

# Roseburg Public Schools Contracting Rules

## Division 46 - General Provisions Related to Public Contracting

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Adopted 12-14-2005

### 137-46-0100 Application

(1) Pursuant to ORS 279A.065(5), the District elects to establish its own rules of procedure for Public Contracting Rules ("Rules"). The Attorney General Model Rules pursuant to ORS 279A.065(1) do not apply to the District. These Rules set forth policy and procedure for the Public Contracting of the District. Pursuant to ORS 279A.065(5), the District adopts these Rules, including but not limited to selected and adapted Public Contract Model Rules. These Rules, that set forth policy and procedure and implement the Oregon Public Contracting Code, consist of the following three divisions:

- (a) Division 46, which applies to all Public Contracting, implementing ORS279A;
  - (b) Division 47, which applies only to Public Contracting for Goods and Services, implementing ORS279B; and
  - (c) Division 49, which applies only to Public Contracting for Public Improvement Contracts, implementing ORS279C.
- (4) These Rules apply to Public Contracts first advertised on or after March 1, 2005, and to unadvertised Public Contracts entered into on or after March 1, 2005.
- (5) The District shall review the rules each time the Attorney General modifies the model rules to ensure compliance with statutory changes. The District may adopt other rules, and modify as necessary, to carry out the provisions of the Code pursuant to ORS 279A.070.

### 137-46-0101 Federal Law Supremacy

(1) Federal statutes and regulations prevail and govern, except as otherwise expressly provided in ORS 279C.800 through ORS 279C.870 (Prevailing Wage Rate) and notwithstanding other provisions of the Public Contracting Code, under these conditions:

- (a) Federal funds are involved, and
- (b) The federal statutes or regulations either:
  - (A) Conflict with any provision of ORS Chapters 279A, 279B, and ORS 279C.005 through 279C.670, or
  - (B) Require additional conditions in Public Contracts not authorized by ORS Chapters 279A, 279B, and ORS 279C.005 through 279C.670. 279A.065(5)(a); ORS 279A.070

### 137-46-0110 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.
- (2) "**Advantageous**" means in the District's best interests, as assessed according to the judgment of the District.
- (3) "**Administering Agency**" means the Agency that solicits and establishes the Original Contract for Procurement of Goods and Services or Public Improvements in a Cooperative Procurement.
- (4) "**Affected Person**" or "Affected Offeror" means a Person whose ability to participate in a Procurement is adversely impaired by a District decision.
- (5) "**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.

(6) "**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."

(7) "**Architectural, Engineering and Land Surveying Services**" is defined in ORS 279C.100 and collectively means professional services that are required to be performed by an architect, engineer or land surveyor. "Architectural, Engineering and Land Surveying Services" includes "Architectural, Engineering or Land Surveying Services," separately or any combination thereof, as appropriate within the context of a Rule.

(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.

(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."

(9) "**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.

(10) "**Bid**" means a response to an Invitation to Bid.

(11) "**Bidder**" means a Person who submits a Bid in response to an Invitation to Bid.

(12) "**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

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Offerors to offer Goods and Services that are equivalent or superior to those named or described in the Specification.

(13) **“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.

(14) **“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.

(15) **“Closing”** means the date and time announced in a Solicitation Document as the deadline for submitting Offers.

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

(17) **“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 137-47-0261 or 137-49-0650. 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 137-47-0261 or 137-49-0650.

(18) **“Competitive Sealed Bidding”** means the sourcing method pursuant to ORS 279B.055.

(19) **“Competitive Sealed Proposals”** means the sourcing method pursuant to ORS 279B.060.

(20) **“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.

(21) **“Contract”** for the purposes of these Rules means “Public Contract.”

(22) **“Contract terms and conditions”** means the entire Contract document including but not limited to: the Contract; a Solicitation Document incorporated by reference in the Contract; and all attachments, exhibits or other requirements specifically referenced in the Contract.

(23) **“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.

(24) **“Contractor”** means the Person with whom the District enters into a Contract and is interchangeable with “Consultant” and “Provider.”

(25) **“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 and Services set forth in the Contract.

(26) **“Cooperative Procurement”** is defined in ORS 279A.200 and means a Procurement conducted by the State

Procurement Office, other Contracting Agency or the District on behalf of one or more Agencies. “Cooperative Procurement” includes but is not limited to multiparty contracts and Price Agreements.

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

(28) **“Days”** means calendar days.

(29) **“DBE Disqualification”** means a disqualification, suspension or debarment pursuant to ORS 200.065, 200.075, and 279A.110 and 137-46-0210.

(30) **“District”** means the Roseburg Public Schools.

(31) **“District Price Agreement”** means a Price Agreement issued by the District. Such Agreements may result from a Cooperative Procurement.

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

(33) **“Descriptive Literature”** means the Offerors materials submitted to provide information concerning the Goods and Services available in response to a Solicitation.

(34) **“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.

(35) **“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 District. Entities eligible to acquire federal donation property may also acquire Surplus Property other than federal donation property.

(36) **“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; (b) ORPIN; or (c) an Electronic Procurement System other than ORPIN. An Electronic Advertisement may or may not include a Solicitation Document.

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

(38) **“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

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(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), 137-48-0200, or related rules.

(39) **"Employee's Household"** means all persons residing with an employee of the District.

(40) **"Employee's Immediate Family"** means the children, step-children, parents, step-parents, grandparents and spouse of employee, separately or in any combination thereof.

(41) **"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.

(42) **"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).

(43) **"Established Catalog Price"** is defined in ORS 279C.100 and means the price included in a catalog, price list, and 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 buyers or to buyers constituting the general market, including public bodies, for the Goods and Services involved.

(43) **"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.

(44) **"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.

(45) **"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.

(46) **"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.

(47) **"Goods"** is defined in ORS 279B.005(b) and means supplies, equipment, or materials, 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.

(48) **"Goods and Services"** is defined in ORS 279B.005 collectively means Goods, trade services, and personal services, separately or in any combination of these terms thereof as appropriate within the context of the Rule. "Goods and Services" includes "personal services" and Construction Services or Architectural, Engineering and Land Surveying Services and Related Services.

(49) **"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

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(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.

(50) **"Intermediate Procurement"** means a sourcing method pursuant to ORS 279B.070 or 137-49-0160.

(51) **"Interstate Cooperative Procurement"** is defined in ORS 279A.200 and means a Permissive Cooperative Procurement in which the Administering District is a governmental body, domestic or foreign, approved by the State Procurement Office, 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 Authorized Agencies are located outside of their state.

(52) **"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.

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

(a) The participating Authorized Agencies or the Cooperative Procurement group;

(B) The contract requirements or estimated contract requirements.

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

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

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

(57) **"Local Public Contract Review Board"** The School Board is the District local government contract review board pursuant to ORS 279A.060.

(58) **"Locality"** is defined in ORS 279C.800 and means the following district in which the Public Works, or the major portion thereof, is to be performed: District 2, composed of Clackamas, Multnomah and Washington Counties.

(59) **"Lowest Responsible Bidder"** means the lowest Bidder who:

(a) Has substantially complied with all prescribed Public Contracting procedures and requirements;

(b) Has met the standards of responsibility set forth in ORS 279B.110 or 279C.375;

(c) Has not been debarred or disqualified by the District under ORS 279B.130 or 279C.440; and

(d) Is not on the list created by the Oregon Construction Contractors Board under ORS 701.227, if the advertised contract is a Public Improvement Contract.

(60) **"Mandatory Use Contract"** means a Public Contract, District Price Agreement, or other agreement that the District is required to use for the Procurement of Goods and Services.

(61) **"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, 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.

(62) **"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 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.

(63) **"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.

(64) **"Nonresident Bidder"** is defined in ORS 279A.120 and means a Bidder who is not a resident Bidder.

(65) **"Not-for-Profit Organization"** is defined in ORS 307.130 and ORS 279A.250(2) and means a Nonprofit Corporation.

(66) **"OAR"** means the Oregon Administrative Rules.

(67) **"Offer"** means collectively or in the alternative: a Bid, Proposal, Quote or similar response to a Solicitation.

(68) **"Offeror"** means collectively or in the alternative: a Bidder or Proposer.

(69) **"Opening"** means the date, time and place announced in the Solicitation Document for the public opening of Written sealed Offers.

(70) **"Original Contract"** means the initial Contract or Price Agreement as solicited and awarded by the District. See 137-46-0400(3)(h) for the definition of "Original Contract" applied to Cooperative Procurements only.

(71) **"ORPIN"** means the on-line electronic Oregon Procurement Information Network administered by the State Procurement Office, as further defined in 137-46-0500.

(72) **"ORS"** means the Oregon Revised Statutes.

(73) **"Participating Agency"** means the Agency that procures Goods and Services or Public Improvements from a Provider based on the Original Contract established by an Administering District in a Cooperative Procurement.

(74) **"Permissive Cooperative Procurement"** is defined in ORS 279A.200 and means a Cooperative Procurement in which the Participating Authorized Agencies are not identified.

(75) **"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.

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(76) **“Personal Services”** means the services or type of services performed under a Personal Services Contract.

(77) **“Personal Services Contract”** means a Contract, or a member of a class of Contracts 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), Consultant, or Architectural, Engineering and Land Surveying Services and Related Services, and construction services that are not Public Improvement Contracts.

(78) **“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.

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

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

(80) **“Procurement”** means the act of purchasing, leasing, renting or otherwise acquiring: Goods and 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.

(81) **“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 279C.450.

(82) **“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.

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

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

(85) **“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 137-48-0110(4), whereby “Proposer” means a Consultant who submits a proposal to the District in response to a Request for Proposals.

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

(87) **“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.

(88) **“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 and Services, Public Improvements, Public Works, minor alterations, or ordinary repair or maintenance necessary to preserve a Public Improvement. “Public Contract” does not include Grants.

(89) **“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.

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

(91) **“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.

(92) **“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.

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

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

(94) **“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.

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

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

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

(97) **“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.

(98) **“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.

(99) **“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.

(100) **“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 137-47-0550. (117) **“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”.

(101) **“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.

(102) **“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 137-47-0500 or 137-49-0390(2), and who has not been debarred or disqualified by the District under 137-47-0575 or 137-49-0370, respectively. When used alone, “Responsible” means meeting the aforementioned standards.

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

(104) **“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.

(105) **“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.

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

(107) **“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.

(108) **“Rules”** mean these Public Contracting Rules of the District including Divisions 46 through 49, unless otherwise indicated.

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

(110) **“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.

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

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

(113) **“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.

(114) **“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.

(115) **“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.

(a) **“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 and Services.

(b) **“Contract-specific Special Procurement”** 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 and Services on a one-time basis or for a single project.

(116) **“Specifications”** means any description of the physical or functional characteristics, or of the nature of a Goods and Services or a construction item, including any requirement for

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inspecting, testing, or preparing a Goods and 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).

(117) **"State"** means the State of Oregon.

(118) **"Substantial Completion"** is defined in 279C.465 and pursuant to ORS 12.135 and HB 3022 means the date when the Contractor 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 by the Contractor.

(119) **"School Board"** means the District Board of Directors pursuant to ORS Chapter 332.

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

(119) **"Surplus Property "** means all personal property, vehicles and titled equipment property owned by the District for sale or donation to state agencies, political subdivisions of the State, and private not-for-profit organizations or the general public or any combination thereof.

(120) **"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.

(121) **"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.

(122) **"Trade Services"** means all remaining services that do not meet the definition for Personal Services.

(123) **"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.

(124) **"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.

(125) **"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.

**137-46-0120 Policy**

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.

**137-46-0130 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) Neither the Code nor these Rules apply to contracts or Cooperative Procurement between Agencies or between Agencies and the federal government.

(3) The District may enter into Public Contracts under a federal program described in ORS 279A.180 and pursuant to 137-46-0360, without following the procedures set forth in ORS 279B.050 through ORS 279B.085, and 137-47-0250 through 137-47-0650.

