



ADMINISTRATIVE REGULATIONS

**HIGH DESERT EDUCATION SERVICE DISTRICT
ADMINISTRATIVE REGULATIONS
CODE: DJ-AR
PUBLIC CONTRACTING RULES AND PROCEDURES
DATED: March 16, 2006**

**HIGH DESERT EDUCATION SERVICE DISTRICT
MODEL PROCUREMENT RULES
FOR ADOPTION**

**PUBLIC CONTRACTING RULES AND PROCEDURES
MANUAL**

46-0100

Application; Commentary; Federal Law Prevails

(1) These Rules set forth the procedures for Public Contracting of the High Desert Education Service District School District (“District”). Pursuant to ORS 279A.065(5), the District adopts these Rules, including but not limited to selected and adapted Attorney General’s Model Public Contract Rules. These Rules implement the Oregon Public Contracting Code and consist of the following five Divisions:

- (a) Division 46, which applies to all Public Contracting;
- (b) Division 47, which applies only to Public Contracting for Goods or Services, as defined in ORS 279B.005, and for Personal Services other than Architectural, Engineering and Land Surveying Services and Related Services;
- (c) Division 48, which applies only to Public Contracting for Architectural, Engineering and Land Surveying Services and Related Services;
- (d) Division 49, which applies only to Public Contracting for construction services and applies equally to “Public Improvement Contracts” and “Public Works Contracts” as defined by Oregon Statutes; and
- (e) Division 50, which applies to the acquisition and disposition of surplus property.

(2) In the event of conflict between rules in this division 46 and rules in divisions 47, 48 49, and 50, the rules in divisions 47, 48, 49 and 50 take precedence over the rules in this division 46.

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

(4) These division 46, 47, 48, 49, and 50 rules become effective on March 1, 2005 and apply to Public Contracts first advertised, but if not advertised then entered into, on or after March 1, 2005.

Stat. Auth.: ORS 279A.065

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

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Definitions

As used in the Public Contracting Code and these Rules, unless the context or a specifically applicable definition requires otherwise:

- (1) **“Addendum” or “Addenda”** means an addition or deletion to, a material change in, or general interest explanation of a Solicitation Document after issuance.
- (2) **“Adequate”** is defined in ORS 279C.305 and means sufficient to control the performance of the Work and to ensure satisfactory quality of construction by the District personnel.
- (3) **“Administering Contracting Agency”** means the District, which may be the District that solicits and establishes the original contract for procurement of goods, services or public improvements in a cooperative procurement.
- (4) **“Advantageous”** means a judgmental assessment by the District of the District’s best interests.

(5) **“Affected Person”** or **“Affected Offeror”** means a Person whose ability to participate in a procurement is adversely impaired by the District decision.

(6) **“Affirmative Action”** is defined in ORS 279A.100 and means a program designed to ensure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age or physical or mental disability.

(7) **“Architect”** is defined in ORS 279C.100 and means a person who is registered and holds a valid certificate in the practice of architecture in the State of Oregon, as provided under ORS 671.010 to 671.220, and includes without limitation the terms “architect,” “licensed architect” and “registered architect.

(8) **“Architectural, Engineering and Land Surveying Services and Related Services”** is defined in ORS 279C.100 and ORS 279C.100(6) and collectively means professional services that are required to be performed by an architect, engineer or land surveyor and Related Services. “Related Services” means services that are related to the planning, design, engineering or oversight of Public Improvement projects or components thereof, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, environmental impact studies, hazardous substances or hazardous waste or toxic substances testing services, wetland delineation studies, wetland mitigation studies, Native American studies, historical research services, endangered species studies, rare plant studies, biological services, archaeological services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner’s representative services or land-use planning services. “Architectural, Engineering and Land Surveying Services and Related Services” includes “Architectural, Engineering or Land Surveying Services or Related Services”, separately or in any combination thereof, as appropriate within the context of a Rule.

(9) **“As-Is, Where-Is”** applies to the sale of Goods and means that the Goods are of the kind, quality, and locale represented, even though they are in a damaged condition. It implies that the buyer takes the entire risk as to the quality of the Goods involved, based upon the buyer’s own inspection. Implied and express warranties are excluded in sales of Goods “As-Is, Where-Is.”

(10) **“Award”** means, as the context requires, either the act or occurrence of the District’s identification of the Person with whom the District will enter into a Contract following the resolution of any protest of the District’s selection of that Person, and the completion of all Contract Negotiations.

(11) **“Bid”** means a response to an Invitation to Bid.

(12) **“Bidder”** means a Person who submits a Bid in response to an Invitation to Bid.

(13) **“Brand Name or Equal Specification”** is defined in ORS 279B.200(1) and means a Specification that uses one or more manufacturers’ names, makes, catalog numbers or similar identifying characteristics to describe the standard of quality, performance, functionality or other characteristics needed to meet the District’s requirements and that authorizes Offerors to offer Goods or Services that are equivalent or superior to those named or described in the Specification.

(14) **“Brand Name Specification”** is defined in ORS 279B.200(2) and means a Specification limited to one or more products, brand names, makes, manufacturer’s names, catalog numbers or similar identifying characteristics.

(15) **“Chief Procurement Officer”** means the Superintendent or individual designated and authorized by the District to perform certain procurement functions described in these Rules.

- (16) **“Class Special Procurement”** is defined in ORS 279B.085 and means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into a series of contracts over time for the acquisition of a specified class of goods or services.
- (17) **“Closing”** means the date and time announced in a Solicitation Document as the deadline for submitting Offers.
- (18) **“Code” or “Public Contracting Code”** is defined in ORS 279A.010 and means ORS Chapters 279A, 279B and 279C.
- (19) **“Competitive Negotiation”** is defined as a method of contracting in which proposal evaluation and contract award result from an open and competitive procedure, typically through the Request for Proposal (RFP) process, in which factors other than price are considered in contractor selection.
- (20) **“Competitive Range”** means the Proposers with whom the District will conduct Discussions or Negotiations if the District intends to conduct Discussions or Negotiations in accordance with Rules 47-0261 through 0262. The size of the Competitive Range must be stated in the Solicitation Document. The size of the Competitive Range will be decreased if the number of Proposers that submit Proposals is less than the specified number and may be increased by the District in accordance with Rule 47-0262.
- (21) **“Competitive Sealed Bidding”** means the sourcing method pursuant to ORS 279B.055.
- (22) **“Competitive Sealed Proposals”** means the sourcing method pursuant to ORS 279B.060.
- (23) **“Competitive Solicitation”** is defined as a documented process providing an equal and open opportunity to qualified parties that culminates in a selection based on criteria that include, but are not limited to, the contractor’s availability, capacity, experience, reputation, responsiveness to time limitations, responsiveness to solicitation requirements, quality of previous performance, and fees or costs.
- (24) **“Consultant”** means the Person with whom the District enters into a Contract for the purposes of consulting, conferring, or deliberating on one or more subjects, and this Person provides advice or opinion; e.g., Consultants for Architectural, Engineering and Land Surveying Services and Related Services as defined in ORS 279C.115 and information technology Consultants.
- (25) **“Contract”** for the purposes of these Rules means “Public Contract.”
- (26) **“Contract Administration”** means all functions related to a given Contract between the District and a Contractor from the time the Contract is awarded until the Work is completed and accepted or the Contract is terminated, payment has been made, and disputes have been resolved.
- (27) **“Contracting Agency”** is defined in ORS 279A.010(b) and means a public body authorized by law to conduct a procurement and is interchangeable with “District” in these Rules.
- (28) **“Contractor”** means the Person with whom the District enters into a Contract and is interchangeable with “Consultant” and “Provider.”
- (29) **“Contract Price”** means, as the context requires, (i) the maximum payments that the District will make under a Contract, including bonuses, incentives and contingency amounts, if the Contractor fully performs under the Contract, (ii) the maximum not-to-exceed amount of payments specified in the Contract, or (iii) the unit prices for Goods or Services set forth in the Contract.
- (29) **“Contract-Specific Special Procurement”** is defined in ORS 279B.085 and means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065 and 279B.070 and is for the purpose of entering into a single Contract or a number of

related Contracts for the acquisition of specified Goods or Services on a one-time basis or for a single project.

(30) **“Cooperative Procurement”** is defined in ORS 279A.200 and means a Procurement conducted by an Administering Contracting Agency on behalf of one or more Public Agencies. “Cooperative Procurement” includes but is not limited to multiparty contracts and Price Agreements.

(31) **“Cooperative Procurement Group”** means a group of Public Agencies or other governmental bodies, domestic or foreign, approved by the Local Contract Review Board, joined through an intergovernmental agreement for the purposes of facilitating Cooperative Procurements pursuant to ORS 279A.200.

(32) **“Days”** means calendar days.

(33) **“DBE Disqualification”** means a disqualification, suspension or debarment pursuant to ORS 200.065, 200.075, and 279A.110.

(34) **“Descriptive Literature”** means the Offeror's materials submitted to provide information concerning the Goods or Services available in response to a Solicitation.

(35) **“Designated Procurement Officer”** means the individual designated by the Superintendent to perform certain procurement functions related to some or all public procurements described in these Rules.

(36) **“Discussions”** means to exchange information, compare views, take counsel, and communicate, with another for the purposes of achieving clarification and mutual understanding of an Offer. This typically occurs before the issuance of a Notice of Intent to Award, or in the absence of such Notice, during the Procurement Process and prior to award.

(37) **“Disqualification”** means the preclusion of an Entity from contracting with the District for a time. Disqualification may be Conduct disqualification or DBE Disqualification.

(38) **“Donee”** is defined in ORS 279A.250 and means an entity eligible to acquire federal donation property based upon federal regulations or eligible to acquire Surplus Property in accordance with rules adopted by the Local Contract Review Board. Entities eligible to acquire federal donation property may also acquire Surplus Property other than federal donation property.

(39) **“Electronic Advertisement”** means notice of the District’s request for Offers or request for Quotes, request for information or other document inviting participation in the District’s Procurements available over the Internet via (a) the World Wide Web; or (b) an Electronic Procurement System. An Electronic Advertisement may or may not include a Solicitation Document.

(40) **“Electronic Goods”** are defined as goods which are dependent on electric currents or electromagnetic fields in order to work properly and goods for the generation, transfer and measurement of such currents and fields.

(41) **“Electronic Offer”** means a response to the District’s request for Offers, or request for quotes submitted to the District via e-mail or through the District’s electronic procurement system.

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

(43) **“Emergency”** means circumstances that:

- (a) Could not have been reasonably foreseen;
- (b) Create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and
- (c) Require prompt execution of a Contract to remedy the condition.

An “**Emergency Procurement**” means a sourcing method pursuant to ORS 279B.080, ORS 279C.335(5), or related rules (See Rule 48-200).

(44) “**Energy Savings Performance Contract**” means a Public Contract between the District and a qualified energy service company for the identification, evaluation, recommendation, design and construction of energy conservation measures, including a design-build contract, that guarantee energy savings or performance.

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

(46) “**ESD Board**” means the District Board of Directors pursuant to ORS Chapter 334.

(47) “**Established Catalog Price**” is defined in ORS 279C.100 and means the price included in a catalog, price list, schedule or other form that:

- (A) Is regularly maintained by a manufacturer or Contractor;
- (B) Is either published or otherwise available for inspection by customers; and
- (C) States prices at which sales are currently, or were last made to a significant number of any category of buyer or to buyers constituting the general market, including public bodies, for the Goods or Services involved.

(48) “**Findings**” is defined in ORS 279C.330 and means the justification for the District’s conclusion that includes, but is not limited to, information regarding:

- (a) Operational, budget and financial data;
- (b) Public benefits;
- (c) Value engineering;
- (d) Specialized expertise required;
- (e) Public safety;
- (f) Market conditions;
- (g) Technical complexity; and
- (h) Funding sources.

(49) “**Flagger**” is defined in ORS 279C.810 and means a person who controls the movement of vehicular traffic through construction projects using sign, hand or flag signals.

(50) “**Fringe Benefits**” is defined in ORS 279C.800 and means the amount of:

- (a) The rate of contribution irrevocably made by a Contractor or subcontractor to a trustee or to a third person under a plan, fund or program; and
- (b) The rate of costs to the Contractor or subcontractor that may be reasonably anticipated in providing benefits to Workers pursuant to an enforceable commitment to carry out a financially responsible plan or program that is committed in Writing to the Workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only when the Contractor or subcontractor is not required by other federal, state or local law to provide any of these benefits.

(51) **“Good Cause”** is defined in ORS 279C.585, and the Oregon Construction Contractors Board must define “Good Cause” by rule. “Good Cause” includes, but is not limited to, the financial instability of a subcontractor. The definition of “Good Cause” must reflect the least-cost policy for Public Improvements established in ORS 279C.305.

(52) **“Good Faith Dispute”** is defined in ORS 279C.580 and means a documented dispute concerning:

- (a) Unsatisfactory job progress;
- (b) Defective Work not remedied;
- (c) Third-party claims filed or reasonable evidence that claims will be filed;
- (d) Failure to make timely payments for labor, equipment and materials;
- (e) Damage to the prime Contractor or subcontractor; or
- (f) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.

(53) **“Goods and Services”** or **“Goods or Services”** is defined in ORS 279B.005 and means supplies, equipment, materials and services other than personal services designated under ORS 279A.055 and any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, that the District is authorized by law to procure.

(54) **“Grant”** is defined in ORS 279A.010(i) and means:

(a) An agreement under which the District receives money, property or other assistance, including but not limited to federal assistance that is characterized as a Grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, from a grantor for the purpose of supporting or stimulating a program or activity of the District and in which no substantial involvement by the grantor is anticipated in the program or activity other than involvement associated with monitoring compliance with the Grant conditions; or

(b) An agreement under which the District provides money, property or other assistance, including but not limited to federal assistance that is characterized as a grant by federal law or regulations, loans, loan guarantees, credit enhancements, gifts, bequests, commodities or other assets, to a recipient for the purpose of supporting or stimulating a program or activity of the recipient and in which no substantial involvement by the District is anticipated in the program or activity other than involvement associated with monitoring compliance with the grant conditions.

(c) “Grant” does not include a Public Contract:

(A) For a Public Improvement for Public Works, as defined in ORS 279C.800, or

(B) For emergency Work, minor alterations or ordinary repair or maintenance necessary to preserve a Public Improvement, when under the Public Contract,

(i) The District pays moneys that the District has received under a Grant, and

(ii) Such payment is made in consideration for Contract performance intended to realize or to support the realization of the purposes for which Grant funds were provided to the District.

(55) **“Guaranteed Maximum Price (GMP)”** means the total maximum price provided to the District by the contractor, and accepted by the District, that includes all reimbursable costs of and fees for completion of the contract Work as defined by the contract documents, except for material changes in the scope of Work. It may also include particularly identified contingency amounts.

(56) **“Independent Contractor”** means, a Person who provides services to the District in which the District neither controls nor has the right to control the means or manner by which Work is

performed. The District may control the results of the services, but not control the means or manner of Contractor's performance of the Work. The person providing the services must meet the tests of "Independent Contractor" as defined by the Internal Revenue Services (IRS) Ruling 87-41 and the Public Employees Retirement System OAR 459-010-0030.

(57) **"Intermediate Procurement"** means a sourcing method pursuant to ORS 279B.070 or Rule 49-0160.

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

(59) **"Invitation to Bid"** or **"ITB"** is defined in ORS 279B.005 and 279C.400 and means all documents, whether attached or incorporated by reference, and any Addenda thereto, used for soliciting Bids in accordance with either ORS 279B.055 or 279C.335.

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

(A) The participating Public Agencies or the Cooperative Procurement group;

(B) The contract requirements or estimated contract requirements.

(61) **"Labor Dispute"** is defined in ORS 662.010 and means any controversy concerning terms or conditions of employment, or concerning the association or representation of Persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

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

(63) **"Legally Flawed"** is defined in ORS 279B.405 and means that a Solicitation Document contains terms or conditions that are contrary to law.

(64) **"Local Contract Review Board (LCRB)"** means the governing body of the District unless the governing body designates another body, board or commission to serve as the local contract review board pursuant to ORS 279A.060.

(65) **"Local Government"** has the meaning given that term in ORS 174.116.

(66) **"Locality"** is defined in ORS 279C.800 and means the following district in which the Public Works, or the major portion thereof, is to be performed:

(a) District 1, composed of Clatsop, Columbia and Tillamook Counties;

(b) District 2, composed of Clackamas, Multnomah and Washington Counties;

(c) District 3, composed of Marion, Polk and Yamhill Counties;

(d) District 4, composed of Benton, Lincoln and Linn Counties;

(e) District 5, composed of Lane County;

(f) District 6, composed of Douglas County;

(g) District 7, composed of Coos and Curry Counties;

(h) District 8, composed of Jackson and Josephine Counties;

(i) District 9, composed of Hood River, Sherman and Wasco Counties;

(j) District 10, composed of Crook, Deschutes and Jefferson Counties;

(k) District 11, composed of Klamath and Lake Counties;

(l) District 12, composed of Gilliam, Grant, Morrow, Umatilla and Wheeler Counties;

- (m) District 13, composed of Baker, Union and Wallowa Counties; and
- (n) District 14, composed of Harney and Malheur Counties.
- (67) **“Lowest Responsible Bidder”** means the lowest Bidder who:
- (a) Has substantially complied with all prescribed Public Contracting procedures and requirements;
 - (b) Has met the standards of responsibility set forth in ORS 279B.110 or 279C.375;
 - (c) Has not been debarred or disqualified by the Agency under ORS 279B.130 or 279C.440; and
 - (d) Is not on the list created by the Oregon Construction Contractors Board under ORS 701.227, if the advertised contract is a Public Improvement Contract.
- (68) **“Material Change”** or **“Material Alteration”** means an alteration in a Public Contract or Solicitation that is different in effect from the original meaning or Scope. This includes changes in quality, price or type of Goods or Services or Public Improvements.
- (69) **“Multiple-tiered”** or **“Multisteped”** means the type of process used in Competitive Sealed Bidding and Competitive Sealed Proposals pursuant to ORS 279B and Division 47 of these Rules, where the process is staged in phases. For example, a multisteped proposal process includes more than one opportunity to submit proposals for the same project.
- (70) **“Negotiations”** means to compare views, take counsel, and communicate with another so as to arrive at a voluntary, mutual agreement about a matter. Pursuant to ORS 279B and Division 47 of these Rules, Negotiations typically occur after issuance of a Notice of Intent to Award, or in the absence of such Notice, preceding an award of a Contract.
- (71) **“Nonprofit Organization”** is defined in ORS 279C.810 and means an organization or group of organizations described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.
- (72) **“Nonresident Bidder”** is defined in ORS 279A.120 and means a Bidder who is not a resident Bidder.
- (73) **“Not-for-Profit Organization”** is defined in ORS 307.130 and means a Nonprofit Corporation.
- (74) **“OAR”** means the Oregon Administrative Rules.
- (75) **“Offer”** means collectively or in the alternative: a Bid, Proposal, Quote or similar response to a Solicitation.
- (76) **“Offeror”** means collectively or in the alternative: a Bidder or Proposer.
- (77) **“Offering”** means collectively or in the alternative: the Bid or Proposal.
- (78) **“Opening”** means the date, time and place announced in the Solicitation Document for the public opening of written sealed offers.
- (79) **“Original Contract”** means the initial Contract or Price Agreement as solicited and awarded by the District.
- (80) **“ORS”** means the Oregon Revised Statutes.
- (81) **“Participating District”** or **“Purchasing District”** means the District that procures Goods or Services or Public Improvements from a Provider based on the Original Contract established by an Administering Contracting Agency in a Cooperative Procurement.
- (82) **“Permissive Cooperative Procurement”** is defined in ORS 279A.200 and means a Cooperative Procurement in which the Participating Public Agencies are not identified.
- (83) **“Person”** means an individual, organization, or representative of an organization. “Person” is also defined in ORS 279C.500 and 279C.815 and means any employer, labor organization or any official representative of an employee or employer association.

(84) **“Personal Services”** means the services or type of services performed under a Personal Services Contract. “Personal Services” is also defined in the Public Contracting Code in ORS 279C.100, and that definition in ORS 279C.100 is applicable only to Architect, Engineer, Land Surveyor or Provider of Related Services.

(85) **“Personal Services Contract”** or **“Contract for Personal Services”** means a Contract, or a member of a class of Contracts, other than a Contract for the services of an Architect, Engineer, Land Surveyor or Provider of Related Services as defined in ORS 279C.100, which primary purpose is to acquire specialized skills, knowledge and resources in the application of technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment, including, without limitation, a Contract for the services of an accountant, physician or dentist, educator, broadcaster, artist (including a photographer, filmmaker, painter, weaver or sculptor), or Consultant. Contracts for Architectural, Engineering and Land Surveying Services and Related Services are a special class of Personal Services Contracts, defined in ORS 279C.100(5), and Providers under such Contracts are Consultants, as defined in Rule 48-0110(1).

(86) **“Prevailing Rate of Wage”** is defined in ORS 279C.800 and means the rate of hourly wage, including all fringe benefits, paid in the Locality to the majority of Workers employed on projects of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries.

(87) **“Price Agreement”** means a Public Contract for the Procurement of Goods or Services at a set price with:

(a) No guarantee of a minimum or maximum purchase; or

(b) An initial order or minimum purchase combined with a continuing Contractor obligation to provide Goods or Services in which the District does not guarantee a minimum or maximum additional purchase.

(88) **“Procurement”** means the act of purchasing, leasing, renting or otherwise acquiring: Goods or Services; Architectural, Engineering, and Land Surveying Services and Related Services; and Public Improvements. Procurement includes each function and procedure undertaken or required to be undertaken by the District to enter into a Public Contract, administer a Public Contract and obtain the performance of a Public Contract under the Public Contracting Code and these Rules. **“Procurement Process”** means the process related to these acts, functions, and procedures of Procurement.

(89) **“Procurement Description”** means the words used in a solicitation to describe the goods or services to be procured. “Procurement description” includes specifications attached to or made a part of the solicitation.

(90) **“Procurement Document”** collectively means the inclusive Solicitation Document and all documents either attached or incorporated by reference, and any changes thereto, used for any of the methods pursuant to ORS 279A.200 through 279A.220, ORS 279B.055 through ORS 279B.085, ORS 279C.100 through 279C.125, or ORS 279C.300 through ORS 2729C.450.

(91) **“Product Sample”** means a representative specimen of the item offered by the Offeror in response to the Solicitation Document. Unless otherwise provided in the Solicitation Document, the Product Sample must be the exact product or a representative portion of that product offered by the Offeror.

(92) **“Property”** is defined in ORS 279A.250 and means personal property.

(93) **“Proposal”** means a response to a Request for Proposals.

(94) **“Proposer”** means a Person who submits a proposal in response to a Request for Proposals, except for Architectural, Engineering and Land Surveying Services and Related Services

pursuant to OAR 125-248-0110(4), whereby “Proposer” means a Consultant who submits a proposal to the District in response to a Request for Proposals.

(95) **“Provider”** means collectively or in the alternative: the supplier, Contractor or Consultant, providing Goods or Services or Public Improvements.

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

(97) **“Public Body,”** is defined in ORS 174.109, subject to ORS 174.108, and means state government bodies, local government bodies and special government bodies.

(98) **“Public Contract”** is defined in ORS 279A.010(x) and means a sale or other disposal, or a purchase, lease, rental or other acquisition, by the District of Goods or Services, Public Improvements, Public Works, minor alterations, or ordinary repair or maintenance necessary to preserve a Public Improvement. “Public Contract” does not include Grants.

(99) **“Public Contracting”** is defined in ORS 279A.010(y) and means Procurement activities described in the Public Contracting Code relating to obtaining, modifying or administering Public Contracts or Price Agreements.

(100) **“Public Contracting Code”** or **“Code”** is defined in ORS 279A.010(z) and means ORS 279A, 279B and 279C.

(101) **“Public Improvement”** means a project for construction, reconstruction or major renovation on real property by or for the District. “Public Improvement” does not include:

(a) Projects for which no funds of the District are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or

(b) Emergency Work, minor alteration, ordinary repair or maintenance necessary to preserve a Public Improvement.

(102) **“Public Improvement Contract”** means a Public Contract for a Public Improvement. “Public Improvement Contract” does not include a Public Contract for emergency Work, minor alterations, or ordinary repair or maintenance necessary to preserve a Public Improvement.

(103) **“Public Works”** is defined in ORS 279C.800 and includes, but is not limited to: roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for, by any public agency, to serve the public interest, but does not include the reconstruction or renovation of privately owned property that is leased by a Public Agency.

(104) **“Purchase Order”** means the District’s document to formalize a purchase transaction with a Provider. Acceptance of a Purchase Order constitutes a Public Contract. The District’s use of a Purchase Order must comply with District Policy, the Public Contracting Code and these Rules.

(105) **“Purchasing Contracting Agency”** means the Contracting Agency that procures Goods or Services or Public Improvements from a Provider based on the Original Contract established by an Administering Contracting Agency in a Cooperative Procurement.

(106) **“QBS”** means the qualifications based selection process mandated by ORS 279C.110 for Architectural, Engineering and Land Surveying Services and Related Services Contracts.

(107) **“Quote”** means a verbal or written Offer obtained through an Intermediate Procurement.

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

(109) **“Recycled Product”** means all materials, goods and supplies, not less than 50 percent of the total weight of which consists of secondary and post-consumer waste with not less than 10 percent of its total weight consisting of post-consumer waste. “Recycled Product” includes any product that could have been disposed of as solid waste, having completed its life cycle as a consumer item, but otherwise is refurbished for reuse without substantial alteration of the product’s form.

(110) **“Related Services”** is defined in ORS 279C.100(6) and means personal services, other than architectural, engineering and land surveying services, that are related to the planning, design, engineering or oversight of Public Improvement projects or components thereof, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, environmental impact studies, hazardous substances or hazardous waste or toxic substances testing services, wetland delineation studies, wetland mitigation studies, Native American studies, historical research services, endangered species studies, rare plant studies, biological services, archaeological services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner’s representative services or land-use planning services.

(111) **“Request for Proposals”** or **“RFP”** is defined in ORS 279B.005 and means all documents, either attached or incorporated by reference, and any Addenda thereto, used for soliciting Proposals in accordance with either ORS.279B.060 or 279C.405 and related rules.

(112) **“Request for Qualifications”** or **“(RFQ)”** means a Written document describing the District's circumstances and the type of service(s) desired; setting forth all significant evaluation factors and their relative importance and, if appropriate, price; and soliciting competitive Written qualifications. The RFQ will not result in a Contract, but is intended to establish an open, inclusive list of qualified Contractors from which to seek Proposals and select a Contractor in accordance with Rule 47-0550. See the definition for a Request for Qualifications pursuant to Rule 48-0110(5), applicable only to Architectural, Engineering and Land Surveying Services and Related Services Contracts.

(113) **“Resident bidder”** is defined in ORS 279A.120 and means a Bidder that has paid unemployment taxes or income taxes in this state during the 12 calendar months immediately preceding submission of the Bid, has a business address in this State, and has stated in the Bid whether the Bidder is a “resident Bidder”.

(114) **“Responsible Bidder”** or **“Responsible Proposer”** is defined in ORS 279A.105 and 279B.005 and means a person who meets the standards of responsibility as described in ORS 279B.110.

(115) **“Responsible Offeror”**, (also **“Responsible Bidder”** or **“Responsible Proposer”** as applicable) means a Person who has submitted an Offer and met the standards set forth in Rule 47-0500 or 49-0390(2), and who has not been debarred or disqualified by the District under Rule 47-0575 or 49-0370, respectively. When used alone, “Responsible” means meeting the aforementioned standards.

(116) **“Responsive Bid”** or **“Responsive Proposal”** is defined in ORS 279B.005 and means a Bid or Proposal that substantially complies with the Invitation to Bid or Request for Proposals, respectively, and all prescribed Procurement procedures and requirements.

(117) **“Responsive Offer”** (also, **“Responsive Bid”** or **“Responsive Proposal,”** as applicable) means an Offer that substantially complies in all material respects with applicable Solicitation procedures and requirements and the Solicitation Document. When used alone, “Responsive”

means having the characteristic of substantially complying in all material respects with applicable Solicitation procedure and requirements and the Solicitation Document.

(118) **“Retainage”** is defined in ORS 279C.550 and means the difference between the amount earned by a Contractor on a Public Contract and the amount paid on the contract by the District.

(119) **“Rules”** mean these Public Contracting Rules of the District including Divisions 46 through 50, unless otherwise indicated.

(120) **“Scope”** means the range and attributes of the Goods or Services; Public Improvements; or Architectural, Engineering and Land Surveying Services and Related Services, described in the applicable Procurement Document.

(121) **“Signed”** or **“Signature”** means any mark, word or symbol, including electronic signature, attached to or logically associated with a document and executed or adopted by a Person with the intent to be bound.

(122) **“Small Procurement”** means a sourcing method pursuant to ORS 279B.065.

(123) **“Sole-Source Procurement”** means a sourcing method pursuant to ORS 279B.075.

(124) **“Solicitation”** means:

(a) A request by the District for the purpose of soliciting Offers. This request may take the form of an Invitation for Bid, a Request for Proposal, a Request for Quotation, a Request for Qualifications or a similar document; or

(b) The process of notifying prospective Offerors that the District requests such Offers; or

(c) The Solicitation Document itself.

A Solicitation and award process uses methods identified in ORS 279A.200 through 279A.220 (Cooperative Procurement); ORS 279B.055 through 085 (seven methods for Goods or Services); ORS 279C.100 through 279C.125 (Architectural, Engineering and Land Surveying and Related Services); or ORS 279C.300 through 279C.450 (Public Improvements).

(125) **“Solicitation Document,”** means an Invitation to Bid, a Request for Proposals, or a Special Procurement Solicitation, and all other documents, either attached or incorporated by reference, and any changes thereto, issued by the District to establish an Original Contract that forms the basis for the District’s participation in a Procurement.

(126) **“Special Government Body”** is defined in ORS 174.117 and means any of the following:

(A) A public corporation created under a statute of this State and specifically designated as a public corporation.

(B) A school district.

(C) A public charter school established under ORS chapter 338.

(D) An education service district.

(E) A community college district or community college service district established under ORS chapter 341.

(F) An intergovernmental body formed by two or more public bodies.

(G) Any entity that is created by statute, ordinance or resolution that is not part of state government or local government.

(H) Any entity that is not otherwise described in this section that is:

(i) Not part of state government or local government;

(ii) Created pursuant to authority granted by a statute, ordinance or resolution, but not directly created by that statute, ordinance or resolution; and

(iii) Identified as a governmental entity by the statute, ordinance or resolution authorizing the creation of the entity, without regard to the specific terms used by the statute, ordinance or resolution.

(b) Subject to ORS 174.117, “Special Government Body” includes:

(A) An entity created by statute for the purpose of giving advice only to a special government body;

(B) An entity created by a Special Government Body for the purpose of giving advice to the special government body, if the document creating the entity indicates that the entity is a public body; and

(C) Any entity created by a Special Government Body described in Subsection (a) of this section, other than an entity described in paragraph (B) of this Subsection, unless the document creating the entity indicates that the entity is not a governmental entity or the entity is not subject to any substantial control by the Special Government Body.

(127) “**Special Procurement**” means a sourcing method pursuant to ORS 279B.085 and a class Special Procurement, a contract-specific Special Procurement or both, unless the context requires otherwise. (See also “Class Special Procurement” and “Contract-specific Special Procurement.”)

(128) “**Specifications**” means any description of the physical or functional characteristics, or of the nature of Goods or Services or a construction item, including any requirement for inspecting, testing, or preparing Goods or Services or a construction item for delivery and the quantities or qualities of materials to be furnished under the Contract. Specifications generally will state the result to be obtained and may, on occasion, describe the method and manner of doing the Work to be performed. See ORS 279B.200(3).

(129) “**State**” means the State of Oregon.

(130) “**State Government**,” subject to ORS 174.108, means the Executive Department, the Judicial Department and the Legislative Department.

(131) “**Substantial Completion**” is defined in 279C.465 and pursuant to ORS 12.135 and HB 3022 means the date when the District accepts in Writing the construction, alteration or repair of the improvement to real property or any designated portion thereof as having reached that state of completion when it may be used or occupied for its intended purpose or, if there is no such Written acceptance, the date of acceptance of the completed construction, alteration or repair of such improvement made by the Contractor.

(132) “**Superintendent**” means the District Superintendent or the Superintendent’s designee.

(133) “**Surplus Property**” means all real or personal property, vehicles and titled equipment owned by the District for which the district no longer has a use, is unsuitable for use, has become too costly to repair, or is obsolete. The School Board shall formally declare the property as surplus and authorize its disposal.

(134) “**Sustainability**” is defined in ORS 184.421 and means using, developing and protecting resources in a manner that enables people to meet current needs and provides that future generations can also meet future needs, from the joint perspective of environmental, economic and community objectives.

(135) “**Threshold**” means a specific monetary limitation that distinguishes one Procurement method from another, triggers a requirement, or marks a point of reference or change in Rule. For example, the Thresholds of \$5,000 to \$150,000 distinguish Intermediate Procurements under ORS 279B from other methods.

(136) “**Trade Services**” means all remaining services that do not meet the definition for Personal Services.

(137) “**Unnecessarily Restrictive**” is defined in ORS 279B.405 and means that Specifications limit competition arbitrarily, without reasonably promoting the fulfillment of the Procurement needs of the District.

(138) **“Value Engineering”** is defined as those proposed changes to the plans, Specifications, or other contract requirements that may be made consistent with industry practice(s) 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, that may either increase or decrease absolute costs over varying periods.

