

## CHAPTER 49

## PUBLIC CONTRACTS FOR CONSTRUCTION SERVICES

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**GENERAL PROVISIONS**

**49-0100 Application**

**A. Scope of Contracts.**

The Rules of this chapter apply to both (1) Public Improvement Contracts and (2) Public Contracts for ordinary construction Services that are not Public Improvements. The Rules of this chapter that apply specifically to only one of these two types of contracts are so identified.

**B. ORS 279C.**

The Rules of this chapter address matters covered in ORS chapter 279C (with the exception of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, Land Surveying and Related Services, all of which are addressed in chapter 48 of these Rules).

**49-0110 Policies**

It is the policy of the City of Beaverton in enacting these Rules that its contracting system meet policies set forth in ORS 279A.015, ORS 279B.010, ORS 279C.300 and the ORS 279C.305.

**49-0120 [Reserved]**

**49-0130 Competitive Bidding Requirement**

Except as permitted by BPC 49-0150 (Small Procurement, BPC 49-0160 (Intermediate Procurements) or BPC Chapter 50 (Application and Exemptions), or if Federal law over-rides these rules, the City shall solicit Bids for Public Improvement Contracts by Invitation to Bid ("ITB").

**49-0140 Contracts for Construction Other Than Public Improvements**

**A. Procurement Under ORS Chapter 279B.**

Pursuant to ORS 279C.320, Public Contracts for construction Services that are not Public Improvement Contracts, other than Emergency Contracts regulated under ORS 279C.335 (6) and BPC 49-0150, may be procured and amended as general trade Services under the provisions of ORS chapter 279B and chapter 47 Rules rather than under the provisions of ORS chapter 279C and these chapter 49 Rules. Emergency Contracts for construction Services that are not Public Improvement Contracts are regulated under ORS 279B.080.

**B. Application of ORS Chapter 279C.**

Non-procurement provisions of ORS chapter 279C and BPC chapter 47 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, 620 and 625); Termination (ORS 279C. 660 and 670); and all of the Prevailing Wage Rates requirements (ORS 279C.800 through 870) for Public Works Contracts.

**SMALL AND INTERMEDIATE PROCUREMENT PROCESS**

**49-0150 Small Procurements**

**A. General.**

Any Procurement of public improvements not exceeding \$10,000 including amendments may be awarded in any manner deemed practical by the Purchasing Agent or Finance Director. A Procurement may not be artificially divided or fragmented so as to constitute a small Procurement under this section.

**B. Amendments.**

The City may amend a Public Improvement Contract awarded as a small Procurement in accordance with BPC 49-0910, but the cumulative amendments shall not increase the total Contract Price to greater than \$12,500, absent

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Finance Director approval. Before approving such a request, the City shall provide to the Finance Director in Writing the following information:

- a. An explanation of the need for the Amendment;
- b. An explanation why the additional Work was not included in the original scope of Work; and
- c. An estimated cost of the additional Work.

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

#### **A. General.**

Public Improvement Contracts estimated by the City to be valued greater than \$10,000 and less than or equal to \$100,000, may be Awarded in accordance with intermediate level procurement procedures for competitive quotes established by this Section.

#### **B. 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.

#### **C. Request for Quotes.**

The City shall utilize Written requests for quotes whenever reasonably practicable. Written Request for Quotes shall 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 quotations orally, prior to requesting the price quote the City shall state any additional selection criteria and, if the criteria are not of equal value, their relative value. For Public Works Contracts, oral quotations may be utilized only in the event that Written copies of the prevailing wage rates are not required by the Bureau of Labor and Industries.

#### **D. Number of Quotes; Record Required.**

The City shall 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 City shall make a Written record of the effort made to obtain those quotes.

#### **E. Award.**

If Awarded, the City shall Award the Contract to the prospective contractor whose quote will best serve the interests of the City, taking into account the announced selection criteria. If Award is not made to the Offeror offering the lowest price, the City shall make a Written record of the basis for Award.

#### **F. Price Increases**

Intermediate level Public Improvement Contracts obtained by competitive quotes may be increased above the original amount of Award by the City issuance of a Change to the Work or Amendment pursuant to BPC 49-0910, within the following limitations:

1. Project Manager Approval

The Project Manager may approve a price increase of 25% over the original Contract amount when:

- a. the Project Manager determines that a price increase is warranted for additional reasonably-related Work;
- b. the aggregate Contract Price with the Change to Work or Amendment does not exceed \$100,000;
- c. the proposed expenditure is included in the current fiscal year budget; and
- d. the increase is approved by the Finance Director.

2. Contract Review Board Approval

Council must approve any amendment that causes the Contract Price of an Intermediate Procurement to exceed \$100,000.

**G. Amendments.**

Amendments of intermediate level Public Improvement Contracts that exceed the thresholds stated in section A, are specifically authorized, when made in accordance with subsection F of this Rule. Accordingly, such amendments are not considered new procurements and do not require an exemption from competitive bidding.

**H. Prevailing Wage Application**

Notwithstanding the solicitation process described above any public improvement contract not specifically exempted by state statute shall comply with the applicable prevailing wage regulations promulgated by Bureau of Labor and Industries.

**FORMAL PROCUREMENT RULES**

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

**A. Solicitation Document.**

Pursuant to ORS 279C.365 and this Rule, the Solicitation Document for a Public Improvement Contract shall include the following:

1. General Information

- a. Identification of the Public Improvement project, including the character of the Work, and applicable plans, Specifications and other Contract documents;
- b. Notice of any pre-Offer conference as follows:
  - i. The time, date and location of any pre-Offer conference;
  - ii. Whether attendance at the conference will be mandatory or voluntary; and
  - iii. That statements made by the City representatives at the conference are not binding upon the City 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 authorized Person designated for receipt of Offers and the name and title of 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 BPC 49-0300 regarding facsimile Bids or Proposals and BPC 49-0310 regarding Electronic Procurement);
- f. The time, date and place of Opening;
- g. The time and date of Closing after which the City will not accept Offers, which time shall be not less than seven (7) Days after the date of the last publication of the advertisement. If the City is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, the City shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370 (1) (b) and BPC 49-0360. For timing issues relating to Addenda, see BPC 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;
- j. If the Contract resulting from a solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148), a statement that no Offer

will be received or considered by the City 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 City 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 BPC 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);
- n. How the City will notify Offerors of Addenda and how the City will make Addenda available (See BPC 49-0250); and
- o. When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in BPC 49-0360.

## 2. Evaluation Process

A description of the bidding and evaluation process, including the following

- a. A statement that the City 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 City 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 BPC 49-0600 (incorporating by reference OAR 137-049-0600 to 137-049-690), along with the process the City will use to determine acceptability of the Work;
  - i. If the Solicitation Document is an Invitation to Bid, the City shall set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, 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 shall be objective, reasonable estimates based upon information the City has available concerning future use;
  - ii. If the Solicitation Document is a Request for Proposals, the City shall refer to the additional requirements of BPC 49-0600(incorporating by reference OAR 137-049-0650); and

## 3. Contract Provisions.

The City shall include all Contract terms and conditions, including warranties, insurance and bonding requirements, that the City considers appropriate for the Public Improvement project. The City 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; liens and withholding taxes (ORS 279C.505(1));
- 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 shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530 (2));
- l. Maximum hours, holidays and overtime (ORS 279C.540);
- m. Time limitation on claims for overtime (ORS 279C.545);
- n. Prevailing wage rates (ORS 279C.800 to 279C.870);
- o. BOLI Public Works bond (ORS 279C.830(3))
- p. Retainage (ORS 279C.550 to 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 to 701.055 before the subcontractors commence Work under the Contract.

