating that a number of Proposers greater or less than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the most advantageous Proposer.

**(b) Protesting Competitive Range.** The District must provide Written Notice to all Proposers identifying Proposers in the Competitive Range. The District may provide an opportunity for Proposers excluded from the Competitive Range to protest the District's evaluation and determination of the Competitive Range in accordance with PPS-47-0720.

**(c) Intent to Award; Discuss or Negotiate.** After determination of the Competitive Range and after any protest period provided in accordance with Section (2)(b) expires, or after the District has provided a final response to any protest, whichever date is later, the District may either:

**(A)** Provide Written Notice to all Proposers in the Competitive Range of its Intent to Award the Contract to the highest-ranked Proposer in the Competitive Range:

**(i)** An unsuccessful Proposer may protest the District's Intent to Award in accordance with PPS-47-0740 and ORS 279B.410.

**(ii)** After the protest period provided in accordance with PPS-47-0740 expires, or after the District has provided a final response to any protest, whichever date is later, the District must commence negotiations in accordance with this Rule with the highest-ranked Proposer in the Competitive Range; or

**(B)** Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them as set forth in this Rule, and following such discussions and receipt and evaluation of revised Proposals, conduct negotiations as set forth in this Rule with the Proposers in the Competitive Range.

**(2) Discussions and Revised Proposals.** If the District chooses to use the Competitive Range method and then enter into discussions and receive Best and Final Offers from all Proposers submitting Responsive Proposals or all Proposers in the Competitive Range (collectively "eligible Proposers"), the District must proceed as follows:

**(a) Initiating Discussions.** If the District initiates any discussion, the District will initiate oral or Written discussions with all eligible Proposers regarding their Proposals with respect to the

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provisions of the RFP that the District identified in the RFP as the subject of discussions. The District may conduct discussions for the following purposes:

- (A) Informing eligible Proposers of deficiencies in their initial Proposals;
  - (B) Notifying eligible Proposers of parts of their Proposals for which the District would like additional information; or
  - (C) Otherwise allowing eligible Proposers to develop revised Proposals that will allow the District to obtain the best Proposal based on the requirements and evaluation criteria set forth in the Request for Proposals.
- (b) Conducting Discussions. The District may conduct discussions with each eligible Proposer necessary to fulfill the purposes of this Section (2), but need not conduct the same amount of discussions with each eligible Proposer. The District may terminate discussions with any eligible Proposer at any time. However, the District must offer all eligible Proposers the same opportunity to discuss their Proposals with the District before the District notifies eligible Proposers of the date and time pursuant to Section (4) that Best and Final Proposals will be due.
- (A) In conducting discussions, the District:
    - (i) Must treat all eligible Proposers fairly and must not favor any eligible Proposer over another;
    - (ii) Must only disclose other eligible Proposers' Proposals or discussions in accordance with ORS 279B.060(6)(a)(ii) or (iii);
    - (iii) May adjust the evaluation of a Proposal as a result of a discussion under this Section. The conditions, terms, or price of the Proposal may be altered or otherwise changed during the course of the discussions provided the changes are within the scope of the RFP.
  - (B) At any time during the time allowed for discussions, the District may:
    - (i) Continue discussions with a particular eligible Proposer;
    - (ii) Terminate discussions with a particular eligible Proposer and continue discussions with other eligible Proposers; or
    - (iii) Conclude discussions with all remaining eligible Proposers and provide Notice pursuant to this Rule to the eligible Proposers requesting Best and Final Offers.
- (3) **Negotiations.**
- (a) Initiating Negotiations. The District may commence serial negotiations with the highest-ranked eligible Proposer or commence simultaneous negotiations with all eligible Proposers as follows:
    - (A) After initial determination of which Proposals are Responsive; or
    - (B) After initial determination of the Competitive Range in accordance with Section (1) of this Rule; or
    - (C) After conclusion of discussions with all eligible Proposers and evaluation of revised Proposals (see Section (2) of this Rule).
  - (b) Conducting Negotiations.
    - (A) Scope. The District may negotiate:
      - (i) The statement of Work;

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- (ii) The Contract Price as it is affected by negotiating the statement of Work; and
    - (iii) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the Request for Proposals or Addenda thereto. Accordingly, Proposers shall not submit, and District shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the Request for Proposals or Addenda thereto.
  - (B) Terminating Negotiations. At any time during discussions or negotiations that the District conducts in accordance with Sections (2) or (3) of this Rule, the District may terminate discussions or negotiations with the highest-ranked Proposer, or the eligible Proposer with whom it is currently discussing or negotiating, if the District reasonably believes that:
    - (i) The eligible Proposer is not discussing or negotiating in good faith; or
    - (ii) Further discussions or negotiations with the eligible Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.
  - (c) Continuing Serial Negotiations. If the District is conducting serial negotiations and the District terminates negotiations with an eligible Proposer in accordance with Section (3)(b)(B) of this Rule, the District may then commence negotiations with the next highest-scoring eligible Proposer, and continue the process described in Section (3) of this Rule until the District has either:
    - (A) Determined to Award the Contract to the eligible Proposer with whom it is currently discussing or negotiating; or
    - (B) Completed one round of discussions or negotiations with all eligible Proposers, unless the District provided for more than one round of discussions or negotiations in the Request for Proposals, in which case the District has completed all rounds of discussions or negotiations.
  - (d) Competitive Simultaneous Negotiations. If the District chooses to conduct competitive negotiations, the District may negotiate simultaneously with competing eligible Proposers. The District:
    - (A) Shall treat all eligible Proposers fairly and shall not favor any eligible Proposer over another;
    - (B) May disclose other eligible Proposers' Proposals or the substance of negotiations with other eligible Proposers only if the District notifies all of the eligible Proposers with whom the District will engage in negotiations of the District's intent to disclose before engaging in negotiations with any eligible Proposer.
  - (e) Any oral modification of a Proposal resulting from negotiations under this Section (3) shall be reduced to Writing.
- (4) **Best and Final Offers**. If the District requires Best and Final Offers, the District shall establish a common date and time by which eligible Proposers must submit Best and Final Offers. Best and Final Offers must be submitted only once; however, the District may make a Written determination that it is in the District's best interest to conduct additional discussions and negotiations or change the District's requirements and require another submission of Best and Final Offers. Otherwise, no discussion of or changes in the Best and Final Offers may be allowed prior to Award. All eligible Proposers must also be informed that if they do not submit Notice of withdrawal or another Best and Final Offer, their immediately previous Offer will be construed as their best the final Offer. The District must evaluate Offers as modified by the Best and Final Offer. The District must conduct evaluations conducted as described in PPS-47-0600. The District must not modify evaluation factors or their relative importance after the date and time that Best and Final Offers are due.

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**PPS-47-0263 Multi-step Sealed Proposals**

(1) **Generally.** The District may procure Goods and Services by using multi-step Competitive Sealed Proposals pursuant to PPS-47-0260(3)(b)(G).

(2) **Phased Process.** The multi-step Sealed Proposal process is a phased Procurement process that seeks necessary information or un-priced technical Proposals in the first phase and invites Proposers who submitted technically qualified Proposals in the first phase to submit Competitive Sealed Price Proposals on the technical Proposals in the second phase. The Contract shall be Awarded to the Responsible Proposer submitting the most advantageous Proposal in accordance with the terms of the Solicitation Document applicable to the second phase.

(3) **Public Notice.** Whenever multi-step Sealed Proposals are used, the District must provide public Notice of the first phase in accordance with PPS-47-0300. Public Notice is not required for the second phase. However, the District must give Notice of the subsequent phases to all Proposers and inform any Proposers excluded from the second phase of the right, if any, to protest exclusion pursuant to PPS-47-0720.

(4) **Procedure for Phase One of Multi-step Sealed Proposals.**

(a) **Form.** Multi-step Sealed Proposals must be initiated by the issuance of a Request for Proposal in the form and manner required for Competitive Sealed Proposals in accordance with PPS-47-0260, except as provided in this Rule. In addition to the requirements set forth in PPS-47-0260(2), this Request for Proposal must state:

(A) That un-priced technical submittals are requested;

(B) That the solicitation is a multi-step Sealed Proposal Procurement, and that priced Proposals will be considered only in the second phase from those Proposers whose un-priced technical Proposals are found qualified in the first phase;

(C) The criteria to be used in the evaluation of un-priced technical submittals;

(D) That the District, to the extent that it finds necessary, may conduct oral or Written discussions for the purposes of clarification of the un-priced technical submittals;

(E) That the Goods and Services being procured must be furnished generally in accordance with the Proposer's un-priced technical submittals as found to be finally qualified and must meet the requirements of the Request for Proposals;

(F) Whether Proposers excluded from the second phase have a right to protest the exclusion. Such information must be given in the solicitation or changed by Addenda; and

(b) **Addenda to the Request for Proposal.** After receipt of un-priced technical Proposals, Addenda to the Request for Proposal must be distributed only to those Proposers who submitted un-priced technical Proposals.

(c) **Receipt and Handling of Un-priced Technical Proposals.** Un-priced technical Proposals need not be opened publicly.

(d) **Evaluation of Un-Priced Technical Proposals.** The un-priced technical Proposals must be evaluated solely in accordance with the criteria set forth in the Request for Proposals. Un-priced technical Proposals shall be categorized as:

(A) Qualified;

(B) Potentially qualified; that is, reasonably susceptible of being made qualified; or

(C) Unqualified. The District must record in Writing the basis for determining a Proposal unqualified and make it part of the Procurement File. The District may initiate phase two of

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the procedure if, in the District's opinion, there are sufficient qualified or potentially qualified un-priced technical submittals to assure effective price competition in phase two without technical discussions. If the District finds that such is not the case, the District may issue an Addendum to the Request for Proposals or engage in discussions as set forth in this Rule.

- (e) Discussion of Un-priced Technical Proposals. The District may seek clarification of a technical Proposal of any Proposer who submits a qualified, or potentially qualified, un-priced technical Proposal. During the course of such discussions, the District must not disclose any information derived from one un-priced technical submittal to any other Proposer. Once discussions begin, any Proposer who has not been notified that its Proposal has been finally found unqualified may submit supplemental information amending its technical Proposal at any time until the Closing of the second phase. Such submission may be made at the request of the District or at the Proposer's own initiative.
- (f) Notice of Unqualified Un-priced Technical Proposal. When the District determines a Proposer's un-priced technical Proposal to be unqualified, such Proposer shall not be afforded an additional opportunity to supplement its un-priced technical Proposal.
- (g) Mistakes During Multi-step Sealed Proposals. Mistakes may be corrected or Proposals may be withdrawn during phase one:
  - (A) Before un-priced technical submittals are considered;
  - (B) After any discussions have commenced under this Rule;
  - (C) When responding to any Addenda of the Request for Proposals; or
  - (D) In accordance with PPS-47-0470.

(5) **Methods of Contractor Selection for Phase One.** In conducting phase one, the District may employ any combination of the methods of Contractor selection that call for the establishment of a Competitive Range or include discussions, negotiations, or Best and Final Offers as set forth in PPS-47-0261 and PPS-47-0262. If the District uses such methods of Contractor selection, it shall follow the procedures set forth in PPS-47-0261 and PPS-47-0262.

(6) **Procedure for Phase Two.**

- (a) Initiation. Upon the completion of phase one, the District shall invite each qualified Proposer to submit Price Proposals.
- (b) Conduct. The District shall conduct phase two as any other Competitive Sealed Proposal Procurement except:
  - (A) As specifically set forth in this Rule; and
  - (B) No public Notice need be given of the Request to submit Price Proposals because such Notice was previously given.

**PPS-47-0265 Small Procurements**

(1) **Generally.** For Procurements of Goods and Services less than or equal to \$5,000, the District may Award a Contract as a Small Procurement in any manner deemed practical or convenient by the District, including by direct selection or Award.

(2) **Amendments.** The District may amend a Contract Awarded as a Small Procurement in accordance with PPS-47-0800, but the cumulative Amendments must not increase the total Contract Price to greater than \$6,000.



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**(3) No Fragmentation.** A Procurement may not be artificially divided or fragmented so as to constitute a Small Procurement. See ORS 279B.065(2).

**PPS-47-0270 Intermediate Procurements**

**(1) Generally.** For Procurements of Goods and Services greater than \$5,000 and less than or equal to \$150,000, the District may Award a Contract as an Intermediate Procurement pursuant to ORS 279B.070.

**(2) Intermediate Solicitation Process.** When conducting an Intermediate Procurement, the District shall seek at least three informally solicited Competitive Price Quotes or Competitive Proposals from prospective Contractors. The District shall keep a Written record of the sources of the Quotes or Proposals received. If three Quotes or Proposals are not reasonably available, fewer will suffice, but the District shall make a Written record of the effort made to obtain the Quotes or Proposals.

**(3) Written Solicitations.** For Intermediate Procurements equal to or exceeding \$75,000, the District shall use a Written solicitation to obtain Quotes, Bids, or Proposals.

**(4) Negotiations.** The District may negotiate with a prospective Contractor who offers to provide Goods or Services in response to an Intermediate Procurement to clarify its Quote or Offer or to effect modifications that will make the Quote or Offer more advantageous to the District.

**(5) Award.** If a Contract is Awarded, the District shall Award the Contract to the Offeror whose Quote or Proposal will best serve the interests of the District, taking into account price as well as considerations including, but not limited to, experience, expertise, product functionality, suitability for a particular purpose, and Contractor responsibility under ORS 279B.110.

**(6) Amendments.** The District may amend a Contract Awarded as an Intermediate Procurement in accordance with PPS-46-0605, but the cumulative Amendments shall not increase the total Contract Price to a sum that is greater than 25% of the Original Contract Price.

**(7) No Fragmentation.** A Procurement may not be artificially divided or fragmented so as to constitute an Intermediate Procurement. See ORS 279B.070(2).

**PPS-47-0275 Sole Source Procurements**

**(1) Generally.** The Superintendent is delegated the authority to determine whether Goods and Service or a class of Goods and Services are available from only one source pursuant to ORS 279B.075. The Superintendent's determination must be based on Written Findings that may include information that:

- (a)** The efficient utilization of existing Goods or Services requires the acquisition of compatible Goods or Services;
- (b)** The Goods or Services required for the exchange of software or data with other public or private agencies are available from only one source;
- (c)** The Goods or Services are for use in a pilot or an experimental Project; or
- (d)** Other Findings that support the conclusion that the Goods or Services are available from only one source.

**(2) Public Notice.** If the Contract amount is greater than \$150,000, the District shall give public Notice of the Superintendent's determination that the Goods or Services or class of Goods or Services are available from only one source. The District shall publish such Notice in a manner similar to public Notice of Competitive Sealed Bids under ORS 279B.055(4) and PPS-47-0300. The public Notice shall describe the Goods or Services to be acquired by a sole-source Procurement, identify the prospective Contractor, and include the date, time, and place that protests are due. The District shall give affected Persons at least seven

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Days from the date of the Notice of the determination that the Goods or Services are available from only one source to protest the sole-source determination.

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

**PPS-47-0280 Emergency Procurements**

**(1) Generally.** The Superintendent may Award a Public Contract as an Emergency Procurement. The Superintendent will document the nature of the Emergency and describe the method used for selection of the particular Contractor. See ORS 279B.080.

**(2) Construction Services.** For an Emergency Procurement of construction services that are not Public Improvements, the District shall ensure competition for a Contract for the Emergency Work that is reasonable and appropriate under the Emergency circumstances. In conducting the Procurement, the District shall set a solicitation time period that the District determines to be reasonable under the Emergency circumstances, and may issue Written or oral requests for Offers or make direct appointments without competition in cases of extreme necessity. See PPS-49-0150.

**SPECIAL PROCUREMENTS (CONTRACTING EXEMPTIONS)**

**PPS-47-0285 Special Procurements; Purpose and Application**

The District may Award a Public Contract as a Special Procurement pursuant to the requirements of ORS 279B.085 without using Competitive Sealed Bidding or Competitive Sealed Proposals or other competitive procedures as otherwise required by these Rules. The Contract Review Board must approve Special Procurements. The Contract Review Board may approve the following two types of Special Procurements:

**(1)** A "Class Special Procurement" is a Procurement procedure for entering into a series of Contracts over time or for multiple Projects based on the classification of the Contract.

**(2)** A "Contract-Specific Special Procurement" is a Procurement procedure for the purpose of entering into a single Contract or a number of related Contracts on a one-time basis or for a single Project.

**PPS-47-0287 Special Procurements; Request Procedures**

**(1)** To seek approval of an additional Special Procurement, the Superintendent shall submit a Written request to the Contract Review Board. The request must describe the contracting procedure, the Goods and Services or class of Goods and Services that are the subject of the Special Procurement, and the circumstances that justify the use of a Special Procurement under the standards set forth in Section (2) of this Rule.

**(2)** The Contract Review Board shall review and may approve a request for a Special Procurement if the Contract Review Board finds that the use of the Special Procurement:

**(a)** Is unlikely to encourage favoritism in the Awarding of Public Contracts or to substantially diminish competition for Public Contracts; and

**(b) (A)** Is reasonably expected to result in substantial cost savings to the District or to the public; or

**(B)** Otherwise substantially promotes the public interest in a manner that could not practicably be realized by complying with Procurement requirements that would otherwise be applicable to the Procurement under Division 47 of these Rules.

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(3) The District shall give public Notice of approval of a Special Procurement in the manner provided in PPS-47-0300. The Notice will describe the Goods or Services or class of Goods or Services subject to the Special Procurement, and shall give affected Persons at least seven Days from the date of Notice of the approval of the Special Procurement to protest the Special Procurement.

(4) An affected Person may protest the approval of a Special Procurement in accordance with ORS 279B.400 and PPS-47-0700.

(5) An approved Class Special Procurement shall be added to enumerated Class Special Procurements in PPS-47-0288.

**PPS-47-0288 Approved Class Special Procurements**

The Contract Review Board declares the following classes of Contracts for Goods or Services listed in this Section as Class Special Procurements for which Contracts may be Awarded without compliance with the competitive Procurement requirements that would otherwise be applicable to the Procurement under Division 47 of these Rules. Unless an alternative Procurement process is particularly specified in these Rules, the selection procedures for such Class Special Procurements shall be as the Superintendent determines will result in a Contract that will best serve the interests of the District. Prior to utilizing a Class Special Procurement, the Superintendent will document in Writing in the Procurement File the reasons why the Contract qualifies as a Class Special Procurement under these Rules, including any required Findings. Except as otherwise provided in this Rule, the School Board must approve any Contracts Awarded pursuant to Special Procurement if the Contract Price exceeds the Superintendent's delegated authority under PPS-45-0200. The Contract Review Board hereby designates the following classes of Contracts for Special Procurement:

(1) **Advertising Contracts.** The District may purchase advertising in any medium, regardless of the dollar value of the Contract. The District may sell advertising for District publications or activities, regardless of the dollar value of the Contract.

(2) **Equipment Repair/Overhaul.** The District may enter into a Public Contract for equipment repair or overhaul without competitive Procurement, subject to the following conditions:

- (a) Where the extent of the repair or overhaul is unknown or not easily identified; or
- (b) Where service or parts requirements are unpredictable; or
- (c) Service or parts required are for equipment for which specially trained personnel are required, and such personnel are available from only one source; and
- (d) Conducting a competitive process is impractical. The District must document in the Procurement File the reasons why a competitive process was deemed to be impractical

(3) **Specifications.**

(a) "Or Equal" Specification.

- (A) A Brand Name or Equal Specification may be used when the use of a Brand Name or Equal Specification is advantageous to the District, because the Brand Name describes the standard of quality, performance, functionality, and other characteristics of the product needed by the District.
- (B) The Superintendent is entitled to determine what constitutes a product that is equal or superior to the product specified, and any such determination is final.
- (C) Nothing in this Section may be construed as prohibiting the Superintendent from specifying one or more comparable products as examples of the quality, performance, functionality, or other characteristics of the product needed by the District.

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- (b) Specifying a Particular Make or Product. A Brand Name Specification may be prepared and used only if the Superintendent determines for a solicitation or a class of solicitations that only the identified Brand Name Specification will meet the needs of the District based on one or more of the following Findings:
- (A) That use of a Brand Name Specification is unlikely to encourage favoritism in the Awarding of Public Contracts or substantially diminish competition for Public Contracts;
  - (B) That use of a Brand Name Specification would result in substantial cost savings to the District;
  - (C) That there is only one manufacturer or seller of the product of the quality, performance, or functionality required;
  - (D) That the equipment or supplies being procured are used in athletic programs or physical education programs; or
  - (E) That efficient utilization of existing Goods requires the acquisition of compatible Goods or Services. For the purposes of this Finding, "compatibility" includes, without limitation, technical compatibility, technological equity, and equivalent ease of training, durability, and use. "Compatibility" also includes, without limitation, compatibility among equipment in a standardized technology bundle developed to deliver curriculum in a classroom.
- (c) Purchasing from Sole Source, Single Seller. The District may purchase particular Goods or Services available from only one source based on Written Findings that may include:
- (A) That the efficient use of existing Goods requires the acquisition of compatible Goods or Services;
  - (B) That the Goods or Services required for the exchange of data with other public or private agencies are available from only one source;
  - (C) That the Goods or Services are for use in a pilot or experimental Project; or
  - (D) Other Findings that support the conclusion that the Goods and Services are available from only one source.
- (4) **Copyrighted Materials and Creative Works**. The District may directly purchase copyrighted materials or creative works regardless of dollar value if available from only one source. Examples of copyrighted materials covered by this exemption may include, but are not necessarily limited to, new adopted textbooks, workbooks, curriculum kits, on-line curriculum, reference materials, books, periodicals, audio and visual media, and non-mass-marketed software. Examples of creative works covered by this Class Special Procurement include, but are not limited to, artwork, music, uncopyrighted writings, and similar works.
- (5) **Insurance and Employee Benefits**. The District may purchase liability, property damage, workers' compensation, and other insurance and insurance services Contracts, and employee benefits, without Competitive Procurement and regardless of dollar amount, by selecting either a vendor directly or by appointing an agent of record. For the purpose of this Special Procurement, "employee benefits" includes, but is not limited to, "employee benefit plans" as defined in ORS 243.105(1), plans provided through the Oregon Educators Benefits Board pursuant to ORS 243.860 through 243.886, plans provided through the School District No. 1J Health and Welfare Trust, flexible benefit plans as defined in ORS 243.221, insurance or other benefit based on life, supplemental medical, supplemental dental, optical, accidental death or disability insurance plans, long-term care insurance, health care coverage to retired officers, employees, spouses, and children, employee assistance plans, and expense reimbursement plans.

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- (6) Spot Buys.** This Special Procurement provides a process for the District to procure products that are available for a limited period of time at "lower-than-normal" prices (also referred to as "Spot Buys").
- (a)** Regardless of dollar value and without Competitive Procurement, the District may purchase "Spot Buys."
  - (b) Conditions.** The District may procure an unlimited dollar value of products when all of the following conditions are present:
    - (A)** A non-exclusive mandatory-use Contract or regularly scheduled Bid process already exists for the item being purchased;
    - (B)** The proposed unit price of the item(s) to be purchased is significantly less than a comparable item's price on an existing mandatory-use Contract, recent Bid, or based on obtaining at least three Quotes, and the amount saved exceeds any additional administrative costs incurred to purchase the item using this Special Procurement;
    - (C)** The product being purchased has limited availability (i.e., the product may no longer be available or available at the special price upon completion of normal Bid processes);
    - (D)** Any mandatory-use Contract currently in place for the item being purchased contain clauses allowing for the use of this Special Procurement; and
    - (E)** The purchase does not jeopardize fulfillment of a guaranteed minimum volume under an existing mandatory-use Contract;
  - (c) Documentation.** Purchases may only be made under this Special Procurement if the Superintendent documents to the Procurement File that the conditions set forth in Section (6)(b) apply to the proposed purchase.
  - (d)** Notwithstanding PPS-45-0200, the School Board hereby authorizes the Superintendent to enter into and approve payment on "spot-buy" Contracts in any dollar amount, but will report the nature and amount of the Contract to the School Board as provided in PPS-45-0200(6).
- (7) Price Agreements.**
- (a)** Price Agreements may be established for the purposes of minimizing paperwork, achieving continuity of product, securing a source of supply, reducing inventory, combining District requirements for volume discounts, creating standardization among agencies, and reducing lead time for ordering. The Superintendent may enter into Price Agreements to purchase Goods or Services for an anticipated need at a predetermined price, but the Contract must be let by a Competitive Procurement process pursuant to the requirements of these Rules.
  - (b)** The Superintendent may purchase the Goods and Services from a Contractor Awarded a Price Agreement without first undertaking additional Competitive solicitation up to the amount set forth in the Price Agreement.
  - (c)** The Superintendent may use the Price Agreement entered into by another Public Agency when the Original Contract was let pursuant to PPS-46-0400 through PPS-46-0480;
  - (d)** The term of the Price Agreement, including renewals, may not exceed the term stated in the original solicitation.
- (8) Purchase of Used Personal Property.** The District may purchase used property or equipment. "Used personal property or equipment" is property or equipment that has been placed in its intended use by a previous owner or user for a time recognized in the relevant trade or industry as qualifying the personal property or equipment as "used" at the time of the District purchase. "Used personal property or equipment" generally does not include property or equipment if the District was the previous user, whether under a lease,

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as part of a demonstration, trial, or pilot Project, or under a similar arrangement. Notwithstanding PPS-45-0200, the School Board hereby authorizes the Superintendent to enter into and approve payment on a Contract for the purchase of used personal property in any dollar amount, but will report the nature and amount of the Contract to the School Board as provided in PPS-45-200(6).

**(9) Sale of Used Personal Property.**

- (a) The Superintendent may sell used personal property without obtaining Competitive Bids or Quotes if a liquidation sale would bring in greater revenue to the District than would be gained through Bids. As used in this Section, "surplus personal property" is property or equipment that has been determined to no longer be useful to the District. It may be property or equipment that the District has used for some time and that is fully used up or obsolete. It may be property or equipment that is the natural excess or leftover from a Project, such as cable, wire, carpet, etc., that has been cut or partially used in some manner so that it cannot be returned to the supplier for a refund.
- (b) For sales of Surplus Property valued at more than \$25,000 per item or lot, the Superintendent must attempt to obtain at least three Competitive Quotes. The Superintendent will keep a Written record of the source and number of Quotes received. If three Quotes are not available, a Written record must be made of the attempt to obtain three Quotes.
- (c) The Superintendent may sell used personal property regardless of price via an electronic auction or sales service including, without limitation, eBay, Craigslist, or other similar Internet-based auctions or marketplaces. If the service does not otherwise provide for a competitive sales process, the Superintendent shall establish a minimum Bid, a time period for acceptance of Bids, and shall not sell the property unless the Superintendent receives a minimum of three Bids. The sale shall be Awarded to the highest Responsible Bidder submitting a Responsive Bid, except that the Superintendent may accept a lower Bid if transportation or other costs associated with collection or delivery of the property would offset the higher Bid amount.
- (d) The Superintendent may sell, sell at a discount, or donate used personal property to another school district, to another Public Body, or to a nonprofit corporation that provides educational, social, or other important services to the District, District students, or families of District students.
- (e) If the Superintendent determines that the used personal property has no market value, or that the market value is so low that the staff time or cost involved in selling the property is likely to exceed the value of the used personal property, the Superintendent may dispose of the property as the Superintendent determines is in the best interest of the District.

**(10) Reverse Auctions.**

- (a) A Reverse Auction means a process for the purchase of Goods and Services from the lowest Bidder. The District must conduct Reverse Auctions by first publishing a solicitation that describes its requirements and Contract terms and conditions. Then the District must solicit online Bids from all interested Bidders through an Internet-based program. The solicitation must set forth a start and end time for Bids and specify the following type of information to be disclosed to Bidders during the Reverse Auction:
  - (A) The prices of the other Bidders or the price of the most Competitive Bidder;
  - (B) The rank of each Bidder (e.g., (i) "winning" or "not winning" or (ii) "1st, 2nd, or higher");
  - (C) The scores of the Bidders if the District chooses to use a scoring model that weighs non-price factors in addition to price; or

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**(D)** Any combination of (A), (B), and (C) above. Before the Reverse Auction commences, Bidders must be required by the District to assent to the Contract terms and conditions, either in Writing or by an Internet "click" agreement. The Bidders then compete for the Award of a Contract by offering successively lower prices, informed by the price(s), ranks, and scores, separately or in any combination thereof, disclosed by the District. The identity of the Bidders must not be revealed during this process. Only the successively lower price(s), ranks, scores, and related details, separately or in any combination thereof, will be revealed to the participants. The District may cancel this solicitation if the District determines that it is in the District's best interest. At the end of this Bidding process, the District must Award any potential Contract to the lowest Responsible Bidder, or in the case of multiple Awards, lowest Responsible Bidders pursuant to ORS 279A.055(10)(b). This process allows the District to test and determine the suitability of the Goods and Services before making the Award. The District must comply with the following procedures for this type of solicitation.

**(11) Software and Hardware Maintenance and Upgrades.** The Superintendent may enter into a Contract and may renew existing Contracts for proprietary information technology and telecommunications services, and hardware or software maintenance or upgrades where such hardware where the efficient utilization of existing equipment or systems requires the acquisition of compatible goods or services, or where goods or services are available from only one source. The Superintendent must make a Finding supporting this conclusion as required in PPS-47-0288(3)(b) or (3)(c). In making this determination, the Superintendent may consider the functionality of the existing system with upgrades or continued service, long-term cost, ease of use, integration with existing technology or systems, or other factors.

**(12) Hazardous Material Abatement.**

- (a)** The Superintendent may enter into Public Contracts without Competitive Procurement, regardless of dollar amount, when ordered to clean up oil or hazardous waste pursuant to the authority granted by the Oregon Department of Environmental Quality ("DEQ") under ORS Chapter 466, especially ORS 466.605 through 466.680. In exercising its authority under this exemption:
- (b)** The Superintendent must, to the extent reasonable under the circumstances, encourage competition by attempting to obtain informal Quotes from potential suppliers of Goods and Services.
- (c)** The department responsible for managing or coordinating the clean-up must submit a Written description of the circumstances that require the clean-up and a copy of the DEQ order for the clean-up, along with a requisition authorizing the Contract, to the District Purchasing Department.
- (d)** The District Procurement and Distribution Department must record the measures taken under Section (12)(b) of this Rule to encourage competition, the amount of the Quotes or Proposals obtained, if any, and the reason for selecting the Contractor to whom Award is made.
- (e)** The District may not contract pursuant to this exemption in the absence of an order from the DEQ to clean up a site that includes a time limit that would not allow the District to hire a Contractor under normal Competitive Procurement procedures. Goods and Services to perform other hazardous material removal or clean-up will be purchased in accordance with normal Competitive Procurement procedures as described in these Rules and policies.
- (f)** Notwithstanding PPS-45-0200, the School Board hereby authorizes the Superintendent to enter into and approve payment on a Contract for hazardous material abatement in any dollar amount, but will report the nature and amount of the Contract to the School Board as provided in PPS-45-0200(6).

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**(13) Purchase of Products for Resale to Students and Staff.** The District may purchase personal property for resale to students and staff without Competitive Procurement and regardless of dollar amount.

**(14) Radio and Television Contracts for Student Activities.**

- (a) Generally. The Superintendent must use a Competitive Procurement method (e.g., an Invitation to Bid or Request for Proposals) to obtain Written Bids or Proposals to provide commercial radio and television Services for any student activity or District program, including athletics, if the value of the Services totals more than \$150,000, regardless of whether the District is paying or receiving revenue under the Contract.
- (b) Specific and Ancillary Services. The Solicitation Document used to invite Bids or Proposals to furnish radio or television Services to District programs must include the minimum Bidder or qualifications and Service specifications and will conform to the other requirements of the "Request for Proposal" Rule herein. The Solicitation Document may invite interested Bidders or Proposers to offer other ancillary Services. Each ancillary Service, if offered, must be accompanied by a dollar value that reflects the current purchase price for the Service and a description of the Service and its use and application.
- (c) Term of Contract. A Contract for radio or television Services may be Awarded for up to five years.

**(15) Donated Materials or Services.** The District may directly negotiate a Contract with a Person to perform Services or provide Goods or Services regardless of dollar amount, if:

- (a) The Person has agreed to donate all or a significant portion of the materials or Services necessary to perform the Work; and
- (b) The Person enters into a license or agreement with the District whereby the Person agrees to comply with the Public Contract requirements applicable to the particular Project and any requirements that the District deems necessary or beneficial to protect the District.

**(16) Manufacturer Direct Supplies.** The District may purchase Goods directly from a manufacturer if a large-volume purchase is required and the cost from the manufacturer is the same or less than the cost the manufacturer charges to its distributor(s). Procurements of this type are made on a Contract-by-Contract basis and are not Price Agreements.

**(17) Purchases through Federal Programs.** The District may purchase certain authorized Goods and Services through General Service Administration federal programs or federal contracts, provided that the District has federal authorization to purchase through the federal program and the federal contract was solicited in a manner substantially equivalent to the requirements of the PPS Division 47 and the Public Contracting Code.

**(18) Benson House Program Contracts.** The District may directly negotiate a Contract for Goods and/or Services without complying with the Competitive Procurement requirements of these Rules where the Contract is for the purpose of supporting the Benson Polytechnic High School Building Construction Class, and all or a portion of the Contract Price is discounted or donated to the District.

**(19) Purchases under Contracts Solicited by Nonprofit Procurement Organizations of Which the District is a Member.** The District may purchase Goods and/or Services under a Contract or Procurement solicited by a Nonprofit Procurement Organization of which it is a member. For the purposes of this Special Procurement, such a Procurement Organization will be considered to be an "Administering Contracting Agency" and a "Contracting Purchasing Group" under PPS-46-0400 through 46-0480. Such Procurement must otherwise comply with the requirements for permissive, joint, or Interstate Cooperative Procurements, as applicable, pursuant to PPS-46-0400 through PPS-46-0480.



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**(20) Secure, Specialized Transportation for Special Needs Students.** The Superintendent may contract directly for transportation services for special needs students where such transportation need requires a transportation service with skills or equipment tailored to the needs of the particular special needs student or class of special needs students. For the purposes of this Special Procurement, a "special needs student" is a student with special physical, mental, developmental, or security needs such that District transportation, public transportation, or other private general transportation providers (taxicabs, town car services, charter services, etc.) cannot provide safe, beneficial, or timely service. Notwithstanding PPS-45-0200, the School Board hereby authorizes the Superintendent to enter into and approve payment on a Contract for secure, specialized transportation, in any dollar amount, and will report the nature and amount of the Contract to the School Board as provided in PPS-45-200(6).

**(21) FSCP.** The Superintendent may establish an FSCP for Goods, Services, or construction Services that are not Public Improvements for a particular class of Services, where the need for such Services is ongoing in nature, where it is difficult to anticipate the Service need, time, amount, or availability of Contractors, or where Service needs arise so quickly that it is not practical or cost-effective to conduct individual solicitations under these Rules. An FSCP shall comply with the following requirements:

- (a) Solicitation to Create an FSCP. An FSCP for Goods or Services shall be solicited based on the total cost of the Work estimated to be Awarded through the FSCP during its life. If the total amount of the Work is estimated to be over \$150,000, the Superintendent shall use a Competitive Sealed Proposals process as provided in PPS-47-0260. If the total amount of the Work is \$150,000 or less, the FSCP may be solicited pursuant to the Intermediate Procurement process set forth in PPS-47-0270
  - (A) The Superintendent shall document the reasons for establishing an FSCP consistent with this Rule in the Procurement File. This documentation must be reviewed and approved by the Director of Procurement as demonstrating that the procurement qualifies for use of an FSCP under these Rules.
  - (B) The solicitation shall describe the class of Contracts that can be Awarded to Contractors in the FSCP. The District may not Award Contracts outside of the designated class of Contracts to the FSCP.
  - (C) The solicitation shall set forth the number of Contractors that will be appointed to the FSCP, the selection criteria, and the methodology for ranking the requests and selecting the Contractors to be appointed to the pool.
  - (D) The solicitation may request a binding Price Quote or rate that will become part of a subsequent Contract or may establish the pool based on qualification alone.
  - (E) The solicitation may set or limit the value of the Work to be performed by the FSCP.
- (b) Contracting for Work from an FSCP. Once an FSCP has been established, the Superintendent may negotiate Contracts directly with Contractors in the pool to perform certain Services or provide certain Goods within the established scope of the Work. Upon creation of the FSCP, the Superintendent will generate a random list of names of the Contractors appointed to the FSCP. Contracts for individual Services or Goods will be offered, negotiated, and Awarded sequentially to Contractors on the FSCP list. Once the Superintendent has offered a Contract to all of the Contractors in the FSCP (whether or not some or all of the Contractors have accepted the Offer), a new random FSCP list will be generated. The Superintendent may Offer a Contract to Contractors out of sequence in the following circumstances:
  - (A) The Contractor that is next on the list declines or is unavailable during the time period needed.

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- (B) Contract negotiations with the next-listed Contractor are not successful.
- (C) The Project is for Goods or Services that is a continuation of, addition to, or connected with Goods or Services previously performed by a Contractor on the list, and such prior experience means that it is in the best interest of the District to Award the Contract to the Contractor that performed the prior Work or provided the prior Goods.
- (D) The nature of the Project is such that the Superintendent determines that an additional analysis of Contractor capability or capacity is required. In order to make this determination, the Superintendent shall conduct an Intermediate Procurement pursuant to PPS-47-0270 limited to Contractors in the FSCP.

If a Contractor is selected outside of the sequence, the reason shall be documented in Writing in the Procurement File.

- (c) An FSCP established under this Section will expire after three years from the date of Closing of the solicitation, unless reestablished as provided in this Rule.
- (d) Appointment to an FSCP does not guarantee that a Contractor will receive a particular amount of Work or orders or any Work or orders at all.
- (e) The establishment of an FSCP does not preclude the Superintendent from procuring Goods or Services that would otherwise fall within the FSCP from other Contractors through any other Procurement method authorized under these Rules.
- (f) At any time during the term of an FSCP, the Superintendent may request confirmation from a Contractor or Contractors in the pool that the Contractor continues to maintain the skills, personnel, inventory, or other capability needed to perform the class of Work or provide the required Goods or Services.
- (g) If an FSCP for construction Services is reasonably estimated to include Public Works Projects that will total over \$50,000 during the life of the FSCP, Public Works Contracts Awarded to Contractors on an FSCP list shall require the payment of prevailing wages pursuant to ORS 279C.800 through 279C.870.

**(22) Contracts for Price Regulated Items.** The Superintendent may contract for the direct purchase of Goods or Services where the rate or price for the Goods or Services being purchased is established by federal, state, or local regulatory authority without competitive solicitation.

**(23) Service Monopoly.** The Superintendent may enter into Contracts for Work by a utility or other entity that has been granted a monopoly for Services for a specific geographic area or provision of a type of Service and by agreement the utility or entity is either entitled to or is required to perform the required Work.

**(24) Investment Contracts.** The Superintendent may contract for the investment of District funds or the borrowing of funds by the District when such investment or borrowing is contracted pursuant to statute, rule, or constitution. The Superintendent shall use competitive methods where possible to achieve the best value for the District.

**(25) Rating Agency Contracts.** The District may purchase the Services of Moody's Investors Service, Standard & Poor's, or similar rating agencies.

**(26) Gasoline, Diesel Fuel, Heating Oil, Lubricants, and Asphalt.** The Superintendent may purchase gasoline, diesel fuel, heating oil, lubricants, and asphalt using the Intermediate Procurement Process set forth in PPS-47-0270 regardless of dollar amount.

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**PROCUREMENT PROCESS**

**PPS-47-0300 Public Notice of Solicitation Documents**

- (1) **Notice of Solicitation Documents; Fee.** The District shall provide public Notice of every Solicitation Document in accordance with Section (2) of this Rule. The District may give additional Notice using any method it determines appropriate to foster and promote competition, including:
- (a) Mailing Notice of the availability of the Solicitation Document to Persons that have expressed an interest in the District's Procurements;
  - (b) Placing Notice on the District's Electronic Procurement System; or
  - (c) Placing Notice on the District's Internet World Wide Web site.
- (2) **Advertising.** The District shall advertise every Notice of a Solicitation Document as follows:
- (a) The District shall publish the advertisement for Offers in accordance with the requirements of ORS 279B.055(4) and 279B.060(4) in at least one newspaper of general circulation in the District and in as many other publications as the District may determine; or
  - (b) The District may publish the advertisement for Offers on the State's or State's and District's Electronic Procurement System instead of publishing Notice in a newspaper of general circulation as required by ORS 279B.055(4)(b) if, by rule or order, the District's Contract Review Authority has authorized the District to publish Notice of Solicitation Documents on the District's Electronic Procurement System.
  - (c) Notice shall be given at least seven Days prior to the solicitation Closing day.
- (3) **Content of Advertisement.** All advertisements for Offers shall set forth:
- (a) Where, when, how, and for how long the Solicitation Document may be obtained;
  - (b) A general description of the Goods or Services to be acquired;
  - (c) The interval between the first date of Notice of the Solicitation Document given in accordance with Sections (2)(a) or (b) above and Closing, which shall not be less than seven Days for an Invitation to Bid and 14 Days for a Request for Proposals, unless the District determines that a shorter interval is in the public's interest, and that a shorter interval will not substantially affect competition. However, in no event shall the interval between the first date of Notice of the Solicitation Document given in accordance with Section (2)(a) or (b) above and Closing be less than seven Days as set forth in ORS 279B.055(4)(f). The District shall document the specific reasons for the shorter public Notice period in the Procurement File;
  - (d) The date that Persons must file applications for prequalification if prequalification is a requirement, and that the class of Goods or Services is one for which Persons must be prequalified;
  - (e) The office where Contract terms, conditions, and Specifications may be reviewed;
  - (f) The name, title, and address of the individual authorized by the District to receive Offers;
  - (g) The scheduled Opening; and
  - (h) Any other information the District deems appropriate.
- (4) **Posting Advertisement for Offers.** The District shall post a copy of each advertisement for Offers at the principal business office of the District. An Offeror may request a copy of the advertisement for Offers.
- (5) **Fees.** The District may charge a fee or require a deposit for the Solicitation Document.

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**(6) Notice of Addenda.** The District shall provide potential Offerors Notice of any Addenda to a Solicitation Document in accordance with PPS-47-0430.

**PPS-47-0310 Bids or Proposals are Offers**

**(1) Offer and Acceptance.** The Bid or Proposal is the Bidder's or Proposer's Offer to enter into a Contract.

- (a)** In Competitive Bidding and Competitive Proposals, the Offer is always a "Firm Offer," i.e., the Offer shall be held open by the Offeror for the District's acceptance for the period specified in PPS-47-0480. The District may elect to accept the Offer at any time during the specified period, and the District's Award of the Contract constitutes acceptance of the Offer and binds the Offeror to the Contract.
- (b)** Notwithstanding the fact that a Competitive Proposal is a "Firm Offer" for the period specified in PPS-47-0480, the District may elect to discuss or negotiate certain contractual provisions, as identified in these Rules or in the Solicitation Document, with the Proposer. Where negotiation is permitted by the Rules or the Solicitation Document, Proposers are obligated to negotiate in good faith and only on those terms or conditions that the Rules or the Solicitation Document have reserved for negotiation.

**(2) Contingent Offers.** Except to the extent that the Proposer is authorized to propose certain terms and conditions pursuant to PPS-47-0262, a Proposer must not make its Offer contingent upon the District's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

**(3) Offeror's Acknowledgment.** By Signing and returning the Offer, the Offeror acknowledges that it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits Proposers to propose alternative terms or conditions under PPS-47-0262, the Offeror's Offer includes any nonnegotiable terms and conditions, and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the District in Writing, and Offeror's agreement to perform the scope of Work and meet the performance standards set forth in the final negotiated scope of Work.