(4) The District is subject to the remainder of the Code and these Rules, including but not limited to delegation of authority in accordance with 137-46-0170.

**137-46-0140**

**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)

**137-46-0170**

**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 School Board pursuant to ORS 294.435; and

(b) The total amount of the contract is less than \$ 50,000

(2) Except as provided in subsection (1) of this section, the School 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**

**137-46-0200 Affirmative Action; Limited Competition Permitted**

Pursuant to ORS 279A.100, the District may limit competition on Public Contracts for Goods and 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.

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**137-46-0210 Subcontracting to and Contracting with Emerging Small Businesses; DBE Disqualification**

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

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

(b) A business enterprise that is:

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

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

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

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

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

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

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

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

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

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

(F) State the proposed DBE Disqualification period; and

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

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

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

(A) The effective date and period of DBE Disqualification;

(B) The grounds for DBE Disqualification; and

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

**CONTRACT PREFERENCES**

**137-46-0300 Preference for Oregon Goods and 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 and Services that have been manufactured or produced in Oregon.

(b) If two or more Offerors submit identical Offers, and both offer Goods and Services or Personal Services manufactured or produced in Oregon, the District must award the Contract by drawing lots among the identical Offers offering Goods and Services that have been manufactured or produced in Oregon.

(c) If the District receives identical Offers, and none of the identical Offers offer Goods and Services manufactured or



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produced in Oregon, then the District must award the Contract by drawing lots among the identical Offers.

(d) The Offerors that submitted the identical Offers subject to the drawing of lots must 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.

**137-46-0310 Reciprocal Preferences**

When evaluating Bids pursuant to 137-47-0255 through 137-47-0264, 137-49-0390 or 137-49-0640 through 137-49-0660, the District must add a percentage increase to the Bid of a Nonresident Bidder equal to the percentage, if any, of the preference that would be given to that Bidder in the state in which the Bidder resides. The District may rely on the list prepared and maintained by the State pursuant to ORS 279A.120(4) to determine both whether the Nonresident Bidder's state gives preference to in-state bidders, and the amount of such preference.

**137-46-0320 Preference for Recycled Materials**

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

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

- (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 (5%), or a higher percentage if a Written determination is made by the District and set forth in the Solicitation Document. For purposes of making the foregoing determination, the District must consider the costs of the Goods following any adjustments the District makes to the price of the Goods for purposes of evaluation pursuant to 137-46-0310.

(3) Offerors must certify in their Offers:

- (a) The minimum, if not exact, percentage of Recycled Product in all materials and supplies offered; and
  - (b) Both the post-consumer and secondary waste content thereof.
- (4) To be eligible for a preference under ORS 279A.125 and this Rule:
- (a) The Offeror must indicate which materials and supplies contain verifiable recycled content; and
  - (b) Such products must meet the requirements of ORS 279A.125 and this Rule.

(5) A preference under ORS 279A.125 will only be applied to those products in the Offer that contain verifiable recycled content.

(6) Offers that contain false information about (i) the percentage of Recycled Product, post-consumer and secondary waste content, or (ii) verifiable recycled content, must be rejected as nonresponsive, and the Offeror offering false information may be deemed non-responsible.

**PERSONAL SERVICES CONTRACTS**

**137-46-0340 Personal Services Contract Definition**

(1) Pursuant to ORS 279A.050(2), a contract for "Personal Services" is a contract primarily for the provision of services that require specialized technical, creative, professional or communication skills or talents, unique and specialized knowledge, or the exercise of discretionary judgment skills, and for which the quality of services depends on attributes that are unique to the service provider. Personal Services includes Architectural, Engineering and Land Surveying Services and Related Services.

(2) Personal Services contracts that fall within the definition in Subsection (1) include, but are not limited to, the following:

- (a) Contracts for services performed in a professional capacity, including services of an accountant, attorney, architect, land-use-planning consultant, engineer, appraiser, surveyor, 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.

(3) The Board delegates to the Superintendent the discretion to decide whether a particular type of contract or service falls within the definition of "personal services contract" as set forth in Subsections (1) and (2) of this section.

(4) The District may not use Personal Services contracts to obtain and pay for the services of an employee. A Personal Services contract may be used only to obtain and pay for the services of an independent contractor.

**137-46-0342 Personal Services Contracts**

(1) Independent Contractor Status. The District must develop a Statement of Work for services that will not result in an employee relationship with the potential Contractor. The District and Contractor(s) must complete an Independent Contractor Certification. If the individual cannot certify Independent Contractor status, the District may not contract with the individual using a Personal Services Contract.

(a) An Independent Contractor Certification must be part of each contract;

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(b) A corporation is not considered an employee of the District. If the Contractor is a corporation, the Independent Contractor Certification is not required. However, if the Contractor is a professional corporation, the Independent Contractor certification is required. A professional corporation is a corporation organized under ORS Chapter 58, or a similar statute in another state, and is used by certain professions.

(c) If the nature of the services or project is such that an employee/employer relationship will exist, the District must hire the individual through normal personnel procedures.

(d) The Contract must include the Contractor's legal name, address, and Social Security or federal tax identification number.

(e) The Contract must provide that the Contractor is responsible for federal Social Security, except those categories excluded by law, and for any federal or state taxes applicable to the contract payment.

(3) Tax Compliance. No Contract or other agreement for more than \$1,000 may be entered into, renewed or extended with any Person unless the Person certifies in Writing, under penalty of perjury, that the Person is not in violation of any tax laws described in ORS 305.385(6)(7).

(4) Requirements to Transact Business in Oregon.

(a) A Contractor who is a corporation, partnership, or who has an assumed business name must be registered with the Secretary of State Office as required by ORS chapters 58, 60, 62, 63, 65, 67, 70, and 648.

(b) In addition, for Contracts requiring the services of one or more architects, engineers, and land surveyors, these Consultants must be registered with the appropriate licensing boards under the provisions of ORS 671.020, 672.020, and 672.025.

**137-46-0345 PSC Formal Selection Procedures**

(1) Formal Selection Procedure. The District will use a formal selection procedure whenever the Superintendent determines that the amount of the contract or complexity of the project requires use of the formal process. All formal RFP and RFQ solicitations must comply with the requirements for competitive sealed proposals contained in ORS 279B.060 and may be solicited, processed and reviewed through any of the sealed proposal procurement methods set forth in 137-047-0260 to 137-047-0261.

(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. The RFQ may require information, including but not limited to the contractor's particular capability to perform the required services; the number of experienced staff available to perform the required services, including specific

qualifications and experience of personnel; a list of similar services the contractor has completed, with references concerning past performance; and any other information necessary to evaluate contractor qualifications.

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

(c) Unless the RFQ establishes that competition does not exist or 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.

**137-46-0350 PSC Informal Selection Procedures**

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

(1) The informal selection process must solicit responses/Proposals from at least three qualified contractors offering the required services. If three proposals are not reasonably available, fewer will suffice, but the District shall make a written record of the effort made to obtain at least three proposals.

(2) The informal selection process is intended to be competitive. The selection and ranking may be based on criteria including but not limited to each Proposer's:

(a) Particular capability to perform the services required;

(b) Experienced staff available to perform the services required, including each Proposer's recent, current, and projected workloads;

(c) Performance history;

(d) Approach and philosophy used in providing services;

(e) Fees or costs;

(f) Geographic proximity to the project or the area where the services are to be performed; and

(g) Work volume previously awarded by the District, with the object of effecting an equitable distribution of contracts among qualified contractors. But distribution must not violate the policy of selecting the most highly qualified contractor to perform the services at a fair and reasonable price.

(3) Written confirmation of solicitation attempts and responses with contractor names and addresses shall be maintained in the District's contract file.

**137-46-0352 PSC Selection by Negotiation**

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

(1) The contract price is not more than \$25,000;

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

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

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**137-46-0355 PSC Emergencies**

- (1) The District may in its discretion enter into a Personal Services contract without complying with formal or informal solicitation requirements if an emergency exists.
- (2) The Superintendent must declare the existence of an emergency in writing that will authorize the District to enter into an emergency contract. The Superintendent must make written Findings describing the emergency conditions that require prompt execution of the contract.
- (3) The Superintendent may not contract pursuant to this exemption in the absence of a substantial risk of loss, damage, or interruption of services or harm to public health, safety, or the environment that would occur if contract performance awaited the time necessary, given the complexity of the project, to solicit, receive, and analyze Proposals.

**137-46-0358 PSC Contract Requirements**

District Personal Services contracts must contain the mandatory contract provisions set forth in ORS 279B.020.

**PROCUREMENT FILES**

**137-46-0360 Procurement Files**

- (1) This Rule applies only Competitive Sealed Bidding, Competitive Sealed Proposals exceeding the Intermediate Procurement Threshold.
- (2) Each District's 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, and
  - (e) Documentation of Contract Administration pursuant to 137-46-0555.
  - (f) A list of prospective Providers notified of any Solicitation;
  - (g) The method used to advertise or notify prospective Providers;
  - (h) A copy of each Offer that resulted in the Award of a Contract;
  - (i) The method of evaluating Offers, the results of the evaluation, and basis of selection;
  - (j) The record of any Negotiation of the Statement of Work and results;
  - (k) A record of all material Communications regarding the Solicitation by interested Providers pursuant to 137-46-0635;
  - (l) All information describing how the Provider was selected, including the basis for awarding the Contract;
  - (m) A copy of the Request for Special Procurement, if any;
  - (n) Documentation for a Federal Program purchase pursuant to 137-46-0360; and
  - (o) Documentation related to Cooperative Procurements pursuant to 137-46-0410 et. seq.
- (4) The District must maintain Procurement Files, including all documentation, for a period not less than six (6) years, except for ten (10) years beyond each Contract's expiration

**COOPERATIVE PROCUREMENT**

**137-46-0400 Purpose, Policy, and Definitions**

- (1) Purpose. The purpose of these Rules for Cooperative Procurement is to specify the policy and procedures of the District for Procurement, using one of the three Cooperative Procurement Methods; Joint Cooperative Procurements, Permissive Cooperative Procurements, and Interstate Cooperative Procurements. An Administering Agency's Original Contract or a Participating Agency's Contract with a Provider in a Cooperative Procurement is subject to ORS 279A and these Rules, unlike agreements solely between Authorized Agencies pursuant to ORS 190 et seq. and excepted from the Code pursuant to OR 279A.025.
- (2) Policy. It is the policy of the District that Authorized Agencies will collaborate to leverage their purchases for Goods and Services to achieve efficiency in state government by optimizing the benefits from these Cooperative Procurements.
- (3) Definitions. The following definitions apply to Cooperative Procurement:
  - (a) "Administering Agency" means the State Procurement Office; another governmental body, domestic or foreign, approved by State Procurement Office; or the District, that solicits and establishes the Original Contract for Procurement of Goods and Services or Public Improvements in a Cooperative Procurement.
  - (b) "Contract" for purposes of these Cooperative Procurement Rules means a Public Contract or Price Agreement arising from an Original Contract that was solicited and awarded during a Cooperative Procurement by an Administering Agency.
  - (c) "Cooperative Procurement" means Procurement conducted by the State Procurement Office or the District or on behalf of one or more Agencies. Cooperative Procurement includes but is not limited to multiparty Contracts and Price Agreements.
  - (d) "Cooperative Procurement Group" means a group of Authorized Agencies or another governmental body, domestic or foreign, approved by State Procurement Office, joined through an intergovernmental agreement pursuant to ORS 190 for the purposes of facilitating a Cooperative Procurements pursuant to ORS 279A.200.
  - (e) "Interstate Cooperative Procurement" means a Permissive Cooperative Procurement in which the Administering Agency is a governmental body, domestic or foreign, approved by the State Procurement Office, that is authorized under that governmental body's laws, rules, or regulations to enter into Public Contracts and in which one or more of the Participating Authorized Agencies are located outside of the State of Oregon.
  - (f) "Joint Cooperative Procurement" means a Cooperative Procurement that identifies:
    - (A) The Participating Authorized Agencies or the Cooperative Procurement Group; and

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(B) The contract requirements or estimated contract requirements for the Original Contract.