**B. Assignment or Transfer Restricted.**

Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, or transfer rights, or delegate duties under the Contract, either in whole or in part, without the City prior Written consent. Unless otherwise agreed by the City in Writing, such consent shall not relieve the Contractor of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If the City consents in Writing to an assignment, sale, disposal or transfer of the Contractor's rights or delegation of Contractor's duties, the Contractor and its surety, if any, shall remain liable to the City for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the City otherwise agrees in Writing.

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

**A. Notice and Distribution Fee.**

The City shall furnish “Notice” as set forth below in subsections (1) through (3), 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 City may charge a fee or require a deposit for the Solicitation Document. The City may furnish Notice using any method determined to foster and promote competition, including:

1. Mailing Notice of the availability of Solicitation Documents to Persons that have expressed an interest in the City Procurements;
2. Placing Notice on the City Electronic Procurement System; or
3. Placing Notice on the City Internet Web site.

**B. Advertising.**

Pursuant to ORS 279C.360 and this Rule, the City 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.

**1. Local Advertisement**

Unless the City publishes by Electronic Advertisement as permitted under subsection B(2), the City 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 City may determine to be necessary or desirable to foster and promote competition.

**2. Electronic Advertisement**

The City may publish by Electronic Advertisement if the Contract Review Board determines Electronic Advertisement is likely to be cost effective and, by rule or order, authorizes Electronic Advertisement.

**3. Statewide Advertisement**

In addition to the City publication required under subsection B(1) or B(2), the City 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 and no such advertisement has yet been published in a trade newspaper in connection with the solicitation.

**4. Content of Advertisement**

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.430, 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 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 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148).

**49-0220 Prequalification of Offerors**

**A. Prequalification.**

Pursuant to ORS 279C.430 and this Rule, two types of prequalification are authorized:

**1. Mandatory Prequalification.**

The City may, by rule, resolution, ordinance or other law or regulation, require mandatory prequalification of Offerors on forms prescribed by the Contract Review Board. The City must indicate in the solicitation Document if it will require mandatory prequalification. Mandatory prequalification is when the City conditions a Person's submission of an Offer upon the Person's prequalification. The City shall not consider an Offer from a Person that is not prequalified if the City required prequalification.

**2. Permissive Prequalification.**

The City may prequalify a Person for the City solicitation list on forms prescribed by the Contract Review Board, but in permissive prequalification the City shall not limit distribution of a solicitation to that list.

**B. 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 shall be rebuttably presumed qualified to perform similar Work for the City.

**C. Standards for Prequalification.**

A Person may prequalify by demonstrating to the City satisfaction:

1. That 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;
2. The Person's record of performance;
3. The Person's record of integrity;
4. The Person is qualified to contract with the City.

[Note: see also BPC 49-0390(B) regarding standards of responsibility.]

**D. Notice of Denial.**

If a Person fails to prequalify for a mandatory prequalification, the City shall notify the Person, specify the reasons under section (C) of this Rule and inform the Person of the Person's right to a hearing under ORS 279C.445 and 279C.450.

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

**A. Construction Contracts.**

The City shall not consider a Person's Offer to do Work as a contractor, as defined in ORS 701.005(2), unless the Person has a current, valid certificate of registration issued by the Construction Contractors Board at the time the Offer is made.

**B. Landscape Contracts.**

The City shall not consider a Person's Offer to do Work as a landscape contractor as defined in ORS 671.520(2), unless the Person has a current, valid landscape contractors license issued pursuant to ORS 671.560 by the State Landscape Contractors Board at the time the offer is made.

**C. Non-complying Entities.**

The City shall deem an Offer received from a Person that fails to comply with this Rule nonresponsive and shall reject the Offer as stated in ORS 279C.365(1)(k), unless contrary to federal law or subject to different timing requirements set by federal funding agencies.

**49-0240 Pre-Offer Conferences**

A. Purpose.

The City may hold pre-Offer conferences with prospective Offerors prior to Closing, to explain the Procurement requirements, obtain information or to conduct site inspections.

B. Required attendance.

The City 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 an offering firm is present.

C. Scheduled time.

If the City holds a pre-Offer conference, it shall 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.

D. Statements Not Binding.

Statements made by the City's representative at the pre-Offer conference do not change the Solicitation Document unless the City confirms such statements with a Written Addendum to the Solicitation Document.

E. City Announcement.

The City must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with BPC 49-0200(A)(1)(b).

**49-0250 Addenda to Solicitation Documents**

A. Issuance; Receipt.

The City may change a Solicitation Document only by Written Addenda. An Offeror shall provide Written acknowledgement of receipt of all issued Addenda with its Offer, unless the City otherwise specifies in the Addenda or in the Solicitation Document.

B. Notice and Distribution.

The City shall notify prospective Offerors of Addenda consistent with the standards of Notice set forth in BPC 49-0210(A). The Solicitation Document shall specify how the City will provide notice of Addenda and how the City will make the Addenda available (see, BPC 49-0200(A)(1)(n)). For example, "the City will not mail notice of Addenda, but will publish notice of any Addenda on the City's Web site. Addenda may be downloaded off the City's Web site. Offerors should frequently check the City's Web site until closing, i.e., at least once weekly until the week of Closing and at least once daily the week of the Closing,"

C. Timelines; Extensions.

The City shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The City may extend the Closing if the City determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by public interest, the City shall not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.

D. 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 BPC 49-0260, by the close of the City'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 BPC 49-0260, whichever date is later. The City shall consider only an Offeror's request for change or protest to the Addendum; the City shall 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 City's receipt of request for change or protests as set forth in BPC 49-0260(B) and (C).

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

A. Clarification.

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

B. Request for Change.

1. 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 City not less than 10 Days prior to Closing;

2. Content of Request for Change.

- a. An Offeror's Written request for change shall 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 shall 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).

C. Protest.

1. 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 City not less than 10 Days prior to Closing;

2. Content of Protest.

- a. An Offeror's Written protest shall 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 shall mark its protest as follows:
  - i. "Contract Provision Protest"; and
  - ii. Solicitation Document number (or other identification as specified in the Solicitation Document)

D. City Response.

The City is not required to consider an Offeror's request for change or protest after the deadline established for submitting such request or protest. The City shall provide notice to the applicable Person if it entirely rejects a protest. If the City agrees with the Person's request or protest, in whole or in part, the City shall either issue an Addendum reflecting its determination under this section or cancel the under BPC 49-0270.