**PPS-47-0320 Facsimile Bids and Proposals**

**(1) District Authorization.** The District may authorize Offerors to submit Facsimile Offers. If the District determines that Bid or Proposal security is or will be required, the District should not authorize Facsimile Offers unless the District has another method for receipt of such security. Prior to authorizing the submission of Facsimile Offers, the District must determine that the District's equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time. In addition, the District must establish administrative procedures and controls:

- (a)** To receive, identify, record, and safeguard Facsimile Offers;
- (b)** To ensure timely delivery of Offers to the location of Opening; and
- (c)** To preserve the Offers as sealed.

**(2) Provisions to be Included in Solicitation Document.** In addition to all other requirements, if the District authorizes a Facsimile Offer, the District will include in the Solicitation Document the following:

- (a)** A provision substantially in the form of the following: "A 'Facsimile Offer,' as used in this Solicitation Document, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by the District via a facsimile machine";

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- (b) A provision substantially in the form of the following: "Offerors may submit Facsimile Offers in response to this Solicitation Document. The entire response must arrive at the place and by the time specified in this Solicitation Document";
- (c) A provision that requires Offerors to Sign their Facsimile Offers;
- (d) A provision substantially in the form of the following: "The District reserves the right to Award the Contract solely on the basis of a Facsimile Offer. However, upon the District's request the apparent successful Offeror must promptly submit its complete original Signed Offer;
- (e) The data and compatibility characteristics of the District's receiving facsimile machine as follows:
  - (A) Telephone number; and
  - (B) Compatibility characteristics, e.g., make and model number, receiving speed, and communications protocol.
- (f) A provision that provides that the District is not responsible for any failure attributable to the transmission or receipt of the Facsimile Offer including, but not limited to, the following:
  - (A) Receipt of garbled or incomplete documents;
  - (B) Availability or condition of the receiving facsimile machine;
  - (C) Incompatibility between the sending and receiving facsimile machine;
  - (D) Delay in transmission or receipt of documents;
  - (E) Failure of the Offeror to properly identify the Offer documents;
  - (F) Illegibility of Offer documents; and
  - (G) Security and confidentiality of data.

**PPS-47-0330 E-Procurement**

**(1) Electronic Procurement Authorized.**

- (a) The District may conduct all phases of a Procurement, including, without limitation, the posting of Electronic Advertisements and the receipt of Electronic Offers, by electronic methods if and to the extent the District specifies in a Solicitation Document, a Request for Quotes, or any other Writing that instructs Persons how to participate in the Procurement.
- (b) The District must open an Electronic Offer in accordance with electronic security measures in effect at the District at the time of its receipt of the Electronic Offer. Unless the District provides procedures for the secure receipt of Electronic Offers, the Person submitting the Electronic Offer assumes the risk of premature disclosure due to submission in unsealed form.
- (c) The District's use of electronic Signatures must be consistent with applicable statutes and Rules. The District must authorize, and may limit the use of, electronic methods of conducting a Procurement based on the best interests of the District, as determined by the District.
- (d) If the District determines that Bid or Proposal security is or will be required, the District should not authorize Electronic Offers unless the District has another method for receipt of such security.

**(2) Rules Governing Electronic Procurements.** The District must conduct all portions of an Electronic Procurement in accordance with these Division 47 Rules, unless otherwise set forth in this Rule.

**(3) Preliminary Matters.** As a condition of participation in an Electronic Procurement, the District may require potential Contractors to register with the District before the date and time on which the District will first accept Offers, to agree to the terms, conditions, or other requirements of a Solicitation Document, or to

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agree to terms and conditions governing the Procurement, such as procedures that the District may use to attribute, authenticate, or verify the accuracy of an Electronic Offer, or the actions that constitute an electronic Signature.

**(4) Offer Process.** The District may specify that Persons must submit an Electronic Offer by a particular date and time, or that Persons may submit multiple Electronic Offers during a period of time established in the Electronic Advertisement. When the District specifies that Persons may submit multiple Electronic Offers during a specified period of time, the District must designate a time and date on which Persons may begin to submit Electronic Offers, and a time and date after which Persons may no longer submit Electronic Offers. The date and time after which Persons may no longer submit Electronic Offers need not be specified by a particular date and time, but may be specified by a description of the conditions that, when they occur, will establish the date and time after which Persons may no longer submit Electronic Offers. When the District will accept Electronic Offers for a period of time other than at the designated date and time that the District will first receive Electronic Offers, the District must begin to accept real time Electronic Offers on an Electronic Procurement System, and must continue to accept Electronic Offers in accordance with Section (5)(b) of this Rule until the date and time specified by the District, after which the District will no longer accept Electronic Offers.

**(5) Receipt of Electronic Offers.**

- (a)** When the District conducts an Electronic Procurement that provides that all Electronic Offers must be submitted by a particular date and time, the District must receive the Electronic Offers in accordance with these Division 47 Rules.
- (b)** When the District specifies that Persons may submit multiple Electronic Offers during a period of time, the District must accept Electronic Offers, and Persons may submit Electronic Offers, in accordance with the following:
  - (A)** Following receipt of the first Electronic Offer after the date and time that the District first receives Electronic Offers, the District must post and update on a real-time basis:
    - (i)** The prices of the other Bidders or the price of the most Competitive Bidder;
    - (ii)** The rank of each Bidder (e.g., (i) "winning" or "not winning" or (ii) "1st, 2nd, or higher";
    - (iii)** The scores of the Bidders if the District chooses to use a scoring model that weighs non-price factors in addition to price; or
    - (iv)** Any combination of (i), (ii), and (iii) above. At any time before the date and time after which the District will no longer receive Electronic Offers, a Person may revise its Electronic Offer, except that a Person may not lower its price unless that price is below the then lowest Electronic Offer.
  - (B)** A Person may not increase the price set forth in an Electronic Offer after the date and time that the District first accepts Electronic Offers.
  - (C)** A Person may withdraw an Electronic Offer only in compliance with these Division 47 Rules. If a Person withdraws an Electronic Offer, it may not later submit an Electronic Offer at a price higher than that set forth in the withdrawn Electronic Offer.

**(6) Failure of the E-Procurement System.** In the event of a failure that interferes with the ability of Persons to submit Electronic Offers, protest, or to otherwise participate in the Procurement, the District may cancel the Procurement in accordance with PPS-47-0660, or may extend the date and time for receipt of Electronic Offers by providing Notice of the extension immediately after the system becomes available.

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**BID AND PROPOSAL PREPARATION**

**PPS-47-0400 Offer Preparation**

- (1) **Instructions.** Offerors must submit and Sign their Offers in accordance with the instructions set forth in the Solicitation Document. Offerors must initial any corrections or erasures to their Offers.
- (2) **Forms.** Offerors must submit their Offer on the form(s) provided in the Solicitation Document, unless Offerors are otherwise instructed in the Solicitation Document.
- (3) **Documents.** Offerors must provide the District with all documents and Descriptive Literature required by the Solicitation Document.

**PPS-47-0410 Offer Submission**

- (1) **Product Samples and Descriptive Literature.** The District may require Product Samples or Descriptive Literature if the District determines either is necessary or desirable to evaluate the quality, features, or characteristics of an Offer. The District will dispose of Product Samples, or make them available for the Offeror to retrieve, in accordance with the Solicitation Document.
- (2) **Identification of Offers.**
  - (a) To ensure proper identification and handling, Offers must be submitted in a sealed envelope appropriately marked. If the District permits Electronic Offers or Facsimile Offers in the Solicitation Document, the Offeror may submit and identify Electronic Offers or Facsimile Offers in accordance with these Division 47 Rules and the instructions set forth in the Solicitation Document. The District will not consider Facsimile or Electronic Offers unless authorized by the Solicitation Document.
  - (b) The District is not responsible for Offers submitted in any manner, format, or to any delivery point other than as required in the Solicitation Document.
- (3) **Receipt of Offers.** Offerors are responsible for ensuring that the District receives their Offers at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

**PPS-47-0420 Pre-Offer Conferences**

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

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**PPS-47-0430 Addenda to Solicitation Document**

- (1) Issuance; Receipt.** The District may change a Solicitation Document only by Written Addenda. An Offeror must provide Written acknowledgment of receipt of all issued Addenda with its Offer, unless the District otherwise specifies in the Addenda.
- (2) Notice and Distribution.** The District must notify prospective Offerors of Addenda in a manner intended to foster competition and to make prospective Offerors aware of the Addenda. The Solicitation Document must specify how the District will provide Notice of Addenda and how the District will make the Addenda available before Closing, and at each subsequent step or phase of evaluation if the District will engage in a multi-step Competitive Sealed Bidding process in accordance with PPS-47-0256, or a multi-tiered or multi-step Competitive Sealed Proposals process in accordance with PPS-47-0261. The following is an example: "The District will not mail Notice of Addenda, but will post public Notice of any Addenda on the District's Web site. Offerors should frequently check the District's Web site until Closing, i.e., at least once weekly until the week of Closing and at least once daily the week of Closing."
- (3) Timelines; Extensions.**
- (a)** The District must issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The District may extend the Closing if the District determines that prospective Offerors need additional time to review and respond to Addenda. Except to the extent justified by a countervailing public interest, the District must not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.
  - (b)** Notwithstanding Section (3)(a) of this Rule, an Addendum that modifies the evaluation criteria, selection process, or procedure for any step or phase of competition under a multi-step Sealed Bidding or multi-step Sealed Proposals process issued in accordance with PPS-47-0256 or PPS-47-0261 must be issued no fewer than five Days before the beginning of that step or phase of competition, unless the District determines that a shorter period is sufficient to allow the Offerors to prepare for that step or phase of competition. The District must document the factors it considered in making that determination, which may include, without limitation, the scope of the changes to the Solicitation Document, the location of the remaining eligible Proposers, or whether shortening the period between issuing an Addendum and the beginning of the next step or phase of competition favors or disfavors any particular Proposer or Proposers.
- (4) Request for Change or Protest.** Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in PPS-47-0730, by the close of the District's next business Day after issuance of the Addendum, or up to the last Day allowed to submit a request for change or protest of the solicitation under PPS-47-0730, whichever date is later. If the date established in the previous sentence falls after the deadline for receiving protests to the Solicitation Document in accordance with PPS-47-0730, then the District may consider an Offeror's request for change or protest to the Addendum only, and the District shall not consider a request for change or protest to matters not added or modified by the Addendum. Notwithstanding any provision of this Section (4) of this Rule, the District is not required to provide a protest period for Addenda issued after the initial Closing during a multi-tier or multi-step Procurement process conducted pursuant to ORS 279B.055 or 279B.060.

**PPS-47-0440 Pre-Closing Modification or Withdrawal of Offers**

- (1) Modifications.** An Offeror may modify its Offer in Writing prior to the Closing. An Offeror must prepare and submit any modification to its Offer to the District in accordance with PPS-47-0400 and PPS-47-0410, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror must mark the submitted modification as follows:



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

**(2) Withdrawals.**

- (a) An Offeror may withdraw its Offer by Written Notice submitted on the Offeror's letterhead, Signed by an authorized representative of the Offeror, delivered to the individual and location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by the District prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in person prior to the Closing upon presentation of appropriate identification and evidence of authority satisfactory to the District.
- (b) The District may release an unopened Offer withdrawn under Section (2)(a) of this Rule to the Offeror or its authorized representative, after voiding any date and time-stamp mark.
- (c) The Offeror must mark the Written request to withdraw an Offer as follows:
  - (A) Bid (or Proposal) Withdrawal; and
  - (B) Solicitation Document Number (or other identification as specified in the Solicitation Document).

**(3) Documentation.** The District must include all documents relating to the modification or withdrawal of Offers in the appropriate Procurement File in accordance with PPS-46-0355.

**PPS-47-0450 Receipt, Opening, and Recording of Offers**

**(1) Receipt.** The District must electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The District must not open the Offer or modification, but must maintain it as confidential and secure until Opening. If the District inadvertently opens an Offer or a modification prior to the Opening, the District must return the Offer or modification to its secure and confidential state until Opening. The District must document the resealing for the Procurement File (e.g., "District inadvertently opened the Offer due to improper identification of the Offer").

**(2) Opening and Recording.** The District must publicly open Offers including any modifications made to the Offer pursuant to PPS-47-0440(1). In the case of Invitations to Bid, to the extent practicable, the District must read aloud the name of each Bidder and such other information as the District considers appropriate. However, the District may withhold from disclosure information marked by the Offeror as "confidential" or a "trade secret" in accordance with ORS 279B.055(5)(c) and 279B.060(5). In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the District will not read Offers aloud.

**PPS-47-0460 Late Offers, Late Withdrawals, and Late Modifications**

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. The District must not consider late Offers, withdrawals, or modifications except as permitted in PPS-47-0470 or PPS-47-0261.

**PPS-47-0470 Mistakes**

**(1) General.** To protect the integrity of the Competitive Procurement process and to assure fair treatment of Offerors, the District should carefully consider whether to permit waiver, correction, or withdrawal of Offers for certain mistakes.

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**(2) District Treatment of Mistakes.** The District must not allow an Offeror to correct or withdraw an Offer for an error in judgment. If the District discovers certain mistakes in an Offer after Opening but before the Award of the Contract, the District may take the following action:

- (a)** The District may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:
  - (A)** Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;
  - (B)** Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer evidencing an intent to be bound; and
  - (C)** Acknowledge receipt of an Addendum to the Solicitation Document, provided: it is clear on the face of the Offer that the Offeror received the Addendum and intended to be bound by its terms; or the Addendum involved did not affect price, quality, or delivery.
- (b)** The District may correct a clerical error if the error is evident on the face of the Offer, or other documents submitted with the Offer, and the Offeror confirms the District's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Unit prices will prevail over extended prices in the event of a discrepancy between extended prices and unit prices.
- (c)** The District may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:
  - (A)** The nature of the error;
  - (B)** That the error is not a minor informality under this Section or an error in judgment;
  - (C)** That the error cannot be corrected or waived under Section (b) of this Rule;
  - (D)** That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;
  - (E)** That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;
  - (F)** That the Offeror will suffer substantial detriment if the District does not grant the Offeror permission to withdraw the Offer;
  - (G)** That the District's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on the District or the public it represents; and
  - (H)** That the Offeror promptly gave Notice of the claimed error to the District.
- (d)** The criteria in Section (2)(c) of this Rule must determine whether the District will permit an Offeror to withdraw its Offer after Closing. These criteria also must apply to the question whether the District will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or Proposal security), or without liability to the District based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually Awarded by the District, whether by Award to the next lowest Responsive and Responsible Bidder, the most advantageous Responsive and Responsible Proposer, or by resort to a new solicitation.

**(3) Rejection for Mistakes.** The District must reject any Offer in which a mistake is evident on the face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents accompanying the Offer.

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**(4) Identification of Mistakes after Award.** The procedures and criteria set forth above are Offeror's only opportunity to correct mistakes or withdraw Offers because of a mistake. Following Award, an Offeror is bound by its Offer, and may only withdraw its Offer or rescind a Contract entered into pursuant to this Division 47 to the extent permitted by applicable law.

**PPS-47-0480 Time for District Acceptance**

An Offeror's Offer is a Firm Offer, irrevocable, valid, and binding on the Offeror for not less than 60 Days following Closing unless otherwise specified in the Solicitation Document.

**PPS-47-0490 Extension of Time for Acceptance of Offer**

The District may request, orally or in Writing, that Offerors extend, in Writing, the time during which the District may consider their Offer(s). If an Offeror agrees to such extension, the Offer must continue as a Firm Offer, irrevocable, valid, and binding on the Offeror for the agreed-upon extension period.

**QUALIFICATIONS AND DUTIES**

**PPS-47-0500 Responsibility of Offerors**

**(1) Determination.** Before Awarding a Contract, the District must determine that the Offeror submitting the lowest Bid or Proposal or most advantageous Offer is Responsible. The District must use the standards set forth in ORS 279B.110 and PPS-47-0640(1)(c)(F) to determine if an Offeror is Responsible. In the event the District determines an Offeror is not Responsible, it must prepare a Written determination of non-Responsibility as required by ORS 279B.110 and must reject the Offer.

**PPS-47-0525 Qualified Products Lists**

- (1)** The District may develop and maintain a qualified products list pursuant to ORS 279B.115 in instances in which the testing or examination of Goods before initiating a Procurement is necessary or desirable in order to best satisfy the requirements of the District. For purposes of this Section, "Goods" includes products that have associated or incidental service components, such as supplier warranty obligations or maintenance service programs.
- (2)** In the initial development of any qualified products list, the District shall give public Notice, in accordance with PPS-47-0300, of the opportunity for potential Contractors, sellers, or suppliers to submit Goods for testing and examination to determine their acceptability for inclusion on the list, and may solicit in Writing representative groups of potential Contractors, sellers, or suppliers to submit Goods for the testing and examination. Any potential Contractor, seller, or supplier, even though not solicited, may offer its Goods for consideration.
- (3)** The District's inclusion of Goods on a qualified products list shall be based on the results of tests or examinations. Notwithstanding any provision of ORS 192.410 through 192.505, the District may make the test or examination results public in a manner that protects the identity of the potential Contractor, seller, or supplier that offered the Goods for testing or examination, including by using only numerical designations. Notwithstanding any provision of ORS 192.410 through 192.505, the District may keep confidential trade secrets, test data, and similar information provided by a potential Contractor, seller, or supplier if so requested in Writing by the potential Contractor, seller, or supplier.
- (4)** The inclusion of Goods on a qualified products list does not constitute and may not be construed as a prequalification under ORS 279B.120 and 279B.125 of any prospective Contractor, seller, or supplier of Goods on the qualified products list.

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

**(1) Prequalification of Prospective Offerors.** Pursuant to ORS 279B.120 and 279B.125, the District may prequalify prospective Bidders or Proposers to submit Bids or Proposals for Public Contracts to provide particular types of Goods or Services.

**(2)** The District shall, in response to the receipt of a prequalification application submitted under Section (1) of this Rule, notify the prospective Bidder or Proposer whether the prospective Bidder or Proposer is qualified based on the standards of responsibility listed in Section (7), the type and nature of Contracts that the prospective Bidder or Proposer is qualified to compete for and the time period for which the prequalification is valid. If the District does not prequalify a prospective Bidder or Proposer as to any Contracts covered by the prequalification process, the Notice must specify which of the standards of responsibility listed in Section (7) the prospective Bidder or Proposer failed to meet. Unless the reasons are specified, the prospective Bidder or Proposer shall be deemed to have been prequalified in accordance with the application.

**(3)** If the District subsequently discovers that a prospective Bidder or Proposer that prequalified under Sections (1) and (2) of this Rule is no longer qualified, the District may revoke the prequalification upon reasonable Notice to the prospective Bidder or Proposer, except that a revocation is invalid as to any Contract for which an advertisement for Bids or Proposals has already been issued. Notwithstanding this prohibition against revocation of prequalification, the District may determine that a prequalified Offeror is not Responsible prior to Contract Award.

**(4) Application.** When the District permits or requires prequalification of Bidders or Proposers, a prospective Bidder or Proposer who wishes to prequalify shall submit a prequalification application to the District on a form prescribed by the District. Upon receipt of a prequalification application, the District shall investigate the prospective Bidder or Proposer as necessary to determine whether the prospective Bidder or Proposer is qualified. The determination shall be made in less than 30 Days, if practicable, if the prospective Bidder or Proposer requests an early decision to allow the prospective Bidder or Proposer as much time as possible to prepare a Bid or Proposal for a Contract that has been advertised. In making its determination, the District shall consider only the applicable standards of responsibility listed in Section (7). The District shall promptly notify the prospective Bidder or Proposer whether the prospective Bidder or Proposer is qualified.

**(5)** If the District finds that a prospective Bidder or Proposer is qualified, the Notice must state the type and nature of Contracts that the prospective Bidder or Proposer is qualified to compete for and the period of time for which the prequalification is valid. If the District finds that the prospective Bidder or Proposer is not qualified as to any Contracts covered by the Rule, resolution, ordinance, or other regulation, the Notice must specify the reasons given under Section (7) below. To be entitled to a hearing under PPS-47-0760, a prospective Bidder or Proposer shall, within three business Days after receipt of the Notice, notify the District that the prospective Bidder or Proposer demands a hearing under PPS-47-0760.

**(6)** If the District has reasonable cause to believe that there has been a substantial change in the conditions of a prequalified prospective Bidder or Proposer and that the prospective Bidder or Proposer is no longer qualified or is less qualified, the District may revoke or may revise and reissue the prequalification after reasonable Notice to the prequalified prospective Bidder or Proposer. The Notice must specify the reasons given under Section (2) for revocation or revision of the prequalification of the prospective Bidder or Proposer and inform the prospective Bidder or Proposer of the right to a hearing under PPS-47-0760. To be entitled to a hearing under PPS-47-0760, a prospective Bidder or Proposer shall, within three business Days after receipt of the Notice, notify the District that the prospective Bidder or Proposer demands a hearing under PPS-47-0760. A revocation or revision does not apply to any Contract for which an advertisement for

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Bids or Proposals was issued before the date the Notice of revocation or revision was received by the prequalified prospective Bidder or Proposer.

**(7) Standards of Responsibility.** In determining whether a Bidder or Proposer has met the standards of responsibility pursuant to ORS 279B.110(2), the District shall consider whether a Bidder or Proposer has:

- (a) Available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to indicate the capability of the Bidder or Proposer to meet all contractual responsibilities;
- (b) A satisfactory record of performance. The District shall document the record of performance of a Bidder or Proposer if the District finds the Bidder or Proposer non-responsible under this Section;
- (c) A satisfactory record of integrity. The District shall document the record of integrity of a Bidder or Proposer if the District finds the Bidder or Proposer non-responsible under this Section;
- (d) Qualified legally to contract with the District;
- (e) Supplied all necessary information in connection with the inquiry concerning responsibility. If a Bidder or Proposer fails to promptly supply information requested by the District concerning responsibility, the District shall base the determination of responsibility on any available information or may find the Bidder or Proposer non-responsible; and
- (f) Not been debarred by the District under PPS-47-0575.

**(8) Pre-negotiation.** The District may pre-negotiate some or all Contract terms and conditions including prospective Proposer Contract forms such as license agreements, maintenance and support agreements, or similar documents for use in future Procurements. Such pre-negotiation of Contract terms and conditions (including prospective Proposer forms) may be part of the prequalification process of a Proposer in Section 1 or the pre-negotiation may be a separate process. Unless required as part of the prequalification process, the failure of the District and the prospective Proposer to reach agreement on pre-negotiated Contract terms and conditions does not prohibit the prospective Proposer from responding to Procurements. The District may agree to different pre-negotiated Contract terms and conditions with different prospective Proposers. When the District has pre-negotiated different terms and conditions with Proposers or, when permitted, Proposers offer different terms and conditions, the District may consider the terms and conditions in the Proposal evaluation process.

**PPS-47-0560 Request for Qualifications (RFQ)**

For purposes of this Section, an RFQ may be used without the RFQ constituting a prequalification pursuant to PPS-47-0550, if the District establishes the RFQ to determine whether competition exists to perform the needed Services or to establish a nonbinding, open list of qualified Contractors in addition to the general public and in order to expand the pool of qualified Contractors, prior to issuing an RFP. If the District establishes a closed, exclusive, or binding list of qualified Contractors, then the District must comply with Section (1) of this Rule. The District is not required to issue an RFQ and may elect to forego using an RFQ before issuing an RFP.

**(1)** At a minimum, the RFQ must describe the particular specialty desired, the qualifications the Contractor(s) must have in order to be considered, and the evaluation factors and their relative importance. The RFQ may require information including, but not limited to: the Contractor's particular capability to perform the required Services; the number of experienced staff available to perform the required Services, including specific qualifications and experience of personnel; a list of similar services the Contractor has completed, with references concerning past performance; and any other information deemed necessary by the District to evaluate Contractor qualifications.

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- (2) A qualifications pre-submission meeting, voluntary or mandatory, may be held for all interested Contractors to discuss the proposed Services. The RFQ must include the date, time, and place of the meeting(s).
- (3) Unless the RFQ establishes that competition does not exist or unless the solicitation process is canceled or all qualification statements are rejected, all respondents who met the published qualifications must receive a Notice, or other materials as appropriate, in addition to the general public, of any required Services and have an opportunity to submit a Proposal in response to the District's subsequent RFP.
- (4) All RFQs must:
  - (a) Be in Writing;
  - (b) Provide that the District may, at any time during the solicitation process, reject any or all Proposals or cancel the solicitation without liability if it is in the public interest to do so; and
  - (c) Provide that the District is not responsible for any costs of any Proposers incurred while submitting Proposals, and that all Proposers who respond to solicitations do so solely at their own expense, unless compensation is expressly provided for in the Solicitation Document.

**PPS-47-0575 Debarment of Prospective Offerors**

- (1) **Generally.** The District may debar prospective Offerors for the reasons of discriminating against a subcontractor in the Awarding of a Contract because the subcontractor is a minority, women or emerging small business enterprise as set forth in ORS 279A.110, or after providing Notice and the opportunity for hearing as set forth in Sections (5)-(8).
- (2) **Responsibility.** Notwithstanding the limitation on the term for debarment in ORS 279B.130(1)(b), the District may determine that a previously debarred Offeror is not Responsible prior to Contract Award.
- (3) **Imputed Knowledge.** The District may attribute improper conduct of a Person or their affiliate or affiliates having a Contract with a prospective Offeror to the prospective Offeror for purposes of debarment where the impropriety occurred in connection with the Person's duty for or on behalf of, or with the knowledge, approval, or acquiescence of, the prospective Offeror.
- (4) **Limited Participation.** The District may allow a debarred Person to participate in solicitations and Contracts on a limited basis during the debarment period upon Written determination that participation is advantageous to the District. The determination must specify the factors on which it is based and define the extent of the limits imposed.
- (5) **Debarment Process.** The District may debar a prospective Bidder or Proposer from consideration for Award of the District's Contracts for the reasons listed in Section (6) of this Rule after providing the prospective Bidder or Proposer with Notice and a reasonable opportunity to be heard.
  - (a) The District may not debar a prospective Bidder or Proposer under this Section for more than three years.
- (6) **Reasons for Debarment.** A prospective Bidder or Proposer may be debarred from consideration for Award of the District's Contracts if:
  - (a) The prospective Bidder or Proposer has been convicted of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract or in the performance of a public or private contract or subcontract.
  - (b) The prospective Bidder or Proposer has been convicted under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that

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currently, seriously, and directly affects the prospective Bidder's or Proposer's responsibility as a Contractor.

- (c) The prospective Bidder or Proposer has been convicted under state or federal antitrust statutes.
- (d) The prospective Bidder or Proposer has committed a violation of a Contract provision that is regarded by the District or the Construction Contractors Board to be so serious as to justify disqualification. A violation may include, but is not limited to, a failure to perform the terms of a Contract or an unsatisfactory performance in accordance with the terms of the Contract. However, a failure to perform or an unsatisfactory performance caused by acts beyond the control of the Contractor may not be considered to be a basis for debarment.
- (e) The prospective Bidder or Proposer does not carry workers' compensation or unemployment insurance as required by statute.

**(7) Written Debarment Decision Required.** The District shall issue a Written decision to debar a prospective Bidder or Proposer under this Section. The decision must:

- (a) State the reasons for the action taken;
- (b) Inform the debarred prospective Bidder or Proposer of the appeal rights of the prospective Bidder or Proposer under PPS-47-0760; and
- (c) Be mailed or otherwise furnished immediately to the debarred prospective Bidder or Proposer.

**(8)** A prospective Bidder or Proposer that wishes to appeal debarment shall, within three business Days after receipt of Notice of debarment, notify the District that the prospective Bidder or Proposer appeals the debarment as provided in PPS-47-0760.

## **OFFER EVALUATION AND AWARD**

### **PPS-47-0600 Offer Evaluation and Award**

**(1) District Evaluation.** The District must evaluate Offers only as set forth in the Solicitation Document pursuant to ORS 279B.055(6)(a) and 279B.060(6)(b) based on the requirements set forth in the ITB or RFP, and in accordance with applicable law. The District must not evaluate Offers using any other requirement or criterion.

**(a) Evaluation of Bids.**

- (A) Nonresident Bidders:** In determining the lowest Responsive Bid, the District must apply the reciprocal preference set forth in ORS 279A.120(2)(b) and PPS-46-0310 for nonresident Bidders.
- (B) Public Printing:** The District must, for the purpose of evaluating Bids, apply the public printing preference set forth in ORS 282.210 (printing shall be performed within the state).
- (C) Award When Bids are Identical:** If the District determines that one or more Bids are identical under PPS-46-0300, the District must Award a Contract in accordance with the procedures set forth in PPS-46-0300.

**(b) Evaluation of Proposals.**

- (A) Award When Proposals are Identical:** If the District determines that one or more Proposals are identical under PPS-46-0300, the District must Award a Contract in accordance with the procedures set forth in PPS-46-0300.
- (B) Public Printing:** The District must, for the purpose of evaluating Proposals, apply the public printing preference set forth in ORS 282.210 (printing shall be performed within the state).

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- (c) Recycled Materials. When procuring Goods, the District shall give preference for Recycled Materials as set forth in ORS 279A.125 if:
- (A) The Recycled Product is available;
  - (B) The Recycled Product meets applicable standards;
  - (C) The Recycled Product can be substituted for a comparable non-recycled product; and
  - (D) The Recycled Product's costs do not exceed the costs of non-recycled products by more than 5%, or a higher percentage if the District makes a Written determination.

(2) **Clarification of Bids or Proposals.** After the Opening, the District may conduct discussions with apparent Responsive Offerors for the purpose of clarification to assure full understanding of the Bids or Proposals. All Bids or Proposals, in the District's sole discretion, needing clarification must be afforded such an opportunity. The District must document clarification of any Offeror's Bid or Proposal in the Procurement File in accordance with PPS-46-0355.

(3) **Negotiations.**

- (a) Bids. The District shall not negotiate with any Bidder. After Award of the Contract, the District and Contractor may only modify the Contract in accordance with PPS-47-0800.
- (b) Requests for Proposals. The District may only conduct discussions or negotiate with Proposers in accordance with ORS 279B.060(6)(b) and PPS-47-0262. After Award of the Contract, the District and Contractor may only modify the Contract in accordance with PPS-47-0800.

(4) **Award.**

- (a) General. If Awarded, the District must Award the Contract to the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer submitting the most advantageous Responsive Proposal. The District may Award by item, groups of items, or the entire Offer, provided such Award is consistent with the Solicitation Document and in the public interest.
- (b) Multiple Items. An Invitation to Bid or Request for Proposals may call for pricing of multiple items of similar or related type with the Award based on individual line item, group total of certain items, a "market basket" of items representative of the District's expected purchases, or grand total of all items.
- (c) Multiple Awards - Bids.
  - (A) Notwithstanding Section (4)(a) of this Rule, the District may Award multiple Contracts under an Invitation to Bid in accordance with the criteria set forth in the Invitation to Bid. A multiple Award may be made if the Award to two or more Bidders is beneficial for adequate availability, delivery, service, competition, pricing, product capabilities, or other factors deemed significant by the District. Multiple Awards may not be allowed for user preference unrelated to utility or economy. A Notice to prospective Bidders that multiple Contracts may be Awarded for any Invitation to Bid shall not preclude the District from Awarding a single Contract for such Invitation to Bid.
  - (B) If an Invitation to Bid permits the Award of multiple Contracts, the District must specify in the Invitation to Bid the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services.
- (d) Multiple Awards - Proposals.
  - (A) Notwithstanding Section (4)(a) of this Rule, the District may Award multiple Contracts under a Request for Proposals in accordance with the criteria set forth in the Request for



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Proposals. A multiple Award may be made if the Award to two or more Proposers is beneficial for adequate availability, delivery, service, competition, pricing, product capabilities, or other factors deemed significant by the District. Multiple Awards may not be allowed for user preference unrelated to utility or economy. A Notice to prospective Proposers that multiple Contracts may be Awarded for any Request for Proposals must not preclude the District from Awarding a single Contract for such Request for Proposals.

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

**PPS-47-0610 Notice of Intent to Award**

(1) **Notice of Intent to Award.** The District must provide Written Notice to all Offerors of its Intent to Award pursuant to ORS 279B.135 at least seven Days before the Award of a Contract, unless the District determines that circumstances justify prompt execution of the Contract, in which case the District may provide a shorter Notice period. The District must document the specific reasons for the shorter Notice period in the Procurement File in accordance with PPS-46-0355. This Section does not apply to a Contract Awarded as a Small Procurement, an Intermediate Procurement, a sole-source Procurement, an Emergency Procurement, or a Special Procurement.

- (2) **Finality.** The District's Award will not be final until the later of the following:
  - (a) The expiration of the protest period provided pursuant to PPS-47-0740; or
  - (b) The District provides Written responses to all timely filed protests denying the protests and affirming the Award.

**PPS-47-0620 Documentation of Award**

(1) **Basis of Award.** After Award, the District must make a record showing the basis for determining the successful Offeror as part of the District's Procurement File in accordance with PPS-46-0355.

(2) **Contents of Award Record.** The District's record must include:

- (a) For Bids.
  - (A) Bids;
  - (B) Completed Bid tabulation sheet; and
  - (C) Written justification for any rejection of lower Bids.
- (b) For Proposals.

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- (A) Proposals;
- (B) The completed evaluation of the Proposals;
- (C) Written justification for any rejection of higher-scoring Proposals; and
- (D) If the District engaged in any of the methods of Contractor selection described in ORS 279B.060(6)(b) and PPS-47-0261, Written documentation of the content of any discussions, negotiations, Best and Final Offers, or any other procedures the District used to select a Proposer to which the District Awarded a Contract.

**PPS-47-0630 Availability of Award Decisions**

- (1) **Contract Documents.** To the extent required by the Solicitation Document, the District must deliver to the successful Offeror a Contract, a Signed Purchase Order, Price Agreement, or other Contract Documents as applicable.
- (2) **Availability of Award Decisions.** A Person may obtain tabulations of Awarded Bids or evaluation summaries of Proposals for a minimal charge in person or by submitting to the District a Written request accompanied by payment. The requesting Person must provide the Solicitation Document number and enclose a self-addressed, stamped envelope.
- (3) **Availability of Procurement Files.** After Notice of Intent to Award, the District must make Procurement Files, in accordance with PPS-46-0355, available in accordance with applicable law.

**PPS-47-0640 Rejection of an Offer**

- (1) **Rejection.**
  - (a) Any solicitation or Procurement described in a solicitation may be canceled, or any or all Bids or Proposals may be rejected in whole or in part, when the cancellation or rejection is in the best interest of the District as determined by the District. The reasons for the cancellation or rejection must be made part of the Procurement File. The District is not liable to any Bidder or Proposer for any loss or expense caused by or resulting from the cancellation or rejection of a solicitation, Bid, Proposal, or Award. ORS 279B.100.
  - (b) The District must reject an Offer upon the District's Finding that the Offer:
    - (A) Is contingent on the District's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;
    - (B) Takes exception to terms and conditions (including Specifications) set forth in the Solicitation Document;
    - (C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of the Solicitation Document or in contravention of applicable law;
    - (D) Offers Goods and Services that fail to meet the Specifications of the Solicitation Document;
    - (E) Is late;
    - (F) Is not in substantial compliance with the Solicitation Document; or
    - (G) Is not in substantial compliance with all prescribed public Procurement procedures.
  - (c) The District must reject an Offer upon the District's Finding that the Offeror:
    - (A) Has not been prequalified and the District required mandatory prequalification;

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- (B)** Has been debarred or has been disqualified pursuant to PPS-46-0210(4) (DBE Disqualification);
- (C)** Has not met the requirements of ORS 279A.105 (emerging small business), if required by the Solicitation Document;
- (D)** Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;
- (E)** Has failed to provide the certification of non-discrimination required under ORS 279A.110(4); or
- (F)** Is Non-Responsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the District must have information that indicates that the Offeror meets the applicable standards of responsibility. To be a Responsible Offeror, the District must determine pursuant to ORS 279B.110 that the Offeror:
  - (i)** Has available the appropriate financial, material, equipment, facility and personnel resources, and expertise, or ability to obtain the resources and expertise, necessary to meet all contractual responsibilities;
  - (ii)** Has completed previous contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that to the extent the costs associated with and time available to perform a previous contract were within the Offeror's control, the Offeror stayed within the time and budget allotted for the Procurement, and otherwise performed the contract in a satisfactory manner. The District should carefully scrutinize an Offeror's record of contract performance if the Offeror is or has recently been materially deficient in contract performance. In reviewing the Offeror's performance, the District should determine whether the Offeror's deficient performance was expressly excused under the terms of the contract, or whether the Offeror took appropriate corrective action. The District may review the Offeror's performance on both private and Public Contracts in determining the Offeror's record of contract performance. Pursuant to ORS 279B.110(2)(b), the District must make its basis for determining an Offeror non-Responsible under this Section part of the Procurement File;
  - (iii)** Has a satisfactory record of integrity. An Offeror may lack integrity if the District determines that the Offeror demonstrates a lack of business ethics, such as violation of state environmental laws or false certifications made to the District. The District may find an Offeror non-Responsible based on the lack of integrity of any person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the contract or a parent company, predecessor, or successor person). The standards for debarment under ORS 279B.130 may be used to determine an Offeror's integrity. The District may find an Offeror non-Responsible based on previous convictions of offenses related to obtaining or attempting to obtain a contract or subcontract, or in connection with the Offeror's performance of a contract or subcontract. Pursuant to ORS 279B.110(2)(c), the District must make its basis for determining that an Offeror is non-Responsible under this Section part of the Procurement File;
  - (iv)** Is legally qualified to contract with the District; and
  - (v)** Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by the

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District concerning responsibility, the District must base the determination of responsibility on any available information, or may find the Offeror non-Responsible.

**(2) Form of Business Entity.** For purposes of this Rule, the District may investigate any Person submitting an Offer. The investigation may include that Person's officers, directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this Rule or to apply the debarment provisions of this Rule.

**PPS-47-0650 Rejection of All Offers**

**(1) Rejection.** The District may reject all Offers when the rejection is in the best interest of the District as determined by the District. The reasons for the rejection must be made part of the Procurement File. The District is not liable to any Bidder or Proposer for any loss or expense caused by or resulting from the cancellation or rejection of a solicitation, Bid, Proposal, or Award. ORS 279B.100. The District must notify all Offerors of the rejection of all Offers, along with the reasons for rejection of all Offers.

**(2) Criteria.** The District may reject all Offers based on the following criteria:

- (a)** The content of or an error in the Solicitation Document or the Procurement process unnecessarily restricted competition for the Contract;
- (b)** The price, quality, or performance presented by the Offerors are too costly or of insufficient quality to justify acceptance of any Offer;
- (c)** Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;
- (d)** Causes other than legitimate market forces threaten the integrity of the competitive process. These causes may include, without limitation, those that tend to limit competition, such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the Solicitation Document;
- (e)** The District cancels the Procurement or solicitation in accordance with PPS-47-0660; or
- (f)** Any other circumstance indicating that Awarding the Contract would not be in the public interest.

**PPS-47-0660 Cancellation of Procurement or Solicitation**

**(1) Cancellation in the District Interest.** The District may cancel a Procurement or solicitation when the cancellation is in the best interest of the District as determined by the District. The reasons for the cancellation must be made part of the Procurement File. The District is not liable to any Bidder or Proposer for any loss or expense caused by or resulting from the cancellation or rejection of a solicitation, Bid, Proposal, or Award.

**(2) Notice of Cancellation Before Opening.** If the District cancels a Procurement or solicitation prior to Opening, the District must provide Written Notice of cancellation in the same manner that the District initially provided Notice of the solicitation. Such Notice of cancellation must:

- (a)** Identify the Solicitation Document;
- (b)** Briefly explain the reason for cancellation; and
- (c)** If appropriate, explain that an opportunity will be given to compete on any re-solicitation.

**(3) Notice of Cancellation After Opening.** If the District cancels a Procurement or solicitation after Opening, the District must provide Written Notice of cancellation to all Offerors who submitted Offers.

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**PPS-47-0670 Disposition of Offers if Solicitation Cancelled**

- (1) Prior to Opening.** If the District cancels a Procurement or solicitation prior to Opening, the District must return all Offers it received to Offerors unopened, provided the Offerors submitted their Offers in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the District must open the Offer to determine the source and then return it to the Offeror. For Electronic Offers, the District must delete the Offers from ORPIN or other approved Electronic Procurement System.
- (2) After Opening.** If the District cancels a Procurement or solicitation after Opening, the District:
  - (i)** May return Proposals in accordance with ORS 279B.060(5)(c); and
  - (ii)** Must keep Bids in the Procurement File in accordance with PPS-46-0355.
- (3) Rejection of All Offers.** If the District rejects all Offers, the District must keep all Proposals and Bids in the Procurement File.

**LEGAL REMEDIES**

**PPS-47-0700 Protests and Judicial Review of Special Procurements**

- (1) Purpose.** An affected Person may protest the approval of a Special Procurement. Pursuant to ORS 279B.400(1), before seeking judicial review of the approval of a Special Procurement, an affected Person must file a Written protest with the Superintendent and exhaust all administrative remedies.
- (2) Delivery.** Notwithstanding the requirements for filing a writ of review under ORS Chapter 34 pursuant to ORS 279B.400(4)(a), an affected Person must deliver a Written protest to the District within seven Days after the first date of public Notice of the approval of a Special Procurement, unless a different protest period is provided in the public Notice of the approval of a Special Procurement.
- (3) Content of Protest.** The Written protest must include:
  - (a)** A detailed statement of the legal and factual grounds for the protest;
  - (b)** A description of the resulting harm to the affected Person; and
  - (c)** The relief requested.
- (4) Contract Review Board Response.** The Contract Review Board shall not consider an affected Person's protest of the approval of a Special Procurement submitted after the timeline established for submitting such protest under this Rule or such different time period as may be provided in the public Notice of the approval of a Special Procurement. The Contract Review Board shall issue a Written disposition of the protest in a timely manner. If the Contract Review Board upholds the protest, in whole or in part, it may in its sole discretion implement the sustained protest in the approval of the Special Procurement, or revoke the approval of the Special Procurement.
- (5) Judicial Review.** An affected Person may seek judicial review of the Superintendent's decision relating to a protest of the approval of a Special Procurement in accordance with ORS 279B.400.

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

- (1) Purpose.** For sole-source Procurements requiring public Notice under PPS-47-0275, an affected Person may protest the determination of the Superintendent or designee that the Goods or Services or class of Goods or Services are available from only one source. Pursuant to ORS 279B.420(3)(f), before seeking judicial review, an affected Person must file a Written protest with the Superintendent or designee and exhaust all administrative remedies.

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- (2) **Delivery.** Unless otherwise specified in the public Notice of the sole-source Procurement, an affected Person must deliver a Written protest to the Superintendent or designee within seven Days after the first date of public Notice of the sole-source Procurement, unless a different protest period is provided in the public Notice of a sole-source Procurement.
- (3) **Content of Protest.** The Written protest must include:
- (a) A detailed statement of the legal and factual grounds for the protest;
  - (b) A description of the resulting harm to the affected Person; and
  - (c) The relief requested.
- (4) **Response.** The Superintendent or designee shall not consider an affected Person's sole-source Procurement protest submitted after the timeline established for submitting such protest under this Rule, or such different time period as may be provided in the public Notice of the sole-source Procurement. The Superintendent or designee shall issue a Written disposition of the protest in a timely manner. If the Superintendent or designee upholds the protest, in whole or in part, the Superintendent shall not enter into a sole-source Contract.
- (5) **Judicial Review.** Judicial review of the Superintendent's or designee's disposition of a sole-source Procurement protest shall be in accordance with ORS 279B.420.