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

(140) **“Written”** or **“Writing”** means conventional paper documents, whether hand written, manuscript or printed, in contrast to spoken words. It also includes electronic transmissions or facsimile documents when required or permitted by applicable law, or to the extent permitted by the Solicitation Document or Contract.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.065, ORS 279A.200, ORS 279B.005, and ORS 279C.110.

46-0120

Policies

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

Stat. Auth.: ORS 279A.065

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

46-0130

Application of the Code and Rules; Exceptions

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

(2) Contracts or classes of contracts for Personal Services of the District designated as such by the District’s Local Contract Review Board pursuant to ORS 279A.055, are not subject to these Rules.

(3) Neither the Code nor these Rules apply to the contracts or the classes of contracts described in ORS 279A.025(2) including:

(a) Contracts between contracting agencies or between the District and the federal government;

(b) Insurance and service contracts as provided for under ORS 414.115, 414.125, 414.135, and 414.145 for purposes of source selection;

(c) Grants;

(d) Contracts for professional or expert witnesses or consultants to provide services or testimony relating to existing or potential litigation or legal matters in which a public body is or may become interested;

(e) Acquisitions or disposals of real property or interest in real property;

(f) Sole-source expenditures when rates are set by law or ordinance for purposes of source selection;

(g) Contracts for the procurement or distribution of textbooks;

(h) Procurements by a contracting agency from an Oregon Corrections Enterprises program;

- (i) Energy savings performance contracts;
- (j) Contracts, agreements or other documents entered into, issued or established in connection with:
 - (A) The incurring of debt by a public body (pursuant to 279A.025(2)(q)(A));
 - (B) The making of program loans and similar extensions or advances of funds (pursuant to ORS 279A.025(2)(q)(B)); or
 - (C) The investment of funds by a public body as authorized by law, and other financial transactions of a public body that by their character cannot practically be established under the competitive contractor selection procedures of ORS 279B.050 to 270.085; or
- (k) Contracts for employee benefit plans as provided in ORS 243.105(1), 243.125(4), 243.221, 243.275, 243.291, 243.303 and 243.565.
- (4) The District otherwise subject to the Code and these Rules may enter into Public Contracts under a federal program described in ORS 279A.180 without following the procedures set forth in ORS 279B.050 through ORS 279B.085, provided that the District enters into the Public Contract pursuant to rules adopted pursuant to ORS 279A.180.
- (5) The District may enter into contracts for Goods or Services with non-profit agencies providing employment opportunities for disabled individuals pursuant to ORS 279.835 through 279.855 without following the source selection procedures set forth in either ORS 279A.200 through ORS 279A.225, or ORS 279B.050 through ORS 279B.085 so long as such contracts are entered into in accordance with these rules.

Stat. Auth.: ORS 279A.065

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

AUTHORITY

46-0140

Procurement Authority

Pursuant to ORS 279A.050, except as otherwise provided in the Public Contracting Code, the District has all of the rights, powers and authority necessary to carry out the provisions of the Public Contracting Code, and the District must exercise all rights, powers and authority in accordance with the Public Contracting Code. The District is the Local Contracting Agency described in the Public Contracting Code, except as delegated pursuant to Rule 46-0170.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.050(1) and (2)

46-0170

Delegation of Authority

(1) **Policy.** Pursuant to ORS 279A.075 and 332.075(3), the School District Board of Directors delegates to the Superintendent or his/her designee, the authority to enter into and approve payment on contracts for products, materials, capital outlay, equipment, and services if:

- (a) The contract is within appropriations made by the ESD Board pursuant to ORS 294.435; and
 - (b) The total amount of the contract is less than \$150,000.
- (2) Except as provided in subsection (1) of this section, the ESD Board must approve all District contracts.

Stat. Auth: ORS 279A.065(5)(a); ORS 279A.070
Stats. Implemented: ORS 279A.050 and ORS 279A.075

MINORITIES, WOMEN AND EMERGING SMALL BUSINESSES

46-0200

Affirmative Action; Limited Competition Permitted

Pursuant to ORS 279A.100, the District may limit competition on Public Contracts for Goods or Services, or on other Public Contracts with an estimated cost of \$50,000 or less to carry out affirmative action policies, in accordance with any policies and procedures established by the District.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070
Stats. Implemented: ORS 279A.100

46-0210

Subcontracting to and Contracting with Emerging Small Businesses; DBE Disqualification

(1) As set forth in ORS 279A.105, the District may require a Contractor to subcontract some part of a Contract to, or to obtain materials to be used in performing the Contract from:

- (a) A business enterprise that is certified under ORS 200.055 as an emerging small business; or
- (b) A business enterprise that is:

(A) Certified under ORS 200.055 as an emerging small business; and

(B) Is located in or draws its Workforce from economically distressed areas, as designated by the Oregon Economic and Community Development Department.

(2) A subcontractor certified under ORS 200.055 as an emerging small business is located in or draws its Workforce from economically distressed areas if:

(a) Its principal place of business is located in an area designated as economically distressed by the Oregon Economic and Community Development Department pursuant to administrative rules adopted by the Oregon Economic and Community Development Department; or

(b) The Contractor certifies in Writing to the District that a substantial number of the subcontractor's employees, or subcontractors that will manufacture the Goods or complete the services under the Contract, reside in an area designated as economically distressed by the Oregon Economic and Community Development Department pursuant to administrative rules adopted by the Oregon Economic and Community Development Department. For the purposes of making the foregoing determination, the District must determine in each particular instance what proportion of a Contractor's or subcontractor's employees or subcontractors constitute a substantial number.

(3) The District must include in each Solicitation Document a requirement that Offerors certify in their Offers in a form prescribed by the District, that the Offeror has not and will not

discriminate against a subcontractor in the awarding of a subcontract because the subcontractor is a minority, women or emerging small business enterprise certified under ORS 200.055.

(4) DBE Disqualification.

(a) The District may disqualify a Person from consideration of award of the District's Contracts under ORS 200.065(5), or suspend a Person's right to bid on or participate in any Public Contract pursuant to ORS 200.075(1) after providing the Person with notice and a reasonable opportunity to be heard in accordance with sections (d) and (e) of this section.

(b) As provided in ORS 200.065 and 200.075 the District may disqualify or suspend a Person's right to submit an Offer or to participate in a Contract (e.g., act as a subcontractor) as follows:

(A) For a DBE Disqualification under ORS 200.065, the District may disqualify a Person upon finding that the Person engaged in any of the activities made unlawful by ORS 200.065(1) or (2), or if the Person has been disqualified by another The District pursuant to ORS 200.065.

(B) For a DBE Disqualification under ORS 200.075, the District may suspend a Person upon finding that the Person engaged in any of the acts prohibited by ORS 200.075(a) through (c).

(c) The District may disqualify or suspend a Person's right to submit Offers or participate in Public Contracts only for the length of time permitted by ORS 200.065 or ORS 200.075, as applicable.

(d) The District must notify the Person in Writing of a proposed DBE Disqualification pursuant to this section, served personally or by registered or certified mail, return receipt requested. This notice shall:

(A) State that the District intends to disqualify or suspend the Person;

(B) Set forth the reasons for the DBE Disqualification;

(C) Include a statement of the Person's right to a hearing if requested in Writing within the time stated in the notice and that if the District does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived their right to a hearing;

(D) Include a statement of the authority and jurisdiction under which the hearing will be held;

(E) Include a reference to the particular sections of the statutes and rules involved;

(F) State the proposed DBE Disqualification period; and

(G) State that the Person may be represented by legal counsel.

(e) **Hearing.** The District must schedule a hearing upon the District's receipt of the Person's timely request. The District must notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.

(f) **Notice of DBE Disqualification.** The District will notify the Person in Writing of its DBE Disqualification, served personally or by registered or certified mail, return receipt requested. The notice shall contain:

The effective date and period of DBE Disqualification;

The grounds for DBE Disqualification; and

A statement of the Person's appeal rights and applicable appeal deadlines.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

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

CONTRACT PREFERENCES

46-0300

Preference for Oregon Goods or Services; Nonresident Bidders

(1) **Award When Offers Identical.** When the District receives Offers identical in price, fitness, availability and quality, and chooses to award a Contract, the District must award the Contract based on the following order of precedence:

(a) The District must award the Contract to the Offeror among those submitting identical offers that is offering Goods or Services or Personal Services that have been manufactured or produced in Oregon.

(b) If two or more Offerors submit identical Offers, and both offer Goods or Services or Personal Services manufactured or produced in Oregon, the District may award the Contract by drawing lots among the identical Offers offering Goods or Services or Personal Services that have been manufactured or produced in Oregon. The Offerors that submitted the identical Offers subject to the drawing of lots may be given notice and an opportunity to be present when the lots are drawn.

(c) If the District receives identical Offers, and none of the identical Offers offer Goods or Services or Personal Services manufactured or produced in Oregon, then the District may award the Contract by drawing lots among the identical Offers. The Offerors that submitted the identical Offers subject to the drawing of lots may be given notice and an opportunity to be present when the lots are drawn.

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

(a) Bids received in response to an Invitation to Bid are identical in price, fitness, availability and quality if the Bids are Responsive, and offer the Goods or Services or Personal Services described in the Invitation to Bid at the same price.

(b) Proposals received in response to a Request for Proposals are identical in price, fitness, availability and quality if they are Responsive and achieve equal scores when scored in accordance with the evaluation criteria set forth in the Request for Proposals.

(c) Proposals received in response to a Special Procurement conducted pursuant to ORS 279B.085 are identical in price, fitness, availability and quality if, after completing the contracting procedure approved by the LCRB, the District determines, in writing, that two or more Proposals are equally advantageous to the District.

(3) **Determining if Goods or Services or Personal Services are Manufactured or Produced in Oregon.** For the purposes of complying with section 1 of this Rule, the District may request, either in a Solicitation Document, following Closing, or at any other time determined appropriate by the District, any information the District determines is appropriate and necessary to allow the District to determine if the Goods or Services or Personal Services are manufactured or produced in Oregon. The District may use any reasonable criteria to determine if Goods or Services or Personal Services are manufactured or produced in Oregon, provided that the criteria reasonably relate to that determination, and provided that the criteria are applied equally to each Bidder or Proposer.

(4) **Procedure for Drawing Lots.** In any instance when this Section calls for the drawing of lots, the District must draw lots by a procedure that affords each Offeror subject to the drawing a substantially equal probability of being selected, and that does not allow the person making the

selection the opportunity to manipulate the drawing of lots to increase the probability of selecting one Offeror over another.

Stat. Auth.: ORS 279A.065

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

46-0310

Reciprocal Preferences

(1) When evaluating Bids pursuant to Rules 47-0255, 47-0256 or 49-0390, the District must add a percentage increase to the Bid of a Nonresident Bidder equal to the percentage, if any, of the preference that would be given to that Bidder in the state in which the Bidder resides. The District may rely on the list prepared and maintained by the Oregon Department of Administrative Services pursuant to ORS 279A.120(4) to determine both (i) whether the Nonresident Bidder's state gives preference to in-state bidders, and (ii) the amount of such preference.

Stat. Auth.: ORS 279A.065

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

46-0320

Preference for Recycled Materials

(1) Notwithstanding provisions of law requiring the District to award a Contract to the lowest responsible bidder or best proposer or provider of a quotation, and in accordance with subsection (2) of this section, the District must give preference to the procurement of goods manufactured from recycled materials.

(2) In comparing goods from two or more Bidders or Proposers, if at least one Bidder or Proposer offers goods manufactured from recycled materials, and at least one Bidder or Proposer does not, the District must select the Bidder or Proposer offering goods manufactured from recycled materials if each of the following four conditions exists:

(a) The recycled product is available;

(b) The recycled product meets applicable standards;

(c) The recycled product can be substituted for a comparable non-recycled product; and

(d) The recycled product's costs do not exceed the costs of non-recycled products by more than five percent, or a higher percentage if a written determination is made by the District and set forth in the Solicitation Document. For purposes of making the foregoing determination, the District must consider the costs of the goods following any adjustments the District makes to the price of the goods for purposes of evaluation pursuant to Rule 46-0310.

(3) For the purposes of this Section, the District must determine if goods are manufactured from recycled materials in accordance with standards established by the District.

Stat. Auth.: ORS 279A.065

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

Personal Services Contracts

46-0330

Authority and Standards for Personal Services Contracts

(1) **Application.** For purposes of this Rule only, “Personal Services” include but are not limited to the following:

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

“Personal Services” does not include architect, engineer, land surveyor and related services as defined in ORS 279C.100(6).

(2) Identification of Personal Services Contracts.

(a) **Authority** - Pursuant to ORS 279A.055(2), the LCRB may designate Contracts or classes of Contracts as Personal Services Contracts for the purposes of reporting Personal Services Contracts in accordance with ORS 279A.055 and identifying the appropriate required procedures in accordance with ORS 279A.070. In the event of uncertainty or disagreement as to the status of any particular contract or class of contracts, the LCRB may determine whether the Work calls for the performance of Personal Services.

(b) **Contract Requirements** - The District must identify within the contract that it is contracting for personal services. A failure to adequately describe personal services within the contract will not invalidate the procurement or contract if the District properly used a sourcing method pursuant to ORS 279B.055 through 279B.085 and substantially followed the related Rules regarding screening, selection, evaluation, award, and approval in accordance with these Rules. In addition, District Personal Services Contracts must comply with all applicable provisions of ORS 279B.220 to 279B.240.

(3) **Independent Contractor.** The District may, within the limits of its adopted budget, contract for Personal Services with Providers who are Independent Contractors.

(4) **Employees.** The District may not use Personal Services Contracts to obtain and pay for the services of an employee. If a Contractor is not an Independent Contractor, the District may not enter into a Personal Services Contract with the Contractor; instead, the District must follow personnel policies for employment options.

(5) **Contracting Out for Services Provided by Employees.** Where the District is contemplating contracting for Work performed by District employees represented by a labor organization, the District must review the relevant collective bargaining agreement to ensure the contract complies with the provisions.

Stat. Auth.: ORS 279A.055; ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.

46-0335

Selection Procedures.

(a) Informal Selection Procedures.

The District may use an informal selection process to obtain services where the anticipated cost of the service is expected to be more than \$75,000 but less than or equal to \$150,000. If the anticipated cost of the service is expected to be \$75,000 or less, the District may procure the service through direct appointment as defined in Rule 48-0200.

- (1) The informal selection process must solicit responses/Proposals from at least three qualified contractors offering the required services.
- (2) The informal selection process is competitive. The selection and ranking may be based on criteria including but not limited to each Proposer's:
 - (A) Particular capability to perform the services required;
 - (B) Experienced staff available to perform the services required, including each Proposer's recent, current, and projected workloads;
 - (C) Performance history;
 - (D) Approach and philosophy used in providing services;
 - (E) Fees or costs;
 - (F) Geographic proximity to the project or the area where the services are to be performed; and
 - (G) Work volume previously awarded by the District, with the object of effecting an equitable distribution of contracts among qualified contractors. But distribution must not violate the policy of selecting the most highly qualified contractor to perform the services at a fair and reasonable price.
- (3) Written confirmation of solicitation attempts and responses with contractor names and addresses shall be maintained in the Procurement file.

(b) Formal Selection Procedures.

- (1) The District will use a formal selection procedure when the anticipated cost of the contract will exceed \$150,000 or whenever the Superintendent determines that the amount of the contract or complexity of the project requires use of the formal process. All formal RFP and RFQ solicitations must comply with the requirements for RFPs contained in Division 47 of these rules.
- (2) Additional Requirements for a Request for Qualifications (RFQ). An RFQ may be used to determine whether competition exists to perform the needed services or to establish a list of qualified contractors for RFPs, for informal solicitations, or for individual negotiation, as provided in these rules.
 - (a) The RFQ must at least describe the particular specialty desired, the qualifications the contractor must have in order to be considered, and the evaluation factors and their relative importance.
 - (b) The RFQ may require information, including but not limited to:
 - (i) The contractor's particular capability to perform the required services;
 - (ii) The number of experienced staff available to perform the required services, including specific qualifications and experience of personnel;
 - (iii) A list of similar services the contractor has completed, with references concerning past performance; and
 - (iv) Any other information necessary to evaluate contractor qualifications.

(c) A qualifications pre-submission meeting may be held for all interested contractors to discuss the proposed services. The RFQ must include the date, time, and place of the meeting and indicate whether it is voluntary or mandatory.

(d) Unless the RFQ establishes that competition does not exist or unless the solicitation process is canceled or all qualification statements rejected, all respondents (who met the published qualifications) will receive a notice (or other materials as appropriate) of any required services and have an opportunity to submit a Proposal in response to a contracting district's subsequent RFP.

Stat. Auth.: ORS 279A.055; ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.

46-0340

Selection by Negotiation.

The District may procure Personal Services with contractors directly through negotiation, if:

(1) The District has, through an RFQ, established a list of qualified contractors for the particular project or class of projects; or

(2) The nature of the Work is not project-driven but requires an ongoing, long-term relationship of knowledge and trust. Examples include legal services and audit services.

Stat. Auth.: ORS 279A.055; ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.

46-0345

Procedures for Personal Services Contracts.

(1) **Contract Forms for Architectural, Engineering and Land Surveying Services and Related Services.** The District must comply with Rule 48-0300(1).

(2) **Contract Forms for other Personal Services Contracts.** The District will use the approved form for standard contracts which contain all terms and conditions for Contracts for Personal Services.

(a) If the District obtains approval in accordance with this Rule, it may enter into a Personal Services Contract containing terms and conditions other than those in the approved form for one-time acquisitions of Personal Services so long as the School Board has been made aware of the changes.

(b) The District must review the approved Contract form at least every two years. If upon review revisions to the Contract form are deemed necessary, the District must obtain approval from the LCRB prior to using the revised Contract form.

(3) **Screening, Selection, Evaluation and Award Procedures.** The District must follow the procedures set forth in Division 48 of these Rules when contracting for Architectural, Engineering and Land Surveying Services and Related Services. For all other Personal Services Contracts, the District must select a sourcing method from the seven methods available pursuant to ORS 279B.055 through 279B.085 and follow the screening, selection, evaluation and award procedures set forth for the selected sourcing method in Division 47 of these Rules.

(4) **Amendments and Reinstatements.** The procedures for Amendments and reinstatements are found in Rules 46.0560 and 46.0565, respectively. Procedures for Amendments and

reinstatements for Architectural, Engineering and Land Surveying Services and Related Services are found in Division 48 of these Rules.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.70; ORS 279A.140(h)(B)

Procurement Files

46-0355

Procurement Files

(1) This Rule applies only to Procurements exceeding the Intermediate Procurement Threshold for Goods or Services; the Informal Selection Threshold for Architectural, Engineering, and Land Surveying Services; and the Intermediate Procurement Threshold for Public Improvements pursuant to Rules 47-0270, 48-0210, and 49-0160, respectively, unless a policy established by the District provides otherwise.

(2) Each Procurement File must contain:

(a) An executed Contract, if awarded;

(b) The record of the actions used to develop the Contract;

(c) A copy of the Solicitation, if any;

(d) Any required findings or statement of justification for the selection of the Provider and sourcing method pursuant to ORS 279A.200 through 279A.220 (Cooperative Procurement); ORS 279B.055 through 085 (seven methods for Goods or Services); ORS 279C.100 through 279C.125 (Architectural, Engineering and Land Surveying and Related Services); or ORS 279C.300 through 279C.450 (Public Improvements); and

(e) Documentation of Contract Administration pursuant to Rule 46-0555.

(3) Each District's Procurement File may also contain, if required by the Code or these Rules:

(a) A list of prospective Providers notified of any Solicitation;

(b) The method used to advertise or notify prospective Providers;

(c) A copy of each Offer that resulted in the Award of a Contract;

(d) The method of evaluating Offers, the results of the evaluation, and basis of selection;

(e) The record of any Negotiation of the Statement of Work and results;

(f) A record of all material Communications regarding the Solicitation by interested Providers pursuant to Rule 46-0635;

(g) All information describing how the Provider was selected, including the basis for awarding the Contract;

(h) A copy of the Request for Special Procurement, if any;

(i) Documentation for a Federal Program purchase pursuant to Rule 46-0360; and

(j) Documentation related to Cooperative Procurements pursuant to Rule 46-0410 et. seq.

(4) The District must maintain Procurement Files, including all documentation, for a period not less than six (6) years, except for Architectural, Engineering and Land Surveying Services and Related Services which will be maintained for ten (10) years beyond each Contract's expiration date, or for another period of time in accordance with another provision of law.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.050; ORS 279A.065(5); ORS 279A.070; and ORS 279A.140

COOPERATIVE PROCUREMENT

46-0400

Authority for Cooperative Procurements

(1) The District may participate in, sponsor, conduct or administer Cooperative Procurements as follows:

(a) The District may participate in, sponsor, conduct or administer Joint Cooperative Procurements to establish Contracts or Price Agreements for Goods or Services or Personal Services, that use source selection methods substantially equivalent to those set forth in ORS 279B.055, 279B.060, or 279B.085 or to establish Contracts for Public Improvements that use a competitive bidding process substantially equivalent to that set forth in ORS 279C.005 through 279C.870.

(b) The District may participate in, sponsor, conduct or administer Permissive Cooperative Procurements to establish contracts or Price Agreements for the acquisition of Goods or Services or Personal Services that use source selection methods substantially equivalent to those set forth in ORS 279B.055 or 279B.060.

(c) The District may participate in, sponsor, conduct or administer Interstate Cooperative Procurements to establish contracts or Price Agreements for the acquisition of Goods or Services or Personal Services that use source selection methods substantially equivalent to those set forth in ORS 279B.055 or 279B.060.

(2) A solicitation and award process uses source selection methods substantially equivalent to those identified in ORS 279B.055, ORS 279B.060 or ORS 279B.085 when it has the characteristics set forth in ORS 279A.200(2). Each Participating District shall determine, in writing, whether the solicitation and award process for an Original Contract arising out of a Cooperative Procurement is substantially equivalent to those identified in ORS 279B.055, ORS 279B.060 or ORS 279B.085 in accordance with ORS 279A.200(2).

Stat. Auth.: ORS 279A.065

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

46-0410

Responsibilities of Administering Contracting Agency and Purchasing District

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

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

- (a) The extent to which the Purchasing Contracting Agency may participate in the Cooperative Procurement,
- (b) The advertisement of the solicitation document related to the Cooperative Procurement, and
- (c) Public notice of the Purchasing Contracting Agency's intent to establish Contracts or Price Agreements based on a Cooperative Procurement.

Stat. Auth.: ORS 279A.065

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

46-0420

Joint Cooperative Procurements

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

Stat. Auth.: ORS 279A.065

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

46-0430

Permissive Cooperative Procurements

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

Stat. Auth.: ORS 279A.065

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

46-0440

Advertisements of Intent to Establish Contracts or Price Agreements through a Permissive Cooperative Procurement

(1) If the District wishes to enter into a Contract or Price Agreement arising out of a Permissive Cooperative Procurement it must publish notice of its intent to do so if the estimated cost of the Goods or Services or Personal Services acquired under the Contract or Price Agreement will exceed \$250,000.

(2) For purposes of determining whether the District must give the notice required by Section 440(1) of these rules, the District will spend in excess of \$250,000 for Goods or Services or Personal Services acquired under a Contract or Price Agreement arising out of a Permissive Cooperative Procurement if:

(a) The District's Contract or Price Agreement arising out of the Permissive Cooperative Procurement expressly provides that the District will make payments over the term of the Contract or Price Agreement that will, in aggregate, exceed \$250,000, whether or not the total amount or value of the payments is expressly stated;

(b) The District's Contract or Price Agreement arising out of the Permissive Cooperative Procurement expressly provides for a guaranteed maximum price, or a maximum not to exceed amount in excess of \$250,000; or

(c) At the time the District enters into the Contract or Price Agreement, the District reasonably contemplates, based on historical or other data available to the District, that the total payments it will make for Goods or Services or Personal Services under the Contract or Price Agreement

will, in aggregate, exceed \$250,000 over the anticipated duration of the Contract or Price Agreement.

(3) The notice of intent must contain the following information:

(A) A description of the purchases to be made;

(B) An estimated amount of the purchases;

(C) The name of the Administering Contracting Agency; and,

(D) A time, place and date by which comments must be submitted to the Purchasing District regarding the Notice of Intent to establish a Contract or price agreement.

(4) The notice of intent must be published:

(A) At least once in at least one newspaper of general circulation in the area where the contract is to be performed and in as many additional issues and publications as the district may determine; or

(B) Published electronically instead of in a newspaper of general circulation if the LCRB determines that electronically providing public notice of bids or proposals is likely to be cost-effective.

(5) Unless the District has adopted rules that set forth a different time period, the District must give the notice required by this Section no fewer than 7 days before the deadline for submitting comments regarding the District's intent to establish a Contract or Price Agreement through Permissive Cooperative Procurement.

(6) An Administering Contracting Agency that intends to establish a Contract or Price Agreement arising out of the Permissive Cooperative Procurement it administers may satisfy the notice requirements set forth in Section 440(1) and (3) of these rules by including the information required by ORS 279A.215(2)(b) in the Solicitation Document related to the Permissive Cooperative Procurement, and including instructions in the Solicitation Document to potential Offerors describing how they may submit comments in response to the Administering Contracting Agencies intent to establish a Contract or Price Agreement through the Permissive Cooperative Procurement. The content and timing of such notice shall comply in all respects with ORS 279a.215(2), ors 279a.215(3) and these Rules.

(7) The District must respond to any comments on its intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement as follows:

(A) The School Board, superintendent or another designated person must make a Written determination that establishing a Contract is in the best interest of the District.

(B) The District must then provide a copy of the Written determination to all Providers that submitted comments.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.215

46-0450

Interstate Cooperative Procurements

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

Stat. Auth.: ORS 279A.065

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

46-0460

Advertisements of Interstate Cooperative Procurements

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

(1) The Solicitation Document for the Interstate Cooperative Procurement lists the District or the Cooperative Procurement Group of which the District is a member as a party that may enter into Contracts or Price Agreements under the terms and conditions of the Original Contract, and the Solicitation Document is advertised in Oregon in compliance with ORS 279B.055(4) or ORS 279B.060(4) by either:

(a) The Purchasing District; or

(b) The Cooperative Procurement Group, or a member of the Cooperative Procurement Group, of which the District is a member; or

(c) Another Purchasing Contracting Agency that is subject to the Code, so long as such advertisement would, if given by the District, comply with ORS 279B.055(4) or ORS 279B.060(4) with respect to the Purchasing Contracting Agency; or

(2) If the Solicitation Document issued by the Administering Contracting Agency was not advertised in accordance with Section 0460(1) of these rules, the District must give notice of its intent to enter into a Public Contract or Price Agreement based on the terms of the Interstate Cooperative Procurement. The notice of intent shall contain the information required by ORS 279A.220 (2)(b)(B), and The District must advertise the notice in the same manner as provided in ORS 279B.055(4)(b) and (c). Unless the District has adopted rules that set forth a different time period, the notice required by this Section shall be provided no fewer than 7 days before the deadline for submitting comments regarding the District's intent to establish a contract or price agreement through a Permissive Cooperative Procurement.

(3) The District must respond to any comments on its intent to establish a contract or price agreement through a Permissive Cooperative Procurement as set forth in ORS 279A.220(3)(c) and Rule 46.0440(7).

Stat. Auth.: ORS 279A.065

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

46-0470

Protests and Disputes

(1) If a bidder or proposer wishes to protest the procurement process, the contents of a solicitation document related to a Cooperative Procurement, or the award or proposed award of an Original Contract, the bidder or proposer shall direct the protest to the Administering Contracting Agency, and the bidder or proposer shall make such protest in accordance with ORS 279B.400 through ORS 279B.425. If the Administering Contracting Agency is not subject to the Code, then bidders or proposers shall make such protests in accordance with the processes and procedures established by the Administering Contracting Agency.

(2) The failure of the District to exercise any rights or remedies it has under a Contract or Price Agreement entered into through a Cooperative Procurement shall not affect the rights or remedies of any other Contracting Agency that participates in the Cooperative Procurement, including the Administering Contracting Agency, and shall not prevent any other Purchasing Contracting Agency from exercising any rights or seeking any remedies that may be available to it under its own Contract or Price Agreement arising out of the Cooperative Procurement.

(3) Any other protests related to a Cooperative Procurement, or disputes related to a Contract or Price Agreement arising out of a Cooperative Procurement, shall be made and resolved as set forth in ORS 279A.225.

Stat. Auth.: ORS 279A.065

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

46-0480

Contract Amendments

The District may amend a Contract entered into pursuant to a Cooperative Procurement as set forth in Rule 47-0800.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

ETHICS IN PUBLIC CONTRACTING

46-0600

Policy

These Rules supplement and do not replace ORS 244.010 through ORS 244.400, for the purpose of applying the policy of ORS 244.010 to Oregon Public Contracting under the Public Contracting Code and these Rules. Oregon Public Contracting is a public trust. The Agencies and Contractors involved in Public Contracting must safeguard this public trust.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.065(5)(a), ORS 279A.070, and ORS 279A.140

46-0605

Selection and Award of Public Contracts

(1) District officers, employees or agents involved in the process of selection and award of Public Contracts must carefully review the provisions of ORS 244.040.

(2) District officers, employees and agents are prohibited from soliciting or receiving Gifts, which means something of economic value given to a public official or the public official's relative without an exchange of valuable consideration of equivalent value, including the full or partial forgiveness of indebtedness, and which is not extended to others who are not public officials or the relatives of public officials on the same terms and conditions; and something of economic value given to a public official or the public official's relative for valuable consideration less than that required from others who are not public officials.

(3) District officers, employees and agents are prohibited from using their official position for personal or financial gain.

(4) District officers, employees and agents are prohibited from using confidential information gained in the course of the screening and selection procedures for personal or financial gain.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.065(5)(a), ORS 279A.070, and ORS 279A.140

46-0610

Appointments to Advisory Committees

The Chief Procurement Officer or designee may appoint procurement advisory committees to assist with Specifications, procurement decisions, and structural change that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competition pursuant to ORS 279A.015.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.065(5)(a), ORS 279A.070, and ORS 279A.140

46-0615

Nonretaliation

This Rule prohibits retaliation against anyone who complies with the Public Contracting Code and these Rules. Any officer, employee or agent of the District or a Provider who engages in retaliation action will be subject to Penalties pursuant to ORS 279A.990, ORS 244.350 to ORS 244.400 and related rules. Also, any Provider who engages in a retaliation action may be debarred.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.065(5)(a), ORS 279A.070, and ORS 279A.140

46-0625

Sole-Source

The District may not select a Sole-Source Procurement pursuant to ORS 279B.075 and avoid a competitive Procurement if the purpose of the selection is to primarily benefit the Provider, directly or indirectly, to the detriment of the District or the best interest of the Public.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.065(5)(a), ORS 279A.070; ORS 279B.075; ORS 279A.140

46-0630

Fragmentation

A Procurement may not be artificially divided or fragmented so as to constitute a Small Procurement, pursuant to ORS 279B.065, or an Intermediate Procurement, pursuant to ORS 279B.070.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.065(5)(a), ORS 279A.070; ORS 279B.065

46-0635

District and Provider Communications

(1) **Research Phase.** The District is encouraged to conduct research with Providers who can meet the District's needs. This research includes but is not limited to: meetings, industry presentations, and demonstrations with any Providers that, in the District's discretion, may be able to meet the District's need. The District must document the items discussed during the

research phase of Solicitation development. The research phase ends the day of a Solicitation release or request for a Quote pursuant to an Intermediate Procurement, unless the Solicitation or Intermediate Procurement provides for a different process that permits on-going research.

(2) **Solicitation and Contracting Phase.** Any communication between the District and Providers regarding a Solicitation, that occurs after the Solicitation release or request for a Quote and before the Award of a Contract, must only be made within the context of the Solicitation Document or Intermediate Procurement requirements (Communication). This Communication may allow for Discussions, Negotiations, Addenda, Providers' questions, and the District's answers to Providers' questions about terms and conditions, Specifications, Amendments, or related matters. During this phase, telephone conversations and meetings must be documented in the Procurement File. Written inquiries regarding the Solicitation should be responded to by the District in writing. A record of all material Communications regarding the Solicitation by interested Providers must be made a part of the Procurement File pursuant to Rule 46-0355.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.065(5)(a), ORS 279A.070, and ORS 279A.140

DIVISION 47

PUBLIC PROCUREMENTS FOR GOODS OR SERVICES GENERAL PROVISIONS

47-0050

Application

These division 47 rules implement ORS chapter 279B, Public Procurements and apply to the Procurement of Goods or Services. This division shall also govern the procurement of Personal Services, except for Architectural, Engineering, Land Surveying and Related Services, as defined in ORS 279C.100 and Division 48 rules. The term “Services”, when used in these division 47 rules also includes Personal Services. The District must award Personal Services Contracts under procedures set forth in ORS 279B.055 through 279B.085 and these rules.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.015

47-0100

Definitions

The definitions for this Division 47 are found in Rule 46-110.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279B.005

SOURCE SELECTION

47-0250

Methods of Source Selection

The District must award a Public Contract for Goods or Services by one of the seven sourcing methods, as follows:

- (1) Competitive Sealed Bidding (also known as Bidding or ITB) pursuant to ORS 279B.055;
 - (2) Competitive Sealed Proposals (also known as Proposals or RFP) pursuant to ORS 279B.060;
 - (3) Small Procurement pursuant to ORS 279B.065;
 - (4) Intermediate Procurement pursuant to ORS 279B.070;
 - (5) Sole-Source Procurement pursuant to ORS 279B.075;
 - (6) Emergency Procurement pursuant to ORS 279B.080;
 - (7) Special Procurement pursuant to ORS 279B.085;
- and related rules.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.050

47-0255

Competitive Sealed Bidding

(1) **Generally.** The District may procure Goods or Services by competitive sealed bidding as set forth in ORS 279B.055. An Invitation to Bid is used to initiate a competitive sealed bidding

solicitation and shall contain the information required by ORS 279B.055(2) and by section 2 of this rule. The District must provide public notice of the competitive sealed bidding solicitation as set forth in Division 47, Section 0300 of these rules.