(g) "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 and Services or Public Improvements.

(h) "Original Contract" means the initial Contract or Price Agreement as solicited and awarded during a Cooperative Procurement by an Administering Agency.

(i) "Permissive Cooperative Procurement" means a Cooperative Procurement in which the Participating Authorized Agencies are not identified.

**137-46-0410 Authority for Cooperative Procurements**

(1) The District may participate in, sponsor, conduct or administer any of the following:

(a) Joint Cooperative Procurements to establish Original Contracts or Contracts for the acquisition of Goods and Services, using a source selection method substantially equivalent to those set forth in ORS 279B.055, 279B.060, or 279B.085 or to establish Original Contracts or Contracts for Public Improvements that use a competitive bidding process substantially equivalent to that set forth in ORS 279C.005 through 279C.870.

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

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

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

**137-46-0420 Responsibilities**

(1) The District may establish any terms and conditions necessary to allow other Participating Authorized Agencies or Cooperative Procurement Groups, of which the District is a member (hereinafter collectively known as "Participating Agency), to participate in a Cooperative Procurement. The District may require Participating Authorized Agencies to enter into a Written agreement which establishes the terms and conditions for participation in a Cooperative Procurement. These terms and conditions may include, but are not limited to, the establishment of any administrative fees for the District or any other matters related to the administration of the Cooperative Procurement source selection and the resulting Original Contract.

(2) In administering or applying these Rules, the District must collaboratively review and compare the procurement needs and requirements of both the District and the respective

Participating Agency(s) for the purpose of using a Cooperative Procurement to achieve cost savings (for examples: lowest total cost of acquisition, least time to procure, process streamlining, Return on Investment calculation based on a comparison of the total costs of individual District Procurements versus a Cooperative Procurement).

(3) If a Participating Agency enters into a Contract through a Cooperative Procurement, the Participating Agency must comply with the Code, these Rules, and any terms and conditions set out by the District without limitation.

(4) The District must use a Solicitation and award process that is substantially equivalent to a source selection method identified in ORS 279B.055, ORS 279B.060, ORS 279B.085, or ORS 279C.005 through ORS 279C.870 when it has the characteristics set forth in ORS 279A.200(2).

(5) Interstate Procurement Solicitations must substantially comply with the public notice requirements for advertising pursuant to 137-47-0300.

(6) The interval between the first date of notice of a Joint or Permissive Procurement Solicitation and Closing must be not less than fourteen (14) Days for an ITB and twenty (20) Days for an RFP. A Joint or Permissive Procurement Solicitation must comply with the requirements of 137-47-0300.

**137-46-0430 Joint Cooperative Procurements**

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

(2) Solicitation and Original Contract Documents. The Solicitation Document and Original Contract for a Joint Cooperative Procurement must include, but is not limited to:

(a) A list of the Participating Agency(s) that may enter into a Contract under the terms and conditions of the Original Contract;

(b) The Original Contract requirements, which may include, but are not limited to:

(A) The Original Contract's not-to-exceed value;

(B) The term of the Original Contract;

(C) The quantity or quantity range of purchases to be made;

(D) The minimum level of quality or quality range requirements for the Goods and Services;

(E) The minimum Provider qualifications;

(F) The scope of the Goods and Services or Public Improvements to be purchased;

(G) Terms and conditions;

(H) Any special considerations; and

(I) Any insurance or bonding requirements.

(c) A Written requirement that the Participating Agency will not materially change or alter the terms, conditions, and prices from the Original Contract between the Provider and the District.

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(d) A Written requirement that Anticipated Amendments will be generally stated, in Writing, in the Solicitation Document and the Original Contract pursuant to 137-46-0560.

**137-46-0440 Permissive Cooperative Procurements**

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

(2) Solicitation and Original Contract Documents. The Solicitation Document and Original Contract for a Permissive Cooperative Procurement must include, but is not limited to:

(a) A Written requirement that other Participating Authorized Agencies may establish Contracts to purchase the Supplies or Service;

(b) A Written requirement that the Provider will extend the terms, conditions and prices to any Participating Agency that establishes a Contract through a Permissive Cooperative Procurement;

(c) The Original Contract requirements, which may include, but is not limited to:

(A) The Original Contract's not-to-exceed value;

(B) The term of the Original Contract;

(C) The quantity or quantity range of purchases to be made;

(D) The minimum level of quality or quality range requirements for the Goods and Services;

(E) The minimum Provider qualifications;

(F) The scope of the Goods and Services to be purchased;

(G) Terms and conditions;

(H) Any special considerations; and

(I) Any insurance or bonding requirements.

(d) A Written requirement that the Participating Agency will not Materially Change or Alter the terms, conditions, and prices from the Original Contract between the Provider and the Administering District.

(e) A Written requirement that Anticipated Amendments will be generally stated, in Writing, in the Solicitation Document and the Original Contract pursuant to 137-46-0560.

(3) Public Notice of Intent to establish a Contract; Comment Period.

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

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

(A) The District intends to make payments, in aggregate, over the term of the Contract, in excess of \$250,000, whether or not the total amount or value of the payments is expressly stated in the Contract;

(B) The District's Contract expressly provides for a guaranteed maximum price, or a maximum not-to-exceed amount is in excess of \$250,000; or,

(C) At the time the District enters into the Contract, the District reasonably contemplates, based on historical or other data available to the District, that the total payments it will make for the Goods and Services under the Contract will, in aggregate, exceed \$250,000 over the anticipated duration of the Contract.

(c) 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, and;

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

(E) The Contract requirements, which may include, but are not limited to:

(i) The Contract's not-to-exceed value;

(ii) The term of the Contract;

(iii) The quantity or quantity range of purchases to be made;

(iv) The minimum level of quality or quality range requirements for the Goods and Services;

(v) The minimum Provider qualifications;

(vi) The scope of the Goods and Services to be purchased;

(v) Any special considerations;

(vi) Terms and conditions; and

(vii) Any insurance or bonding requirements.

(d) A Written requirement that Anticipated Amendments will be generally stated, in Writing, in the Contract pursuant to 137-46-0560.

(e) Any Notice of Intent for a Permissive Cooperative Procurement must be published for no fewer than five (5) calendar days before the deadline for submission of comments regarding the Notice of Intent to establish a Contract.

(f) Providers must submit comments within five (5) calendar days after the Notice of Intent is published. If the District receives comments on its intent to establish a Contract, the District must respond to any comments on its intent, to include:

(A) A Written determination that establishing a Contract is in the best interest of the District.

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

(g) The District's Notice of Intent described in this Section and the Permissive Cooperative Procurement Solicitation advertisement requirements described in 137-047-0300 may occur concurrently.

**137-46-0450 Interstate Cooperative Procurements**

(1) Applicability. The District may only participate in this type of Cooperative Procurement for the purchase of Goods and Services if the Solicitation was advertised in Oregon by the Administering Agency or Participating Agency pursuant to 137-47-0300. The District must comply with the procedures set out in ORS 279A.220 and these Rules to procure Goods and Services using an Interstate Cooperative Procurement.

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(2) Solicitation and Original Contract Documents. The Solicitation Document and Original Contract for an Interstate Cooperative Procurement must include, but is not limited to:

- (a) A Written requirement that other governmental bodies may establish Contracts to purchase the Goods and Services;
- (b) A list of the Participating Agency(s) that may enter into Contracts under the terms and conditions of the Original Contract;
- (c) A Written requirement that the Provider will extend the terms, conditions and prices to any Participating Agency that establishes a Contract through the Interstate Cooperative Procurement; and,
- (d) The Original Contract requirements, which may include, but are not limited to:
  - (A) The Original Contract's not-to-exceed value;
  - (B) The term of the Original Contract;
  - (C) The quantity or quantity range of purchases to be made;
  - (D) The minimum level of quality or quality range requirements for the Supplies or Service;
  - (E) The minimum Provider qualifications;
  - (F) The scope of the Goods and Services to be purchased;
  - (G) Any special considerations;
  - (H) Terms and conditions; and
  - (I) Any insurance and bonding requirements.

(d) A Written requirement that a Participating Agency will not materially change or alter the terms, conditions, and prices from the Original Contract between the Provider and the Administering Agency.

(e) A Written requirement that Anticipated Amendments will be generally stated, in Writing, in the Solicitation Document and the Original Contract pursuant to 137-46-0560.

(3) Public Notice of Intent to establish a Contract; Comment Period.

(a) When the District intends to enter into a Contract through an Interstate Cooperative Procurement the District must publish a Notice of Intent to do so in Oregon.

(b) Notice of Intent must appear in at least one newspaper of general circulation, and in as many additional issues and publications as may be necessary or desirable to ensure Providers, who would otherwise be prospective Offeror on the Contract, are given an opportunity to comment.

(c) 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; and
- (D) A time, place and date by which comments must be submitted to the District regarding the Notice of Intent to establish a Contract.
- (E) The Contract requirements, which may include, but are not limited to:
  - (i) The Contract's not-to-exceed value;
  - (ii) The term of the Contract;
  - (iii) The quantity or quantity range of purchases to be made;
  - (iv) The minimum level of quality or quality range requirements for the Goods and Services;
  - (v) The minimum Provider qualifications;
  - (vi) The scope of the Goods and Services to be purchased;
  - (vii) Any special considerations;

(viii) Terms and conditions; and

(ix) Any insurance and bonding requirements.

(d) A Written requirement that Anticipated Amendments will be generally stated, in Writing, in the Contract pursuant to 137-46-0560.

(e) The Notice of Intent for an Interstate Cooperative Procurement must be published for no fewer than five (5) calendar days before the deadline for submission of comments regarding the intent to establish a Contract.

(f) Providers must submit comments within five (5) calendar days after the Notice of Intent is published. If the District receives comments on its intent to establish a Contract, the District must respond to any comments on its intent, including:

(A) The District must make a Written determination that establishing a Contract is in the best interest of the District; and

(B) The District must provide a copy of the Written determination to any Provider that submitted comments.

(g) The District's Notice of Intent described in this Section and the Interstate Cooperative Procurement Solicitation advertisement requirements described in 137-047-0305 may occur concurrently.

**137-046-0460 Advertisements of Interstate Cooperative Procurements**

A Purchasing Contracting Agency 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 Purchasing Contracting Agency or the Cooperative Procurement Group of which the Purchasing Contracting Agency 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 Contracting Agency; or
- (b) The Cooperative Procurement Group, or a member of the Cooperative Procurement Group, of which the Purchasing Contracting Agency 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 Purchasing Contracting Agency, 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 137-046-0460(1), the Purchasing Contracting Agency gives 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 Purchasing Contracting Agency shall advertise the notice in the same manner as provided in ORS 279B.055(4)(b) and (c).

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Unless the Purchasing Contracting Agency has adopted rules that set forth a different time period, the Purchasing Contracting Agency shall give the notice required by this Section no fewer than 5 days before the deadline for submitting comments regarding the Purchasing Contracting Agency's intent to establish a contract or price agreement through a Permissive Cooperative Procurement.

(3) The Purchasing Contracting Agency shall 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).

**137-46-0470 Protest and Disputes; Cooperative Procurements**

(1) Protests to the District. If an Offeror wishes to protest the contents of the original Solicitation or the award or proposed award of an Original Contract, the Offeror must direct the protest to the District, and the Offeror must make such protest pursuant to ORS 279B.400 to 279B.425.

(2) Protests to a Participating Agency. If an Offeror wishes to protest the use by a Participating Agency of a Cooperative Procurement after the execution of an Original Contract, the potential Offeror must direct the protest to the Participating Agency, and the potential Offeror must make such protest pursuant to ORS 279B.400 to 279B.425. The protest to the Participating Agency is limited in scope to the Participating Agency's authority to enter into a Cooperative Procurement Contract.