E. Extension of Closing.

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

**49-0270 Cancellation of Solicitation Document**

**A. Cancellation in the Public Interest.**

The City may cancel a solicitation for good cause if the City finds that cancellation is in the public interest. The City's reasons for cancellation shall be made part of the solicitation file.

**B. Notice of Cancellation.**

If the City cancels a Solicitation prior to Opening, the City shall provide Notice of cancellation in accordance with BPC 49-0210(A). Such notice of cancellation shall:

1. Identify the solicitation;
2. Briefly explain the reason for cancellation; and
3. If appropriate, explain that an opportunity will be given to compete on any re-solicitation.

**C. Disposition of Offers.**

1. Prior to Offer Opening.

If the City cancels a solicitation prior to Offer Opening, the City shall return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the City shall open the Offer to determine the source and then return it to the Offeror.

2. After Offer Opening.

If the City rejects all Offers, the City shall retain all such Offers as part of the City's solicitation file.

**49-0280 Offer Submissions**

**A. Offer and Acceptance.**

The Bid or Proposal is the Bidder's or Proposer's offer to enter into a Contract.

1. Offers are "Firm Offers"

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 City's acceptance for the period specified in BPC 49-0410. The City may elect to accept the Offer at any time during the specified period, and the City's Award of the Contract to a Bidder constitutes acceptance of the Offer and binds the Offeror to the Contract.

2. Negotiation of Certain Contract Provisions

Notwithstanding the fact that a competitive Proposal is a "Firm Offer" for the period specified in BPC 49-0410, the City 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 these Rules or the Solicitation Document, Proposers are bound to an obligation to negotiate in good faith and only on those terms that these Rules or the Solicitation Document has reserved for negotiation.

[Note: See also BPC 49-0600(incorporating by reference OAR 137-049-0650 on Requests for Proposals) and BPC 49-0290 on Bid or Proposal Security.]

**B. Responsive Offer.**

The City may Award a Contract only to a Responsible Offeror with a Responsive Offer.

**C. Contingent Offers.**

Except to the extent that an Offeror is authorized to propose certain terms and conditions pursuant to BPC 49-0600(incorporating by reference OAR 137-049-0650), an Offeror shall not make an Offer contingent upon the City's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

**D. Offeror's Acknowledgement.**

By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the

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Solicitation Document. If the Request for Proposals permits Proposal of alternative terms under BPC 49-0600(incorporating by reference OAR 137-049-0650), 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 City in Writing.

### **E. Instructions.**

An Offeror shall submit and Sign its Offer in accordance with the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document.

### **F. Forms.**

An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.

### **G. Documents.**

An Offeror shall provide the City with all documents and Descriptive Literature required under the Solicitation Document.

### **H. Facsimile or Electronic Submissions.**

If the City permits facsimile or electronic Offers in the Solicitation Document, the Offeror may submit facsimile or electronic Offers in accordance with the Solicitation Document. The City shall not consider facsimile or electronic Offers unless authorized by the Solicitation Document.

### **I. Product Samples and Descriptive Literature.**

The City 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 City will dispose of Product Samples or return or make available for return Product Samples to the Offeror in accordance with the Solicitation Document.

### **J. Identification of Offers**

#### **1. Marked Envelopes**

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

#### **2. Mismarked or Misdelsivered Offers**

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

### **K. Receipt of Offers.**

The Offeror is responsible for ensuring that the City receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

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

### **A. Security Amount.**

If the City requires Bid or Proposal security, it shall 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 City shall not use Bid or Proposal security to discourage competition. The City shall clearly state any Bid or Proposal security requirements in its Solicitation Document. The Offeror shall forfeit Bid or Proposal security after Award if the Offeror fails to execute the Contract and promptly return it with any required performance bond and payment bond and any required proof of insurance. See ORS 279C.365(4) and ORS 279C.385.

### **B. Requirement for Bid Security (Optional for Proposals).**

Unless the City has otherwise exempted a solicitation or class of solicitations from Bid security pursuant to ORS 279C.390, the City shall require Bid security for its solicitation of Bids for Public Improvements. This requirement applies only to Public Improvement Contracts with a value, estimated by the City, of more than \$100,000 or, in the case of Contracts for highways, bridges and other transportation projects, more than \$50,000. See ORS 279C.365(6). The City may also require Bid security even if it has exempted a class of solicitations from Bid security.

[Note: See also ORS 279C.400(5) relating to required Proposal security in an RFP].

**C. Form of Bid or Proposal Security.**

The City may accept only the following forms of Bid or Proposal security; which shall be submitted with or posted for all bids or proposals as security unless the contract for which a bid is submitted has been exempted from this requirement.

1. A surety bond from a surety company authorized to do business in the State of Oregon;
2. An irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or
3. A cashier's check or Offeror's certified check.

**D. Return of Security.**

The City shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been fully executed and all required bonds and insurance have been provided, or after all Offers have been rejected. The City 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.

**49-0300 Facsimile Bids and Proposals**

**A. City Authorization.**

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

1. To receive, identify record and safeguard facsimile Offers;
2. To ensure timely delivery of Offers to the location of Opening; and
3. To preserve the Offers as sealed.

**B. Provisions To Be Included in Solicitation Document.**

In addition to all other requirements, if the City authorizes a facsimile Offer for Bids or Proposals, the City shall include in the Solicitation Document (other than in a Request for Quotes) the following:

1. 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 City via a facsimile machine.";
2. 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.";
3. A provision that requires Offerors to Sign their facsimile Offers;
4. A provision substantially in the form of the following: "The City reserves the right to Award the Contract solely on the basis of the facsimile Offer. However, upon the City's request the apparent successful Offeror shall promptly submit its complete original Signed Offer.";
5. The data and compatibility characteristics of the City receiving facsimile machine as follows:
  - a. Telephone number; and



- b. Compatibility characteristics, e.g., make and model number, receiving speed, communications protocol; and
- 6. A provision that the City 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.

**49-0310 Electronic Procurement**

A. General.

The City may utilize Electronic Advertisement of Public Improvement Contracts in accordance with ORS 279C.360(1), provided that advertisement of such Contracts with an estimated Contract Price in excess of \$125,000 must also be published in a trade newspaper of general statewide circulation, and may post notices of intent to Award electronically as provided by ORS 279C.410(7).

B. Alternative Procedures.

In the event that the City desires to direct or permit the submission and receipt of Offers for a Public Improvement Contract, by electronic means, as allowed under ORS 279C.365(1)(d), it shall first promulgate supporting procedures substantially in conformance with the Electronic Procurement provisions under ORS chapter 279B, taking into account ORS chapter 279C requirements for Written bids, opening bids publicly, bid security, first-tier subcontractor disclosure and inclusion of prevailing wage rates.

C. Interpretation.

Nothing in this Rule shall be construed as prohibiting the City 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.

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

A. Modifications.

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

- 1. Bid (or Proposal) Modification; and
- 2. Solicitation Number (or Other Identification as specified in the Solicitation Document).

B. Withdrawals

- 1. 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 City 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.

2. The City may release an unopened Offer withdrawn under subsection B(1) to the Offeror or its authorized representative, after voiding any date and time stamp mark.