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

(a) **General Information.**

(A) Notice of any pre-Offer conference as follows:

(i) The time, date and location of any pre-Offer conference;

(ii) Whether attendance at the conference will be mandatory or voluntary; and

(iii) A provision that provides that statements made by the District's representatives at the conference are not binding upon the District unless confirmed by Written Addendum.

(B) The form and instructions for submission of Bids and any other special information, e.g., whether Bids may be submitted by electronic means (See 47-0330 for required provisions of electronic Bids);

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

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

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

(F) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See 46-0210(3)); and

(G) How the District will notify Bidders of Addenda and how the District will make Addenda available (See Division 47, Section 0430 of these rules).

(b) **District Need.** The character of the Goods or Services the District is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements.

(c) **Bidding and Evaluation Process.**

(A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;

(B) The District must set forth objective evaluation criteria in the Solicitation Document in accordance with the requirements of ORS 279B.055(6)(a). Evaluation criteria need not be precise predictors of actual future costs, but to the extent possible, such evaluation factors shall be reasonable estimates of actual future costs based on information the District has available concerning future use; and

(C) If the District intends to Award Contracts to more than one Bidder pursuant to 47-0600(4)(c), the District must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. This may be left to the District's discretion at the time of the Award, provided it is so described in the Solicitation.

(d) **Applicable preferences pursuant to ORS 279B.055(6)(b).**

(A) Preference for Oregon Goods or Services, pursuant to ORS 279A.120 and Rules 46.0300 and 46.0310;

(B) Preference for recycled materials, pursuant to ORS 279A.125 and Rules 46.0320 and 46.0324.

(e) **Terms and Conditions.** All Contract terms and conditions, including a provision indicating whether the Contractor can assign the Contract, delegate its duties, or subcontract the delivery of the Goods or Services without prior written approval from the District.

Stat. Auth.: ORS 279A.065

47-0256

Competitive Sealed Bidding; Multistep Solicitations.

(1) **Generally.** The District may procure Goods or Services by using one of the following methods of selection for Multistep Competitive Sealed Bidding pursuant to ORS 279.055(12): Multistep Invitation to Bid or Multistep Revised Bidding.

A “Phase” may include one or more “steps” as referenced in the Code. All of the methods described in ORS 279B.055(12) and this Rule may also be collectively referred to in Division 47 as a “Multi-tiered Sealed Bidding” or “Multistep Sealed Bidding.”

(2)(a) **Multistep Invitation to Bid.** A Multistep Invitation to Bid is a phased process that seeks necessary information or un-priced submittals in Phase One, followed by a Phase Two of Competitive Sealed Bidding, inviting Bidders who submitted eligible un-priced submittals in Phase One to submit competitive sealed price Bids on the un-priced submittals in Phase Two. The District initially issues a Multistep Invitation to Bid, requesting the submission of un-priced submittals. Phase One may include multiple steps, at the discretion of the District, in order to obtain necessary information or un-priced submittals. At the conclusion of Phase One, the District evaluates those un-priced submittals to determine the eligibility of the Bidders to submit priced Bids. After this determination, the District may begin Phase Two by issuing subsequent Invitations to Bid, limited to those Bidders eligible to submit priced Bids. The Contract shall be awarded to the lowest Responsible Bidder or to multiple Responsible Bidders in accordance with ORS 279B.055(10). If time is a factor, the District may require Bidders to submit a separate sealed price Bid during the initial phase to be opened after the evaluation of the un-priced submittals. The District must comply with the following procedures for this type of Solicitation:

(b) **Public Notice.** Whenever a Multistep Invitation to Bid is used, Public Notice for Phase One shall be given in accordance with Rule 47-0305. Public Notice is not required for subsequent steps in Phase One, unless a step in Phase One expands the number of Bidders, and then Public Notice is required. Public Notice is not required for Phase Two. However, the District must give notice to all Bidders of subsequent steps in Phase One and Phase Two, inform Bidders of the right to protest Addenda issued after the initial Closing pursuant to Rule 47-0430, and further inform Bidders excluded from subsequent steps or Phase of the right, if any, to protest exclusion pursuant to Rule 47-0720.

(c) **Procedures Generally.** In addition to the procedures set forth in Rule 47-0300 through 47-0490, the District must employ the following procedures:

(A) **Solicitation Protest.** Prior to the Closing of Phase One, the District must provide an opportunity to protest the Solicitation under ORS 279B.405 and Rule 47-0730.

(B) **Addenda Protest.** The District may, provide an opportunity to protest any Addenda issued during Phase Two pursuant to Rule 47-0430(3)(b).

(C) **Exclusion Protest.** The District may, but is not required, to provide an opportunity for a Bidder to protest exclusion from a subsequent step or Phase as set forth in Rule 47-0720.

(D) **Administrative Remedy.** Proposers may submit a protest to any Addenda or to any action by the District that has the effect of excluding the Proposer from a subsequent step or Phase of bidding to the extent such protests are provided for in the Solicitation Document or required by this Section. Failure to so protest shall be considered the Bidder’s failure to pursue an administrative remedy made available to the Bidder by the District.

(E) **Award Protest.** The District must provide an opportunity to protest its intent to award a Contract pursuant to ORS 279B.410 and Rule 47-0740. An Affected Bidder may protest, for any of the bases set forth in Rule 47-0720(2), its exclusion from a subsequent Step or Phase of a Multistep Invitation to Bid, or an Addendum issued following initial Closing, if the District did not previously provide Bidders the opportunity to protest such exclusion or Addendum.

(d) **Procedure for Phase One.**

(A) **Form.** A Multistep Invitation to Bid shall be initiated by the issuance of an Invitation to Bid in the form and manner required for Competitive Sealed Bidding, except as hereinafter provided. In addition to the requirements set forth in Rule 47-0255(2), the Invitation to Bid shall state:

(i) That un-priced submittals are requested;

(ii) Whether priced Bids are to be submitted at the same time as un-priced submittals; if they are, that such priced Bids shall be submitted in a separate sealed envelope;

(iii) That the Solicitation is a multistep sealed Bid Procurement, and priced Bids will be considered only in Phase Two and only from those Bidders whose un-priced submittals are found eligible in Phase One;

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

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

(vi) That the Goods or Services being procured shall be furnished generally in accordance with the Bidder's un-priced submittal as found to be finally eligible and shall meet the requirements of the Invitation to Bid; and

(vii) Whether Bidders excluded from subsequent steps or Phase have a right to protest the exclusion before the notice of intent to award. Such information shall be given in the Bid Solicitation or changed by Addenda.

(B) **Addenda to the Invitation to Bid.** After receipt of un-priced submittals in Phase One, Addenda to the Invitation to Bid shall be distributed only to Bidders who submitted un-priced submittals.

(C) **Receipt and Handling of Un-priced Submittals.** Un-priced submittals in Phase One need not be opened publicly.

(D) **Evaluation of Un-priced Submittals.** Un-priced submittals submitted by Bidders in Phase One shall be evaluated solely in accordance with the criteria set forth in the Invitation to Bid. Un-priced submittals shall be categorized as:

(i) Eligible;

(ii) Potentially eligible; that is, reasonably susceptible of being made eligible; or

(iii) Ineligible. The District must record in Writing the basis for determining an un-priced submittal ineligible and make it part of the Procurement File in accordance with Rule 46-0355. The District may initiate Phase Two of the procedure if, in the District's opinion, there are sufficient eligible un-priced submittals to assure effective price competition in Phase Two without Discussions. If the District finds that such is not the case, the District may issue an Addendum to the Invitation to Bid or engage in Discussions as set forth in Subsection (5)(e) of this Rule.

(E) **Discussion of Un-priced Submittals.** The District may seek clarification of an un-priced submittal by any eligible or potentially eligible Bidder. During the course of such Discussions, the District will not disclose any information derived from one un-priced submittal to any other Bidder. Once Discussions have begun, any Bidder who has not been notified that its un-priced submittal has been finally found ineligible, may submit supplemental information amending its

un-priced submittal at any time until the Closing of the final step established by the District in the Solicitation Document. Such submission may be made at the request of the District or upon the Bidder's own initiative.

(F) **Notice of Ineligible Un-priced Submittal.** When the District determines a Bidder's un-priced submittal to be ineligible, such Bidder shall not be afforded an additional opportunity to supplement its un-priced submittal.

(G) **Mistakes During a Multistep Invitation to Bid.** Mistakes may be corrected or un-priced submittals may be withdrawn prior to the Closing of Phase One:

- (i) Before un-priced submittals are considered;
- (ii) After any Discussions have commenced under Subsection (5)(e);
- (iii) When responding to any Addenda of the Invitation to Bid; or
- (iv) In accordance with Rule 47-0470.

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

(A) **Initiation.** Upon the completion of Phase One, the District must either:

- (i) Open priced Bids submitted in Phase One (if priced Bids were required to be submitted) from Bidders whose un-priced submittals were found to be eligible; or
- (ii) If priced Bids have not been submitted, Discussions have been held, or Addenda to the Invitation to Bid have been issued, invite each eligible Bidder to submit a priced Bid.

(B) **Conduct.** Phase Two shall be conducted as any other Competitive Sealed Bidding Procurement except:

- (i) As specifically set forth in this Rule; and
- (ii) No public notice need be given of this invitation to submit priced Bids because such notice was previously given.

(3)(a) **Multistep Revised Bidding.** Revised Bidding means a multistep process that begins with an initial Round of Competitive Sealed Bidding pursuant to Rule 47-0255 and may, at the discretion of the District, include successive steps of Bidding in order for the District to gain the best and final offer for purposes of Award. The District may revise the Solicitation's Specifications, terms and conditions, and pricing structure for successive steps to best meet the District's needs. Bidders will be allowed adequate time to revise and resubmit their Bids in accordance with the requirements set forth in the newly revised Solicitation Document. At each successive step, the District may disregard its scoring of prior Bids and commence new scoring for the new Bids. The District must comply with the following procedures for this type of Solicitation:

(b) **Revisions.** The District may reject any Bid, after any round, because the Bid did not meet a minimum score or minimum set of requirements. The District may then proceed with a subsequent step that requires additional Bids to be submitted, based on different Specifications, terms and conditions, pricing structure, scoring model, and set of award criteria, separately or in any combination thereof, in order to best meet the District's interests (Revisions). If any Revision is made by the District in any subsequent step, the District has the right, in its sole discretion, to permit any Bidder whose Bid was previously rejected to submit a new Bid, if the reason(s) for the rejection of the prior Bid by that Bidder no longer applies.

(c) **Public Notice.** The District must give public notice pursuant to Rule 47-0305. The initial Solicitation Document shall disclose that a Multistep Revised Bidding process will or may be used. The District must give notice to all initial Bidders of any Revision(s) in the Specifications, terms and conditions, pricing structure, scoring model, and set of award criteria, separately or in any combination thereof. If the District discloses any prices, terms or conditions offered by

other Bidders, the District will give notice of these disclosures to the initial Bidders. At the end of the process, the District must give a Notice of Intent to award at least seven (7) calendar days prior to making the Award. Following clarifications and additional investigations, an Offeror may be reinstated or disqualified at any stage of the evaluation process.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070
Stats. Implemented: ORS 279B.055

47-0260

Competitive Sealed Proposals

(1) **Generally.** The District may procure Goods or Services by competitive sealed Proposals as set forth in ORS 279B.060. A Request for Proposal (RFP) is used to initiate a competitive sealed Proposal solicitation and shall contain the information required by ORS 279B.060(2) and by section 2 of this rule. The District must provide public notice of the competitive sealed Proposal as set forth in Rule 47-0305.

(2) **Request for Proposal.** In addition to the provisions required by ORS 279B.060(2), the Request for Proposal shall include the following:

(a) **General Information.**

(A) Notice of any pre-Offer conference as follows:

(i) The time, date and location of any pre-Offer conference; and

(ii) Whether attendance at the conference will be mandatory or voluntary; and

(iii) A provision that provides that statements made by the District's representatives at the conference are not binding upon the District unless confirmed by Written Addendum.

(B) The form and instructions for submission of Proposals and any other special information, e.g., whether Proposals may be submitted by electronic means (See Rule 47-0330 for required provisions of electronic Proposals);

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

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

(E) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See Rule 46-0210(3)); and

(F) How the District will notify Proposers of Addenda and how the District will make Addenda available. (See Rule 47-0430)

(b) **District Need.** The character of the Goods or Services the District is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements.

(c) **Proposal and Evaluation Process.**

(A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;

(B) The District must set forth selection criteria in the Solicitation Document in accordance with the requirements of ORS 279B.060(2)(h)(E). Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates of actual future costs based on information available to the District; and

(C) If the District intends to Award Contracts to more than one Proposer pursuant to Rule 47-0600(4)(d), the District must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. This may be left to the District's discretion at the time of Award, provided it is so described in the solicitation documents.

(d) **Applicable Preferences described in ORS 279A.120 and ORS 279A.125(2).**

(A) Preference for Oregon Goods and Services, pursuant to ORS 279A.120 and Rules 46-0300 through 46-0310;

(B) Preference for recycled materials, pursuant to ORS 279A.125 and Rules 46-320 through 46-0324.

(e) **Terms and Conditions.** All Contract terms and conditions, including a provision indicating whether the Contractor can assign the Contract, delegate its duties, or subcontract the Goods or Services without prior written approval from the District.

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

Stats. Implemented: ORS 279B.060

47-0261

Procedures for Competitive Range, Multi-tiered and Multistep Proposals

(1) Generally. The District may procure Goods or Services employing any combination of the methods of Contractor selection as set forth in ORS 279B.060(6)(b). In addition to the procedures set forth in Rules 47-0300 through 47-0490 for methods of Contractor selection that call for the establishment of a Competitive Range or include discussions or negotiations, the District must employ the procedures set forth in this rule for:

(a) Competitive Range;

(b) Best and Final Offer;

(c) Multi-tiered and Multistep Un-priced Proposals; and

(d) Multistep Revised Negotiations.

The District may also use a Request for Qualifications (RFQ) pursuant to Rule 47-0550 in combination with any of the methods described in ORS 279B.060(6)(b) or this Rule. All of the methods described in ORS 279B.060(6)(b) and this Rule may also be collectively referred to in Division 47 as “Multi-tiered Sealed Proposal” or “Multistep Sealed Proposals.”

(2) Protests.

(a) **Solicitation Protest.** Prior to the initial Closing, the District must provide an opportunity to protest the solicitation under ORS 279B.405 and Rule 47-0730.

(b) **Addenda Protest.** The District may provide an opportunity to protest, pursuant Rule 47-0430, any Addenda issued pursuant to ORS 279B.060(6)(d).

(c) **Exclusion Protest.** The District may provide before the notice of Intent to Award an opportunity for a Proposer to protest exclusion from the Competitive Range or from subsequent phases of multi-tiered or multistep sealed Proposals as set forth in Rule 47-0720.

(d) **Administrative Remedy.** Proposers may submit a protest to any Addenda or to any action by the District that has the effect of excluding the Proposer from subsequent phases of a multiple-tiered or multistep Request for Proposals to the extent such protests are provided for in the Solicitation Document. Failure to so protest shall be considered the Proposer’s failure to pursue an administrative remedy made available to the Proposer by the District.

(e) **Award Protest.** The District must provide an opportunity to protest its intent to award a Contract pursuant to ORS 279B.410 and Rule 47-0740. An Affected Proposer may protest, for any of the bases set forth in Rule 47-0720(2), its exclusion from the Competitive Range or any phase of a multi-tiered or multistep sealed Proposal, or an Addendum issued following initial Closing, if the District did not previously provide Proposers the opportunity to protest such exclusion or Addendum.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

47-0262

Competitive Range, Discussions and Negotiations

(1) Competitive Range. When the District's solicitation process conducted pursuant to ORS 279B.060(6)(b) calls for the District to establish a Competitive Range at any stage in the Procurement process, it shall do so as follows:

(a) Determining Competitive Range.

(A) The District must establish a Competitive Range after evaluating all Responsive Proposals in accordance with the evaluation criteria set forth in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria set forth in the Request for Proposals, the District must determine and rank the Proposers in the Competitive Range.

(B) The District may increase the number of Proposers in the Competitive Range if the District's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the most Advantageous Proposer. The District may decrease the number of Proposers in the initial Competitive Range only if the excluded Proposers have no reasonable chance to be the most advantageous Proposer.

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

(c) Intent to Award; Discuss or Negotiate. After determination of the Competitive Range and after any protest period provided in accordance with subsection (1)(b) expires, or after the District has provided a final response to any protest, whichever date is later, the District may either:

(A) Provide Written notice to all Proposers in the Competitive Range of its intent to award the Contract to the highest-ranked Proposer in the Competitive Range.

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

(ii) After the protest period provided in accordance with Rule 47-0740 expires, or after the District has provided a final response to any protest, whichever date is later, the District must commence negotiations in accordance with section (3) of this rule with Proposers in the Competitive Range; or

(B) Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them as set forth in section (2) of this rule and following such discussions and receipt and evaluation of revised Proposals, conduct negotiations as set forth in section (3) of this rule with the Proposers in the Competitive Range.

(2) Discussions and Revised Proposals for Best and Final Offers. If the District chooses to enter into discussions with and receive best and final Offers (See Rule 47-0262(4)), the District must proceed as follows:

(a) Initiating Discussions. The District must initiate oral or written discussions with all Proposers submitting Responsive Proposals or all Proposers in the Competitive Range (collectively "eligible Proposers") regarding their Proposals with respect to the provisions of the

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

(A) Informing eligible Proposers of deficiencies in their initial Proposals;

(B) Notifying eligible Proposers of parts of their Proposals for which the District would like additional information; or

(C) Otherwise allowing eligible Proposers to develop revised Proposals that will allow the District to obtain the best Proposal based on the requirements and evaluation criteria set forth in the Request for Proposals.

(b) Conducting Discussions. The District may conduct discussions with each eligible Proposer necessary to fulfill the purposes of this section 2, but need not conduct the same amount of discussions with each eligible Proposer. The District may terminate discussions with any eligible Proposer at any time. However, the District must offer all eligible Proposers the same opportunity to discuss their Proposals with the District before the District notifies eligible Proposers of the date and time pursuant to section 4 that best and final Proposals will be due.

(A) In conducting discussions, the District:

(i) Shall treat all eligible Proposers fairly and shall not favor any eligible Proposer over another;

(ii) Shall disclose other eligible Proposer's Proposals or discussions only in accordance with 279B.060(6)(a)(B) or (C);

(iii) May adjust the evaluation of a Proposal as a result of a discussion under this section. The conditions, terms, or price of the Proposal may be altered or otherwise changed during the course of the discussions provided the changes are within the scope of the Request for Proposals.

(B) At any time during the time allowed for discussions, the District may:

(i) Continue discussions with a particular eligible Proposer;

(ii) Terminate discussions with a particular eligible Proposer and continue discussions with other eligible Proposers; or

(iii) Conclude discussions with all remaining eligible Proposers and provide notice pursuant to section 4 of this rule to the eligible Proposers requesting best and final Offers.

(3) Negotiations.

(a) **Initiating Negotiations.** The District may commence serial negotiations with the highest-ranked eligible Proposers or commence simultaneous negotiations with all eligible Proposers as follows:

(A) After initial determination of which Proposals are Responsive; or

(B) After initial determination of the Competitive Range in accordance with section (1) of this rule; or

(C) After conclusion of discussions with all eligible Proposers and evaluation of revised Proposals (See section (2) of this rule).

(b) Conducting Negotiations.

(A) **Scope.** The District may negotiate:

(i) **The statement of Work;**

(ii) The Contract Price as it is affected by negotiating the statement of Work; and

(iii) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the RFP or Addenda thereto. Accordingly, Proposers shall not submit, and the District will not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the Request for Proposals or Addenda thereto.

(B) Terminating Negotiations. At any time during discussions or negotiations that the District conducts in accordance with sections (2) or (3) of this rule, the District may terminate discussions or negotiations with the highest-ranked Proposer, or the Proposer with whom it is currently discussing or negotiating, if the District reasonably believes that:

(i) The Proposer is not discussing or negotiating in good faith; or

(ii) Further discussions or negotiations with the Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.

(c) Continuing Serial Negotiations. If the District is conducting serial negotiations and the District terminates negotiations with a Proposer in accordance with paragraph 3(b)(B) of this rule, the District may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in section (3) of this rule until the District has either:

(A) Determined to Award the Contract to the Proposer with whom it is currently discussing or negotiating; or

(B) Completed one round of discussions or negotiations with all Proposers in the Competitive Range, unless the District provided for more than one round of discussions or negotiations in the Request for Proposals, in which case the District has completed all rounds of discussions or negotiations.

(d) Competitive Simultaneous Negotiations. If the District chooses to conduct competitive negotiations, the District may negotiate simultaneously with competing Proposers. The District:

(A) Shall treat all Proposers fairly and shall not favor any Proposer over another;

(B) May disclose other Proposer's Proposals or the substance of negotiations with other Proposers only if the District notifies all of the Proposers with whom the District will engage in negotiations of the District's intent to disclose before engaging in negotiations with any Proposer.

(e) Oral Modifications. Any oral modification of a Proposal resulting from negotiations under this section (3) shall be reduced to Writing by the Proposer.

(4) Best and Final Offers. If best and final Offers are required, the District must establish a common date and time by which Proposers must submit best and final Offers. Best and final Offers shall be submitted only once; provided, however, the District may make a written determination that it is in the District's best interest to conduct additional discussions, negotiations or change the District's requirements and require another submission of best and final Offers. Otherwise, no discussion of or changes in the best and final Offers shall be allowed prior to Award. Proposers shall also be informed if they do not submit notice of withdrawal or another best and final Offer, their immediately previous Offer will be construed as their best and final Offer. The District will evaluate Offers as modified by the best and final Offer and conduct evaluations described in Rule 47-0600. The District will not modify evaluation factors or their relative importance after the date and time that best and final Offers are due.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

47-0263

Multistep Sealed Proposals

(1) Generally. The District may procure Goods or Services by using multistep competitive sealed Proposals pursuant to ORS 279.060(6)(b)(G).

(2) Phased Process. Multistep sealed Proposals is a phased Procurement process that seeks necessary information or un-priced technical Proposals in the initial phase and invites Proposers who submitted technically qualified Proposals in the initial phase to submit competitive sealed price Proposals on the technical Proposals in the final phase. The Contract shall be Awarded to the Responsible Proposer submitting the most Advantageous Proposal in accordance with the terms of the Solicitation Document applicable to the final phase. If time is a factor, the District may require Proposers to submit a separate sealed price Proposal during the initial phase to be opened after the technical evaluation.

(3) Public Notice. Whenever multistep sealed Proposals are used, the District must provide public notice of the solicitation as set forth in Rule 47-300. Public Notice is not required for any subsequent steps of Phase One, unless a step in Phase One expands the number of proposers, and then public notice is required. Public notice is not required for the subsequent phases. However, the District will give notice of the subsequent phases to all Proposers and inform any Proposers excluded from the subsequent phases of the right, if any, to protest exclusion pursuant to Rule 47-0720. If the District elects to provide a protest period during this Procurement Process for Addenda issued after the initial Closing pursuant to Rule 47-0430, then the District will give notice to the Proposers of this right to protest such Addenda.

(4) Procedure for Phase One of Multistep Sealed Proposals.

(a) **Form.** Multistep sealed Proposals shall be initiated by the issuance of a Request for Proposal in the form and manner required for competitive sealed Proposals except as provided in this rule. In addition to the requirements set forth in Rule 47-0260(2), the multistep Request for Proposal shall state:

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

(B) Whether priced Proposals are to be submitted at the same time as un-priced technical Proposals; that if they are, such priced Proposals shall be submitted in a separate sealed envelope;

(C) That the solicitation is a multistep sealed Proposal Procurement, and that priced Proposals will be considered only in the subsequent phases from those Proposers whose un-priced technical Proposals are found qualified in the first phase;

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

(E) That the District, to the extent that it finds necessary, may conduct oral or written discussions of the un-priced technical Proposals;

(F) That the Goods or Services being procured shall be furnished generally in accordance with the Proposer's technical Proposal as found to be finally qualified and shall meet the requirements of the Request for Proposal.

(G) Whether Proposers excluded from subsequent phases have a right to protest the exclusion. Such information can be given or changed through Addenda.

(H) If time is a factor, the District may require Proposers to submit a separate sealed price Proposal during Phase One to be opened after the evaluation of un-priced technical proposals.

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

(c) **Receipt and Handling of Un-priced Technical Proposals.** The District is not required to publicly open un-priced technical Proposals.

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

(A) Qualified;

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

(C) Unqualified. The District will record in writing the basis for determining a Proposal unqualified and make it part of the Procurement file. The District may initiate phase two of the procedure if, in its opinion, there are sufficient qualified or potentially qualified un-priced technical Proposals to assure effective price competition in the second phase without technical discussions. If the District finds that such is not the case, the District may issue an Addendum to the Request for Proposal or engage in technical discussions as set forth in subsection 4(e).

(e) **Discussion of Un-priced Technical Proposals.** The District may seek clarification of a technical Proposal of any Proposer who submits a qualified, or potentially qualified un-priced technical Proposal. During the course of such discussions, the District will not disclose any information derived from one un-priced technical Proposal to any other Proposer. Once discussions are begun, any Proposer who has not been notified that its Proposal has been finally found unqualified may submit supplemental information amending its technical Proposal at any time until the Closing date of Phase Two established by the District. Such submission may be made at the request of the District or upon the Proposer's own initiative.

(f) **Notice of Unqualified Un-priced Technical Proposal.** When the District determines a Proposer's un-priced technical Proposal to be unqualified, such Proposer shall not be afforded an additional opportunity to supplement its technical Proposals.

(g) **Mistakes During Multistep Sealed Proposals.** Mistakes may be corrected or Proposals may be withdrawn during phase one:

(A) Before un-priced technical Proposals are considered;

(B) After any discussions have commenced under subsection 4(e) of this rule;

(C) When responding to any Addenda to the Request for Proposal; or

(D) In accordance with Rule 47-0470.

(5) **Procedure for Subsequent Phases.**

(a) **Initiation.** Upon the completion of phase one, the District will either:

(A) Open priced Proposals submitted in phase one (if priced Proposals were required to be submitted) from Proposers whose un-priced technical Proposals were found to be qualified; or

(B) If priced Proposals have not been submitted, technical discussions have been held, or Addenda to the Request for Proposals have been issued, invite each qualified Proposer to submit priced Proposals.

(b) **Conduct.** Phase two shall be conducted as any other competitive sealed Proposal solicitation except:

(A) As specifically set forth in this rule; and

(B) No public notice need be given of the request to submit price Proposals because such notice was previously given.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

47-0265

Small Procurements

(1) Generally. For Procurements of Goods or Services less than or equal to \$5,000 the District may Award a Contract as a small Procurement pursuant to ORS 279B.065 and this rule.

(2) Amendments. The District may amend a Public Contract Awarded as a small Procurement in accordance with Rule 47-0800, but the cumulative amendments shall not increase the total Contract Price to greater than \$6,000.

(3) Fragmentation. A Procurement may not be artificially divided or fragmented so as to constitute a Small Procurement, pursuant to ORS 279B.065(2)

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

Stats. Implemented: ORS 279B.065

47-0270

Intermediate Procurements

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

(2) Negotiations. The District may negotiate with a Proposer to clarify its quote, Bid, or Proposal or to effect modifications that will make the quote, Bid, or Proposal acceptable or make the quote, Bid, or Proposal more Advantageous to the District.

(3) Amendments. The District may amend a Public Contract Awarded as an intermediate Procurement in accordance with Rule 47-0800, but the cumulative amendments shall not increase the total Contract Price to a sum that is greater than one hundred and twenty-five percent (125%) of the original Contract price.

(4) Fragmentation. A Procurement may not be artificially divided or fragmented so as to constitute an Intermediate Procurement, pursuant to ORS 279B.070(2).

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

Stats. Implemented: ORS 279B.070

47-0275

Sole-source Procurements

(1) Generally. The District may Award a Public Contract without competition as a sole-source Procurement pursuant to the requirements of ORS 279B.075 and this rule.

(2) Requirements for Public Notice.

(a) For all Public Contracts awarded as Sole-Source Procurements exceeding \$5,000 but not exceeding \$150,000 the District must give public notice of the LCRB's determination that the Goods or Services or class of Goods or Services are available from only one source in a manner similar to public notice of competitive sealed Bids under ORS 279B.055(4) and Rule 47-0305. The public notice shall describe the Goods or Services to be acquired by a sole-source Procurement, identify the prospective Contractor and include the date, time and place that protests are due. The District must give such public notice at least seven (7) Days before Award of the Contract to allow for protests.

(b) For all Public Contracts exceeding \$150,000, the District must give such public notice at least fourteen (14) Days before Award of the Contract unless the Chief Procurement Officer gives prior written approval to reduce the number of days based upon extraordinary circumstance that do not meet the criteria for an Emergency Procurement pursuant to Rule 47-0280.

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

(4) Brand Name. If the Sole-source Procurement involves any Brand Name specification, the District must also comply with Rule 47-288(2).

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

Stats. Implemented: ORS 279B.075

47-0280

Emergency Procurements

(1) The District may Award a Public Contract as an Emergency Procurement pursuant to the requirements of ORS 279B.080. When an Emergency Procurement is authorized, the Procurement shall be made with competition that is practicable under the circumstances.

(2) Pursuant to the requirements of this Rule, the District, may in its discretion, enter into a Public Contract without competitive Solicitation if an emergency exists. Emergency means circumstances that could not have been reasonably foreseen that create a substantial risk of loss, damage, interruption of services or threat to public health or safety that require prompt execution of a Contract to remedy the condition.

(3) Regardless of the dollar value of the Contract, the District entering into an Emergency Contract shall:

(a) Make a Written declaration of emergency, including findings describing the emergency circumstances that require the prompt performance of the Contract, stating the anticipated harm from failure to establish the Contract on an expedited basis.

(b) Record the measures taken to encourage competition; the amounts of the Bids, Quotes or Proposals obtained, if any; and the reason for selecting the Contractor.

(4) Pursuant to ORS 279B.080, the Chief Procurement Officer, or person designated under ORS 279A.075, shall declare the existence of the emergency, as required by Subsection (3)(a), which must authorize the District to enter into an Emergency Contract.

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

Stats. Implemented: ORS 279B.080

47-0285

Special Procurements

(1) **Generally.** The District may Award a Public Contract as a Special Procurement pursuant to the requirements of ORS 279B.085 and these rules.

(2) **Purpose.** Pursuant to ORS 279B.085, these Rules establish the criteria for procuring Goods or Services through Special Procurements.

(3) Request Procedures

(a) **Approval.** The Chief Procurement Officer, acting on behalf of the District, may request approval from the LCRB for the District to use a Special Procurement for a particular Contract or Contracts or for a specific class of Contracts.

(b) **Requests.** Special Procurement Requests must be in writing and contain the following:

(i) Request must include reason(s) why the District has elected to use Special Procurement and how it will benefit the District or the public.

(b) The Request must include findings, market research, or other documentation that the Special Procurement:

(i) Will be unlikely to encourage favoritism in the awarding of Public Contracts or to substantially diminish competition for Public Contracts, and

(ii) Will either:

(A) Result in substantial cost savings to the District or to the public, or

(B) Otherwise substantially promote the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under ORS 279B.055, 279B.060, 279B.065 or 279B.070 or under any related rules.

(c) The alternative process designed by the District must be clear and complete, including a description of the Goods or Services to be acquired, provisions for advertisement, a proposed Solicitation process, including provisions for Amendment and criteria for selection, and the proposed contract document.

(3) **Effect.** The Special Procurement approval is effective only after the LCRB's approval of the findings and Request.

(4) **Public Notice.**

(a) The manner in which the District must give public notice of its request for approval and of the LCRB's approval of a Special Procurement must be similar to the manner it gives for public notice of Competitive Sealed Bidding under ORS 279B.055(4) and Rule 47-0305. The public notice must describe the Goods or Services or class of Goods or Services to be acquired through the Special Procurement. Notwithstanding Rule 47-0305 and pursuant to ORS 279B.400, reasonable times and manners for affected persons to protest the District's request for approval of a Special Procurement are as follows:

(i) If the Special Procurement involves one or more Solicitations, then the District must give a combined public notice of its initial Solicitation, its request for approval of a Special Procurement, and the approval of the Special Procurement by the LCRB of the District, at least seven (7) calendar days before the initial Solicitation's closing date. The Solicitation Document must either contain the attached request and approval of the Special Procurement or incorporate the request and approval by reference with the documents easily accessible to affected Persons; or

(ii) If the Special Procurement does not involve a Solicitation, then the District must give a combined public notice of its request for approval of a Special Procurement and the approval of the Special Procurement, at least seven (7) days prior to the commencement of the Special Procurement.

(b) The District may specify an exception to the public notice requirement of this Rule in cases where confidentiality or security may be jeopardized only pursuant to an exception under the Public Meetings Law (ORS 192.610 through ORS 192.690).

(5) **Protest.** An Affected Person may protest the approval of or request for approval of a Special Procurement in accordance with ORS 279B.400 and Rule 47-0700.

(6) **Reference.** Any Solicitation or Contract resulting from a Special Procurement approval must reference the Special Procurement approval number in the file.

(7) **Conditions.** The LCRB's approval may include conditions, such as expiration dates, and may be revoked at any time by the LCRB.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279B.085

47-0288

Special Procurements; by Rule

(1) Brand Names or Products, “or Equal,” Single Seller and Sole Source. The District may enter into a public contract for the procurement of Brand Name “or Equal” Products subject to the requirements of this rule.