**PPS-47-0720 Protests and Judicial Review of Multi-Tiered and Multi-Step Solicitations**

- (1) **Purpose.** An affected Offeror may protest exclusion from the Competitive Range or from subsequent tiers or steps of a solicitation in accordance with the applicable Solicitation Document. When such a protest is permitted by the Solicitation Document, then pursuant to ORS 279B.420(3)(f), before seeking judicial review, an affected Offeror must file a Written protest with the District and exhaust all administrative remedies.
- (2) **Basis for Protest.** An affected Offeror may only protest its exclusion from a tier or step of competition if the Offeror is Responsible and submitted a Responsive Offer and, but for the District's mistake in evaluating the Offerors or other Offerors' Offers, the protesting Offeror would have been eligible to participate in the next tier, step, or phase of competition. For example, the protesting Offeror must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Offerors are removed from consideration, and that those ineligible Offerors are ineligible for inclusion in the Competitive Range because their Proposals were not Responsive, or the District committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.
- (3) **Delivery.** Unless otherwise specified in the Solicitation Document, an affected Offeror must deliver a Written protest to the District within five Days after issuance of the Notice of the Competitive Range or Notice of subsequent tiers, steps, or phases.
- (4) **Content of Protest.** The affected Offeror's protest must be in Writing and must specify the grounds on which the protest is based.
- (5) **District Response.** The District must not consider an affected Offeror's multi-tiered or multi-step solicitation protest submitted after the timeline established for submitting such protest under this Rule, or such different time period as may be provided in the Solicitation Document. The District must issue a Written disposition of the protest in a timely manner. If the District upholds the protest, in whole or in part, the District may in its sole discretion either issue an Addendum under PPS-47-0430 reflecting its disposition or cancel the Procurement or solicitation under PPS-47-0660.

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**(6) Judicial Review.** Judicial review of the District's decision relating to a multi-tiered or multi-step solicitation protest must be in accordance with ORS 279B.420.

**PPS-47-0730 Protests and Judicial Review of Solicitations**

**(1) Protests.** A prospective Offeror may protest the Procurement process or the Solicitation Document for a Contract solicited under ORS 279B.055, 279B.060, and 279B.085 as set forth in ORS 279B.405(2). Pursuant to ORS 279B.405(3), before seeking judicial review, a prospective Offeror must file a Written protest with the District and exhaust all administrative remedies.

**(2) Delivery.** Unless otherwise specified in the Solicitation Document, a prospective Offeror must deliver a Written protest to the District not less than five Days prior to Closing.

**(3) Content of Protest.** The prospective Offeror's Written protest must include:

- (a)** Sufficient information to identify the solicitation that is the subject of the protest;
- (b)** The grounds that demonstrate how the Procurement process is contrary to law or how the Solicitation Document is unnecessarily restrictive, is legally flawed, or improperly specifies a Brand Name;
- (c)** Evidence or supporting documentation that supports the grounds on which the protest is based; and
- (d)** A statement of the desired changes to the Procurement process or the Solicitation Document that the prospective Offeror believes will remedy the conditions upon which the prospective Offeror based its protest.

**(4) District Response.** The District will not consider a Prospective Offeror's solicitation protest submitted after the timeline established for submitting such protest under this Rule, or such different time period as may be provided in the Solicitation Document. The District must consider the protest if it is timely filed and meets the conditions set forth in Section (3) of this Rule. The District will issue a Written disposition of the protest no fewer than three business Days before Offers are due. If the District upholds the protest, in whole or in part, the District may in its sole discretion either issue an Addendum reflecting its disposition under PPS-47-0430 or cancel the Procurement or solicitation under PPS-47-0660.

**(5) Extension of Closing.** If the District receives a protest from a prospective Offeror in accordance with this Rule, the District may extend Closing if the District determines an extension is necessary to consider and respond to the protest.

**(6) Clarification.** Prior to the deadline for submitting a protest, a prospective Offeror may request that the District clarify any provision of the Solicitation Document. The District's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on the District unless the District amends the Solicitation Document by Addendum.

**(7) Judicial Review.** Judicial review of the District's decision relating to a solicitation protest must be in accordance with ORS 279B.405.

**(8) Failure to Protest or Request a Clarification Precludes Protest of Award on Such Issue.** An Offeror cannot protest an Award based on any issue that could have, but was not, raised as a Request for Clarification or Protest of solicitation pursuant to this Section.

**PPS-47-0740 Protests and Judicial Review of Contract Award**

**(1) Purpose.** An Offeror may protest the Award of a Contract, or the Intent to Award a Contract, whichever occurs first, if:

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- (a) The Bidder or Proposer is adversely affected because the Bidder or Proposer would be eligible to be Awarded the Public Contract in the event that the protest were successful; and
  - (b) The reason for the protest is that:
    - (A) All lower Bids or higher-ranked Proposals are non-Responsive;
    - (B) The District has failed to conduct the evaluation of Proposals in accordance with the criteria or processes described in the solicitation materials;
    - (C) The District has abused its discretion in rejecting the protestor's Bid or Proposal as non-Responsive; or
    - (D) The District's evaluation of Bids or Proposals or the District's subsequent determination of Award is otherwise in violation of these Rules or the Public Contracting Code.
- (2) **Delivery.** An Offeror must file a Written protest with the District and exhaust all administrative remedies before seeking judicial review of the District's Contract Award decision. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest to the District within seven Days after the Award of a Contract, or issuance of the Notice of Intent to Award the Contract, whichever occurs first.
- (3) **Content of Protest.** An Offeror's Written protest shall specify the grounds for the protest to be considered by the District pursuant to Section (1) of this Rule.
- (4) **District Response.** The District shall not consider an Offeror's Contract Award protest submitted after the timeline established for submitting such protest under this Rule, or such different time period as may be provided in the Solicitation Document. The District shall issue a Written disposition of the protest in a timely manner. If the District upholds the protest, in whole or in part, the District may in its sole discretion either Award the Contract to the successful protestor or cancel the Procurement or solicitation.
- (5) **Judicial Review.** Judicial review of the District's decision relating to a Contract Award protest shall be in accordance with ORS 279B.415.

**PPS-47-0750 Judicial Review of Other Violations**

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

**PPS-47-0760 Review of Prequalification and Debarment Decisions**

- (1) Upon receipt of a Notice from the District of a prequalification decision under ORS 279B.125 or of a decision to debar under ORS 279B.130, a prospective Bidder or Proposer that wishes to appeal the decision shall, within three Days after receipt of the Notice, notify the District that the prospective Bidder or Proposer appeals the decision as provided in this Section.
- (2) Immediately upon receipt of the prospective Bidder's or Proposer's Notice of appeal, the District shall notify the appropriate Local Contract Review Board.
- (3) Upon the receipt of Notice from the District under Section (2) of this Rule, the Contract Review Board shall promptly notify the Person appealing and the District of the time and place of the hearing. The Contract Review Board shall conduct the hearing and decide the appeal within 30 Days after receiving the Notice from the District. The Contract Review Board shall set forth in Writing the reasons for the hearing decision.
- (4) At the hearing, the Contract Review Board shall consider de novo the Notice of denial, revocation, or revision of a prequalification or the Notice of debarment, the standards of responsibility listed in



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ORS 279B.110(2) on which the District based the denial, revocation or revision of the prequalification or the reasons listed in ORS 279B.130(2) on which the District based the debarment, and any evidence provided by the parties. Hearings before the Contract Review Board shall be conducted under rules of procedure adopted by the Contract Review Board.

- (5) The Contract Review Board may allocate the Contract Review Board's costs for the hearing between the Person appealing and the District. The allocation shall be based on facts found by the Contract Review Board and stated in the final order that, in the Contract Review Board's opinion, warrant such allocation of costs. If the final order does not allocate the costs for the hearing, the costs shall be paid as follows:
- (a) If the decision to deny, revoke, or revise a prequalification of a Person as a Bidder or the decision to debar a Person is upheld, the costs shall be paid by the Person appealing the decision.
  - (b) If the decision to deny, revoke, or revise a prequalification of a Person as a Bidder or the decision to debar a Person is reversed, the costs shall be paid by the District.
- (6) Judicial review of the District's prequalification and debarment decisions must be as set forth in ORS 279B.425.

**PPS-47-0800 Amendments to Goods or Services Contracts and Price Agreements**

- (1) **Generally.** The District may Amend a Contract for Goods or Services without additional competition in any of the following circumstances:
- (a) The Amendment is within the scope of the Procurement as described in the Solicitation Documents, if any, or if no Solicitation Documents, as described in the sole-source Notice or the approval of the Special Procurement or the Contract, in that order. An Amendment is not within the scope of the Procurement if the District determines that if it had described the changes to be made by the Amendment in the Procurement documents, it would likely have increased competition or affected Award of the Contract.
  - (b) These Rules otherwise permit the District to Award a Contract without competition for the Goods or Services to be procured under the Amendment.
  - (c) The Amendment is necessary to comply with a change in law that affects performance of the Contract.
  - (d) The Amendment results from renegotiation of the terms and conditions, including the Contract Price, of a Contract and the Amendment is advantageous to the District, subject to all of the following conditions:
    - (A) The Goods or Services to be provided under the Amended Contract are the same as the Goods or Services to be provided under the unamended Contract.
    - (B) The District determines that, with all things considered, the Amended Contract is at least as favorable to the District as the unamended Contract.
    - (C) The Amended Contract does not have a total term greater than allowed in the Solicitation Document, Contract, or approval of a Special Procurement after combining the initial and extended terms. For example, a one-year Contract, renewable each year for up to four additional years, may be renegotiated as a two- to five-year Contract, but not beyond a total of five years. Also, if multiple Contracts with a single Contractor are restated as a single Contract, the term of the single Contract may not have a total term greater than the longest term of any of the prior Contracts.

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**(2) Small or Intermediate Contract.** The District may amend a Contract Awarded as a Small or Intermediate Procurement pursuant to Section (1) of this Rule, provided that the total increase in Contract Price does not exceed the amount set forth in PPS-47-0265 for Small Procurements or PPS-47-0270 for Intermediate Procurements.

**(3) Price Agreements.** The District may amend a Price Agreement as follows:

- (a)** As permitted by the Price Agreement;
- (b)** If the circumstances set forth in ORS 279B.140(2) exist, as follows:
  - (A)** The District fails to receive funding or appropriations to sustain purchases at the levels contemplated at the time of contracting; or
  - (B)** The applicable program is terminated or the law changes so that purchases under the Price Agreement are no longer authorized or appropriate for the District's use; or
- (c)** As permitted by applicable law.

**END OF DIVISION 47**

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**DIVISION 48**

**CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING AND LAND SURVEYING  
SERVICES AND RELATED SERVICES CONTRACTS**

**PPS-48-0100 Application**

- (1) These Division 48 Rules apply to the screening and selection of Architects, Engineers, Land Surveyors, and providers of Related Services under Contracts as set forth in the following procedures:
  - (a) Procedures through which Contracting Agencies select Consultants to perform Architectural, Engineering and Land Surveying Services or Related Services; and
  - (b) Two-tiered procedures for selection of Architects, Engineers, Land Surveyors, and providers of Related Services for certain Public Improvements owned and maintained by a Local Government.
- (2) These Division 48 Rules apply when the District seeks the Services of a Consultant to perform Architectural, Engineering and Land Surveying Services or Related Services.

**PPS-48-0110 Definitions**

In addition to the definitions set forth in PPS-46-0110, the following definitions apply to these Division 48 Rules:

- (1) "**Architect**" is defined in ORS 279C.100 and means a Person who is registered and holds a valid certificate in the practice of architecture in the State of Oregon, as provided under ORS 671.010 through 671.220, and includes, without limitation, the terms "Architect," "licensed Architect," and "registered Architect."
- (2) "**Architectural, Engineering and Land Surveying Services**" is defined in ORS 279C.100 and means professional Services that are required to be performed by an Architect, Engineer, or Land Surveyor.
- (3) "**Architectural, Engineering and Land Surveying Services and Related Services**" is defined in ORS 279C.100(6) and means Services that are related to the planning, design, engineering, or oversight of Public Improvement Projects or components thereof, including, but not limited to, landscape architectural services, facilities planning services, energy planning services, space planning services, environmental impact studies, hazardous substances or hazardous waste or toxic substances testing services, wetland delineation studies, wetland mitigation studies, Native American studies, historical research services, endangered species studies, rare plant studies, biological services, archaeological services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner's representative services, or land-use planning services.
- (4) "**Consultant**" means an Architect, Engineer, Land Surveyor, or provider of Related Services. A Consultant includes a business entity that employs Architects, Engineers, Land Surveyors, or providers of Related Services, or any combination of the foregoing.
- (5) "**Estimated Fee**" means a Contracting Agency's reasonably projected fee to be paid for a Consultant's Services under the anticipated Contract, excluding all anticipated reimbursable or other non-professional fee expenses. The Estimated Fee is used solely to determine the applicable Contract solicitation method and is distinct from the total amount payable under the Contract.
- (6) "**Project**" means all components of a Contracting Agency's planned undertaking that gives rise to the need for a Consultant's Architectural, Engineering and Land Surveying Services or Related Services under a Contract.

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**PPS-48-0120 List of Interested Consultants; Performance Record**

- (1) Consultants who are engaged in the lawful practice of their profession and who are interested in providing Architectural, Engineering and Land Surveying Services or Related Services may annually submit a statement describing their qualifications and related performance information to the District's office addresses. The District will use this information to create a list of prospective Consultants and will update this list at least once every two years.
- (2) The District may compile and maintain a record of each Consultant's performance under Contracts with the particular Contracting Agency, including information obtained from Consultants during an exit interview. Upon request and in accordance with the Oregon Public Records Law (ORS 192.410 through 192.505), the District may make available copies of the records.
- (3) The District shall keep a record of all Contracts with Consultants and shall make these records available to the public, consistent with the requirements of the Oregon Public Records Law (ORS 192.410 through 192.505). The District shall include the following information in the record:
  - (a) Locations throughout the state where the Contracts are performed;
  - (b) Consultants' principal office address and all office addresses in the State of Oregon;
  - (c) Consultants' direct expenses on each Contract, whether or not those direct expenses are reimbursed. "Direct expenses" include all amounts that are directly attributable to Consultants' Services performed under each Contract, including personnel travel expenses, and that would not have been incurred but for the Services being performed. The record shall include all personnel travel expenses as a separate and identifiable expense on the Contract; and
  - (d) The total number of Contracts Awarded to each Consultant over the immediately preceding ten-year period from the date of the record.

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

- (1) The District must select Consultants to perform Architectural, Engineering and Land Surveying Services or Related Services on the basis of qualifications alone when:
  - (a) The District receives money from the State Highway Fund under ORS 366.762 or 366.800 or from a Grant or loan from the state that will be used to pay for any portion of the design or construction of the Project;
  - (b) The total amount of grants, loans, or moneys from the State Highway Fund and from the state exceeds 10% of the value of the Project; and
  - (c) The value of the Project exceeds \$900,000.

When subject to this Section, the District shall not solicit or use pricing policies, pricing proposals, or other pricing information to determine a Consultant's compensation until after the Contracting Agency has selected the most qualified Consultant in accordance with the applicable selection procedure.

- (2) When selecting Consultants to perform Architectural, Engineering and Land Surveying Services and Related Services for a Contract, the District shall follow one of the following selection procedures:
  - (a) When selecting a Consultant on the basis of qualifications alone, the District shall follow the applicable selection procedure under PPS-48-0200, PPS-48-0210, or PPS-48-0220.
  - (b) When selecting a Consultant on the basis of price competition alone, the District shall follow either the provisions under PPS Division 47 for obtaining and evaluating Bids, or PPS-48-0200 if the requirements of PPS-48-0200(1) apply; and

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- (c) When selecting a Consultant on the basis of price and qualifications, the District shall follow either the provisions under PPS Division 47 for obtaining and evaluating Proposals or PPS-48-0200 if the requirements of PPS-48-0200(1) apply. The District may request and consider a Proposer's pricing policies and pricing Proposals, or other pricing information, submitted with a Proposal.
- (3) The District may use electronic methods to screen and select a Consultant in accordance with the procedures described in Sections (1) and (2) of this Rule pursuant to PPS-47-0330.
- (4) Consistent with the requirements of ORS 279C.107 and the remaining requirements of ORS 279C.100, 279C.105, and 279C.110 through 279C.125, the following provisions apply to Proposals received by the District for Architectural, Engineering and Land Surveying Services or Related Services:

  - (a) The term "Competitive Proposal" for purposes of ORS 279C.107 includes Proposals under PPS-48-0200, PPS-48-0210, PPS-48-0220, or PPS-48-0130(2)(c).
  - (b) For purposes of Proposals received by the District under PPS-48-0200, a formal Notice of Intent to Award is not required. As a result, PPS-48-0200 Proposals are not required to be open for public inspection until after the District has made the decision to begin Contract negotiations with the selected Consultant.
  - (c) In the limited circumstances permitted by ORS 279C.110, 279C.115, and 279C.120 where the District is conducting discussions or negotiations with Proposers who submit Proposals that the Contracting Agency has determined to be closely competitive or to have a reasonable chance of being selected for Award, the District may open Proposals so as to avoid disclosure of Proposal contents to competing Proposers pursuant to ORS 279C.107. Otherwise, Contracting Agencies should open Proposals in such a way as to avoid disclosure of the contents until after the District issues a Notice of Intent to Award a Contract.
  - (d) Disclosure of Proposals and Proposal information is otherwise governed by ORS 279C.107.
- (5) As required by ORS 279C.307 pertaining to requirements to ensure the objectivity and independence of providers of certain Personal Services which are procured under ORS 279C, the District may not procure Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with, or otherwise overseeing a Public Contract for construction Services procured under ORS 279C:

  - (a) From a Contractor or an affiliate of a Contractor who is a party to the Public Contract that is subject to administration, management, monitoring, inspection, evaluation, or oversight by means of the Personal Services; or
  - (b) Through the Public Contract that is subject to administration, management, monitoring, inspection, evaluation, or oversight by means of the Personal Services.
- (6) The requirements of ORS 279C.307 and Section (5) of this Rule apply in the following circumstances, except as provided in Section (7) of this Rule:

  - (a) The Procurement of Personal Services which the District requires for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with, or otherwise overseeing a Public Contract or performance under a Public Contract that is subject to ORS 279C. A Public Contract that is "subject to ORS 279C" includes a Public Contract for Architectural, Engineering and Land Surveying Services, a Public Contract for Related Services, or a Public Contract for construction Services under ORS 279C.
  - (b) The Procurement of Personal Services subject to the restrictions of ORS 279C.307 include, but are not limited to, the following:

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- (A) Procurements for Architectural, Engineering and Land Surveying Services which involve overseeing or monitoring the performance of a construction Contractor under a Public Contract for construction Services subject to ORS 279C;
  - (B) Procurements for commissioning Services, which involve monitoring, inspecting, evaluating, or otherwise overseeing the performance of a Contractor providing Architectural, Engineering and Land Surveying Services, or the performance of a construction Contractor under a Public Contract for construction Services subject to ORS 279C;
  - (C) Procurements for project management Services, which involve administration, management, monitoring, inspecting, evaluating compliance with, or otherwise overseeing the performance of a Contractor providing Architectural, Engineering and Land Surveying Services, construction Services subject to ORS 279C, commissioning Services, or other Related Services for a Project;
  - (D) Procurements for special inspections and testing Services, which involve inspecting, testing, or otherwise overseeing the performance of a construction Contractor under a Public Contract for construction Services subject to ORS 279C; and
  - (E) Procurements for other Related Services or Personal Services, which involve administering, managing, monitoring, inspecting, evaluating compliance with, or otherwise overseeing the Public Contracts described in Section (6)(a) of this Rule.
- (7) The restrictions of Sections (5) and (6) of this Rule do not apply in the following circumstances, except as further specified below:
- (a) To the District's Procurement of both design Services and construction Services through a single "Design-Build" Procurement, as that term is defined in PPS-49-0610. Such a Design-Build Procurement includes a Procurement under an ESPC, as defined in ORS 279A.010. Provided, however, the restrictions of Sections (5) and (6) of this Rule do apply to the District's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with, or otherwise overseeing a Design-Build Contract or performance under such a Contract resulting from a Design-Build Procurement.
  - (b) To the District's Procurement of both preconstruction Services and construction Services through a single "Construction Manager/General Contractor" Procurement, as defined in PPS-49-0610. Provided, however, the restrictions of Sections (5) and (6) of this Rule do apply to the District's Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with, or otherwise overseeing a Construction Manager/General Contractor Contract or performance under such a Contract resulting from a Construction Manager/General Contractor Procurement.

## **SELECTION PROCEDURES**

### **PPS-48-0200 Direct Appointment Procedure**

- (1) The District may enter into a Contract directly with a Consultant without following the selection procedures set forth elsewhere in these Rules as follows:
- (a) Emergency. The District finds that an Emergency exists;
  - (b) Small Estimated Fee. The Estimated Fee to be paid under the Contract does not exceed \$50,000;
  - (c) FSCP. The Consultant is a member of an FSCP that has been established for the class of Work for which a Contract is required.

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- (2) The District may select Consultants for Contracts under this Rule from the following sources:
  - (a) Contracting Agency's list of Consultants that is created under PPS-48-0120;
  - (b) Another Contracting Agency's list of Consultants that the Contracting Agency has created under OAR 137-048-0120 or similar local rule, with Written consent of that Contracting Agency; or
  - (c) All Consultants offering the required Architectural, Engineering and Land Surveying Services or Related Services that the District reasonably can identify under the circumstances.
- (3) The District shall direct negotiations with Consultants selected under this Rule toward obtaining Written agreement on:
  - (a) Consultants' performance obligations and performance schedule;
  - (b) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering and Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the District as determined solely by the District, taking into account the value, scope, complexity, and nature of the Architectural, Engineering and Land Surveying Services or Related Services; and
  - (c) Any other provisions that the District believes to be in the District's best interest to negotiate.

**PPS-48-0210 Informal Selection Procedure**

- (1) The District may use the informal selection procedure described in this Rule to obtain a Public Contract if the Estimated Fee is expected not to exceed \$150,000.
- (2) When using the informal selection procedure, the District shall:
  - (a) Create a Request for Proposals that includes at a minimum the following:
    - (A) A description of the Project for which a Consultant's Architectural, Engineering and Land Surveying Services or Related Services are needed and a description of the Architectural, Engineering and Land Surveying Services or Related Services that will be required under the resulting Contract;
    - (B) Anticipated Contract performance schedule;
    - (C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional Services related to the Project, including construction Services;
    - (D) Date and time Proposals are due and other directions for submitting Proposals;
    - (E) Criteria upon which the most qualified Consultant will be selected. Selection criteria may include, but are not limited to, the following:
      - (i) Amount and type of resources and number of experienced staff the Consultant has available to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the Request for Proposals within the applicable time limits, including the current and projected workloads of such staff and the proportion of time such staff would have available for the Architectural, Engineering and Land Surveying Services or Related Services;
      - (ii) Proposed management techniques for the Architectural, Engineering and Land Surveying Services or Related Services described in the Request for Proposals;
      - (iii) A Consultant's capability, experience, and past performance history and record in providing similar Architectural, Engineering and Land Surveying Services or Related

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Services, including, but not limited to, quality of work, ability to meet schedules, cost control methods, and contract administration practices;

- (iv) A Consultant's approach to Architectural, Engineering and Land Surveying Services or Related Services described in the Request for Proposals and design philosophy, if applicable;
  - (v) A Consultant's geographic proximity to and familiarity with the physical location of the Project;
  - (vi) Volume of work, if any, previously Awarded to a Consultant, with the objective of effecting equitable distribution of Contracts among qualified Consultants, provided such distribution does not violate the principle of selecting the most qualified Consultant for the type of professional Services required;
  - (vii) A Consultant's ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;
  - (viii) Pricing policies and pricing Proposals, or other pricing information, if the Contracting Agency is a Local Contracting Agency selecting a Consultant when the conditions under ORS 279C.110(2) do not exist.
- (F) A Statement that Proposers responding to the RFP do so solely at their expense, and the Contracting Agency is not responsible for any Proposer expenses associated with the RFP; and
- (G) A statement directing Proposers to the protest procedures set forth in these Division 48 Rules.
- (b) Provide a Request for Proposals to a minimum of five prospective Consultants drawn from:
- (A) The District's list of Consultants that is created and maintained under PPS-48-0120;
  - (B) Another Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 or equivalent local rule; or
  - (C) All Consultants that the District reasonably can locate that offer the desired Architectural, Engineering and Land Surveying Services or Related Services, or any combination of the foregoing.
- (c) Review and rank that all Proposals received according to the criteria set forth in the Request for Proposals, and select the three highest-ranked Proposers.
- (3) If the District does not cancel the RFP after it reviews and ranks each Proposer, the District will begin negotiating a Contract with the highest-ranked Proposer. The District shall direct negotiations toward obtaining Written agreement on:
- (a) Consultant's performance obligations and performance schedule;
  - (b) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering and Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the District as determined solely by the District, taking into account the value, scope, complexity, and nature of the Architectural, Engineering and Land Surveying Services or Related Services; and
  - (c) Any other provisions the District believes to be in the District's best interest to negotiate.



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(4) The District shall, either orally or in Writing, formally terminate negotiations with the highest-ranked Proposer if the District and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The District may thereafter negotiate with the second-ranked Proposer, and if necessary, with the third-ranked Proposer, in accordance with Section (3) of this Rule, until negotiations result in a Contract. If negotiations with any of the top three Proposers do not result in a Contract within a reasonable amount of time, the District may end the particular informal solicitation and thereafter may proceed with a new informal solicitation under this Rule, or proceed with a formal solicitation under PPS-48-0220.

(5) The District shall terminate the informal selection procedure and proceed with the formal selection procedure under PPS-48-0220 if the scope of the anticipated Contract is revised during negotiations so that the Estimated Fee will exceed \$150,000. Notwithstanding the foregoing, the District may continue contract negotiations with the Proposer selected under the informal selection procedure if the District makes Written Findings that contracting with that Proposer will:

- (a) Promote efficient use of public funds and resources and result in substantial cost savings to the District; and
- (b) Protect the integrity of the Public Contracting process and the competitive nature of the Procurement by not encouraging favoritism or substantially diminishing competition in the Award of the Contract.

**PPS-48-0220 Formal Selection Procedure**

(1) Subject to PPS-48-0130, the District shall use the formal selection procedure described in this Rule to select Consultants if the Consultants cannot be selected under either PPS-48-0200 or PPS-48-0210. The formal selection procedure described in this Rule may otherwise be used at the District's discretion.

(2) When using the formal selection procedure, the District shall obtain Contracts through public advertisement of Requests for Proposals, or Requests for Qualifications followed by Requests for Proposals.

- (a) Except as provided in Section (2)(b) of this Rule, the District shall advertise each RFP and RFQ at least once in at least one newspaper of general circulation in the area where the Project is located, and in as many other issues and publications as may be necessary or desirable to achieve adequate competition. Other issues and publications may include, but are not limited to, local newspapers, trade journals, and publications targeted to reach the minority, women and emerging small business enterprise audiences.
  - (A) The District shall publish the advertisement within a reasonable time before the deadline for the Proposal submission or response to the RFQ or RFP, but in any event no fewer than 14 Days before the Closing date set forth in the RFQ or RFP.
  - (B) The District shall include a brief description of the following items in the advertisement:
    - (i) The Project;
    - (ii) A description of the Architectural, Engineering and Land Surveying Services or Related Services the District seeks;
    - (iii) How and where Consultants may obtain a copy of the RFQ or RFP; and
    - (iv) The deadline for submitting a Proposal or response to the RFQ or RFP.
- (b) In the alternative to advertising in a newspaper as described in Section (2)(a) of this Rule, the District shall publish each RFP and RFQ by one or more of the electronic methods identified in PPS-46-0110(13). The District shall comply with Sections (2)(a)(A) and (2)(a)(B) of this Rule when publishing advertisements by electronic methods.

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- (c) The District may send Notice of the RFP or RFQ directly to all Consultants on the District's list of Consultants that is created and maintained under PPS-48-0120.

**(3) Request for Qualifications Procedure.** The District may use the RFQ procedure to evaluate potential Consultants and establish a short list of qualified Consultants to whom the District may issue an RFP for some or all of the Architectural, Engineering and Land Surveying Services or Related Services described in the RFQ.

- (a) The District shall include the following, at a minimum, in each RFQ:
- (A) A brief description of the Project for which the District is seeking Consultants;
  - (B) A description of the Architectural, Engineering and Land Surveying Services or Related Services the District seeks for the Project;
  - (C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional Services related to the Project, including, but not limited to, construction Services;
  - (D) The deadline for submitting a response to the RFQ;
  - (E) A description of required Consultant qualifications for the Architectural, Engineering and Land Surveying Services or Related Services that the Contracting Agency seeks;
  - (F) The RFQ evaluation criteria, including weights, points, or other classifications applicable to each criterion;
  - (G) A statement whether or not the District will hold a prequalification meeting for all interested Consultants to discuss the Project and the Architectural, Engineering and Land Surveying Services or Related Services described in the RFQ, and if a prequalification meeting will be held, the location of the meeting and whether or not attendance is mandatory; and
  - (H) A statement that Consultants responding to the RFQ do so solely at their expense, and the District is not responsible for any Consultant expenses associated with the RFQ.
- (b) The District may include a request for any or all of the following in each RFQ:
- (A) A statement describing Consultants' general qualifications and related performance information;
  - (B) A description of Consultants' specific qualifications to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFQ, including Consultants' available resources and recent, current, and projected workloads;
  - (C) A list of similar Architectural, Engineering and Land Surveying Services or Related Services and references concerning past performance, and a copy of all records, if any, of Consultants' performance under Contracts with any other Contracting Agency;
  - (D) The number of Consultants' experienced staff available to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFQ, including such personnel's specific qualifications and experience and an estimate of the proportion of time that such personnel would spend on those Services;
  - (E) Consultants' approaches to Architectural, Engineering and Land Surveying Services or Related Services described in the RFQ and design philosophy, if applicable;
  - (F) Consultants' geographic proximity to and familiarity with the physical location of the Project;

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- (G) Consultants' ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;
  - (H) Consultants' pricing policies and pricing proposals, or other pricing information, if the conditions under ORS 279C.110(2) do not exist;
  - (I) Consultants' ability to assist the District in complying with art acquisition requirements, pursuant to ORS 276.073 through 276.090;
  - (J) Consultants' ability to assist the District in complying with State of Oregon energy efficient design requirements, pursuant to ORS 276.900 through 276.915;
  - (K) Consultants' ability to assist the District in complying with the solar energy technology requirements of ORS 279C.527; and
  - (L) Any other information the District deems reasonably necessary to evaluate Consultants' qualifications.
- (c) **RFQ Evaluation Committee.** The District shall establish an RFQ evaluation committee of at least two individuals to review, score, and rank the responding Consultants according to the evaluation criteria. The District may appoint to the evaluation committee District employees or employees of other public agencies with experience in architecture, engineering, or land surveying, Related Services, construction, or Public Contracting. If the District procedure permits, the District may include on the evaluation committee private practitioners of architecture, engineering, land surveying, or related professions. The District shall designate one member of the evaluation committee as the evaluation committee chairperson.
- (d) The District may use any reasonable screening or evaluation method to establish a short list of qualified Consultants, including, but not limited to, the following:
- (A) Requiring Consultants responding to an RFQ to achieve a threshold score before qualifying for placement on the short list;
  - (B) Placing a predetermined number of the highest-scoring Consultants on a short list;
  - (C) Placing on a short list only those Consultants with certain essential qualifications or experience, whose practice is limited to a particular subject area, or whose practice is in a particular geographic locale or region, provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFP.
- (e) After the evaluation committee reviews, scores, and ranks the responding Consultants, the District shall establish a short list of at least three qualified Consultants, provided however, that if four or fewer Consultants responded to the RFQ, then:
- (A) The District may establish a short list of fewer than three qualified Consultants; or
  - (B) The District may cancel the RFQ and issue an RFP.
- (f) No Consultant will be eligible for placement on the District's short list established under Section (3)(d) of this Rule if the Consultant or any of Consultant's principals, partners, or associates are members of the District's RFQ evaluation committee.
- (g) Except when the RFQ is cancelled, the District shall provide a copy of the subsequent RFP to each Consultant on the short list.
- (4) Formal Selection of Consultants Through Request for Proposals.** The District shall use the procedure described in this Section (4) of this Rule when issuing an RFP for a Contract described in Section (1) of this Rule.

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- (a) RFP Required Contents. When using the formal selection procedure, the District shall include at least the following in each RFP, whether or not the RFP is preceded by an RFQ:
- (A) General background information, including a description of the Project and the specific Architectural, Engineering and Land Surveying Services or Related Services sought for the Project, the estimated Project cost, the estimated time period during which the Project is to be completed, and the estimated time period in which the specific Architectural, Engineering and Land Surveying Services or Related Services sought will be performed.
  - (B) The RFP evaluation process and the criteria that will be used to select the most qualified Proposer, including the weights, points, or other classifications applicable to each criterion. If the District does not indicate the applicable number of points, weights, or other classifications, then each criterion is of equal value. Evaluation criteria may include, but are not limited to, the following:
    - (i) Proposers' availability and capability to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP;
    - (ii) Experience of Proposers' key staff persons in providing similar Architectural, Engineering and Land Surveying Services or Related Services on comparable projects;
    - (iii) The amount and type of resources and number of experienced staff persons Proposers have available to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP;
    - (iv) The recent, current, and projected workloads of the staff and resources referenced in Section (4)(a)(B)(iii), above;
    - (v) The proportion of time Proposers estimate that the staff referenced in Section (4)(a)(B)(iii) above would spend on the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP;
    - (vi) Proposers' demonstrated ability to complete successfully similar Architectural, Engineering and Land Surveying Services or Related Services on time and within budget, including whether or not there is a record of satisfactory performance under PPS-48-0120;
    - (vii) References and recommendations from past clients;
    - (viii) Proposers' performance history in meeting deadlines, submitting accurate estimates, producing high quality work, and meeting financial obligations;
    - (ix) Status and quality of any required license or certification;
    - (x) Proposers' knowledge and understanding of the Project and Architectural, Engineering and Land Surveying Services or Related Services described in the RFP as shown in Proposers' approaches to staffing and scheduling needs for the Architectural, Engineering and Land Surveying Services or Related Services, and proposed solutions to any perceived design and constructability issues;
    - (xi) Results from interviews, if conducted;
    - (xii) Design philosophy, if applicable, and approach to the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP;

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- (xiii) Pricing policies and pricing Proposals, or other pricing information, if the District is a Local Contracting Agency selecting a Consultant when the conditions under ORS 279C.110(2) do not exist; and
    - (xiv) Any other criteria that the District deems relevant to the Project and Architectural, Engineering and Land Surveying Services or Related Services described in the RFP, including, where the nature and budget of the Project so warrant, a design competition between competing Proposers.
  - (C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional Services related to the Project, including, but not limited to, construction Services;
  - (D) Whether interviews are possible and if so, the weight, points, or other classifications applicable to the potential interview;
  - (E) The date and time Proposals are due, and the delivery location for Proposals;
  - (F) Reservation of the right to seek clarifications of each Proposal;
  - (G) Reservation of the right to negotiate a final Contract that is in the best interest of the District;
  - (H) Reservation of the right to reject any or all Proposals and reservation of the right to cancel the RFP at any time if doing either would be in the public interest as determined by the District;
  - (I) A statement that Proposers responding to the RFP do so solely at their expense, and the District is not responsible for any Proposer expenses associated with the RFP;
  - (J) A statement directing Proposers to the protest procedures set forth in these Division 48 Rules;
  - (K) Special Contract requirements, including, but not limited to, disadvantaged business enterprise ("DBE"), minority business enterprise ("MBE"), women business enterprise ("WBE"), and emerging small business enterprise ("ESB") participation goals or good-faith efforts with respect to DBE, MBE, WBE, and ESB participation, and federal requirements when federal funds are involved;
  - (L) A statement whether or not the District will hold a pre-Proposal meeting for all interested Consultants to discuss the Project and the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP, and if a pre-Proposal meeting will be held, the location of the meeting and whether or not attendance is mandatory;
  - (M) A request for any information the District deems reasonably necessary to permit the District to evaluate, rank, and select the most qualified Proposer to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP; and
  - (N) A sample form of the Contract.
- (b) RFP Evaluation Committee. The District shall establish a committee of at least three individuals to review, score, and rank Proposals according to the evaluation criteria set forth in the RFP. If the RFP has followed an RFQ, the District may include the same members who served on the RFQ evaluation committee. The District may appoint to the evaluation committee the District employees or employees of other public agencies with experience in architecture, engineering, land surveying, related services, construction, or Public Contracting. At least one member of the evaluation committee must be a District employee. If the District procedure permits, the District may include on the evaluation committee private practitioners of architecture, engineering, land

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surveying, or related professions. The District shall designate one of its employees who also is a member of the evaluation committee as the evaluation committee chairperson.

- (A) No Proposer will be eligible for Award of the Contract under the RFP if Proposer or any of Proposer's principals, partners, or associates are members of the District's RFP evaluation committee for the Contract;
  - (B) If the RFP provides for the possibility of Proposer interviews, the evaluation committee may elect to interview Proposers if the evaluation committee considers it necessary or desirable. If the evaluation committee conducts interviews, it shall award weights, points, or other classifications indicated in the RFP for the anticipated interview; and
  - (C) The evaluation committee shall provide to the District the results of the scoring and ranking for each Proposer.
- (c) If the District does not cancel the RFP after it receives the results of the scoring and ranking for each Proposer, the District will begin negotiating a Contract with the highest-ranked Proposer. The District shall direct negotiations toward obtaining Written agreement on:
- (A) Consultant's performance obligations and performance schedule;
  - (B) Payment methodology and a maximum amount payable to the Consultant for the Architectural, Engineering and Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the District as determined solely by the District, taking into account the value, scope, complexity, and nature of the Architectural, Engineering and Land Surveying Services or Related Services; and
  - (C) Any other provisions the District believes to be in the District's best interest to negotiate.
- (d) The District shall, either orally or in Writing, formally terminate negotiations with the highest-ranked Proposer if the District and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The District may thereafter negotiate with the second-ranked Proposer, and if necessary, with the third-ranked Proposer, and so on, in accordance with Section (4)(c) of this Rule, until negotiations result in a Contract. If negotiations with any Proposer do not result in a Contract within a reasonable amount of time, the District may end the particular formal solicitation. Nothing in this Rule precludes the District from proceeding with a new formal solicitation for the same Architectural, Engineering and Land Surveying Services or Related Services described in the RFP that failed to result in a Contract.

**PPS-48-0230 Ties Among Proposers**

(1) If the District is selecting a Consultant on the basis of qualifications alone and determines after the ranking of Proposers that two or more Proposers are equally qualified, the District may select a candidate through any process that the District believes will result in the best value for the District, taking into account the scope, complexity, and nature of the Architectural, Engineering or Land Surveying Services. The process shall instill public confidence through ethical and fair dealing, honesty, and good faith on the part of the District and Proposers and shall protect the integrity of the Public Contracting process. Once a tie is broken, the District and the selected Proposer shall proceed with negotiations under PPS-48-0210(3) or PPS-48-0220(4)(c), as applicable.

(2) If the District is selecting a Consultant on the basis of price alone, or on the basis of price and qualifications, and determines after the ranking of Proposers that two or more Proposers are identical in terms of price or are identical in terms of price and qualifications, then the District shall follow the procedure set forth in PPS-46-0300 to select the Consultant.

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**PPS-48-0240 Protest Procedures**

**(1) RFP Protest and Request for Change.** Consultants may submit a Written protest of anything contained in an RFP and may request a change to any provision, Specification, or Contract term contained in an RFP, no later than seven Days prior to the date Proposals are due, unless a different deadline is indicated in the RFP. Each protest and request for change must include the reasons for the protest or request, and any proposed changes to the RFP provisions, Specifications, or Contract terms. The District will not consider any protest or request for change that is submitted after the submission deadline.

**(2) Protest of Consultant Selection.**

- (a) Single Award.** In the event of an Award to a single Proposer, the District shall provide to all Proposers a copy of the selection Notice that the District sent to the highest-ranked Proposer. A Proposer who claims to have been adversely affected or aggrieved by the selection of the highest-ranked Proposer may submit a Written protest of the selection to the District no later than seven Days after the date of the selection Notice, unless a different deadline is indicated in the RFP. A Proposer submitting a protest must claim that the protesting Proposer is the highest-ranked Proposer because the Proposals of all higher-ranked Proposers failed to meet the requirements of the RFP, or because the higher-ranked Proposers otherwise are not qualified to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP.
- (b) Multiple Award.** In the event of an Award to more than one Proposer, the District shall provide to all Proposers copies of the selection Notices that the District sent to the highest-ranked Proposers. A Proposer who claims to have been adversely affected or aggrieved by the selection of the highest-ranked Proposers may submit a Written protest of the selection to the District no later than seven Days after the date of the selection Notices, unless a different deadline is indicated in the RFP. A Proposer submitting a protest must claim that the protesting Proposer is one of the highest-ranked Proposers because the Proposals of all higher-ranked Proposers failed to meet the requirements of the RFP, or because a sufficient number of Proposals of higher-ranked Proposers to include the protesting Proposer in the group of highest-ranked Proposers failed to meet the requirements of the RFP. In the alternative, a Proposer submitting a protest must claim that the Proposals of all higher-ranked Proposers, or a sufficient number of higher-ranked Proposers to include the protesting Proposer in the group of highest-ranked Proposers, otherwise are not qualified to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP.
- (c) Effect of Protest Submission Deadline.** The District will not consider any protest that is submitted after the submission deadline.

**(3) Resolution of Protests.** A duly authorized representative of the District shall resolve all timely submitted protests within a reasonable time following the District's receipt of the protest, and once resolved, shall promptly issue a Written decision on the protest to the Proposer who submitted the protest. If the protest results in a change to the RFP, the District shall revise the RFP accordingly and shall re-advertise the RFP in accordance with these Rules.

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

The District may cancel, delay, or suspend a solicitation, RFQ, or other preliminary Procurement document, whether related to a direct appointment, informal selection procedure, or formal selection procedure, or reject all Proposals, responses to RFQs, responses to other preliminary Procurement documents, or any combination of the foregoing, if the District believes it is in the public interest to do so. In the event of any such cancellation, delay, suspension, or rejection, the District is not liable to any Proposer for any loss or

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expense caused by or resulting from any such cancellation, delay, suspension, or rejection. Consultants responding to solicitations, RFQs, or other preliminary Procurement documents are responsible for all costs they may incur in connection with submitting Proposals, responses to RFQs, or responses to other preliminary Procurement documents.

**PPS-48-0260 Two-Tiered Selection Procedure for District Public Improvement Projects**

**(1)** If the District requires an Architect, Engineer, or Land Surveyor to perform Architectural, Engineering and Land Surveying Services or Related Services for a Public Improvement that is owned and maintained by the District and a State Agency will serve as the lead, the District will enter into Contracts with Architects, Engineers, or Land Surveyors for Architectural, Engineering and Land Surveying Services or Related Services for that Public Improvement, and the State Contracting Agency shall utilize the two-tiered selection process described below to obtain these Contracts with Architects, Engineers, or Land Surveyors.