3. The Offeror shall 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).

**C. Documentation.**

The City shall include all documents relating to the modification or withdrawal of Offers in the appropriate solicitation file.

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

**A. Receipt.**

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

**B. Opening and Recording.**

The City shall publicly open Offers including any modifications made to the Offer pursuant to BPC 49-0320. In the case of Invitations to Bid, to the extent practicable, the City shall read aloud the name of each Bidder, the Bid price(s), and such other information as the City considers appropriate. In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the City will not read Offers aloud.

**C. Availability.**

After Opening, the City shall make Bids available for public inspection; however, pursuant to ORS 279C.410 Proposals are not required to be available for public inspection until after notice of intent to Award is issued. In any event the City 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. e.g., ORS 192.501(2); ORS 646.461 to 646.475.) To the extent the City determines such designation is not in accordance with applicable law, the City shall make those portions available for public inspection. The Offeror shall separate information designated as confidential from other non-confidential information at the time of submitting its Offer. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and shall be publicly available regardless of an Offeror's designation to the contrary.

**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 City shall not consider late Offers, withdrawals or modifications except as permitted in BPC 49-0350 or 49-0390.

**49-0350 Mistakes**

**A. Generally.**

To protect the integrity of the competitive Procurement process and to assure fair treatment of Offerors, the City should carefully consider whether to permit waiver, correction or withdrawal of Offers for certain mistakes.

**B. City Treatment of Mistakes.**

The City shall not allow an Offeror to correct or withdraw an Offer for an error in judgment. If the City discovers certain mistakes in an Offer after Opening, but before Award of the Contract, the City may take the following action:

- 1. The City 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.
2. The City may wave or permit an Offeror to contest a mistake that does not affect the price, quantity or quality of performance.
3. The City 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 City's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example a missing unit price may be established by dividing the total price for the units by the quantity of units for that item or a missing, or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). Unit prices shall prevail over extended prices in the event of a discrepancy between extended prices and unit prices.
4. The City may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:
  - a. The nature of the error;
  - b. That the error is not a minor informality under this subsection or an error in judgment;
  - c. That the error cannot be corrected or waived under subsection (2) of this section;
  - d. That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;
  - e. That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;
  - f. That the Offeror will suffer substantial detriment if the City does not grant the Offeror permission to withdraw the Offer;
  - g. That the City's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on the City or the public it represents; and
  - h. That the Offeror promptly gave notice of the claimed error to the City.
5. The criteria in subsection (B)(4) of this Rule shall determine whether the City will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether the City 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 City based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by the City, 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.

**C. Rejection for Mistakes.**

The City shall reject any Offer in which a mistake is evident on the face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents submitted with the Offer.

**D. 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 chapter 49 only to the extent permitted by applicable law.

**49-0360 First-Tier Subcontractors; Disclosure and Substitution**

**A. Required Disclosure.**

Within two working hours after the Bid Closing on an ITB for a Public Improvement having a Contract Price anticipated by the City to exceed \$100,000, all Bidders shall submit to the City 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:

1. Five percent of the total Contract Price, but at least \$15,000; or
2. \$350,000, regardless of the percentage of the total Contract Price.

**B. Bid Closing, Disclosure Deadline and Bid Opening.**

For each ITB to which this Rule applies, the City shall:

1. Set the Bid Closing on a Tuesday, Wednesday or Thursday, and at a time between 2 p.m. and 5 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;
2. Open Bids publicly immediately after the Bid Closing; and
3. Consider for Contract Award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed by the City.

**C. Bidder Instructions and Disclosure Form.**

For the purposes of this Rule, the City's solicitation shall:

1. Prescribe the disclosure form that must be utilized, substantially in the form set forth in ORS 279C.370 (2); and
2. 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:

- i. The subcontractor's name,
- ii. The category of Work that the subcontractor would be performing, and
- iii. 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 CITY MUST REJECT A BID IF THE BIDDER FAILS TO SUBMIT THE DISCLOSURE FORM WITH THIS INFORMATION BY THE STATED DEADLINE (SEE BPC 49-0360)."**

**D. Submission.**

A Bidder shall submit the disclosure form required by this Rule either in its Bid submission, or within two working hours after Bid Closing in the manner specified by the ITB.

**E. Responsiveness.**

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

**F. City Role.**

The City shall obtain, and make available for public inspection, the disclosure forms required by ORS 279C.370 and this Rule. The City shall also provide copies of disclosure forms to the Bureau of Labor and Industries as required by ORS 279C.835. The City is not required to determine the accuracy or completeness of the information provided on disclosure forms.

**G. Substitution.**

Substitution of affected first-tier subcontractors shall be made only in accordance with ORS 279C.585. The City shall accept Written submissions filed under that statute as public records. Aside from issues involving inadvertent clerical error under ORS 279C.585, The City does not have a statutory role or duty to review, approve or resolve disputes concerning such substitutions. [Note: See also ORS 279C.590 regarding complaints to the Construction Contractors Board on improper substitution.]

**49-0370 Disqualification of Persons**

**A. Authority.**

The City may disqualify a Person from consideration of Award of the City's Contracts after providing the Person with notice and a reasonable opportunity to be heard in accordance with sections (B) and (D) of this Rule.

**1. Standards for Conduct Disqualification.**

As provided in ORS 279C.440, the City 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 City to be so serious as to justify Conduct Disqualification. A violation under this subsection A(1)(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.

**2. Standards for DBE Disqualification.**

As provided in ORS 200.065, 200.075 or 279A.110, the City 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 City 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 City pursuant to ORS 200.065.
- b. For a DBE Disqualification under ORS 200.075, the City 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 Work 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 the City disqualifies a Person for a DBE Disqualification under ORS 200.075, the City shall not permit such Person to participate in the City's Contracts.
- c. For a DBE Disqualification under ORS 279A.110, the City may disqualify a Person if the City finds that the Person discriminated against minority, women or emerging small business enterprises in awarding a subcontract under a contract with the City.

**B. Notice of Intent to Disqualify.**

The City shall notify the Person in Writing of a proposed Disqualification personally or by registered or certified mail, return receipt requested. This notice shall:

- 1. State that the City intends to disqualify the Person;
- 2. Set forth the reasons for the Disqualification;
- 3. 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 City does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived its right to a hearing;
- 4. Include a statement of the authority and jurisdiction under which the hearing will be held;
- 5. Include a reference to the particular sections of the statutes and rules involved;
- 6. State the proposed Disqualification period; and
- 7. State that the Person may be represented by legal counsel.

**C. Hearing.**

The City shall schedule a hearing upon the City's receipt of the Person's timely request. The City shall notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.

**D. Notice of Disqualification.**

The City will notify the Person in Writing of its Disqualification, personally or by registered or certified mail, return receipt requested. The notice shall contain:

- 1. The effective date and period of Disqualification;
- 2. The grounds for Disqualification; and

3. A statement of the Person's appeal rights and applicable appeal deadlines. For a Conduct Disqualification or a DBE Disqualification under ORS 279A.110, the disqualified person must notify the City in Writing within three business Days after receipt of the City's notice of Disqualification if the Person intends to appeal the City's decision.