(3) Other Protests or Disputes. Any other protests related to a Cooperative Procurement, or disputes related to an Original Contract or Contract arising out of a Cooperative Procurement, must be made and resolved as set forth in ORS 279A.225.

**137-46-0475 Amendments of Cooperative Procurements**

The District must comply with 137-46-0560(7).

**137-046-0480 Contract Amendments; Cooperative Procurements**

The District may amend a Contract entered into pursuant to a Cooperative Procurement as set forth in 137-046-0560.

**CONTRACT ADMINISTRATION**

**137-46-0550 General Definitions**

(1) "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.

(2) "Contract terms and conditions" means the entire Contract document including but not limited to: the Contract; a Solicitation Document incorporated by reference in the Contract; and all attachments, exhibits or other requirements specifically referenced in the Contract.

(3) For definitions related to the Rule on Amendments, see 137-46-0560.

**137-46-0555 Contract Administration; General Provisions**

(1) Contract Administrator. The District must appoint, in Writing, a Contract Administrator to represent the District for each Contract.

(2) Documentation of Contract Administration.

(a) Applicability. This Section applies only to Procurements exceeding the Intermediate Procurement Threshold for Goods and Services; the Informal Selection Threshold for Architectural, Engineering, and Land Surveying Services and Related Services; and the Intermediate Procurement Threshold for Public Improvements pursuant to 137-47-0270, 137-48-0210, and 137-49-0160, respectively, unless the policy established by the District provides otherwise.

(b) Requirements. Documentation of Contract Administration is a part of the Procurement File in accordance with 137-46-0355, and this documentation must include:

(A) An executed Contract;

(B) The record of the actions used to administer the Contract; and

(C) The Contract Administrator and any technical representative delegates, together with a description of their delegated duties.

(c) Documentation of Contract Administration may also include, if any:

(A) Amendments, including but not limited to the approval of Amendments and the bases for determinations of the Designated Procurement Officer, as required in 137-46-0560(c)(B);

(B) Claims related to the Contract;

(C) Release of claims documents;

(D) Contract close-out documents; and

(E) Other documents related to Contract Administration.

**CONTRACT AMENDMENTS**

**137-46-0560 Amendments**

(1) Generally. This Rule on Amendments sets forth:

(a) A General Rule for Amendments in Section (2) applicable to Contracts for Goods and Services; and

(b) Special Rules for Amendments in Section (3), applicable to different types of Contracts. These Special Rules supplement the General Rule, unless expressly stated otherwise.

(c) The General Rule for Amendments under Section (2) of this Rule may not increase the Contract beyond the limit of any Threshold established in the Public Contracting Code or Rules.

(d) "Amendment" means a Written modification to a Public Contract, other than by Changes to the Work pursuant to Section (5)(b), that is reasonably related to the Scope of the original Procurement and requires the mutual agreement between the District and the Contractor, provided;

(i) 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.220;

(ii) All Amendments to Contracts must be in Writing;

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(iii) All Amendments to Contracts must be signed by the authorized representatives of the parties to the Contracts;  
(iv) The Amendment will promote efficient use of public funds and resources and result in substantial cost savings; and  
(v) The Amendment will not encourage favoritism in the contracting process.

(2) General Rule for Amendments.

(a) Definitions.

(A) "Anticipated Amendment" means:

(i) The District has stated in Writing in any Solicitation Document and the Original Contract that the District may amend that Contract;  
(ii) The Amendment is in accordance with the definition of an Amendment under Subsection (1)(d);  
(iii) Required language in a Solicitation Document and the Original Contract includes:  
(I) The possibility of one or more Amendments; and  
(II) The general circumstances of certain or known changes to the requirements of the Contract that may be anticipated or even planned for, but not necessarily quantified at the time of Contract execution. These changes may be specifically described in any Solicitation and Contract as:

(a) Extra Work;

(b) Additional Work;

(c) Work to be done if certain situations are encountered; or

(d) Changes in terms, conditions, price, or type of Work.

(iii) The District is not required to designate an Amendment in any Solicitation Document and Original Contract as an "Anticipated Amendment," if Subsections (a)(B)(i) and (ii) are followed.

(B) "Unanticipated Amendment" means:

(i) A required Amendment due to unforeseen circumstances or predicaments which were not foreseen at the time the contract was established, and not constitute an effort to evade the Rules; and

(ii) That is not described in one or more of any Solicitation Document and Original Contract pursuant to Subsection (a)(A)(i).

(b) Anticipated Amendments. The District may make Anticipated Amendments to a Contract without any additional competitive process and for an unlimited amount, provided, the Anticipated Amendment's circumstances, method, and changes were described in any Solicitation Document and the Original Contract, pursuant to Subsection (2)(a)(A).

(c) Unanticipated Amendments.

(A) Limited Amount. The District may make Unanticipated Amendments to a Contract without any additional competitive process, provided:

(i) The Amendment is in accordance with the definition of an Amendment under Subsection (1)(d)

(ii) The cumulative amounts of one or more Unanticipated Amendments to a Contract must not exceed 20% of the Original Contract amount.

(B) Unlimited Amount. The District may make Unanticipated Amendments to a Contract without any additional competitive process and for an unlimited amount, provided:

(i) The Amendment is in accordance with the definition of an Amendment under Subsection (1)(d).

(ii) The District's Procurement Officer gives Written approval of the Unanticipated Amendment, based upon a determination of the best interests of the District, including but not limited to:

(I) Whether the change is legitimate and due to unforeseen circumstances which occurred as Work progressed, and whether the reasons for the change were unforeseen at the time the Original Contract was established, as opposed to an effort to evade Procurement requirements; and

(II) Whether the Unanticipated Amendment represents any important general change, which alters the essential identity or main purpose of the Original Contract, or is of such importance as to constitute a new undertaking. The approval of the Procurement Officer and the basis of this determination must be documented in the Procurement File.

(3) Special Rules for Amendments of Contracts for Goods and Services

(a) Small Procurements. The District may amend a Contract awarded as a Small Procurement in accordance with 137-47-0265, but the cumulative Amendments must not increase the total Contract Price to greater than \$6,000. The Contract and all cumulative Amendments must not exceed a total amount of \$6,000. In addition, the General Rule on Amendments applies to Small Procurements.

(b) Intermediate Procurements. The District may amend a Contract awarded as an Intermediate Procurement in accordance with 137-47-0270, and the General Rule on Amendments applies to Intermediate Procurements not exceeding the Threshold of \$50,000. If the Contract and all cumulative Amendments would result in an amended Contract amount exceeding \$50,000, then the District may only amend that Contract, providing:

(A) The District conducts a Renegotiation of an Existing Contract with an Incumbent Contractor in accordance with the Special Procurement of 137-47-0285; or

(B) The District requests and obtains prior approval of a Special Procurement in accordance with 137-47-0285.

(c) Formal Procurements. The General Rule on Amendments applies to Procurements pursuant to ORS 279A.200 through 279A.220 (Cooperative Procurement), ORS 279B.055 through 279B.060 (Competitively Sealed Bidding and Proposals) and ORS 279B.085 (Special Procurements), if applicable, (for purposes of this Subsection only, "Formal" Procurements), and except as provided in this Rule.

(d) Special Procurement for Renegotiated Contracts.

Notwithstanding the General Rule on Amendments in Section (2) the District may renegotiate the terms and conditions, including the Contract Price, of a Contract without any additional competitive process and amend a Contract if the District determines that it is in the best interest of the District and subject to the following conditions:

(A) The District must determine that, with all things considered, the renegotiated Contract is at least as favorable to the District as the Original Contract; and

(B) The renegotiated Contract will not have a total term greater than allowed in the original Solicitation Document or Contract after combining the initial and extended terms. For example, a one-year Contract, renewable each year for up to



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four additional years, may be renegotiated as a two to five-year Contract, but not beyond a total of five years. Also, if 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 any one of the prior Contracts.

(C) If the Contract to be renegotiated is the result of a Cooperative Procurement, the amended Contract must be within the Scope of the Original Contract and may not materially change the terms, conditions, and prices of the Original Contract.

(e) Payment Authorization of Cost Overruns for Trade and Personal Services Contracts, including A & E.

(A) Payments on Contracts for Trade or Personal Services that exceed the maximum contract consideration require approval from the District's Procurement Officer. Approval may be provided if:

(i) The Original Contract has not expired or been terminated as of the date Written approval to increase the Contract amount is granted;

(ii) The cost overrun is not associated with any change in the Statement of Work set out in the Original Contract;

(iii) The cost overrun arose out of extraordinary circumstances or conditions encountered in the course of contract performance that were reasonably not anticipated at the time the Original Contract, or the most recent Amendment, if any, was signed. Such circumstances include, but are not limited to: to address emergencies arising in the course of the Contract that require prompt action to protect the Work already completed, to comply with official or judicial commands or directives issued during contract performance or to ensure that the purpose of the Contract will be realized;

(iv) The cost overrun was incurred in good faith, results from the good faith performance by the Contractor, and is no greater than the prescribed hourly rate or the reasonable value of the additional Work or performance rendered.

(5) Special Rules for Amendments of Contracts for Public Improvements:

(a) Intermediate Procurements.

(A) Price Increases. Notwithstanding the General Rule on Amendments in Section (2), Intermediate level Public Improvement Contracts obtained by competitive quotes may be increased above the original amount of the Award by the District issuance of a Change to the Work or Amendment, pursuant to 137-49-0910, within the following limitations:

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

(ii) Up to an aggregate Contract Price increase of 50% over the Original Contract amount, when the District's Designated Procurement Officer determines that a price increase is warranted for additional reasonably related Work and the Designated Procurement Officer approves the increase in Writing.

(B) Amendments. Amendments of intermediate level Public Improvement Contracts that exceed the Thresholds stated in 137-49-0160 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.

(C) This Subsection (5)(a) is also found in 137-49-0160.

(b) Changes to the Work and Amendments. Notwithstanding the General Rule on Amendments in Section (2):

(A) Definitions. As used in Subsection 5(b) of this Rule:

(i) "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.

(ii) "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.

(B) 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.

(C) 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.

(D) Contract Amendments. Contract Amendments reasonably related to the 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:

(i) They are reasonably related to the scope of the original Procurement;

(ii) 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;

(iii) 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

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(iv) The Amendment is made consistent with applicable legal requirements.

(E) This Subsection (5)(b) is also found in OAR 125-249-0910.

(6) Special Rule for Amendments of Price Agreements.

Notwithstanding the General Rule on Amendments in Section (2) the District may amend a Price Agreement as follows:

(a) As permitted by the Price Agreement;

(b) As permitted by any applicable Special Rule for Amendments, Sections (3) through (9); or

(c) As permitted by applicable law.

(7) Special Rule for Amendments of Cooperative Procurements.

(a) An Administering District may amend an Original Contract in a manner that is substantially equivalent to this Rule.

(b) A Participating District may amend its own Contract resulting from a Cooperative Procurement in a manner that complies with this Rule.

(8) Special Rule for Sole-Source Procurements. The General Rule on Amendments in Section (2) applies to Sole-Source Procurements pursuant to ORS 279B.075 and 137-47-0275.

(9) Special Rule for Amendments of Contracts for Emergencies. Notwithstanding Sections (2) through (8) of this Rule, an 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.

### ETHICS IN PUBLIC CONTRACTING

#### 137-46-0600 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.

#### 137-46-0605 Selection and Award of Public Contracts

(1) District officers, employees or agents involved in the process of the 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, employees and agents are prohibited from using their official position for personal or financial gain.

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

### SURPLUS PROPERTY

#### 137-46-0730 Disposal of District Surplus Personal Property

(1) The Board may, at any time, declare district property as surplus and authorize its disposal when such property is no longer useful to the district, unsuitable for use, too costly to repair or obsolete.

(2) Efforts will be made to find other uses for items declared surplus.

(3) Items that are still usable, but no longer of use in the district, may be disposed of through:

(a) Auction by approved state agencies (e.g. State Auction, OSU Auction);

(b) Donation to other Agencies and not-for-profit organizations;

(c) Surplus Bid to the general public.