(A) Specifications. Solicitation specifications for public contracts must not expressly or implicitly require any product of any particular manufacturer or seller except as expressly authorized in Subsections (i) and (ii) of this Rule.

(i) “Or Equal” Specification. The District may specify a particular brand name, make or product suffixed by “or equal”, “or approved equal”, “or equivalent”, “or approved equivalent”, or similar language if there is no other practical method of specification.

(ii) Specifying a Particular Make or Product. The District may specify a brand name, make, or product without an “or equal” or equivalent suffix if there is no other practical method of specification, after documenting the procurement file with the following information:

(I) A brief description of the solicitation(s) to be covered including volume of contemplated future purchases;

(II) The brand name, mark, or product to be specified; and

(III) The reasons for seeking this procurement method, which must include at least one of the following findings in the procurement file:

(aa) It is unlikely that Specification of the brand name, mark or product will encourage favoritism in the award of the public contracts or substantially diminish competition; or

(bb) Specification of the brand name, mark or product would result in substantial cost savings to the District; or

(cc) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies.

(B) Public Notice. The District will make reasonable effort to notify all known suppliers of the specified product and invite such suppliers to submit competitive bids or proposals; or document the procurement file with findings of current market research to support the determination that the product is available from only one seller. This Requirement is satisfied by electronically posting a notice as provided in Rule 47-0330 for a reasonable period of time or by documenting direct contact with such suppliers in the Procurement file.

(C) Purchasing From Sole Source, Single Seller. The District may purchase a particular product or service available from only one source if the District meets the Requirements of Subsection (A) and (B) of this rule and a Sole-Source Procurement pursuant to ORS 279B.275. Prior to purchase, the District must document its findings of current market research to support the determination that the product or service is available from only one seller or source and place this information in the procurement file. The District’s findings must also include:

(i) A brief description of the contract or contracts to be covered including volume of contemplated future purchases;

(ii) Description of the product or service to be purchased; and

(iii) The reasons the District is seeking this procurement method, which must include at least the following:

(I) Efficient utilization of existing Goods or Services requires the acquisition of compatible Goods or Services; or

- (II) The required product is data processing equipment which will be used for research where there are requirements for exchange of software and data with other research establishments; or
- (III) The particular product is for use in a pilot or an experimental project.
- (D) **Single Manufacturer, Multiple Sellers.** The District may specify a product or service available from only one manufacturer, but available through multiple sellers, if the Requirements of Subsection (A) and (B) and the following are met:
 - (i) If the total purchase is \$75,000 or more but does not exceed \$150,000 competitive quotes must be obtained and retained in the Procurement File pursuant to the rules governing Intermediate Procurements;
 - (ii) If the purchase exceeds \$150,000, the acquisition shall be made through competitive procurement unless a contract-specific special procurement is authorized by the LCRB.
- (E) **Single Manufacturer, Multiple Purchases.** If the District intends to make several purchases of the product of a particular manufacturer or seller for a period not to exceed five (5) years, the District must so state in the Solicitation file, the Solicitation Document, if any, and the public notice described in Subsection (B) of this Rule. Such documentation and public notice constitute sufficient notice as to subsequent purchases. If the total purchase amount is estimated to exceed \$150,000, this must be stated in the advertisement for Bids or Proposals.
- (F) **Competitive Solicitations.** If the District competitively solicits, it must comply with the Rules for that method of Solicitation pursuant to ORS 279B.055 through 279B.075.

(2) Advertising Contracts, Purchase of.

The Chief Procurement Officer, acting on behalf of the District, may purchase media advertising, regardless of dollar value, without competitive bidding.

(3) Advertising Contracts, Sale of. Chief Procurement Officer, acting on behalf of the District, may authorize the sale of advertising in district publications and for district activities, regardless of dollar value, without competitive bidding.

(4) Equipment Repair and Overhaul. Chief Procurement Officer, acting on behalf of the District, may enter into a Public Contract for equipment repair or overhaul without competitive bidding, subject to the following conditions:

(a) Conditions.

(A) Service or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing; or

(B) Service or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source; and

(C) The District purchases within the limits and pursuant to the methods in (5)(b) of this Rule.

(b) Process and Criteria. The Chief Procurement Officer will use competitive methods wherever possible to achieve best value and must document in the Procurement File the reasons why a competitive process was deemed to be impractical. If the anticipated purchase is \$75,000 or more but less than \$150,000 competitive quotes must be obtained and retained in the Procurement File pursuant to the rules governing Intermediate Procurements.

(5) Purchase of Used Personal Property. The District may directly purchase used personal property and equipment if such property is suitable for the District's needs and can be purchased for a lower cost than substantially similar new property. For the purpose of this rule, the cost of used property shall be based upon the life-cycle cost of the property over the period for which the property will be used by the District.

(6) Information Technology Contracts. Chief Procurement Officer, acting on behalf of the District, shall comply with the requirements of this rule for the Procurement of information technology Contracts. Competitive methods will be used wherever possible to achieve best value. The reasons why a competitive process was deemed to be impractical must be documented in the Procurement file.

(A) If the anticipated purchase is \$75,000 or more but less than \$150,000 competitive quotes will be obtained and retained in the Procurement File pursuant to the rules governing Intermediate Procurements.

(B) If the anticipated purchase exceeds \$150,000, the District will solicit written proposals in accordance with District rules governing requests for proposals.

(7) Telecommunications Systems – Hardware and Software Contracts. Chief Procurement Officer, acting on behalf of the District, shall comply with the requirements of this rule for the procurement of telecommunications systems contracts. Competitive methods will be used wherever possible to achieve best value. The reasons why a competitive process was deemed to be impractical must be documented in the Procurement file.

\$75,000 or more but less than \$150,000 competitive quotes will be obtained and retained in the Procurement File pursuant to the rules governing Intermediate Procurements.

(B) If the anticipated purchase exceeds \$150,000, the District will solicit written proposals in accordance with District rules governing requests for proposals.

(8) Telecommunications Services. Chief Procurement Officer, acting on behalf of the District, may enter into a Public Contract for telecommunications services without competitive bidding, if no competition exists within the area for the service required. To determine whether competition exists, the Chief Procurement Officer will consider the following factors:

(A) Determination of alternative providers available within the geographic and service market area;

(B) The extent to which alternative services offered are comparable or substitutable in technology, service provided and performance; and

(C) The extent to which alternative providers can respond to the District's interest in consistency and continuity of services throughout its service area, volume discounts, equitable service for all users, centralized management and limiting District liability.

(D) The District will use competitive methods wherever possible to achieve best value. If competition exists as defined above and the anticipated purchase is \$75,000 or more but less than \$150,000 competitive quotes will be obtained and retained in the procurement file pursuant to the rules governing Intermediate Procurements. If the anticipated purchase exceeds \$150,000, the District will solicit written proposals in accordance with District rules governing requests for proposals.

(9) Copyrighted and Library Materials.

The District may purchase copyrighted materials where there is only one known supplier available for such goods. This includes, but is not limited to, new books, periodicals, curriculum materials, reference materials, audio and visual media, and non-mass marketed software from a particular publisher or its designated distributor. Instructional materials are adopted through a statewide process under the authority of the Oregon Department of Education. The District purchases its instructional materials through Northwest Textbook Depository.

(10) Requirements Contracts.

The Chief Procurement Officer, acting on behalf of the District, may establish requirements contracts for the purposes of minimizing paper work, achieving continuity of products, securing

a source of supply, reducing inventory, combining District requirements for volume discounts, standardization among District departments and reducing lead time for ordering. Requirements contracts may be utilized in accordance with the following:

- (A) The contract must have originally been let by competitive procurement procedures;
- (B) District departments may purchase the goods or services from the awarded contractor without first undertaking additional competitive procurement procedures; and
- (C) The term of any District requirements contract, including renewals, will not exceed five years unless otherwise exempted pursuant to ORS 279B.085.

(11) Purchases under Federal Contracts. When the price of goods and services has been established by a contract of the federal government pursuant to a federal contract award, the District may purchase the goods and services in accordance with the federal contract without subsequent competitive bidding. In exercising its authority under this exemption, the district shall obtain and document permission from the appropriate federal agency to purchase under the federal contract and document the cost savings to be gained for the District from the anticipated purchases under the federal contract. The District shall not contract pursuant to this rule in the absence of a cost savings to the District by using this method.

(12) Hazardous Material Removal and Cleanup. The District may directly acquire services to remove or clean up hazardous material or oil from any vendor when ordered to do so by the Oregon Department of Environmental Quality pursuant to its authority under ORS Chapter 466. In doing so, the following conditions apply:

- (A) To the extent reasonable under the circumstances, the District will encourage competition by attempting to obtain informal price quotations or proposals from potential suppliers of goods and services.
- (B) The District department responsible for managing or coordinating the clean-up shall prepare a written description of the circumstances that require it and a copy of the DEQ order for the cleanup to the Chief Procurement Officer, together with a request for contract authorization;
- (C) The District department responsible for managing or coordinating the clean-up shall record whether there was time for competition, and, if so, the measures taken to encourage competition, the amount of the price quotations obtained, if any, and the reason for selecting the contractor to whom award is made; and
- (D) The timeline for cleanup does not permit use of intermediate procurement procedures.

(13) Tag-on Contracts. The District may enter into a contract for the purchase of goods or services, other than public improvements or personal services, from an entity that is selling substantially identical goods or services by contract with another Oregon public agency (the “Originating Agency”) if:

- (A) The Originating Agency selected the contractor through a competitive process that complied with the District’s public contracting rules;
- (B) The District contract is executed not later than two years after the date of the contract with the Originating Agency; and
- (C) The contract allows the District to purchase the goods and services at the unit prices or rates and under the same conditions as set forth in the Originating Agency’s contract, subject only to price adjustments for minor modifications to customize the goods and services to the District’s specifications and modifications to conform timing and place of performance to the District’s requirements. For the purposes of this rule, a modification of the primary purpose or

function of the goods or services shall not result in a unit price or rate adjustment of more than five percent of the unit pricing or rates set forth in the Originating Agency's contract.

(14) Insurance, Employee Benefit and Other. The District may purchase employee benefit insurance and other insurance without competitive bidding, regardless of dollar amount, subject to the terms of any collective bargaining agreement between the District and represented employee groups.

(15) Disposal of Abandoned, Seized or Non-owned Property. Contracts or arrangements for the sale or other disposal of abandoned, seized or other personal property not owned by the District at the time the District obtains possession are not subject to competitive procurement procedures. The Chief Procurement Officer may select any method of disposal including, but not limited to, donation to a charitable organization.

(16) Disposal of Surplus Property. Surplus property shall be disposed of in accordance with Rules 50-0100 through 50-0200.

(17) Temporary Extensions or Renewals. The District may enter into contracts for a single period of one year or less, for the temporary extension or renewal of an expiring and non-renewable, or recently expired, contract, other than a contract for public improvements, without competitive bidding.

(18) Temporary Use of District Property. The District may negotiate and enter into a license, permit or other contract for the temporary use of District-owned property without using a competitive selection process if:

(A) The contract results from an unsolicited proposal to the District based on the unique attributes of the property or the unique needs of the proposer;

(B) The proposed use of the property is consistent with the District's use of the property and the public interest; and

(C) The District reserves the right to terminate the contract without penalty, in the event that the District determines that the contract is no longer consistent with the District's present or planned use of the property or the public interest.

(19) Sponsorship Agreements. Sponsorship agreements, under which the District receives a gift, donation or consideration in exchange for official recognition of the person making the donation or payment may be awarded by any method deemed appropriate by the District, including without limitation, by direct appointment, private negotiation, from a qualified pool, or using a competitive process.

(20) Concession Agreements. The District may enter into contracts which grant a franchise or concession to a private entity or individual to promote or sell, for its own business purposes, specified types of goods or services from District property and under which the concessionaire or promoter makes payments to the District based, at least in part, on the concessionaire's revenues from sales or the value of such promotion to the sponsor's business, whether on or off the District property. A concession agreement does not include an agreement which represents a rental, lease, license, permit or other arrangement for the use of public property. Concession agreements may be awarded by any method deemed appropriate by the Chief Procurement Officer including without limitation, by direct appointment, private negotiation, from a qualified pool, or using a competitive process.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279B.085

PROCUREMENT PROCESS

47-0300

Applicability to Methods of Source Selection

- (1) **Generally.** These Procurement Process Rules are intended to apply to more than one sourcing method pursuant to ORS 279B.050 through 279B.090 and to specify those methods.
- (2) In the event of conflict or ambiguity arising from specific requirements of another Rule in Division 47 and a general Rule under Procurement Process, the specific requirements of another Rule take precedence over the more general requirements of a Rule under Procurement Process.
- (3) If a Rule under Procurement Process is silent regarding its specific application or an ambiguity arises regarding the application of any such Rule to any of the seven sourcing methods of ORS 279B.050 through 279B.090, that Rule applies only to Bidding and Proposals in accordance with ORS 279B.055, 279B.060, and Rules 47-0255 through 47-0261.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279B.050 through 279B.090

47-0305

Public Notice of Solicitation Documents

- (1) **Notice of Solicitation Documents; Fee.** The District must provide public notice of every Solicitation Document in accordance with section (2) of this rule. The District may give additional notice using any method it determines appropriate to foster and promote competition, including:
 - (a) Mailing notice of the availability of the Solicitation Document to Persons that have expressed an interest in the District's Procurements;
 - (b) Placing notice on the District's Electronic Procurement System; or
 - (c) Placing notice on the District's Internet World Wide Web site.
- (2) **Advertising.** The District must advertise every notice of a Solicitation Document as follows:
 - (a) The District must publish the advertisement for Offers in a newspaper of general circulation as described in ORS 279B.055(4) and 279B.060(4); or
 - (b) The District may publish the advertisement for Offers on the District's Electronic Procurement System instead of publishing notice in a newspaper of general circulation as required by ORS 279B.055(4)(b) in accordance with Rule 47-0330.
- (3) **Content of Advertisement.** All advertisements for Offers shall set forth:
 - (a) Where, when, how, and for how long the Solicitation Document may be obtained;
 - (b) A general description of the Goods or Services to be acquired;
 - (c) The interval between the first date of notice of the Solicitation Document and the Closing, shall not be less than fourteen (14) Days for an Invitation to Bid and thirty (30) Days for a Request for Proposals, unless the Chief Procurement Officer determines that a shorter interval is in the public's interest, and that a shorter interval will not substantially affect competition. However, in no event shall the interval between the first date of notice of the Solicitation Document and the Closing be less than seven (7) Days as set forth in ORS 279B.055(4)(f). The specific reasons for the shorter public notice period must be documented in the Procurement file;

- (d) The date that Persons must file applications for prequalification if prequalification is a requirement and the class of Goods or Services is one for which Persons must be prequalified;
 - (e) The office where Contract terms, conditions and Specifications may be reviewed if not electronically attached;
 - (f) The name, title and address of the individual authorized by the District to receive Offers;
 - (g) The scheduled Opening; and
 - (h) Any other information the District deems appropriate.
- (4) **Posting Advertisement for Offers.** The District must post a copy of each advertisement for Offers at the principal business office of the District. A Proposer may obtain a copy of the advertisement for Offers upon request.
- (5) **Fees.** The District may charge a fee or require a deposit for the Solicitation Document.
- (6) **Notice of Addenda.** The District must provide potential Offerors notice of any Addenda to a Solicitation Document in accordance with Rule 47-0430.

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

47-0310

Bids or Proposals are Offers

- (1) **Offer and Acceptance.** The Bid or Proposal is the Bidder's or Proposer's Offer to enter into a Contract. The Offer is a "Firm Offer," i.e., the Offer shall be held open by the Offeror for the District's acceptance for the period specified in Rule 47-0480. The District's Award of the Contract constitutes acceptance of the Offer and binds the Offeror to the Contract.
- (2) **Contingent Offers.** Except to the extent the Proposer is authorized to propose certain terms and conditions pursuant to Rule 47-0262, a Proposer shall not make its Offer contingent upon the District's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.
- (3) **Offeror's Acknowledgment.** By Signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits proposal of alternative terms under Rule 47-0262, the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the District in Writing.

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

47-0320

Facsimile Bids and Proposals

- (1) **Authorization.** The District may authorize Offerors to submit facsimile Offers. If the District determines that Bid or Proposal security is or will be required, the District must have another method for receipt of such security. Prior to authorizing the submission of facsimile Offers, the District must determine that the District's equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time. In addition, the District must establish administrative procedures and controls:
- (a) To receive, identify, record, and safeguard facsimile Offers;

- (b) To ensure timely delivery of Offers to the location of Opening; and
- (c) To preserve the Offers as sealed.

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

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

Stat. Auth.: ORS 279A.065; ORS 279A.070
Stats. Implemented: ORS 279A050; ORS 279B.090

47-0330

Electronic Procurement

(1) Electronic Procurement Authorized.

- (a) The District may conduct all phases of a Procurement, including without limitation the posting of Electronic Advertisements and the receipt of Electronic Offers, by electronic methods if and to the extent the District specifies in a Solicitation Document, a request for quotes, or any other Written instructions on how to participate in the Procurement.
- (b) The District must open an Electronic Offer in accordance with electronic security measures in effect at the District at the time of its receipt of the Electronic Offer. Unless the District provides procedures for the secure receipt of Electronic Offers, the Person submitting the Electronic Offer assumes the risk of premature disclosure due to submission in unsealed form.
- (c) The District’s use of electronic Signatures shall be consistent with applicable statutes, policies and rules. The District must authorize, and may limit the use of electronic methods of conducting a Procurement based on the best interests of the District, as determined by the District.
- (d) If the District determines that Bid or Proposal security is or will be required, the District will establish a method for receipt of such security.

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

(3) **Preliminary Matters.** As a condition of participation in an electronic Procurement the District may require potential Contractors to register with the District before the date and time on which the District will first accept Offers, to agree to the terms, conditions, or other requirements of a Solicitation Document, or to agree to terms and conditions governing the Procurement, such as procedures that the District may use to attribute, authenticate or verify the accuracy of an Electronic Offer, or the actions that constitute an electronic Signature.

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

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

(a) When the District conducts an electronic Procurement that provides that all Electronic Offers must be submitted by a particular date and time, the District must receive the Electronic Offers in accordance with these Division 47 rules.

(b) When the District specifies that Persons may submit multiple Offers during a period of time, the District must accept Electronic Offers, and Persons may submit Electronic Offers, in accordance with the following:

(A) Following receipt of the first Electronic Offer after the day and time specified by the District, the District must post on the District's Electronic Procurement System, and update the following on a real time basis:

i) The lowest Electronic Offer; or

ii) The highest-ranking Electronic Offer, if the District chooses to use a scoring model that weighs non-price factors in addition to price.

At any time before the date and time after which the District will no longer receive Electronic Offers, a Person may revise its Electronic Offer, except that a Person may not lower its price unless that price is below the then lowest Electronic Offer.

(B) A Person may not increase the price set forth in an Electronic Offer after the day and time that the District first accepts Electronic Offers.

(C) A Person may withdraw an Electronic Offer only in compliance with these Division 47 rules. If a Person withdraws an Electronic Offer, it may not later submit an Electronic Offer at a price higher than that set forth in the withdrawn Electronic Offer.

(6) **Failure of the E-Procurement System.** In the event of a failure of the District's Electronic Procurement System that interferes with the ability of Persons to submit Electronic Offers,

protest or to otherwise participate in the Procurement, the District may cancel the Procurement in accordance with Rule 47-0660, or may extend the date and time for receipt of Electronic Offers by providing notice of the extension immediately after the Electronic Procurement System becomes available.

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

Stats. Implemented: ORS 279A.065

BID AND PROPOSAL PREPARATION

47-0400

Offer Preparation

(1) **Instructions.** An Offeror shall submit and Sign its Offer in accordance with the instructions set forth in the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to Opening in accordance with the requirements for submitting an Offer set forth in the Solicitation Document.

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

(3) **Documents.** An Offeror shall provide the District with all documents and descriptive literature required by the Solicitation Document.

(4) **Electronic Submissions.** If the Solicitation Document permitted Electronic Offers under Rule 47-0330, an Offeror may submit its Offer electronically. The District will not consider Electronic Offers unless authorized by the Solicitation Document.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

47-0410

Offer Submission

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

(2) Identification of Offers

(a) To ensure proper identification and handling, Offers shall be submitted in a sealed envelope appropriately marked or in the envelope provided by the District, whichever is applicable. If the District permits Electronic Offers or facsimile Offers in the Solicitation Document, the Offeror may submit and identify Electronic Offers or facsimile Offers in accordance with these Division 47 rules and the instructions set forth in the Solicitation Document.

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

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

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

47-0420

Pre-Offer Conferences

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

Stat. Auth.: ORS 279A.065; ORS 279A.070
Stats. Implemented: ORS 279A.065; ORS 279B.050; ORS 279B.090

47-0430

Addenda to Solicitation Document

- (1) **Issuance; Receipt.** The District may change a Solicitation Document only by Written Addenda. An Offeror shall provide Written acknowledgment of receipt of all issued Addenda with its Offer, unless the District otherwise specifies in the Addenda.
- (2) **Notice and Distribution.** The District must notify prospective Offerors of Addenda in a manner intended to foster competition and to make prospective Offerors aware of the Addenda. The Solicitation Document shall specify how the District will provide notice of Addenda and how the District will make the Addenda available before Closing, and at each subsequent step or tier of evaluation if the District will engage in a multistep competitive sealed Bid process in accordance with Rule 47-0257, or a multi-tiered or multistep competitive sealed Proposal process in accordance with Rules 47-0261 through 47-0263. The following is an example of how the District may specify how it will provide notice of Addenda: "The District will not mail notice of Addenda, but will publish notice of any Addenda on the District's web site. Addenda may be downloaded off the District's web site. Offerors should frequently check the District's web site until Closing, i.e., at least once weekly until the week of Closing and at least once daily the week of the Closing."
- (3) **Timelines; Extensions.**
 - (a) The District must issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The District may extend the Closing if the District determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by a countervailing public interest, the District will not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.

(b) Notwithstanding subsection 3(a) of this rule, an Addendum that modifies the evaluation criteria, selection process or procedure for any tier of competition under a multistep sealed Bid or a multi-tiered or multistep sealed Proposal issued in accordance with ORS 279B.060(6)(d) and Rules 47-0261 through 47-0263 must be issued no fewer than five (5) Days before the beginning of that step or phase of competition, unless the District determines that a shorter period is sufficient to allow Offerors to prepare for that step or phase of competition. The District must document the factors it considered in making that determination, which may include, without limitation, the scope of the changes to the Solicitation Document, the location of the remaining eligible Proposers, or whether shortening the period between issuing an Addendum and the beginning of the next step or phase of competition favors or disfavors any particular Proposer or Proposers.

(4) **Request for Change or Protest.** Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in Rule 47-0730, by the close of the District's next business day after issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under Rule 47-0730, whichever date is later. If the date established in the previous sentence falls after the deadline for receiving protests to the Solicitation Document in accordance with Rule 47-0730, then the District may consider an Offeror's request for change or protest to the Addendum only, and the District will not consider a request for change or protest to matters not added or modified by the Addendum. Notwithstanding any provision of this section (4) of this rule, the District is not required to provide a protest period for Addenda issued after initial Closing during a multi-tier or multistep Procurement process conducted pursuant to ORS 279B.055 or ORS 279B.060 and these rules.

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

Stats. Implemented: ORS 279B.060

47-0440

Pre-Closing Modification or Withdrawal of Offers

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

(a) Bid (or Proposal) Modification; and

(b) Solicitation Document Number (or other identification as specified in the Solicitation Document).

(2) **Withdrawals.**

(a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, Signed by an authorized representative of the Offeror, delivered to the individual and location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by the District prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in person prior to the Closing, upon presentation of appropriate identification and evidence of authority satisfactory to the District.

(b) The District may release an unopened Offer withdrawn under subsection 2(a) of this rule to the Offeror or its authorized representative, after voiding any date and time stamp mark.

- (c) The Offeror shall mark the Written request to withdraw an Offer as follows:
- (A) Bid (or Proposal) Withdrawal; and
 - (B) Solicitation Document Number (or Other Identification as specified in the Solicitation Document).
- (3) **Documentation.** The District must include all documents relating to the modification or withdrawal of Offers in the appropriate Procurement file.

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

Stats. Implemented: ORS 279B.055

47-0450

Receipt, Opening, and Recording of Offers; Confidentiality of Offers.

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

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

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

Stats. Implemented: ORS 279B.055

47-0460

Late Offers, Late Withdrawals and Late Modifications

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. The District will not consider late Offers, withdrawals or modifications except as permitted in Rule 47-0470 or Rule 47-0262.

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

Stats. Implemented: ORS 279B.055

47-0470

Mistakes

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

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

(a) The District may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:

(A) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;

(B) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and

(C) Acknowledge receipt of an Addendum to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addendum and intended to be bound by its terms; or the Addendum involved did not affect price, quality or delivery.

(b) The District may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms the District's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. 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). In the event of a discrepancy, unit prices shall prevail over extended prices.

(c) The District may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:

(A) The nature of the error;

(B) That the error is not a minor informality under this subsection or an error in judgment;

(C) That the error cannot be corrected or waived under subsection (b) of this section;

(D) That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;

(E) That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;

(F) That the Offeror will suffer substantial detriment if the District does not grant the Offeror permission to withdraw the Offer;

(G) That the District's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on the District or the public it represents; and

(H) That the Offeror promptly gave notice of the claimed error to the District.

(d) The criteria in subsection (2)(c) of this rule shall determine whether the District will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether the District will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to the District based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by the District, whether by Award to the next lowest Responsive and Responsible Bidder or the most Advantageous Responsive and Responsible Proposer, or by resort to a new solicitation.

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

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

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

Stats. Implemented: ORS 279B.055

47-0480

Time for Agency Acceptance

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

47-0490

Extension of Time for Acceptance of Offer

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

QUALIFICATIONS AND DUTIES

47-0500

Responsibility of Bidders and Proposers

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.110

47-0525

Qualified Products Lists

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.115

47-0550

Prequalification of Prospective Offerors; Request for Qualifications (RFQ)

(1) **Prequalification of Prospective Offerors.** The District may prequalify prospective Offerors pursuant to ORS 279B.120 and 279B.125. Notwithstanding the prohibition against revocation of prequalification in ORS 279B.120(3), the District may determine that a prequalified Offeror is not Responsible prior to Contract Award.

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

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

(b) A qualifications pre-submission meeting, voluntary or mandatory, may be held for all interested Contractors to discuss the proposed services. The RFQ must include the date, time and place of the meeting(s).

(c) Unless the RFQ establishes that competition does not exist or unless the Solicitation process is canceled or all qualification statements are rejected, all respondents who met the published qualifications must receive a notice, or other materials as appropriate, in addition to the general public, of any required services and have an opportunity to submit a proposal in response to the District's subsequent RFP.

(d) All RFQs must:

(A) Be in Writing;

(B) Be posted pursuant to Rule 47-0305;

(C) Provide that the District may, at any time during the Solicitation process, reject any or all Proposals or cancel the Solicitation without liability if it is in the public interest to do so; and

(D) Provide that the District is not responsible for any costs of any proposers incurred while submitting Proposals, and that all Proposers who respond to Solicitations do so solely at their own expense, unless compensation is expressly provided for in the Solicitation Document.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279B.050 through 279B.090, ORS 279B.120 and ORS 279B.125

47-0575

Debarment of Prospective Offerors

(1) **Generally.** The District may Debar prospective Offerors for the reasons set forth in ORS 279A.110 or after providing notice and the opportunity for hearing as set forth in ORS 279B.130.

(2) **Responsibility.** Notwithstanding the limitation on the term for Debarment in ORS 279B.130(1)(b), the District may determine that a previously Debarred Offeror is not Responsible prior to Contract Award.

(3) **Imputed Knowledge.** The District may attribute improper conduct of a Person or its affiliate or affiliates having a contract with a prospective Offeror to the prospective Offeror for purposes of Debarment where the impropriety occurred in connection with the Person's duty for or on behalf of, or with the knowledge, approval, or acquiescence of, the prospective Offeror.

(4) **Limited Participation.** The District may allow a Debarred Person to participate in solicitations and Contracts on a limited basis during the Debarment period upon Written determination that participation is Advantageous to the District. The determination shall specify the factors on which it is based and define the extent of the limits imposed.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.130

OFFER EVALUATION AND AWARD

47-0600

Offer Evaluation and Award

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

(a) **Evaluation of Bids.**

(A) **Nonresident Bidders.** In determining the lowest Responsive Bid, the District must apply the reciprocal preference set forth in ORS 279A.120(2)(b) and Rule 46-0310 for Nonresident Bidders.

(B) **Award When Bids are Identical.** If the District determines that one or more Bids are identical under Rule 46-0300, the District must Award a Contract in accordance with the procedures set forth in Rule 46-0300.

(b) **Evaluation of Proposals.**

(A) **Award When Proposals are Identical.** If the District determines that one or more Proposals are identical under Rule 46-0300, the District must Award a Contract in accordance with the procedures set forth in Rule 46-0300.

(c) **Recycled Materials.** When procuring Goods, the District must give preference for recycled materials as set forth in ORS 279A.125 and Rule 46-0320.

(2) **Clarification of Bids.** After Bid Opening, the District may conduct discussions with apparent Responsive Bidders for the purpose of clarification to assure full understanding of the Bid. All Bids, in the District's sole discretion, needing clarification shall be accorded such an opportunity. The District must document clarification of any Bidder's Bid in the Procurement file.

(3) **Negotiations Prohibited.**

(a) **Bids.** Except as permitted by section 2 of this rule, the District will not negotiate with any Bidder. After Award of the Contract, the District and Contractor may only modify the Contract in accordance with Rule 47-0800.

(b) **Requests for Proposals.** The District may conduct discussions or negotiate with Proposers only in accordance with ORS 279B.060(6)(b) and Rule 47-0262 After Award of the Contract, the District and Contractor may only modify the Contract in accordance with Rule 47-0800.

(4) **Award.**

(a) **Generally.** If Awarded, the District will Award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the most Advantageous, Responsive Proposal. The District may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in the public interest.

(b) **Multiple Items.** An Invitation to Bid or Request for Proposals may call for pricing of multiple items of similar or related type with Award based on individual line item, group total of certain items, a “market basket” of items representative of the District’s expected purchases, or grand total of all items.

(c) **Multiple Awards - Bids.**

(A) Notwithstanding subsection 4(a) of this rule, the District may Award multiple Contracts under an Invitation to Bid in accordance with the criteria set forth in the Invitation to Bid. Multiple Awards shall not be made if a single Award will meet the District’s needs, including but not limited to adequate availability, delivery, service, or product compatibility. A multiple Award may be made if Award to two or more Bidders of similar Goods or Services is necessary for adequate availability, delivery, service, or product compatibility. Multiple Awards may not be made for the purpose of dividing the Procurement into multiple solicitations, or to allow for user preference unrelated to utility or economy. A notice to prospective Bidders that multiple Contracts may be Awarded for any Invitation to Bid shall not preclude the District from Awarding a single Contract for such Invitation to Bid.

(B) If an Invitation to Bid permits the Award of multiple Contracts, the District will specify in the Invitation to Bid the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services.

(d) **Multiple Awards – Proposals.**

(A) Notwithstanding subsection 4(a) of this rule, the District may Award multiple Contracts under a Request for Proposals in accordance with the criteria set forth in the Request for Proposals. Multiple Awards shall not be made if a single Award will meet the District’s needs, including but not limited to adequate availability, delivery, service or product compatibility. A multiple Award may be made if Award to two or more Proposers of similar Goods or Services is necessary for adequate availability, delivery, service, or product compatibility. Multiple Awards may not be made for the purpose of dividing the Procurement into multiple solicitations, or to allow for user preference unrelated to obtaining the most Advantageous Contract. A notice to prospective Proposers that multiple Contracts may be awarded for any Request for Proposals shall not preclude the District from awarding a single Contract for such Request for Proposals.

(B) If a Request for Proposals permits the Award of multiple Contracts, the District must specify in the Request for Proposals the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services.

(e) **Partial Awards.** If after evaluation of Offers, the District determines that an acceptable Offer has been received for only parts of the requirements of the Solicitation Document:

(A) The District may Award a Contract for the parts of the Solicitation Document for which acceptable Offers have been received; or

(B) The District may reject all Offers and may issue a new Solicitation Document on the same or revised terms, conditions and Specifications.

(f) **All or none Offers.** The District may Award all or none Offers if the evaluation shows an all or none Award to be the lowest cost for Bids or the most Advantageous for Proposals of those submitted.

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

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

47-0610

Notice of Intent to Award

(1) **Notice of Intent to Award.** The District must provide Written notice of its intent to Award to all Bidders and Proposers pursuant to ORS 279B.135 at least seven (7) Days before the Award of a Contract, unless the District determines that circumstances require prompt execution of the Contract, in which case the District may provide a shorter notice period. The District must document the specific reasons for the shorter notice period in the Procurement file.

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

(a) The expiration of the protest period provided pursuant to Rule 47-0740; or

(b) The District provides Written responses to all timely filed protests denying the protests and affirming the Award.

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

Stats. Implemented: ORS 279B.135

47-0620

Documentation of Award

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

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

(a) **For Bids:**

(A) Bids;

(B) Completed Bid tabulation sheet; and

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

(b) **For Proposals:**

(A) Proposals;

(B) The completed evaluation of the Proposals;

(C) Written justification for any rejection of higher scoring Proposals; and

(D) If the District engaged in any of the methods of Contractor selection described in ORS 279B.060(6)(b) and Rules 47-0261 through 47-0263, Written documentation of the content of any discussions, negotiations, best and final Offers, or any other procedures the District used to select a Proposer to which the District Awarded a Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: 279A.065

47-0630

Availability of Award Decisions

(1) **Contract Documents.** To the extent required by the Solicitation Document, the District will deliver to the successful Offeror a Contract, Signed purchase order, Price Agreement, or other Contract documents as applicable.