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

##### A. General.

A Public Improvement Contract, if Awarded, must be Awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. See BPC 49-0390, and Rules for Alternative Contracting Methods at BPC 49-0600(incorporating by reference OAR 137-049-0600 to 137-049-0690).

##### B. Bid Evaluation Criteria.

Invitations to Bid may solicit lump-sum Offers, unit-price Offers or a combination of the two.

1. Lump Sum.

If the ITB requires a lump-sum Bid, without additive or deductive alternates, or if the City 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 City, for the purpose of comparing Bids.

2. 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 City, for the purpose of comparing Bids. The City shall specify within the Solicitation Document the estimated quantity of the procurement to be used for determination of the low Bidder. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price governs. (See BPC 49-0350(B)(2)).

##### C. Proposal Evaluation Criteria.

If the City's Contract Review Board has exempted the Procurement of a Public Improvement from the competitive bidding requirements of ORS 279C.335 (1), and has directed the City to use an Alternative Contracting Method under ORS 279C.335 (4), the City shall set forth the evaluation criteria in the Solicitation Documents. See BPC 49-0600(incorporating by reference OAR 137-049-0640, ORS 279C.335 and 279C.405).

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

##### A. General.

If Awarded, the City shall 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 (ORS 279C.375(3)(a)) or is ineligible for Award as a nonresident education service district (ORS 279C.325). The City 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. ORS 279C.375(5) permits multiple contract awards when specified in the ITB.

##### B. Determination of Responsibility.

Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the City shall 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 City must determine that the Offeror:

1. 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;
2. 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 City should carefully scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in contract

performance. In reviewing the Offeror's performance, the City should determine whether the Offeror's deficient performance was expressly excused under the terms of contract, or whether the Offeror took appropriate corrective action. The City may review the Offeror's performance on both private and Public Contracts in determining the Offeror's record of contract performance. The City shall make its basis for determining an Offeror not Responsible under this paragraph part of the Solicitation file;

3. Has a satisfactory record of integrity. An Offeror may lack integrity if the City determines the Offeror demonstrates a lack of business ethics such as violation of state safety and environmental laws or false certifications made to the City or other Contracting Agency. The City may find an Offeror not Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Conduct Disqualification under BPC 49-0370 may be used to determine an Offeror's integrity. The City 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. The City shall make its basis for determining that an Offeror is not Responsible under this paragraph part of the Solicitation file;

4. Is legally qualified to contract with the City; and

5. Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by the City concerning responsibility, the City shall base the determination of responsibility upon any available information, or may find the Offeror not Responsible.

In addition to making the responsibility determination under ORS 279C.375(3)(b) and this section, the City may consider, as authorized by House Bill 2094 (2019 Oregon Laws, chapter 124), as part of the City's evaluation of an Offer, whether the Offeror owes a liquidated and delinquent debt to the State of Oregon.

**C. Documenting City Determination**

The City shall document their 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.

**D. City Evaluation.**

The City shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. The City shall not evaluate an Offer using any other requirement or criterion.

**E. Offeror Submissions.**

1. The City may require an Offeror to submit Product Samples, descriptive literature, technical data, or other material and may also require any of the following prior to Award:

- a. Demonstration, inspection or testing of a product prior to Award for characteristics such as compatibility, quality or workmanship;
- b. Examination of such elements as appearance or finish; or
- c. Other examinations to determine whether the product conforms to Specifications.

2. The City shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. The City shall reject an Offer providing any product that does not meet the Solicitation Document requirements. The City's rejection of an Offer because it offers nonconforming Work or materials is not Disqualification and is not appealable under ORS 279C.445.



**F. Evaluation of Bids.**

The City shall use only objective criteria to evaluate Bids as set forth in the ITB. The City shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid.

**1. Nonresident Bidders.**

In determining the lowest Responsive Bid, the City shall, in accordance with BPC 46-0310, add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.

**2. Clarifications.**

In evaluating Bids, the City may seek information from a Bidder only to clarify the Bidder's Bid. Such clarification shall not vary, contradict or supplement the Bid. A Bidder must submit Written and Signed clarifications and such clarifications shall become part of the Bidder's Bid.

**3. Negotiation Prohibited.**

The City shall not negotiate scope of Work or other terms or conditions under an Invitation to Bid process prior to Award.

**G. Evaluation of Proposals.**

See BPC 49-0600 (incorporating by reference OAR 137-049-0650 regarding rules applicable to Requests for Proposals).

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

**A. Notice.**

At least seven days before the Award of a Public Improvement Contract, the City shall issue to each Bidder (pursuant to ORS 279C.375(2)) and each Proposer (pursuant to ORS 279C.410(7)), or post, electronically or otherwise, a notice of the City's intent to Award the Contract. See ORS 279C.375(2). This requirement does not apply to Award of a small (under \$10,000), or intermediate (informal competitive quotes) Public Improvement Contract awarded under ORS 279C.335(1)(c) or (d).

**B. Form and Manner of Posting.**

The form and manner of posting notice shall conform to customary practices within the City's procurement system, and may be made electronically. The referral of a recommendation to the Contract Review Board to Award a Contract is sufficient notice of the City's intent to award the Contract.

**C. Finalizing Award.**

The City's Award shall not be final until the later of the following:

1. Seven Days after the date of the notice, unless the Solicitation Document provided a different period for protest (See ORS 279C.375); or
2. The City provides a Written response to all timely-filed protests that denies the protest and affirms the Award.

**D. Prior Notice Impractical.**

Posting of notice of intent to award shall not be required when the City determines that it is impractical due to unusual time constraints in making prompt Award for its immediate procurement needs, documents the Contract file as to the reasons for that determination, and posts notice of that action as soon as reasonably practical.

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

**A. Basis of Award.**

After Award, the City shall make a record showing the basis for determining the successful Offeror part of the City's solicitation file.

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### **B. Contents of Award Record for Bids.**

The City's record shall include:

1. All submitted Bids;
2. Completed Bid tabulation sheet; and
3. Written justification for any rejection of lower Bids.

### **C. Contents of Award Record for Proposals.**

Where the use of Requests for Proposals is authorized as set forth in BPC 49-0600(incorporating by reference OAR 137-049-0650), the City's record shall include:

1. All submitted Proposals.
2. The completed evaluation of the Proposals;
3. Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and
4. If the City permitted negotiations in accordance with BPC 49-0600(incorporating by reference OAR 137-049-0650), the City's completed evaluation of the initial Proposals and the City's completed evaluation of final Proposals.

### **D. Contract Document.**

The successful Offeror shall promptly execute a formal contract and execute and deliver to the City any required performance bond and a payment bond. The City shall deliver a fully executed copy of the final contract to the successful Offeror.

### **E. Bid Tabulations and Award Summaries.**

Upon request of any Person the City shall 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 City may also provide tabulations of Bids and Proposals Awarded on designated Web sites or on the City's Electronic Procurement System.

### **F. Availability of Solicitation Files.**

The City shall make completed solicitation files available for public review at City Hall.

### **G. Copies from Solicitation Files.**

Any Person may obtain copies of material from solicitation files upon payment of a reasonable copying charge.