(d) The monies are returned to the general fund.

(4) Items of no value and/or that no longer function may be disposed of and do not need to be declared surplus.

#### 137-46-0731 Sale of District Surplus Personal Property

(1) **Conduct.** The District must conduct public sales for the disposal of Surplus Property. Methods of disposal may include, but not be 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 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 Internet Auctions.**

(a) The District may offer Surplus Property for public sale through an internet auction provider. 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 District;

(c) All 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. A purchaser or disappointed bidder must have no recourse against the District. All sales must 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 Invitation to Bid. The time limit for making full payment, and the place where payment must be made will be specified in public Invitation to Bid

(5) **Claiming Items Purchased.**

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- (a) Items not paid in full by the time specified in the sales terms and conditions must be canceled;
- (b) Property paid for, but not claimed within the time specified in the sales terms and conditions must be considered abandoned and ownership must default to the District, unless prior 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 must be transferred upon receipt of full payment. The District rejects any liability once a purchaser takes possession of a vehicle;
- (d) Motor Vehicles Division trip permits must be required to drive unlicensed motor vehicles and must be available at the Property Distribution Center. A purchaser of a vehicle must certify that the driver of the vehicle has a valid driver's license and is insured as required by Oregon law before a trip permit can be issued.
- (6) **Failure to Comply.** The District may establish criteria to debar participants from internet auctions and other District sales pursuant to this Rule. Such criteria must 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 this criteria the District may debar participants from internet auctions and participation in other District 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 must be available at the auction site 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 District;
  - (c) All 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 use. A purchaser or disappointed Bidder must have no recourse against the District, the District, its Property Distribution Center or any of their respective officers, employees or agents. All sales must be final.

## **LIFE CYCLE COSTING**

### **137-46-0750 Life Cycle Costing**

(1) Policy. Life Cycle Costing provides an acquisition method that is consistent with the concept of sustainability and also drives the concept of lowest cost of ownership and best value of the equipment purchased. When planning the award method of an Invitation to Bid or Request for Proposal for products or equipment, the District may consider using Life Cycle Costing whenever the costs of system operation, support, and disposal, and other quantifiable costs are significant in comparison with the cost of acquisition.

(2) Concept. Insofar as this Rule is concerned, the concept of Life Cycle Costing will be limited to begin with the acquisition of the product or service, include all the associated cost(s) of ownership, such as purchase price, shipping, maintenance and repair, longevity, and include disposition cost(s) at the end of life. The initial acquisition price is adjusted with additional cost streams expected to occur over the anticipated life of the product or equipment. These additional cost streams must be clearly thought out costs or adjustments, and must be based upon reasonable assumptions. Cost streams are discrete elements of costs that relate to the particular purchase considered for Life Cycle Costing. In some cases cost streams may include negative costs or savings that are expected to result in a particular cost stream.

(a) Acquisition costs are costs associated with acquiring an item for State use. For complex items, several Contracts may be required and costs may involve research and development as well as production, delivery, and installation of the item.

(b) Typical cost streams may include:

(A) Switching cost are costs associated with changing from current equipment or products to another model or brand of equipment or products. Typically such costs may include: removal, shipping, training, and replacement of supporting supplies. They may also consider increased project management or additional transition time.

(B) Operating and support costs are all costs, including third party contract costs, associated with equipment, supplies, utilities, fuel, and services needed to operate and maintain an operational system.

(C) Disposal costs are costs, including third party contract costs, associated with removing equipment from service and disposing of it. Evaluations that consider Life-Cycle Cost should also consider any significant salvage or resale value at the time of disposal. Oregon Property Services may help with estimating values, and with adherence to current Rules regarding disposition of State property.

(3) Solicitation Requirements. Life Cycle Cost methodology is permitted under this Rule for use in either an ITB or an RFP. When conducting a Life Cycle Costing-based award, the Solicitation must:

(a) Advise prospective Offerors how Life Cycle Costing will be considered in an award decision.

(A) Awards may be made based on lowest evaluated cost resulting from Life Cycle Costing. Under this approach the evaluation includes Life Cycle Costs in the Solicitation issued by the District.

(B) Awards of Invitations to Bid to the lowest Bidder include the total Life Cycle Costs as a part of the bid evaluation methodology and award. The lowest total Life Cycle Cost is considered the low Bid.

(C) Awards of RFPs may include a Life Cycle Costing award factor in two ways:

(i) The RFP may include Life Cycle Costs as a part of the total points awarded for costs. In this method, all Life Cycle Costs are calculated and the lowest total Life Cycle Cost is awarded the maximum points allocated for cost in the RFP; or

(ii) The RFP may include a separate Life Cycle Cost Factor that is assessed a weight or points and is considered in

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addition to other factors in the proposal evaluation methodology. As a separate evaluation factor, it may be used in addition to costs, when the cost factor does not consider Life Cycle Costing elements.

(b) When Life Cycle Costs continue over a period of years, Solicitations may provide for adjustments to the cost stream for one or more of the following:

- (A) Time value of money;
- (B) Cost uncertainty; or
- (C) Inflation factors.

(4) Factors in the Solicitation. To the extent the District considers practical, the Solicitation must provide relevant information (e.g., projected item usage, operating environment, the operating period, and other information that will be considered in the evaluation of the offer.) The District may include projections and estimates of life and cycle times from independent third party sources. The Solicitation must describe how Life Cycle Cost will be applied in the award process. Factors not described in the Solicitation may not be used in the evaluation.

(5) Elements that may be used in Awards. Solicitations must describe what relevant costs, along with appropriate information to support life costs, the Offer must provide. Typical elements used in Life Cycle Costing Awards may include:

- (a) Average unit price, including (when appropriate) recurring and nonrecurring production costs;
- (b) Delivery, shipping and transportation costs;
- (c) Switching costs prepared by the State that include a reasonable estimate of what it will cost to switch from a current product or brand to another;
- (d) Unit operating and support costs (e.g., manpower, energy, parts requirements, scheduled maintenance, and training);
- (e) Unit disposal costs (e.g., the cost of removing equipment from the State facility);
- (f) Unit salvage or residual value; and
- (g) Related information as requested to support costs such as testing and operational data.

(6) Award Decision. Award of an Invitation to Bid using Life Cycle Cost methods must be made to the responsible firm whose responsive offer provides the lowest overall cost of ownership in accordance with the Life Cycle Cost evaluation factors listed in the solicitation document. In the case of a Life Cycle Cost request for proposal, award must be made to the responsible firm whose responsive offer, after consideration of Life Cycle Cost factors as a part of price evaluation, and other factors listed in the Solicitation Document are determined to be the most Advantageous or best Proposal for the District.

End of Division

# **Roseburg Public Schools Contracting Rules**

## **Division 47 - Public Procurement Of Goods And Services**

### **METHODS OF SOURCE SELECTION**

#### **137-47-0200 Methods of Source Selection**

Except as permitted in these Rules, the District must award a Public Contract for Goods and 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;
- (8) Cooperative Procurement pursuant to ORS 279A.200.

#### **137-47-0255 Competitive Sealed Bidding; One Step Solicitations**

(1) Generally. The District may procure Goods and Services by Competitive Sealed Bidding (or multistep competitive sealed bidding) as set forth in ORS 279B.055. An Invitation to Bid is used to initiate a Competitive Sealed Bidding Solicitation and must contain the information required by ORS 279B.055(2) and by Section (2) of this Rule. The District must provide public notice of the Competitive Sealed Bidding Solicitation as set forth in 137-47-0300.

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

(a) General Information.

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

- (i) The time, date and location of any pre-Offer conference;
- (ii) Whether attendance at the conference will be mandatory or voluntary; and
- (iii) A provision that provides that statements made by 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 137-47-0330 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);

(G) How the District will notify Bidders of Addenda, and how the District will make Addenda available (See 137-47-0430); and

(H) The requirement, if applicable, for the awarded Bidder to obtain or subcontract labor, materials, or labor and materials from a supplier registered as an Emerging Small Business.

(b) District Need. The character of the Goods and 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); and

(C) If the District intends to award Contracts to more than one Bidder pursuant to 137-47-0600(4)(d), the District must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. This may be left to the District's discretion at the time of the Award, provided it is so described in the Solicitation.

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

(A) Preference for Oregon Goods and Services, pursuant to ORS 279A.120 and 137-46-0300 and 137-46-0310; and

(B) Preference for recycled materials, pursuant to ORS 279A.125 and 137-46-0320 through 137-46-0324.

(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 and Services without prior Written approval from the District.

#### **137-47-0256 Competitive Sealed Bidding; Multistep Solicitations**

(1) Generally. The District may procure Goods or Services by using multistep competitive sealed Bids pursuant to ORS 279.055(12).

(2) Phased Process. Multistep bidding is a phased process that seeks necessary information or unpriced technical Bids in the initial phase and regular competitive sealed bidding, inviting Bidders who submitted technically eligible Bids in the initial phase to submit competitive sealed price Bids on the technical Bids in the final phase. The Contract shall be Awarded to the lowest Responsible Bidder. If time is a factor, the District may require Bidders to submit a separate sealed price Bid during the initial phase to be opened after the technical evaluation.

(3) Public Notice. Whenever multistep sealed Bids are used, public notice for the first phase shall be given in accordance with 137-047-0300. Public notice is not required for the subsequent phases. However, the District shall give notice of subsequent phases to all Bidders and inform Bidders of the right to protest Addenda issued after initial Closing pursuant to 137-047-0430 and inform Bidders excluded from the subsequent phases of the right, if any, to protest exclusion pursuant to 137-047-0720.

(4) Procedures Generally. In addition to the procedures set forth in 137-047-0300 through 137-047-0490, the District shall employ the procedures set forth in this rule for multistep bidding:

(a) Solicitation Protest. Prior to the Closing of phase one, the District shall provide an opportunity to protest the solicitation and under ORS 279B.405 and 137-047-0730.

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(b) Addenda Protest. The District may, provide an opportunity to protest any Addenda issued during phase two pursuant to 137-047-0430(3)(b).

(c) Exclusion Protest. The District may, but is not required to provide an opportunity for a Bidder to protest exclusion from the second round of multistep sealed Bids as set forth in 137-047-0720.

(d) Administrative Remedy. Proposers may submit a protest to any Addenda or to any action by the District that has the effect of excluding the Proposer from the second phase of multistep 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 shall provide an opportunity to protest its intent to Award a Contract pursuant to ORS 279B.410 and 137-047-0740. An Affected Bidder may protest, for any of the bases set forth in 137-047-0720(2), its exclusion from the second phase of a multistep sealed Bid, or an Addendum issued following initial Closing, if the A District did not previously provide Bidders the opportunity to protest such exclusion or Addendum.

(5) Procedure for Phase One of Multistep Sealed Bids.

(a) Form. Multistep sealed bidding shall be initiated by the issuance of an Invitation to Bid in the form and manner required for competitive sealed Bids except as hereinafter provided. In addition to the requirements set forth in 137-047-0255(2), the multistep Invitation to Bid shall state:

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

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

(C) That the solicitation is a multistep sealed Bid Procurement, and priced Bids will be considered only in the second phase and only from those Bidders whose un-priced technical Bids are found eligible in the first phase;

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

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

(F) That the Goods or Services being procured shall be furnished generally in accordance with the Bidder's technical Bid as found to be finally eligible and shall meet the requirements of the Invitation to Bid.

(G) Whether Bidders excluded from subsequent phases have a right to protest the exclusion before the notice of intent to Award. Such information can be given or changed by Addenda.

(b) Addenda to the Invitation to Bid. After receipt of un-priced technical Bids, Addenda to the Invitation to Bid shall be distributed only to Bidders who submitted un-priced technical Bids.