**(2) Tier One.** State Contracting Agencies shall, when feasible, identify no fewer than the three most qualified Proposers responding to an RFP that was issued under the applicable selection procedures described in OAR 137-048-0210 and 137-048-0220, or from among Architects, Engineers, or Land Surveyors identified under 137-048-0200, and shall notify the District of the Architects, Engineers, or Land Surveyors selected.

**(3) Tier Two.** In accordance with the qualifications-based selection requirements of ORS 279C.110, the District shall either:

- (a)** Select an Architect, Engineer, or Land Surveyor from the State Contracting Agency's list of Proposers to perform the Architectural, Engineering and Land Surveying Services or Related Services for the District's Public Improvement; or
- (b)** Select an Architect, Engineer, or Land Surveyor to perform the Architectural, Engineering and Land Surveying Services or Related Services for the District's Public Improvement through an alternative process adopted by the District, consistent with the provisions of the applicable RFP, if any, and these Division 48 Rules. The District's alternative process must be described in the applicable RFP, may be structured to take into account the unique circumstances of the particular procurement of the District, and may include provisions to allow the District to perform its tier two responsibilities efficiently and economically, alone or in cooperation with other Local Contracting Agencies. The District's alternative process may include, but is not limited to, one or more of the following methods:
  - (A)** A general Written direction from the District to the State Contracting Agency, prior to the advertisement of a Procurement or series of Procurements, or during the course of the Procurement or series of Procurements, that the District's tier two selection shall be the highest-ranked firm identified by the State Contracting Agency during the tier one process, and that no further coordination or consultation with the District is required. However, the District may provide Written Notice to the State Contracting Agency that the District's general Written direction is not to be applied for a particular Procurement and describe the process that the District will utilize for the particular Procurement. In order for a Written direction from the District consistent with this Section to be effective for a particular Procurement, it must be received by the Contracting Agency with adequate time for the State Contracting Agency to revise the RFP in order for Proposers to be notified of the tier two process to be utilized in the Procurement. In the event of a multiple Award under the terms of the applicable Procurement, the Written direction from the District may apply to the highest-ranked Proposers that are selected under the terms of the Procurement document.



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- (B) An intergovernmental agreement between the District and the Contracting Agency outlining the alternative process that the District has adopted for a Procurement or series of Procurements.
  - (C) Where multiple Local Government Contracting Agencies are involved in a two-tiered selection procedure, the Local Government Contracting Agencies may name one or more authorized representative(s) to act on behalf of all the Local Government Contracting Agencies, whether the Local Government Contracting Agencies are acting collectively or individually, to select the Architect, Engineer, or Land Surveyor to perform the Architectural, Engineering and Land Surveying Services or Related Services under the tier two selection process. In the event of a multiple Award under the terms of the applicable Procurement, the authorized representative(s) of the Local Contracting Agencies may act on behalf of the Local Contracting Agencies to select the highest-ranked firms that are required under the terms of the Procurement document, as part of the tier two selection process.
- (4) The State Contracting Agency shall thereafter begin Contract negotiations with the selected Architect, Engineer, or Land Surveyor in accordance with the negotiation provisions in OAR 137-048-0200, 137-048-0210, or 137-048-0220 as applicable.
- (5) Nothing in these Division 48 Rules should be construed to deny or limit the District's ability to contract directly with Architects, Engineers, or Land Surveyors pursuant to ORS 279C.125(4) through a selection process established by the District.

**PPS-48-0270 FSCP**

The Superintendent may establish an FSCP for a particular class of Architectural, Engineering, Land Surveying or Related Services where the need for such Services is ongoing in nature, where it is difficult to anticipate the Service need, time, amount, or availability of Contractors, or where Service needs arise so quickly it is not practical or cost-effective to conduct individual solicitations under these Rules. An FSCP shall comply with the following requirements:

- (1) **Solicitation to Create an FSCP.** An FSCP can be established pursuant to an RFQ, an RFP, Competitive Quotes, or such other method of competitive Procurement as the Superintendent deems to be appropriate given the Services to be procured.
  - (a) The Superintendent shall document the reasons for establishing an FSCP consistent with this Rule in the Procurement File. This documentation must be reviewed and approved by the Director of Procurement as demonstrating that the procurement qualifies for use of an FSCP under these Rules.
  - (b) The solicitation shall describe the class of Contracts that can be Awarded to Contractors in the FSCP. The District may not Award Contracts outside of the designated class of Contracts to the FSCP.
  - (c) The solicitation shall set forth the number of Contractors that will be appointed to the FSCP, the selection criteria, and the methodology for ranking the requests and selecting the Contractors to be appointed to the pool.
  - (d) The solicitation may request a binding Price Quote or rate that will become part of a subsequent Contract or may establish the pool based on qualifications alone.
  - (e) The solicitation may set or limit the value of the Work to be performed by the FSCP.

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**(2) Contracting for Work from an FSCP.**

- (a)** Once an FSCP has been established, the Superintendent may negotiate Contracts directly with Contractors in the pool to perform individual Projects within the established scope of the Work. Upon creation of the FSCP, the Superintendent will generate a random list of names of the Contractors appointed to the FSCP. Contracts for individual Projects will be offered, negotiated, and Awarded sequentially to Contractors on the FSCP list. Once the Superintendent has Offered Work to all the Contractors in the FSCP (whether or not some or all of the Contractors have accepted the Offer), a new random FSCP list will be generated. The Superintendent may Offer Work out of sequence in the following circumstances:
  - (A)** The Contractor that is next on the list declines or is unavailable during the time period needed.
  - (B)** Contract negotiations with the next-listed Contractor are not successful.
  - (C)** The Project is for Work that is a continuation of, addition to, or is connected with Work previously performed by a Contractor on the list, and such prior experience means that it is in the best interest of the District to Award the Contract to the Contractor that performed the prior Work.
  - (D)** The nature of the Project is such that the Superintendent determines that an additional analysis of Contractor capability is required. In order to make this determination, the Superintendent shall conduct an informal Procurement pursuant to PPS-46-0510 limited to Contractors in the FSCP.

If a Contractor is selected outside of the sequence, the reason shall be documented in Writing in the Procurement File.

- (b)** An FSCP established under this Section will expire after three years from the date of Closing of the solicitation, unless reestablished as provided in this Rule.
- (c)** Appointment to an FSCP does not guarantee that a Contractor will receive a particular amount of Work or any Work at all.
- (d)** The establishment of an FSCP does not preclude the Superintendent from procuring Work that would otherwise fall within the FSCP class of Work from other Contractors through any other Procurement method authorized under these Rules.
- (e)** At any time during the term of an FSCP, the Superintendent may request confirmation from a Contractor or Contractors in the pool that the Contractor continues to maintain the skills, personnel, or other capability needed to perform the class of Work.

**POST-SELECTION CONSIDERATIONS**

**PPS-48-0300 Prohibited Payment Methodology; Purchase Restrictions**

- (1)** Except as otherwise allowed by law, the District shall not enter into any Contract in which:
  - (a)** The compensation paid under the Contract is solely based on or limited to the Consultant's hourly rates for the Consultant's personnel working on the Project, and reimbursable expenses incurred during the performance of Work on the Project (sometimes referred to as a "time and materials" Contract); and
  - (b)** The Contract does not include a maximum amount payable to the Consultant for the Architectural, Engineering and Land Surveying Services or Related Services required under the Contract.

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- (2) Except in cases of Emergency or in the particular instances noted in the Sections below, the District shall not purchase any building materials, supplies, or equipment for any building, structure, or facility constructed by or for the District from any Consultant under a Contract with the District to perform Architectural, Engineering and Land Surveying Services or Related Services for the building, structure, or facility. This prohibition does not apply if either of the following circumstances exists:
- (a) Consultant is providing Architectural, Engineering and Land Surveying Services or Related Services under a Contract with the District to perform Design-Build Services or ESPC Services (see PPS-49-0670 and PPS-49-0680); or
  - (b) That portion of the Contract relating to the acquisition of building materials, supplies, or equipment was Awarded to Consultant pursuant to applicable law governing the Award of such Contracts.

**PPS-48-0310 Expired or Terminated Contracts; Reinstatement**

- (1) If the District enters into a Contract for Architectural, Engineering and Land Surveying Services or Related Services and that Contract subsequently expires or is terminated, the District may proceed as follows, subject to the requirements of Section (2) of this Rule:
- (a) Expired Contracts. If the Contract has expired as the result of Project delay caused by the District or caused by any other occurrence outside the reasonable control of the District or the Consultant, and if no more than one year has passed since the Contract expiration date, the District may Amend the Contract to extend the Contract expiration date, revise the description of the Architectural, Engineering and Land Surveying Services or Related Services required under the Contract to reflect any material alteration of the Project made as a result of the delay, and revise the applicable performance schedule. Beginning on the effective date of the Amendment, the District and the Consultant shall continue performance under the Contract as Amended; or
  - (b) Terminated Contracts. If the District or both parties to the Contract have terminated the Contract for any reason and if no more than one year has passed since the Contract termination date, then the District may enter into a new Contract with the same Consultant to perform the remaining Architectural, Engineering and Land Surveying Services or Related Services not completed under the Original Contract, or to perform any remaining Architectural, Engineering and Land Surveying Services or Related Services not completed under the Contract as adjusted to reflect a material alteration of the Project.
- (2) The District may proceed under either Sections (1)(a) or (1)(b) of this Rule only after making Written Findings that Amending the existing Contract or entering into a new Contract with Consultant will:
- (a) Promote efficient use of public funds and resources and result in substantial cost savings to the District;
  - (b) Protect the integrity of the Public Contracting process and the competitive nature of the Procurement process by not encouraging favoritism or substantially diminishing competition in the Award of Contracts.; and
  - (c) Result in a Contract that is still within the scope of the final form of the original Procurement document.

**PPS-48-0320 Contract Amendments**

- (1) The District may amend any Contract if the District, in its sole discretion, determines that the Amendment is within the scope of the Solicitation Document and that the Amendment would not materially impact the field of competition for the Architectural, Engineering and Land Surveying Services or Related

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Services described in the final form of the original Procurement document. In making this determination, the District shall consider potential alternative methods of procuring the Services contemplated under the proposed Amendment. An Amendment would not materially impact the field of competition for the Services described in the Solicitation Document if the District reasonably believes that the number of Proposers would not significantly increase if the Procurement document were re-issued to include the additional Services.

(2) The District may Amend any Contract if the additional Services are required by reason of existing or new laws, rules, regulations, or ordinances of federal, state, or local agencies which affect performance of the Original Contract.

(3) All Amendments to Contracts must be in Writing, must be Signed by an authorized representative of the Consultant and the District, and must receive all required approvals before the Amendments will be binding on the District.

**END OF DIVISION 48**

**PPS DIVISION 49**

**DISTRICT PUBLIC CONTRACTING RULES FOR CONTRACTS  
FOR PUBLIC IMPROVEMENTS AND/OR PUBLIC WORKS**

**PPS-49-0100 Application**

These Division 49 Rules are intended to implement the requirements of ORS 279C in regard to Public Improvements, Public Works, and construction Services.

**PPS-49-0110 Policies**

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

**PPS-49-0120 Definitions**

- (1) **"Conduct Disqualification"** means a disqualification pursuant to ORS 279C.440 in accordance with PPS-49-0370.
- (2) **"Disqualification"** means the preclusion of a Person from contracting with the District for a period of time. Disqualification may be a Conduct Disqualification or DBE Disqualification. The District is authorized to disqualify a Person in accordance with PPS-49-0370.
- (3) **"Foreign Contractor"** means a Contractor that is not domiciled in or registered to do business in the State of Oregon. See PPS-49-0480.
- (4) **"Notice"** means any of the alternative forms of Public announcement of Procurements, as described in PPS-49-0210.

**PPS-49-0130 Competitive Bidding Requirement**

The District must solicit Bids for Public Improvement Contracts by Invitation to Bid, except as otherwise allowed or required pursuant to ORS 279C.335 on Competitive Bidding exceptions and exemptions, ORS 279A.030 on federal law overrides, or ORS 279A.100 on affirmative action. Also see PPS-49-0600 through PPS-49-0690 regarding the use of Alternative Contracting Methods and the exemption process.

**PPS-49-0140 Contracts for Construction Other Than Public Improvements; Emergency Construction Contracts**

- (1) **Procurement Under ORS 279B.** Pursuant to ORS 279C.320, Public Contracts for construction Services that are not Public Improvement Contracts may be procured and Amended as general trade Services under the provisions of ORS 279B rather than under the provisions of ORS 279C and these Division 49 Rules.
- (2) **Emergency Construction Contracts.** Emergency Contracts for construction Services are not Public Improvement Contracts and are regulated under ORS 279B.080. See PPS-49-0150.
- (3) **Application of ORS 279C.** Non-procurement provisions of ORS 279C and these Division 49 Rules may still be applicable to the resulting Contracts. See, for example, particular statutes on disqualification (ORS 279C.440, 445, and 450); Legal Actions (ORS 279C.460 and 465); Required Contract Conditions (ORS 279C.505, 515, 520, and 530); Hours of Labor (ORS 279C.540 and 545); Retainage (ORS 279C.550, 560, and 565); Subcontracts (ORS 279C.580); Action on Payment Bonds (ORS 279C.600, 605, 610, 615,

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620, and 625); Termination (ORS 279C.650, 655, 660, and 670); and all of the Prevailing Rate of Wage requirements (ORS 279C.800 through 870) for Public Works Contracts.

#### **PPS-49-0145 Exemptions From Competitive Bidding**

**(1) Specific Exemptions for Individual Contracts.** Contracts that have been specifically exempted under ORS 279C.335(2) are as follows:

- (a) Contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 through 279.855.
- (b) A Public Improvement Contract exempt under Section (2) of this Rule.
- (c) A Public Improvement Contract with a value of less than \$5,000.
- (d) A Contract not to exceed \$100,000 made under procedures for Competitive Quotes in PPS-49-0160.
- (e) Energy savings performance Contracts entered into in accordance with rules of procedure adopted under ORS 279A.065.

**(2) Contracts Approved Pursuant to a Request for Exemption for an Individual Contract or Class of Contracts.**

- (a) The Superintendent may request a resolution from the Contract Review Board exempting a particular Public Improvement Contract or class of Public Improvement Contracts from Competitive Bidding if the Contract or Contracts are not otherwise exempted under these Rules.
- (b) When requesting a class exemption, the Superintendent must clearly identify the class based on the class's defining characteristics, including some combination of Project descriptions or locations, time periods, Contracting values, methods of Procurement, or other factors that distinguish the limited and related class of Public Improvements from the District's overall construction program. The Superintendent or Contract Review Board may not define a class exemption solely by funding source (e.g., a bond fund) or by method of Procurement (e.g., RFP or CM/GC).
- (c) Any approved class exemption shall be added to PPS-49-0146.

**(3) Contents of Exemption Request.** Exemption requests must contain the following:

- (a) The nature of the Project;
- (b) Estimated cost of the Project;
- (c) Findings supporting why it is unlikely that an exemption from Competitive Bidding would encourage favoritism or diminish competition for the Public Contract as required by ORS 279C.335(2)(a);
- (d) Findings supporting that the exemption will likely result in substantial cost savings to the District as required by ORS 279C.335(2)(b) or is a pilot Project for which the District intends to determine whether the use of an Alternative Contracting Method actually results in substantial cost savings;
- (e) Information regarding the following factors as required by ORS 279C.330:
  - (A) Operational, budget, and financial data;
  - (B) Public benefits;
  - (C) Value Engineering;

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- (D) Specialized expertise required;
  - (E) Public safety;
  - (F) Market conditions;
  - (G) Technical complexity; and
  - (H) Funding sources.
- (f) Proposed Alternative Contracting and Purchasing practices to be employed; and
  - (g) The estimated date by which it would be necessary to let the Contract.
- (4) **Hearing Required.**
- (a) The Contract Review Board must hold a public hearing prior to adoption of an exemption resolution.
  - (b) Notification of the public hearing must be published in at least one trade newspaper of general statewide circulation at least 14 Days before the hearing.
  - (c) The Notice must state that the public hearing is for the purpose of taking comments on the District's draft Findings for an exemption from the Competitive Bidding requirement. At the time of the Notice, copies of the draft Findings must be made available to the public.
  - (d) At the public hearing, the District must offer an opportunity for any interested party to appear and present comment.
  - (e) If the District is required to act promptly due to circumstances beyond its control that do not constitute an Emergency, notification of the public hearing can be published simultaneously with the District's solicitation of Contractors for the Alternative Public Contracting method, as long as responses to the solicitation are due at least five Days after the hearing and approval of the resolution adopting the Findings.

#### **PPS-49-0146 Class Exemptions; Public Improvement Contracts**

The Local Contract Review Board declares the following Contracts listed in this Section as classes of Public Improvement Contracts exempt from Competitive Bidding.

- (1) **Donated Public Improvements.** The Superintendent may authorize a Person to construct a Public Improvement without Competitive Bidding or other Competitive process and regardless of dollar amount, if:
- (a) The Person has agreed to donate all or a significant portion of the materials or Services necessary to construct the Public Improvement or perform the Service; and
  - (b) The Person enters into a license or agreement with the District whereby the Person agrees to comply with the Public Contract requirements applicable to the particular Project and any requirements that the District deems necessary or beneficial to protect the District.
- (2) **Benson House Program Contracts.** The Superintendent may directly negotiate a Public Improvement Contract without complying with the Competitive Procurement requirements of these Rules where the Contract is for the purpose of supporting the Benson Polytechnic High School Building Construction Class, and all or a portion of the Contract Price is discounted or donated to the District.
- (3) **Purchases under Contracts Solicited by Nonprofit Procurement Organizations of Which the District is a Member.** The Superintendent may purchase Public Improvements under a Contract or Procurement solicited by a Nonprofit Procurement Organization of which it is a member. For the purposes of this Special Procurement, such a Nonprofit Procurement Organization will be considered a "Contracting

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Purchasing Group" under PPS-46-0400 through PPS-46-0480, and a Procurement must comply with the requirements for Joint Cooperative Procurements pursuant to PPS-46-0420.

**(4) FSCP.** The Superintendent may establish an FSCP for a particular class of Public Improvements where the need for such Work is ongoing in nature, where it is difficult to anticipate the Service need, time, amount, or availability of Contractors, or where Service needs arise so quickly that it is not practical or cost-effective to conduct individual solicitations under these Rules. An FSCP shall comply with the following requirements:

- (a) Solicitation to Create an FSCP.** An FSCP for Public Improvements shall be solicited based on the total cost of the Work estimated to be Awarded through the FSCP during its life. If the total amount of the Work is estimated to be over \$100,000, the Superintendent shall use a formal RFQ process pursuant to PPS-49-0645 or an RFP process pursuant to PPS-49-0650. If the total amount of the Work is \$100,000 or less, the FSCP may be solicited pursuant to the Intermediate Procurement process set forth in PPS-49-0160.

  - (A)** The Superintendent shall document the reasons for establishing an FSCP consistent with this Rule in the Procurement File. This documentation must be reviewed and approved by the Director of Procurement as demonstrating that the Procurement qualifies for use of an FSCP under these Rules.
  - (B)** The solicitation shall describe the class of Contracts that can be Awarded to Contractors in the FSCP. The District may not Award Contracts outside of the designated class of Contracts to the FSCP.
  - (C)** The solicitation shall set forth the number of Contractors that will be appointed to the FSCP, the selection criteria, and the methodology for ranking the requests and selecting the Contractors to be appointed to the pool.
  - (D)** The solicitation may request a binding Price Quote or time and materials rate that will become part of a subsequent Contract or may establish the pool based on qualification alone.
  - (E)** The solicitation may set or limit the value of the work performed by the FSCP.
- (b) Contracting for Work from an FSCP.** Once an FSCP has been established, the Superintendent may negotiate Contracts directly with Contractors in the pool to perform specific Work within the established scope of the Work. Upon creation of the FSCP, the Superintendent will generate a random list of names of the Contractors appointed to the FSCP. Contracts for individual Work will be Offered, negotiated, and Awarded sequentially to Contractors on the FSCP list. Once the Superintendent has Offered a Contract to all the Contractors in the FSCP (whether or not some or all of the Contractors have accepted the Offer), a new random FSCP list will be generated. The Superintendent may offer a Contract to Contractors out of sequence in the following circumstances:

  - (A)** The Contractor that is next on the list declines or is unavailable during the time period needed.
  - (B)** Contract negotiations with the next-listed Contractor are not successful.
  - (C)** The Project is for a Public Improvement that is a continuation of, an addition to, or connected with a Public Improvement previously constructed by a Contractor on the list, and such prior experience means that it is in the best interest of the District to Award the Contract to the Contractor that performed the prior Work or provided the prior Goods.
  - (D)** The nature of the Project is such that the Superintendent determines that an additional analysis of Contractor capability or capacity is required. In order to make this



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determination, the Superintendent shall conduct an Intermediate Procurement pursuant to PPS-49-160 limited to Contractors in the FSCP.

If a Contractor is selected outside of the sequence, the reason shall be documented in Writing in the Procurement File.

- (c) An FSCP established under this Section will expire after three years from the date of Closing of the solicitation, unless reestablished as provided in this Rule.
- (d) Appointment to an FSCP does not guarantee that a contractor will receive a particular amount of work or orders or any work or orders at all.
- (e) The establishment of an FSCP does not preclude the Superintendent from procuring public improvements that would otherwise fall within the FSCP from other contractors through any other Procurement method authorized under these Rules.
- (f) At any time during the term of an FSCP, the Superintendent may request confirmation from a contractor or contractors in the pool that the Contractor continues to maintain the skills, personnel, inventory or other capability needed to perform the class of work or provide the required goods.
- (g) If an FSCP for public improvements is reasonably estimated to include Projects that will total over \$50,000 during the life of the FSCP, public improvement contracts awarded to Contractors on an FSCP list shall require the payment of prevailing wages pursuant to ORS 279C.800 through 279C.870.

#### (5) Price Agreements.

- (a) Price Agreements may be established for the purposes of minimizing paperwork, achieving continuity of product, securing a source of supply, reducing inventory, combining District requirements for volume discounts, creating standardization among agencies, and reducing lead time for ordering. The Superintendent may enter into Price Agreements to purchase Public Improvements for an anticipated need at a predetermined price, but the Contract must be solicited by a Competitive Procurement process pursuant to the requirements of these Rules based on the total Contract Price.
- (b) The Superintendent may purchase Public Improvements from a Contractor Awarded a Price Agreement without first undertaking additional competitive solicitation up to the amount set forth in the Price Agreement.
- (c) The Superintendent may use the Price Agreement entered into by another Oregon Public Agency when the Original Contract was let pursuant to PPS-46-0420.
- (d) The term of the Price Agreement, including renewals, may not exceed the term stated in the original solicitation.
- (e) If a Price Agreement for Public Improvements will exceed \$50,000 over the term of the Agreement, the Contract shall require the payment of prevailing wages pursuant to ORS 279C.800 through 279C. 870.

#### **PPS-49-0150 Emergency Contracts; Bidding and Bonding Exemptions**

(1) **Emergency Declaration.** The Superintendent may declare that Emergency circumstances exist that require prompt execution of a Public Contract for Emergency construction or repair Work. The declaration shall be by a Written declaration that describes the circumstances creating the Emergency and the anticipated harm from failure to enter into an Emergency Contract. The Emergency declaration shall be kept on file as a public record.

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- (2) Competition for Emergency Contracts.** Pursuant to ORS 279C.320(1), Emergency Contracts are regulated under ORS 279B.080, which provides that, for an Emergency Procurement of construction Services, the District shall ensure competition that is reasonable and appropriate under the Emergency circumstances, and may include Written Requests for Offers, oral Requests for Offers, or direct appointments without competition in cases of extreme necessity, in whatever solicitation time periods the Superintendent considers reasonable in responding to the Emergency.
- (3) Emergency Contract Scope.** Although no dollar limitation applies to Emergency Contracts, the scope of the Contract must be limited to Work that is necessary and appropriate to remedy the conditions creating the Emergency as described in the declaration.
- (4) Emergency Contract Modification.** Emergency Contracts may be modified by Change Order or Amendment to address the conditions described in the original declaration or an Amended declaration that further describes additional Work necessary and appropriate for related Emergency circumstances.
- (5) Excusing Bonds.** Pursuant to ORS 279C.380(4) and this Rule, the Emergency declaration may also state that the District waives the requirement of furnishing a performance bond and payment bond for the Emergency Contract. After making such an Emergency declaration, those bonding requirements are excused for the Procurement, but this Emergency declaration does not affect the separate Public Works bond requirement for the benefit of BOLI in enforcing prevailing wage rate and overtime payment requirements. See PPS-49-0815 and BOLI rules at OAR 839-025-0015.

#### **PPS-49-0160 Intermediate Procurements; Competitive Quotes and Amendments**

- (1) General.** Public Improvement Contracts estimated by the District not to exceed \$100,000 may be Awarded in accordance with Intermediate-level Procurement procedures for Competitive Quotes established by this Rule.
- (2) Selection Criteria.** The selection criteria may be limited to price or some combination of price, experience, specific expertise, availability, Project understanding, Contractor capacity, responsibility, and similar factors.
- (3) Request for Quotes.** The District must utilize Written Requests for Quotes whenever reasonably practicable. Written Requests for Quotes must include the selection criteria to be utilized in selecting a Contractor and, if the criteria are not of equal value, their relative value or ranking. When requesting Quotes orally, prior to requesting the Price Quote the District shall state any additional selection criteria and, if the criteria are not of equal value, their relative value. For Public Works Contracts, oral quotes may only be utilized in the event that Written copies of or references to the prevailing wage rates are not required by BOLI (e.g., if the Contract is for \$50,000 or less or is not otherwise subject to payment of prevailing wages).
- (4) Number of Quotes; Record Required.** The District must seek at least three Competitive Quotes and keep a Written record of the sources and amounts of the Quotes received. If three Quotes are not reasonably available, the District must make a Written record of the effort made to obtain those Quotes.
- (5) Award.** If Awarded, the District must Award the Contract to the prospective Contractor whose Quote will best serve the interests of the District, taking into account the announced selection criteria. If Award is not made to the Offeror offering the lowest price, the District must make a Written record of the basis for Award.
- (6) Price Increases.** Intermediate-level Public Improvement Contracts obtained by Competitive Quotes may be increased above the original amount of Award by the District's issuance of a Change to the Work or Amendment, pursuant to PPS-49-0910, within the following limitations:

  - (a)** Up to an aggregate Contract Price increase of 25% over the Original Contract amount when the District's contracting officer determines that a price increase is warranted for additional reasonably related Work, and;

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- (b) Up to an aggregate Contract Price increase of 50% over the Original Contract amount, when the District's contracting officer determines that a price increase is warranted for additional reasonably related Work and the District official, Board, or governing body with administrative or review authority over the contracting officer approves the increase.

(7) **Amendments.** Amendments of Intermediate-level Public Improvement Contracts that exceed the thresholds stated in Section (1) of this Rule are specifically authorized by the Code when made in accordance with this Rule. Accordingly, such Amendments are not considered new Procurements and do not require an exemption from Competitive Bidding.

## **FORMAL PROCUREMENT RULES**

### **PPS-49-0200 Solicitation Documents; Required Provisions; Assignment or Transfer**

(1) **Solicitation Document.** Pursuant to ORS 279C.365 and this Rule, the Solicitation Document must include the following:

(a) **General Information.**

- (A) Identification of the Public Improvement Project, including the character of the Work, and applicable plans, specifications, and other Contract Documents;
- (B) Notice of any pre-Offer conference as follows:
  - (i) The time, date, and location of any pre-Offer conference; and
  - (ii) Whether attendance at the conference will be mandatory or voluntary; and
  - (iii) That statements made by the District's representatives at the conference are not binding on the District unless confirmed by Written Addendum.
- (C) The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be prequalified if prequalification is a requirement;
- (D) The name and title of the District Person designated for receipt of Offers and the contact Person (if different);
- (E) Instructions and information concerning the form and submission of Offers, including the address of the office to which Offers must be delivered, any Bid or Proposal security requirements, and any other required information or special information, e.g., whether Offers may be submitted by facsimile or electronic means (See PPS-49-0300 regarding Facsimile Bids or Proposals and PPS-49-0310 regarding Electronic Procurement);
- (F) The time, date, and place of Opening;
- (G) The time and date of Closing after which the District will not accept Offers, which time must be not less than five Days after the date of the last publication of the advertisement. Although a minimum of five Days is prescribed, the District is encouraged to use at least a 14-Day solicitation period when feasible. If the District is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, the District must designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and PPS-49-0360. For timing issues relating to Addenda, see PPS-49-0250;
- (H) The office where the Specifications for the Work may be reviewed;
- (I) A statement that each Bidder to an ITB must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120;

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- (J) If the Contract resulting from a solicitation will be a Contract for a Public Work subject to ORS 279C.800 through 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148, a statement that no Offer will be received or considered by the District unless the Offer contains a statement by the Offeror as a part of its Offer that "Contractor agrees to be bound by and will comply with the provisions of ORS 279C.838, ORS 279C.840, or 40 U.S.C. 3141 to 3148";
  - (K) A statement that the District will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the Construction Contractors Board or is licensed by the State Landscape Contractors Board as specified in PPS-49-0230;
  - (L) Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;
  - (M) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See PPS-49-0440(3));
  - (N) How the District will notify Offerors of Addenda and how the District will make Addenda available (see PPS-49-0250); and
  - (O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in PPS-49-0360.
- (b) Evaluation Process.
- (A) A statement that the District may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, including the requirement to demonstrate the Bidder's responsibility under ORS 279C.375(3)(b), and may reject for Good Cause all Offers after finding that doing so is in the public interest.
  - (B) The anticipated solicitation schedule, deadlines, protest process, and evaluation process, if any;
  - (C) Evaluation criteria, including the relative value applicable to each criterion, that the District will use to determine the Responsible Bidder with the lowest Responsive Bid (where Award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of Competitive Proposals is authorized under ORS 279C.335 and PPS-49-0620), along with the process the District will use to determine acceptability of the Work;
  - (D) If the Solicitation Document is an Invitation to Bid, the District must set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, and ownership or Life-Cycle Cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but to the extent possible, such evaluation factors must be objective, reasonable estimates based on information the District has available concerning future use; and
  - (E) If the Solicitation Document is a Request for Proposals, the District must refer to the additional requirements of PPS-49-0650; and
- (c) Contract Provisions. The District must include all Contract terms and conditions, including warranties, insurance, and bonding requirements, that the District considers appropriate for the Public Improvement Project. The District must also include all applicable Contract provisions required by Oregon law as follows:
- (A) Prompt payment to all Persons supplying labor or material, contributions to Industrial Accident Fund, and liens and withholding taxes (ORS 279C.505(1));

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- (B) Demonstrate that an employee drug testing program is in place (ORS 279C.505(2));
- (C) If the Contract calls for demolition Work described in ORS 279C.510(1), a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;
- (D) If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost-effective (ORS 279C.510(2));
- (E) Payment of claims by public officers (ORS 279C.515(1));
- (F) Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515(2), including the rate of interest;
- (G) Person's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279C.515(3));
- (H) Hours of labor in compliance with ORS 279C.520;
- (I) Environmental and natural resources regulations (ORS 279C.525);
- (J) Payment for medical care and attention to employees (ORS 279C.530(1));
- (K) A Contract provision substantially as follows: "All employers, including Contractor, that employ subject workers who work under this Contract in the State of Oregon must comply with ORS 656.017 and provide the required workers' compensation coverage, unless such employers are exempt under ORS 656.126. Contractor must ensure that each of its subcontractors complies with these requirements." (ORS 279C.530(2));
- (L) Maximum hours, holidays, and overtime (ORS 279C.540);
- (M) Time limitation on claims for overtime (ORS 279C.545);
- (N) Prevailing wage rates (ORS 279C.800 through 279C.870);
- (O) BOLI Public Works Bond (ORS 279C.830(2))
- (P) Retainage (ORS 279C.550 through 279C.570);
- (Q) Prompt payment policy, progress payments, rate of interest (ORS 279C.570);
- (R) Contractor's relations with subcontractors (ORS 279C.580);
- (S) Notice of claim (ORS 279C.605);
- (T) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385; and
- (U) Contractor's certification that all subcontractors performing Work described in ORS 701.005(2) (i.e., construction Work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 through 701.055 before the subcontractors commence Work under the Contract.

**(2) Assignment or Transfer Restricted.** Unless otherwise provided in the Contract, the Contractor must not assign, sell, dispose of or transfer rights, nor delegate duties under the Contract, either in whole or in part, without the District's prior Written consent. Unless otherwise agreed by the District in Writing, such consent must not relieve the Contractor of any obligations under the Contract. Any assignee or transferee must be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If the District consents in Writing to an assignment, sale, disposal, or transfer of the Contractor's rights or delegation of

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Contractor's duties, the Contractor and its surety, if any, must remain liable to the District for complete performance of the Contract as if no such assignment, sale, disposal, transfer, or delegation had occurred unless the District otherwise agrees in Writing.

#### **PPS-49-0210 Notice and Advertising Requirements; Posting**

**(1) Notice and Distribution Fee.** The District shall furnish "Notice" as set forth below in Sections (1)(a) through (1)(c) to a number of Persons sufficient for the purpose of fostering and promoting competition. The Notice shall indicate where, when, how, and for how long the Solicitation Document may be obtained and generally describe the Public Improvement Project or Work. The Notice may contain any other appropriate information. The District may charge a fee or require a deposit for the Solicitation Document. The District may furnish Notice using any method determined to foster and promote competition, including:

- (a)** Mailing Notice of the availability of Solicitation Documents to Persons that have expressed an interest in the District's Procurements;
- (b)** Placing Notice on the District's Electronic Procurement System; or
- (c)** Placing Notice on the District's Internet Web site.

**(2) Advertising.** Pursuant to ORS 279C.360 and this Rule, the District shall advertise every solicitation for Competitive Bids or Competitive Proposals for a Public Improvement Contract, unless the Contract Review Board has exempted the solicitation from the advertisement requirement as part of a Competitive Bidding exemption under ORS 279C.335.

- (a)** Unless the District publishes by Electronic Advertisement as permitted under Section (2)(b) of this Rule, the District shall publish the advertisement for Offers at least once in at least one newspaper of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as the District may determine to be necessary or desirable to foster and promote competition.
- (b)** The District may publish by Electronic Advertisement if the Contract Review Board determines that Electronic Advertisement is likely to be cost-effective and, by Rule or order, authorizes Electronic Advertisement.
- (c)** In addition to the District's publication required under Sections (2)(a) or (2)(b), the District shall also publish an advertisement for Offers in at least one trade newspaper of general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000.
- (d)** All advertisements for Offers shall set forth:
  - (A)** The Public Improvement Project;
  - (B)** The office where Contract terms, conditions, and Specifications may be reviewed;
  - (C)** The date that Persons must file applications for prequalification under ORS 279C.340, if prequalification is a requirement, and the class or classes of Work for which Persons must be prequalified;
  - (D)** The scheduled Closing, which shall not be less than five Days after the date of the last publication of the advertisement;
  - (E)** The name, title, and address of the District Person authorized to receive Offers;
  - (F)** The scheduled Opening; and
  - (G)** If applicable, that the Contract is for a Public Work subject to ORS 279C.800 through 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148).

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#### **PPS-49-0220 Prequalification of Offerors**

**(1) Prequalification.** Pursuant to ORS 279C.430 and this Rule, two types of prequalification are authorized:

- (a) **Mandatory Prequalification.** The District may require mandatory prequalification of Offerors. The District must indicate in the Solicitation Document if it will require mandatory prequalification. Mandatory prequalification is when the District conditions a Person's submission of an Offer on the Person's prequalification. The District must not consider an Offer from a Person that is not prequalified if the District required prequalification.
- (b) **Permissive Prequalification.** The District may prequalify a Person for the District's solicitation list, but in permissive prequalification the District must not limit distribution of a solicitation to that list.
- (c) **Prequalification Procedure.** When prequalification is required or allowed, a Person shall submit a prequalification application to the District on the form prescribed by the District. The District shall determine if the applicant is qualified within 30 Days of the date of application, or sooner if practicable and so requested by the applicant to enable the applicant to participate in Bidding on an advertised Contract. If the District finds that the applicant is qualified, the District will provide Notice to the applicant of the nature and type of Contracts the applicant is qualified to Bid on and the period of time for which the qualification is valid.

**(2) Prequalification Presumed.** If an Offeror is currently prequalified by either the Oregon Department of Transportation or the Oregon Department of Administrative Services to perform Contracts, the Offeror must be rebuttably presumed qualified to perform similar Work for the District. When qualifying for the same kind of Work for the District, the Person may submit proof of the prequalification in lieu of a prequalification application under Section (1) of this Rule.

**(3) Standards for Prequalification.** A Person may prequalify by demonstrating to the District's satisfaction that:

- (a) The Person's financial, material, equipment, facility, and personnel resources and expertise, or ability to obtain such resources and expertise, indicate that the Person is capable of meeting all contractual responsibilities;
- (b) The Person's record of performance;
- (c) The Person's record of integrity;
- (d) The Person is qualified to contract with the District. (See PPS-49-0390(2) regarding standards of responsibility.)

**(4) Notice Of Denial.** If a Person fails to prequalify for a mandatory prequalification, the District must notify the Person and specify the reasons under Section (3) of this Rule and inform the Person of the Person's right to a hearing under ORS 279C.445 and 279C.450 as provided in Section (6) of this Rule.

**(5) Revocation of Prequalification.** If the District has reasonable cause to believe that there has been a substantial change in the conditions of a prequalified Person and that the Person is no longer qualified or is less qualified, the District may revoke or revise and reissue the prequalification after reasonable Notice to the prequalified Person. The Notice shall specify the reasons under Section (3) of this Rule and inform the Person of the Person's right to a hearing under ORS 279C.445 and 279C.450 as provided in Section (6) of this Rule.

**(6) Appeal of Denial or Revocation of, or Revision to Prequalification.**

- (a) Any Person who wishes to appeal the District decision under Sections (4) or (5) of this Rule shall, within three business Days after receipt of the Notice of disqualification, file Written Notice with

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the District that Person appeals the decision. The District shall notify the Contract Review Board and schedule the appeal hearing before the Contract Review Board.

- (b) Immediately upon receipt of the prospective Bidder's or Proposer's Notice of appeal, the District shall notify the local Contract Review Board.
- (c) Upon the receipt of Notice from the District under Section (2) of this Rule, the Contract Review Board shall promptly notify the Person appealing and the District of the time and place of the hearing. The Contract Review Board shall conduct the hearing and decide the appeal within 30 Days after receiving the Notice from the District. The Contract Review Board shall set forth in Writing the reasons for the hearing decision.
- (d) At the hearing the Contract Review Board shall consider de novo the Notice of denial, revocation or revision of a prequalification, the standards listed in Section (3) of this Rule on which the District based the decision, and any evidence provided by the parties. Hearings before a Contract Review Board shall be conducted under rules of procedure adopted by the Contract Review Board.
- (e) The Contract Review Board may allocate the Contract Review Board's costs for the hearing between the Person appealing and the District. The allocation shall be based on facts found by the Contract Review Board and stated in the final order that, in the Contract Review Board's opinion, warrant such allocation of costs. If the final order does not allocate the costs for the hearing, the costs shall be paid as follows:
  - (A) If the decision to deny, revoke, or revise a prequalification of a Person as a Bidder is upheld, the cost shall be paid by the Person appealing the decision.
  - (B) If the decision to deny, revoke, or revise a prequalification of a Person as a Bidder is reversed, the costs shall be paid by the District.
- (f) Judicial review of any decision by the Contract Review Board shall be as set forth in ORS 279C.450.

#### **PPS-49-0230 Eligibility to Bid or Propose; Registration or License**

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

#### **PPS-49-0240 Pre-Offer Conferences**

- (1) **Purpose.** The District may hold pre-Offer conferences with prospective Offerors prior to Closing to explain the Procurement requirements, obtain information, or conduct site inspections.
- (2) **Required Attendance.** The District may require attendance at the pre-Offer conference as a condition for making an Offer. Unless otherwise specified in the Solicitation Document, a mandatory attendance requirement is considered to have been met if, at any time during the mandatory meeting, a representative of the Offering firm is present.



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- (3) **Scheduled Time.** If the District holds a pre-Offer conference, it must be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference.
- (4) **Statements Not Binding.** Statements made by the District's representative at the pre-Offer conference do not change the Solicitation Document unless the District confirms such statements with a Written Addendum to the Solicitation Document.
- (5) **District Announcement.** The District must set forth Notice of any pre-Offer conference in the Solicitation Document in accordance with PPS-49-0200(1)(a)(B).

#### **PPS-49-0250 Addenda to Solicitation Documents**

- (1) **Issuance; Receipt.** The District may change a Solicitation Document only by Written Addenda. An Offeror must provide Written acknowledgement of receipt of all issued Addenda with its Offer, unless the District otherwise specifies in the Addenda or in the Solicitation Document.
- (2) **Notice and Distribution.** The District must notify prospective Offerors of Addenda consistent with the standards of Notice set forth in PPS-49-0210(1). The Solicitation Document must specify how the District will provide Notice of Addenda and how the District will make the Addenda available (see PPS-49-0200(1)(a)(N)). For example, "The District will not mail Notice of Addenda, but will publish Notice of any Addenda on the District's Web site. Addenda may be downloaded off the District's Web site. Offerors should frequently check the District's Web site until Closing, i.e., at least once weekly until the week of Closing, and at least once daily during the week of the Closing."
- (3) **Timelines; Extensions.** The District must issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The District may extend the Closing if the District determines that prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by public interest, the District must not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.
- (4) **Request for Change or Protest.** Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in PPS-49-0260, by the close of the District's next business Day after issuance of the Addendum, or up to the last Day allowed to submit a request for change or protest under PPS-49-0260, whichever date is later. The District must consider only an Offeror's request for change or protest to the Addendum; the District must not consider a request for change or protest to matters not added or modified by the Addendum, unless the Offeror submits the request for change or protest before the deadline for the District's receipt of request for change or protests as set forth in PPS-49-0260(2) and (3).

#### **PPS-49-0260 Request for Clarification or Change; Solicitation Protests**

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

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**(b) Content of Request for Change.**

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

**(3) Protest.**

- (a) Delivery.** An Offeror may protest Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest on those matters to the District not less than five Days prior to Closing.

**(b) Content of Protest.**

- (A)** An Offeror's Written protest must include:
  - (i)** A detailed statement of the legal and factual grounds for the protest;
  - (ii)** A description of the resulting prejudice to the Offeror; and
  - (iii)** A statement of the desired changes to the Contract terms and conditions, including any Specifications.
- (B)** An Offeror must mark its protest as follows:
  - (i)** "Contract Provision Protest"; and
  - (ii)** Solicitation Document number (or other identification as specified in the Solicitation Document).

**(4) The Response.** The District is not required to consider an Offeror's request for change or protest after the deadline established for submitting such request or protest. The District must provide Notice to the applicable Person if it entirely rejects a protest. If the District agrees with the Person's request or protest, in whole or in part, the District must either issue an Addendum reflecting its determination under PPS-49-0260 or cancel the solicitation under PPS-49-0270.

**(5) Extension of Closing.** If the District receives a Written request for change or protest from an Offeror in accordance with this Rule, the District may extend Closing if the District determines that an extension is necessary to consider the request or protest and issue an Addendum, if any, to the Solicitation Document.

**(6) Failure to Protest or Request a Change Precludes Protest of Award on Such Issue.** An Offeror cannot protest an Award based on any issue that could have, but was not, raised as a Request for Change or Protest of solicitation.

### **PPS-49-0270 Cancellation of Solicitation Document**

**(1) Cancellation in the Public Interest.** The District may cancel a solicitation for Good Cause if the District finds that cancellation is in the public interest. The District's reasons for cancellation must be made part of the Procurement File.