(2) **Availability of Award Decisions.** A Person may obtain tabulations of Awarded Bids or evaluation summaries of Proposals for a minimal charge, in person or by submitting to the District a Written request accompanied by payment. The requesting Person shall provide the Solicitation Document number and enclose a self-addressed, stamped envelope. In addition, the District may make available tabulations of Bids and Proposals through the Electronic Procurement System of the District or the District's website.

(3) **Availability of Procurement Files.** After notice of intent to Award, the District will make Procurement files available in accordance with applicable law.

Stat. Auth.: ORS 279A.065

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

47-0640

Rejection of an Offer

(1) Rejection of an Offer.

(a) The District may reject any Offer as set forth in ORS 279B.100.

(b) The District must reject an Offer upon the District's finding that the Offer:

(A) Is contingent upon the District's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;

(B) Takes exception to terms and conditions (including Specifications) set forth in the Solicitation Document;

(C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of the Solicitation Document or in contravention of applicable law;

(D) Offers Goods or Services that fail to meet the Specifications of the Solicitation Document;

(E) Is late;

(F) Is not in substantial compliance with the Solicitation Document; or

(G) Is not in substantial compliance with all prescribed public Procurement procedures.

(c) The District must reject an Offer upon the District's finding that the Offeror:

(A) Has not been prequalified under ORS 279B.120 and the District required mandatory prequalification;

(B) Has been Debarred as set forth in ORS 279B.130 or has been disqualified pursuant to Rule 46-0210(4) (DBE Disqualification);

(C) Has not met the requirements of ORS 279A.105, if required by the Solicitation Document;

(D) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;

(E) Has failed to provide the certification of non-discrimination required under ORS 279A.110(4); or

(F) Is non-Responsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the District must have information that indicates that the Offeror meets the applicable standards of Responsibility. To be a Responsible Offeror, the District must determine pursuant to ORS 279B.110 that the Offeror:

- (i) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to indicate the capability of the Offeror to meet all contractual responsibilities; and
 - (ii) Has a satisfactory record of contract performance. The District 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 District should determine whether the Offeror's deficient performance was expressly excused under the terms of the contract, or whether the Offeror took appropriate corrective action. The District may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. The District must make its basis for determining an Offeror non-Responsible under this subparagraph part of the Procurement file pursuant to ORS 279B.110(2)(b);
 - (iii) Has a satisfactory record of integrity. An Offeror may lack integrity if the District determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to the District. The District may find an Offeror non-Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Debarment under ORS 279B.130 may be used to determine an Offeror's integrity. The District must make its basis for determining that an Offeror is non-Responsible under this subparagraph part of the Procurement file pursuant to ORS 279B.110(2)(c);
 - (iv) Is qualified legally to contract with the District; and
 - (v) Has supplied all necessary information in connection with the inquiry concerning Responsibility. If the Offeror fails to promptly supply information requested by the District concerning Responsibility, the District will base the determination of Responsibility upon any available information, or may find the Offeror non-Responsible.
- (2) **Form of Business Entity.** For purposes of this rule, the District may investigate any Person submitting an Offer. The investigation may include that Person's officers, directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this rule or to apply the Debarment provisions of ORS 279B.130.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100 & 279B.110

47-0650

Rejection of All Offers

- (1) **Rejection.** The District may reject all Offers as set forth in ORS 279B.100. The District must notify all Offerors of the rejection of all Offers, along with the reasons for rejection of all Offers.
- (2) **Criteria.** The District may reject all Offers based upon the following criteria:
 - (a) The content of or an error in the Solicitation Document, or the Procurement process unnecessarily restricted competition for the Contract;
 - (b) The price, quality or performance presented by the Offerors are too costly or of insufficient quality to justify acceptance of any Offer;
 - (c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;

- (d) Causes other than legitimate market forces threaten the integrity of the competitive process. These causes may include, without limitation, those that tend to limit competition, such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the Solicitation Document;
- (e) The District cancels the Procurement or solicitation in accordance with Rule 47-0660; or
- (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

47-0660

Cancellation of Procurement or Solicitation

- (1) **Cancellation in the Public Interest.** The District may cancel a Procurement or solicitation as set forth in ORS 279B.100.
- (2) **Notice of Cancellation Before Opening.** If the District cancels a Procurement or solicitation prior to Opening, the District must provide Written notice of cancellation in the same manner that the District initially provided notice of the solicitation. Such notice of cancellation shall:
 - (a) Identify the Solicitation Document;
 - (b) Briefly explain the reason for cancellation; and
 - (c) If appropriate, explain that an opportunity will be given to compete on any re-solicitation.
- (3) **Notice of Cancellation After Opening.** If the District cancels a Procurement or solicitation after Opening, the District must provide Written notice of cancellation to all Offerors who submitted Offers.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

47-0670

Disposition of Offers if Procurement or Solicitation Canceled

- (1) **Prior to Opening.** If the District cancels a Procurement or solicitation prior to Opening, the District must return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the District will open the Offer to determine the source and then return it to the Offeror. For Electronic Offers, the District will delete the Offers from the District's Electronic Procurement System or information technology system.
- (2) **After Opening.** If the District cancels a Procurement or solicitation after Opening, the District:
 - (a) May return Proposals in accordance with ORS 279B.060(5)(c); and
 - (b) Shall keep Bids in the Procurement file.
- (3) **Rejection of All Offers.** If the District rejects all Offers, the District will keep all Proposals and Bids in the Procurement file.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

LEGAL REMEDIES

47-0700

Protests and Judicial Review of Special Procurements

(1) **Purpose.** An Affected Person may protest the approval of, or request for approval of, a Special Procurement. Pursuant to ORS 279B.400(1), before seeking judicial review of the approval or request for approval of a Special Procurement, an Affected Person must file a Written protest with the LCRB for the District and exhaust all administrative remedies.

(2) **Delivery.**

(a) **Protest of Request for Approval of a Special Procurement.** An Affected Person must deliver a Written protest to the LCRB for the District within fourteen (14) Days after the first date of public notice of a proposed Special Procurement, unless a different protest period is provided in the public notice of the proposed Special Procurement.

(b) **Protest of Approval of a Special Procurement.** Notwithstanding the requirements for filing a writ of review under ORS chapter 34 pursuant to ORS 279B.400(4)(a), an Affected Person must deliver a Written protest to the LCRB for the District within fourteen (14) Days after the first date of public notice of the approval of a Special Procurement by the LCRB for the District, unless a different protest period is provided in the public notice of the approval of a Special Procurement.

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

(a) A detailed statement of the legal and factual grounds for the protest;

(b) A description of the resulting harm to the Affected Person; and

(c) The relief requested.

(4) **LCRB Response.**

(a) **Protest of Request for Approval of a Special Procurement:** The LCRB shall not consider an Affected Person's protest of the District's request for approval of a Special Procurement submitted after the timeline established for submitting such protest under this rule or such different time period as may be provided in the public notice of the request for approval of a proposed Special Procurement. The LCRB shall issue a Written disposition of the protest in a timely manner. If the LCRB upholds the protest, in whole or in part, it may in its sole discretion implement the sustained protest in the approval of the Special Procurement, or deny the request for approval of the Special Procurement.

(b) **Protest of Approval of a Special Procurement:** The LCRB shall not consider an Affected Person's protest of the approval of a Special Procurement submitted after the timeline established for submitting such protest under this rule or such different time period as may be provided in the public notice of the approval of a Special Procurement. The LCRB shall issue a Written disposition of the protest in a timely manner. If the LCRB upholds the protest, in whole or in part, it may in its sole discretion implement the sustained protest in the approval of the Special Procurement, or revoke the approval of the Special Procurement.

(5) **Judicial Review.** An Affected Person may not seek judicial review of the LCRB's denial of a protest of a request for approval of a Special Procurement. An Affected Person may seek judicial review of the LCRB's decision relating to a protest of the approval of a Special Procurement in accordance with ORS 279B.400.

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

Stats. Implemented: ORS 279B.400

47-0710

Protests and Judicial Review of Sole-Source Procurements

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

(2) **Delivery.** Unless otherwise specified in the public notice of the sole-source Procurement, an Affected Person must deliver a Written protest to the LCRB or designee within seven (7) Days after the first date of public notice of the sole-source Procurement, unless a different protest period is provided in the public notice of a sole-source Procurement.

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

- (a) A detailed statement of the legal and factual grounds for the protest;
- (b) A description of the resulting harm to the Affected Person; and
- (c) The relief requested.

(4) **LCRB Response.** The LCRB or designee shall not consider an Affected Person's sole-source Procurement protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the public notice of the sole-source Procurement. The LCRB or designee shall issue a Written disposition of the protest in a timely manner. If the LCRB or designee upholds the protest, in whole or in part, the District will not enter into a sole-source Contract.

(5) **Judicial Review.** Judicial review of the LCRB's or designee's disposition of a sole-source Procurement protest shall be in accordance with ORS 279B.420.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.075

47-0720

Protests and Judicial Review of Multi-Tiered and Multistep Solicitations

(1) **Purpose.** An Affected Offeror may protest exclusion from the Competitive Range or from subsequent steps or phases of a solicitation in accordance with the applicable Solicitation Document. When the Solicitation Document permits such a protest, then before seeking judicial review, pursuant to ORS 279B.420(3)(f), an Affected Offeror must file a Written protest with the District and exhaust all administrative remedies.

(2) **Basis for Protest.** An Affected Offeror may protest its exclusion from a step or phase of competition only if the Offeror is Responsible and submitted a Responsive Offer and but for the District's mistake in evaluating the Offeror's or other Offerors' Offers, the protesting Offeror would have been eligible to participate in the next step or phase of competition. (For example, the protesting Offeror must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Offerors are removed from consideration, and that those ineligible Offerors are ineligible for inclusion in the Competitive Range because: their Proposals were not Responsive, or the District committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.)

(3) **Delivery.** Unless otherwise specified in the Solicitation Document, an Affected Offeror must deliver a Written protest to the District within seven (7) Days after issuance of the notice of the Competitive Range or notice of subsequent tiers or steps.

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

(a) A detailed statement of the legal and factual grounds for the protest;

(b) A description of the resulting harm to the Affected Person; and

(c) The relief requested.

(5) **District Response.** The District will not consider an Affected Offeror's multi-tiered or multistep solicitation protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Solicitation Document. The District must issue a Written disposition of the protest in a timely manner. If the District upholds the protest, in whole or in part, the District may in its sole discretion either issue an Addendum under Rule 47-0430 reflecting its disposition or cancel the Procurement or solicitation under Rule 47-0660.

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

47-0730

Protests and Judicial Review of Solicitations

(1) **Purpose.**

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

(b) Contract-Specific Special Procurements. Notwithstanding section 1(a) of this rule, a Person may not protest, challenge, or review a Contract-Specific Special Procurement except upon the occurrence of the conditions set forth ORS 279B.405(2)(b).

(2) **Delivery.** Unless otherwise specified in the Solicitation Document, a prospective Offeror must deliver a Written protest to the District not less than ten (10) Days prior to Closing.

(3) **Content of Protest.** In addition to the information required by ORS 279B.405(4), a prospective Offeror's Written protest shall include a statement of the desired changes to the Procurement process or the Solicitation Document that the prospective Offeror believes will remedy the conditions upon which the prospective Offeror based its protest.

(4) **District Response.** The District will not consider a Prospective Offeror's solicitation protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Solicitation Document. The District must consider the protest if it is timely filed and meets the conditions set forth in ORS 279B.405(4). The District must issue a Written disposition of the protest in accordance with the timeline set forth in ORS 279B.405(6). If the District upholds the protest, in whole or in part, the District may in its sole discretion either issue an Addendum reflecting its disposition under Rule 47-0430 or cancel the Procurement or solicitation under Rule 47-0660.

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

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

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

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

Stats. Implemented: ORS 279B.405

47-0740

Protests and Judicial Review of Contract Award

(1) **Purpose.** An Offeror may protest the Award of a Contract, or the intent to Award a Contract, whichever occurs first, if the conditions set forth in ORS 279B.410(1) are satisfied. An Offeror must file a Written protest with the District and exhaust all administrative remedies before seeking judicial review of the District's Contract Award decision.

(2) **Delivery.** Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest to the District within seven (7) Days after issuance of the notice of intent to Award the Contract.

(3) **Content of Protest.** An Offeror's Written protest shall specify the grounds for the protest to be considered by the District pursuant to ORS 279B.410(2).

(4) **District Response.** The District will not consider an Offeror's Contract Award protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Solicitation Document. The District must issue a Written disposition of the protest in a timely manner as set forth in ORS 279B.410(4). If the District upholds the protest, in whole or in part, the District may in its sole discretion either Award the Contract to the successful protestor or cancel the Procurement or solicitation.

(5) **Judicial Review.** Judicial review of the District's decision relating to a Contract Award protest shall be in accordance with ORS 279B.415.

Stat. Auth.: ORS 279A.065 & ORS 279B.410

Stats. Implemented: ORS 279B.410 & ORS 279B.415

47-0745

Protests and Judicial Review of Qualified Products List Decisions

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

(2) **Delivery.** Unless otherwise stated in the District's notice to prospective Offerors of the opportunity to submit Goods for inclusion on the qualified products list, a prospective Offeror

must deliver a Written protest to the District within seven (7) Days after issuance of the District's decision to exclude the prospective Offeror's Goods from the qualified products list.

(3) **Content of Protest.** The prospective Offeror's protest shall be in Writing and must specify the grounds upon which the protest is based.

(4) **District Response.** The District will not consider a prospective Offeror's qualified products list protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the District's notice to prospective Offerors of the opportunity to submit Goods for inclusion on the qualified products list. The District must issue a Written disposition of the protest in a timely manner. If the District upholds the protest, it shall include the successful protestor's Goods on the qualified products list.

(5) **Judicial Review.** Judicial review of the District's decision relating to a qualified products list protest shall be in accordance with ORS 279B.425.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.115

47-0750

Judicial Review of Other Violations

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.420

47-0760

Review of Prequalification and Debarment Decisions

Review of the District's prequalification and Debarment decisions shall be as set forth in ORS 279B.425.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.425

47-0800

Contract Amendments

(1) **Additional Goods or Services.** The District may amend a Contract without additional competition to add additional Goods or Services within the Scope of the Solicitation Document, or if no Solicitation Document, the Contract, or in the instance of a Special Procurement the approval of Special Procurement subject to the following conditions:

(a) The original Contract was Awarded pursuant to ORS 279B.055, 279B.060, 279B.065, 279B.070, 279B.075, 279B.085, or 279A.200 through 279A.225; and

(b) One of the following two conditions are satisfied:

(A) The additional Goods or Services are required by reason of existing or new laws, rules, regulations or ordinances of federal, state or local agencies, that affect performance of the original Contract; or

(B) The prices for the Goods or Services are modified only as follows:

(i) When prices for the Goods or Services are based on unit prices, unit prices that establish the cost basis for the additional Goods or Services were provided in the Offer or original Contract and those prices do not increase except as permitted by an escalation clause in the Contract; or,

(ii) When prices for the Goods or Services are not based on unit prices, options that establish the cost basis for the additional Goods or Services were provided in the Solicitation Document, Offer, or original Contract.

(2) **Renegotiated Contract.** The District may renegotiate the terms and conditions, including the Contract Price, of a Contract without additional competition and amend a Contract if it is Advantageous to the District subject to the following conditions:

(a) The amended Contract is within the Scope of the Solicitation Document, or if no Solicitation Document, the Contract, or in the instance of a Special Procurement the approval of Special Procurement.

(b) The District must determine that, with all things considered, the renegotiated Contract is at least as favorable to the District as the original Contract.

(c) The renegotiated Contract will not have a total term greater than allowed in the original Solicitation Document, Contract or approval of a Special Procurement after combining the initial and extended terms. For example, a one-year Contract, renewable each year for up to four additional years, may be renegotiated as a two to five-year Contract, but not beyond a total of five years. Also, if multiple Contracts with a single Contractor are restated as a single Contract, the term of the single Contract may not have a total term greater than the longest term of any of the prior Contracts.

(d) If a Contractor offers a lower price in exchange for a change in term or condition that was expressly rejected in the original solicitation, the amended Contract may be structured with this changed term as an optional, but not as a mandatory Contract term.

(e) If the Contract is the result of a Cooperative Procurement, the amended Contract may not materially change the terms, conditions, and prices of the Original Contract.

(3) **Small or Intermediate Contract.** The District may amend a Contract Awarded as a small or intermediate Procurement pursuant to sections 1 or 2 of this rule, provided also the total increase in Contract price does not exceed the amount set forth in Rule 47-0265 for small Procurements and Rule 47-0270 for intermediate Procurements.

(4) **Emergency Contract.** The District may amend a Contract Awarded as an emergency Procurement if the emergency justification for entering into the Contract still exists, and the amendment is necessary to address the continuing emergency.

(5) **Price Agreements.** The District may amend or terminate a Price Agreement as follows:

(a) As permitted by the Price Agreement;

(b) As permitted by this rule;

(c) If the circumstances set forth in ORS 279B.140(2) exist; or

(d) As permitted by applicable law.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

DIVISION 48

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

48-0100

Application

(1) These division 48 rules apply to the screening and selection of Architects, Engineers and Land Surveyors, and providers of Related Services (Services) under Contracts, and set forth the following procedures:

(a) Procedures through which the District selects Consultants to perform Architectural, Engineering, or Land Surveying Services, or Related Services (Services); and

(b) Two-tiered procedures for selection of Architects, Engineers, Land Surveyors and providers of Related Services (Services) for certain Public Improvements owned and maintained by the District.

(c) In the event of conflict or ambiguity, the more specific requirements of the Rules in this Division 48 take precedence over the more general requirements of the Rules in Division 46.

(2) The Rules as a whole implement the Oregon Public Contracting Code, as defined in ORS 279A.010, and this Division 48 of the Rules specifically addresses matters covered in ORS Chapter 279C.110 through 279C.125.

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

Stats. Implemented: ORS 279A.065

48-0110

Definitions

In addition to the definitions set forth in ORS 279A.010, ORS 279C.100, and Rule 46-0110, the following definitions apply to these division 48 rules:

(1) "**Consultant**" means an Architect, Engineer, Land Surveyor, or Provider of Related Services. A Consultant includes a business entity that employs Architects, Engineers, Land Surveyors or providers of Related Services, or any combination of the foregoing.

(2) "**Design-Build**" means an alternative contracting method for the construction of Public Improvements where construction and design services are combined in a single Contract.

(3) "**Direct Appointment**" or "**Direct Appointment Procedure**" means the Consultant selection method provided for under Rule 48-0200.

(4) "**Estimated Fee**" means a District's reasonably projected fee to be paid for a Consultant's services under the anticipated Contract, excluding all anticipated reimbursable or other non-professional fee expenses. The Estimated Fee is used solely to determine the applicable Contract Solicitation method and is distinct from the total amount payable under the Contract. The Estimated Fee must not be used as a basis to resolve other Public Contracting issues, including without limitation, direct purchasing authority or Public Contract review and approval under ORS 291.247.

(5) "**Formal Selection**" or "**Formal Selection Procedure**" means the Consultant selection method provided for under Rule 48-0220.

(6) "**Informal Selection**" or "**Informal Selection Procedure**" means the Consultant selection method provided for under Rule 48-0210.

(7) "**Mixed Contract**" means a Contract that requires the Consultant to perform certain services and also provide the District with other kinds of Goods or Services; the classification of a Mixed Contract as a contract for Architectural, Engineering and Land Surveying Services and Related Services is determined by the Mixed Contract's predominate purpose. For a Mixed Contract to be considered a contract for Architectural, Engineering and Land Surveying Services and Related Services, the majority of the payments made or received under the Mixed Contract must be for Architectural, Engineering and Land Surveying Services and Related Services.

(8) "**Project**" means all components of a District's planned undertaking that gives rise to the need for a Consultant's Architectural, Engineering and Land Surveying Services and Related Services under a Contract.

(9) "**Proposer**" means a Consultant who submits a proposal to a District in response to a Request for Proposals.

(10) "**Request for Qualifications**" or "**RFQ**" means a Written document issued by a District to which Consultants respond with a description of their experience with and qualifications for the Architectural, Engineering and Land Surveying Services and Related Services described in the RFQ and from which the District creates a list of Consultants who are qualified to perform those services, but which is not intended to result in a Contract between a Consultant and the District.

(11) "**Record of Past Performance**" means information including but not limited to price and cost data from previous Projects, performance data from previous Projects, quality of Work, ability to meet schedules, cost control methods and Contract Administration.

(12) "**Resources Available**" means information indicating, staff, specialized services, or other resources available for the Project described in the RFQ or RFP.

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

Stats. Implemented: ORS 279A.065

SELECTION PROCEDURES

48-0200

Selection Procedures

Direct Appointment Procedure

(a) The District may enter into a Contract directly with a Consultant without following the selection procedures set forth elsewhere in these rules if the anticipated cost of the service does not exceed \$75,000. A Procurement may not be artificially divided or fragmented so as to comply with this Rule.

(b) Informal Selection Procedures.

The District may use an informal selection process to obtain services where the anticipated cost of the service is expected to be more than \$75,000 but less than or equal to \$150,000. If the anticipated cost of the service is expected to be \$75,000 or less, the District may procure the service through direct appointment as defined in Rule 48-0200.

(1) The informal selection process must solicit responses/Proposals from at least three qualified contractors offering the required services.

(2) The informal selection process is competitive. The selection and ranking may be based on criteria including but not limited to each Proposer's:

(A) Particular capability to perform the services required;

- (B) Experienced staff available to perform the services required, including each Proposer's recent, current, and projected workloads;
- (C) Performance history;
- (D) Approach and philosophy used in providing services;
- (E) Fees or costs;
- (F) Geographic proximity to the project or the area where the services are to be performed; and
- (G) Work volume previously awarded by the District, with the object of effecting an equitable distribution of contracts among qualified contractors. But distribution must not violate the policy of selecting the most highly qualified contractor to perform the services at a fair and reasonable price.

(3) Written confirmation of solicitation attempts and responses with contractor names and addresses shall be maintained in the Procurement file.

(c) Formal Selection Procedures.

(1) The District will use a formal selection procedure when the anticipated cost of the contract will exceed \$150,000 or whenever the Chief Procurement Officer determines that the amount of the contract or complexity of the project requires use of the formal process. All formal RFP and RFQ solicitations must comply with the requirements for RFPs contained in Division 47 of these rules.

(2) Additional Requirements for a Request for Qualifications (RFQ). An RFQ may be used to determine whether competition exists to perform the needed services or to establish a list of qualified contractors for RFPs, for informal solicitations, or for individual negotiation, as provided in these rules.

(a) The RFQ must at least describe the particular specialty desired, the qualifications the contractor must have in order to be considered, and the evaluation factors and their relative importance.

(b) The RFQ may require information, including but not limited to:

The contractor's particular capability to perform the required services;

(v) The number of experienced staff available to perform the required services, including specific qualifications and experience of personnel;

(vi) A list of similar services the contractor has completed, with references concerning past performance; and

(vii) Any other information necessary to evaluate contractor qualifications.

(c) A qualifications pre-submission meeting may be held for all interested contractors to discuss the proposed services. The RFQ must include the date, time, and place of the meeting and indicate whether it is voluntary or mandatory.

(d) Unless the RFQ establishes that competition does not exist or unless the solicitation process is canceled or all qualification statements rejected, all respondents (who met the published qualifications) will receive a notice (or other materials as appropriate) of any required services and have an opportunity to submit a Proposal in response to a contracting district's subsequent RFP.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C110, ORS 279C.115

48-0210

Selection by Negotiation

The District may procure Personal Services with contractors directly through negotiation, if:

- (1) The District has, through an RFQ, established a list of qualified contractors for the particular project or class of projects; or
- (2) The nature of the Work is not project-driven but requires an ongoing, long-term relationship of knowledge and trust.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.110

POST-SELECTION CONSIDERATIONS

48-0300

Prohibited Payment Methodology; Purchase Restrictions

(1) Except as otherwise allowed by law, the District will not enter into any Contract which includes compensation provisions that expressly provide for payment of:

- (a) Consultant's costs under the Contract plus a percentage of those costs; or
- (b) A percentage of the Project construction costs or total Project costs.

(2) Except as otherwise allowed by law, the District will not enter into any Contract in which:

(a) The compensation paid under the Contract is solely based on or limited to the Consultant's hourly rates for the Consultant's personnel working on the Project and reimbursable expenses incurred during the performance of work on the Project (sometimes referred to as a "time and materials" Contract); and

(b) The Contract does not include a maximum amount payable to Contractor for the Services required under the Contract.

(3) Except in cases of Emergency or in the particular instances noted in the subsections below, the District will not purchase any building materials, supplies or equipment for any building, structure or facility constructed by or for the District from any Consultant under a Contract with the District to perform Architectural, Engineering or Land Surveying Services, or Related Services, for the building, structure or facility. This prohibition does not apply if either of the following circumstances exists:

(a) Consultant is providing Architectural, Engineering or Land Surveying Services, or Related Services under a Contract with the District to perform Design-Build services or Energy Savings Performance Contract services (see Rules 49-0670 and 49-0680); or

(b) That portion of the Contract relating to the acquisition of building materials, supplies or equipment was awarded to Consultant pursuant to applicable law governing the award of such contracts.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

48-0310

Effect of Material Alteration or Delay of Project

(1) If the District delays or delays and then materially alters a Project for which the District has entered a Contract, and the Contract has expired or been terminated, the District may enter into a Contract with the same Consultant to perform either the same Services described in the Contract or those Services as amended to reflect the District's material alteration of the Project if no more than one year has passed since expiration or termination of the Contract and the District makes written findings that entering a Contract with Consultant:

- (a) Will promote efficient use of public funds and resources and result in substantial cost savings to the District;
- (b) Will not encourage favoritism in the contracting process; and
- (c) Will not substantially diminish competition for future contracts with Consultants.

Stat. Auth.: ORS 279A.065

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

48-0340

Contract Amendments

(a) The District may amend any Contract for Services if the District, in its sole discretion, determines that the Amendment is within the scope of services contemplated under the Request for Proposals and that the Amendment would not materially impact the field of competition for the services described in the Request for Proposals. In making this determination, the District must consider potential alternative methods of procuring the services contemplated under the proposed Amendment. An Amendment would not materially impact the field of competition for the services described in the Request for Proposals if the District reasonably believes that the number of Proposers would not significantly increase if the Request for Proposals were re-issued to include the additional services.

(b) The District may amend any Contract if the additional services are required by reason of existing or new regulations or ordinances of federal, state or local agencies, and these existing or new regulations or ordinances affect performance of the Original Contract and were not cited in the original Request for Proposals or Contract or were enacted or amended after issuance of the original Request for Proposals or execution of the Original Contract.

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

(d) Contracts entered into under this Rule may be amended, subject to the following conditions:

(A) The Services to be provided under the Amendment are included within or directly related to, the scope of services that were described in the original Solicitation Document; and

(B) Each such Amendment is in Writing, signed by an authorized representative of the Consultant and the District, and receives all necessary approvals before it becomes binding on the District.

(e) A Contract may also be amended to reflect necessary changes if the scope of the project has been materially altered due to unforeseen or unavoidable circumstances that have arisen in the course of performing the services that could not have been anticipated and subject to the following conditions:

(A) Informal Written findings are submitted with the Amendment to the District's authorized representative with contract approval authority containing the following:

- (i) A description of the circumstances that require the necessary contract changes;
- (ii) A finding that the Amendment is not likely to encourage favoritism or substantially diminish competition in the awarding of the Services Contracts;
- (iii) A finding that the Amendment will result in substantial cost savings to the District; and
- (iv) A finding that the Amendment is in the best interest of the District; and

(B) Each such Amendment is in Writing, signed by an authorized representative of the Consultant and the District, and receives all necessary approvals before it becomes binding on the District.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.065

DIVISION 49

GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTS FOR CONSTRUCTION SERVICES

49-0100

Application

(1) In addition to the general requirements set forth in Division 46 of these Rules, the Rules in Division 49 apply to Public Improvement Contracts as well as Public Contracts for ordinary construction services that are not Public Improvements. Rules that apply specifically to Public Improvement Contracts are so identified. In the event of conflict or ambiguity, the more specific requirements of the Rules in this Division 49 take precedence over the more general requirements of the Rules in Division 46.

(2) These division 49 rules address matters covered in ORS Chapter 279C (with the exception of Architectural, Engineering, Land Surveying and Related Services, all of which are addressed in division 48 of these Rules).

(3) Pursuant to Rule 46-0100 and except as otherwise expressly provided in ORS 279C.800 through ORS 279C.870, applicable federal statutes and regulations govern when federal funds are involved and the federal statutes or regulations require additional conditions or conflict with the Code or with these Rules.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

49-0110

Policies

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

Stat. Auth.: ORS 279A.065

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

49-0120

Definitions

The definitions for this Division 49 are found in Rule 46-0110, except the following definitions apply only to Division 49.

(1) “**Conduct Disqualification**” means a Disqualification pursuant to ORS 279C.440.

(2) “**Disqualification**” means the preclusion of a Person from contracting with the District for a period of time in accordance with Rule 49-0370. Disqualification may be a Conduct Disqualification or DBE Disqualification.

(3) “**Foreign Contractor**” means a Contractor that is not domiciled in or registered to do business in the State of Oregon. See Rule 49-0480.

(4) “**Mandatory prequalification**” is when the District conditions a Person's submission of an Offer upon the Person's prequalification.

(5) “**Notice**” means any of the alternative forms of public announcement of Procurements, as described in OAR 137-049-0210.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

49-0130

Competitive Bidding Requirement

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335

49-0140

Contracts for Construction Other Than Public Improvements

(1) **Procurement Under ORS Chapter 279B.** Pursuant to ORS 279C.320, Public Contracts for construction services that are not Public Improvement Contracts (i.e., minor alterations, ordinary repair or maintenance of public improvements, etc.) other than Emergency Contracts regulated under ORS 279C.335(5) and Rule 49-0150, may be procured and amended as general trade services under the provisions of ORS Chapter 279B rather than under the provisions of ORS Chapter 279C and these division 49 rules.

(2) **Application of ORS Chapter 279C.** Non-procurement provisions of ORS Chapter 279C and these division 49 rules may still be applicable to the resulting Contracts. See, for example, particular statutes on Disqualification (ORS 279C.440, 445 and 450); Legal Actions (ORS 279C.460 and 465); Required Contract Conditions (ORS 279C.505, 515, 520 and 530); Hours of Labor (ORS 279C.540 and 545); Retainage (ORS 279C.550, 560 and 565); Subcontracts (ORS 279C.580); Action on Payment Bonds (ORS 279C.600, 605, 610, 615, 620 and 625); Termination (ORS 279C.650, 650, 660 and 670); and all of the Prevailing Wage Rates requirements (ORS 279C.800 through 870) for Public Works Contracts.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.320

49-0150

Emergency Contracts; Bidding and Bonding Exemptions

(1) **Emergency Declaration.** Pursuant to ORS 279C.335(5) and this rule, the District may declare that Emergency circumstances exist that require prompt execution of a Public Contract for Emergency construction or repair Work. The declaration shall be made at an administrative level consistent with the District’s internal policies, by a written declaration that describes the circumstances creating the Emergency and the anticipated harm from failure to enter into an Emergency Contract. The Emergency declaration shall exempt the Public Contract from the

competitive bidding requirements of ORS 279C.335(1) and shall thereafter be kept on file as a public record.

(2) **Competition for Contracts.** The District must ensure competition for an Emergency Contract as reasonable and appropriate under the Emergency circumstances, and may include written requests for Offers, oral requests for Offers or direct appointment without competition in cases of extreme necessity, in whatever Solicitation time periods the District considers reasonable in responding to the Emergency.

(3) **Contract Award.** Any Contract Awarded under this rule must be Awarded within 60 Days after declaration of the Emergency, unless an extension is granted under ORS 279C.335(5).

(4) **Contract Scope.** Although no dollar limitation applies to Emergency Contracts, the scope of the Contract must be limited to Work that is necessary and appropriate to remedy the conditions creating the Emergency as described in the declaration.

(5) **Contract Modification.** Emergency Contracts may be modified by change order or amendment to address the conditions described in the original declaration or an amended declaration that further describes additional work necessary and appropriate for related Emergency circumstances.

(6) **Waiver of Bonds.** Pursuant to ORS 279C.380(4) and this rule, the Emergency declaration may also state that the District waives the requirement of furnishing a performance bond and payment bond for the Emergency Contract. After making such an Emergency declaration the bonding requirements are excused for the procurement.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335(5) and 279C.380(4)

49-0160

Intermediate Procurements; Competitive Quotes and Amendments

(1) **General.** Public Improvement Contracts estimated by the District not to exceed \$150,000 may be Awarded in accordance with intermediate level procurement procedures for competitive quotes established by this rule.

(2) **Selection Criteria.** The selection criteria may be limited to price or some combination of price, experience, specific expertise, availability, project understanding, contractor capacity, responsibility and similar factors.

(3) **Request for Quotes.**

(a) Written requests for quotes shall be utilized 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.

(b) When requesting quotations orally, prior to requesting the price quote The District must 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 prevailing wage rates are not required by the Bureau of Labor and Industries.

(4) **Number of Quotes; Record Required.** The District must seek at least three competitive quotes, and keep a written record of the sources and amounts of the quotes received. If three quotes are not reasonably available The District must make a written record of the effort made to obtain those quotes.