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

(d) Evaluation of Un-Priced Technical Bids. Un-priced technical Bids submitted by Bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation to Bid. Un-priced technical Bids shall be categorized as:

(A) Eligible;

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

(C) Ineligible. The District shall record in writing the basis for determining a Bid ineligible and make it part of the Procurement file. The District may initiate phase two of the procedure if, in the District's opinion, there are sufficient eligible un-priced technical Bids to assure effective price competition in the second phase without technical discussions. If the District finds that such is not the case, the District may issue an Addendum to the Invitation to Bid or engage in technical discussions as set forth in subsection (5)(e) of this rule.

(e) Discussion of Un-priced Technical Bids. The District may seek clarification of a technical Bid by any eligible, or potentially eligible Bidder. During the course of such discussions, the District shall not disclose any information derived from one un-priced technical Bid to any other Bidder. Once discussions are begun, any Bidder who has not been notified that its Bid has been finally found ineligible may submit supplemental information amending its technical Bid at any time until the Closing of the final step established by the District. Such submission may be made at the request of the District or upon the Bidder's own initiative.

(f) Notice of Ineligible Un-priced Technical Bid. When the District determines a Bidder's un-priced technical Bid to be ineligible, such Bidder shall not be afforded an additional opportunity to supplement its technical Bids.

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

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

(B) After any discussions have commenced under subsection(5)(e);

(C) When responding to any Addenda of the Invitation to Bid; or

(D) In accord with 137-47-0470.

(6) Procedure for Phase Two of Multistep Sealed Bids.

(a) Initiation. Upon the completion of phase one, the Contracting Agency shall either:

(A) Open price Bids submitted in phase one (if price Bids were required to be submitted) from Bidders whose un-priced technical Bids were found to be eligible; or

(B) If price Bids have not been submitted, technical discussions have been held, or Addenda to the Invitation to Bid have been issued, invite each eligible Bidder to submit a price Bid.

(b) Conduct. Phase Two shall be conducted as any other competitive sealed Bid Procurement except:

(A) As specifically set forth in this rule;

(B) No public notice need be given of this invitation to submit price Bids because such notice was previously given.

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**137-47-0260 Competitive Sealed Proposals; One Step Solicitations**

(1) Generally. The District may procure Goods and Services by Competitive Sealed Proposals as set forth in ORS 279B.060. A Request for Proposal is used to initiate a Competitive Sealed Proposals Solicitation and must contain the information required by ORS 279B.060(2) and by Section (2) of this Rule. The District must provide public notice of the Competitive Sealed Proposals as set forth in 137-47-0300.

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

(a) General Information.

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

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

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

(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); and

(F) How the District will notify Proposers of Addenda and how the District will make Addenda available. (See 137-47-0430).

(b) District Need. The character of the Goods and 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 must 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 137-47-0600(4)(d), the District must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will award. This may be left to the District's discretion at the time of the Award, provided it is so described in the Solicitation.

(d) Applicable Preferences described in ORS 279A.120, 279A.125(2) and 282.210:

(A) Preference for Oregon Goods and Services, pursuant to ORS 279A.120 and 137-46-0300 and 137-46-0310;

(B) Preference for recycled materials, pursuant to ORS 279A.125 and 137-46-0320 through 137-46-0324; and

(C) Performance with the State of public printing, binding and stationery Work, pursuant to ORS 282.210.

(e) Certification if requested. For The District subject to ORS 305.385, Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385.

(f) 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 and Services without prior Written approval from the District.

**137-47-0261 Competitive Sealed Proposals; Multistep Solicitations**

(1) Generally. The District may procure Goods and 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 137-47-0300 through 137-47-0490 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 Offers;

(c) Multistep Unpriced Proposals; and

(d) Multistep Revised Negotiations.

The District may also use a Request for Qualifications pursuant to 137-47-0550 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 Proposals" or "Multistep Sealed Proposals."

(2) Generally; Protests.

(a) Solicitation Protest. Prior to the initial Closing, the District must provide an opportunity to protest the Solicitation under ORS 279B.405 and 137-47-0730.

(b) Addenda Protest. Pursuant 137-47-0430(4), the District may provide an opportunity in accordance with 137-47-0730 to protest any Addenda issued pursuant to ORS 279B.060(6)(d), but the District is not required to provide this opportunity.

(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 137-47-0720.

(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 must be considered the Proposer's failure to pursue an administrative remedy made available to the Proposer by the District.

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(e) Award Protest. The District must provide an opportunity to protest its Intent to Award a Contract pursuant to ORS 279B.410 and 137-47-0740. An Affected Proposer may protest, for any of the bases set forth in 137-47-0720(2), its exclusion from the Competitive Range or any phase of a Technical Proposal, Multi-tiered Proposal 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.

(3) 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, the District must comply with the following procedures:

(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) Contesting 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 137-030-0720.

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

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

(i) An unsuccessful Proposer may protest the District's intent to award in accordance with 137-47-0740 and ORS 279B.410.

(ii) After the protest period provided in accordance with 137-47-0740 expires, or after the District has provided a final response to any protest, whichever date is later, the District must commence Negotiations in accordance with this Rule with 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 this Rule and following such Discussions and receipt and evaluation of revised Proposals, conduct Negotiations as set

forth in this Rule with the Proposers in the Competitive Range.

(4) Discussions and Revised Proposals for Best and Final Offers. If the District chooses to use the Competitive Range method and then enter into Discussions and receive Best and Final Offers, the District must proceed as follows:

(a) Initiating Discussions. If the District initiates any Discussion, 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 4, 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 Subsection (4)(c) that best and final Proposals will be due.

(A) In conducting Discussions, the District:

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

(ii) Must only disclose other eligible Proposer's Proposals or Discussions in accordance with 279B.060(6)(a)(ii) or (iii);

(iii) May adjust the evaluation of a Proposal as a result of a Discussion under this Section. The conditions, terms, or price of the Proposal may be altered or otherwise changed during the course of the Discussions provided the changes are within the scope of the 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 this Rule to the eligible Proposers requesting best and final Offers.

(c) Best and Final Offers. The District must establish a common date and time by which Proposers must submit best and final Offers. Best and final Offers must 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 and Negotiations or change the District's requirements and require another submission of best



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and final Offers. Otherwise, no Discussion of or changes in the best and final Offers may be allowed prior to award. Proposers must 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 the final Offer. The District must evaluate Offers as modified by the best and final Offer. The District must conduct evaluations conducted as described in 137-47-0600. The District must not modify evaluation factors or their relative importance after the date and time that best and final Offers are due.

#### **(5) Multistep Unpriced Proposals**

(a) Process. The District may procure Goods and Services by using Multistep Unpriced Proposals pursuant ORS 279.060(6)(b)(G). The Multistep Unpriced Proposals process is a phased Procurement Process that seeks necessary information or unpriced technical submittals in Phase One and regular Competitive Sealed Proposals, inviting Proposers who submitted technically qualified submittals in Phase One, to submit Competitive Sealed Price Proposals on the technical Proposals in Phase Two. Any Contract must be awarded to the Responsible Proposer, or in the case of multiple awards, the Responsible Proposers pursuant to ORS 279B.060(10), submitting the most Advantageous Proposal in accordance with the terms of the Solicitation Document applicable to Phase Two. A "Phase" may include one or more "steps" as referenced in the Code. 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 unpriced technical submittals. The District must comply with the following procedures for this type of Solicitation:

#### **(b) Procedure for Phase One of Multistep Unpriced Technical Proposals.**

(A) Public Notice. Whenever Multistep Unpriced Proposals are used, the District must provide Public Notice of the Solicitation as set forth in 137-47-0305. 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 Phase Two. However, the District must give notice to all Proposers of subsequent steps in Phase One and Phase Two, inform Proposers of the right to protest Addenda issued after the initial Closing pursuant to 137-47-0430, and further inform Proposers excluded from subsequent Steps or Phase of the right, if any, to protest exclusion pursuant to 137-47-0720. If the District elects to provide a protest period during this Procurement Process for Addenda issued after the initial Closing pursuant to 137-47-0430, then the District must give notice to the Proposers of this right to protest such Addenda.

(B) The Form of the Request for Proposals. Multistep Unpriced Proposals must be initiated by the issuance of a Request for Proposal in the form and manner required for Competitive Sealed Proposals in accordance with 137-47-0260, except as provided in this Rule. In addition to the requirements set forth in 137-47-0260(2), this Request for Proposal must state:

(i) That unpriced technical submittals are requested;

(ii) Whether price Proposals are to be submitted at the same time as unpriced technical submittals; if they are, that such price Proposals must be submitted in a separate sealed envelope;

(iii) That the Solicitation is a Technical Proposal Procurement, and priced Proposals will be considered only in Phase Two and only from those Proposers whose unpriced technical submittals are found acceptable in Phase One;

(iv) The criteria to be used in the evaluation of unpriced technical 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 unpriced technical submittals;

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

(vii) Whether Proposers excluded from subsequent steps or Phase Two have a right to protest the exclusion. Such information must be given in the Solicitation or changed by Addenda; and

(viii) 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 unpriced technical submittals.

(C) Addenda to the Request for Proposal. After receipt of unpriced technical in Phase One, Addenda to the Request for Proposal must be distributed only to those Proposers who submitted unpriced technical submittals.

(D) Receipt and Handling of Un-priced Technical Proposals. The District is not required to publicly open unpriced technical submittals.

(E) Evaluation of Un-Priced Technical Proposals. The unpriced technical submittals submitted by Proposers must be evaluated solely in accordance with the criteria set forth in the Request for Proposals. The unpriced technical submittals must be categorized as:

(i) Qualified;

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

(iii) Unqualified. The District must record in Writing the basis for determining a Proposal unqualified and make it part of the Procurement File in accordance with 137-46-0355. The District may initiate Phase Two of the procedure if, in the District's opinion, there are sufficient qualified unpriced technical submittals to assure effective price competition in Phase Two without technical Discussions. If the District finds that such is not the case, the District may issue an Addendum to the Request for Proposals or engage in Discussions as set forth in this Rule.

(F) Discussion of Unpriced Technical Submittals. The District may seek clarification of any technical Proposal of any Proposer who submits a qualified, or potentially qualified unpriced technical submittal. During the course of such Discussions, the District must not disclose any information derived from one unpriced technical submittal to any other Proposer. Once Discussions begin, any Proposer may submit

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supplemental information amending the unpriced technical submittal at any time until the Closing of Phase Two set by the District. A submission may be in response to a request of the District or be initiated by the Proposer.

(G) Notice of Unqualified Unpriced Technical Submittals. When the District determines a Proposer's unpriced technical submittal to be unqualified, such Proposer must not be afforded an additional opportunity to supplement its unpriced technical submittal.

(H) Mistakes During Multistep Sealed Proposals. Mistakes may be corrected or Proposals may be withdrawn during Phase One:

- (i) Before unpriced technical submittals are considered;
- (ii) After any Discussions have commenced under this Rule;
- (iii) When responding to any Addenda of the Request for Proposals; or

(I) In accordance with 137-47-0470.

(c) Procedure for Phase Two.

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

(i) Open price Proposals submitted in Step One (if price Proposals were required to be submitted) from Proposers whose unpriced technical submittals were found to be qualified; or

(ii) If price Proposals have not been submitted, Discussions have been held, or Addenda to the Request for Proposals have been issued, invite each qualified Proposer to submit a price Proposal.

(B) Conduct. Phase Two must be conducted as any other Competitive Sealed Proposals Solicitation pursuant to 137-47-0260, except:

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

(6) Multistep Revised Negotiations.