**(2) Notice of Cancellation.** If the District cancels a solicitation prior to Opening, the District must provide Notice of cancellation in accordance with PPS-49-0210(1). Such Notice of cancellation must:

- (a)** Identify the solicitation;

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- (b) Briefly explain the reason for cancellation; and
  - (c) If appropriate, explain that an opportunity will be given to compete on any re-solicitation.
- (3) **Disposition of Offers.**
- (a) Prior to Offer Opening. If the District cancels a solicitation prior to Offer Opening, the District will return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the District will open the Offer to determine the source and then return it to the Offeror.
  - (b) After Offer Opening. If the District rejects all Offers, the District will retain all such Offers as part of the District's Procurement File.

#### **PPS-49-0280 Offer Submissions**

- (1) **Offer and Acceptance.** The Bid or Proposal is the Bidder's or Proposer's Offer to enter into a Contract.
- (a) In Competitive Bidding and Competitive Proposals, the Offer is always a "Firm Offer," i.e., the Offer must be held open by the Offeror for the District's acceptance for the period specified in PPS-49-0410. The District may elect to accept the Offer at any time during the specified period, and the District's Award of the Contract to a Bidder constitutes acceptance of the Offer and binds the Offeror to the Contract.
  - (b) Notwithstanding the fact that a Competitive Proposal is a "Firm Offer" for the period specified in PPS-49-0410, the District may elect to discuss or negotiate certain Contractual provisions, as identified in these Rules or in the Solicitation Document, with the Proposer. See PPS-49-0650 on Requests for Proposals and PPS-49-0290 on Bid or Proposal Security. Where negotiation is permitted by the Rules or the Solicitation Document, Proposers are bound to an obligation to negotiate in good faith and only on those terms that the Rules or the Solicitation Document has reserved for negotiation. In Competitive Proposals, the Solicitation Document must describe whether Offers are to be made and considered as "Firm Offers" that may be accepted without negotiation, as in the case of Competitive Bidding, or whether Offers are subject to discussion, negotiation, or otherwise are not to be considered as final Offers. See PPS-49-0650 on Requests for Proposals and PPS-49-0290 on Bid or Proposal Security.
- (2) **Responsive Offer.** The District may Award a Contract only to a Responsible Offeror with a Responsive Offer.
- (3) **Contingent Offers.** Except to the extent that an Offeror is authorized to Propose certain terms and conditions pursuant to PPS-49-0650, an Offeror must not make an Offer contingent upon the District's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.
- (4) **Offeror's Acknowledgement.** By signing and returning the Offer, the Offeror acknowledges that they have read and understand the terms and conditions contained in the Solicitation Document and that they accept and agree to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits Proposal of alternative terms under PPS-49-0650, the Offeror's Offer includes the nonnegotiable terms and conditions and any Proposed terms and conditions offered for negotiation upon and to the extent accepted by the District in Writing.
- (5) **Instructions.** An Offeror must submit and Sign the Offer in accordance with the Solicitation Document. An Offeror must initial and submit any corrections or erasures to their Offer prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document.

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(6) **Forms.** An Offeror must submit the Offers on the form(s) provided in the Solicitation Document, unless Offerors are otherwise instructed in the Solicitation Document.

(7) **Documents.** An Offeror must provide the District with all documents and Descriptive Literature required under the Solicitation Document.

(8) **Facsimile or Electronic Submissions.** If the District permits Facsimile or Electronic Offers in the Solicitation Document, the Offeror may submit Facsimile or Electronic Offers in accordance with the Solicitation Document. The District will not consider Facsimile or Electronic Offers unless authorized by the Solicitation Document.

(9) **Product Samples and Descriptive Literature.** The District may require Product Samples or Descriptive Literature if it is necessary or desirable to evaluate the quality, features, or characteristics of the offered items. The District will dispose of Product Samples or return or make available for return Product Samples to the Offeror in accordance with the Solicitation Document.

(10) **Identification of Offers.**

(a) To ensure proper identification and handling, Offers must be submitted in a sealed envelope appropriately marked or in the envelope provided by the District, whichever is applicable.

(b) The District is not responsible for Offers submitted in any manner or format, or to any delivery point, other than as required in the Solicitation Document.

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

#### **PPS-49-0290 Bid or Proposal Security**

(1) **Security Amount.** If the District requires Bid or Proposal security, it must be not more than 10% or less than 5% of the Offeror's Bid or Proposal, consisting of the base Bid or Proposal together with all additive alternates. The District must not use Bid or Proposal security to discourage competition. The District must clearly state any Bid or Proposal security requirements in its Solicitation Document. The Offeror must forfeit Bid or Proposal security after Award if the Offeror fails to execute the Contract and promptly return it with any required Performance Bond and Payment Bond and, in the case of Proposal security, with any required proof of insurance. See ORS 279C.365(5) and ORS 279C.385.

(2) **Requirement for Bid Security (Optional for Proposals).** Unless the District has otherwise exempted a solicitation or class of solicitations from Bid security pursuant to ORS 279C.390, the District must require Bid security for its solicitation of Bids for Public Improvements. The District may require Bid security even if it has exempted a class of solicitations from Bid security. The District may require Proposal security in RFPs. See ORS 279C.400(5).

(3) **Form of Bid or Proposal Security.** The District may accept only the following forms of Bid or Proposal security:

(a) A surety bond from a surety company authorized to do business in the State of Oregon;

(b) An irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or

(c) A cashier's check or Offeror's certified check.

(4) **Return of Security.** The District must return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been fully executed and all required bonds have been provided, or after all Offers have been rejected. The District may return the Bid or Proposal security of unsuccessful Offerors prior to Award if the return does not prejudice Contract Award and the security of at least the Bidders with the three lowest Bids, or the Proposers with the three highest-scoring Proposals, is retained pending execution of a Contract.

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### **PPS-49-0300 Facsimile Bids and Proposals**

**(1) District Authorization.** The District may authorize Offerors to submit Facsimile Offers. If the District determines that Bid or Proposal security is or will be required, the District must not authorize Facsimile Offers unless the District has established a method for receipt of such security. Prior to authorizing the submission of Facsimile Offers, the District must determine that the District's equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time. In addition, the District must establish administrative procedures and controls:

- (a) To receive, identify, record, and safeguard Facsimile Offers;
- (b) To ensure timely delivery of Offers to the location of Opening; and
- (c) To preserve the Offers as Sealed.

**(2) Provisions To Be Included in Solicitation Document.** In addition to all other requirements, if the District authorizes a Facsimile Offer for Bids or Proposals, the District must include in the Solicitation Document (other than in an RFQ) the following:

- (a) A provision substantially in the form of the following: "A 'Facsimile Offer' as used in this Solicitation Document means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by the District via a facsimile machine";
- (b) A provision substantially in the form of the following: "Offerors may submit Facsimile Offers in response to this Solicitation Document. The entire response must arrive at the place and by the time specified in this Solicitation Document.";
- (c) A provision that requires Offerors to Sign their Facsimile Offers;
- (d) A provision substantially in the form of the following: "The District reserves the right to Award the Contract solely on the basis of the Facsimile Offer." However, upon the District's request, the apparent successful Offeror must promptly submit its complete original Signed Offer; and
- (e) The data and compatibility characteristics of the District's receiving facsimile machine as follows:
  - (A) Telephone number; and
  - (B) Compatibility characteristics, e.g., make and model number, receiving speed, communications protocol; and
- (f) A provision that the District is not responsible for any failure attributable to the transmission or receipt of the Facsimile Offer including, but not limited to, the following:
  - (A) Receipt of garbled or incomplete documents;
  - (B) Availability or condition of the receiving facsimile machine;
  - (C) Incompatibility between the sending and receiving facsimile machine;
  - (D) Delay in transmission or receipt of documents;
  - (E) Failure of the Offeror to properly identify the Offer documents;
  - (F) Illegibility of Offer documents; and
  - (G) Security and confidentiality of data.

### **PPS-49-0310 Electronic Procurement**

**(1) General.** The District may utilize Electronic Advertisement of Public Improvement Contracts in accordance with ORS 279C.360(1), provided that advertisement of such Contracts with an estimated

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Contract Price in excess of \$125,000 must also be published in a trade newspaper of general statewide circulation, and may post Notices of Intent to Award electronically as provided by ORS 279C.410(7).

**(2) Alternative Procedures.** In the event that the District desires to allow Electronic Offers for a Public Improvement Contract, the District will comply with PPS-47-0330 (Electronic Procurement under ORS 279B), taking into account ORS 279C requirements for Written Bids, opening Bids publicly, Bid security, first-tier subcontractor disclosure, and inclusion of prevailing wage rates.

**(3) Interpretation.** Nothing in this Rule must be construed as prohibiting The District from making Procurement documents for Public Improvement Contracts available in electronic format as well as in hard copy when Bids are to be submitted only in hard copy. See ORS 279C.365(2).

#### **PPS-49-0320 Pre-Closing Modification or Withdrawal of Offers**

**(1) Modifications.** An Offeror may modify its Offer in Writing prior to the Closing. An Offeror must prepare and submit any modification to its Offer to the District in accordance with PPS-49-0280, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror must mark the submitted modification as follows:

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

**(2) Withdrawals.**

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

**(3) Documentation.** The District must include all documents relating to the modification or withdrawal of Offers in the appropriate Procurement File.

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

**(1) Receipt.** The District must electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The District must not open the Offer or modification upon receipt, but must maintain it as confidential and secure until Opening. If the District inadvertently opens an Offer or a modification prior to the Opening, the District must return the Offer or modification to its secure and confidential state until Opening. The District must document the resealing for the Procurement File in accordance with PPS-46-0355 (e.g., "The District inadvertently opened the Offer due to improper identification of the Offer").

**(2) Opening and Recording.** The District must publicly open Offers, including any modifications made to the Offer, pursuant to PPS-49-0320. In the case of Invitations to Bid, to the extent practicable, the District must read aloud the name of each Bidder, the Bid price(s), and such other information as the District

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considers appropriate. In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the District will not read Offers aloud.

**(3) Availability.** After Opening, the District must make Bids available for public inspection, but pursuant to ORS 279C.410, Proposals are not required to be available for public inspection until after the Notice of Intent to Award is issued. In any event, The District may withhold from disclosure those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.501(2); ORS 646.461 through 646.475. To the extent that the District determines such designation is not in accordance with applicable law, the District must make those portions available for public inspection. The Offeror must separate information designated as confidential from other non-confidential information at the time of submitting its Offer. Prices, makes, models, or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and must be publicly available regardless of an Offeror's designation to the contrary.

#### **PPS-49-0340 Late Bids, Late Withdrawals, and Late Modifications**

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. The District will not consider late Offers, withdrawals, or modifications except as permitted in PPS-49-0350 or PPS-49-0390.

#### **PPS-49-0350 Mistakes**

**(1) Generally.** To protect the integrity of the Competitive Procurement process and to assure fair treatment of Offerors, the District should carefully consider whether to permit waiver, correction, or withdrawal of Offers for certain mistakes.

**(2) District Treatment of Mistakes.** The District must not allow an Offeror to correct or withdraw an Offer for an error in judgment. If the District discovers certain mistakes in an Offer after Opening but before Award of the Contract, the District may take the following action:

- (a)** The District may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:
  - (A)** Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;
  - (B)** Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and
  - (C)** Acknowledge receipt of an Addendum to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addendum and intended to be bound by its terms, or the Addendum involved did not affect price, quality, or delivery.
- (b)** The District may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms the District's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Unit prices shall prevail over extended prices in the event of a discrepancy between extended prices and unit prices.
- (c)** The District may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:
  - (A)** The nature of the error;
  - (B)** That the error is not a minor informality under this Section or an error in judgment;

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- (C) That the error cannot be corrected or waived under Section (b) of this Rule;
  - (D) That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;
  - (E) That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;
  - (F) That the Offeror will suffer substantial detriment if the District does not grant the Offeror permission to withdraw the Offer;
  - (G) That the District's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on the District or the public it represents; and
  - (H) That the Offeror promptly gave Notice of the claimed error to the District.
- (d) The criteria in Section (2)(c) of this Rule must determine whether the District will permit an Offeror to withdraw its Offer after Closing. These criteria also must apply to the question of whether the District will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to the District based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually Awarded by the District, whether by Award to the next lowest Responsive and Responsible Bidder or the best Responsive and Responsible Proposer, or by resort to a new solicitation.
- (3) **Rejection for Mistakes.** The District will reject any Offer in which a mistake is evident on the face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents submitted with the Offer.
- (4) **Identification of Mistakes after Award.** The procedures and criteria set forth above are Offeror's only opportunity to correct mistakes or withdraw Offers because of a mistake. Following Award, an Offeror is bound by its Offer, and may withdraw its Offer or rescind a Contract entered into pursuant to this Division 49 only to the extent permitted by applicable law.

#### **PPS-49-0360 First-Tier Subcontractors; Disclosure and Substitution; ITB**

- (1) **Required Disclosure.** Within two working hours after the Bid Closing on an ITB for a Public Improvement having a Contract Price anticipated by the District to exceed \$100,000, all Bidders must submit to the District a disclosure form as described by ORS 279C.370(2), identifying any first-tier subcontractors (those entities that would be contracting directly with the prime Contractor) that will be furnishing labor or labor and materials on the Contract, if Awarded, whose subcontract value would be equal to or greater than:
- (a) 5% of the total Contract Price, but at least \$15,000; or
  - (b) \$350,000, regardless of the percentage of the total Contract Price.
- (2) **Bid Closing, Disclosure Deadline, and Bid Opening.** For each ITB to which this Rule applies, the District must:
- (a) Set the Bid Closing on a Tuesday, Wednesday, or Thursday, and at a time between 2:00 p.m. and 5:00 p.m., except that these Bid Closing restrictions do not apply to an ITB for maintenance or construction of highways, bridges, or other transportation facilities, and provided that the two-hour disclosure deadline described by this Rule would not then fall on a legal holiday;
  - (b) Open Bids publicly immediately after the Bid Closing; and
  - (c) Consider for Contract Award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed by the District.



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**(3) Bidder Instructions and Disclosure Form.** For the purposes of this Rule, the District in its solicitation must:

- (a) Prescribe the disclosure form that must be utilized, substantially in the form set forth in ORS 279C.370(2); and
- (b) Provide instructions in a Notice substantially similar to the following:

"Instructions for First-Tier Subcontractor Disclosure:

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

- (A) The subcontractor's name,
- (B) The category of Work that the subcontractor would be performing, and
- (C) The dollar value of the subcontract.

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

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

**(4) Submission.** A Bidder must submit the disclosure form required by this Rule either in its Bid submission or within two working hours after Bid Closing in the manner specified by the ITB.

**(5) Responsiveness.** Compliance with the disclosure and submittal requirements of ORS 279C.370 and this Rule is a matter of Responsiveness. Bids that are submitted by Bid Closing, but for which the disclosure submittal has not been made by the specified deadline, are not Responsive and will not be considered for Contract Award.

**(6) District Role.** The District must obtain, and make available for public inspection, the disclosure forms required by ORS 279C.370 and this Rule. The District must also provide copies of disclosure forms to BOLI as required by ORS 279C.835. The District is not required to determine the accuracy or completeness of the information provided on disclosure forms.

**(7) Substitution.** Pursuant to ORS 278C.585, a Contractor whose Bid is accepted may substitute a first-tier subcontractor that was not disclosed under ORS 279C.370 and this Rule by submitting the name of the new subcontractor and the reason for the substitution in Writing to the District. A Contractor may substitute a first-tier subcontractor under this Section in the following circumstances:

- (a) When the subcontractor disclosed under ORS 279C.370 fails or refuses to execute a Written Contract after having had a reasonable opportunity to do so after the Written Contract, which must be reasonably based on the general terms, conditions, plans, and Specifications for the Public Improvement Project or the terms of the subcontractor's Written Bid, is presented to the subcontractor by the Contractor.
- (b) When the disclosed subcontractor becomes bankrupt or insolvent.
- (c) When the disclosed subcontractor fails or refuses to perform the subcontract.

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- (d) When the disclosed subcontractor fails or refuses to meet the bond requirements of the Contractor that had been identified prior to the Bid submittal.
- (e) When the Contractor demonstrates to the District that the subcontractor was disclosed as the result of an inadvertent clerical error.
- (f) When the disclosed subcontractor does not hold a license from, or has a license that is not properly endorsed by, the Construction Contractors Board and is required to be licensed by the Construction Contractors Board.
- (g) When the Contractor determines that the Work performed by the disclosed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and Specifications or that the subcontractor is substantially delaying or disrupting the progress of the Work.
- (h) When the disclosed subcontractor is ineligible to work on a Public Improvement Contract under applicable statutory provisions.
- (i) When the substitution is for Good Cause. The Construction Contractors Board shall define "Good Cause" by rule. "Good cause" includes, but is not limited to, the financial instability of a subcontractor. The definition of "Good Cause" must reflect the least-cost policy for Public Improvement Contracts established in ORS 279C.305.
- (j) When the substitution is reasonably based on the Contract alternates chosen by the District.

The District must accept Written submissions filed under this Section (7) as public records. Aside from issues involving inadvertent clerical error under ORS 279C.585, the District does not have a statutory role or duty to review, approve, or resolve disputes concerning such substitutions. See ORS 279C.590 regarding complaints to the Construction Contractors Board on improper substitution.

#### **PPS-49-0370 Disqualification of Persons**

(1) **Authority.** The District may disqualify a Person from consideration of Award of the District's Contracts after providing the Person with Notice and a reasonable opportunity to be heard in accordance with Sections (2) and (4) of this Rule.

- (a) Standards for Conduct Disqualification. As provided in ORS 279C.440, the District may disqualify a Person for:
  - (A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private Contract or subcontract or in the performance of such Contract or subcontract.
  - (B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously, and directly affects the Person's responsibility as a Contractor.
  - (C) Conviction under state or federal antitrust statutes.
  - (D) Violation of a Contract provision that is regarded by the District to be so serious as to justify disqualification. A violation under this Section (2)(a)(D) may include, but is not limited to, material failure to perform the terms of a Contract or an unsatisfactory performance in accordance with the terms of the Contract. However, a Person's failure to perform or unsatisfactory performance caused by acts beyond the Person's control is not a basis for disqualification.
  - (E) Failure to carry workers' compensation or unemployment insurance as required by statute.

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- (b) Standards for DBE Disqualification. As provided in ORS 200.065, 200.075, or 279A.110, the District may disqualify a Person's right to submit an Offer or to participate in a Contract (e.g., subcontractors) as follows:
- (A) For a DBE Disqualification under ORS 200.065, the District may disqualify a Person upon finding that:
    - (i) The Person fraudulently obtained or retained or attempted to obtain or retain or aided another Person to fraudulently obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise; or
    - (ii) The Person knowingly made a false claim that any Person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit; or
    - (iii) The Person has been disqualified by another district pursuant to ORS 200.065.
  - (B) For a DBE Disqualification under ORS 200.075, the District may disqualify a Person upon finding that:
    - (i) The Person has entered into an agreement representing that a disadvantaged, minority, women or emerging small business enterprise, certified pursuant to ORS 200.055 ("Certified Enterprise"), will perform or supply materials under a Public Improvement Contract without the knowledge and consent of the Certified Enterprise; or
    - (ii) The Person exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any Certified Enterprise; or
    - (iii) The Person uses a Certified Enterprise to perform Services under a Contract or to provide supplies under a Public Improvement Contract to meet an established Certified Enterprise goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the Contract.
    - (iv) If a Person is disqualified for a DBE Disqualification under ORS 200.075, the affected District must not permit such Person to participate in that District's Contracts.
  - (C) For a DBE Disqualification under ORS 279A.110, the District may disqualify a Person if the District finds that the Person discriminated against minority, women, or emerging small business enterprises in Awarding a subcontract under a Contract with that District.
- (2) **Notice of Intent to Disqualify**. The District must notify the Person in Writing of a proposed disqualification personally or by registered or certified mail, return receipt requested. This Notice must:
- (a) State that the District intends to disqualify the Person;
  - (b) Set forth the reasons for the disqualification;
  - (c) Include a statement of the Person's right to a hearing if requested in Writing within a time period established by the District and that if the District does not receive the Person's Written request for a hearing within the time stated, the Person must have waived its right to a hearing;
  - (d) Include a statement of the authority and jurisdiction under which the hearing will be held;
  - (e) Include a reference to the particular Sections of the statutes and Rules involved;
  - (f) State the proposed disqualification period; and
  - (g) State that the Person may be represented by legal counsel.

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- (3) Hearing.** The Superintendent will schedule a hearing upon receipt of a timely request for hearing. The Superintendent will notify the Person of the time and place of the hearing and provide information on hearing procedures. Following the hearing, the Superintendent will make a decision on whether to disqualify the Person.
- (4) Notice of Disqualification.** The District will notify the Person in Writing of its disqualification, personally or by registered or certified mail, return receipt requested. The Notice must contain:
- (a)** The effective date and period of disqualification;
  - (b)** The grounds for disqualification; and
  - (c)** A statement of the Person's appeal rights and applicable appeal deadlines as provided in Section (5) of this Rule.
- (5) Appeal of Disqualification.**
- (a)** Any Person who wishes to appeal a decision by the Superintendent to disqualify the Person under this Section shall, within three business Days after receipt of the Notice of intent to disqualify under Section (4) of this Rule, file Written Notice with the District that the Person appeals the decision. The District shall notify the Contract Review Board and schedule the appeal hearing before the Contract Review Board.
  - (b)** Immediately upon receipt of the prospective Bidder's or Proposer's Notice of appeal, the District shall notify the appropriate Local Contract Review Board.
  - (c)** Upon the receipt of Notice from the District under Section (2) of this Rule, the Contract Review Board shall promptly notify the Person appealing and the District of the time and place of the hearing. The Contract Review Board shall conduct the hearing and decide the appeal within 30 Days after receiving the Notice from the District. The Contract Review Board shall set forth in Writing the reasons for the hearing decision.
  - (d)** At the hearing the Contract Review Board shall consider de novo the Notice of disqualification, the reasons for disqualification set forth in Section (1) of this Rule on which the District based the disqualification, and any evidence provided by the parties. Hearings before a Contract Review Board shall be conducted under rules of procedure adopted by the Contract Review Board.
  - (e)** The Contract Review Board may allocate the Contract Review Board's costs for the hearing between the Person appealing and the District. The allocation shall be based on facts found by the Contract Review Board and stated in the final order that, in the Contract Review Board's opinion, warrant such allocation of costs. If the final order does not allocate the costs for the hearing, the costs shall be paid as follows:
    - (A)** If the decision to disqualify the Person is upheld, the costs shall be paid by the Person appealing the decision.
    - (B)** If the decision to disqualify a Person is reversed, the costs shall be paid by the District.
  - (f)** Judicial review of any decision by the Contract Review Board shall be as set forth in ORS 279C.450.

#### **PPS-49-0380 Bid or Proposal Evaluation Criteria**

- (1) General.** A Public Improvement Contract, if Awarded, will be Awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. See PPS-49-0390 and Rules for Alternative Contracting Methods at PPS-49-0600 to PPS-49-0690.
- (2) Bid Evaluation Criteria.** Invitations to Bid may solicit lump-sum Offers, unit-price Offers, or a combination of the two.

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- (a) **Lump Sum.** If the ITB requires a lump-sum Bid without additive or deductive alternates, or if the District elects not to Award additive or deductive alternates, Bids must be compared on the basis of lump-sum prices, or lump-sum base-Bid prices, as applicable. If the ITB calls for a lump-sum base Bid, plus additive or deductive alternates, the total Bid price must be calculated by adding to or deducting from the base Bid those alternates selected by the District for the purpose of comparing Bids.
- (b) **Unit Price.** If the Bid includes unit pricing for estimated quantities, the total Bid price must be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by the District for the purpose of comparing Bids. The District must specify within the Solicitation Document the estimated quantity of the Procurement to be used for determination of the low Bidder. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price must govern. See PPS-49-0350(2)(b).

(3) **Proposal Evaluation Criteria.** If the District has exempted the Procurement of a Public Improvement from the Competitive Bidding requirements of ORS 279C.335(1), the District must set forth the evaluation criteria in the Solicitation Documents. See PPS-49-0650, ORS 279C.335, and ORS 279C.405.

#### **PPS-49-0390 Offer Evaluation and Award; Determination of Responsibility**

(1) **General.** If Awarded, the District must Award the Contract to the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals, provided that such Person is not listed by the Construction Contractors Board as disqualified to hold a Public Improvement Contract (See ORS 279C.375(3)(a)) or is ineligible for Award as a nonresident education service district (ORS 279C.325). The District may Award by item, groups of items, or the entire Offer provided such Award is consistent with the Solicitation Document and in the public interest. Where Award is based on Competitive Bids, ORS 279C.375(5) permits multiple Contract Awards when specified in the ITB.

(2) **Determination of Responsibility.** Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the District must have information that indicates that the Offeror meets the standards of responsibility set forth in ORS 279C.375(3)(b). To be a Responsible Offeror, the District must determine that the Offeror:

- (a) Has available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or has the ability to obtain the resources and expertise, necessary to meet all Contractual responsibilities.
- (b) Holds current licenses that businesses or service professionals operating in this state must hold in order to undertake or perform the Work specified in the Contract.
- (c) Is covered by liability insurance and other insurance in amounts the District requires in the Solicitation Documents.
- (d) Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407, or has elected coverage under ORS 656.128.
- (e) Has made the disclosure required under ORS 279C.370.
- (f) Completed previous contracts of a similar nature with a satisfactory record of performance. For purposes of this subparagraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the Bidder's control, the Bidder stayed within the time and budget allotted for the procurement, and otherwise performed the contract in a satisfactory manner. The District shall document the

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Bidder's record of performance in the Procurement File if the Contracting Agency finds under this subparagraph that the Bidder is not responsible.

- (g) Has a satisfactory record of integrity. In evaluating the Bidder's record of integrity, the District may consider, among other things, whether the Bidder has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the Bidder's performance of a contract or subcontract. The District shall document the Bidder's record of integrity in the Procurement File if the Contracting Agency finds under this subparagraph that the Bidder is not responsible.
- (h) Is legally qualified to contract with the District.
- (i) Supplied all necessary information in connection with the inquiry concerning responsibility. If a Bidder fails to promptly supply information concerning responsibility that the Contracting Agency requests, the District shall determine the Bidder's responsibility based on available information, or may find that the Bidder is not responsible.

**(3) Documenting Agency Determinations.** The District must document its compliance with ORS 279C.375(3) and the above Sections of this Rule on a Responsibility Determination Form substantially as set forth in 279.375(3)(c), and file that form with the Construction Contractors Board within 30 Days after Contract Award.

**(4) District Evaluation.** The District must evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. The District must not evaluate an Offer using any other requirement or criterion.

**(5) Offeror Submissions.**

- (a) The District may require an Offeror to submit Product Samples, Descriptive Literature, technical data, or other material, and may also require any of the following prior to Award:
  - (A) Demonstration, inspection, or testing of a product for characteristics such as compatibility, quality, or workmanship;
  - (B) Examination of such elements as appearance or finish; or
  - (C) Other examinations to determine whether the product conforms to Specifications.
- (b) The District must evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. The District must reject an Offer providing any product that does not meet the Solicitation Document requirements. The District's rejection of an Offer because it offers nonconforming Work or materials is not disqualification and is not appealable under ORS 279C.445.

**(6) Evaluation of Bids.** The District must use only objective criteria to evaluate Bids as set forth in the ITB. The District must evaluate Bids to determine which Responsible Offeror Offers the lowest Responsive Bid.

- (a) Nonresident Bidders. In determining the lowest Responsive Bid, the District must add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.
- (b) Clarifications. In evaluating Bids, the District may seek information from a Bidder only to clarify the Bidder's Bid. Such clarification must not vary, contradict, or supplement the Bid. A Bidder must submit Written and Signed clarifications and such clarifications must become part of the Bidder's Bid.
- (c) Negotiation Prohibited. The District must not negotiate scope of Work or other terms or conditions under an Invitation to Bid process prior to Award.

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(7) **Evaluation of Proposals.** See PPS-49-0650 regarding Rules applicable to Requests for Proposals.

#### **PPS-49-0395 Notice of Intent to Award**

(1) **Notice.** At least seven Days before the Award of a Public Improvement Contract, the District shall issue to each Bidder (pursuant to ORS 279C.375(2)) and each Proposer (pursuant to 279C.410(7)), or post electronically or otherwise, a Notice of the District's Intent to Award the Contract. This requirement does not apply to Award of a Small (under \$5,000) or Intermediate (informal Competitive Quotes) Public Improvement Contract Awarded under ORS 279C.335(1)(c) or (d).

(2) **Form and Manner of Posting.** The form and manner of posting Notice shall conform to customary practices within the District's Procurement system, and may be made electronically.

(3) **Finalizing Award.** The District's Award shall not be final until the later of the following:

(a) Seven Days after the date of the Notice, unless the Solicitation Document provided a different period for protest; or

(b) The District provides a Written response to all timely filed protests that denies the protest and affirms the Award.

(4) **Prior Notice Impractical.** Posting of Notice of Intent to Award shall not be required when the District determines that it is impractical due to unusual time constraints in making prompt Award for its immediate Procurement needs, documents the Procurement File as to the reasons for that determination, and posts Notice of that action as soon as reasonably practical.

#### **PPS-49-0400 Documentation of Award; Availability of Award Decisions**

(1) **Basis of Award.** After Award, the District must make a record showing the basis for determining the successful Offeror part of the District's Procurement File.

(2) **Contents of Award Record for Bids.** The District's record must include:

(a) Bids.

(b) Completed Bid tabulation sheet; and

(c) Written justification for any rejection of lower Bids.

(3) **Contents of Award Record for Proposals.** Where the use of Requests for Proposals is authorized as set forth in PPS-49-0650, the District's record must include:

(a) Proposals.

(b) The completed evaluation of the Proposals;

(c) Written justification for any rejection of higher-scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and

(d) If the District permitted negotiations in accordance with PPS-49-0650, the District's completed evaluation of the initial Proposals and the District's completed evaluation of final Proposals.

(4) **Contract Document.** The District must deliver a fully executed copy of the final Contract to the successful Offeror.

(5) **Bid Tabulations and Award Summaries.** Upon request of any Person, the District must provide tabulations of Awarded Bids or evaluation summaries of Proposals for a nominal charge which may be payable in advance. Requests must contain the Solicitation Document number and, if requested, be accompanied by a self-addressed, stamped envelope. The District may also provide tabulations of Bids and Proposals Awarded on designated Web sites.

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(6) **Availability of Procurement Files.** The District must make completed Procurement Files available for public review at the District.

(7) **Copies from Procurement Files.** Any Person may obtain copies of material from Procurement Files upon payment of a reasonable copying charge.

#### **PPS-49-0410 Time for District Acceptance; Extension**

(1) **Time for Offer Acceptance.** An Offeror's Bid, or Proposal submitted as a Firm Offer (see PPS-49-0280), is irrevocable, valid, and binding on the Offeror for not less than 60 Days from Closing unless otherwise specified in the Solicitation Document.

(2) **Extension of Acceptance Time.** The District may request, orally or in Writing, that Offerors extend, in Writing, the time during which the District may consider and accept their Offer(s). If an Offeror agrees to such extension, the Offer must continue as a Firm Offer, irrevocable, valid, and binding on the Offeror for the agreed-upon extension period.

#### **PPS-49-0420 Negotiation With Bidders Prohibited**

(1) **Bids.** Except as permitted by ORS 279C.340 and PPS-49-0430 when all Bids exceed the Cost Estimate, the District must not negotiate with any Bidder prior to Contract Award. After Award of the Contract, the District and the Contractor may only modify the Contract by Change Order or Amendment to the Contract in accordance with PPS-49-0860.

(2) **Requests for Proposals.** The District may only conduct discussions or negotiations with Proposers in accordance with the requirements of PPS-49-0650.

#### **PPS-49-0430 Negotiation When Bids Exceed Cost Estimate**

(1) **Generally.** In accordance with ORS 279C.340, if all Responsive Bids from Responsible Bidders on a competitively Bid Project exceed the District's Cost Estimate, prior to Contract Award the District may negotiate value engineering and other options with the Responsible Bidder submitting the lowest Responsive Bid in an attempt to bring the Project within the District's Cost Estimate. The subcontractor disclosure and substitution requirements of PPS-49-0360 do not apply to negotiations under this Rule.

(2) **Definitions.** The following definitions apply to this Rule:

- (a) **"Cost Estimate"** means the District's most recent pre-Bid, good-faith assessment of anticipated Contract costs, consisting either of an estimate of an Architect, Engineer, or other qualified professional, or confidential cost calculation worksheets, where available, and otherwise consisting of formal planning or budgetary documents.
- (b) **"Other Options"** means those items generally considered appropriate for negotiation in the RFP process, relating to the details of Contract performance as specified in PPS-49-0650, but excluding any material requirements previously announced in the solicitation process that would likely affect the field of competition.
- (c) **"Project"** means a Public Improvement.
- (d) **"Value Engineering"** means the identification of alternative methods, materials, or systems which provide for comparable function at reduced initial or life-time cost. It includes proposed changes to the plans, Specifications, or other Contract requirements that may be made, consistent with industry practice, under the Original Contract by mutual agreement in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the Public Improvement. Cost savings include those resulting from Life-Cycle Costing, which may either increase or decrease absolute costs over varying time periods.



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- (3) **Rejection of Bids.** In determining whether all Responsive Bids from Responsible Bidders exceed the Cost Estimate, only those Bids that have been formally rejected, or Bids from Bidders who have been formally disqualified by the District, must be excluded from consideration.
- (4) **Scope of Negotiations.** The District must not proceed with Contract Award if the scope of the Project is significantly changed from the original Bid. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other Bidders would have been expected by the District to participate in the Bidding process had the change been made during the solicitation process rather than during negotiation. This Rule must not be construed to prohibit solicitation of trade subcontracts.
- (5) **Discontinuing Negotiations.** The District may discontinue negotiations at any time, and must do so if it appears to the District that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to re-Bid any portion of the Project, or to obtain subcontractor pricing information upon request, must be considered a lack of good faith.
- (6) **Limitation.** Negotiations may be undertaken only with the lowest Responsive, Responsible Bidder pursuant to ORS 279C.340. That statute does not provide any additional authority to further negotiate with Bidders next in line for Contract Award.
- (7) **Public Records.** To the extent that a Bidder's records used in Contract negotiations under ORS 279C.340 are public records, they are exempt from disclosure until after the negotiated Contract has been Awarded or the negotiation process has been terminated, at which time they are subject to disclosure pursuant to the provisions of the Oregon Public Records Law, ORS 192.410 through 192.505.

#### **PPS-49-0440 Rejection of Offers**

- (1) **Rejection of an Offer.**
- (a) The District may reject any Offer upon finding that to accept the Offer may impair the integrity of the Procurement process or that rejecting the Offer is in the public interest.
- (b) The District will reject an Offer upon the District's finding that the Offer:
- (A) Is contingent upon the District's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document, or
  - (B) Takes exception to terms and conditions (including Specifications), or
  - (C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of the Solicitation Document or in contravention of applicable law; or
  - (D) Offers Work that fails to meet the Specifications of the Solicitation Document; or
  - (E) Is late; or
  - (F) Is not in substantial compliance with the Solicitation Document; or
  - (G) Is not in substantial compliance with all prescribed public solicitation procedures.
- (c) The District will reject an Offer upon the District's finding that the Offeror:
- (A) Has not been prequalified under ORS 279C.430 and the District required mandatory prequalification; or
  - (B) Has been disqualified; or
  - (C) Has been declared ineligible under ORS 279C.860 by the Commissioner of BOLI and the Contract is for a Public Work; or

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- (D) Is listed as not qualified by the Construction Contractors Board, if the Contract is for a Public Improvement; or
  - (E) Has not met the requirements of ORS 279A.105 if required by the Solicitation Document; or
  - (F) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document; or
  - (G) Has failed to provide the certification required under Section (3) of this Rule; or
  - (H) Is not Responsible. See PPS-49-0390(2) regarding District determination that the Offeror has met statutory standards of responsibility.
- (2) **Form of Business.** For purposes of this Rule, the District may investigate any Person submitting an Offer. The investigation may include that Person's officers, directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this Rule or to apply the disqualification provisions of ORS 279C.440 through 279C.450 and PPS-49-0370.
- (3) **Certification of Non-Discrimination.** The Offeror must certify and deliver to the District Written certification, as part of the Offer, that the Offeror has not discriminated against minority, women or emerging small business enterprises in obtaining any required subcontracts. Failure to do so must be grounds for disqualification.
- (4) **Rejection of all Offers.** The District may reject all Offers for good cause upon the District's Written Finding that it is in the public interest to do so. The District must notify all Offerors of the rejection of all Offers, along with the good-cause justification and Finding.
- (5) **Criteria for Rejection of All Offers.** The District may reject all Offers upon a Written Finding that:
- (a) The content of or an error in the Solicitation Document or the solicitation process unnecessarily restricted competition for the Contract;
  - (b) The price, quality, or performance presented by the Offerors is too costly or of insufficient quality to justify acceptance of the Offer;
  - (c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the Competitive process;
  - (d) Causes other than legitimate market forces threaten the integrity of the Competitive Procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the Solicitation Document;
  - (e) The District cancels the solicitation in accordance with PPS-49-0270; or
  - (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

#### **PPS-49-0450 Protest of Contractor Selection, Contract Award**

- (1) **Purpose.** An adversely affected or aggrieved Offeror must exhaust all avenues of administrative review and relief before seeking judicial review of the District's Contractor selection or Contract Award decision.
- (2) **Notice of Competitive Range.** Unless otherwise provided in the RFP, when the Competitive Proposal process is authorized under PPS-49-0650, the District must provide Written Notice to all Proposers of the District's determination of the Proposers included in the Competitive Range. The District's Notice of the Proposers included in the Competitive Range must not be final until the later of the following:
- (a) Ten Days after the date of the Notice, unless otherwise provided therein; or

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- (b) Until the District provides a Written response to all timely filed protests that denies the protest and affirms the Notice of the Proposers included in the Competitive Range.
- (3) **Notice of Intent to Award.** Unless otherwise provided in the Solicitation Document, the District must provide Written Notice to all Offerors of the District's Intent to Award the Contract as provided in PPS-49-0395.
- (4) **Right to Protest Award.**
  - (a) An adversely affected or aggrieved Offeror may submit to the District a Written protest of the District's Intent to Award within seven Days after issuance of the Notice of Intent to Award the Contract, unless a different protest period is provided under the Solicitation Document.
  - (b) The Offeror's protest must be in Writing and must specify the grounds on which the protest is based.
  - (c) An Offeror is adversely affected or aggrieved only if the Offeror is eligible for Award of the Contract as the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer submitting the best Responsive Proposal and is next in line for Award, i.e., the protesting Offeror must claim that all lower Bidders or higher-scored Proposers are ineligible for Award:
    - (A) Because their Offers were Non-Responsive; or
    - (B) The District committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been the Responsible Bidder offering the lowest Bid or the Responsible Proposer offering the highest-ranked Proposal.
  - (d) The District will not consider a protest submitted after the time period established in this Rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest the District's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.
- (5) **Right to Protest Competitive Range.**
  - (a) An adversely affected or aggrieved Proposer may submit to the District a Written protest of the District's decision to exclude the Proposer from the Competitive Range within seven Days after issuance of the Notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document. (See procedural requirements for the use of RFPs at PPS-49-0650.)
  - (b) The Proposer's protest must be in Writing and must specify the grounds on which the protest is based.
  - (c) A Proposer is adversely affected only if the Proposer is responsible and submitted a Responsive Proposal and is eligible for inclusion in the Competitive Range, i.e., the protesting Proposer must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Proposers are removed from consideration, and that those ineligible Proposers are ineligible for inclusion in the Competitive Range because:
    - (A) Their Proposals were not Responsive; or
    - (B) The District committed a substantial violation of a provision in the RFP or of an applicable Procurement statute or administrative rule, and the protesting Proposer was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.

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(d) The District must not consider a protest submitted after the time period established in this Rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest the District's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.

(6) **Authority to Resolve Protests.** The Superintendent may settle or resolve a Written protest submitted in accordance with the requirements of this Rule.

(7) **Decision.** If a protest is not settled, the head of the District, or such Person's designee, must promptly issue a Written decision on the protest. Judicial review of this decision will be available if provided by statute.

(8) **Award.** The successful Offeror must promptly execute the Contract after the Award is final. The District must execute the Contract only after it has obtained all applicable required documents and approvals.

#### **PPS-49-0460 Performance and Payment Security; Waiver**

(1) **Public Improvement Contracts.** Unless the required performance bond is waived under ORS 279C.380(1)(a) or this Rule, excused in cases of Emergency under ORS 279C.380(4), or unless the District exempts a Contract or classes of Contracts from the required performance bond and payment bond pursuant to ORS 279C.390, the Contractor must execute and deliver to the District a performance bond and a payment bond each in a sum equal to the Contract Price for all Public Improvement Contracts.

(2) **Other Construction Contracts.** The District may require performance security for other construction Contracts that are not Public Improvement Contracts. Such requirements must be expressly set forth in the Solicitation Document.

(3) **Requirement for Surety Bond.** The District must accept only a performance bond furnished by a surety company authorized to do business in Oregon unless otherwise specified in the Solicitation Document (i.e., the District may accept a cashier's check or certified check in lieu of all or a portion of the required performance bond if specified in the Solicitation Document). The payment bond must be furnished by a surety company authorized to do business in Oregon, and in an amount equal to the full Contract Price.

(4) **Time for Submission.** The apparent successful Offeror must promptly furnish the required performance security at the District's request. If the Offeror fails to furnish the security as requested, the District may reject the Offer and Award the Contract to the Responsible Bidder with the next lowest Responsive Bid or the Responsible Proposer with the next highest-scoring Responsive Proposal, and, at the District's discretion, the Offeror must forfeit its Bid or Proposal security.

(5) **Public Improvement Contracts Under \$100,000.** The Superintendent may, in his or her discretion, waive the Bid security requirements and performance and payment bond requirements of ORS 279C.380 if the amount of the Contract for the Public Improvement is \$100,000 or less.

#### **PPS-49-0470 Substitute Contractor**

If the Contractor provided a performance bond, the District may afford the Contractor's surety the opportunity to provide a substitute Contractor to complete performance of the Contract. A substitute Contractor must perform all remaining Contract Work and comply with all terms and conditions of the Contract, including the provisions of the performance bond and the payment bond. Such substitute performance does not involve the Award of a new Contract and must not be subject to the Competitive Procurement provisions of ORS 279C.

#### **PPS-49-0490 Foreign Contractor**

If the Contract Price exceeds \$10,000 and the Contractor is a Foreign Contractor, the Contractor must promptly report to the Oregon Department of Revenue on forms provided by the Department of Revenue, the

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Contract Price, terms of payment, Contract duration, and such other information as the Department of Revenue may require before final payment can be made on the Contract. A copy of the report must be forwarded to the District. The District Awarding the Contract must satisfy itself that the above requirements have been complied with before it issues final payment on the Contract.

### **ALTERNATIVE CONTRACTING METHODS**

#### **PPS-49-0600 Alternative Contracting Methods; Purpose**

These PPS-49-0600 to PPS-49-0690 Rules are intended to provide guidance to the District regarding the use of Alternative Contracting Methods for Public Improvement Contracts. Those methods include, but are not limited to, Design-Build, ESPC, and Construction Manager/General Contractor ("CM/GC") forms of contracting. As to ESPC contracting, these PPS-49-0600 through PPS-49-0690 Rules implement the requirements of ORS 279C.335 pertaining to the adoption of Rules appropriate for use by the entire District to govern the procedures for entering into ESPCs.