(5) **Award.** If Awarded, the District must Award the Contract to the prospective contractor whose quote will best serve the interests of the District, taking into account the announced

selection criteria. If Award is not made to the Offeror offering the lowest price, the District must make a written record of the basis for Award.

(6) **Price Increases.** Intermediate level Public Improvement Contracts obtained by competitive quotes may be increased above the original amount of Award by issuance of a Change to the Work or Amendment, pursuant to Rule 49-0910, within the following limitations:

(a) Up to an aggregate Contract Price increase of 25% over the original Contract amount when the District determines that a price increase is warranted for additional reasonably related Work, and;

(b) Up to an aggregate Contract Price increase of 50% over the original Contract amount, when the District determines that a price increase is warranted for additional reasonably related Work and the District Board of Directors approves the increase.

(7) **Amendments.** Amendments of intermediate level Public Improvement Contracts that exceed the thresholds stated in section (1) are specifically authorized by the code, when made in accordance with this rule. Accordingly, such amendments are not considered new procurements and do not require an exemption from competitive bidding.

Stat. Auth.: ORS 279A.065

Stats. Implemented: Temporary provisions relating to competitive quotes were not codified but compiled as Legislative Counsel notes following ORS 279C.410.

FORMAL PROCUREMENT RULES

49-0200

Solicitation Documents; Required Provisions; Assignment or Transfer

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

(a) **General Information.**

(A) Identification of the Public Improvement project, including the character of the Work, and applicable plans, Specifications and other Contract documents;

(B) Notice of any pre-Offer conference as follows:

(i) The time, date and location of any pre-Offer conference;

(ii) Whether attendance at the conference will be mandatory or voluntary; and

(iii) That statements made by the District's representatives at the conference are not binding upon the District unless confirmed by Written Addendum.

(C) The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be pre-qualified if prequalification is a requirement;

(D) The name and title of the authorized District representative designated for receipt of Offers and 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 Rule 49-0300 regarding facsimile Bids or Proposals and Rule 49-0310 regarding electronic Procurement);

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

(G) The time and date of Closing after which the District will not accept Offers, which time shall be not less than five days after the date of the last publication of the advertisement. Although a

minimum of five days is prescribed, at least a 14-Day Solicitation period is recommended when feasible. If the District is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$150,000, the designated time of Closing shall be consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and Rule 49-0360. For timing issues relating to Addenda, see Rule 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. 276a), a statement that no Offer will be received or considered by the District unless the Offer contains a statement by the Offeror as a part of its Offer that "Contractor agrees to be bound by and will comply with the provisions of ORS 279C.840 or 40 U.S.C. 276a.";

(K) A statement that the District will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as specified in Rule 49-0230;

(L) Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;

(M) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See Rule 49-0440(3));

(N) How the District will notify Offerors of Addenda and how the Addenda will be made available (See Rule 49-0250); and

(O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in Rule 49-0360.

(b) Evaluation Process:

(A) A statement that the District may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, and may reject for good cause all Offers upon the District's finding that it is in the public interest to do so;

(B) The anticipated Solicitation schedule, deadlines, protest process and evaluation process, if any;

(C) Evaluation criteria, including the relative value applicable to each criterion, that the District will use to determine the Responsible Bidder with the lowest Responsive Bid (where Award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of Competitive Proposals is authorized under ORS 279C.335 and Rule 49-0620), along with the process the District will use to determine acceptability of the Work;

(i) If the Solicitation Document is an Invitation to Bid, the District must set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, ownership or life-cycle cost formulas, performance history on other private and public contracts, experience of key personnel, adequacy of equipment and physical plant, financial wherewithal, sources of supplies, references and warranty provisions. 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 District has available concerning future use;

(ii) If the Solicitation Document is a Request for Proposals, the District must refer to the additional requirements of Rule 49-0650.

(d) **Contract Provisions.** The District must include all Contract terms and conditions, including warranties, insurance and bonding requirements, that the District considers appropriate for the Public Improvement project. The District must also include all applicable Contract provisions required by Oregon law as follows:

(A) Prompt payment to all Persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279.505(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 (279C.525);

(J) Payment for medical care and attention to employees (ORS 279C.530(1));

(K) A Contract provision substantially as follows: "All employers, including Contractor, that employ subject Workers who Work under this Contract in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530(2));

(L) Maximum hours, holidays and overtime (ORS 279C.540);

(M) Time limitation on claims for overtime (ORS 279C.545);

(N) Prevailing wage rates (ORS 279C.800 to 279C.870);

(O) Fee paid to BOLI (ORS 279C.830);

(P) 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.

(2) **Assignment or Transfer Restricted.** Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, or transfer rights, nor delegate duties under the Contract, either in whole or in part, without the District's prior Written consent. Unless otherwise agreed by the District in Writing, such consent 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 District 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 District for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the District otherwise agrees in Writing.

(3) Additional Terms and Conditions. The District may include additional terms and conditions as applicable to the contract. If federal grant funds are involved, the federal laws, rules, and regulations applicable to the grant will govern if they conflict with any provision required by ORS 279A 279B or 279C.

(4) Compliance with Solicitation Document required; Exceptions.

(a) An Offeror is responsible for knowing and understanding the terms and conditions included in or applicable to a Solicitation Document.

(b) By signing and returning the Offer the Offeror acknowledges acceptance of and agrees to be bound by the terms and conditions of the contract.

(5) First-Tier Subcontractor Disclosure and Substitution. For all contracts that exceed \$150,000 on an ITB for Public Improvement, first-tier subcontractor disclosure is required by ORS 279C.370. Disclosure is required for first-tier subcontractors pursuant to Rule 49-0360.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.110(4), ORS 279A.120, ORS 279C.365, ORS 279C.370, ORS 279C.390, ORS 279C.505 to 580, ORS 279C.605, ORS 305.385, ORS 468A.720, ORS 701.005 & ORS 701.055

49-0210

Notice and Advertising Requirements; Posting

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

(a) Mailing Notice of the availability of Solicitation Documents to Persons that have expressed an interest in the District's Procurements;

(b) Placing Notice on the District's Electronic Procurement System; or

(c) Placing Notice on the District's Internet Web site.

(2) **Advertising.** Pursuant to ORS 279C.360 and this rule, the District must advertise every Solicitation for competitive Bids or competitive Proposals for a Public Improvement Contract, unless the LCRB has exempted the Solicitation from the advertisement requirement as part of a competitive Bidding exemption under ORS 279C.335 and Rules 49-0600 through 49.0690.

(a) Unless the District publishes by Electronic Advertisement as permitted under subsection 2(b), the advertisement for Offers shall be published at least once in at least one newspaper of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as the District may determine to be necessary or desirable to foster and promote competition.

(b) The District may publish by Electronic Advertisement if the LCRB determines Electronic Advertisement is likely to be cost effective and, by rule or order, authorizes Electronic Advertisement.

(c) In addition to the District's publication required under subsection 2(a) or 2(b), the District must 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 \$150,000.

(d) All advertisements for Offers shall set forth:

(A) The Public Improvement project;

(B) The office where Contract terms, conditions and Specifications may be reviewed;

(C) The date that Persons must file applications for prequalification under ORS 279C.340, if prequalification is a requirement, and the class or classes of Work for which Persons must be pre-qualified;

(D) The scheduled Closing, which shall not be less than five Days after the date of the last publication of the advertisement;

(E) The name, title and address of the District Person authorized to receive Offers;

(F) The scheduled Opening; and

(G) If applicable, that the Contract is for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 276(a)).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.360

49-0220

Prequalification of Offerors

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

(a) **Mandatory Prequalification.** The District may, by rule, resolution, ordinance or other regulation, require mandatory prequalification of Offerors on forms prescribed by the LCRB. The District must indicate in the Solicitation Document if it will require mandatory prequalification. Mandatory prequalification is when the District conditions a Person's submission of an Offer upon the Person's prequalification. The District will not consider an Offer from a Person that is not prequalified if the District required prequalification.

(b) **Permissive Prequalification.** The District may prequalify a Person for a Solicitation list on forms prescribed by the LCRB, but in permissive prequalification the District will not limit distribution of a Solicitation to that list.

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

(a) 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;

(b) The Person's record of performance;

(c) The Person's record of integrity;

(d) The Person is qualified to contract with the District. (See Rule 49-0390(2) regarding standards of responsibility).

(3) **Notice Of Denial.** If a Person fails to prequalify for a mandatory prequalification, the District must notify the Person and specify the reasons under Section (2) of this Rule and inform the Person of their right to a hearing under ORS 279C.445 and 279C.450.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070
Stats. Implemented: ORS 279C.430 and ORS 279C.435

49-0230

Eligibility to Bid or Propose; Registration or License

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

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

(3) **Noncomplying Entities.** The District must 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.

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279C.365, ORS 671.530 & ORS 701.055

49-0240

Pre-Offer Conferences

(1) **Purpose.** The District may hold pre-Offer conferences with prospective Offerors prior to Closing to explain the Procurement requirements, obtain information or to conduct site inspections.

(2) **Required attendance.** The District may require attendance at the pre-Offer conference as a condition for making an Offer. Unless otherwise specified in the Solicitation Document, a mandatory attendance requirement is considered to have been met if, at any time during the mandatory meeting, a representative of an offering firm is present.

(3) **Scheduled time.** If the District 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.

(4) **Statements Not Binding.** Statements made by the District's representative at the pre-Offer conference do not change the Solicitation Document unless the District confirms such statements with a Written Addendum to the Solicitation Document.

(5) **The District Announcement.** The District must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with Rule 49-0200(1)(a)(B).

Stat. Auth.: ORS 279A.065
Stats. Implemented: ORS 279C.365 and 279C.370

49-0250

Addenda to Solicitation Documents

(1) **Issuance; Receipt.** The District 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 District otherwise specifies in the Addenda or in the Solicitation Document.

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

(3) **Timelines; Extensions.** The District must issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The District may extend the Closing if the District determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by public interest, the District will not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.

(4) **Request for Change or Protest.** Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in Rule 49-0260, by the close of the District's next business day after issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under Rule 49-0260, whichever date is later. The District must consider only an Offeror's request for change or protest to the Addendum; The District will not consider a request for change or protest to matters not added or modified by the Addendum, unless the Offeror submits the request for change or protest before the deadline for the District's receipt of request for change or protests as set forth in Rule 49-0260(2) and (3).

Stat. Auth.: ORS 279A.065

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

49-0260

Request for Clarification or Change; Solicitation Protests

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

(2) **Request for Change.**

(a) Delivery. An Offeror may request in Writing a change to the Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver the Written request for change to the District not less than 10 Days prior to Closing;

(b) 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).

(3) **Protest.**

(a) Delivery. An Offeror may protest Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest on those matters to the District not less than 10 Days prior to Closing;

(b) 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)

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

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.345 & ORS 279C365

49-0270

Cancellation of Solicitation Document

(1) **Cancellation in the Public Interest.** The District may cancel a Solicitation for good cause if the District finds that cancellation is in the public interest. The District's reasons for cancellation shall be made part of the Solicitation file.

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

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

(3) **Disposition of Offers.**

(a) Prior to Offer Opening. If the District cancels a Solicitation prior to Offer Opening, all Offers received shall be returned to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the

envelope, the District must open the Offer to determine the source and then return it to the Offeror.

(b) After Offer Opening. If the District rejects all Offers, all Offers reviewed shall be retained as part of the District's Procurement file.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.395

49-0280

Offer Submissions

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

(a) In competitive Bidding, the Offer is always a "Firm Offer," i.e., the Offer shall be held open by the Offeror, for the District's acceptance for the period specified in Rule 49-0410. The District's Award of the Contract to a Bidder constitutes acceptance of the Offer and binds the Offeror to the Contract.

(b) In competitive Proposals, the Solicitation Document shall describe whether Offers are to be made and considered as "Firm Offers" that may be accepted without negotiation, as in the case of competitive Bidding, or whether Offers are subject to discussion, negotiation or otherwise are not to be considered as final offers. See Rule 49-0650 on Requests for Proposals and Rule 49-0290 on Bid or Proposal Security.

(2) **Responsive Offer**. The District may Award a Contract only to a Responsible Offeror with a Responsive Offer.

(3) **Contingent Offers**. Except to the extent that an Offeror is authorized to propose certain terms and conditions pursuant to Rule 49-0650, an Offeror shall not make an Offer contingent upon the District's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

(4) **Offeror's Acknowledgement**. By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits proposal of alternative terms under Rule 49-0650, the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the District in Writing.

(5) **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.

(6) **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.

(7) **Documents**. An Offeror shall provide the District with all documents and descriptive literature required under the Solicitation Document.

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

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

(10) **Identification of Offers**

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

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

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

Stat. Auth.: ORS 279A.065

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

49-0290

Bid or Proposal Security

(1) **Security Amount.** If the District 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 District will not use Bid or Proposal security to discourage competition. The District must clearly state any Bid or Proposal security requirements in its Solicitation Document. The Offeror 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, in the case of Proposal security, with any required proof of insurance. See ORS 279C.365(4) and ORS 279C.385.

(2) **Requirement for Bid Security (Optional for Proposals).** Unless the District has otherwise exempted a Solicitation or class of Solicitations from Bid security pursuant to ORS 279C.390, the District must require Bid security for its Solicitation of Bids for Public Improvements. The District may require Bid security even if it has exempted a class of Solicitations from Bid security. The District may require Proposal security in RFPs when Award of a Public Improvement Contract may be made without negotiation following receipt of a Firm Offer as described in Rule 49-0280(1)(b). See ORS 279C.400(5).

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

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

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

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

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

Stat. Auth.: ORS 279A.065

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

49-0300

Facsimile Bids and Proposals. The District may authorize utilization of facsimile offers to bids or proposals pursuant to Rule 47-0320.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365

49-0310

Electronic Procurement

(1) **Generally.** The District may utilize Electronic Advertisement of Public Improvement Contracts in accordance with ORS 279C.360(1), provided that advertisement of such Contracts with an estimated Contract Price in excess of \$125,000 must also be published in a trade newspaper of general statewide circulation. Notices of intent to Award may be posted electronically as provided by ORS 279C.410(7) and Rules 47-0330 and 49-0320.

(2) **Alternative Procedures.** In the event that the District desires to allow Electronic Offers for a Public Improvement Contract, it shall comply with Rules 47-0330 49-0320.

(3) **Interpretation.** Nothing in this rule shall be construed as prohibiting the District from making procurement documents for Public Improvement Contracts available in electronic format as well as in hard copy when Bids are to be submitted only in hard copy.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.365

49-0320

Public Notice of Solicitation

(1) **Advertising.** The District must advertise every solicitation for Offers, unless the Contract Review Board has exempted the solicitation from the advertisement requirement.

(a) **The District may publish by Electronic Advertisement if:**

(A) The District has published a notice that it may publish future advertisements for Offers by Electronic Advertisement. The District must publish the notice in at least one newspaper of general circulation in the area where the business office of the District is located and in as many additional issues and publications as the District may determine to be necessary or desirable to provide notice to potential Offerors. The District notice must include the World Wide Web location (i.e., Uniform Resource Locator or URL) where the District will publish future Electronic Advertisements or alternatively, to the Web location where the District will publish information on accessing the Electronic Advertisement via a Telnet application.

(B) The District posts in its business office a notice that the District will publish advertisements for Offers by Electronic Advertisement. The notice must include the World Wide Web location (i.e., Uniform Resource Locator or URL) where the District publishes Electronic Advertisements or alternatively, to the Web location where the District publishes information on accessing the Electronic Advertisement via Telnet.

(C) The LCRB determines that Electronic Advertisement is less expensive than publishing by newspaper under subsection (2)(a).

(c) In addition to the District's publication required under subsection (2)(a) or (2)(b), the District must also publish 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 \$150,000.

(d) All advertisements for Offers must set forth:

(A) The scheduled Closing, that may not be less than five Days after the date of the last publication of the advertisement;

(B) The date on which Entities must file applications for prequalification if prequalification is a requirement and the class or classes of Work for which Entities must be prequalified;

(C) The nature of the Work to be performed or the goods to be purchased;

(D) The office where contract terms, conditions, and Specifications may be reviewed;

(E) The name, title, and address of the person authorized to receive Offers;

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

(G) The provision that the District may reject any Offer that does not comply with all prescribed public procurement procedures and requirements;

(H) The provision that the District may reject for good cause any or all Offers upon the District's finding that it is in the public interest to do so;

(I) The provision that the Offer must include a statement indicating whether the Offeror is a "resident bidder," as defined in ORS 279.029;

(J) Whether a Contractor or subcontractor must be licensed under ORS 468A.720, to Work with asbestos-containing materials; and

(K) The provision that the District may not receive or consider an Offer for a construction contract unless the Offeror is registered with the Construction Contractors Board as required by ORS 701.055, or licensed by the State Landscape Contractors Board, as required by ORS 671.530.

(L) If prequalifications is a requirement, the date that prequalification applications must be filed under ORS 279C.430 and Section 46-130 (4) of these rules and the class or classes of work for which bidders must be prequalified.

(3) Posting Advertisement for Offers. The District must post a copy of each advertisement for Offers at the principal business office of the District. An Offeror may obtain a copy of the advertisement for Offers upon request.

Stats. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.360

49-0330

Pre-Closing Modification or Withdrawal of Offers

(1) **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 District in accordance with Rule 49-0280, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:

(a) Bid (or Proposal) Modification; and

(b) Solicitation Number (or Other Identification as specified in the Solicitation Document).

(2) **Withdrawals**

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.360(2), ORS 279C.365, ORS 279C.375 & ORS 279C.395

49-0335

Receipt, Opening and Recording of Offers; Confidentiality of Offers

- (1) **Receipt.** The District must electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The District will not open the Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If the District inadvertently opens an Offer or a modification prior to the Opening, the Offer or modification will be returned to its secure and confidential state until Opening. The District must document the resealing for the Solicitation file (e.g. "The District inadvertently opened the Offer due to improper identification of the Offer").
- (2) **Opening and Recording.** The District must publicly open Offers including any modifications made to the Offer pursuant to Rule 49-0320. In the case of Invitations to Bid, to the extent practicable, the District must read aloud the name of each Bidder, the Bid price(s), and such other information as the District considers appropriate. In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the District will not read Offers aloud.
- (3) **Availability.** After Opening, the District must make Bids available for public inspection, but pursuant to ORS 279C.410 Proposals are not subject to disclosure until after notice of intent to award is issued. In any event the District may withhold from disclosure those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.501(2); ORS 646.461 to 646.475. To the extent the District determines such designation is not in accordance with applicable law, the District must make those portions available for public inspection. The Offeror shall separate information designated as confidential from other nonconfidential 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.

Stat. Auth.: ORS 279A.065

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

49-0340

Late Bids, Late Withdrawals and Late Modifications

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

Stat. Auth.: ORS 279A.065

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

49-0350

Mistakes

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

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

(a) The District may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:

(A) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;

(B) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and

(C) Acknowledge receipt of an Addendum to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addendum and intended to be bound by its terms; or the Addendum involved did not affect price, quality or delivery.

(b) The District may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms the District's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. 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). In the event of a discrepancy, unit prices shall prevail over extended prices.

(c) The District may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:

(A) The nature of the error;

(B) That the error is not a minor informality under this subsection or an error in judgment;

(C) That the error cannot be corrected or waived under subsection (b) of this section;

(D) That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;

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

Stat. Auth.: ORS 279A.065

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

49-0360

First-Tier Subcontractors; Disclosure and Substitution

- (1) **Required Disclosure.** Within two working hours after the Bid Closing on an ITB for a Public Improvement having a Contract Price anticipated by the District to exceed \$150,000, all Bidders shall submit to the District a disclosure form as described by ORS 279C.370(2), identifying any first-tier subcontractors (those Entities that would be contracting directly with the prime contractor) that will be furnishing labor or labor and materials on the Contract, if Awarded, whose subcontract value would be equal to or greater than:
- (a) Five percent of the total Contract Price, but at least \$15,000; or
 - (b) \$350,000, regardless of the percentage of the total Contract Price.
- (2) **Bid Closing, Disclosure Deadline and Bid Opening.** For each ITB to which this rule applies, the District must:
- (a) Set the Bid Closing on a Tuesday, Wednesday or Thursday, and at a time between 2 p.m. and 5 p.m.;
 - (b) Open Bids publicly immediately after the Bid Closing; and
 - (c) Consider for Contract Award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed by the District.
- (3) **Bidder Instructions and Disclosure Form.** For the purposes of this rule, the District in its Solicitation shall:
- (a) Prescribe the disclosure form that must be utilized, substantially in the form set forth in ORS 279C.370(2); and

(b) Provide instructions in a notice substantially similar to the following:

“Instructions for First-Tier Subcontractor Disclosure”

Bidders are required to disclose information about certain first-tier subcontractors when the contract value for a Public Improvement is greater than \$150,000 (see ORS 279C.370). Specifically, when the contract amount of a first-tier subcontractor furnishing labor or labor and materials would be greater than or equal to: (i) 5% of the project Bid, but at least \$15,000, or (ii) \$350,000 regardless of the percentage, the Bidder must disclose the following information about that subcontract either in its Bid submission, or within two hours after Bid Closing:

- (1) The subcontractor's name,
- (2) The category of Work that the subcontractor would be performing, and
- (3) The dollar value of the subcontract.

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

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

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

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

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

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

Stat. Auth.: ORS 279A.065

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

49-0370

Disqualification of Persons

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

(a) **Standards for Conduct Disqualification.** As provided in ORS 279C.440, the District may disqualify a Person for:

(A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.

(B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the Person's responsibility as a contractor.

(C) Conviction under state or federal antitrust statutes.

(D) Violation of a contract provision that is regarded by the District to be so serious as to justify Conduct Disqualification. A violation under this subsection 1(a)(D) may include but is not limited to material failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a Person's failure to perform or unsatisfactory performance caused by acts beyond the Person's control is not a basis for Disqualification.

(b) **Standards for DBE Disqualification.** As provided in ORS 200.065, 200.075 or 279A.110, the District may disqualify a Person's right to submit an Offer or to participate in a Contract (e.g. subcontractors) as follows:

(A) For a DBE Disqualification under ORS 200.065, the District may disqualify a Person upon finding that:

(i) The Person fraudulently obtained or retained or attempted to obtain or retain or aided another Person to fraudulently obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise; or

(ii) The Person knowingly made a false claim that any Person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit; or

(iii) The Person has been disqualified by another Contracting Agency pursuant to ORS 200.065.

(B) For a DBE Disqualification under ORS 200.075, the District may disqualify a Person upon finding that:

(i) The Person has entered into an agreement representing that a disadvantaged, minority, women, or emerging small business enterprise, certified pursuant to ORS 200.055 ("Certified Enterprise"), will perform or supply materials under a Public Improvement Contract without the knowledge and consent of the Certified Enterprise; or

(ii) The Person exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any Certified Enterprise; or

(iii) The Person uses a Certified Enterprise to perform services under a contract or to provide supplies under a Public Improvement Contract to meet an established Certified Enterprise goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the contract.

(iv) If a Person is disqualified for a DBE Disqualification under ORS 200.075, the affected District shall not permit such Person to participate in District Contracts.

(C) For a DBE Disqualification under ORS 279A.110, the District may disqualify a Person if the District finds that the Person discriminated against minority, women or emerging small business enterprises in awarding a subcontract under a contract with that the District.

(2) **Notice of Intent to Disqualify.** The District must notify the Person in Writing of a proposed Disqualification personally or by registered or certified mail, return receipt requested. This notice shall:

- (a) State that the District intends to disqualify the Person;
 - (b) Set forth the reasons for the Disqualification;
 - (c) Include a statement of the Person's right to a hearing if requested in Writing within the time stated in the notice and that if the District does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived its right to a hearing;
 - (d) Include a statement of the authority and jurisdiction under which the hearing will be held;
 - (e) Include a reference to the particular sections of the statutes and rules involved;
 - (f) State the proposed Disqualification period; and
 - (g) State that the Person may be represented by legal counsel.
- (3) **Hearing.** The District must schedule a hearing upon receipt of the Person's timely request. The District must notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.
- (4) **Notice of Disqualification.** The District will notify the Person in Writing of its Disqualification, personally or by registered or certified mail, return receipt requested. The notice shall contain:
- (a) The effective date and period of Disqualification;
 - (b) The grounds for Disqualification; and
 - (c) A statement of the Person's appeal rights and applicable appeal deadlines. For a Conduct Disqualification or a DBE Disqualification under ORS 279A.110, the disqualified person must notify the District in Writing within three business Days after receipt of the District's notice of Disqualification if the Person intends to appeal the District's decision.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 200.065, ORS 200.075, ORS 279C.440, ORS 279C.445, ORS 279C.450 & ORS 279A.110

49-0380

Bid or Proposal Evaluation Criteria

- (1) **General.** A Public Improvement Contract, if Awarded, shall be Awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. See Rule 49-0390, and Rules for Alternative Contracting Methods at 49-0600 to 49-0690.
- (2) **Bid Evaluation Criteria.** Invitations to Bid may solicit lump-sum Offers, unit-price Offers or a combination of the two.
- (a) Lump Sum. If the ITB requires a lump-sum Bid, without additive or deductive alternates, or if the District elects not to award additive or deductive alternates, Bids shall 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 shall be calculated by adding to or deducting from the base Bid those alternates selected by the District, for the purpose of comparing Bids.
 - (b) Unit Price. If the Bid includes unit pricing for estimated quantities, the total Bid price shall be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by the District, for the purpose of comparing Bids. The District must specify within the Solicitation Document the estimated quantity of the procurement to be used for determination of the low Bidder. In the event of

mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price shall govern. See Rule 49-0350(2)(b).

(3) **Proposal Evaluation Criteria.** If the LCRB has exempted the Procurement of a Public Improvement from the competitive Bidding requirements of ORS 279C.335(1), and has directed the District to use an Alternative Contracting Method under ORS 279C.335(3), the District must set forth the evaluation criteria in the Solicitation Documents. See Rules 49-0650, 49-0650, and ORS 279C.335 and 279C.405.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335

49-0390

Offer Evaluation and Award; Determination of Responsibility

(1) **General.** If Awarded, the District must Award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer or Proposers submitting the best, Responsive Proposal or Proposals, provided that such Person is not listed by the Construction Contractors Board as disqualified to hold a Public Improvement Contract. See ORS 279C.375(2)(a). The District may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in the public interest.

(2) **Determination of Responsibility.** Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the District must have information that indicates that the Offeror meets the standards of responsibility set forth in ORS 279.375(2)(b). To be a Responsible Offeror, the District must determine that the Offeror:

(a) **Availability.** Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to demonstrate the capability of the Offeror to meet all contractual responsibilities;

(b) **Performance.** Has a satisfactory record of contract performance. The District 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 District should determine whether the Offeror's deficient performance was expressly excused under the terms of the contract, or whether the Offeror took appropriate corrective action. The District may review the Offeror's performance on both private and Public Contracts in determining the Offeror's record of contract performance. The District must make its basis for determining an Offeror not Responsible under this paragraph part of the Solicitation file;

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

(d) Is qualified legally to contract with the District; and

(e) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by the District

concerning responsibility, the District must base the determination of responsibility upon any available information, or may find the Offeror not Responsible.

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

(4) **Offeror Submissions.**

(a) The District may require an Offeror to submit Product Samples, descriptive literature, technical data, or other material and may also require any of the following prior to Award:

(A) Demonstration, inspection or testing of a product prior to Award for characteristics such as compatibility, quality or workmanship;

(B) Examination of such elements as appearance or finish; or

(C) Other examinations to determine whether the product conforms to Specifications.

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

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

(a) **Nonresident Bidders.** In determining the lowest Responsive Bid, the District must, in accordance with Rule 46-0310, add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.

(b) **Clarifications.** In evaluating Bids, the District 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.

(c) **Negotiation Prohibited.** The District will not negotiate scope of Work or other terms or conditions under an Invitation to Bid process prior to Award.

(6) **Evaluation of Proposals.** See Rule 49-0650 regarding rules applicable to Requests for Proposals.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335, ORS 279C.365, ORS 279C.375 & ORS 279C.395

49-0400

Documentation of Award; Availability of Award Decisions

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

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

(a) All submitted Bids;

(b) Completed Bid tabulation sheet; and

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

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

- (a) All submitted Proposals.
 - (b) The completed evaluation of the Proposals;
 - (c) Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and
 - (d) If the District permitted negotiations in accordance with Rule 49-0650, the District's completed evaluation of the initial Proposals and the District's completed evaluation of final Proposals.
- (4) **Contract Document.** The District must deliver a fully executed copy of the final Contract to the successful Offeror.
- (5) **Bid Tabulations and Award Summaries.** Upon request of any Person The District must provide tabulations of Awarded Bids or evaluation summaries of Proposals for a nominal charge which may be payable in advance. Requests must contain the Solicitation Document number and, if requested, be accompanied by a self-addressed, stamped envelope. The District may also provide tabulations of Bids and Proposals Awarded on designated Web sites or on the District's Electronic Procurement System.
- (6) **Availability of Solicitation Files.** The District must make completed Solicitation files available for public review at the District.
- (7) **Copies from Solicitation Files.** Any Person may obtain copies of material from Solicitation files upon payment of a reasonable copying charge.

Stat. Auth.: ORS 279A.065

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

49-0410

Time for District Acceptance; Extension

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375

49-0420

Negotiation With Bidders Prohibited

- (1) **Bids.** Except as permitted by ORS 279C.340 and Rule 49-0430 when all bids exceed the cost estimate, the District will not negotiate with any Bidder prior to Contract Award. After Award of the Contract, the District and Contractor may modify the Contract only by change order or amendment to the Contract in accordance with Rule 49-0910.
- (2) **Requests for Proposals.** The District may conduct discussions or negotiations with Proposers only in accordance with the requirements of Rule 49-0650.

Stat. Auth.: ORS 279A.065

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

49-0430

Negotiation When Bids Exceed Cost Estimate

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

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

(a) **“Cost Estimate”** means the District's most recent pre-Bid, good faith assessment of anticipated Contract costs, consisting either of an estimate of an architect, engineer or other qualified professional, or confidential cost calculation Worksheets, where available, and otherwise consisting of formal planning or budgetary documents.

(b) **“Other Options”** means those items generally considered appropriate for negotiation in the RFP process, relating to the details of Contract performance as specified in Rule 49-0650, but excluding any material requirements previously announced in the Solicitation process that would likely affect the field of competition.

(c) **“Project”** means a Public Improvement.

(3) **Rejection of Bids.** In determining whether all Responsive Bids from Responsible Bidders exceed the Cost Estimate, only those Bids that have been formally rejected, or Bids from Bidders who have been formally disqualified by the District, shall be excluded from consideration.

(4) **Scope of Negotiations.** The District will not proceed with Contract Award if the scope of the Project is significantly changed from the original Bid. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other Bidders would have been expected by the District to participate in the Bidding process had the change been made during the Solicitation process rather than during negotiation. This rule shall not be construed to prohibit re-solicitation of trade subcontracts.

(5) **Discontinuing Negotiations.** The District may discontinue negotiations at any time, and shall do so if it appears to the District that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to re-bid any portion of the project, or to obtain subcontractor pricing information upon request, shall be considered a lack of good faith.

(6) **Limitation.** Negotiations may be undertaken only with the lowest Responsive, Responsible Bidder pursuant to ORS 279C.340. That statute does not provide any additional authority to further negotiate with Bidders next in line for Contract Award.

(7) **Public Records.** To the extent that a Bidder's records used in Contract negotiations under ORS 279C.340 are public records, they are exempt from disclosure until after the negotiated Contract has been awarded or the negotiation process has been terminated, at which time they are subject to disclosure pursuant to the provisions of the Oregon Public Records Law, ORS 192.410 to 192.505.

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

Stats. Implemented: ORS 279C.340

49-0440

Rejection of Offers

(1) **Rejection of an Offer.**

(a) The District may reject any Offer upon finding that to accept the Offer may impair the integrity of the Procurement process or that rejecting the Offer is in the public interest.

(b) The District must reject an Offer upon the District's finding that the Offer:

(A) Is contingent upon the District's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;

(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 the Solicitation Document or in contravention of applicable law;

(D) Offers Work or goods that fail 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.

(c) The District must reject an Offer upon the District's finding that the Offeror:

(A) Has not been prequalified under ORS 279C.430 and the District required mandatory prequalification;

(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 Rule 49-0390(2) regarding District determination that the Offeror has met statutory standards of responsibility.

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

(3) **Certification of Non-Discrimination.** The Offeror shall certify and deliver to the District Written certification, as part of the Offer 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.

(4) **Rejection of all Offers.** The District may reject all Offers for good cause upon the District's Written finding it is in the public interest to do so. The District must notify all Offerors of the rejection of all Offers, along with the good cause justification and finding.