## **49-0410 Time for City Acceptance; Extension**

### **A. Time for Offer Acceptance.**

An Offeror's Bid, or Proposal submitted as a Firm Offer (see BPC 49-0280), is irrevocable, valid and binding on the Offeror for not less than 30 Days from Closing unless otherwise specified in the Solicitation Document.

### **B. Extension of Acceptance Time.**

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

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

### **A. Bids.**

Except as permitted by ORS 279C.340 and BPC 49-0430 when all bids exceed the cost estimate, the City shall not negotiate with any Bidder prior to Contract Award. After Award of the Contract, the City and Contractor may modify the resulting Contract only by change order or amendment to the Contract in accordance with BPC 49-0910.

**B. Requests for Proposals.**

The City may conduct discussions or negotiations with Proposers only in accordance with the requirements of BPC 49-0600 (incorporating by reference OAR 137-049-0650).

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

**A. Generally.**

In accordance with ORS 279C.340, if all Responsive Bids from Responsible Bidders on a competitively Bid Project exceed the City's Cost Estimate, prior to Contract Award the City 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 City's Cost Estimate. The subcontractor disclosure and substitution requirements of BPC 49-0360 do not apply to negotiations under this Rule.

**B. Definitions.**

The following definitions apply to this administrative rule:

1. "Cost Estimate" means the City's most recent pre-Bid, good faith assessment of anticipated Contract costs, consisting either of an estimate of an architect, engineer, photogrammetrist, transportation planner, land surveyor or other qualified professional, or confidential cost calculation worksheets, where available, and otherwise consisting of formal planning or budgetary documents.
2. "Other Options" means those items generally considered appropriate for negotiation in the RFP process, relating to the details of Contract performance as specified in BPC 49-0600 (incorporating by reference OAR 137-049-0650), but excluding any material requirements previously announced in the solicitation process that would likely affect the field of competition.
3. "Project" means a Public Improvement.
4. "Value Engineering" means the identification of alternative methods, materials or systems which provide for comparable function at reduced initial or life-time cost. It includes proposed changes to the plans, Specifications, or other Contract requirements which may be made, consistent with industry practice, under the original Contract by mutual agreement in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the Public Improvement. Cost savings include those resulting from life cycle costing, which either may increase or decrease absolute costs over varying time periods.

**C. 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 City, shall be excluded from consideration.

**D. Scope of Negotiations.**

The City shall 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 City to participate in the Bidding process had the change been made during the solicitation process rather than during negotiation. This Rule shall not be construed to prohibit re-solicitation of trade subcontracts.

**E. Discontinuing Negotiations.**

The City may discontinue negotiations at any time, and shall do so if it appears to the City that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to rebid any portion of the project, or to obtain subcontractor pricing information upon request, shall be considered a lack of good faith.

**F. 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.

**G. 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 192.311 to 192.478.

**49-0440 Rejection of Offers**

**A. Rejection of an Offer.**

1. The City 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.
2. The City shall reject an Offer upon the City's finding that the Offer:
  - a. Is contingent upon the City's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;
  - b. Takes exception to terms and conditions (including Specifications);
  - c. Attempts to prevent public disclosure of matters in contravention of the terms and conditions of Solicitation Document or in contravention of applicable law;
  - d. Offers Work that fails to meet the Specifications of the Solicitation Document;
  - e. Is late;
  - f. Is not in substantial compliance with the Solicitation Documents;
  - g. Is not in substantial compliance with all prescribed public solicitation procedures.
3. The City shall reject an Offer upon the City's finding that the Offeror:
  - a. Has not been prequalified under ORS 279C.430 and the City required mandatory prequalification;
  - b. Has been Disqualified;
  - c. Has been declared ineligible under ORS 279C.860 by the Commissioner of Bureau of Labor and Industries and the Contract is for a Public Work;
  - d. Is listed as not qualified by the Construction Contractors Board, if the Contract is for a Public Improvement;
  - e. Has not met the requirements of ORS 279A.105 if required by the Solicitation Document;
  - f. Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;
  - g. Has failed to provide the certification required under section 3 of this Rule;
  - h. Is not Responsible. See BPC 49-0390(B) regarding the City's determination that the Offeror has met statutory standards of responsibility.

**B. Form of Business.**

For purposes of this Rule, the City may investigate any Person submitting an Offer. The investigation may include that Person's officers, Directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this Rule or to apply the Disqualification provisions of ORS 279C.440 to 279C.450 and BPC 49-0370.

**C. Certification of Non-Discrimination.**

As part of the Offer the Offeror shall certify and deliver to the City Written certification, that the Offeror has not discriminated and will not discriminate against minority, women or emerging small business enterprises in obtaining any required subcontracts. Failure to do so shall be grounds for disqualification.

**D. Rejection of all Offers.**

The City may reject all Offers for good cause upon the City's Written finding it is in the public interest to do so. The City shall notify all Offerors of the rejection of all Offers, along with the good cause justification and finding.

**E. Criteria for Rejection of All Offers.**

The City may reject all Offers upon a Written finding that:

1. The content of or an error in the Solicitation Document, or the solicitation process unnecessarily restricted competition for the Contract;
2. The price, quality or performance presented by the Offerors is too costly or of insufficient quality to justify acceptance of the Offer;
3. Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;
4. 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;
5. The City cancels the solicitation in accordance with BPC 49-0270; or
6. Any other circumstance indicating that Awarding the Contract would not be in the public interest.

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

**A. Purpose.**

An adversely affected or aggrieved Offeror must exhaust all avenues of administrative review and relief before seeking judicial review of the City's Contractor selection or Contract Award decision.

**B. Notice of Competitive Range.**

Unless otherwise provided in the RFP, when the competitive Proposal process is authorized under BPC 49-0600 (incorporating by reference OAR 137-049-0650), the City shall provide Written notice to all Proposers of the City's determination of the Proposers included in the Competitive Range. The City notice of the Proposers included in the Competitive Range shall not be final until the later of the following:

1. 10 Days after the date of the notice, unless otherwise provided therein; or
2. Until the City 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.

**C. Notice of Intent to Award.**

**1. Issuance of Notice.**

The City shall provide Written notice to all bidders and proposers of the City's intent to award the Contract, as provided by BPC 49-0395.

**2. Finality.**

The City's Award shall not be final until the later of the following:

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- a. The expiration of the protest period provided in this Rule; or
- b. The City provides Written responses to all timely-filed protests denying the protests and affirming the Award.

### **D. Right to Protest Award.**

1. An adversely affected or aggrieved Offeror may submit to the City a Written protest of the City'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.
2. The Offeror's protest must be in Writing and must specify the grounds upon which the protest is based.
3. 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 nonresponsive; or
  - b. The City 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.
4. The City shall 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 City's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.

### **E. Right to Protest Competitive Range.**

1. An adversely affected or aggrieved Proposer may submit to the City a Written protest of the City 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 RFP's at BPC 49-0600(incorporating by reference OAR 137-049-0650).
2. The Proposer's protest shall be in Writing and must specify the grounds upon which the protest is based.
3. 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 City 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.
4. The City shall 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 City's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.