#### **PPS-49-0610 Definitions for Alternative Contracting Methods**

The following definitions must apply to Rules PPS-49-0600 to PPS-49-0690, unless the context requires otherwise:

- (1) "Alternative Contracting Methods"** mean innovative Procurement techniques for obtaining Public Improvement Contracts, utilizing processes other than the traditional method of Design-Bid-Build (with Award based solely on price, in which a final design is issued with formal Bid Documents, construction services are obtained by Sealed Bid Awarded to the lowest Responsive, Responsible Bidder, and the Project is built in accordance with those Documents). In industry practice, such methods commonly include variations of Design-Build contracting, CM/GC forms of contracting, and ESPCs, which are specifically addressed in these PPS-49-0600 to PPS-49-0690 Rules, as well as other developing techniques such as general "performance" and "cost-plus-time" contracting, for which procedural requirements are identified under these PPS-49-0600 to PPS-49-0690 Rules.
- (2) "Construction Manager/General Contractor"** means a form of Procurement that results in a Public Improvement Contract for a Construction Manager/General Contractor to undertake Project team involvement with design development; constructability reviews; value engineering, scheduling, estimating, and subcontracting services; establish a GMP to complete the Contract Work; act as General Contractor; hold all subcontracts, self-perform portions of the Work as may be allowed by the District under the CM/GC Contract; coordinate and manage the building process; provide General Contractor expertise; and act as a member of the Project team along with the District, Architect/Engineers, and other Consultants. CM/GC also refers to a Contractor under this form of Contract, sometimes known as the "Construction Manager at Risk."
- (3) "Design-Build"** means a form of Procurement that results in a Public Improvement Contract in which the construction Contractor also provides or obtains specified design services, participates on the Project team with the District, and manages both design and construction. In this form of Contract, a single Person provides the District with all of the Services necessary to both design and construct the Project.
- (4) "Energy Conservation Measures" ("ECMs")** (also known as "**Energy Efficiency Measures**") means, as used in ESPC Procurement, any equipment, fixture, or furnishing to be added to or used in an existing building or structure, and any repair, alteration, or improvement to an existing building or structure that is designed to reduce energy consumption and related costs, including those costs related to electrical energy, thermal energy, water consumption, waste disposal, and future Contract-labor costs and materials costs associated with maintenance of the building or structure. For purposes of these PPS-49-0600 to PPS-49-0690 Rules, use of either or both of the terms "building" or "structure" must be deemed to include existing energy, water, and waste disposal systems connected or related to or otherwise used for the building

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or structure when such system(s) are included in the Project, either as part of the Project together with the building or structure, or when such system(s) are the focus of the Project. Maintenance services are not Energy Conservation Measures for purposes of these PPS-49-0600 to PPS-49-0690 Rules.

(5) **"Energy Savings Guarantee"** means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the District that certain energy savings and performance will be achieved for the Project covered by the RFP through the installation and implementation of the agreed-upon ECMs for the Project. The Energy Savings Guarantee must include, but must not be limited to, the specific energy savings and performance levels and amounts that will be guaranteed, provisions related to the financial remedies available to the District in the event the guaranteed savings and performance are not achieved, the specific conditions under which the ESCO will guarantee energy savings and performance (including the specific responsibilities of the District after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.

(6) **"Energy Savings Performance Contract" ("ESPC")** means a Public Improvement Contract between the District and a Qualified Energy Service Company for the identification, evaluation, recommendation, design, and construction of Energy Conservation Measures, including a Design-Build Contract, that guarantee energy savings or performance.

(7) **"Guaranteed Maximum Price" ("GMP")** means the total maximum price provided to the District by the Contractor, and accepted by the District, that includes all reimbursable costs of and fees for completion of the Contract Work, as defined by the Public Improvement Contract, except for material changes in the scope of Work. It may also include particularly identified contingency amounts.

(8) **"Measurement and Verification" ("M & V")** means, as used in ESPC Procurement, the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy-using systems pre-installation and post-installation.

(9) **"Project Development Plan"** means a secondary phase of Services performed by an ESCO in an ESPC Procurement when the ESCO performs more extensive design of the agreed-upon ECMs for the Project, provides the detailed provisions of the ESCO's Energy Savings Guarantee that the fully installed and commissioned ECMs will achieve a particular energy savings level for the building or structure, and prepares an overall report or plan summarizing the ESCO's services during this secondary phase of the Work and otherwise explaining how the agreed-upon ECMs will be implemented during the design and construction phase of the Work. The term "Project Development Plan" can also refer to the report or plan provided by the ESCO at the conclusion of this phase of the Work.

(10) **"Qualified Energy Service Company" ("ESCO")** means, as used in ESPC Procurement, a company, firm, or other legal Person with the following characteristics: demonstrated technical, operational, financial, and managerial capabilities to design, install, construct, commission, manage, measure and verify, and otherwise implement Energy Conservation Measures and other Work on building systems or building components that are directly related to the ECMs in existing buildings and structures; a prior record of successfully performing ESPCs on projects involving existing buildings and structures that are comparable to the Project under consideration by the District; and the financial strength to effectively guarantee energy savings and performance under the ESPC for the Project in question, or the ability to secure necessary financial measures to effectively guarantee energy savings under an ESPC for that Project.

(11) **"Technical Energy Audit,"** as used in ESPC Procurement means the initial phase of Services to be performed by an ESCO that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the District of the ESCO's Findings during this initial phase of the Work. The term "Technical Energy Audit" can also refer to the report provided by the ESCO at the conclusion of this phase of the Work.

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### **PPS-49-0620 Use of Alternative Contracting Methods Resolution No. 4027-**

**(1) Competitive Bidding Exemptions.** ORS 279C requires a Competitive Bidding process for Public Improvement Contracts unless a statutory exception applies, a class of Contracts has been exempted, or an individual Contract has been exempted in accordance with ORS 279C.335 and any applicable District Rules. Use of Alternative Contracting Methods may be directed by the District as an exception to the prescribed Public Contracting practices in Oregon, and their use must be justified in accordance with the Public Contract Code and these PPS-49-0600 through PPS-49-0690 Rules. See PPS-49-0630 regarding required Findings and restrictions on class exemptions.

**(2) Energy Savings Performance Contracts.** Unlike other Alternative Contracting Methods covered by these PPS-49-0600 through PPS-49-0690 Rules, ESPCs may be exempted from the Competitive Bidding process for Public Improvement Contracts pursuant to ORS 279C.335(1)(f) if the District complies with the procedures set forth in these PPS-49-0600 through PPS-49-0690 Rules related to the solicitation, negotiation, and contracting for ESPC Services. If these procedures are not followed, an ESPC Procurement may still be exempted from competitive Bidding requirements by following the general exemption procedures within ORS 279C.335.

**(3) Post-Project Evaluation.** ORS 279C.355 requires that the District prepare a formal post-Project evaluation of Public Improvement Projects in excess of \$100,000 for which the Competitive Bidding process was not used. The purpose of this evaluation is to determine whether it was actually in the District's best interest to use an Alternative Contracting Method. The evaluation must be delivered to the Contract Review Board of the District as applicable within 30 Days of the date the District "accepts" the Public Improvement Project, which event is typically defined in the Contract. In the absence of such definition, acceptance of the Project occurs on the later of the date of final payment or the date of final completion of the Work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:

- (a) Financial information, consisting of Cost Estimates, any GMP changes, and actual costs;
- (b) A narrative description of successes and failures during design, engineering, and construction; and
- (c) An objective assessment of the use of the Alternative Contracting Method as compared to the exemption Findings.

### **PPS-49-0630 Findings, Notice, and Hearing**

**(1) Cost Savings Factors.** When Findings are required under ORS 279C.335 to exempt a Contract or class of Contracts from Competitive Bidding requirements, the "substantial cost savings" criterion at ORS 279C.335(2)(b) allows consideration of the type, cost, and amount of the Contract, number of entities available to Bid, and "such other factors as may be deemed appropriate."

**(2) Required Information.** Likewise, the statutory definition of "Findings" at ORS 279C.330 means the justification for the District's conclusion that includes "but is not limited to" information regarding eight identified areas.

**(3) Addressing Cost Savings.** Accordingly, when the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the "substantial cost savings" requirement may be addressed by a combination of:

- (a) Specified Findings that address the factors and other information specifically identified by statute, including an analysis or reasonable forecast of future cost savings as well as present cost savings; and
- (b) Additional Findings that address industry practices, surveys, trends, past experiences, evaluations of completed projects required by ORS 279C.355, and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable,

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such Findings must relate back to the specific characteristics of the Project or Projects at issue in the exemption request; and

- (c) As an alternative to the "substantial cost savings" requirement where an Alternative Contracting Method has not been previously used, the District may make a Finding that identifies the Project as a "pilot Project" under ORS 279C.335(2)(c).

**(4) Favoritism and Competition.** The criteria at ORS 279C.335(2)(a) that it is "unlikely" that the exemption will "encourage favoritism" or "substantially diminish competition" may be addressed in contemplating the use of Alternative Contracting Methods by specifying the manner in which an RFP process will be utilized, that the Procurement will be formally advertised with public Notice and disclosure of the planned Alternative Contracting Method, competition will be encouraged, Award will be made based on identified selection criteria, and an opportunity will be given to protest that Award.

**(5) Class Exemptions.** In making the Findings supporting a class exemption, the District must clearly identify the class with respect to its defining characteristics. Those characteristics must include some combination of Project descriptions or locations, time periods, Contract values or method of Procurement, or other factors that distinguish the limited and related class of Projects from the District's overall construction program. Classes must not be defined solely by funding sources, such as a particular bond fund or by method of Procurement, but must be defined by characteristics that reasonably relate to the exemption criteria set forth in ORS 279C.335(2).

**(6) Public Hearing.** Before final adoption of Findings exempting a Public Improvement Contract from the requirement of Competitive Bidding, the District must give Notice and hold a public hearing as required by ORS 279C.335(4). The hearing must be for the purpose of receiving public comment on the District's draft Findings.

#### **PPS-49-0640 Competitive Proposals; Procedure**

The District may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS 279C.400 through 279C.410 and PPS-49-0600 through PPS-49-690, unless other applicable statutes control the District's use of Competitive Proposals for Public Improvement Contracts. Also see the Section of Rules in this Division entitled Formal Procurement Rules, PPS-49-0200 through PPS-49-0480, and RFP-related Rules under the Alternative Contracting Methods Section at PPS-49-0640 through PPS-49-0660. For ESPCs, the following RFP process must be utilized if the District desires the Procurement process to be exempt from the Competitive Bidding requirements of ORS 279C.335. The RFP process for the Alternative Contracting Methods identified in PPS-49-0600 through PPS-49-0690 includes the following steps:

**(1) Proposal Evaluation.** Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. For ESPC Proposal evaluations, the District may provide in the RFP that qualifications-based evaluation factors will outweigh the District's consideration of price-related factors due to the fact that prices for the major components of the Work to be performed during the ESPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation. Proposal evaluation must be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors must:

- (a) Be reasonable estimates based on information available to the District;
- (b) Treat all Proposals equitably; and
- (c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the District. See ORS 279C.305.



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#### (2) Evaluation Factors.

- (a) In basic negotiated construction contracting where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that affect cost or quality.
- (b) In CM/GC contracting, in addition to Section (2)(a) above, those factors may also include the ability to respond to the technical complexity or unique character of the Project, analyze and propose solutions or approaches to complex Project problems, coordination of multiple disciplines, the time required to commence and complete the improvement, and related matters that affect cost or quality.
- (c) In Design-Build contracting, in addition to Sections (2)(a) and (2)(b) above, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience, and related matters that affect cost or quality.
- (d) In ESPC contracting, in addition to the factors set forth in Sections (2)(a)-(c) above, those factors may also include sample Technical Energy Audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP, financial statements and related information of joint ventures comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting energy guarantee contract levels, the specific Person that will provide the Energy Savings Guarantee to be offered by the ESCO, the ESCO's management plan for the Project, information on the specific methods, techniques, and equipment that the ESCO will use in the performance of the Work under the ESPC, the ESCO's team members and consultants to be assigned to the Project, the ESCO's experience in the energy savings performance contracting field, the ESCO's experience acting as the prime contractor on previous ESPC projects (as opposed to a subcontractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular Project between the District and the ESCO, the ESCO's equipment performance guarantee policies and procedures, the ESCO's energy savings and cost savings guarantee policies and procedures, the ESCO's Project cost guarantee policies and procedures, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the Work, and the ESCO's fee structure for all phases of the ESPC Project.

(3) **Contract Negotiations.** Contract terms may be negotiated to the extent allowed by the RFP and PPS-49-0600 through PPS-49-0690, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See PPS-49-0650. Terms that may be negotiated consist of details of Contract performance; methods of construction, timing, and assignment of risk in specified areas; fee; and other matters that affect cost or quality. In ESPC contracting, terms that may be negotiated also include the scope of preliminary design of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the scope of Services to be performed by the ESCO during the Project Development Plan phase of the Work, the detailed provisions of the Energy Savings Guarantee to be provided by the ESCO, and scope of Work,

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methodologies, and compensation terms and conditions during the design and construction phase and M & V phase of the Work, consistent with the requirements of PPS-49-0680 below.

#### **PPS-49-0645 Requests for Qualifications ("RFQ")**

As provided by ORS 279C.405(1), the District may utilize RFQs to obtain information useful in the preparation or distribution of an RFP. When using RFQs as the first step in a two-step solicitation process in which distribution of the RFPs will be limited to the firms identified as most qualified through their submitted statements of qualification, the District must first advertise and provide Notice of the RFQ in the same manner in which RFPs are advertised, specifically stating that RFPs will be distributed only to the firms selected in the RFQ process. In such cases, the District must also provide within the RFQ a protest provision substantially in the form of PPS-49-0450(5) regarding protests of the Competitive Range. Thereafter, the District may distribute RFPs to the selected firms without further advertisement of the solicitation.

#### **PPS-49-0650 Requests for Proposals ("RFP")**

**(1) Generally.** The use of Competitive Proposals must be specially authorized for a Public Improvement Contract under the Competitive Bidding requirement of ORS 279C.335(1), PPS-49-0130, and PPS-49-0600 through PPS-49-0690. Also see ORS 279C.400 through 279C.410 for statutory requirements regarding Competitive Proposals, and PPS-49-0640 regarding Competitive Proposal procedures.

**(2) Solicitation Documents.** In addition to the Solicitation Document requirements of PPS-49-0200, this Rule applies to the requirements for RFPs. RFP Solicitation Documents must conform to the following standards:

- (a)** The District must set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references, and warranty provisions. See PPS-49-0640. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors must be reasonable estimates based on information available to the District;
- (b)** When the District is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, the District must identify the specific terms and conditions in or provisions of the Solicitation Document that are subject to negotiation or discussion and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions the District has identified as authorized for negotiation. The District must describe the evaluation and discussion or negotiation process, including how the District will establish the Competitive Range;
- (c)** The anticipated size of the Competitive Range shall be stated in the Solicitation Document but may be decreased if the number of Proposers that submit Responsive Proposals is less than the specified number, or may be decreased as provided in PPS-49-0650(4)(a).
- (d)** When the District intends to Award Contracts to more than one Proposer, the District must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. The District must also include the criteria it will use to determine how the District will endeavor to achieve optimal value, utility, and substantial fairness when selecting a particular Contractor to provide Goods and Services from those Contractors Awarded Contracts.

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**(3) Evaluation of Proposals.**

- (a) Evaluation. The District must evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. The District must evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.
  - (A) Clarifications. In evaluating Proposals, the District may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer must submit Written and Signed clarifications and such clarifications must become part of the Proposer's Proposal.
  - (B) Limited Negotiation. If the District did not permit negotiation in its Request for Proposals, the District may, nonetheless, negotiate with the highest-ranked Proposer, but may then only negotiate the:
    - (i) Statement of Work; and
    - (ii) Contract Price as it is affected by negotiating the statement of Work.
    - (iii) The process for discussions or negotiations that is outlined and explained in Sections (5)(b) and (6) of this Rule does not apply to this limited negotiation.
- (b) Discussions; Negotiations. If the District permitted discussions or negotiations in the Request for Proposals, the District must evaluate Proposals and establish the Competitive Range, and may then conduct discussions and negotiations in accordance with this Rule.
  - (A) If the Solicitation Document provided that discussions or negotiations may occur at the District's discretion, the District may forego discussions and negotiations and evaluate all Proposals in accordance with this Rule.
  - (B) If the District proceeds with discussions or negotiations, the District must establish a negotiation team tailored for the acquisition. The District's team may include legal, technical, and negotiating personnel.
- (c) Cancellation. Nothing in this Rule must restrict or prohibit the District from canceling the solicitation at any time.

**(4) Competitive Range; Protest; Award.**

- (a) Determining Competitive Range.
  - (A) If the District does not cancel the solicitation, after the Opening the District will evaluate all Proposals in accordance with the evaluation criteria set forth in the RFP. After evaluation of all Proposals in accordance with the criteria set forth in the RFP, the District will determine and rank the Proposers in the Competitive Range.
  - (B) The District may increase the number of Proposers in the Competitive Range if the District's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive or have a reasonable chance of being determined the best Proposer after the District's evaluation of revised Proposals submitted in accordance with the process described in this Rule.
- (b) Protesting Competitive Range. The District must provide Written Notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest the District's evaluation and determination of the Competitive Range in accordance with PPS-49-0450.

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- (c) Intent to Award; Discuss or Negotiate. After the protest period provided in accordance with these Rules expires, or after the District has provided a final response to any protest, whichever date is later, the District may either:
- (A) Provide Written Notice to all Proposers in the Competitive Range of its Intent to Award the Contract to the highest-ranked Proposer in the Competitive Range.
    - (i) An unsuccessful Proposer may protest the District's Intent to Award in accordance with PPS-49-0450.
    - (ii) After the protest period provided in accordance with PPS-49-0450 expires, or after the District has provided a final response to any protest, whichever date is later, the District must commence final Contract negotiations with the highest-ranked Proposer in the Competitive Range; or
  - (B) Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them, and, following such discussions and receipt and evaluation of revised Proposals, conduct negotiations with the Proposers in the Competitive Range.
- (5) **Discussions; Revised Proposals.** If the District chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, the District must proceed as follows:
- (a) Initiating Discussions. The District must initiate oral or Written discussions with all of the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP that the District identified in the RFP as the subject of discussions. The District may conduct discussions for the following purposes:
    - (A) Informing Proposers of deficiencies in their initial Proposals;
    - (B) Notifying Proposers of parts of their Proposals for which the District would like additional information; and
    - (C) Otherwise allowing Proposers to develop revised Proposals that will allow the District to obtain the best Proposal based on the requirements and evaluation criteria set forth in the RFP.
  - (b) Conducting Discussions. The District may conduct discussions with each Proposer in the Competitive Range necessary to fulfill the purposes of this Section, but need not conduct the same amount of discussions with each Proposer. The District may terminate discussions with any Proposer in the Competitive Range at any time. The District must, however, offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with the District before the District notifies Proposers of the date and time pursuant to this Section that revised Proposals will be due.
    - (A) In conducting discussions, the District:
      - (i) Must treat all Proposers fairly and must not favor any Proposer over another;
      - (ii) Must not discuss other Proposers' Proposals;
      - (iii) Must not suggest specific revisions that a Proposer should make to its Proposal, and must not otherwise direct the Proposer to make any specific revisions to its Proposal.
    - (B) At any time during the time allowed for discussions, the District may:
      - (i) Continue discussions with a particular Proposer;
      - (ii) Terminate discussions with a particular Proposer and continue discussions with other Proposers in the Competitive Range; or

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- (iii) Conclude discussions with all remaining Proposers in the Competitive Range and provide Notice to the Proposers in the Competitive Range to submit revised Proposals.
  - (c) Revised Proposals. If the District does not cancel the solicitation at the conclusion of the District's discussions with all remaining Proposers in the Competitive Range, the District must give all remaining Proposers in the Competitive Range Notice of the date and time by which they must submit revised Proposals. This Notice constitutes the District's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in the District's Notice.

    - (A) Upon receipt of the revised Proposals, the District must score the revised Proposals based on the evaluation criteria set forth in the RFP and rank the revised Proposals based on the District's scoring.
    - (B) The District may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the RFP.
  - (d) Intent to Award; Protest. The District must provide Written Notice to all Proposers in the Competitive Range of the District's Intent to Award the Contract. An unsuccessful Proposer may protest the District's Intent to Award in accordance with PPS-49-0450. After the protest period provided in accordance with that Rule expires, or after the District has provided a final response to any protest, whichever date is later, the District must commence final Contract negotiations.
- (6) **Negotiation.**
- (a) Initiating Negotiations. The District may determine to commence negotiations with the highest-ranked Proposer in the Competitive Range following the:

    - (A) Initial determination of the Competitive Range; or
    - (B) Conclusion of discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.
  - (b) Conducting Negotiations

    - (A) Scope: The District may negotiate:

      - (i) The statement of Work;
      - (ii) The Contract Price as it is affected by negotiating the statement of Work; and
      - (iii) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the RFP. Accordingly, Proposers must not submit, and the District must not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the RFP.
  - (c) Terminating Negotiations. At any time during discussions or negotiations that the District conducts in accordance with this Rule, the District may terminate discussions or negotiations with the highest-ranked Proposer, or the Proposer with whom it is currently discussing or negotiating, if the District reasonably believes that:

    - (A) The Proposer is not discussing or negotiating in good faith; or
    - (B) Further discussions or negotiations with the Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.
  - (d) Continuing Negotiations. If the District terminates discussions or negotiations with a Proposer, the District may then commence negotiations with the next highest-scoring Proposer in the Competitive Range, and continue the process described in this Rule until the District has either:

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- (A) Determined to Award the Contract to the Proposer with whom it is currently discussing or negotiating; or
- (B) Completed one round of discussions or negotiations with all Proposers in the Competitive Range, unless the District provided for more than one round of discussions or negotiations in the Request for Proposals.

#### **PPS-49-0660 RFP Pricing Mechanisms**

- (1) An RFP may result in a lump-sum Contract Price, as in the case of Competitive Bidding. Alternatively, a Cost Reimbursement Contract may be negotiated.
- (2) Economic incentives or disincentives may be included to reflect stated District purposes related to time of completion, safety, or other Public Contracting objectives, including total least-cost mechanisms such as Life-Cycle Costing pursuant to PPS-47-0210.
- (3) A GMP is used as the pricing mechanism for CM/GC where a total Contract Price is provided in the design phase in order to assist the District in determining whether the Project scope is within the District's budget and allowing for design changes during preliminary design rather than after final design Work has been completed.
  - (a) If this collaborative process is successful, the Contractor must propose a final GMP, which may be accepted by the District and included within the Contract.
  - (b) If this collaborative process is not successful and no mutually agreeable resolution on GMP can be achieved with the Contractor, then the District must terminate the Contract. The District may then proceed to negotiate a new Contract (and GMP) with the Proposer that was next-ranked in the original selection process, or employ other means for continuing the Project under ORS 279C.
- (4) When Cost Reimbursement Contracts are utilized, regardless of whether a GMP is included, the District must provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable, and properly allocated.

#### **PPS-49-0670 Design-Build Contracts**

- (1) **General.** The Design-Build form of contracting, as defined at PPS-49-0610(3), has technical complexities that are not readily apparent. The District must use this contracting method only with the assistance of knowledgeable staff or Consultants who are experienced in its use. In order to use the Design-Build process, the District must be able to reasonably anticipate the following types of benefits:
  - (a) Obtaining, through a Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control, and required documentation as a fully integrated function with a single point of responsibility;
  - (b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the Project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;
  - (c) Reducing the risk of design flaws, misunderstandings, and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims;
  - (d) Shortening Project time as construction activity (early submittals, mobilization, subcontracting, and advance Work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased Projects); or
  - (e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.

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- (2) **Authority.** The District must utilize the Design-Build form of contracting only in accordance with the requirements of these PPS-49-0600 through PPS-49-0690 Rules. See particularly PPS-49-0620 pertaining to Alternative Contracting Methods and PPS-49-0680 pertaining to ESPCs.
- (3) **Selection.** Design-Build selection criteria may include those factors set forth above in PPS-49-0640(2)(a), (b), and (c).
- (4) **QBS Inapplicable.** Because the value of construction Services predominates the Design-Build form of Contracting, the qualifications-based selection ("QBS") process mandated by ORS 279C.110 for the District in certain circumstances in obtaining certain Consultant services is not applicable.
- (5) **Licensing.** If a Design-Build Contractor is not an Oregon-licensed design professional, the District must require that the Design-Build Contractor disclose in its Written Offer that it is not an Oregon-licensed design professional, and identify the Oregon-licensed design professional(s) who will provide design Services. See ORS 671.030(5) regarding the offer of Architectural Services, and ORS 672.060(11) regarding the offer of Engineering Services that are appurtenant to construction Services.
- (6) **Performance Security.** ORS 279C.380(1)(a) provides that for Design-Build Contracts, the surety's obligation on performance bonds, or the Bidder's obligation on cashier's or certified checks accepted in lieu thereof, includes the preparation and completion of design and related professional Services specified in the Contract. This additional obligation, beyond performance of construction Services, extends only to the provision of professional Services and related design revisions, corrective Work, and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage.
- (7) **Contract Requirements.** The District must conform their Design-Build contracting practices to the following requirements:
- (a) **Design Services.** The level or type of design Services required must be clearly defined within the Procurement documents and Contract, along with a description of the level or type of design Services previously performed for the Project. The Services to be performed must be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.
  - (b) **Professional Liability.** The Contract must clearly identify the liability of design professionals with respect to the Design-Build Contractor and the District, as well as requirements for professional liability insurance.
  - (c) **Risk Allocation.** The Contract must clearly identify the extent to which the District requires an express indemnification from the Design-Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations, and faulty Work claims.
  - (d) **Warranties.** The Contract must clearly identify any express warranties made to the District regarding characteristics or capabilities of the completed Project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated Project performance and budget guidelines.
  - (e) **Incentives.** The Contract must clearly identify any economic incentives and disincentives, the specific criteria that apply, and their relationship to other financial elements of the Contract.
  - (f) **Honoraria.** If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the solicitation process on the basis that the District is benefited from such deliverables.

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### **PPS-49-0680 Energy Savings Performance Contracts**

**(1) Generally.** These PPS-49-0600 through PPS-49-0690 Rules include a limited, efficient method for the District to enter into ESPCs outside the Competitive Bidding requirements of ORS 279C.335 for existing buildings or structures, but not for new construction. If the District chooses not to utilize the ESPC Procurement method provided for by these PPS-49-0600 through PPS-49-0690 Rules, the District may still enter into an ESPC by complying with the Competitive Bidding exemption process set forth in ORS 279C.335, or by otherwise complying with the Procurement requirements applicable to any district not subject to all the requirements of ORS 279C.335.

**(2) ESPC Contracting Method.** The ESPC form of contracting, as defined at PPS-49-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the District, as well as the additional technical complexities associated with a Design-Build Contract. The District must only utilize the ESPC contracting method with the assistance of knowledgeable staff or Consultants who are experienced in its use. In order to utilize the ESPC contracting process, the District must be able to reasonably anticipate one or more of the following types of benefits:

- (a) Obtaining, through an ESCO, the following types of integrated Services: facility profiling, energy baseline studies, ECMs, Technical Energy Audits, project development planning, engineering design, plan preparation, cost estimating, Life-Cycle Costing, construction administration, project management, construction, quality control, operations and maintenance staff training, commissioning Services, M & V Services, and required documentation as a fully integrated function with a single point of responsibility;
- (b) Obtaining, through an ESCO, an Energy Savings Guarantee;
- (c) Integrating the Technical Energy Audit phase and the Project Development Plan phase into the design and construction phase of Work on the Project;
- (d) Reducing the risk of design flaws, misunderstandings, and conflicts inherent in the construction process, through the integration of ESPC Services;
- (e) Obtaining innovative design solutions through the collaboration of the members of the ESCO-integrated ESPC Services team;
- (f) Integrating cost-effective ECMs into an existing building or structure so that the ECMs pay for themselves through savings realized over the useful life of the ECMs;
- (g) Preliminary design, development, implementation, and an Energy Savings Guarantee of ECMs into an existing building or structure through an ESPC as a distinct part of a major remodel of that building or structure that is being performed under a separate remodeling Contract; and
- (h) Satisfying local energy efficiency design criteria or requirements.

**(3) Authority.** The District desiring to pursue an exemption from the Competitive Bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086) must utilize the ESPC form of contracting only in accordance with the requirements of these PPS-49-0600 to PPS-49-0690 Rules.

**(4) No Findings Required.** The District is only required to comply with the ESPC contracting procedures set forth in PPS-49-0600 through PPS-49-0690 of these Rules in order for the ESPC to be exempt from the Competitive Bidding processes of ORS 279C.335. No Findings are required for an ESPC to be exempt from the Competitive Bidding process for Public Improvement Contracts pursuant to ORS 279C.335, unless the District is subject to the requirements of ORS 279C.335 and chooses not to comply with the ESPC contracting procedures set forth in these PPS-49-0600 through PPS-49-0690 Rules.



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- (5) Selection.** ESPC selection criteria may include those factors set forth above in PPS-49-0640(2)(a), (b), (c), and (d). Since the Energy Savings Guarantee is such a fundamental component in the ESPC contracting process, Proposers must disclose in their Proposals the identity of any Person providing (directly or indirectly) any Energy Savings Guarantee that may be offered by the successful ESCO during the course of the performance of the ESPC, along with any financial statements and related information pertaining to any such Person.
- (6) Qualifications Based Selection (QBS).** Because the value of construction Services predominates in the ESPC method of contracting, the QBS process mandated by ORS 279C.110 for the District in obtaining certain Consultant Services is not applicable.
- (7) Licensing.** If the ESCO is not an Oregon-licensed design professional, the District must require that the ESCO disclose in the ESPC that it is not an Oregon-licensed design professional, and identify the Oregon-licensed design professional(s) who will provide design Services. See ORS 671.030(5) regarding the offer of Architectural Services, and ORS 672.060(11) regarding the offer of Engineering Services that are appurtenant to construction Services.
- (8) Performance Security.** At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the ESCO must provide a performance bond and a payment bond, each for 100% of the full Contract Price, including the construction and design and related professional Services specified in the ESPC Design-Build Contract, pursuant to ORS 279C.380(1)(a). For ESPC Design-Build Contracts, these "design and related professional Services" include conventional design Services, commissioning Services, training Services for the District's operations and maintenance staff, and any similar professional Services provided by the ESCO under the ESPC Design-Build Contract prior to final completion of construction. M & V Services, and any Services associated with the ESCO's Energy Savings Guarantee, are not included in these ORS 279C.380(1)(a) "design and related professional Services." Nevertheless, the District may require that the ESCO provide performance security for M & V Services and any Services associated with the ESCO's Energy Savings Guarantee, if the District so provides in the RFP.
- (9) Contracting Requirements.** The District must conform their ESPC contracting practices to the following requirements:
- (a) General ESPC Contracting Practices.** An ESPC involves a multi-phase Project, which includes the following contractual elements:
    - (A)** A contractual structure which includes general Contract terms describing the relationship of the parties, the various phases of the Work, the contractual terms governing the Technical Energy Audit for the Project, the contractual terms governing the Project Development Plan for the Project, the contractual terms governing the final design and construction of the Project, the contractual terms governing the performance of the M & V Services for the Project, and the detailed provisions of the ESCO's Energy Savings Guarantee for the Project.
    - (B)** The various phases of the ESCO's Work will include the following:
      - (i)** The Technical Energy Audit phase of the Work;
      - (ii)** The Project Development Plan phase of the Work;
      - (iii)** A third phase of the Work that constitutes a Design-Build Contract, during which the ESCO completes any plans and Specifications required to implement the ECMs that have been agreed to by the parties to the ESPC, and the ESCO performs all construction, commissioning, construction administration, and related Services to actually construct the Project; and
      - (iv)** A final phase of the Work whereby the ESCO, independently or in cooperation with an independent Consultant hired by the District, performs M & V Services to ensure

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that the Energy Savings Guarantee identified by the ESCO in the earlier phases of the Work and agreed to by the parties has actually been achieved.

- (b) Design-Build Contracting Requirements in ESPCs. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the District must conform its Design-Build contracting practices to the Design-Build contracting requirements set forth in PPS-49-0670(7).
- (c) Pricing Alternatives. The District may utilize one of the following pricing alternatives in an ESPC:
  - (A) A fixed price for each phase of the Services to be provided by the ESCO;
  - (B) A cost-reimbursement pricing mechanism, with a maximum not-to-exceed price or a GMP; or
  - (C) A combination of a fixed fee for certain components of the Services to be performed, a cost-reimbursement pricing mechanism for the construction Services to be performed with a GMP, a single or annual fixed fee for M & V Services to be performed for an identified time period after final completion of the construction Work, and a single or annual Energy Savings Guarantee fixed fee payable for an identified time period after final completion of the construction Work that is conditioned on certain energy savings being achieved at the facility by the ECMs that have been implemented by the ESCO during the Project (in the event an annual M & V Services fee and annual Energy Savings Guarantee fee is utilized by the parties, the parties may provide in the Design-Build Contract that, at the sole option of the District, the ESCO's M & V Services may be terminated prior to the completion of the M & V/Energy Savings Guarantee period and the District's future obligation to pay the M & V Services fee and Energy Savings Guarantee fee will likewise be terminated, under terms agreed to by the parties).
- (d) Permitted ESPC Scope of Work. The scope of Work under the ESPC is restricted to implementation and installation of ECMs, as well as other Work on building systems or building components that are directly related to the ECMs, and that, as an integrated unit, will pay for themselves over the useful life of the ECMs installed. The permitted scope of Work for ESPCs resulting from a solicitation under these PPS-49-0600 through PPS-49-0690 Rules does not include maintenance services for the Project facility.

#### **PPS-49-0690 Construction Manager/General Contractor (CM/GC)**

(1) **General**. The CM/GC form of contracting, as defined at PPS-49-0610(2), is a technically complex project delivery system. The District must use this contracting method only with the assistance of knowledgeable staff or Consultants who have a demonstrated capability of managing the CM/GC process in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, public contracting, and project management. Unlike the Design-Build form of contracting, the CM/GC form of contracting does not contemplate a "single point of responsibility" under which the Contractor is responsible for successful completion of all Work related to a performance Specification. The CM/GC has defined Contract obligations, including responsibilities as part of the Project team along with the District and design professional, although in the CM/GC method there is a separate Contract between the District and design professional. In order to utilize the CM/GC method, the District must be able to reasonably anticipate the following types of benefits:

- (a) Time Savings. The Public Improvement has significant schedule ramifications, such that concurrent design and construction are necessary in order to meet critical deadlines and shorten the overall duration of construction. The District may consider operational and financial data that show significant savings or increased opportunities for generating revenue as a result of early

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completion, as well as less disruption to public facilities as a result of shortened construction periods;

- (b) **Cost Savings.** Early Contractor input during the design process is expected to contribute to significant cost savings. The District may consider value engineering, building systems analysis, Life-Cycle Costing analysis, and construction planning that lead to cost savings. The District must specify any special factors influencing this analysis, including high rates of inflation, market uncertainty due to material and labor fluctuations or scarcities, and the need for specialized construction expertise due to technical challenges; or
  - (c) **Technical Complexity.** The Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between the District, design professionals, and the Contractor, in which the Contractor will assist in addressing specific Project challenges through preconstruction Services. The District may consider the need for Contractor input on issues such as operation of the facility during construction, tenant occupancy, public safety, delivery of an early budget or GMP, financing, historic preservation, difficult remodeling Projects, and Projects requiring complex phasing or highly coordinated scheduling.
- (2) **Authority.** The District must use the CM/GC form of contracting only in accordance with the requirements of these Rules. See particularly PPS-49-0620 on "Use of Alternative Contracting Methods."
- (3) **Selection.** CM/GC selection criteria may include those factors set forth in PPS-49-0640(2)(b).
- (4) **Basis for Payment.** The CM/GC process adds specified Construction Manager Services to traditional General Contractor Services, requiring full Contract performance within a negotiated GMP. The basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for Work and Services rendered, which together must not exceed the GMP. See GMP definition at PPS-49-0610(7) and pricing mechanisms at PPS-49-0660.
- (5) **Contract Requirements.** The District must conform their CM/GC contracting practices to the following requirements:
- (a) **Setting the GMP.** The GMP must be set at an identified time consistent with industry practice, after supporting information reasonably considered necessary to its use has been developed, and the supporting information must define with particularity both what is included and excluded from the GMP. A set of drawings and Specifications must be produced establishing the GMP scope.
  - (b) **Adjustments to the GMP.** The Contract must clearly identify the standards or factors under which changes or additional Work will be considered outside of the scope of Work that warrants an increase in the GMP, as well as criteria for decreasing the GMP. The GMP must not be increased without a concomitant increase to the scope defined at the establishment of the GMP or most recent GMP Amendment.
  - (c) **Cost Savings.** The Contract must clearly identify the disposition of any cost savings resulting from completion of the Work below the GMP; that is, under what circumstances, if any, the CM/GC might share in those cost savings, or whether they accrue only to the District's benefit. (Note that unless there is a clearly articulated reason for sharing such cost savings, they should accrue to the District.)
  - (d) **Cost Reimbursement.** The Contract must clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, including any category of "General Conditions" (a general grouping of direct costs that are not separately invoiced, subcontracted, or included within either overhead or fee), and may also incorporate a mutually agreeable cost-reimbursement standard.

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- (e) Audit. Cost reimbursements must be made subject to final audit adjustment, and the Contract must establish an audit process to ensure that Contract costs are allowable, properly allocated, and reasonable.
- (f) Fee. Compensation for the CM/GC's Services must be paid on the basis of a fee that is inclusive of profit, overhead, and all other indirect or non-reimbursable costs. Costs determined to be included within the fee should be expressly defined wherever possible. The fee, first expressed as a proposed percentage of all reimbursable costs, must be identified during and become an element of the selection process. It must subsequently be expressed as a fixed amount when the GMP is established.
- (g) Incentives. The Contract must clearly identify any economic incentives, the specific criteria that apply, and their relationship to other financial elements of the Contract (including the GMP).
- (h) Controlled Insurance Programs. For Projects anticipated to exceed \$75 million, the Contract must clearly identify whether an Owner-Controlled or Contractor-Controlled Insurance Program is anticipated or allowable. If so, the Contract must clearly identify (1) anticipated cost savings from reduced premiums, claims reductions, and other factors, (2) the allocation of cost savings, and (3) safety responsibilities and incentives, separately or combined.
- (i) Early Work. The RFP must clearly identify, whenever feasible, the circumstances under which any of the following activities may be authorized and undertaken for compensation prior to establishing the GMP:
  - (D) Early Procurement of materials and supplies;
  - (E) Early release of Bid packages for such things as site development; and
  - (F) Other advance Work related to critical components of the Contract.
- (j) Subcontractor Selection. The Contract must clearly describe the methods by which the CM/GC must publicly receive, open, and record Bids or price quotations, and competitively select subcontractors to perform the Contract Work based on price, as well as the mechanisms by which the District may waive those requirements. The documents must also describe completely the methods by which the CM/GC and its affiliated or subsidiary entities may compete to perform the Work, including, at a minimum, advance Notice to the public of the CM/GC's intent to compete and a Public opening of Bids or Quotations by an independent party.
- (k) Subcontractor Approvals and Protests. The Contract must clearly establish whether the District must approve subcontract Awards, and to what extent, if any, the District will resolve Procurement protests of subcontractors and suppliers. The related procedures and reporting mechanisms must be established with certainty, including whether the CM/GC acts as the District's representative in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the District must retain the right to monitor the subcontracting process in order to protect the District's interests.
- (l) CM/GC Self-Performance. Whenever feasible, the Contract must establish the elements of Work the CM/GC may self-perform without competition, including, for example, the Work of the job-site general conditions. In the alternative, the Contract must include a process for District approval of CM/GC self-performance.
- (m) Socio-Economic Programs. The Contract must clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and the District.

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### **CONTRACT PROVISIONS**

#### **PPS-49-0800 Required Contract Clauses**

Except as provided by PPS-49-0150 and PPS-49-0160, the District must include in all Solicitation Documents for Public Improvement Contracts all of the ORS 279C-required Contract clauses, as set forth in the checklist contained in PPS-49-0200(1)(c) regarding Solicitation Documents. The following series of Rules provides further guidance regarding particular Public Contract provisions.

#### **PPS-49-0810 Waiver of Delay Damages against Public Policy**

The District must not place any provision in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from the District's unreasonable delay in performing the Contract. However, Contract provisions requiring Notice of delay, providing for alternative dispute resolution such as arbitration (where allowable) or mediation, providing other procedures for settling Contract disputes, or providing for reasonable liquidated damages are permissible.

#### **PPS-49-0815 BOLI Public Works Bond**

Pursuant to ORS 279C.830(2), the Specifications for every Public Works Contract shall contain a provision stating that the Contractor and every subcontractor must have a Public Works bond filed with the Construction Contractors Board before starting Work on the Project, unless otherwise exempt. This bond is in addition to performance bond and payment bond requirements. See BOLI rule at OAR 839-025-0015.

#### **PPS-49-0820 Retainage**

**(1) Withholding of Retainage.** Except as required by law, the District will not retain an amount in excess of 5% of the Contract Price for Work completed. If the Contractor has performed at least 50% of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written approval, the District may, in its discretion, reduce or eliminate Retainage on any remaining progress payments. The District must respond in Writing to all such applications within a reasonable time. When the Contract Work is 97½% completed, the District may, at its discretion and without application by the Contractor, reduce the retained amount to 100% of the value of the remaining unperformed Contract Work. The District may at any time reinstate Retainage. Retainage must be included in the final payment of the Contract Price.

**(2) Form of Retainage.** Unless the District finds in Writing that accepting a bond or instrument described in Section (2)(a) or (2)(b) of this Rule poses an extraordinary risk that is not typically associated with the bond or instrument, the District, in lieu of withholding moneys from payment, shall accept from a Contractor:

- (a)** Bonds, securities, or other instruments that are deposited and accepted as provided in Section (4)(a) of this Rule; or
- (b)** A surety bond deposited as provided in Section (4)(b) of this Rule.

**(3) Deposit in Interest-Bearing Accounts.** Upon request of the Contractor, the District must deposit cash Retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the District. Earnings on such account must accrue to the Contractor. The District must establish the account through the State Treasurer.

**(4) Alternatives to Cash Retainage.** In lieu of cash Retainage to be held by the District, the Contractor may substitute one of the following:

- (a)** Deposit of bonds, securities, or other instruments.