(5) **Criteria for Rejection of All Offers.** The District may reject all Offers upon a Written finding that:

(a) The content of or an error in the Solicitation Document, or the Solicitation process unnecessarily restricted competition for the Contract;

- (b) The price, quality or performance presented by the Offerors is too costly or of insufficient quality to justify acceptance of the Offer;
- (c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;
- (d) Causes other than legitimate market forces threaten the integrity of the competitive Procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct and inadvertent or intentional errors in the Solicitation Document;
- (e) The District cancels the Solicitation in accordance with Rule 49-0270; or
- (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.375, ORS 279C.380, ORS 279C.395, ORS 279A.105 & ORS 279A.110

49-0450

Protest of Contractor Selection, Contract Award

- (1) **Purpose.** An adversely affected or aggrieved Offeror must exhaust all avenues of administrative review and relief before seeking judicial review of the District's Contractor selection or Contract Award decision.
- (2) **Notice of Competitive Range.** Unless otherwise provided in the RFP, when the competitive proposal process is authorized under Rule 49-0650, the District must provide Written notice to all Proposers of the District's determination of the Proposers included in the Competitive Range. The District's notice of the Proposers included in the Competitive Range shall not be final until the later of the following:
 - (a) 10 Days after the date of the notice, unless otherwise provided therein; or
 - (b) Until the District provides a Written response to all timely-filed protests that denies the protest and affirms the notice of the Proposers included in the Competitive Range.
- (3) **Notice of Intent to Award.** Unless otherwise provided in the Solicitation Document, the District must provide Written notice to all Offerors of the District's intent to Award the Contract. The District's Award shall not be final until the later of the following:
 - (a) Seven Days after the date of the notice, unless the Solicitation Document provided a different period for protest; or
 - (b) The District provides a Written response to all timely-filed protests that denies the protest and affirms the Award.
- (4) **Right to Protest Award.**
 - (a) An adversely affected or aggrieved Offeror may submit to the District a Written protest of the District's intent to Award within seven Days after issuance of the notice of intent to Award the Contract, unless a different protest period is provided under the Solicitation Document.
 - (b) The Offeror's protest must be in Writing and must specify the grounds upon which the protest is based.
 - (c) An Offeror is adversely affected or aggrieved only if the Offeror is eligible for Award of the Contract as the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer submitting the best Responsive Proposal and is next in line for Award, i.e., the

protesting Offeror must claim that all lower Bidders or higher-scored Proposers are ineligible for Award:

(A) Because their Offers were nonresponsive; or

(B) The District committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been the Responsible Bidder offering the lowest Bid or the Responsible Proposer offering the highest-ranked Proposal.

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

(5) Right to Protest Competitive Range.

(a) An adversely affected or aggrieved Proposer may submit to the District a Written protest of the District's decision to exclude the Proposer from the Competitive Range within seven Days after issuance of the notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document. (See procedural requirements for the use of RFPs at Rule 49-0650.)

(b) The Proposer's protest shall be in Writing and must specify the grounds upon which the protest is based.

(c) A Proposer is adversely affected only if the Proposer is responsible and submitted a Responsive Proposal and is eligible for inclusion in the Competitive Range, i.e., the protesting Proposer must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Proposers are removed from consideration, and that those ineligible Proposers are ineligible for inclusion in the Competitive Range because:

(A) Their Proposals were not responsive; or

(B) The District committed a substantial violation of a provision in the RFP or of an applicable Procurement statute or administrative rule, and the protesting Proposer was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.

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

(6) **Authority to Resolve Protests.** The Superintendent or his/her designee, may settle or resolve a Written protest submitted in accordance with the requirements of this rule.

(7) **Decision.** If a protest is not settled, the Superintendent or designee, shall promptly issue a Written decision on the protest. Judicial review of this decision will be available if provided by statute.

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

Stat. Auth.: ORS 279A.065

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

49-0460

Performance and Payment Security; Waiver

(1) **Public Improvement Contracts.** Unless the required performance bond is waived under ORS 279C.380(1)(a), excused in cases of emergency under ORS 279C.380(4), or unless the LCRB 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 District a performance bond and a payment bond each in a sum equal to the Contract Price for all Public Improvement Contracts.

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

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

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

Stat. Auth.: ORS 279A.065

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

49-0470

Substitute Contractor

If the Contractor provided a performance bond, the District may afford the Contractor's surety the opportunity to provide a substitute contractor to complete performance of the Contract. A substitute contractor 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.

Stat. Auth.: ORS 279A.065

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

49-0490

Foreign Contractor

If the Contract Price exceeds \$75,000 (or \$150,000) 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 District. The District Awarding the Contract shall satisfy itself that the above requirements have been complied with before it issues final payment on the Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.120

ALTERNATIVE CONTRACTING METHODS

49-0600

Purpose

Rules 49-0600 to 49-0690 are intended to provide guidance to the District regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as may be directed by the LCRB under ORS 279C.335. Those methods include, but are not limited to, Design-Build, Energy Savings Performance Contract (ESPC) and Construction Manager/General Contractor (CM/GC) forms of contracting. As to ESPC contracting, these Rules 49-0600 to 49-0690 implement the requirements of ORS 279C.335 pertaining to the adoption of rules appropriate for use by the District to govern the procedures for entering into ESPCs.

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

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

49-0610

Definitions for Alternative Contracting Methods

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

(1) **Alternative Contracting Methods** means innovative Procurement techniques for obtaining Public Improvement Contracts, utilizing processes other than the traditional method of Design-Bid-Build (with Award based solely on price, in which a final design is issued with formal Bid documents, construction services are obtained by sealed Bid Awarded to the lowest Responsive, Responsible Bidder, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design-Build contracting, CM/GC forms of contracting and ESPCs, which are specifically addressed in these Rules 49-0600 to 49-0690, as well as other developing techniques such as general "performance contracting" and "cost plus time" contracting, for which procedural requirements are identified under these Rules 49-0600 to 49-0690.

(2) **Construction Manager/General Contractor (or "CM/GC")** means a form of Procurement that results in a Public Improvement Contract for a Construction Manager/General Contractor to undertake project team involvement with design development; constructability reviews; value engineering, scheduling, estimating and subcontracting services; establish a Guaranteed Maximum Price to complete the Contract Work; act as General Contractor; hold all subcontracts, self-perform portions of the Work as may be allowed by the District under the CM/GC Contract; coordinate and manage the building process; provide general Contractor expertise; and act as a member of the project team along with the District, architect/engineers and other consultants. CM/GC also refers to a Contractor under this form of Contract, sometimes known as the "Construction Manager at Risk."

(3) **Design-Build** means a form of Procurement that results in a Public Improvement Contract in which the construction Contractor also provides or obtains specified design services, participates on the project team with the District, and manages both design and construction. In this form of Contract, a single Person provides the District with all of the services necessary to both design and construct the project.

(4) **Energy Conservation Measures (or "ECMs") (also known as "energy efficiency measures")** means, as used in ESPC Procurement, any equipment, fixture or furnishing to be added to or used in an existing building or structure, and any repair, alteration or improvement to an existing building or structure that is designed to reduce energy consumption and related costs, including those costs related to electrical energy, thermal energy, water consumption, waste disposal, and future contract-labor costs and materials costs associated with maintenance of the building or structure. For purposes of these Rules 49-0600 to 49-0690, use of either or both of the terms "building" or "structure" shall be deemed to include existing energy, water and waste disposal systems connected or related to or otherwise used for the building or structure when such system(s) are included in the project, either as part of the project together with the building or structure, or when such system(s) are the focus of the project. Maintenance services are not Energy Conservation Measures, for purposes of these Rules 49-0600 to 49-0690.

(5) **Energy Savings Guarantee** means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the District that certain energy savings and performance will be achieved for the project covered by the RFP, through the installation and implementation of the agreed-upon ECMs for the project. The Energy Savings Guarantee shall include, but shall not be limited to, the specific energy savings and performance levels and amounts that will be guaranteed, provisions related to the financial remedies available to the District in the event the guaranteed savings and performance are not achieved, the specific conditions under which the ESCO will guarantee energy savings and performance (including the specific responsibilities of the District after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.

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

(7) **Guaranteed Maximum Price (or "GMP")** means the total maximum price provided by the Contractor, and accepted by the District, that includes all reimbursable costs of and fees for completion of the Contract Work, as defined by the Public Improvement Contract, except for material changes in the scope of Work. It may also include particularly identified contingency amounts.

(8) **Measurement and Verification (or "M & V")** means, as used in ESPC Procurement, the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy-using systems pre-installation and post-installation.

(9) **Project Development Plan** means a secondary phase of services performed by an ESCO in an ESPC Procurement when the ESCO performs more extensive design of the agreed-upon ECMs for the project, provides the detailed provisions of the ESCO's Energy Savings Guarantee that the fully installed and commissioned ECMs will achieve a particular energy savings level for the building or structure, and prepares an overall report or plan summarizing the ESCO's services during this secondary phase of the Work and otherwise explaining how the agreed-upon ECMs

will be implemented during the design and construction phase of the Work; The term "Project Development Plan" can also refer to the report or plan provided by the ESCO at the conclusion of this phase of the Work.

(10) **Qualified Energy Service Company (or "ESCO")** means, as used in ESPC Procurement, a company, firm or other legal Person with the following characteristics: demonstrated technical, operational, financial and managerial capabilities to design, install, construct, commission, manage, measure and verify, and otherwise implement Energy Conservation Measures and other Work on building systems or building components that are directly related to the ECMs in existing buildings and structures; a prior record of successfully performing ESPCs on projects involving existing buildings and structures that are comparable to the project under consideration by the District; and the financial strength to effectively guarantee energy savings and performance under the ESPC for the project in question, or the ability to secure necessary financial measures to effectively guarantee energy savings under an ESPC for that project.

(11) **Technical Energy Audit** means, as used in ESPC Procurement, the initial phase of services to be performed by an ESCO that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the District of the ESCO's Findings during this initial phase of the Work; the term "Technical Energy Audit" can also refer to the report provided by the ESCO at the conclusion of this phase of the Work.

Stat. Auth.: ORS 279A.065

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

49-0620

Use of Alternative Contracting Methods

(1) **Competitive Bidding Exemptions.** ORS Chapter 279C requires a competitive Bidding process for Public Improvement Contracts unless a statutory exception applies, a class of Contracts has been exempted or an individual Contract has been exempted in accordance with ORS 279C.335 and any applicable District rules. Use of Alternative Contracting Methods may be directed by the District's LCRB as an exception to the prescribed Public Contracting practices in Oregon, and their use must be justified in accordance with the Code and these Rules 49-0600 to 49-0690. See Rule 49-0630 regarding required Findings and restrictions on class exemptions.

(2) **Energy Savings Performance Contracts.** Unlike other Alternative Contracting Methods covered by Rules 49-0600 to 49-0690, ESPCs may be exempted from the competitive Bidding process for Public Improvement Contracts pursuant to ORS 279C.335, if the District complies with the procedures set forth in Rules 49-0600 to 49-0690 related to the Solicitation, negotiation and contracting for ESPC services.

(3) **Post-Project Evaluation.** ORS 279C.355 requires that the District prepare a formal post-project evaluation of Public Improvement projects in excess of \$150,000 for which the competitive Bidding process was not used. The purpose of this evaluation is to determine whether it was actually in the District's best interest to use an Alternative Contracting Method. The evaluation must be delivered to the LCRB within 30 Days of the date the District "accepts" the Public Improvement project, which event is typically defined in the Contract. In the absence of such definition, acceptance of the Project occurs on the later of the date of final payment or the date of final completion of the Work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:

- (a) Financial information, consisting of cost estimates, any Guaranteed Maximum Price, changes and actual costs;
- (b) A narrative description of successes and failures during design, engineering and construction; and
- (c) An objective assessment of the use of the Alternative Contracting Method as compared to the exemption Findings.

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

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

49-0630

Findings, Notice and Hearing

(1) **Cost Savings Factors.** When Findings are required under ORS 279C.335 to exempt a Contract or class of Contracts from competitive Bidding requirements, the "substantial cost savings" criterion at ORS 279C.335(2)(b) allows consideration of the type, cost, amount of the Contract, number of Entities available to Bid, and "such other factors as may be deemed appropriate".

(2) **Required Information.** Likewise, the statutory definition of "Findings" at ORS 279.330 means the justification for the District conclusion that includes, "but is not limited to," information regarding eight identified areas.

(3) **Addressing Cost Savings.** Accordingly, when the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the "substantial cost savings" requirement may be addressed by a combination of:

(a) Specified Findings that address the factors and other information specifically identified by statute, including an analysis or reasonable forecast of future cost savings as well as present cost savings; and

(b) Additional Findings that address industry practices, surveys, trends, past experiences, evaluations of completed projects required by ORS 279C.355 and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable, such Findings shall relate back to the specific characteristics of the project or projects at issue in the exemption request.

(4) **Favoritism and Competition.** The criteria at ORS 279C.335(2)(a) that it is "unlikely" that the exemption will "encourage favoritism" or "substantially diminish competition" may be addressed in contemplating the use of Alternative Contracting Methods by specifying the manner in which an RFP process will be utilized, that the Procurement will be formally advertised with public notice and disclosure of the planned Alternative Contracting Method, competition will be encouraged, Award made based upon identified selection criteria and an opportunity to protest that Award.

(5) **Class Exemptions.** In making the findings supporting a class exemption The District must clearly identify the class with respect to its defining characteristics. Those characteristics shall include some combination of Project descriptions or locations, time periods, contract values or method of procurement or other factors that distinguish the limited and related class of Projects from the District's overall construction program. Classes shall not be defined solely by funding sources, such as a particular bond fund, or by method of procurement, but must be defined by characteristics that reasonably relate to the exemption criteria set forth in ORS 279C.335(2).

(6) **Public Hearing.** Before final adoption of Findings exempting a Public Improvement Contract from the requirement of competitive bidding, the District must give notice and hold a public hearing as required by ORS 279C.335(4). The hearing shall be for the purpose of receiving public comment on the District's draft Findings.

Stat. Auth.: ORS 279A.065

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

49-0640

Competitive Proposals; Procedure

The District may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS 279C.400 to 279C.410 and Rules 49-0600 to 49-690, unless other applicable statutes control the District's use of competitive Proposals for Public Improvement Contracts. Also see the subdivision of rules in this division entitled Formal Procurement Rules, 49-0200 to 49-0480, and RFP related rules under the Alternative Contracting Methods subdivision at 49-0640 to 49-0660. For ESPCs, the following RFP process shall be utilized if the District desires the Procurement process to be exempt from the competitive Bidding requirements of ORS 279C.335. The RFP process for the Alternative Contracting Methods identified in Rules 49-0600 to 49-0690 includes the following steps:

(1) **Proposal Evaluation.** Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. For ESPC Proposal evaluations, the District may provide in the RFP that qualifications-based evaluation factors will outweigh the District's consideration of price-related factors, due to the fact that prices for the major components of the Work to be performed during the ESPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation. Proposal evaluation shall be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall:

- (a) Be reasonable estimates based on information available to the District;
- (b) Treat all Proposals equitably; and
- (c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the District. See ORS 279C.305.

(2) **Evaluation Factors.**

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

(b) In CM/GC contracting, in addition to (a) above, those factors may also include the ability to respond to the technical complexity or unique character of the project, analyze and propose solutions or approaches to complex project problems, coordination of multiple disciplines, the time required to commence and complete the improvement, and related matters that affect cost or quality.

(c) In Design-Build contracting, in addition to (a) and (b) above, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience and related matters that affect cost or quality.

(d) In ESPC contracting, in addition to the factors set forth in subsections (a), (b) and (c) above, those factors may also include sample Technical Energy Audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP, financial statements and related information of joint venturers comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting energy guarantee Contract levels, the specific Person that will provide the Energy Savings Guarantee to be offered by the ESCO, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the Work under the ESPC, the ESCO's team members and consultants to be assigned to the project, the ESCO's experience in the Energy Savings Performance Contracting field, the ESCO's experience acting as the prime contractor on previous ESPC projects (as opposed to a sub-contractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular project between the District and the ESCO, the ESCO's equipment performance guarantee policies and procedures, the ESCO's energy savings and cost savings guarantee policies and procedures, the ESCO's project cost guarantee policies and procedures, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the Work and the ESCO's fee structure for all phases of the ESPC.

(3) **Contract Negotiations.** Contract terms may be negotiated to the extent allowed by the RFP and Rules 49-0600 to 49-0690, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See Rule 49-0650. Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that affect cost or quality. In ESPC contracting, terms that may be negotiated also include the scope of preliminary design of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the scope of services to be performed by the ESCO during the Project Development Plan phase of the Work, the detailed provisions of the Energy Savings Guarantee to be provided by the ESCO and scope of Work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the Work, consistent with the requirements of Rule 49-0680 below.

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

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

49-0650

Requests for Proposals (RFP)

(1) **Generally.** The use of competitive proposals must be specially authorized for a Public Improvement Contract under the competitive bidding requirement of ORS 279C.335 (1), Rules

49-0130 and 49-0600 to 49-0690. Also see ORS 279C.400 to 279C.410 for statutory requirements regarding competitive Proposals, and Rule 49-0640 regarding competitive Proposal procedures.

(2) **Solicitation Documents.** In addition to the Solicitation Document requirements of Rule 49-0200, this rule applies to the requirements for Requests for Proposals. RFP Solicitation Documents shall conform to the following standards:

(a) The District must set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references and warranty provisions. See Rule 49-0640. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates based on information available to the District;

(b) When the District is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, the District must identify the specific terms and conditions in or provisions of the Solicitation Document that are subject to negotiation or discussion and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions the District has identified as authorized for negotiation. The District must describe the evaluation and discussion or negotiation process, including how the Competitive Range will be established.

(c) When the District intends to Award Contracts to more than one Proposer, the District must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. The District must also include the criteria it will use to determine how the District will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular Contractor to provide goods or services from those Contractors Awarded Contracts.

(3) **Evaluation of Proposals.**

(a) Evaluation. The District must evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. The District must evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.

(A) Clarifications. In evaluating Proposals, the District may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer must submit Written and Signed clarifications and such clarifications shall become part of the Proposer's Proposal.

(B) Limited Negotiation. If the District did not permit negotiation in its Request for Proposals, the District may, nonetheless, negotiate with the highest-ranked Proposer, but may then only negotiate the:

(i) Statement of Work; and

(ii) Contract Price as it is affected by negotiating the statement of Work.

(iii) The process for discussions or negotiations that is outlined and explained in subsections (5)(b) and (6) of this rule does not apply to this limited negotiation.

(b) Discussions; Negotiations. If the District permitted discussions or negotiations in the Request for Proposals, the District must evaluate Proposals and establish the Competitive Range, and may then conduct discussions and negotiations in accordance with this rule.

(A) If the Solicitation Document provided that discussions or negotiations may occur at the District's discretion, the District may forego discussions and negotiations and evaluate all Proposals in accordance with this rule.

(B) If the District proceeds with discussions or negotiations, the District must establish a negotiation team tailored for the acquisition. The District's team may include legal, technical and negotiating personnel.

(c) Cancellation. Nothing in this rule shall restrict or prohibit the District from canceling the Solicitation at any time.

(4) Competitive Range; Protest; Award.

(a) Determining Competitive Range.

(A) If the District does not cancel the Solicitation, after the Opening the District will evaluate all Proposals in accordance with the evaluation criteria set forth in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria set forth in the Request for Proposals, the District will determine and rank the Proposers in the Competitive Range.

(B) The District may increase the number of Proposers in the Competitive Range if the District's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the best Proposer after the District's evaluation of revised Proposals submitted in accordance with the process described in this rule.

(b) Protesting Competitive Range. The District must provide Written notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest the District's evaluation and determination of the Competitive Range in accordance with Rule 49-0450.

(c) Intent to Award; Discuss or Negotiate. After the protest period provided in accordance with these rules expires, or after the District has provided a final response to any protest, whichever date is later, the District may either:

(A) Provide Written notice to all Proposers in the Competitive Range of its intent to Award the Contract to the highest-ranked Proposer in the Competitive Range.

(i) An unsuccessful Proposer may protest the District's intent to Award in accordance with Rule 49-0450.

(ii) After the protest period provided in accordance with Rule 49-0450 expires, or after the District has provided a final response to any protest, whichever date is later, the District must commence final Contract negotiations with the highest-ranked Proposer in the Competitive Range; or

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

(5) Discussions; Revised Proposals. If the District chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, the District must proceed as follows:

(a) Initiating Discussions. The District must initiate oral or Written discussions with all of the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP identified as the subject of discussions. The District may conduct discussions for the following purposes:

(A) Informing Proposers of deficiencies in their initial Proposals;

(B) Notifying Proposers of parts of their Proposals for which the District would like additional information; and

(C) Otherwise allowing Proposers to develop revised Proposals that will allow the District to obtain the best Proposal based on the requirements and evaluation criteria set forth in the Request for Proposals.

(b) Conducting Discussions. The District may conduct discussions with each Proposer in the Competitive Range necessary to fulfill the purposes of this section, but need not conduct the same amount of discussions with each Proposer. The District may terminate discussions with any Proposer in the Competitive Range at any time. However, the District must offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with the District before the District notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.

(A) In conducting discussions, the District:

(i) Shall treat all Proposers fairly and shall not favor any Proposer over another;

(ii) Shall not discuss other Proposers' Proposals;

(iii) Shall not suggest specific revisions that a Proposer should make to its Proposal, and shall not otherwise direct the Proposer to make any specific revisions to its Proposal.

(B) At any time during the time allowed for discussions, the District may:

(i) Continue discussions with a particular Proposer;

(ii) Terminate discussions with a particular Proposer and continue discussions with other Proposers in the Competitive Range; or

(iii) Conclude discussions with all remaining Proposers in the Competitive Range and provide notice to the Proposers in the Competitive Range to submit revised Proposals.

(c) Revised Proposals. If the District does not cancel the Solicitation at the conclusion of the District's discussions with all remaining Proposers in the Competitive Range, the District must give all remaining Proposers in the Competitive Range notice of the date and time by which they must submit revised Proposals. This notice constitutes the District's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in the District's notice.

(A) Upon receipt of the revised Proposals, the District must score the revised Proposals based upon the evaluation criteria set forth in the Request for Proposals, and rank the revised Proposals based on the District's scoring.

(B) The District may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the Request for Proposals.

(d) Intent to Award; Protest. The District must provide Written notice to all Proposers in the Competitive Range of the District's intent to Award the Contract. An unsuccessful Proposer may protest the District's intent to Award in accordance with Rule 49-0450. After the protest period provided in accordance with that rule expires, or after the District has provided a final response to any protest, whichever date is later, the District must commence final Contract negotiations.

(6) **Negotiations**.

(a) Initiating Negotiations. The District may determine to commence negotiations with the highest-ranked Proposer in the Competitive Range following the:

(A) Initial determination of the Competitive Range; or

(B) Conclusion of discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.

(b) Conducting Negotiations.

(A) Scope. The District may negotiate:

(i) The statement of Work;

- (ii) The Contract Price as it is affected by negotiating the statement of Work; and
- (iii) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the Request for Proposals. Accordingly, Proposers shall not submit, and The District will not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the Request for Proposals.
- (c) Terminating Negotiations. At any time during discussions or negotiations that the District conducts in accordance with this rule, the District may terminate discussions or negotiations with the highest-ranked Proposer, or the Proposer with whom it is currently discussing or negotiating, if the District reasonably believes that:
 - (A) The Proposer is not discussing or negotiating in good faith; or
 - (B) Further discussions or negotiations with the Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.
- (d) Continuing Negotiations. If the District terminates discussions or negotiations with a Proposer, the District may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this rule until the District has either:
 - (A) Determined to Award the Contract to the Proposer with whom it is currently discussing or negotiating; or
 - (B) Completed one round of discussions or negotiations with all Proposers in the Competitive Range, unless the District provided for more than one round of discussions or negotiations in the Request for Proposals.

Stat. Auth.: ORS 279A.065

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

49-0660

RFP Pricing Mechanisms

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.335

49-0670

Design-Build Contracts

(1) **General.** The Design-Build form of contracting, as defined in Rule 49-0610(3), has technical complexities that are not readily apparent. The District should use this contracting method only with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to use the Design-Build process, **the District** must be able to reasonably anticipate the following types of benefits:

(a) Obtaining, through a Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;

(b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;

(c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims;

(d) Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance Work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased projects); or

(e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.

(2) **Authority.** The District must utilize the Design-Build form of contracting only in accordance with the requirements of these Rules 49-0600 to 49-0690. See particularly Rule 49-0620 on "Use of Alternative Contracting Methods" and Rule 49-0680 pertaining to ESPCs.

(3) **Selection.** Design-Build selection criteria may include those factors set forth above in Rule 49-0640(2)(a), (b) and (c).

(4) **Licensing.** If a Design-Build Contractor is not an Oregon licensed design professional, the District must require that the Design-Build Contractor disclose in its Written Offer that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and ORS 672.060(11) regarding the offer of engineering services that are appurtenant to construction services.

(5) **Performance Security.** ORS 279C.380(1)(a) provides that for Design-Build Contracts the surety's obligation on performance bonds, or the Bidder's obligation on cashier's or certified checks accepted in lieu thereof, includes the preparation and completion of design and related professional services specified in the Contract. This additional obligation, beyond performance of construction services, extends only to the provision of professional services and related design revisions, corrective Work and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage.

(6) **Contract Requirements.** The District must conform their Design-Build contracting practices to the following requirements:

(a) **Design Services.** The level or type of design services required must be clearly defined within the Procurement documents and Contract, along with a description of the level or type of design services previously performed for the project. The services to be performed shall be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.

(b) **Professional Liability.** The Contract shall clearly identify the liability of design professionals with respect to the Design-Build Contractor and the District, as well as requirements for professional liability insurance.

(c) **Risk Allocation.** The Contract shall clearly identify the extent to which the District requires an express indemnification from the Design-Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.

(d) **Warranties.** The Contract shall clearly identify any express warranties made to the District regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.

(e) **Incentives.** The Contract shall clearly identify any economic incentives and disincentives, the specific criteria that apply and their relationship to other financial elements of the Contract.

(f) **Honoraria.** If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the Solicitation process on the basis that the District is benefited from such deliverables.

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

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

49-0680

Energy Savings Performance Contracts (ESPC)

(1) **Generally.** These Rules 49-0600 to 49-0690 include a limited, efficient, method for the District to enter into ESPCs outside the competitive Bidding requirements of ORS 279C.335 for existing buildings or structures, but not for new construction. If the District chooses not to utilize the ESPC Procurement method provided for by these Rules 49-0600 to 49-0690 rules, the District may still enter into an ESPC by complying with the competitive Bidding exemption process set forth in ORS 279C.335, or by otherwise complying with the Procurement requirements applicable to any District not subject to all the requirements of ORS 279C.335.

(2) **ESPC Contracting Method.** The ESPC form of contracting, as defined in Rule 49-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the District, as well as the additional technical complexities associated with a Design-Build Contract. The District must only utilize the ESPC contracting method with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the ESPC contracting process, the District must be able to reasonably anticipate one or more of the following types of benefits:

(a) Obtaining, through an ESCO, the following types of integrated services: facility profiling, energy baseline studies, ECMs, Technical Energy Audits, project development planning, engineering design, plan preparation, cost estimating, life cycle costing, construction

administration, project management, construction, quality control, operations and maintenance staff training, commissioning services, M & V services and required documentation as a fully integrated function with a single point of responsibility;

(b) Obtaining, through an ESCO, an Energy Savings Guarantee;

(c) Integrating the Technical Energy Audit phase and the Project Development Plan phase into the design and construction phase of Work on the project;

(d) Reducing the risk of design flaws, misunderstandings and conflicts inherent in the construction process, through the integration of ESPC services;

(e) Obtaining innovative design solutions through the collaboration of the members of the ESCO integrated ESPC services team;

(f) Integrating cost-effective ECMs into an existing building or structure, so that the ECMs pay for themselves through savings realized over the useful life of the ECMs;

(g) Preliminary design, development, implementation and an Energy Savings Guarantee of ECMs into an existing building or structure through an ESPC, as a distinct part of a major remodel of that building or structure that is being performed under a separate remodeling Contract; and

(h) Satisfying local energy efficiency design criteria or requirements.

(3) **Authority.** The District desiring to pursue an exemption from the competitive Bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086), shall utilize the ESPC form of contracting only in accordance with the requirements of these Rules 49-0600 to 49-0690.

(4) **No Findings Required.** The District is only required to comply with the ESPC contracting procedures set forth in these Rules 49-0600 to 49-0690 in order for the ESPC to be exempt from the competitive Bidding processes of ORS 279C.335. No Findings are required for an ESPC to be exempt from the competitive Bidding process for Public Improvement Contracts pursuant to ORS 279C.335, unless the District is subject to the requirements of ORS 279C.335 and chooses not to comply with the ESPC contracting procedures set forth in these Rules 49-0600 to 49-0690.

(5) **Selection.** ESPC selection criteria may include those factors set forth above in Rule 49-0640(2)(a), (b), (c) and (d). Since the Energy Savings Guarantee is such a fundamental component in the ESPC contracting process, Proposers must disclose in their Proposals the identity of any Person providing (directly or indirectly) any Energy Savings Guarantee that may be offered by the successful ESCO during the course of the performance of the ESPC, along with any financial statements and related information pertaining to any such Person.

(6) **Licensing.** If the ESCO is not an Oregon licensed design professional, the District must require that the ESCO disclose in the ESPC that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and ORS 672.060(11) regarding the offer of engineering services that are appurtenant to construction services.

(7) **Performance Security.** At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the ESCO must provide a performance bond and a payment bond, each for 100% of the full Contract Price, including the construction and design and related professional services specified in the ESPC Design-Build Contract, pursuant to ORS 279C.380(1)(a). For ESPC Design-Build Contracts, these "design and related professional services" include conventional design services, commissioning services, training services for the District's operations and maintenance staff, and any similar professional services provided by the ESCO under the ESPC Design-Build Contract prior to final completion of construction. M & V services, and any services associated with the ESCO's Energy Savings

Guarantee are not included in these ORS 279C.380(1)(a) "design and related professional services." Nevertheless, the District may require that the ESCO provide performance security for M & V services and any services associated with the ESCO's Energy Savings Guarantee, if the District so provides in the RFP.

(8) **Contracting Requirements.** The District must conform their ESPC contracting practices to the following requirements:

(a) General ESPC Contracting Practices. An ESPC involves a multi-phase project, which includes the following contractual elements:

(A) A contractual structure which includes general Contract terms describing the relationship of the parties, the various phases of the Work, the contractual terms governing the Technical Energy Audit for the project, the contractual terms governing the Project Development Plan for the project, the contractual terms governing the final design and construction of the project, the contractual terms governing the performance of the M & V services for the project, and the detailed provisions of the ESCO's Energy Savings Guarantee for the project.

(B) The various phases of the ESCO's Work will include the following:

(i) The Technical Energy Audit phase of the Work;

(ii) The Project Development Plan phase of the Work;

(iii) A third phase of the Work that constitutes a Design-Build Contract, during which the ESCO completes any plans and Specifications required to implement the ECMs that have been agreed to by the parties to the ESPC, and the ESCO performs all construction, commissioning, construction administration and related services to actually construct the project; and

(iv) A final phase of the Work, whereby the ESCO, independently or in cooperation with an independent consultant hired by the District, performs M & V services to ensure that the Energy Savings Guarantee identified by the ESCO in the earlier phases of the Work and agreed to by the parties has actually been achieved.

(b) Design-Build Contracting Requirements in ESPCs. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the District must conform its Design-Build contracting practices to the Design-Build contracting requirements set forth in OAR 137-040-0560(7) above.

(c) Pricing Alternatives. The District may utilize one of the following pricing alternatives in an ESPC:

(A) A fixed price for each phase of the services to be provided by the ESCO;

(B) A cost reimbursement pricing mechanism, with a maximum not-to-exceed price or a GMP;
or

(C) A combination of a fixed fee for certain components of the services to be performed, a cost reimbursement pricing mechanism for the construction services to be performed with a GMP, a single or annual fixed fee for M & V services to be performed for an identified time period after final completion of the construction Work, and a single or annual Energy Savings Guarantee fixed fee payable for an identified time period after final completion of the construction Work that is conditioned on certain energy savings being achieved at the facility by the ECMs that have been implemented by the ESCO during the project (in the event an annual M & V services fee and annual Energy Savings Guarantee fee is utilized by the parties, the parties may provide in the Design-Build Contract that, at the sole option of the District, the ESCO's M & V services may be terminated prior to the completion of the M & V/Energy Savings Guarantee period and the District's future obligation to pay the M & V services fee and Energy Savings Guarantee fee will likewise be terminated, under terms agreed to by the parties).

(d) Permitted ESPC Scope of Work. The scope of Work under the ESPC is restricted to implementation and installation of ECMs, as well as other Work on building systems or building components that are directly related to the ECMs, and that, as an integrated unit, will pay for themselves over the useful life of the ECMs installed. The permitted scope of Work for ESPCs resulting from a Solicitation under these 49-0600 to 49-0690 rules does not include maintenance services for the project facility.

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

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

49-0690

Construction Manager/General Contractor (CM/GC)

(1) **Generally**. The CM/GC form of contracting, as defined in Rule 49-0610(2), is a technically complex project delivery system. The District should use this contracting method only with the assistance of knowledgeable staff or consultants who have a demonstrated capability of managing the CM/GC process in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, Public Contracting and project management. Unlike the Design-Build form of contracting, the CM/GC form of contracting does not contemplate a "single point of responsibility" under which the Contractor is responsible for successful completion of all Work related to a performance Specification. The CM/GC has defined contract obligations, including responsibilities as part of the project team along with the District and design professional, although in CM/GC there is a separate contract between the District and design professional. In order to utilize the CM/GC method, the District must be able to reasonably anticipate the following types of benefits:

(a) Time Savings. The Public Improvement has significant schedule ramifications, such that concurrent design and construction are necessary in order to meet critical deadlines and shorten the overall duration of construction. The District may consider operational and financial data that show significant savings or increased opportunities for generating revenue as a result of early completion, as well as less disruption to public facilities as a result of shortened construction periods;

(b) Cost Savings. Early Contractor input during the design process is expected to contribute to significant cost savings. The District may consider value engineering, building systems analysis, life cycle costing analysis and construction planning that lead to cost savings. The District must specify any special factors influencing this analysis, including high rates of inflation, market uncertainty due to material and labor fluctuations or scarcities, and the need for specialized construction expertise due to technical challenges; or

(c) Technical Complexity. The Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between the District, design professionals and Contractor, in which the Contractor will assist in addressing specific project challenges through pre-construction services. The District may consider the need for Contractor input on issues such as operations of the facility during construction, tenant occupancy, public safety, delivery of an early budget or GMP, financing, historic preservation, difficult remodeling projects and projects requiring complex phasing or highly coordinated scheduling.