### **F. Authority to Resolve Protests.**

The City Manager may settle or resolve a Written protest submitted in accordance with the requirements of this Rule.

**G. City Response.**

The Finance Director shall issue a Written recommended disposition of the protest in a timely manner. The recommendation shall be forwarded to the Contract Review Board. The Contract Review Board shall consider the protest and issue a Written disposition of the protest in a timely manner. Judicial review of the Contract Review Board's decision is available if provided by statute.

**H. Award.**

The successful Offeror shall promptly execute the Contract after the Award is final. The City shall execute the Contract only after it has obtained all applicable required documents and approvals.

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

**A. Public Improvement Contracts.**

Unless the required performance bond is waived under ORS 279C.380 (1)(a), excused in cases of emergency under ORS 279C.380 (4), or unless the Contract Review Board exempts a Contract or classes of contracts from the required performance bond and payment bond pursuant to ORS 279C.390, the Contractor shall execute and deliver to the City a performance bond and a payment bond each in a sum equal to the Contract Price for all Public Improvement Contracts. This requirement applies only to Public Improvement Contracts with a value, estimated by the City, of more than \$100,000 or, in the case of Contracts for highways, bridges and other transportation projects, more than \$50,000. See ORS 279C.380(5). Under ORS 279C.390(3)(b) the Director of the Oregon Department of Transportation may reduce the performance bond amount for contracts financed from the proceeds of bonds issued under ORS 367.620(3)(a). See also BPC 49-0815 and BOLI rules at OAR 839-025-0015 regarding the separate requirement for a Public Works bond.

**B. Other Construction Contracts.**

The City may require performance security for other construction Contracts that are not Public Improvement Contracts. Such requirements shall be expressly set forth in the Solicitation Document.

**C. Requirement for Surety Bond.**

The City shall 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 City may accept a cashier's check or certified check in lieu or 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.

**D. Time for Submission.**

The apparent successful Offeror must promptly furnish the required performance security upon the City request. If the Offeror fails to furnish the performance security as requested, the City 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 City discretion, the Offeror shall forfeit its Bid or Proposal security.

**49-0470 Substitute Contractor**

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

**49-0490 Foreign Contractor**

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

**ALTERNATIVE CONTRACTING METHODS**

**49-0600 Incorporation by Reference**

OAR 137-049-0600 to 137-049-690 relating to Alternative Contract Methods for Public Improvement Contracts are hereby incorporated by reference into these Rules and made applicable to the City. Those methods include, but are not limited to the following forms of contracting.

1. Request for Qualifications
2. Requests for Proposals;
3. Design – Build;
4. Energy Savings Performance Contract (ESPC); and
5. Construction Manager/General Contractor (CM/GC)

**49-0610 [Reserved]**

**49-0620 [Reserved]**

**49-0630 [Reserved]**

**49-0640 [Reserved]**

**49-0645 [Reserved]**

**49-0650 [Reserved]**

**49-0660 [Reserved]**

**49-0670 [Reserved]**

**49-0680 Reserved]**

**49-0690 [Reserved]**

**CONTRACT PROVISIONS**

**49-0800 Required Contract Clauses**

Except as provided by BPC 49-0150 and 49-0160, the City shall include in all Solicitation Documents for Public Improvement Contracts all of the ORS chapter 279C required Contract clauses, as set forth in the checklist contained in BPC 49-0200(A)(3) regarding Solicitation Documents. The following series of Rules provides further guidance regarding particular Public Contract provisions.

**49-0810 Waiver of Delay Damages Against Public Policy**

The City shall 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 City'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.



**49-0815 BOLI Public Works Bond**

Pursuant to ORS 279C.830(3), 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.

**49-0820 Retainage**

A. Withholding of Retainage.

Except to the extent the City's Charter or City ordinance laws require otherwise, the City shall not retain an amount in excess of five percent of the Contract Price for Work completed. If the Contractor has performed at least 50 percent of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written approval, the City may, in its discretion, reduce or eliminate retainage on any remaining progress payments. The City shall respond in Writing to all such applications within a reasonable time. When the Contract Work is 97-1/2 percent completed, the City may, at its discretion and without application by the Contractor, reduce the retained amount to 100 percent of the value of the remaining unperformed Contract Work. The City may at any time reinstate retainage. Retainage shall be included in the final payment of the Contract Price.

B. Form of Retainage.

In lieu of withholding moneys from payment as retainage, the City shall accept from a contractor (1) or (2), unless the City finds in writing that accepting a bond or instrument described in part (1) or (2) of this section poses an extraordinary risk that is not typically associated with the bond or instrument:

1. Bonds, securities or other instruments that are deposited and accepted as provided in subsection (D)(1) of this rule; or
2. A surety bond deposited as provided in subsection (D) (2) of this rule.

C. Deposit in Interest-Bearing Accounts.

If the contract price exceeds \$500,000, the City shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association. Earnings on such account shall accrue to the Contractor.

D. Alternatives to Cash Retainage.

In lieu of cash retainage to be held by the City, the Contractor may substitute one of the following:

1. Deposit of bonds, securities or other instruments:
  - a. The Contractor may deposit bonds, securities or other instruments with the City or in any bank or trust company to be held for the benefit of the City. If the City accepts the deposit, the City shall 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 City Attorney or City Finance Director, which may include, without limitation:
    - i. Bills, certificates, notes or bonds of the United States.
    - ii. Other obligations of the United States or agencies of the United States.
    - iii. Obligations of a corporation wholly owned by the Federal Government.
    - iv. Indebtedness of the Federal National Mortgage Association.
    - v. General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.
    - vi. Irrevocable letters of credit issued by an insured institution as defined in ORS 706.008.
  - c. Upon the City determination that all requirements for the protection of the City interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu of retainage.

2. Deposit of surety bond.

The City, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the City in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond shall accept surety bonds from its subcontractors and suppliers in lieu of retainage. In such cases, retainage shall be reduced by an amount equal to the value of the bond, and the excess shall be reimbursed.

E. Recovery of Costs.

By reduction of the final payment, the City may recover from the Contractor all costs incurred in the proper handling of retainage and securities.

F. Additional Retainage When Certified Payroll Statements Not Filed.

Pursuant to ORS 279C.845(7) and OAR 839-025-0010, if a Contractor who is required to file certified payroll statements fails to do so, the City shall retain 25 percent of any amount earned by the Contractor on a Public Works Contract until the Contractor has filed such statements with the City. The City 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.

**49-0830 Contractor Progress Payments**

A. Request for Progress Payments.

Each month the Contractor shall submit to the City its Written request for a progress payment based upon an estimated percentage of Contract completion. At the City discretion, this request may also include the value of material to be incorporated in the completed Work that 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 City will make a progress payment to the Contractor, which shall be equal to: (i) the value of completed Work; (ii) less those amounts that have been previously paid; (iii) less other amounts that may be deductible or owing and due to the City for any cause; and (iv) less the appropriate amount of retainage.

B. Progress Payments do not Mean Acceptance of Work.

Progress payments shall not be construed as an acceptance or approval of any part of the Work and shall not relieve the Contractor of responsibility for defective workmanship or material.