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- (A) The Contractor may deposit bonds, securities, or other instruments with the District or in any bank or trust company to be held for the benefit of the District. If the District accepts the deposit, the District must reduce the cash Retainage by an amount equal to the value of the bonds and securities, and reimburse the excess to the Contractor.
- (B) Bonds, securities, or other instruments deposited or acquired in lieu of cash Retainage must be of a character approved by the District, including, but not limited to:
  - (i) Bills, certificates, notes, or bonds of the United States.
  - (ii) Other obligations of the United States or agencies of the United States.
  - (iii) Obligations of a corporation wholly owned by the federal government.
  - (iv) Indebtedness of the Federal National Mortgage Association.
  - (v) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.
  - (vi) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.
- (C) Upon the District's determination that all requirements for the protection of the District's interests have been fulfilled, it must release to the Contractor all bonds and securities deposited in lieu of Retainage.
  - (b) Deposit of Surety Bond. The District, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the District in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond must accept surety bonds from its subcontractors and suppliers in lieu of Retainage. In such cases, Retainage must be reduced by an amount equal to the value of the bond, and the excess must be reimbursed.
- (5) **Recovery of Costs**. The District may recover from the Contractor all costs incurred in the proper handling of Retainage by reduction of the final payment.
- (6) **Additional Retainage When Certified Payroll Statements Not Filed**. Pursuant to ORS 279C.845(7), if a Contractor is required to file certified payroll statements and fails to do so, the District shall retain 25% of any amount earned by the Contractor on a Public Works Contract until the Contractor has filed such statements with the District. The District shall pay the Contractor the amount retained under this provision within 14 Days after the Contractor files the certified statements, regardless of whether a subcontractor has filed such statements (but see 279C.845(1) regarding the requirement for both Contractors and subcontractors to file certified statements with the District). See BOLI rule at OAR 839-025-0010.

#### **PPS-49-0830 Contractor Progress Payments**

- (1) **Request for Progress Payments**. Each month the Contractor must submit to the District their Written request for a progress payment based on an estimated percentage of Contract completion. At the District's discretion, this request may also include the value of material to be incorporated in the completed Work, which has been delivered to the premises and appropriately stored. The sum of these estimates is referred to as the "value of completed Work." With these estimates as a base, the District will make a progress payment to the Contractor, which must be equal to:
  - (a) The value of completed Work;
  - (b) Less those amounts that have been previously paid;
  - (c) Less other amounts that may be deductible or owing and due to the District for any cause; and

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(d) Less the appropriate amount of Retainage.

(2) **Progress Payments Do Not Mean Acceptance of Work.** Progress payments must not be construed as an acceptance or approval of any part of the Work, and must not relieve the Contractor of responsibility for defective workmanship or material.

#### **PPS-49-0840 Interest**

(1) **Prompt Payment Policy.** The District must pay promptly all payments due and owing to the Contractor on Contracts for Public Improvements.

(2) **Interest on Progress Payments.** Late payment interest must begin to accrue on payments due and owing on the earlier of 30 Days after receipt of invoice or 15 Days after District approval of payment (the "Progress Payment Due Date"). The interest rate must equal three times the discount rate on 90-day commercial paper in effect on the Progress Payment Due Date at the Federal Reserve Bank in the Federal Reserve District that includes Oregon, up to a maximum rate of 30%.

(3) **Interest on Final Payment.** Final payment on the Contract Price, including Retainage, must be due and owing no later than 30 Days after Contract completion and acceptance of the Work. Late-payment interest on such final payment must thereafter accrue at the rate of 1½% per month until paid.

(4) **Settlement or Judgment Interest.** In the event of a dispute as to compensation due a Contractor for Work performed, upon settlement or judgment in favor of the Contractor, interest on the amount of the settlement or judgment must be added to, and not made part of, the settlement or judgment. Such interest, at the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District that includes Oregon, must accrue from the later of the Progress Payment Due Date, or 30 Days after the Contractor submitted a claim for payment to the District in Writing or otherwise in accordance with the Contract requirements.

#### **PPS-49-0850 Final Inspection**

(1) **Notification of Completion; Inspection.** The Contractor must notify the District in Writing when the Contractor considers the Contract Work completed. Within 15 Days of receiving the Contractor's Notice, the District will inspect the Project and Project records, and will either accept the Work or notify the Contractor of remaining Work to be performed.

(2) **Acknowledgment of Acceptance.** When the District finds that all Work required under the Contract has been completed satisfactorily, the District must acknowledge acceptance of the Work in Writing.

#### **PPS-49-0860 Public Works Contracts**

(1) **Generally.** ORS 279C.800 through 279C.870 regulates Public Works Contracts, as defined in ORS 279C.800(6), and requirements for payment of prevailing wage rates. Also see BOLI rules at OAR Chapter 839.

(2) **Required Contract Conditions.** As detailed in the above statutes and Rules, every Public Works Contract must contain the following provisions:

(a) District authority to pay certain unpaid claims and charge such amounts to Contractors, as set forth in ORS 279C.515(1).

(b) Maximum hours of labor and overtime, as set forth in ORS 279C.520(1).

(c) Employer Notice to employees of hours and Days that employees may be required to Work, as set forth in ORS 279C.520(2).

(d) Contractor-required payments for certain services related to sickness or injury, as set forth in ORS 279C.530.

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(e) Requirement for payment of Prevailing Rate of Wage, as set forth in ORS 279C.830(1).

**(3) Requirements for Specifications.** The Specifications for every Public Works Contract, consisting of the Procurement package (such as the Project Manual, Bid or Proposal booklets, Request for Quotes, or similar Procurement Specifications), must contain the following provisions:

(a) The Prevailing Rate of Wage, as required by ORS 279C.830(1)(a), (i) physically contained within or attached to hard copies of Procurement Specifications; (ii) included by a statement incorporating the applicable wage rate publication into the Specifications by reference in compliance with OAR 839-025-0020; or (iii) when the rates are available electronically or by Internet access, the rates may be incorporated into the Specifications by referring to the rates and providing adequate information on how to access them in compliance with OAR 839-025-0020.

(b) If applicable, the federal Prevailing Rate of Wage and information concerning whether the state or federal rate is higher in each trade or occupation in each Locality, as determined by BOLI in a separate publication. The same options for inclusion of wage rate information stated in Section (3)(a) of this Rule apply. See BOLI rules at OAR 839-025-0020 and 839-025-0035.

#### **PPS-49-0870 Specifications; Brand Name Products**

**(1) Generally.** The District's Solicitation Document must not expressly or implicitly require any product by Brand Name or mark, nor must it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279C.345(2).

**(2) Equivalent.** The District may identify products by Brand Names as long as the following language: "approved equal," "or equal," "approved equivalent," or "equivalent," or similar language is included in the Solicitation Document. The District must determine, in its sole discretion, whether an Offeror's alternate product is "equal" or "equivalent."

**(3) Product Exemption.** The Superintendent is delegated the authority to exempt products from the prohibition in Section (1) of this Rule, pursuant to ORS 279C.345(2), upon any of the following Written Findings:

- (a) It is unlikely that the exemption will encourage favoritism in the Awarding of Public Improvement Contracts or substantially diminish competition for Public Improvement Contracts;
- (b) The Specification of a product by Brand Name or mark, or the product of a particular manufacturer or seller, would result in substantial cost savings to the District;
- (c) There is only one manufacturer or seller of the product of the quality required; or
- (d) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies.

#### **PPS-49-0880 Records Maintenance; Right to Audit Records**

**(1) Records Maintenance; Access.** Contractors and subcontractors must maintain all fiscal records relating to Contracts in accordance with generally accepted accounting principles ("GAAP"). In addition, Contractors and subcontractors must maintain all other records necessary to clearly document (i) their performance, and (ii) any claims arising from or relating to their performance under a Public Contract. Contractors and subcontractors must make all records pertaining to their performance and any claims under a Contract (the books, fiscal records, and all other records, hereafter referred to as "Records") accessible to the District at reasonable times and places, whether or not litigation has been filed as to such claims.

**(2) Inspection and Audit.** The District may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the Records of any Person that has submitted cost or pricing data according to the terms of a Contract to the extent that the Records relate to such cost or pricing data. If



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the Person must provide cost or pricing data under a Contract, the Person must maintain such Records that relate to the cost or pricing data for three years from the date of final payment under the Contract, unless a shorter period is otherwise authorized in Writing.

**(3) Records Inspection; Contract Audit.** The District and its authorized representatives must be entitled to inspect, examine, copy, and audit any Contractor's or subcontractor's Records, as provided in Section (1) of this Rule. The Contractor and subcontractor must maintain the Records and keep the Records accessible and available at reasonable times and places for a minimum period of three years from the date of final payment under the Contract or subcontract, as applicable, or until the conclusion of any audit, controversy, or litigation arising out of or related to the Contract, whichever date is later, unless a shorter period is otherwise authorized in Writing.

#### **PPS-49-0890 District Payment for Unpaid Labor or Supplies**

**(1) Contract Incomplete.** If the Contract is still in force, the District may, in accordance with ORS 279C.515(1), pay a valid claim to the Person furnishing the labor or Services, and charge the amount against payments due or to become due to the Contractor under the Contract. If the District chooses to make such a payment as provided in ORS 279C.515(1), the Contractor and the Contractor's surety must not be relieved from liability for unpaid claims.

**(2) Contract Completed.** If the Contract has been completed and all funds disbursed to the prime Contractor, all claims must be referred to the Contractor's surety for resolution. The District must not make payments to subcontractors or suppliers for Work already paid for by the District.

#### **PPS-49-0900 Contract Suspension; Termination Procedures**

**(1) Suspension of Work.** In the event the District suspends performance of Work for any reason considered by the District to be in the public interest other than a labor dispute, the Contractor must be entitled to a reasonable extension of Contract time and to reasonable compensation for all costs, including a reasonable allowance for related overhead, incurred by the Contractor as a result of the suspension.

**(2) Termination of Contract by Mutual Agreement for Reasons Other Than Default.**

**(a) Reasons for termination.** The parties may agree to terminate the Contract or a divisible portion thereof if:

**(A)** The District suspends Work under the Contract for any reason considered to be in the public interest (other than a labor dispute, or any judicial proceeding relating to the Work filed to resolve a labor dispute); and

**(B)** Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the Work.

**(b) Payment.** When a Contract, or any divisible portion thereof, is terminated pursuant to this Section (2), the District must pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. The District must also pay for all Work completed based on the Contract Price. Unless the Work completed is subject to unit or itemized pricing under the Contract, payment must be calculated based on percent of Contract completed. No claim for loss of anticipated profits will be allowed.

**(3) Public Interest Termination by the District.** The District may include in its Contracts terms detailing the circumstances under which the Contractor must be entitled to compensation as a matter of right in the event the District unilaterally terminates the Contract for any reason considered by the District to be in the public interest.

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**(4) Responsibility for Completed Work.** Termination of the Contract or a divisible portion thereof pursuant to this Rule must not relieve either the Contractor or its surety of liability for claims arising out of the Work performed.

**(5) Remedies Cumulative.** The District may, at its discretion, avail itself of any or all rights or remedies set forth in these Rules, in the Contract, or available at law or in equity.

## **CONTRACT AMENDMENTS AND CHANGE ORDERS**

### **PPS-49-0910 Public Improvement Contract Amendments and Changes to the Work**

**(1) Definitions for Rule.** As used in this Rule with regard to Public Improvement Contracts:

- (a) "Amendment"** means a Written modification to the terms and conditions of a Public Improvement Contract, other than by Changes to the Work, within the general scope of the original Procurement that requires mutual agreement between the District and the Contractor.
- (b) "Changes to the Work"** means a mutually agreed-upon Change Order, or a Construction Change Directive or other Written order issued by the District or its authorized representatives to the Contractor requiring a Change in the Work within the general scope of a Public Improvement Contract and issued under its Changes provisions in administering the Contract and, if applicable, adjusting the Contract Price or Contract time for the Changed Work.

**(2) Change Orders.** Changes to the Work are anticipated in construction and, accordingly, the District shall include Change provisions in all Public Improvement Contracts that detail the scope of the Changes clause, provide pricing mechanisms, authorize the District or its authorized representative(s) to issue Changes to the Work, and provide a procedure for addressing Contractor claims for additional time or compensation. When Changes to the Work are agreed to or issued consistent with the Contract's Changes provisions, they are not considered to be new Procurements, and an exemption from Competitive Bidding is not required for their issuance by the District.

**(3) Change Order Authority.** The District may establish internal limitations and delegations for authorizing Changes to the Work, including dollar limitations. Dollar limitations on Changes to the Work are not set by these Rules, but such Changes are limited by the above definition of that term.

**(4) Contract Amendments.** Public Improvement Contract Amendments within the general scope of the original Procurement are not considered to be new Procurements, and an exemption from Competitive Bidding is not required in order to add components or phases of Work specified in or reasonably implied from the Solicitation Document. Amendments to a Public Improvement Contract may be made only when:

- (a)** They are within the general scope of the original Procurement;
- (b)** The field of competition and Contractor selection would not likely have been affected by the Contract modification. Factors to be considered in making that determination include similarities in Work, Project site, relative dollar values, differences in risk allocation, and whether the original Procurement was accomplished through Competitive Bidding, Competitive Proposals, Competitive Quotes, sole source, or Emergency Contract;
- (c)** In the case of a Contract obtained under an Alternative Contracting Method, any additional Work was specified or reasonably implied within the Findings supporting the Competitive Bidding exemption; and
- (d)** The Amendment is made consistent with this Rule and other applicable legal requirements.

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**END OF DIVISION 49**

## EXHIBIT B

### FINDINGS IN SUPPORT OF THE DESIGNATION OF CERTAIN CLASSES OF CONTRACTS FOR GOODS AND SERVICES AS SPECIAL PROCUREMENTS UNDER ORS 279B.085 AND TO EXEMPT CERTAIN CLASSES OF PUBLIC IMPROVEMENT CONTRACTS FROM COMPETITIVE BIDDING PURSUANT TO ORS 279C.335(2)

The Board of Directors of School District No. 1J, Multnomah County, Oregon, acting as the Local Public Contract Review Board ("Board"), finds as follows:

#### I. Class Special Procurements.

**A. Applicable Criteria.** ORS 279B.085(4) empowers the Board to designate classes of contracts for goods or services for special procurement outside of the competitive procurement processes otherwise required under ORS Chapter 279B and the District's Public Contracting Rules. In order to approve a class special procurement, the Board must find that the designation of a class of contracts for special procurement:

1. Is unlikely to encourage favoritism in the award of public contracts or to substantially diminish competition for public contracts; and
2. Either:
  - 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 the requirements that are otherwise applicable under ORS Chapter 279B or the District's rules adopted to implement those rules.

**B. Findings.** The District's proposed class special procurements are set forth in District Public Contracting Rules at PPS-47-0288 (Exhibit A).

1. Advertising Contracts (PPS-47-0288(1)).
  - a. Findings of Fact: The purchase of advertising by the District does not lend itself to the standard competitive procurement process because of the need to select the best medium to reach the target audience, which may not be the least expensive and will be different depending on the context. In many cases when the District must publish notices or solicitation it is limited by law to certain publications, e.g., a newspaper of general circulation in the District or particular trade publications. Similarly, the sale of advertising in District publications requires consideration of the appropriate scope and type of advertising that will be allowed.
  - b. Conclusions of Law: The class special procurement will not diminish competition or encourage favoritism because advertising is not typically sold or purchased through a competitive process, and because a specific medium may be required by law. The class special procurement will promote the public interest by allowing the District to purchase advertising in media that will best communicate with its constituents. It will promote the public interest by allowing it to limit advertising in its publications to such advertising that is appropriate in the public school district publication.
2. Equipment Repair/Overhaul (PPS-47-0288(2)).
  - a. Findings of Fact: This special procurement is limited to situations where the nature of the repair or extent of the overhaul are unknown, when service or parts needs for existing equipment are unpredictable, or where specially trained personnel are required and are available from only one source. In such circumstances, the public interest is in getting the equipment repaired and up

and running using approved parts installed by qualified workers. In addition, the special procurement is only available where a competitive process is deemed and documented to the procurement file to be impractical.

**b.** Conclusions of Law: This special procurement will not substantially diminish competition because competition is limited to parts and services that are compatible and authorized for existing District equipment. In addition, the exception is limited to unplanned maintenance and part replacement, and the District must use a competitive process if practical. The special procurement promotes the public interest in a way that the standard process cannot because it will result in more expeditious repair of existing equipment and less downtime for such equipment, and will better ensure compatibility of repair and maintenance of any warranties.

**3.** Specifications (PPS-47-0288(3)).

**a.** Conclusions of Law: A finding under ORS 279B.085(4) is not necessary because sole-source procurements, brand name specifications, and “or equal” specifications are independently authorized under ORS 279B.075, 279B.200, and 279B.215, and the procurement procedures in PPS-47-0288(3) are consistent with the statutory requirements for such solicitations. The specific exemption for athletic and physical education equipment is justified because the efficient utilization of existing equipment requires obtaining the same brand of equipment pursuant to ORS 279B.215(2)(d).

**4.** Copyrighted Materials and Creative Works (PPS-47-0288(4)).

**a.** Findings of Fact: By their nature, copyrighted materials are protected for the use of a single owner. Others may not duplicate copyrighted materials without the copyright owner’s permission or license. Copyrights are established and regulated under federal law. Often, only one supplier, who may be the owner of the copyright or the licensee, produces copyrighted materials. Certain creative works may not be copyrighted, but are subject to the same limitations and sole-supplier issues noted above. In addition, acquisitions of creative works that require an aesthetic or artistic determination are unsuited to traditional competitive procurement methods.

**b.** Conclusions of Law: This special procurement will not encourage favoritism or substantially diminish competition in the awarding of District contracts. The production and distribution of copyrighted materials is controlled by the owner of the copyright and may only be permitted through a sole source. The awarding of contracts pursuant to this class special procurement will result in a substantial cost savings available to the District because it avoids the costs of an ineffective procurement process. In addition, the acquisition of certain creative works based on aesthetic or artistic review cannot practicably be realized through the procurement methods otherwise authorized in ORS Chapter 279B.

**5.** Insurance and Employee Benefits (PPS-47-0288(5)).

**a.** Findings of Fact: The District may rely on its professional insurance broker, or “agent of record,” to solicit competitive proposals from responsible companies to furnish liability and employee benefit coverages. The agent of record solicits proposals from providers. The agent maintains a mailing list of interested providers. When it is time to solicit proposals to furnish employee benefit coverages, the agent sends solicitations to all providers on the list. After receipt of proposals, the agent of record works with District administration to evaluate them and to negotiate contract awards with those firms who provide the most comprehensive and best services at the most cost-effective rates. The District saves money by being able to take advantage of insurance and employee benefit plans that are tailored to meet the District’s needs. The District’s discretion over the types, kinds, and coverages of employee benefits is constrained or subject to agreement under collective bargaining agreements, the District’s participation in the Health and Welfare Trust, and the mandates of the Oregon Educators Benefits Board.

**b. Conclusions of Law:** It is unlikely that use of this class special procurement will encourage favoritism in the awarding of District contracts or substantially diminish competition for District contracts because the District solicits proposals from insurance and employee benefit insurance providers under conditions that foster competition among a sufficient number of potential vendors. The District evaluates the proposals submitted to furnish employee benefit insurance for the best value to the District, given the requirements specified by the employee benefits portions of the District's agreements with represented employee groups and within the constraints imposed by the Oregon Educators Benefits Board. This class special procurement also substantially promotes the public interest because award of contracts pursuant to the procurement procedures in ORS Chapter 279B is not practicable for the reasons stated above.

**6. Spot Buys (PPS-47-0288(6)).**

**a. Findings of Fact:** This class special procurement permits the District to take advantage of "spot buys"—i.e., limited offers of certain products at lower-than-normal prices. Examples of goods that are frequently offered on a spot-buy basis include food stuffs and technology. This class special procurement recognizes and takes advantage of the particular market conditions related to certain products, and has operational and budgetary benefits by empowering the District to quickly and cheaply acquire such products when such special sales are offered.

**b. Conclusions of Law:** This class special procurement will not encourage favoritism or diminish competition because it takes advantage of a unique marketing process for certain goods and services. Further, the Rule requires a limited competitive review process to ensure that the "spot price" is in fact substantially less expensive than the competitive prices. This class special procurement will result in substantial cost savings to the District because it will enable the District to take advantage of special sales of products at lower-than-normal prices, and promotes the public interest because use of the standard process would cost the District the opportunity to take advantage of a special sale price.

**7. Price Agreements (PPS-47-0288(7)).**

**a. Conclusions of Law:** A finding under ORS 279B.085(4) is not necessary because price agreements are independently authorized pursuant to ORS 279B.140, and PPS-47-0288(7) is consistent with the statute.

**8. Purchase of Used Personal Property (PPS-47-0288(8)).**

**a. Findings of Fact:** Cost savings can frequently be achieved through the procurement of used property and equipment. The District purchases used property and equipment when it meets the District's needs and is cost-effective. Considerations include type, quality, quantity, and estimated useful life of the used item. Used property and equipment becomes available sporadically and without notice, and is usually sold on a first-come, first-served basis. When used property or equipment becomes available, the District must be able to respond immediately in order to obtain the property or equipment. The class special procurement thus allows the District to participate in the market for used property and equipment. In addition, some types of property or equipment may not be readily available in the new-goods market. Finally, competition to provide used property and equipment may be very limited and inconsistent, depending on the type of product.

**b. Conclusions of Law:** It is unlikely that this class special procurement will encourage favoritism or diminish competition for District contracts because of the inconsistent and sporadic market. This class special procurement will result in substantial cost savings to the District because the cost of used equipment and property is generally substantially less expensive than that of new. Finally, this class special procurement will substantially promote the public interest because it will allow acquisition of used personal property in a manner that cannot practicably be realized through other competitive processes in ORS 279B because of the unique qualities and timing issues for acquisition of used personal property.

**9. Sale of Used Personal Property (PPS-47-0288(9)).**

**a. Findings of Fact:** The District is responsible for managing the disposal of surplus property or equipment to maximize its remaining residual value or net revenue. Disposal of surplus property can be accomplished in several ways. Selection of a particular method of disposal will depend on several variables, including the number, value, and nature of the items to be sold. The District must have flexibility to select a method of disposition that will gain the most value to the District at the least cost. The District follows a policy of offering surplus property or equipment to other school districts, local government agencies, and nonprofit agencies that assist the District in carrying out its mission. If there is no intergovernmental or nonprofit need for the property or equipment, the District uses other methods of disposition, such as (i) transfer to the Oregon State Surplus Property program; (ii) direct public sale such as an auction or silent bid sale; (iii) return to a supplier for credit to offset other purchases of needed items, or (iv) recycling. Transfer to the Oregon State Surplus Property program is often desirable, but not always possible. The program sets limits on the quantity and type of item it will take. Often, when the District is ready to dispose of surplus property or equipment, the state program is not taking property. The District must then find another method of disposal or incur storage and handling costs, which are significant expenses as the District has very limited storage facilities and staff. Public sales are often not the most cost-effective ways for the District to dispose of surplus property. For example, the cost of conducting a public auction, which is a form of open competitive sale, may not be recovered by the proceeds. An auction often requires that the surplus property must be handled and stored several times, moved from the school to the central warehouse, stored, and then later moved to a place of auction. The District has to arrange for a place of auction. The sale has to be physically set up; items grouped or marked and displayed for sale. An auctioneer or other sales manager must be paid, plus personnel who help with the sale, such as cashiers, security, etc. The District has risk of personal injuries and property damage and the accompanying liability associated with all of these activities. The auction has to be advertised and promoted. Proper receipts and accounts of the proceeds must be maintained. If there is property or equipment remaining unsold after the auction, it must be removed to a place of storage or otherwise disposed of. The advent of Internet-based auctions and sales vehicles such as Craig's List and eBay can provide the same competition as would an auction while substantially reducing the District's aforementioned administrative costs, resulting in a higher overall return than a traditional auction. District projects may result in leftover goods, such as cable, wire, or carpet, etc. In such situations, it may be to the District's best advantage to return the excess items to the supplier for credit towards other purchases. This is a method that is expedient and inexpensive to the District and that can maximize District buying power. Recycling surplus property or equipment that has limited value can also be an effective way to maximize value and minimize costs to the District.

**b. Conclusions of Law:** This special procurement will not diminish competition because it enables the Superintendent to select the most cost-effective method of sale for the particular property at issue and that is required to include some type of competitive sale process if such process would increase the total return. The use of this class special procurement will result in cost savings by maximizing net revenue to the District from disposal or liquidation of surplus property or equipment. In addition, the procurement methods in ORS Chapter 279B are all designed to procure goods or services that are best suited or at the lowest cost for the District's needs, and are not suited to the sale of property. The offering or donation of certain used personal property to other districts, governmental agencies, or nonprofit partners furthers the District's public educational purpose and mission.

**10. Reverse Auctions (PPS-47-0288(10)).**

**a. Findings of Fact:** The advent and exponential growth of purchasing over the Internet and the development of the reverse-auction method of purchase and sale of goods and services via Web auction sites such as eBay has created a new procurement method for award of a contract based on low bid as defined in the rule.

**b. Conclusions of Law:** It is unlikely that this class special procurement will encourage favoritism in the award of District contracts or substantially diminish competition because it allows the District to take advantage of an alternative low-bid procurement process that is equally

competitive to the standard invitation to bid (“ITB”) process. It will result in substantial cost savings because the reverse-auction procurement process is faster and less expensive than the standard ITB process for certain goods. It can also result in a lower price for goods and services as vendors bid against each other.

**11. Software and Hardware Maintenance and Upgrades (PPS-47-0288(11)).**

**a. Conclusions of Law:** A finding under ORS 279B.085(4) is not necessary because sole-source procurements and brand name specifications are independently authorized under ORS 279B.075, 279B.200, and 279B.215 under the circumstances set forth in PPS-47-0288(11), and the procurement procedures in PPS-47-0288(11) are consistent with the statutory requirements for such solicitations.

**12. Hazardous Material Abatement (PPS-47-0288(12)).**

**a. Findings of Fact:** When the 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 stated on 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. The District would be liable for any delay in responding to DEQ orders to perform hazardous material removal or cleanup. This class special procurement will not be used in those situations where there is no DEQ order to remedy the situation. Cost savings are achieved through this class special procurement because the District can be liable for DEQ penalties and fines if it does not timely remove hazardous materials or oil as ordered. There is also serious risk in these situations that property damage or personal injury could result if the District is slow to act.

**b. Conclusions of Law:** It is unlikely that this class special procurement will encourage favoritism in the award of District contracts or substantially diminish competition for District contracts given the infrequent occurrence of a DEQ-ordered clean-up. The award of public contracts pursuant to this class special procurement will result in substantial cost savings to the District in these situations because the District must comply with the law and avoid and minimize risk to persons and property. This class special procurement also substantially promotes the public interest because award of contracts pursuant to the procurement procedures in ORS Chapter 279B is not practicable under the circumstances listed above and could lead to fines or safety hazards.

**13. Purchase of Products for Resale to Students and Staff (PPS-47-0288(3)).**

**a. Findings of Fact:** Sales of branded items to students and staff are analogous to a retail transaction. Such items could include snacks, candy, logo clothing, and logo school supplies. Profits from student stores are used to support student activities. In order to run a successful program, the District must be able to purchase goods that the students and staff are more likely to purchase. Otherwise, goods remain unsold and revenues drop. A student group usually picks the items selected for sale in student stores, with oversight by faculty. In order to increase and/or maintain adequate sales, student stores need to stock products that are popular with the students at the moment, which may be a particular brand of potato chip or candy, or a logo item. Students and staff in each school are best situated to determine what types and brands of products should be sold. Purchases and sales of student stores items are individual to the school. Each student store sells different items than other student stores. Combining purchases would not be effective in this situation. It would be inefficient, time-consuming, and costly to do so, as well as defeat the purpose of the program.

**b. Conclusions of Law:** It is unlikely that this class special procurement will encourage favoritism in the award of District contracts or substantially diminish competition for District contracts, as required by ORS 279B.085. Student stores are unique activities. Generally, their volume in a particular item is not large enough to require formal purchasing methods. Students and staff operate them on an informal basis. The award of District contracts pursuant to this class special procurement will result in substantial cost savings to the District because it would be an inefficient, time-consuming, and costly process to centralize the purchasing of products for student stores in the central Purchasing



Department. Further, a low-bid purchase of items that students and faculty refuse to buy ends up wasting products and costing more money in the long term, and reduces revenues to the student activities funded by the sales.

**14. Radio and Television Contracts for Student Activities (PPS-47-0288 (14)).**

**a. Findings of Fact:** If the District desires to procure radio or television services for student activities, including athletics or programs, it will purchase them in accordance with the rules herein. If a contract for services is expected to exceed \$100,000, the District will use a competitive procurement method to obtain written bids or proposals. The District may allow bidders or proposers to offer ancillary services as part of their bid or proposal. The bidder or proposer is to attach a dollar value and a description to the offered service so that the District can fairly evaluate the bid or proposal against others submitted in order to determine the best value to the District. The District may award a contract for radio or television services for the term allowed for other "Requirements Contracts." Currently, this rule allows for a maximum contract period of no more than five years.

**b. Conclusions of Law:** It is unlikely that this class special procurement will encourage favoritism in the award of District contracts or substantially diminish competition for District contracts. This rule requires the District to attempt to obtain and document quotes as appropriate to the dollar value of the purchase. If the anticipated purchase is over \$100,000, the District will advertise its need and issue a request for written bids or proposals. The use of this class special procurement will result in substantial cost savings to the District. The procurement of radio and television services will be obtained through open competitive procurement methods.

**15. Donated Materials or Services (PPS-47-0288(15)).**

**a. Findings of Fact:** Parents, school booster clubs, private supporters, and other community groups from time to time offer to donate all or a portion of their professional or skilled services or materials, to help the District meet its materials and/or educational needs. The ability to take advantage of such donated services enables the District to use its limited funds in other areas and frequently results in improvements or services that the District would not otherwise be able to afford. The class special procurement enables the District to take advantage of these offers while continuing to ensure that the requirements of the Public Contracting Law continue to be met.

**b. Conclusions of Law:** It is unlikely that this class special procurement will encourage favoritism in the award of District contracts or substantially diminish competition for District contracts because it will only apply when a person or entity donates all or part of the materials or services. Charitable donations are outside of the competitive market for goods and services. In many instances, the donations will enable the District to construct or complete projects that it otherwise would not be able to afford to do, and thus will not displace what would otherwise be a competitively bid project. This class special procurement also substantially promotes the public interest because award of contracts pursuant to the procurement procedures in ORS Chapter 279B is not practicable in the case of donated goods and services. The use of this class special procurement will result in substantial cost savings to the District because the District is not required to pay for the goods and services if they are donated.

**16. Manufacturer Direct Supplies (PPS-47-0288(16)).**

**a. Finding of Fact:** From time to time, manufacturers will offer special manufacturer direct sales at prices the same or lower than the District could obtain by competitive procurement through distributors. This class special procurement enables the District to take advantage of this special market condition.

**b. Conclusions of Law:** This class special procurement will not substantially diminish competition or encourage favoritism because these offers are rare and affect all distributors equally. It will result in substantial cost savings to the District by allowing the District to buy goods at the same or lower cost than it could pursuant to a competitive procurement while avoiding incurring staff time and procurement expenses. This class special procurement also substantially promotes the public

interest because award of contracts pursuant to the procurement procedures in ORS Chapter 279B is not practicable to take advantage of manufacturer direct offers.

**17. Purchases through Federal Programs (PPS-47-0288(17)).**

**a. Findings of Fact:** Most federal contracts for goods and services are established by federal agencies with private vendors through competitive processes that are compatible with standards of the Public Contracting Code. These processes include open competitive bidding, to which all interested vendors are invited to participate. No Oregon company is excluded from or disadvantaged in participation in bidding on federal contracts. Thus, the class special procurement has the public benefit of supporting a competitive selection process while providing the operational and budgetary benefits to the District by avoiding the cost and delay of replicating the solicitation process. The prices or rates for goods and services under federal contracts are based on competitive bids or proposals. This rule requires the District to document the cost savings to be gained from the anticipated purchase(s) from the federal contract. Documentation might include competitive comparison of previous bid prices obtained from other sources, including local Oregon businesses. This rule requires that the District obtain the permission of both the federal agency and the federal vendor to use the federal contract.

**b. Conclusions of Law:** This class special procurement will not encourage favoritism or substantially diminish competition in the awarding of District contracts because vendors, including Oregon businesses, are able to compete for the initial federal contract. Also, the District will not use a federal contract without agency and vendor permission. This class special procurement will result in substantial cost savings to the District because federal contracts are based on competitive bidding, which results in the most advantageous price to the federal agency, and offers the benefits of economies of scale given that federal procurements are frequently larger. Before it makes a purchase from a federal contract, the District must document the cost savings it will achieve by using the contract. These safeguards will ensure that the District purchases the desired goods or services at the best price available. Further, by being able to take advantage of a competitive federal procurement, the District saves the cost of needlessly duplicating the solicitation process.

**18. Benson House Program Contracts (PPS-47-0288(18)).**

**a. Findings of Fact:** Benson Polytechnic High School offers a series of building construction classes where students participate in the construction of a house in order to learn all aspects of the construction trade ("Benson House Program"). Contractors, trades, suppliers, construction and design professionals, and other members of the building industry have historically discounted or donated all or part of their time, materials, expertise, or other assistance in support of the Benson House Program.

**b. Conclusions of Law:** The Board finds that this class special procurement is unlikely to encourage favoritism in the award of public contracts because it only applies to contracts in support of the Benson House Program, and only where the contractor discounts or donates all or a portion of the value of the contract to the District. Because such a donation is elective on the part of the contractor, the policy for competitive procurement under ORS 279B is not applicable. The Board finds that authorizing this contract exemption will result in substantial cost savings to the District because the exemption only applies where all or a portion of the contract price is donated to the District, thereby reducing the District's operating costs for the Benson House Program. The Board further finds that a class special procurement substantially promotes the public interest in a manner that could not practicably be realized by complying with the applicable competitive procurement provisions of ORS 279B or the District's Rules because of the charitable and educational aspect of the donation of the goods and services.

**19. Purchases under Contracts Solicited by Nonprofit Procurement Organizations of Which the District is a Member (PPS-47-0288(19)).**

a. Findings of Fact: The purpose of this class special procurement is to allow the District to participate in or purchase goods or services under contracts solicited by nonprofit procurement organizations of which the District is a member under the same terms and conditions as provided in ORS 279A.200 to 279A.225 for cooperative procurement through other public bodies. There are a number of regional and national nonprofit procurement entities that permit or are limited to nonprofit or public body members. The benefits of membership are that the District obtains a lower price through the economies of scale and avoidance of duplication of the procurement process. The safeguards are that the nonprofit procurement process must be substantially similar to the competitive process in ORS 279B, and notice must be given in certain circumstances for contracts over certain amounts, the same as is required under the cooperative procurement statutes.

b. Conclusions of Law: This class special procurement will not diminish competition or encourage favoritism because of the requirement that the nonprofit organization must have solicited the contract using competitive procedures substantially equivalent to those required in ORS 279B. The class special procurement will result in substantial cost savings by enabling the District to take advantage of economies of scale resulting from regional or national procurements and because of the avoidance of the cost of a duplicative procurement process.

**20. Secure, Specialized Transportation for Special Needs Students (PPS-47-0288(20)).**

a. Findings of Fact: The District is required by state and federal law to provide transportation to all of its students. When such students have special physical, mental, developmental, or security needs, such transportation may require a transportation service with particularized skills or equipment, and such skills or equipment can be required with little or no advance warning. In order to comply with the law and serve these students, the District needs to have the flexibility to directly retain such service based on the particularized need.

b. Conclusions of Law: This class special procurement will not encourage favoritism or diminish competition given the small population, the unique characteristics required of the vendor, and the very limited market. This class special procurement promotes the public interest in a manner that cannot be achieved through utilization of the standard process because it enables the District to obtain the specialized services needed at the time they are needed, as required by state and federal law.

**21. Flexible Services Contractor Pool (PPS-47-0288(21)).**

a. Findings of Fact: The District operates a 46,000 pupil school district in more than 85 schools, housed in buildings of multiple ages dating back to the late 1800s. The heavy use of the buildings, coupled with their age and condition, results in a number of unanticipated and variable needs for goods or services during a typical year. Such needs may not rise to the level of an emergency, but benefit from prompt attention to minimize damage to the facilities, limit facility or functional down time, or limit staff or student inconvenience. Use of the standard procurement procedures in ORS 279B and the District Rules can result in unreasonable delay and unnecessary additional staff time and expense in addressing such needs. The purpose of the Flexible Services Contract Pool ("FSCP") special procurement is to establish an alternative procurement process to develop a pool of qualified suppliers or contractors so that the District can get a contractor or supplier on the job immediately to remedy these types of situations. The rule provides a full competitive process to develop the pool, requires the process to be renewed at least every three years so that new contractors have an opportunity to become part of the pool, and provides a rotation process so that all the contractors in the pool have a reasonable likelihood of getting some of the work. Use of an FSCP has to be approved by the Director of Procurement and documented to the procurement file.

b. Conclusions of Law: The FSCP is unlikely to diminish competition because the pool will be established through a competitive process in compliance with Ors 279B and the District's Rules. It will not encourage favoritism, and indeed should discourage favoritism, because all of the qualified contractors or suppliers in the pool will be awarded work on a rotational basis. Use of the

FSCP will result in substantial cost savings because it will reduce administrative time that would otherwise be spent managing individual procurement processes and be competitive enough to ensure a good price and the best quality of work. Use of the FSCP will also promote the public interest in a way that cannot be achieved using the standard process by enabling the District to more quickly correct maintenance or use issues relating to its facilities and operations.

**22. Contracts for Price-Regulated Items (PPS-47-0288(22)).**

**a. Findings of Fact:** Competition is not a relevant issue in the procurement of goods or services where the provider, rate, or price of the goods or services being purchased is established by federal, state, or local regulatory authority. The goods or services are generally purchased through a sole or limited number of sources and the prices or rates are set by the regulatory authority. Examples include postage, water service and sewer service, solid waste collection, and certain utilities.

**b. Conclusions of Law:** It is unlikely that this exemption will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts because there is virtually no or very limited competition available and because the service price is regulated. The awarding of public contracts pursuant to this exemption will result in substantial cost savings to the District by avoiding the expense of an irrelevant competitive procurement process.

**23. Service Monopoly (PPS 47-0288(23)).**

**a. Findings of Fact:** Certain services are provided by regulated monopolies which effectively preclude competition. Examples include electricity and natural gas provided pursuant to exclusive service territories awarded by the Public Utility Commission, and textbook purchase and distribution regulated by the Oregon Department of Education.

**b. Conclusions of Law:** It is unlikely that this exemption will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts, as required by ORS 279.015(a), because there is no competition for such services. The awarding of public contracts pursuant to this exemption will result in substantial cost savings to the District by avoiding the expense of an irrelevant competitive procurement process.

**24. Investment Contracts (PPS-47-0288(24)).**

**a. Findings of Fact:** The District invests or borrows funds on a short-term basis in accordance with District policy and Oregon statutes in order to achieve District fiscal management goals. Among other considerations, two of the District's goals are to maximize investment performance and safety, and, in the reverse, to minimize the cost of borrowing. All Oregon school district investment and borrowing activities are closely regulated by state law, including ORS 287A (Local Government Borrowing), 294 (Municipal Financial Administrations), 295 (Depositories of Public Funds), and 297 (Audit). So the District's investment discretion is significantly constrained and directed. In addition, time is literally equal to money with regard to investment activity. Rates of return on particular maturities and the allowable types of investment instruments offered by any one institution may literally change within minutes. Also, the District tries to place the investment as quickly as it receives the funds from state disbursement or tax revenues in order to maximize earnings. For example, if the District receives funds on a Friday, it wants to place them that same day in order to earn interest over the weekend. This activity does not lend itself well to the traditional methods of public sector competitive bidding, where advertisements are placed, a written invitation to bid is sent to all interested parties, and sealed bids are opened two weeks later. Since District investments are generally made in the very short term, it would not be the best use of District funds to lie idle while a formal bidding process is made.

**b. Conclusions of Law:** This special procurement will not substantially diminish competition or encourage favoritism because the District's investment options are substantially limited under state law and because investment pricing is so fluid. It will result in substantial cost savings to the District by enabling the District to invest or move quickly to take advantage of the best rates. It will

promote the public interest in a way that the standard competitive process cannot because of fluidity of interest fluctuations and pricing.

**25. Rating Agency Contracts (PPS-47-0288(25)).**

**a. Findings of Fact:** The selection of rating agencies is required or beneficial when the District issues debt, such as a voter-approved general obligation bond or a revenue bond. There are a very limited number of rating agencies that are used for such services, and they are typically selected on advice of a financial advisor for the particular issuance.

**b. Conclusions of Law:** This class special procurement will not substantially diminish competition or encourage favoritism because the market is already naturally limited. It will result in substantial cost savings to the District by enabling the District to select the best ratings agency for the particular issuance, which can reduce interest rates and thus borrowings. It will promote the public interest in a way that the standard competitive process cannot because the nature of the market does not lend itself to standard competitive process.

**26. Gasoline, Diesel Fuel, Heating Oil, Lubricants, and Asphalt (PPS-47-0288(26)).**

**a. Findings of Fact:** The market pricing of these products varies on a daily basis. Where it is practical, the District uses requirements contracts where award is based on the best discount off “pump” or list price to fill its needs. There are times, however, when it is not practical to maintain a requirements contract for these commodities. At these times, the District may get “spot market” quotes and purchase the item from the vendor offering the lowest price at the moment of need. The District Procurement Department maintains lists of vendors who supply these products. Any vendor may ask to be placed on the list. When the District makes a purchase, it contacts at least three vendors and makes its purchase from the least expensive source. Because of the nature of these products and the way they are supplied, most vendors are in the local area. For example, heating oil suppliers in Portland do not generally compete with heating oil suppliers in the Portland metro area, because of the cost of transportation. The District saves the most money if it has the flexibility to purchase in the best manner indicated by the state of the market at the time of purchase, whether this is through quotes or a requirements contract.

**b. Conclusions of Law:** It is unlikely that this exemption will encourage favoritism in the award of District contracts or substantially diminish competition for District contracts. Local vendors have open access to the District’s vendor lists and may submit price quotes at any time. The District Purchasing Department will contact at least three vendors for a quote before making a spot purchase. If a requirements contract is established for a period of time, the District Purchasing Department will solicit informal or written bids as appropriate to the dollar value of the purchases made. The use of this exemption will result in substantial cost savings to the District since the District can use whatever method of procurement it finds in the best interest of the District at the time of need to obtain gasoline, heating oil, and like products.

**II. Exemptions from Competitive Bidding.**

**A. Applicable Criteria.** ORS 279C.335(2) empowers the Board, acting as the local contract review board, to adopt rules exempting certain classes of public improvement contracts from competitive bidding upon approval of the following findings:

**1.** It is unlikely that such exemptions will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts; and

**2.** The awarding of public improvement contracts pursuant to the exemption will result in substantial cost savings to the District. In making these findings, ORS 279C.315 requires consideration of information regarding: (a) Operational, budget, and financial data; (b) public benefits; (c) value engineering; (d) specialized expertise required; (e) public safety; (f) market conditions; (g) technical complexity; and (h) funding sources. In addition, the Board may consider the type, cost, and

amount of the contract, the number of persons available to bid, and such other factors as the Board deems appropriate. The Board may not identify a class solely based on funding or procurement method.

**B. Findings.** The District's exemptions from competitive bidding for public improvement contracts are set forth in PPS-49-0146 (Exhibit A).

**1. Donated Public Improvements (PPS-49-0146(1)).**

**a. Findings of Fact:** Parents, school booster clubs, private supporters, and other community groups from time to time offer to donate all or a portion of their skills or services or pay for the services of a specific contractor to construct a public improvement. The ability to take advantage of such donations enables the District to use its limited funds in other areas and frequently results in improvements that the District would not otherwise be able to afford. This exemption enables the District to take advantage of these offers while continuing to ensure that the requirements of the Public Contracting Law continue to be met.