(a) Process. Multistep Negotiations means a process that begins with the standard Solicitation procedures for an RFP and may include successive steps of Proposals achieved through Negotiations to gain the best and final Proposal for purposes of Award. These Negotiations may concern the price, Specifications, and final terms and conditions, separately or in any combination thereof. The District must treat all Proposers fairly. Before the start of each step of Negotiations, the District must disclose the parameters of that step of Negotiations. At that time, the District may revise the Solicitation's Specifications, terms and conditions, evaluation criteria and weight, and pricing structure in order to best meet the State's interests (Revisions). At each successive step, Proposers will have the option of dropping out of the process or continuing with the process. At each successive round, the District may disregard its scoring of prior Proposals and commence new scoring for the new Proposals. The District may eliminate any Proposal after a step because the Proposal did not meet a minimum score, or the Proposal was not susceptible to award, and then proceed with a second step that requires additional Proposals based on the Revision(s). If any Revision is made by the District in any subsequent step, the

District reserves the right, in its sole discretion, to permit any Proposer whose Proposal was previously eliminated to submit a new Proposal, if the reason(s) for the elimination of the prior Proposal by that Proposer no longer applies. For each Solicitation, on a case-by-case basis, the District may determine whether prequalification of suppliers is needed. If prequalification is used, the District must prequalify suppliers and provide an appeal process in accordance with ORS 279B.120 and related rules.

(b) Negotiations. The District may negotiate serially with the highest-ranked eligible

Proposers or simultaneously with all eligible Proposers as follows:

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

(B) After an initial determination of the Competitive Range in accordance with this Rule; or

(C) After conclusion of Discussions with all eligible Proposers and evaluation of revised Proposals.

(c) Conducting Negotiations.

(d) Scope. The District may negotiate:

(A) The statement of Work;

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

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

(d) 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.

(e) Continuing Serial Negotiations. If the District is conducting serial Negotiations and the District terminates Negotiations with a Proposer in accordance with this Rule, 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 determined either:

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

(B) Has completed one step 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.

(f) Competitive Simultaneous Negotiations. If the District chooses to conduct competitive Negotiations, the District may

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negotiate simultaneously with competing Proposers. The District:

- (A) Must treat all Proposers fairly and must not favor any Proposer over another;
- (B) Must only disclose other Proposer's Proposals or the substance of Negotiations with other Proposers if the District notifies all of the Proposers with whom the District will engage in Negotiations before engaging in Negotiations with any Proposer; and
- (C) Any oral modification of a Proposal resulting from Negotiations under this Section must be reduced to Writing by the Proposer.

#### **137-47-0265 Small Procurements**

- (1) Generally. For Procurements of Goods and Services less than or equal to \$5,000 the District may award a Contract as a Small Procurement in any manner deemed practical or convenient by the District, including by direct selection or award, and in accordance with these Rules. Informal telephone quotes are suggested.
- (2) Amendments. The District may amend a Contract awarded as a Small Procurement in accordance 137-46-0560, but the cumulative Amendments must not increase the total Contract Price to greater than \$6,000.
- (3) No Fragmentation. A Procurement may not be artificially divided or fragmented so as to constitute a Small Procurement, pursuant to ORS 279B.065(2).

#### **137-47-0270 Intermediate Procurements**

- (1) Generally. For Procurements of Goods and Services greater than \$5000 and less than or equal to \$50,000, the District may award a Contract as an Intermediate Procurement:
- (2) Written Solicitations. The District shall seek at least three informally solicited written quotes, bids or proposals from prospective contractors. The District shall keep a written record of the sources of the quotes, bids or proposals received. If three quotes, bids or proposals are not reasonably available, fewer will suffice, but the District shall make a written record of the effort made to obtain the quotes, bids or proposals.
- (3) 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.
- (4) Amendments. The District may amend a Contract awarded as an Intermediate Procurement in accordance with 137-46-0560 but the cumulative amendments shall not increase the total Contract Price to a sum that is greater than twenty-five percent (25%) of the original Contract price.
- (5) No Fragmentation. A Procurement may not be artificially divided or fragmented so as to constitute an Intermediate Procurement, pursuant to ORS 279B.070(2).

#### **137-47-0275 Sole Source Procurements**

- (1) The Superintendent is delegated the authority to determine whether goods and service or a class of goods and services are available from only one source pursuant to ORS 279B.075.

(2) Public Notice. If, but for the Contracting Agency's determination that it may enter into a Contract as a sole-source, a Contracting Agency would be required to select a Contractor using source selection methods set forth in either ORS 279B.055 or ORS 279B.060, a Contracting Agency shall give public notice of the Contract Review Authority'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 OAR 137-047-0300. The public notice shall describe the Goods or Services to be acquired by a sole-source Procurement, identify the prospective Contractor and include the date, time and place that protests are due. The Contracting Agency shall give such public notice at least fourteen (14) Days before Award of the Contract.

#### **137-47-0280 Emergency Procurements**

- (1) The Superintendent may award a Public Contract as an Emergency Procurement pursuant to the requirements of ORS 279B.080. The Superintendent has delegated authority to enter into an Emergency Contract pursuant to 137-46-0170. When an Emergency Procurement is authorized, the Procurement must 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 requires 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 must:
  - (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; and
  - (b) Encourage competition that is practicable under the circumstances; and
  - (c) Record the measures taken under Subsection (3)(b) 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 head of the District, or person designated under ORS 279A.075, must declare the existence of the emergency, as required by Subsection (3)(a), which must authorize the District to enter into an Emergency Contract.
- (5) Any Contract awarded under this Rule must be awarded within 60 days following the declaration of the emergency unless an extension has been granted by the head of the District, or Person designated.

#### **Special Procurements (Exemptions)**

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#### **137-47-0285 Special Procurements; Purpose and Application**

The District may award a Public Contract as a Special Procurement pursuant to the requirements of ORS 279B.085, which permits class special procurements and contract specific special procurements for the acquisition of goods or services. Such procurements allow the District to enter into a single contract or a series of contracts over time without using competitive sealed bidding or competitive sealed proposals or other competitive procedures as otherwise required by these rules.

#### **137-47-0287 Special Procurements; Request Procedures**

(1) To seek approval of an additional class special procurement, the Superintendent shall submit a written request to the Board as provided in ORS 279B.085(2).

(2) The Board shall review and may approve a request for a class special procurement pursuant to the criteria set forth in ORS 279B.085(3).

(3) Notice of the request and approval of a class special procurement shall be provided as set forth in 137-047-0285. Once a class special procurement has been approved by the Board, no further notice is required to award contracts pursuant to such notice.

#### **137-47-0288 Special Procurements; by Rule**

The Board declares the following contracts listed in this chapter as classes of special procurements for which contracts may be awarded without using competitive sealed bidding or competitive sealed proposals or other competitive procedures as otherwise required by these rules. Unless a process is particularly specified in these Rules, selection procedures for such class special procurements shall be as the Superintendent determines are in the best interests of the District. The Superintendent hereby grants approval of these Special Procurements:

##### **(1) Renegotiations of Existing Contracts with Incumbent Contractors.**

(a) The District may renegotiate and amend existing Contracts with incumbent Contractors, and then only if it is in the best interest of the District.

(b) Process and Criteria. The District may renegotiate various items of the Contract, including but not limited to: price, term, delivery and shipping, order size, item substitution, warranties, discounts, on-line ordering systems, price adjustments, product availability, product quality, and reporting requirements. The District must meet the following conditions in its Renegotiations with incumbent Contractors:

(i) Favorable Result. The District must determine that, with all things considered, the renegotiated Contract is at least as favorable to the District as the Original Contract and document this in the Procurement File. For example, the District and the Contractor may adjust terms and conditions within the Original Contract to meet different needs;

(ii) Within the Scope. The Goods and Services provided under the renegotiated Contract must be reasonably related to the Original Contract's Solicitation. For example, the District

may accept functionally equivalent substitutes for any Goods and Services in the Original Contract's Solicitation.

(iii) Optional Term or Condition. If a Contractor offered to the District during the original Solicitation a term or condition that was rejected at that time, (for the purpose of this subsection only, Rejected Term or Condition), the District may not renegotiate for a lower price based on this Rejected Term or Condition as a mandatory term or condition in the renegotiated Contract. If, however, a Contractor offers a lower price pursuant to a Rejected Term or Condition without additional consideration from the District and as only an option to the District, then the District may accept the option of a lower price under the Rejected Term or Condition. For example, if the District initially rejected a Contractor's proposed Condition that the price required a minimum order, any renegotiated Contract may not mandate this Condition; but the District may agree to the option to order lesser amounts or receive a reduced price based upon a minimum order; and

##### **(2) Brand Names or Products, "or Equal".**

(a) Procurement of Brand Name 'or Equal' Products means the Procurement of a product after specifying the registered Brand name of the product or requiring the same Specifications of the Brand Name product.

(b) Requirements:

(i) 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 (A) and (B) of this Rule.

(A) "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.

(B) 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 1) A brief description of the Solicitation(s) to be covered including volume of contemplated future purchases; (2) The brand name, mark, or product to be specified; and (3) The reasons the District is seeking this procurement method, which must include at least one of the following findings in the Procurement File: (i) 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 (ii) Specification of the brand name, mark or product would result in substantial cost savings to the District; or (iii) Efficient utilization of existing equipment or supplies requires the acquisition of compatible equipment or supplies.

(3) **Copyrighted Materials.** The District may, regardless of dollar value and without competitive Bidding, purchase copyrighted materials. Examples of copyrighted materials covered by this exemption may include, but are not necessarily limited to, new adopted textbooks, workbooks, curriculum kits, reference materials, books, periodicals, audio and visual media, and non-mass-marketed software.

(4) **Food Contracts.**

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(a) Intent. The intent of this Rule is to provide a method for the District to procure food products, which are available for a limited period of time at "lower than normal" prices (also referred to as "spot buys").

(b) The District may, regardless of dollar value and without competitive Bidding, purchase "spot buys".

(c) Conditions. The District may procure an unlimited dollar value of food using a competitive bid or quote process when all of the following conditions are present:

(i) A non-exclusive Mandatory Use Contract or regularly scheduled bid process already exists for the item being purchased;

(ii) The proposed unit price of the item(s) to be purchased is significantly less than a comparable item's price on an existing Mandatory Use Contract or recent bid (as described below) and the amount saved exceeds any additional administrative costs incurred to purchase using this Special Procurement;

(iii) The product being purchased has limited availability (i.e., the product may no longer be available upon completion of normal bid processes);

(iv) Any Mandatory Use Contract currently in place for the item being purchased contain clauses allowing for the use of this Special Procurement; and

(v) The purchase does not jeopardize fulfillment of a guaranteed minimum volume under an existing Mandatory Use Contract.

(e) Documentation. Purchases may only be made under this Special Procurement after the District documents the following: 1) the District's attempt and method to obtain Quotes from at least three sources; 2) the Written Quote or Bid, if obtained; 3) item Specifications; 4) quantity; 5) unit pricing; 6) delivery; and 7) other pertinent information. Contract or bid pricing used for comparison must be representative of current pricing available and must have been obtained or confirmed no more than six (6) months prior to the current purchase. When practical, Written Quotes are recommended.

#### **(5) Product Prequalification.**

(a) When specific design or performance Specifications must be met or such Specifications are impractical to create or reproduce for a type of product to be purchased, the District may specify a list of approved or qualified products by reference to the prequalified product of particular manufacturers or sellers in accordance with the following product prequalification procedure:

(i) Reasonable efforts have been made to notify all known manufacturers and vendors of competing products of the District's intent to compile a list of prequalified products and of the opportunity to submit applications for including their product on the list of prequalified products. Notice may be provided by advertisement in a trade journal of statewide distribution, when possible; or, instead of advertising, the District may provide direct written notice to manufacturers and vendors appearing on the appropriate list maintained by the District.

(ii) Manufacturer and vendor applications to include products on the prequalified list are accepted up to 15 calendar Days

(unless otherwise specified in the advertisement or the District's written notice) prior to the initial advertisement for Bids or Proposals, on the type of product to be purchased. If a vendor application for including a product in a list of prequalified products is denied, the District must promptly provide the applicant with written notice of the denial. The applicant may appeal to the designated District authority, requesting review and reconsideration of the denial.

(c) The Superintendent may adopt alternate prequalification rules or policies that parallel or exceed the requirements of this rule.