**49-0840 Interest**

A. Prompt Payment Policy.

The City shall pay promptly all payments due and owing to the Contractor on Contracts for Public Improvements.

B. Interest on Progress Payments.

Late payment interest shall begin to accrue on payments due and owing on the earlier of 30 Days after receipt of invoice or 15 Days after City approval of payment (the "Progress Payment Due Date"). The interest rate shall 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 percent.

C. Interest on Final Payment.

Final payment on the Contract Price, including retainage, shall be due and owing no later than 30 Days after Contract completion and acceptance of the Work. Late-payment interest on such final payment shall thereafter accrue at the rate of one and one-half percent per month until paid.

D. 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 shall 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, shall accrue from the later of the Progress Payment Due Date, or thirty Days after the Contractor submitted a claim for payment to the City in Writing or otherwise in accordance with the Contract requirements.

**49-0850 Final Inspection**

A. Notification of Completion; Inspection.

The Contractor shall notify the City in Writing when the Contractor considers the Contract Work completed. Within 15 Days of receiving Contractor's notice, the City will inspect the project and project records, and will either accept the Work or notify the Contractor of remaining Work to be performed.

B. Acknowledgment of Acceptance.

When the City finds that all Work required under the Contract has been completed satisfactorily, the City shall acknowledge acceptance of the Work in Writing.

**49-0860 Public Works Contracts**

A. Generally.

ORS 279C.800 to 279C.870 regulates Public Works Contracts, as defined in ORS 279C.800(5), and requirements for payment of prevailing wage rates. See also BOLI rules at OAR chapter 839.

B. Required Contract Conditions.

As detailed in the above statutes and rules, every Public Works Contract must contain the following provisions:

1. City authority to pay certain unpaid claims and charge such amounts to Contractors, as set forth in ORS 279C.515(1).
2. Maximum hours of labor and overtime, as set forth in ORS 279C.520 (1).
3. Employer notice to employees of hours and days that employees may be required to work, as set forth in ORS 279C.520(2).
4. Contractor required payments for certain services related to sickness or injury, as set forth in ORS 279C.530.
5. A requirement for payment of prevailing rate of wage, as set forth in ORS 279C.830(1). If both state and federal prevailing rates of wage apply, the contract and every subcontract must provide that all workers must be paid the higher of the applicable state or federal prevailing rate of wage.
6. A requirement for filing a public works bond by contractor and every subcontractor, as set forth in ORS 279C.830(2):

C. 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:

1. The state prevailing rate of wage, and, if applicable, the federal 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.
2. If both state and federal prevailing rates of wage apply, a requirement that the contractor shall pay the higher of the applicable state or federal prevailing rate of wage to all workers. See BOLI rules at OAR 839-025-0020 and 0035.
3. A requirement for filing a public works bond by contractor and every subcontractor, as set forth in ORS 279C.830(2).

**49-0870 Specifications; Brand Name Products**

A. Generally.

The City Solicitation Document shall not expressly or implicitly require any product by brand name or mark, nor shall it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279C.345(2).

B. Equivalents.

The City 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 City shall determine, in its sole discretion, whether an Offeror's alternate product is "equal" or "equivalent."

**49-0880 Records Maintenance; Right to Audit Records**

A. Records Maintenance; Access.

Contractors and subcontractors shall maintain all fiscal records relating to Contracts in accordance with generally accepted accounting principles ("GAAP"). In addition, Contractors and subcontractors shall 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 shall 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 City at reasonable times and places, whether or not litigation has been filed as to such claims.

B. Inspection and Audit.

The City 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 the Person must provide cost or pricing data under a Contract, the Person shall maintain such Records that relate to the cost or pricing data for 3 years from the date of final payment under the Contract, unless a shorter period is otherwise authorized in Writing.

C. Records Inspection; Contract Audit.

The City, and its authorized representatives, shall 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 shall maintain the Records and keep the Records accessible and available at reasonable times and places for a minimum period of 3 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.

**49-0890 City Payment for Unpaid Labor or Supplies**

A. Contract Incomplete.

If the Contract is still in force, the City 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 City chooses to make such a payment as provided in ORS 279C.515(1), the Contractor and the Contractor's surety shall not be relieved from liability for unpaid claims.

B. Contract Completed.

If the Contract has been completed and all funds disbursed to the prime Contractor, all claims shall be referred to the Contractor's surety for resolution. The City shall not make payments to subcontractors or suppliers for Work already paid for by the City.

**49-0900 Contract Suspension; Termination Procedures**

A. Suspension of Work.

In the event the City suspends performance of Work for any reason considered by the City to be in the public interest other than a labor dispute, the Contractor shall 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.

**B. Termination of Contract by Mutual Agreement for Reasons other than Default.**

**1. Reasons for termination.**

The parties may agree to terminate the Contract or a divisible portion thereof if:

- a. The City 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.

**2. Payment.**

When a Contract, or any divisible portion thereof, is terminated pursuant to this section (B), the City shall pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. The City shall 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 shall be calculated based on percent of Contract completed. No claim for loss of anticipated profits will be allowed.

**C. Public Interest Termination by City.**

The City may include in its Contracts terms detailing the circumstances under which the Contractor shall be entitled to compensation as a matter of right in the event the City unilaterally terminates the Contract for any reason considered by the City to be in the public interest.

**D. Responsibility for Completed Work.**

Termination of the Contract or a divisible portion thereof pursuant to this Rule shall not relieve either the Contractor or its surety of liability for claims arising out of the Work performed.

**E. Remedies Cumulative.**

The City 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.

**49-0910 Changes to the Work and Contract Amendments**

**A. Definitions.**

As used in this Rule:

1. “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 City and the Contractor.
2. “Changes to the Work” means a mutually agreed upon change order, or a construction change directive or other Written order issued by the City 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.

**B. Changes Provisions.**

Changes to the Work are anticipated in construction and, accordingly, the City shall include changes provisions in all Public Improvement Contracts that detail the scope of the changes clause, provide pricing mechanisms, authorize the City or its authorized representatives 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 City.

**C. Change Order and Amendment Authority**

Changes to Work and Amendments shall be authorized according to the expenditure authority described in Section 46-0120 through 46-0230.

**D. Contract Amendments.**

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:

1. They are within the general scope of the original Procurement;
2. 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;
3. 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
4. The Amendment is made consistent with this Rule, other applicable legal requirements, and as authorized below.
  - a. The City may amend a Contract Awarded as a small procurement under this chapter in accordance with BPC 49-0150.
  - b. The City may amend a Contract Awarded as an intermediate procurement under this chapter in accordance with BPC 49-0160.
  - c. The City may amend a Contract Awarded by a formal procurement previously awarded by Council as follows:
    - i. The Finance Director may approve cumulative amendments that are;
      - A) Less than \$100,000.00 or
      - B) Up to twenty-five percent (25%) of the original Contract Price when the proposed expenditure is included in the current fiscal year budget, even when it exceeds \$100,000.
    - ii. The Contract Review Board must approve any amendment made under this section that causes the Contract Price to exceed twenty-five percent (25%) of the original Contract Price.