**b. Conclusions of Law:** It is unlikely that this exemption will encourage favoritism in the award of District contracts or substantially diminish competition for District contracts because it will only apply when a person or entity donates all or part of the cost of construction of a public improvement. Charitable donations are outside of the competitive market for public improvements. In many instances, the donations will enable the District to construct or complete projects that it otherwise would not be able to afford to do, and thus will not displace what would otherwise be a competitively bid project. The use of this class special procurement will result in substantial cost savings to the District because the District is not required to pay for the goods and services if they are donated. Use of this exemption has operation and budget benefits because it can obtain a public improvement at low or no cost, it has public benefits in that District students can enjoy a public improvement they might not otherwise be able to afford or would have to defer, and it allows the District to encourage and support charitable giving.

**2. Benson House Program Contracts (PPS-49-0146(2)).**

**a. Findings of Fact:** Benson Polytechnic High School offers a series of building construction classes where students participate in the construction of a house in order to learn all aspects of the construction trade ("Benson House Program"). Contractors, trades, suppliers, construction and design professionals, and other members of the building industry have historically discounted or donated all or part of their time, materials, expertise, or other assistance in support of the Benson House Program.

**b. Conclusions of Law:** The Board finds that this contract exemption is unlikely to encourage favoritism in the award of public contracts because the class exemption only applies to contracts in support of the Benson House Program, and only where the contractor discounts or donates all or a portion of the value of the contract to the District. Because such a donation is elective on the part of the contractor, the policy for competitive procurement under ORS 279C does not apply. This resolution further directs staff to broadly invite participation in the program so that there is ample opportunity for participation. The Board finds that authorizing this contract exemption will result in substantial cost savings to the District because the exemption only applies where all or a portion of the contract price is donated to the District, thereby reducing the District's operating costs for the Benson House Program. The exemption will have operational benefits because it will assist the District in maintaining this valuable program by encouraging the construction industry to donate time, materials, and expertise to the Benson House Program, thereby reducing the costs to the District. The Program has historically been supported in this manner. The exemption has public benefit because students benefit from the participation of experienced construction industry personnel and from the availability of tools and construction materials. Donations also enable the District to maintain this specialized program in this current economic downturn. The Benson House Program encourages the contracting industry to lend their special expertise to the Program to the benefit of the students. Donation of materials, services, and construction services enables the District to maintain the Program, regardless of market conditions. Finally, encouraging donations will reduce the cost of the Program to the general fund.

**3. Purchases under Contracts Solicited by Nonprofit Procurement Organizations of Which the District is a Member (PPS-49-0146(3)).**

**a. Findings of Fact:** The purpose of this class exemption is to allow the District to participate in or purchase public improvements under contracts solicited by nonprofit procurement organizations of which the District is a member under the same terms and conditions as provided in ORS 279A.200 to 279A.225 for cooperative procurement through other public bodies. There are a number of regional and national nonprofit procurement entities that permit or are limited to nonprofit or public body members. The benefits of membership are that the District obtains a lower price through the economies of scale and avoidance of duplication of the procurement process. The safeguards are that the nonprofit procurement process must be substantially similar to the competitive process in ORS 279C, and notice must be given in certain circumstances for contracts over certain amounts, the same as is required under the cooperative procurement statutes. In addition, such a procurement has to comply with the requirements for a Joint Cooperative Procurement pursuant to PPS-46-0420.

**b. Conclusions of Law:** This class exemption will not diminish competition or encourage favoritism because of the requirement that the nonprofit organization must have solicited the contract using competitive procedures substantially equivalent to those required in ORS 279C. The class special procurement will result in substantial cost savings by enabling the District to take advantage of economies of scale resulting from regional or national procurements and because of the avoidance of the cost of a duplicative procurement process. For this reason, the exemption has operational and budget benefits and general public benefits, allows the District to take advantage of an expanded market, and maximizes the use of its various funding sources.

**4. Flexible Services Contractor Pool (PPS-49-146(4)).**

**a. Findings of Fact:** The District operates a 46,000-pupil school district in more than 85 schools, housed in buildings of multiple ages dating back to the late 1800s. The heavy use of the buildings, coupled with their age and condition, results in a number of unanticipated and variable needs for capital improvements during a typical year. Such needs may not rise to the level of an emergency, but benefit from prompt attention to minimize damage to the facilities, limit facility or functional down time, or limit staff or student inconvenience. Use of the standard procurement procedures in ORS 279C and the District Rules can result in unreasonable delay and unnecessary additional staff time and expense in addressing such needs. The purpose of the Flexible Services Contract Pool ("FSCP") special procurement is to establish an alternative procurement process to develop a pool of qualified suppliers or contractors so that the District can get a contractor or supplier on the job immediately to remedy these types of situations. The rule provides a full competitive process to develop the pool, requires the process to be renewed at least every three years so that new contractors have an opportunity to become part of the pool, and provides a rotation process so that all the contractors in the pool have a reasonable likelihood of getting some of the work. Use of an FSCP has to be approved by the Director of Procurement and documented to the procurement file.

**b. Conclusions of Law:** The exemption is unlikely to diminish competition because the pool will be established through a competitive process in compliance with ORS 279C and the District's Rules. It will not encourage favoritism, and indeed should discourage favoritism, because all of the qualified contractors or suppliers in the pool will be awarded work on a rotational basis. Use of the FSCP will result in substantial cost savings because it will reduce administrative time that would otherwise be spent managing individual procurement processes and be competitive enough to ensure a good price and the best quality of work. Use of the FSCP has operational and public and safety benefits by enabling the District to more quickly correct maintenance or use issues relating to its facilities. The creation of an FSCP ensures that the District always has available any specialized expertise required. The creation of an FSCP allows a flexible response to market conditions, because if one member of the pool is unavailable due to a current project, the District can move to the next contractor on the list.

**5. Price Agreements (PPS-49-0146(5)).**

a. Findings of Fact: This exemption allows the use of price agreements to award public improvement contracts. Use of a price agreement provides the same benefits as an FSCP for more predictable public improvement needs.

b. Conclusions of Law: This exemption is unlikely to diminish competition or encourage favoritism because the contract will be solicited through a competitive process in compliance with ORS 279C and the District's Rules. It will result in substantial costs savings because the District can use a price agreement to fix the price over time, and because it avoids multiple procurement processes for ongoing work. It has operational, budgetary, and public and safety benefits by expediting routine, ongoing work. It addresses market conditions by ensuring a contractor is available and on-call to do the work. It enables the District to manage the workload within the available budget with greater certainty, and makes the best use of the District's funding sources.





# PORTLAND PUBLIC SCHOOLS

Mailing Address: P.O. Box 3107 / Portland, Oregon 97208-3107  
Telephone: (503) 916-3741 • FAX: (503) 916-2724

## BOARD ITEM STAFF REPORT

**TO:** Carole Smith, Superintendent  
**FROM:** Neil Sullivan, Chief Financial Officer  
**DATE:** August 11, 2010  
**RE:** Contracting Rule Rewrite – Proposed Existing Policy Revision/Recissions Recommendation

### **STAFF REPORT AND SUPERINTENDENT RECOMMENDATION TO THE BOARD**

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#### **I. EXECUTIVE SUMMARY**

The FAO at their meeting of July 22, 2010, forwarded version 15 of the Contracting Rules Rewrite to the Board with a "Do-Pass" recommendation.

As the new contracting rules are adopted by the Board, this staff report addresses recommended modifications of a portion of current Board policies for administrative consistency.

The approval of these proposed Board policy revisions/recissions is accomplished by the adoption of the accompanying resolution and modified Board policies.

Attachments to this report include:

1. Exhibit A: Proposed Contracting Rules – version 15
2. Exhibit B: 8.90.010-P, Contracts
3. Exhibit C: DRAFT Resolution Proposing Recission of Board Policy 8.90.010
4. Exhibit D: 8.90.015-P, Amendments & Change Orders
5. Exhibit E: DRAFT Resolution Proposing Recission of Board Policy 8.90.015
6. Exhibit F: 8.90.020-P, Personal Services Contracts
7. Exhibit G: DRAFT Resolution Proposing Recission of Board Policy 8.90.020
8. Exhibit H: 8.50.080-P, Ownership of Equipment with Revisions
9. Exhibit I: DRAFT Resolution Proposing Revisions to Board Policy 8.50.080-P  
Ownership of Equipment
10. Exhibit J: Board Policy 8.50.090-P, Payment of Claims
10. Exhibit K: Board Policy 8.50.100-P, Contracting and Purchasing Rules
11. Exhibit L: Board Policy 8.50.090-P, Payment of Claims with Revisions
12. Exhibit M: DRAFT Resolution Proposing Recission of Board Policy 8.50.100 and  
combine with Board Policy 8.50.090

## II. BACKGROUND

With the approval by the Board of Exhibit A, administrative changes to align current Board policies are recommended in the Exhibit C, E, G, I, and L above.

Generally, the three resolutions recommending rescissions are due to adoption of the new policies and the resulting duplication of policies. The new contracting rules citations which duplicate each current Board policy are as follows:

- 8.90.010-P, Contracts (Exhibit C) Recommend RECISSION and replace with proposed Contracting Rule PPS-46-0200
- 8.90.015-P, Amendments & Change Orders (Exhibit E) Recommend RECISSION and replace with proposed Contracting Rule PPS-45-0200
- 8.90.020-P, Personal Services Contracts (Exhibit G) Recommend RECISSION and replace with proposed Contracting Rule PPS-46-0500

The remaining two resolutions address administrative changes to the three indicated policies as follows:

- 8.50.080-P, Ownership of Equipment (Exhibit I) Recommend REVISION
- 8.50.100-P, Contracting and Purchasing Rules (Exhibit M) Recommend COMBINE with 8.50.090-P into new policy 8.50.090-P

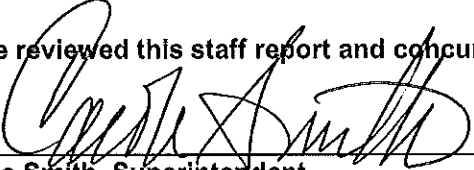
## III. STAFF RECOMMENDATION

Staff recommends approval of the above resolutions and the adoption of the revised rules as presented.

## IV. BOARD COMMITTEE REVIEW

The proposed contracting rule rewrite will be currently be considered by the full Board on August 23, 2010.

I have reviewed this staff report and concur with the recommendation to the Board.

  
\_\_\_\_\_  
Carole Smith, Superintendent  
Portland Public Schools

August 11, 2010  
\_\_\_\_\_  
Date

# Portland Public School District 1<sup>st</sup> Reading

**DATE: August 23, 2010**

## **Notice of Proposed Policy Amendments and Public Comment for Public Contracts and Purchasing**

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The Portland Public School District is providing Notice of Proposed Policy Amendments and Public Comment to offer interested parties reasonable opportunity to submit data or comments on the proposed policies noted below.

Public comment may be submitted in writing directly to the district or through the district Web site noted below. Written comments must be submitted by 5:00 p.m. on the Last Date for Comment listed below.

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**1<sup>st</sup> Reading by: Trudy Sargent, Co-Chair**, Portland Public School Board  
**Summary:** Amending District policy guidelines for purchasing and contracts.

**Draft Policy Web Site:**

<http://www.pps.k12.or.us/departments/board/872.htm>

(click on draft policy link).

**Recommended for 1st Reading by:** Finance, Audit and Operations Committee

**Policy Contact:** Lynda Rose, Manager Board of Education

**Last Date for Comment:** September 13, 2010

**Address:** P.O. Box 3107, Portland, OR 97208-3107

**Telephone:** 503-916-3741

**E-mail:** lrose@pps.k12.or.us

**Last Date for Comment: September 13, 2010**



**BOARD POLICY**  
**CONTRACTS**

**8.90.010-P**

- (1) The Board authorizes the superintendent or designee to enter into and approve payment on contracts under \$25,000 annually per contractor for products, materials, supplies, capital outlay, equipment and services that are within appropriations made by the Board pursuant to ORS 294.435 and consistent with established policies and administrative directives and rules adopted by the Board, acting as its own local contract review board, governing district purchases.
- (2) Board approval is required to enter into and approve payment on the following types of contracts:
  - (a) Collective bargaining agreements.
  - (b) Service contracts that include the provision of labor performed by district employees.
  - (c) Annual contracts for products, materials, supplies, capital outlay, equipment and services where the total amount reaches \$25,000 or more per contractor.
  - (d) Multi-year contracts for products, materials, supplies, capital outlay, equipment and services where the annual payment is less than \$25,000, but the total contract amount reaches \$25,000 or more per contractor.
- (3) All contracts within the delegation listed in section (1) that are \$2,000 or more shall be reported to the Board monthly, except for contracts for public improvements and public works projects which shall be reported quarterly. Reports shall include, at a minimum, the following information: contractor name, term, description of items purchased or services rendered, cost, and fund.
- (4) The superintendent or designee is authorized to establish rules and procedures as necessary to implement the delegation set forth in this policy.

Legal References: ORS 294.435

History: Adpt. 8/28/00, BA 1394 [rpl. 8.90.010-AD Personal Services Contracts]

**To be RESCINDED**



## BOARD POLICY

**8.90.015-P**

### **CONTRACT AMENDMENTS AND CHANGE ORDERS**

- (1) An amendment to a contract is a written agreement changing or extending the terms and/or conditions of an existing contract by introducing, canceling or changing details, but leaving the general purpose of the contract intact.
- (2) A change order is an amendment to a contract for design and construction of a public improvement or public works project.
- (3) The Board shall approve contract amendments and change orders in any one of the following circumstances:
  - (a) Where an increase in the contract price will exceed the authority delegated to the superintendent or designee in 8.90.010-P Contracts.
  - (b) Where an increase in the contract price will exceed the maximum project budget or maximum project contingency amount set forth in the resolution that awarded the contract.
  - (c) Where an increase in the contract price for a contract, which is not for a capital project and does not contain a contingency amount, exceeds 10% of the original contract price or \$10,000, whichever is less.
  - (d) Where an increase will exceed the contract price by an amount established in the Local Contract Review Board Rules.
  - (e) Where there is a material change in the work of a contract previously approved by the Board that will increase or decrease the project scope.

Legal References:

History: Adpt. 8/28/00, BA 1395

**To be RESCINDED**



BOARD POLICY  
**PERSONAL SERVICES  
CONTRACTS**

**8.90.020-P**

- (1) The district may enter into personal services contracts with qualified professionals as provided by ORS 279.051. Personal services contracts, as used in this policy, means contracts for specialized skills, knowledge and resources in the application of highly technical or scientific expertise or the exercise of professional, artistic or management discretion or judgment.
- (2) Selection of a personal services contractor will be based primarily on qualifications and performance history, expertise, knowledge and creativity and the ability to exercise sound professional judgment.
- (3) All personal services contracts shall be based on demonstrated qualifications and competence to perform the required services, encourage competition, discourage favoritism and obtain services at a fair and reasonable price.
- (4) Board approval is required to enter into and approve payment on the following types of personal services contracts:
  - (a) Annual contracts where the total amount reaches \$25,000 or more per contractor; and
  - (b) Multi-year contracts where the annual payment is less than \$25,000, but the total contract amount reaches \$25,000 or more per contractor.
- (5) If the scope of work performed by a contractor(s) or his/her employees(s) may result in direct, unsupervised contact with students, he/she will be required to submit to fingerprinting and criminal records checks as required by law.
- (6) The superintendent or designee is authorized to establish rules and procedures as necessary to implement this policy.

Legal References: ORS 279.051

History: Adpt. 8/28/00, BA 1396 [rpl. 8.90.020-AD Utilization of and Payments to Consultants]

**To be RESCINDED**



BOARD POLICY

8.50.080-P

OWNERSHIP OF EQUIPMENT

Ownership of Equipment.

All property ~~that~~ is procured by a school, student body organization, or donated by an individual or organization ~~to a school or the District~~ shall immediately become ~~District~~ property. ~~The school administrator is responsible for promptly notifying the Director of~~ Facilities and Asset Management of ~~the property~~ purchase or acquisition.

Legal References: ORS 332.075(1)(f); ORS 332.107

History: Adpt. 6/71; Amd. 10/13/83; Amd. 10/28/02, BA 2459; ~~Amd. TBD/TBD/10,~~ ~~BA TBD~~

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BOARD POLICY  
**PAYMENT OF CLAIMS**

**8.50.090-P**

**I. Payment of Claims.**

- (1) Payment will be made only on items procured as authorized in the Contracting and Purchasing Manual adopted by reference by 8.50.100-P. If a purchase commitment is made which is not authorized by these rules, the individual making such contract shall be personally liable.

Legal References: ORS 332.075

History: Adpt. 6/71; Amd. 8/28/78; Amd. 10/13/83; Amd. 9/95; Amd. 8/28/00, BA 1397; Amd. 10/28/02, BA 2460

**To be CONSOLIDATED into the new Board Policy 8.50.090-P,  
Public Contracting Rules, Payment of Claims, and Personal Liability**





## BOARD POLICY

# CONTRACTING AND PURCHASING RULES

**8.50.100-P**

### **I. Contracting and Purchasing Rules.**

The Portland Public School Board has designated itself as the local government contract review board pursuant to ORS 279.055(2).

- (1) The Board has the authority to:
  - (a) Adopt rules of procedure for public contracts and purchasing; and,
  - (b) Exempt certain public contracts or classes of contracts from the competitive bidding process otherwise required by the public contract rules.
- (2) The Superintendent shall develop a Contracting and Purchasing Manual containing the rules of procedure as adopted by the Board. The Manual shall be posted on the district website.
- (3) Revisions to the rules of procedure shall be approved by the Board by resolution.
- (4) The Contracting and Purchasing Manual is hereby adopted by reference and shall have the same authority as a board policy or administrative directive.

Legal References: ORS 279.055; ORS 332.107; BR 1655, 12/11/00

History: Adpt. 12/11/97; Amd. 2/98; Amd. 10/28/02, BA 2461

**To be CONSOLIDATED into the new Board Policy 8.50.090-P,  
Public Contracting Rules, Payment of Claims, and Personal Liability**



## BOARD POLICY

**8.50.090-P**

# **PUBLIC CONTRACTING RULES, PAYMENT OF CLAIMS, AND PERSONAL LIABILITY**

## **I. Public Contracting Rules**

- (1) Pursuant to ORS 279A.060, the Board is designated as the local government contract review board with authority to
  - (a) Adopt rules for public contracts and purchasing, and
  - (b) Exempt certain public contracts or classes of contracts from the competitive bidding process otherwise required by the public contract rules.
- (2) The Superintendent has developed Public Contracting Rules (“Rules”) governing District contracts and purchasing practices and shall post them on the District website. The Board adopts and amends these Rules by resolution.
- (3) The Superintendent may adopt administrative directives to implement the Rules.

## **II. Payment of Claims; Personal Liability**

District Accounting Services will make payment only on items procured as authorized in the Rules adopted by reference in Section I of this policy. If a procurement is made that is not authorized by the Rules, then the person responsible for entering into the agreement resulting in the procurement shall be personally liable for payment on the procurement.

\*\*\*

### **Legal References and History**

#### Contracts:

ORS 279A.050-279A.075, 332.075

Adpt. 8/28/00, BA 1394 [rpl. 8.90.010-AD Personal Services Contracts]

#### Payment of Claims; Personal Liability:

ORS 332.075(2) and (3)

Adpt. 6/71 [full date?]; Amd. 8/28/78; Amd. 10/13/83; Amd. 9/95 [full date?]; Amd. 8/28/00, BA 1397; Amd. 10/28/02, BA 2460

**Proposed COMBINED 8.50.090-P and 8.50.100-P Policy**

**[Highlighted sections to be filled in by Board Office]**



# PORTLAND PUBLIC SCHOOLS

Mailing Address: P.O. Box 3107 / Portland, Oregon 97208-3107  
Telephone: (503) 916-3741 • FAX: (503) 916-2724

## BOARD ITEM STAFF REPORT

**TO:** Carole Smith, Superintendent  
**FROM:** Andy Leibenguth, Interim Director -Transportation  
**THRU:** C.J. Sylvester, Executive Director of Operations  
**DATE:** August 9, 2010  
**RE:** Continuing TriMet Pass Program for High School and Education Options Students

### I. BACKGROUND

For the past two school years PPS has entered into an Intergovernmental Agreement (IGA) with the City of Portland and TriMet to establish fareless public transportation for all high school and education options students in grades 9 - 12. This agreement outlines the responsibilities of all parties to approve a fareless public transportation pass program.

To date, these efforts have included the completion of a successful pilot project in the 2008-09 school year; the research and use of the Business Energy Tax Credit (BETC) as a funding source; and the full expansion to all High School and Education Options students in the 2009-10 school year.

The 2009-10 IGA was linked to the school year. Most details of the IGA were negotiated at this time to accommodate full expansion to all High School and Education Options students. This IGA covered two separate BETC "projects." The first spanned September 1 through December 31, 2009. The other spanned January 1 through December 31, 2010. Oregon Department of Energy (ODOE) has set project maximums that are tied to the calendar year. Aligning the project with the calendar year allowed us to max out the BETC and avoid having to pay a separate application fee. The 2010 project period received Preliminary Certification from (ODOE) in the fall of 2009.

Due to legislative changes surrounding BETC there has been a push from the City to share in the risk in the event that BETC funding does not come through. This risk is very low for the current project as it has already received Preliminary Certification. More concern focused on the next BETC project for the calendar year 2011 that has not been submitted for Preliminary Certification at this time. It was agreed by all parties that we enter into two separate agreements to span the school year. The

first will cover September 1 through December 31, 2010. The second will span January 1 through June 31, 2011. This approach will provide the necessary time needed to receive verification of Preliminary Certification for the 2011 project from ODOE. TriMet plans to submit to ODOE in the next few weeks.

## **II. STAFF RECOMMENDATION**

Staff recommends the Board adopt a resolution directing staff to establish, enter into, and execute an intergovernmental agreement between the City of Portland, TriMet, and the District in a form approved by General Counsel for the district setting forth a fareless public transportation student pass program for District students in the 9<sup>th</sup> through 12<sup>th</sup> grades at all District high schools and Education Options programs for the project period September 1 through December 31, 2010.

## **III. FISCAL IMPACT**

PPS has agreed to provide the money that would have been spent supporting NCLB and Free/Reduced lunch students at all High Schools to TriMet keeping the District cost neutral. If Oregon Department of Energy denies BETC Final Certification all parties would assume 1/3 of the total project cost (estimated at \$1,400,000), less our existing contribution (\$400,000), not to exceed \$500,000 (\$150,000 after 70% reimbursement from the state). Total project cost is calculated by the number of months contained within the Project (4), October ADM issued to the state, and the TriMet Youth monthly pass fare in effect September 1, 2010 (\$26).

## **IV. COMMUNITY OR JURISDICTION INVOLVEMENT**

The Multnomah Youth Commission  
City of Portland  
TriMet  
Portland Public Schools

## **V. LINK TO CURRENT SCHOOL POLICIES (If any)**

Transportation services are required by state law for elementary students who reside more than 1 mile from their school, and for secondary students who reside 1.5 miles from their school. PPS has received an ODE waiver for high school, given the availability of public transit in the City of Portland.

In addition, PPS has adopted the following policies:

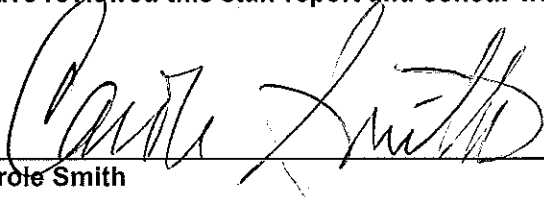
**4.10.100-P Student Transportation Services**

**8.60.030-P Student Transportation**

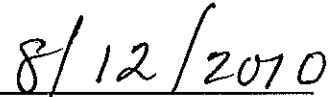
**VI. BOARD COMMITTEE REVIEW**

The Board's FAO Committee will review the TriMet Pass Program for High School and Education Options Students on August 17, 2010.

I have reviewed this staff report and concur with the recommendation to the Board.



**Carole Smith**  
**Superintendent**  
**Portland Public Schools**



**Date**

BOARD OF EDUCATION  
SCHOOL DISTRICT NO. 1J, MULTNOMAH COUNTY, OREGON

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August 23, 2010

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4328	A Resolution of the Board of Education of School District No. 1J, Multnomah County, acting as the Local Public Contract Review Board, Adopting Public Contracting Rules, Enacting Rules for Personal Services Contracts, Creating Certain Class Special Procurements and Granting an Exemption from Competitive Bidding for Certain Classes of Public Improvement Contracts.....	12
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Purchases, Bids, Contracts

The Superintendent RECOMMENDS adoption of the following items:

Numbers 4325 through 4327



**RESOLUTION No. 4325**

Revenue Contracts that Exceed \$25,000 Limit for Delegation of Authority

**RECITAL**

Board Policy 8.90.010-P, "Contracts," requires the Board of Education ("Board") to enter into and approve contracts where the total revenue amount reaches \$25,000 or more per contractor. Contracts meeting this criterion are listed below.

**RESOLUTION**

The Superintendent recommends that the Board approve these contracts. The Board accepts this recommendation and by this resolution authorizes the Deputy Clerk to enter into agreements in a form approved by General Counsel for the District.

**INTERGOVERNMENTAL AGREEMENTS / REVENUE ("IGA/Rs")**

<b>Contractor</b>	<b>Contract Term</b>	<b>Contract Type</b>	<b>Description of Services</b>	<b>Fund, Department, Grant/Project</b>	<b>Contract Amount</b>	<b>Responsible Administrator</b>
North Clackamas School District	07/01/10 through 06/30/11	IGA/R 57747	Columbia Regional Program will provide deaf/hard of hearing classroom services for regionally eligible students.	Fund 299 Dept. 5430 Grant S0031	\$144,637	S. Higgins
Gresham-Barlow School District	07/01/10 through 06/30/11	IGA/R 57748	Columbia Regional Program will provide deaf/hard of hearing classroom services for regionally eligible students.	Fund 299 Dept. 5422 Grant S0031	\$100,537	S. Higgins
Parkrose School District	07/01/10 through 06/30/11	IGA/R 57749	Columbia Regional Program will provide deaf/hard of hearing classroom services for regionally eligible students.	Fund 299 Dept. 5422 Grant S0031	\$140,437	S. Higgins

*N Sullivan*

**RESOLUTION No. 4326**

Expenditure Contracts that Exceed \$25,000 Limit for Delegation of Authority

**RECITAL**

Board Policy 8.90.101-P, "Contracts," requires the Board of Education ("Board") enter into contracts and approve payment for products, materials, supplies, capital outlay, equipment, and services whenever the total amount reaches \$25,000 or more annually per contractor. Contracts meeting this criterion are listed below.

**RESOLUTION**

The Superintendent recommends that the Board approve these contracts. The Board accepts this recommendation and by this resolution authorizes the Deputy Clerk to enter into agreements in a form approved by General Counsel for the District.

**NEW CONTRACTS**

<b>Contractor</b>	<b>Contract Term</b>	<b>Contract Type</b>	<b>Description of Services</b>	<b>Fund, Department, Grant/Project</b>	<b>Contract Amount, Payment Total*</b>	<b>Responsible Administrator</b>
Northwest Textbook Depository Co.	07/29/2010	Purchase Order PO 95315	District-wide: Textbooks and teacher materials for district-wide adopted curriculum including language, mathematics, and social studies.	Fund 191 Dept. 5555	\$28,137 \$17,906	M. Arganbright
Northwest Textbook Depository Co.	07/29/2010	Purchase Order PO 95320	District-wide: Textbooks and teacher materials for district-wide adopted mathematics curriculum.	Fund 191 Dept. 5555	\$59,512 \$17,906	M. Arganbright
Northwest Textbook Depository Co.	08/11/2010	Purchase Order PO 95490	District-wide: Horizons teaching interventions for grades K-6.	Fund 191 Dept. 5555	\$203,049 \$17,906	M. Arganbright
Cambium Learning	08/12/2010	Purchase Order PO 95530	District-wide: Language! Teaching interventions.	Fund 191 Dept. 5555	\$288,536 \$0	M. Arganbright
Education Northwest	07/01/10 through 06/30/11	Personal / Professional Services PS 57xxx	District-wide: Leader participation in Oregon Leadership Network Fall 2010 and Spring 2011 equity-focused institutes.	Fund 299 Dept. 5402 Grant S0166	\$52,094	M. Davalos
MetroPresort	08/06/2010	Purchase Order PO 95422	District-wide: Blanket purchase order for presort mail service.	Fund 101 Dept. 5553	\$40,000 \$2,002	D. Fajer

<b>Contractor</b>	<b>Contract Term</b>	<b>Contract Type</b>	<b>Description of Services</b>	<b>Fund, Department, Grant/Project</b>	<b>Contract Amount, Payment Total*</b>	<b>Responsible Administrator</b>
Apple Computers Inc.	08/11/2010	Purchase Order PO 95474	DaVinci, Mt. Tabor, Hosford and Sellwood: Purchase of 128 MacBooks, data projectors, and "tech bundles" to be distributed to each teacher at each school.	Fund 407 Dept. 5581 Project A1007	\$139,854 \$45,087	N. Jwayad
Apple Computers Inc.	08/11/2010	Purchase Order PO 95475	Roosevelt: (240) white MacBooks and (37) Data Projector Adapters	Fund 205 Dept. 3330 Grant G1108 Dept. 3331 Grant G1109 Dept. 3332 Grant G1110	\$256,898 \$45,087	N. Jwayad
Apple Computers Inc.	08/16/2010	Purchase Order PO 95574	Alameda: (47) MacBooks to be used on (2) 15-unit mobile labs and (17) to be installed in the library lab.	Fund 205 Dept. 1230 Grant TBD	\$50,119 \$45,087	N. Jwayad
Apple Computers Inc.	08/18/2010	Purchase Order PO 95648	Roosevelt: (37) aluminum MacBook Pros	Fund 205 Dept. 3330 Grant G1108 Dept. 3331 Grant G1109 Dept. 3332 Grant G1110	\$43,561 \$45,087	N. Jwayad
Playworks	08/31/2010 through 06/30/2011	Personal / Professional Services PS 57751	Markham K-5: Provide programs to improve health and well-being of students by increasing opportunities for physical activity during the school day and after school support.	Fund 205 Dept. 1170 Grant G1000	\$20,000 \$0	S. Kosmala
Playworks	08/31/2010 through 06/30/2011	Personal / Professional Services PS 57752	Beach K-8: Provide programs to improve health and well-being of students by increasing opportunities for physical activity during the school day and after school support.	Fund 205 Dept. 1140 Grant G1000	\$25,000 \$0	S. Kosmala

<b>Contractor</b>	<b>Contract Term</b>	<b>Contract Type</b>	<b>Description of Services</b>	<b>Fund, Department, Grant/Project</b>	<b>Contract Amount, Payment Total*</b>	<b>Responsible Administrator</b>
Quantum Engineering & Development, Inc.	08/24/10 through 12/31/15	Energy Savings Performance Contract EC 57743	District-wide: Energy Savings Performance Contract, including the technical audit, project development, design, construction, and measurement and verification of energy and water saving projects (e.g., DDC controls, HVAC and refrigeration upgrades, insulation, etc.) at various district facilities.  2010 Recovery Zone Project.	Fund 421 Dept. 5597 Project E0100	Not-to-exceed: \$4,000,000 \$0	T. Magliano
Rose City Contracting, Inc.	08/24/10 through 12/31/10	Construction Services C 57742	Marysville K-8: Abatement, demolition and dispose of CMU shower walls, exposed stud walls and concrete topping slab in restrooms.	Fund 691 Dept. 1268 Project R0102	\$92,800 \$7,083	T. Magliano
Mears Design Group	08/24/10 through 07/31/11	Personal / Professional Services PS 57741	Wilson HS, Jefferson HS, Franklin HS, and Madison HS: Design Services athletic field irrigation design and central control. 2010 Recovery Zone Project.	Fund 421 Dept 5597 Project E0100	\$25,005 \$0	T. Magliano
Education Northwest	07/01/2010 through 06/30/2011	Personal / Professional Services PS 57731	District-wide: The Equity Program will submit a final report with findings on the family and community engagement gap analysis, and will make recommendations that define a district-wide model for family engagement, including priorities for Academic Priority Zone schools.	Fund 101 Dept. 5406	\$26,845 \$22,170	L. Poe
Education Direction	09/01/2010 through 06/30/2011	Personal / Professional Services PS 57729	District-wide: Provide Data Wise training for 12 school leadership teams and achievement coordinators to increase capacity of data for site-base discussions and plan for increasing achievement.	Fund 205 Dept. 5448 Grant G1148	\$90,000 \$0	C. Randall

**AMENDMENTS TO EXISTING CONTRACTS**

<b>Contractor</b>	<b>Amendment Term</b>	<b>Contract Type</b>	<b>Description of Services</b>	<b>Fund, Department, Grant/Project</b>	<b>Amendment Amount, Contract Total, Payment Total*</b>	<b>Responsible Administrator</b>
Self Enhancement Inc.	07/01/10 through 06/30/11  Expiring Term: 09/01/09 through 06/30/10	PS 56972 Amendment 1	Benson and Grant HS, and Jefferson Campus; Boise-Eliot PK-8: One-year extension of contract for academic, social, and emotional support services for 40 freshmen and 40 sophomores at secondary schools; and for 20 students at Boise-Eliot PK-8.	Fund 101 Dept. 5428	\$270,000 \$540,000 \$93,281	T. Hunter
Impact Northwest	06/01/2010 through 08/30/2010	Personal / Professional Services  PS 57266 Amendment #1	Harrison Park K-8: Implement the 21 <sup>st</sup> Century SUN Community Schools model, including staffing and extended day programming, during Summer Academy.	Fund 205 Dept. 1240 Grant G1058  Fund 205 Dept. 5490 Grant G0987	\$17,200 \$137,200 \$39,696	S. Kosmala
MPD Systems, Inc.	08/3/10 through 12/31/10	Construction Services  C57529 Change Order 2	Jackson 6-8: Fire Alarm Upgrades - Move eight keyed test switches and monitor modules for beam detectors. Add tamper switch and monitor module. Add two modules (SK5815XL SLC expanders). Add flow bell for shop sprinkler system.	Fund 191 Dept. 5597 Project F0167	\$3,517 \$119,581 \$33,592	T. Magliano
Payne Construction, Inc.	08/04/10 through 09/30/10	Construction Services  C 57465 Change Order 3	Marysville K-8: Fire related construction services for temporary roof – addtl area asphalt shingles, ridge-vent and metal flashing.	Fund 691 Dept. 1268 Project R0102	\$16,008 \$227,450 \$105,007	T. Magliano
U-Storage Self Storage	9/1/10 through 08/31/11  Expiring Term: 08/01/09 through 08/31/10	Lease Agreement LA 56679 Amendment #2	BESC: Lease of parking spaces for District employees through August 31, 2011.	Fund 101 Dept. 5591	\$44,304 \$130,152 \$0	T. Magliano

<b>Contractor</b>	<b>Amendment Term</b>	<b>Contract Type</b>	<b>Description of Services</b>	<b>Fund, Department, Grant/Project</b>	<b>Amendment Amount, Contract Total, Payment Total*</b>	<b>Responsible Administrator</b>
Columbia-Cascade Construction, Inc.	8/24/10 through 12/31/10  Expiring Term: 03/09/10 through 08/31/10	Construction Services  C 57369  Change Order 2	Community Transition Center @ Green Thumb: Construction Services to provide electrical, security, data, fire alarm components for the modular classroom and connect to existing building. Extend contract period to 12/31/10.	Fund 205 Dept. 5414 Grant G0986	\$13,753 \$83,521 \$55,100	T. Magliano

### INTERGOVERNMENTAL AGREEMENTS (“IGAs”)

<b>Contractor</b>	<b>Contract Term</b>	<b>Contract Type</b>	<b>Description of Services</b>	<b>Fund, Department, Grant/Project</b>	<b>Contract Amount</b>	<b>Responsible Administrator</b>
City of Portland and TriMet	09/01/2010 through 12/31/2010	IGA 57754	District-wide: To provide a fareless public transportation student pass program for students in the 9 <sup>th</sup> through 12 <sup>th</sup> grades at all District high schools and Education Options programs.	Fund 101 Dept. 5560	\$400,000	A. Leibenguth

\* “Payment Total” is the total amount actually paid to the vendor on all contracts with the District since July 1, 2010. Thus, Payment Total may be more or less than the “Contract / Amendment Amount” or “Contract Total,” both of which are specific to the individual contract submitted for approval. Payment Total is not included for IGAs.

*N. Sullivan*

**RESOLUTION No. 4327**

Expenditure Contracts that Exceed \$25,000 Limit for Delegation of Authority  
Office of School Modernization Projects Fund

**RECITAL**

Board Policy 8.90.101-P, "Contracts," requires the Board of Education ("Board") enter into contracts and approve payment for products, materials, supplies, capital outlay, equipment, and services whenever the total amount reaches \$25,000 or more annually per contractor. Contracts meeting this criterion are listed below.

**RESOLUTION**

The Superintendent recommends that the Board approve these contracts. The Board accepts this recommendation and by this resolution authorizes the Deputy Clerk to enter and execute agreements in a form approved by General Counsel for the District.

<b>Modular Classrooms 2010</b>				<b>Total Budget: \$1,954,000</b>
<b>Contractor</b>	<b>Contract Terms</b>	<b>Project Number(s)</b>	<b>Description of Contract / Amendment</b>	<b>Previously Committed Amount / This Amendment Amount</b>
Portland General Electric	8/12/10 through 12/31/2010  Personal / Professional Services  PS 57737	C0406	Astor K-8: Portland General Electric will be providing three-phase power service to the new modular classroom building.	\$4,351
Portland General Electric	8/12/10 through 12/31/2010  Personal / Professional Services  PS 57738	C0408	Llewellyn K-5: Portland General Electric will be providing three-phase power service to the new modular classroom building.	\$2,646
Portland General Electric	8/12/10 through 12/31/2010  Personal / Professional Services  PS 57739	C0409	Rieke K-5: Portland General Electric will be providing three-phase power service to the new modular classroom building	\$8,191
Portland General Electric	8/12/10 through 12/31/2010  Personal / Professional Services  PS 57740	C0411	Sunnyside Environmental K-8: Portland General Electric will be providing three-phase power service to the new modular classroom buildings.	\$2,314

<b>Project Budget OSM Funded</b>	<b>\$1,354,000</b>
<b>Project Budget Facilities Funded</b>	<b>\$600,000</b>

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<b>Total Project Budget</b>	<b>\$1,954,000</b>
<b>This Resolution Request</b>	<b>\$ 17,501</b>
<b>Previously Committed Amount</b>	<b><u>\$1,500,435</u></b>
<b>Remaining Budget</b>	<b>\$436,064</b>

*S. Schoening*



Other Matters Requiring Board Action

The Superintendent RECOMMENDS adoption of the following items:

Numbers 4328 through 4330

## RESOLUTION No. 4328

A Resolution of the Board of Education of School District No. 1J, Multnomah County, Oregon, acting as the Local Public Contract Review Board, Adopting Public Contracting Rules, Enacting Rules for Personal Services Contracts, Creating Certain Class Special Procurements and Granting an Exemption from Competitive Bidding for Certain Classes of Public Improvement Contracts

### RECITALS

- A. The Board of Directors of School District No. 1, Multnomah County, Oregon (“District”) acts as the Local Public Contract Review Board (“Board”) pursuant to ORS 279A.060.
- B. ORS 279A.065 empowers public contracting agencies to adopt rules of procedure for public contracts, and the District has adopted such rules (“Current Rules”).
- C. ORS 279A.065(5)(b) requires a local contracting agency to review its rules for revision each time the Attorney-General modifies the Model Rules for Public Contracts. The Attorney-General has updated the model rules for 2010 in light of amendments to the Public Contract Code in the 2009 legislature.
- D. ORS 279A.055(2) authorizes the Board to designate certain contracts as personal services contracts.
- E. ORS 279B.085 authorizes the Board to declare certain public contracts or classes of contracts for goods and services as special procurements exempt from the competitive procurement process otherwise required by ORS Chapter 279B, upon certain findings.
- F. ORS 279C.0355(2) authorizes the Board to exempt certain contracts or classes of contracts for public improvements from competitive bidding under ORS Chapter 279C, upon certain findings.
- G. The Board deems it necessary and advisable to adopt updated Rules (“New Rules”) to address these statutory and rule changes, to improve the format and usability of the District’s Rules, and to provide for greater public transparency in regard to the District’s procurement procedures.
- H. The Finance, Audit and Operations Committee reviewed the proposed New Rules over the course of three meetings and on July 22, 2010, reviewed this resolution and recommends it approval to the Board.

### RESOLUTION

- 1. The Board hereby adopts the New Rules attached as Exhibit A as the District’s Public Contracting Rules.
- 2. The Board adopts the class special procurements and class exemptions from competitive bidding enacted in the New Rules set forth in Exhibit A based upon the Findings in attached Exhibit B.
- 3. The District’s New Rules supersede and replace the District’s Current Rules for procurements advertised or first solicited on or after the effective date of this Resolution. Procurements advertised or first solicited prior to the effective date of this Resolution shall continue to be processed under the Current Rules.
- 4. The Board directs the superintendent to report back within one year from the effective date of this resolution regarding the implementation, operation, and efficacy of the New Rules to enable the Board to determine whether any additions, corrections, or revisions are necessary in order to improve the District’s contracting and procurement process.

*D. Fajer / N. Sullivan*

## RESOLUTION No. 4329

### Resolution to Continue Supporting and Approving a Fareless Public Transportation Student Pass Program for all High School and Education Options Students in Portland Public Schools Programs for the Period of September 1 through December 31, 2010.

#### RECITALS

- A. The Multnomah Youth Commission has determined that by following national and local models, a fareless public transportation student pass program could address many positive outcomes including:
1. Reducing car traffic and related carbon emissions around schools;
  2. Increasing current and future ridership for TriMet;
  3. Reducing barriers to youth participation in schools;
  4. Increasing access to personal enrichment and employment opportunities; and
  5. Increasing a school district's flexibility for academic programming.
- B. The U.S. Department of Transportation estimates that 20-25% of morning traffic is directly related to cars transporting students to school.
- C. Since many students attend schools and programs outside their neighborhood, a lack of transportation is cited as being a key barrier to youth attendance at school, after school activities, student support programs and work opportunities.
- D. Due to limited funding, Portland Public Schools ("District") Transportation Services is unable to provide services to all students needing transportation to and from school.
- E. District staff has worked closely with TriMet and the City of Portland Mayor's Office to develop a District-wide program. To date, these efforts have included the completion of a successful pilot project in the 2008-09 school year; full expansion to all High School and Education Options Students in the 2009-10 school year; the research and use of the Business Energy Tax Credit (BETC) as a funding source; and currently, development of an intergovernmental agreement defining each organization's role, financial responsibilities, and operational details for the period of September 1 through December 31, 2010.
- F. District staff, TriMet and the City of Portland Mayor's Office will endeavor to pursue further application to the Oregon Department of Energy for BETC funding so that the Project can be extended through June 30, 2011. Application for Preliminary Certification will be submitted by TriMet in September.
- G. In the rare event that Oregon Department of Energy does not approve Final Certification for the 2010 BETC Project the District will assume 1/3 of the project costs less our existing contribution (money that would have been spent on NCLB and Free/Reduced Meal passes). Maximum fiscal impact would be under \$100,000 over our existing contribution.

#### RESOLUTION

1. The Board directs District staff to establish, enter into and execute an intergovernmental agreement between the City of Portland, TriMet and the District in a form approved by General Counsel for the District setting forth a fareless public transportation student pass program for

District students in 9<sup>th</sup> through 12<sup>th</sup> grades at all District high schools and Education Options programs. This program will span the period from September 1, 2010, through December 31, 2010.

*C. Sylvester / A. Leibenguth*

**RESOLUTION No. 4330**

Minutes

The following minutes are offered for adoption:  
July 19, 2010