(2) **Authority**. The District must use the CM/GC form of contracting only in accordance with the requirements of these rules. See particularly Rule 49-0620 on "Use of Alternative Contracting Methods".

(3) **Selection.** CM/GC selection criteria may include those factors set forth above in Rule 49-0640(2)(b).

(4) **Basis for Payment.** The CM/GC process adds specified Construction Manager services to traditional General Contractor services, requiring full Contract performance within a negotiated Guaranteed Maximum Price (GMP). The basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for Work and services rendered, which together shall not exceed the GMP. See GMP definition in Rule 49-0610(7) and Pricing Mechanisms in Rule 49-0660.

(5) **Contract Requirements.** The District must conform their CM/GC contracting practices to the following requirements:

(a) Setting the GMP. The GMP shall be set at an identified time consistent with industry practice, after supporting information reasonably considered necessary to its use has been developed, and the supporting information shall define with particularity both what is included and excluded from the GMP. A set of drawings and Specifications shall be produced establishing the GMP scope.

(b) Adjustments to the GMP. The Contract shall clearly identify the standards or factors under which changes or additional Work will be considered outside of the Work scope that warrants an increase in the GMP, as well as criteria for decreasing the GMP. The GMP shall not be increased without a concomitant increase to the scope defined at the establishment of the GMP or most recent GMP amendment.

(c) Cost Savings. The Contract shall clearly identify the disposition of any cost savings resulting from completion of the Work below the GMP; that is, under what circumstances, if any, the CM/GC might share in those cost savings, or whether they accrue only to the District's benefit. (Note that unless there is a clearly articulated reason for sharing such cost savings, they should accrue to the District.)

(d) Cost Reimbursement. The Contract shall clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, including any category of "General Conditions" (a general grouping of direct costs that are not separately invoiced, subcontracted or included within either overhead or fee), and may also incorporate a mutually-agreeable cost-reimbursement standard.

(e) Audit. Cost reimbursements shall be made subject to final audit adjustment, and the Contract shall establish an audit process to ensure that Contract costs are allowable, properly allocated and reasonable.

(f) Fee. Compensation for the CM/GC's services shall be paid on the basis of a fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee should be expressly defined wherever possible. The fee, first expressed as a proposed percentage of all reimbursable costs, shall be identified during and become an element of the selection process. It shall subsequently be expressed as a fixed amount when the GMP is established.

(g) Incentives. The Contract shall clearly identify any economic incentives, the specific criteria that apply and their relationship to other financial elements of the Contract (including the GMP).

(h) Controlled Insurance Programs. For projects anticipated to exceed \$75 Million, the Contract shall clearly identify whether an Owner Controlled or Contractor Controlled Insurance Program is anticipated or allowable. If so, the Contract shall clearly identify (1) anticipated cost savings from reduced premiums, claims reductions and other factors, (2) the allocation of cost savings, and (3) safety responsibilities and/or incentives.

(i) Early Work. The RFP shall clearly identify, whenever feasible, the circumstances under which any of the following activities may be authorized and undertaken for compensation prior to establishing the GMP:

(A) Early Procurement of materials and supplies;

(B) Early release of Bid packages for such things as site development; and

(C) Other advance Work related to critical components of the Contract.

(j) Subcontractor Selection. The Contract shall clearly describe the methods by which the CM/GC shall publicly receive, open and record Bids or price quotations, and competitively select subcontractors to perform the Contract Work based upon price, as well as the mechanisms by which the District may waive those requirements. The documents shall also describe completely the methods by which the CM/GC and its affiliated or subsidiary entities may compete to perform the Work, including, at a minimum, advance notice to the public of the CM/GC's intent to compete and a public Opening of Bids or quotations by an independent party.

(k) Subcontractor Approvals and Protests. The Contract shall clearly establish whether the District must approve subcontract awards, and to what extent, if any, the District will resolve Procurement protests of subcontractors and suppliers. The related procedures and reporting mechanisms shall be established with certainty, including whether the CM/GC acts as the District's representative in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the District must retain the right to monitor the subcontracting process in order to protect the District's interests.

(l) CM/GC Self-Performance. Whenever feasible, the Contract shall establish the elements of Work the CM/GC may self-perform without competition, including, for example, the Work of the job-site general conditions. In the alternative, the Contract shall include a process for the District approval of CM/GC self-performance.

(m) Socio-Economic Programs. The Contract shall clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and the District.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 297C.335 & ORS 279C.380(2)

EXEMPTIONS FROM COMPETITIVE BIDDING

49-0700

Exemptions; by Rule

(a) **Purpose.** These rules establish exemptions from the requirements of competitive bidding pursuant to ORS 279C.335 and Rules 49-0600 through 49-0690 and relate only to public improvement contracts.

(b) **Generally.** The Superintendent, acting on behalf of the District, may request a resolution from the LCRB exempting a particular contract or class of contracts from competitive bidding if the contract(s) are not otherwise exempted under statute or Rules 49-0600 through 49-0690.

(c) **Requirements.**

(1) **Request Form.** Exemption requests must be in writing and include the following:

- (A) The nature of the project;
- (B) The estimated cost of the project;
- (C) Findings supporting the substantial cost savings anticipated by the exemption from competitive as required by ORS 279C.335(2)(b);
- (D) Findings supporting why it is unlikely that the exemption would encourage favoritism or diminish competition as required by ORS 279C.335(2)(a);
- (E) Detailed information regarding the following findings:
 - Operational, budget and financial data;
 - Public benefits;
 - Value engineering;
 - Specialized expertise required;
 - Public safety;
 - Market conditions;
 - Technical complexity; and
 - Funding sources.
- (F) Proposed alternative contracting and purchasing practices to be employed; and
- (G) The estimated date by which it would be necessary to let the contract.

(2) **Hearing.** Any exemption request involving a contract(s) for a public improvement requires that the District hold a public hearing prior to the adoption of the findings listed in section (1) above.

(A) **Public Notice.** The public notice must be published at least once in a trade newspaper of general statewide circulation a minimum of 14 days before the hearing. The notice must state that the public hearing is being held for the purpose of taking comments on the District's draft findings for an exemption from competitive bidding requirements. In addition, the District may describe the process by which the findings are finally adopted and may indicate the opportunity for any further public input. At the time of the public notice, copies of the draft findings must be made available to the public.

(B) At the public hearing, the LCRB will offer an opportunity for any interested party to appear and present comment regarding the draft findings.

(C) If the District is required to act promptly due to circumstances beyond their control that do not constitute an emergency, notification of the public hearing may be published simultaneously with the District's solicitation of contractors for the alternative public contracting method, as long as responses to the solicitation are due at least five days after the meeting and approval of the findings.

(3) **Post-Project Evaluation.** Upon completion of any public improvement contract in excess of \$150,000 for which the District did not use a competitive bidding process, the District will prepare a post-project evaluation in accordance with Rule 49-0620.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.330, ORS 297C.335 & ORS 279C.345

49-0710

(1) Use of Existing Contractors. When a public improvement is in need of minor alteration, repair or maintenance at or near the site of work being performed by another District contractor, the District may hire that contractor to perform the work, provided:

(A) The contractor was hired through a selection process permitted by the District's public contracting rules;

(B) The Superintendent first obtains a price quotation for the additional work from the contractor that is competitive and reasonable;

(C) The total cost of the proposed work and the original work will not exceed the Bureau of Labor and Industries' threshold of \$25,000; and

(D) The original contract is amended to reflect the new work and is approved by the Superintendent before work begins.

(2) **Brand Names or Products, "or Equal," Single Seller and Sole Source.** The District may enter into a public contract for the procurement of Brand Name "or Equal" Products subject to the requirements of this rule.

(A) **Specifications.** Solicitation specifications for public contracts must not expressly or implicitly require any product of any particular manufacturer or seller except as expressly authorized in Subsections (i) and (ii) of this Rule.

(i) **"Or Equal" Specification.** The District may specify a particular brand name, make or product suffixed by "or equal", "or approved equal", "or equivalent", "or approved equivalent", or similar language if there is no other practical method of specification.

(ii) **Specifying a Particular Make or Product.** The District may specify a brand name, make, or product without an "or equal" or equivalent suffix if there is no other practical method of specification, after documenting the procurement file with the following information:

(I) A brief description of the solicitation(s) to be covered including volume of contemplated future purchases;

(II) The brand name, mark, or product to be specified; and

(III) The reasons for seeking this procurement method, which must include at least one of the following findings in the procurement file:

(aa) It is unlikely that Specification of the brand name, mark or product will encourage favoritism in the award of the public contracts or substantially diminish competition; or

(bb) Specification of the brand name, mark or product would result in substantial cost savings to the District; or

(cc) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies.

(B) **Public Notice.** The District will make reasonable effort to notify all known suppliers of the specified product and invite such suppliers to submit competitive bids or proposals; or document the procurement file with findings of current market research to support the determination that the product is available from only one seller. This Requirement is satisfied by electronically posting a notice as provided in OAR 137-047-0330 for a reasonable period of time or by documenting direct contact with such suppliers in the Procurement file.

(C) **Purchasing From Sole Source, Single Seller.** The District may purchase a particular product or service available from only one source if the District meets the Requirements of Subsection (A) and (B) of this rule and a Sole-Source Procurement pursuant to ORS 279B.275. Prior to purchase, the District must document its findings of current market research to support the determination that the product or service is available from only one seller or source and place this information in the procurement file. The District's findings must also include:

(i) A brief description of the contract or contracts to be covered including volume of contemplated future purchases;

(ii) Description of the product or service to be purchased; and

(iii) The reasons the District is seeking this procurement method, which must include at least the following:

(I) Efficient utilization of existing Goods or Services requires the acquisition of compatible Goods or Services; or

(II) The required product is data processing equipment which will be used for research where there are requirements for exchange of software and data with other research establishments; or

(III) The particular product is for use in a pilot or an experimental project.

(D) **Single Manufacturer, Multiple Sellers.** The District may specify a product or service available from only one manufacturer, but available through multiple sellers, if the Requirements of Subsection (A) and (B) and the following are met:

(i) If the total purchase is \$75,000 or more but does not exceed \$150,000 competitive quotes must be obtained and retained in the Procurement File pursuant to the rules governing Intermediate Procurements;

(ii) If the purchase exceeds \$150,000, the acquisition shall be made through competitive procurement unless a contract-specific special procurement is authorized by the LCRB.

(E) **Single Manufacturer, Multiple Purchases.** If the District intends to make several purchases of the product of a particular manufacturer or seller for a period not to exceed five (5) years, the District must so state in the Solicitation file, the Solicitation Document, if any, and the public notice described in Subsection (B) of this Rule. Such documentation and public notice constitute sufficient notice as to subsequent purchases. If the total purchase amount is estimated to exceed \$150,000, this must be stated in the advertisement for Bids or Proposals.

(F) **Competitive Solicitations.** If the District competitively solicits, it must comply with the Rules for that method of Solicitation pursuant to ORS 279B.055 through 279B.075.

(3) Waiver of Bid Security Requirements.

Public Improvement Contracts Under \$100,000

(a) **Authorization.** The Local Contract Review Board hereby grants approval of this rule pursuant to ORS 279C.375 and 279C.390. The Superintendent, acting on behalf of the District, may, at his discretion, waive bid security requirements if the amount of the public improvement contract is less than \$100,000. Although bid security may be waived for contracts under \$150,000, the District may impose a bid or quote security requirement for projects under \$150,000 when deemed to be in the best interest of the District.

(b) **Findings of Fact/Conclusion of Compliance with the Law.** This rule allows the superintendent to waive bid security requirements for certain public improvement contracts pursuant to ORS 279C. Since this waiver is provided for in statute, findings are not required.

(4) Waiver of Performance Bond and Payment Security Requirements.

Public Improvement Contracts Under \$25,000

(a) **Authorization.** The Local Contract Review Board hereby grants approval of this rule pursuant to ORS 279C.375 and 279C.390. The Superintendent, acting on behalf of the District, may, at his discretion, waive performance and/or payment security requirements if the amount of the public improvement contract is less than \$25,000. Although bid security may be waived for contracts under \$25,000, the District may impose a performance and/or payment security requirement for projects under \$25,000 when deemed to be in the best interest of the District.

(b) **Findings of Fact/Conclusion of Compliance with the Law.** This rule allows the superintendent, acting on behalf of the District, to waive performance and/or payment security

requirements for certain public improvement contracts pursuant to ORS 279C. Since this waiver is provided for in statute, finds are not required.

CONTRACT PROVISIONS

49-0800

Required Contract Clauses

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

Stat. Auth.: ORS 279A.065

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

49-0810

Waiver of Delay Damages Against Public Policy

The District will not place any provision in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from the District's unreasonable delay in performing the Contract. However, Contract provisions requiring notice of delay, providing for alternative dispute resolution such as arbitration (where allowable) or mediation, providing other procedures for settling contract disputes, or providing for reasonable liquidated damages, are permissible.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.315

49-0820

Retainage

(1) **Withholding of Retainage.** Except to the extent the District's enabling laws require otherwise, the District will 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 District may, in its discretion, reduce or eliminate retainage on any remaining progress payments. The District must respond in Writing to all such applications within a reasonable time. When the Contract Work is 97-1/2 percent completed, the District 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 District may at any time reinstate retainage. Retainage shall be included in the final payment of the Contract Price.

(2) **Deposit in interest-bearing accounts.** Upon request of the Contractor, the District must deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the District. Earnings on such account shall accrue to the Contractor.

(3) **Alternatives to cash retainage.** In lieu of cash retainage to be held by the District, the Contractor may substitute one of the following:

(a) Deposit of securities:

(A) The Contractor may deposit bonds or securities with the District or in any bank or trust company to be held for the benefit of the District. In such event, the District must reduce the retainage by an amount equal to the value of the bonds and securities, and reimburse the excess to the Contractor.

(B) Bonds and securities deposited or acquired in lieu of retainage shall be of a character approved by the Oregon Department of Administrative Services, which may include, without limitation:

(i) Bills, certificates, notes or bonds of the United States.

(ii) Other obligations of the United States or its The District.

(iii) Obligations of any corporation wholly owned by the Federal Government.

(iv) Indebtedness of the Federal National Mortgage Association.

(C) Upon the District's determination that all requirements for the protection of the District's interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu of retainage.

(b) Deposit of surety bond. The District, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the District in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond 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.

(4) **Recovery of costs.** The District may recover from the Contractor all costs incurred in the proper handling of cash retainage and securities, by reduction of the final payment.

Stat. Auth.: ORS 279A.065

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

49-0830

Contractor Progress Payments

(1) **Request for progress payments.** Each month the Contractor shall submit to the District its Written request for a progress payment based upon an estimated percentage of Contract completion. At the District's discretion, this request may also include the value of material to be incorporated in the completed Work 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 District 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 District for any cause; and (iv) less the appropriate amount of retainage.

(2) **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.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.570

49-0840

Interest

(1) **Prompt payment policy.** The District must pay promptly all payments due and owing to the Contractor on Contracts for Public Improvements.

(2) **Interest on progress payments.** Late payment interest shall begin to accrue on payments due and owing on the earlier of 30 Days after receipt of invoice or 15 Days after the District 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.

(3) **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.

(4) **Settlement or judgment interest.** In the event of a dispute as to compensation due a Contractor for Work performed, upon settlement or judgment in favor of the Contractor, interest on the amount of the settlement or judgment 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 District in Writing or otherwise in accordance with the Contract requirements.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.570

49-0850

Final Inspection

(1) **Notification of Completion; inspection.** The Contractor shall notify the District in Writing when the Contractor considers the Contract Work completed. Within 15 Days of receiving Contractor's notice, the District will inspect the project and project records, and will either accept the Work or notify the Contractor of remaining Work to be performed.

(2) **Acknowledgment of acceptance.** When the District finds that all Work required under the Contract has been completed satisfactorily, the District must acknowledge acceptance of the Work in Writing.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.570(8)

49-0860

Public Works Contracts

(1) **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. Also see administrative rules of the Bureau of Labor and Industries (BOLI) at OAR Chapter 839.

(2) **Required Contract Conditions.** As detailed in the above statutes and rules, every Public Works Contract must contain the following provisions:

- (a) The District authority to pay certain unpaid claims and charge such amounts to Contractors, as set forth in ORS 279C.515(1).
 - (b) Maximum hours of labor and overtime, as set forth in ORS 279C.520(1).
 - (c) Employer notice to employees of hours and days that employees may be required to work, as set forth in ORS 279C.520(2).
 - (d) Contractor required payments for certain services related to sickness or injury, as set forth in ORS 279C.530.
 - (e) Requirement for payment of prevailing rate of wage, as set forth in ORS 279C.830(1).
 - (f) Requirement for payment of fee to BOLI, as set forth in ORS 279C.830(2) and administrative rule of the BOLI commissioner.
- (3) **Requirements for Specifications.** The Specifications for every Public Works Contract, consisting of the procurement package (such as the Project Manual, Bid or Proposal Booklets, Request for Quotes or similar procurement Specifications), must contain the following provisions:
- (a) The prevailing rate of wage, as required by ORS 279C.830(1), physically contained within or attached to hard copies of procurement Specifications, and by a downloadable direct link to the specific wage rates that apply to the project (either on the District web site or the BOLI web site) when procurement Specifications are also made available in electronic format.
 - (b) Reference to payment of fee to BOLI, as required by ORS 279C.830(2).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.800 to ORS 279C.870

49-0870

Specifications; Brand Name Products

- (1) **Generally.** The District's 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).
- (2) **Equivalents.** The District may identify products by brand names so long as the following language: "approved equal"; "or equal"; "approved equivalent" or "equivalent," or similar language is included in the Solicitation Document. The District must determine, in its sole discretion, whether an Offeror's alternate product is "equal" or "equivalent."

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.345

49-0880

Records Maintenance; Right to Audit Records

- (1) **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 District at reasonable times and places, whether or not litigation has been filed as to such claims.

(2) **Inspection and Audit.** The District may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the Records of any Person that has submitted cost or pricing data according to the terms of a Contract to the extent that the Records relate to such cost or pricing data. If 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.

(3) **Records Inspection; Contract Audit.** The District, 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.

Stat. Auth.: ORS 279A.065

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

49-0890

District Payment for Unpaid Labor or Supplies

(1) **Contract incomplete.** If the Contract is still in force, the District may, in accordance with ORS 279C.515(1), pay a valid claim to the Person furnishing the labor or services, and charge the amount against payments due or to become due to the Contractor under the Contract. If the District chooses to make such a payment as provided in ORS 279C.515(1), the Contractor and the Contractor's surety shall not be relieved from liability for unpaid claims.

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.515

49-0900

Contract Suspension; Termination Procedures

(1) **Suspension of Work.** In the event the District suspends performance of Work for any reason considered by the District to be in the public interest other than a labor dispute, the Contractor 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.

(2) **Termination of Contract by mutual agreement for reasons other than default.**

(a) Reasons for termination. The parties may agree to terminate the Contract or a divisible portion thereof if:

(A) The District suspends Work under the Contract for any reason considered to be in the public interest (other than a labor dispute, or any judicial proceeding relating to the Work filed to resolve a labor dispute); and

(B) Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the Work.

(b) **Payment.** When a Contract, or any divisible portion thereof, is terminated pursuant to this section (2), the District must pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. The District must also pay for all Work completed, based on the Contract Price. Unless the Work completed is subject to unit or itemized pricing under the Contract, payment shall be calculated based on percent of Contract completed. No claim for loss of anticipated profits will be allowed.

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

(4) **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.

(5) **Remedies cumulative.** The District may, at its discretion, avail itself of any or all rights or remedies set forth in these rules, in the Contract, or available at law or in equity.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.650, ORS 279C.326, ORS 279C.655, ORS 279C.660, ORS 279C.665 & ORS 279C.670

49-0910

Changes to the Work and Contract Amendments

(1) **Definitions for Rule.** As used in this rule:

(a) **“Amendment”** means a Written modification to the terms and conditions of a Public Improvement Contract, other than by Changes to the Work, within the general scope of the original Procurement that requires mutual agreement between the District and the Contractor.

(b) **“Changes to the Work”** means a mutually agreed upon change order, or a construction change directive or other Written order issued by the District or its authorized representatives to the Contractor requiring a change in the Work within the general scope of a Public Improvement Contract and issued under its changes provisions in administering the Contract and, if applicable, adjusting the Contract Price or contract time for the changed work.

(2) **Changes Provisions.** Changes to the Work are anticipated in construction and, accordingly, the District must include changes provisions in all Public Improvement Contracts that detail the scope of the changes clause, provide pricing mechanisms, authorize the District 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 District.

(3) **Change Order Authority.** The District may establish internal limitations and delegations for authorizing Changes to the Work, including dollar limitations. Dollar limitations on Changes to the Work are not set by these Rules, but such changes are limited by the above definition of that term.

(4) **Contract Amendments.** Contract Amendments within the general scope of the original Procurement are not considered to be new Procurements and an exemption from competitive bidding is not required in order to add components or phases of Work specified in or reasonably

implied from the Solicitation Document. Amendments to a Public Improvement Contract may be made only when:

- (a) They are within the general scope of the original Procurement;
- (b) The field of competition and Contractor selection would not likely have been affected by the Contract modification. Factors to be considered in making that determination include similarities in Work, project site, relative dollar values, differences in risk allocation and whether the original Procurement was accomplished through Competitive Bidding, Competitive Proposals, competitive quotes, sole source or Emergency contract;
- (c) In the case of a Contract obtained under an Alternative Contracting Method, any additional Work was specified or reasonably implied within the findings supporting the competitive bidding exemption; and
- (d) The Amendment is made consistent with applicable legal requirements.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279C.400(1)

DIVISION 50

SURPLUS PROPERTY

50-0100

Surplus Property Definitions

In addition to the definitions contained in ORS 279A.250 and Rule 46-0110, the following definitions apply to these Rules on Surplus Property:

- (1) "**Bid**" means a competitive Offer to purchase advertised Surplus Property at a price specified by the bidder.
- (2) "**Cash**" includes U.S. currency, cashier's checks, certified checks, traveler's checks, money orders made payable to the District, or approved credit cards.
- (3) "**Direct Labor**" includes all Work required for preparation, production, processing and packing of surplus property, but does not include supervision, administration, inspection and shipping.
- (4) "**Employee's Household**" means all persons residing with employee.
- (5) "**Employee's Immediate Family**" means the children, step-children, parents, step-parents, grandparents and spouse of employee, separately or in any combination thereof.
- (6) "**Invitation to Bid**" means a competitive Offer to bid on Surplus Property available for public sale and is also known as a bid advertisement.
- (7) "**Not-for-profit organization**" is defined in ORS 279A.250(2) and means a nonprofit corporation as defined in ORS 307.130.
- (8) "**Photographic Identification**" means a document that shows the bearer's current name, address, and photographic portrait.
- (9) "**Political Subdivision**" includes divisions or units of Oregon local government having separate autonomy such as Oregon counties, cities, municipalities or other public corporate entities having local governing authority.
- (10) "**Private Not-for-Profit Agencies**" means those Agencies meeting the criteria specified in the Oregon Administrative Rules.
- (11) "**Property**" is defined in ORS 279A.250(3) and means personal property.
- (12) "**State agency**" is defined in ORS 279A.250(4) and means every state officer, board, commission, department, institution, branch or agency of state government whose costs are paid wholly or in part from funds held in the State Treasury, and includes the Legislative Assembly and the courts, including the officers and committees of both, and the Secretary of State and the State Treasurer in the performance of the duties of their constitutional offices.

Stat. Auth.: ORS 283.060; ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.250

50-0110

Eligibility of State Agencies, Political Subdivisions and Non-Profit Organizations

Prior to offering Surplus Property for public sale, the District may make Surplus Property available to the following:

- (1) Public School Districts;
- (2) Private Schools;

- (3) State Agencies;
- (4) Political subdivisions of the State; and
- (3) Any non-profit organization qualified to acquire property as determined by the District.

Stat. Auth.: ORS 283.060; ORS 279A.065(5)(a); ORS 279A.070
Stats. Implemented: ORS 279A.260

50-0120

Surplus Property Acquisition

- (1) Recipients of Surplus Property must have funds available at the time property is acquired, and pay all costs and charges incidental to the acquisition within 30 calendar days from the date of invoice. Invoices outstanding in excess of 90 days may result in suspension of purchasing privileges until such invoices have been paid in full.
- (2) Surplus property may be made available to qualified organizations (those organizations referenced in Rule 50-0110) prior to public sale. Non-qualifying private entities and private citizens, separately or combined, must not be eligible to acquire surplus property except at public sales.
- (3) Surplus Property acquired by qualified organizations must be used in the conduct of their official public programs and not for resale or distribution unless otherwise pre-approved by the District.

Stat. Auth.: ORS 279A.065 (5)(a); ORS 279A.070
Stats. Implemented: ORS 279A.260 and ORS 279A.280

50-0130

Public Sales for Disposal of Surplus Personal Property

- (1) **Conduct.** The District must conduct public sales for the disposal of Surplus Property not sold or transferred pursuant to Rules 50-0110 and 0120. Methods of disposal may include, but are not limited to: internet auctions, oral auctions, sealed bid sales and fixed price retail sales, separately or in any combination thereof.
- (2) **Eligibility.** Members of the general public may participate as buyers at public sales. No employee whether full-time, part-time, temporary or an unpaid volunteer, of the District, member of the employee's household, the employee's immediate family, or any person acting on the employee's behalf may participate in public sales if the employee has had any role in declaring the item surplus, processing the item or related paperwork, or offering it for sale.
- (3) **Conduct of Public Sales, Auctions, and Internet Auctions.**
 - (a) The District may offer Surplus Property for public sale through an internet auction provider, oral auction, sealed bid sale, or fixed price retail sale. The public may inspect Property offered for sale at the time and place specified in the public Invitation to Bid;
 - (b) The District reserves the right to reject any and all bids regarded as not in the best interests of the public;
 - (c) All auction items must be sold to the highest bidder. All Property must be offered "As-Is, Where-Is" with no warranty or other guarantee as to its condition or fitness for any use or purpose. Terms and conditions of the sale will be made a part of the advertisement/posting. A purchaser or disappointed bidder will have no recourse against the District, or any of its respective officers, employees or agents. All sales will be final.

(4) Payment.

(a) Full payment must be made within ten (10) calendar days from the date of auctions close unless otherwise specified in the public notice of the sale.

(5) Claiming Items Purchased.

(a) Items not paid in full by the time specified in the sales terms and conditions will be canceled;

(b) **Unclaimed Property.** Property paid for but not claimed within the time specified in the sales terms and conditions shall be considered abandoned and ownership shall be retained by the District;

(c) **Title.** Title to Property sold will be transferred to the purchaser when full and final payment is made, unless otherwise specified by the District. For vehicles, receipt of payment of the sale price and delivery of key to the purchaser constitutes delivery and possession. Titles to vehicles must be transferred upon receipt of full payment. The District rejects any liability once a purchaser takes possession of a vehicle.

(6) **Failure to Comply.** The District may establish criteria to debar participants from internet auctions and other sales pursuant to this Rule. Such criteria shall be based on:

(a) Conviction of fraud;

(b) Unsatisfactory Internet auction service ratings;

(c) Failure to claim purchases; or

(d) Other documented activities determined by the District to warrant debarment.

Based upon these criteria, the District may debar participants from Internet auctions and participation in other sales.

(7) Conduct of Auctions and Sealed Bid Sales.

(a) The District must advertise the date, time and location of public auction or sealed bid sales. A public Invitation to Bid shall be available at the auction site or sales location one week before an auction or sealed bid sale. The public may inspect property offered for sale at the time and place specified in the public Invitation to Bid;

(b) The District reserves the right to reject any and all bids regarded as not in the best interests of the public;

(c) All items must be sold to the highest Bidder. All Property will be offered "As-Is, Where-Is" with no warranty or other guarantee as to its condition or fitness for use. A purchaser or disappointed Bidder will have no recourse against the District or any of its respective officers, employees or agents. All sales will be final.

(d) The District may require a bid security check (payable to the "District") equal to at least ten (10) percent of the bid to accompany all sealed bids. The Invitation to Bid shall define any bid security requirements. The bid security of unsuccessful bidders will be returned within 30 days following a Bid Opening. The successful Bidder's bid security will be applied as partial payment on property purchased.

(8) Payment.

(a) Full payment must be made on the day of the sale for all purchases unless the invitation to Bid states otherwise. In those instances where full payment is not required, a ten (10) percent down payment is required on the day of the sale. The time limit for making full payment, and the place where payment must be made will be specified in public Invitation to Bid;

(b) Payment by personal check may be accepted, at the absolute discretion of the District, when presented with two (2) pieces of acceptable identification, one of which must be a photo identification ("photo I.D."). Other acceptable identification may include major credit cards, a valid driver's license, or valid voter's registration card. The District reserves the right, in its

absolute discretion, to refuse any tender of payment by personal check and, further, the right to require that payment be made by cash, cashier's check or money order.

(9) Claiming Items Purchased.

(a) Items not paid in full by the time specified in the sales terms and conditions will be canceled and bid security forfeited, with ownership being retained by the District;

(b) Property paid for but not claimed within the time specified in the sales terms and conditions shall be considered abandoned and ownership shall be retained by the District unless prior written approval is obtained from the District;

(c) Title to Property sold must be transferred to the purchaser when full and final payment is made, unless otherwise specified by the District. For vehicles, receipt of payment of the sale price and delivery of key to the purchaser constitutes delivery and possession. Titles to vehicles may be transferred upon receipt of full payment. If payment is made by personal check, the title may be released to the vehicle purchaser in 21 calendar days, or when the check clears the bank. The District rejects any liability once a purchaser takes possession of a vehicle;

(10) Failure to Comply. In addition to Section (6) of this Rule, the Department may debar participants from surplus sales based upon the following criteria:

(a) Failure to observe the procedures set forth in the sales terms and conditions; or

(b) Payment for purchase or bid security with a personal check, which is dishonored by a payer's financial institution.

Stat. Auth.: <http://landru.leg.state.or.us/ors/181.html> ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.280

50-0140

Policies for Disposal of Surplus Property

- 1) **Authority to Conduct Sales.** The Superintendent is delegated the authority to conduct sales of personal property on behalf the District.
- 2) **Authority to Sell Real Property.** The District's Superintendent is delegated the authority to conduct sale of real property on behalf of the District.
- 3) **Authority to Possess District Property.** District property may not become the property of district employees except through public sale. Employees of the District are not permitted to obtain undue financial gain by virtue of their position in the District, and therefore, must not remove discarded items from the District's work sites for personal use.
- 4) **Authority to Discard Property.** Administrators/Supervisors in the District are permitted to discard District owned personal property if they have made the determination that the property has "no value". Property may be thrown away/discarded as having "no value" if the property:
 - a) is past its useful life, or;
 - b) has been damaged beyond repair, or;
 - c) has been determined to be uneconomically repairable, or;
 - d) is an unsafe condition posing a hazard to potential users, or;
 - e) is not acceptable for use by District in any known application, or;
 - f) remains unsold after attempts to sell the property at a public sale.
- 5) **Authorization to Trade-In Equipment.** The District may allow property to be traded-in on a replacement purchase if it is in the best interest of the District to do so. Details of

the trade-in provisions and the value of the trade-in equipment are to be made part of the procurement file. Documentation will be added to the procurement file to reflect the reasons for using this method of property disposal.

- 6) **Authority to Donate Equipment.** The Superintendent, or designee, may donate surplus property to local government units, or not-for-profit agencies, if the value of the items is less than \$300.00.
- 7) **Authority to Approve Donations.** The Superintendent, or designee, may approve a school's request to donate surplus property to a charity on behalf of the school or the district, if the principal:
 - a) makes the request in writing, and;
 - b) describes the item (s) to be donated, the distribution plan, the estimated value, and;
 - c) identifies the agency to receive the donation, and
 - d) the reason for this donation.
- 8) **Recycling Surplus Property.** Recycling surplus property is a preferred method over discarding and should be utilized whenever feasible as an alternative to having property be disposed of at the landfill.
- 9) **Disposal of Textbooks.** The sale of textbooks is be conducted by the Superintendent. The advertising/public notice of the sale of these books may be made solely on the District's Web page. The sale of surplus textbooks and surplus library books may be made contingent on the successful bidder removing all books in the sale lot. Additionally, the District may require as a condition of sale that the successful Purchaser recycle those books with no re-sale value.
- 10) **Recycling Computer Equipment.** The District may recycle or otherwise dispose of computers and related hardware that are surplus, or obsolete, when the value and condition of the equipment does not warrant the cost of the sale.

Stat. Auth.: <http://landru.leg.state.or.us/ors/181.html>ORS 279A.065(5)(a); ORS 279A.070
Stats. Implemented: ORS 279A.280

SELLING GOODS OR SERVICES

50-0200

Policy; Applicability; Methods

- (1) **Policy.** A sound and responsive Public Contracting system, pursuant to ORS 279A.015, may include both purchasing and selling activities. By definition, a Public Contract includes sales by Agencies pursuant to ORS 279.010(x). The policies of ORS 279A.015 apply to public selling activities.
- (2) **Applicability.** This Rule applies to the sales of Goods or Services. The sale of Goods or Services includes but is not limited to: concessions and personal property.
- (3) **Methods.** The District must use a method, as feasible for selling, pursuant to ORS 279B.055 through ORS 279B.085. For the sale of Goods, the value of the sale transactions for the purpose of selecting the appropriate sourcing method must be based on the gross amount of receipts anticipated.

Stat. Auth.: ORS 279A.065(5)(a); ORS 279A.070

Stats. Implemented: ORS 279A.010(x); ORS 279A.015; ORS 279A.050(1) and (2); ORS 279A.065(5)(a)