#### **(6) Requirements Contracts.**

(a) Requirements contracts may be established for the purposes of minimizing paperwork, achieving continuity of product, securing a source of supply, reducing inventory, combining District requirements for volume discounts, creating standardization among agencies, and reducing lead time for ordering. The Superintendent may enter into Requirements contracts to purchase goods or services for an anticipated need at a predetermined price, but the contract must be let by a competitive procurement process pursuant to the requirements of ORS 279.005 to 279.111 and these rules.

(c) The Superintendent may purchase the goods and services from a contractor awarded a Requirements contract without first undertaking additional competitive solicitation.

(d) Pursuant to ORS 279.015(1)(g)(A), The Superintendent may use the requirements contracts entered into by another Oregon public agency when:

(i) The original contract was let pursuant to the requirements of ORS Chapter 279;

(ii) The original contract allows other public agencies to use the contract; and

(iii) The original public contracting agency concurs.

(e) The term of the contract including renewals, may not exceed five years unless otherwise exempted pursuant to ORS 279.015.

**(7) Used Personal Property — Purchase.** Subject to the provisions of this rule, the Superintendent may purchase used property or equipment up to \$ 25,000. "Used personal property or equipment" is property or equipment that has been placed in its intended use by a previous owner or user for a time recognized in the relevant trade or industry as qualifying the personal property or equipment as "used," at the time of the District purchase. "Used personal property or equipment" generally does not include property or equipment if the District was the previous user, whether under a lease; as part of a demonstration, trial or pilot project; or under a similar arrangement.

#### **(8) Used Personal Property — Sale.**

(a) The Superintendent may sell used property or equipment by liquidation without obtaining competitive Bids or quotes, if a liquidation sale would bring in greater revenue to the District than would be gained through Bids. As used in this section, "Surplus Personal Property or Equipment" is property or equipment that has been determined to be no longer useful to the District. It may be property or equipment that the District

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has used for some time and that is fully used up or obsolete. It may be property or equipment that is the natural excess or leftover from a project, such as cable, wire, carpet, etc., that has been cut or partially used in some manner so that it cannot be returned to the supplier for a refund.

(b) For sales of surplus property valued at more than \$25,000 per item or lot, the Superintendent must attempt to obtain at least three competitive quotes. The Superintendent will keep a written record of the source and number of quotes received. If three quotes are not available, a written record must be made of the attempt to obtain quotes.

#### **(9) Reverse Auctions.**

(a) A Reverse Auction means a process for the purchase of Goods and Services from the lowest Bidder. The District must conduct Reverse Auctions by first publishing a Solicitation that describes its requirements, Contract terms and conditions. Then, the District must solicit online Bids from all interested Bidders through an Internet-based program. The Solicitation must set forth a start and end time for Bids and specify the following type of information to be disclosed to Bidders during the Reverse Auction:

(A) The prices of the other Bidders or the price of the most competitive Bidder;

(B) The rank of each Bidder (e.g., (i) "winning" or "not winning" or (ii) "1st, 2nd, or higher");

(C) The scores of the Bidders if the District chooses to use a scoring model that weighs non-price factors in addition to price; or

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

#### **(10) Telecommunications Services.**

(a) This rule is intended to allow the District to secure the most competitive, cost-effective telecommunications services of the quality needed to meet all service performance requirements while minimizing administrative and service delivery costs.

(c) In determining the appropriate procurement method for telecommunications services, the District must (a) comply

with the requirements of ORS 291.038 and (b) determine whether competition exists. The District may consider the following factors:

(i) The extent to which alternative providers exist in the relevant geographic and service market. The relevant market will vary with the geographic area and from service category to service category, depending on changes in the regulatory environment and competitive marketplace. Thus, the relevant market will depend on the facts and circumstances of each case. For example, an alternative local access service or private line provider might offer services in Portland, but not in Medford or the rest of the state.

(ii) The extent to which alternative services offered are comparable or substitutable in technology, service provided, and performance. (For example, if the District requires digital services, analog services are not comparable or substitutable, or if the District requires fiber optic technology, then copper, microwave, or satellite transmission technology may not be comparable or substitutable).

(iii) The extent to which alternative providers can respond to the District's interests in consistency and continuity of services throughout its service area, volume discounts, equitable service for all users, centralized management, and limiting District liability. For example, to be considered as the state's telephone long distance provider, any long distance service vendor must be able to meet, support, and interface with the state's centralized automated billing requirements. The District must document for the record its findings on these factors or any other factors used in determining whether competition exists. In developing its findings, the District may solicit the information either through informal telephone or written contacts or through a formal request for information.

(d) Upon determining that competition does not exist for the relevant service and geographical area, the District may proceed to secure the service on a sole source basis, as described [cite to sole source rule], and follow all applicable rules and procedures.

(11) **Fuel and Asphalt Contracts.** Regardless of dollar amount, the District is exempt from competitive Bidding requirements for the purchase of gasoline, diesel fuel, heating oil, lubricants, and asphaltic products if the District seeks competitive quotes from at least three vendors and makes its purchase from the least expensive source. Written records for the quotations and purchases made will be kept by the Purchasing Department as public records.

#### **(12) Hazardous Material Abatement.**

(a) The District may enter into public contracts without competitive Bidding, regardless of dollar amount, when ordered to clean up oil or hazardous waste pursuant to the authority granted the Oregon Department of Environmental Quality ("DEQ") under ORS Chapter 466, especially ORS 466.605 through 466.680. In exercising its authority under this exemption:

(a) The District must to the extent reasonable under the circumstances encourage competition by attempting to obtain

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informal quotes from potential suppliers of goods and services.

(b) The department responsible for managing or coordinating the cleanup must submit a written description of the circumstances that require the cleanup and a copy of the DEQ order for the cleanup to the District Purchasing Department along with a requisition authorizing the contract.

(c) The District Purchasing Department must record the measures taken under subsection (a) of this section to encourage competition, the amount of the quotes or Proposals obtained, if any, and the reason for selecting the contractor to whom award is made.

(b) The District may not contract pursuant to this exemption in the absence of an order from the DEQ to clean up a site that includes a time limit that would not allow the District to hire a contractor under normal competitive Bidding procedures. Goods and services to perform other hazardous material removal or cleanup will be purchased in accordance with normal competitive Bidding procedures as described in these rules and policies.

(13) **Insurance.** The District may purchase liability and other insurance regardless of dollar amount by selecting either a vendor directly or by appointing an agent of record.

(14) **Office Copier Purchases.**

(a) The District may enter into multiple requirements contracts for the purchase, rental, or lease of office copying equipment. Except for this multiple award exemption, such contracts must otherwise conform to the requirements of these rules.

(b) In exercising this exemption, the District must fully consider the operating capabilities, limitations, and cost of each brand or model and select the brand that will produce the best combination of performance and cost per copy for each application.

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

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

(a) Generally. The District must use a competitive procurement method, e.g., an Invitation to Bid or Request for Proposals, to obtain written Bids or Proposals to provide commercial radio and television services for any student activity or District program, including athletics, if the value of the services totals \$75,000 or more, regardless of whether the District is paying or receiving revenue from such contractors.

(b) Specific and Ancillary Services. The Solicitation Document used to invite Bids or Proposals to furnish radio or television services to District programs must include the minimum Bidder or qualifications and service Specifications and will conform to the other requirements of the "Request for Proposal" rule herein. The Solicitation Document may invite interested Bidders or Proposers to offer other ancillary services. Each ancillary service, if offered, must be accompanied by a dollar value that reflects the current purchase price for the service and a description of the service and its use and application.

(c) Term of Contract. A contract for radio or television services may be awarded for up to five years.

(17) **Donated Materials or Services.** The District may authorize a person to perform services regardless of dollar amount, if:

(a) The person has agreed to donate all or a significant portion of the materials or services necessary to construct the Public Improvement or perform the service; and

(b) The person enters into a license or agreement with the District whereby the person agrees to comply with the public contract requirements applicable to the particular project and any requirements that the District deems necessary or beneficial to protect the District.

(18) **Concession Contracts.** The District may enter into concession or franchise contracts without Competitive Bidding regardless of dollar amount. For the purposes of this section a "concession contract" or "franchise" means that the District authorizes the use of its property or facilities for a private commercial purpose in return for fee or a percentage of revenue from the operation.

(19) **Manufacturer Direct Supplies.** The District may purchase goods directly from a manufacturer without competitive bidding if a large volume purchase is required and the cost from the manufacturer is the same or less than the cost the manufacturer charges to its distributor(s). Procurements of this type are made on a contract-by-contract basis and are not requirements contracts.

(20) **Purchases through Federal Programs.** The District may purchase certain authorized Goods and Services through General Service Administration (GSA) federal programs or federal Contracts (Federal Programs) without Competitive Sealed Bidding, Competitive Sealed Proposals or other competition required under ORS 279B.050 to 279B.085, provided that the District has federal authorization to purchase through the Federal Program and follows the procedures set forth in this rule.

(21) **Brand Name Specifications Authorized.** The District may specify a product by brand name or make or the products of a particular manufacturer or seller, when procuring equipment and supplies used in athletic programs or physical education ("P.E.") programs. Pursuant to ORS 279B.215(2) and this Rule the School Board authorizes the use of brand name specifications in the following cases:

(a) Athletic and Physical Education Equipment. The procurement shall otherwise comply with the requirements of Division 47.

(b) When several vendors can bid on a brand specification, then brand name specification is authorized, if only one vendor can bid on a brand then two brand names are required.

## **PROCUREMENT PROCESS**

### **137-47-0300 Public Notice of Solicitation Documents**

(1) Notice of Solicitation Documents; Fee. The District shall provide public notice of every Solicitation Document in

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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. A District shall advertise every notice of a Solicitation Document as follows:

(a) The District shall publish the advertisement for Offers in accordance with the requirements of ORS 279B.055(4) and 279B.060(4); or

(b) A 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) if, by rule or order, the District's Contract Review Authority has authorized the District to publish notice of Solicitation Documents on the District's Electronic Procurement System.

(3) Content of Advertisement. All advertisements for Offers shall set forth:

(a) Where, when, how, and for how long the Solicitation Document may be obtained;

(b) A general description of the Goods or Services to be acquired;

(c) The interval between the first date of notice of the Solicitation Document given in accordance with subsection 2(a) or (b) above and Closing, which shall not be less than ten (10) Days for an Invitation to Bid and twenty (20) Days for a Request for Proposals, unless the District determines that a shorter interval is in the public's interest, and that a shorter interval will not substantially affect competition. However, in no event shall the interval between the first date of notice of the Solicitation Document given in accordance with subsection 2(a) or (b) above and Closing be less than five (5) Days as set forth in ORS 279B.055(4)(f). The District shall document the specific reasons for the shorter public notice period in the Procurement file;

(d) The date that Persons must file applications for prequalification if prequalification is a requirement and the class of Goods or Services is one for which Persons must be prequalified;

(e) The office where Contract terms, conditions and Specifications may be reviewed;

(f) The name, title and address of the individual authorized by the District to receive Offers;

(g) The scheduled Opening; and

(h) Any other information the District deems appropriate.

(4) Posting Advertisement for Offers. The District shall post a copy of each advertisement for Offers at the principal business office of the District. 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 shall provide potential Offerors notice of any Addenda to a Solicitation Document in accordance with 137-47-0430.

#### **137-47-0302 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 137-47-0255 through 137-47-0261.

#### **137-47-0310 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 must be held open by the Offeror for the District's acceptance for the period specified in 137-47-0480. 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 137-47-0261, a Proposer must not make its Offer contingent upon the District's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

(3) Offerors 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 137-47-0261, the Offerors 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.

#### **137-47-0320 Facsimile Bids and Proposals**

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

(a) To receive, identify, record, and safeguard facsimile Offers;



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(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 must promptly submit its complete original Signed Offer;

(e) The data and compatibility characteristics of the District's receiving facsimile machine as follows:

(A) Telephone number; and

(B) Compatibility characteristics, e.g. make and model number, receiving speed, communications protocol; and

(f) A provision that provides that the District is not responsible for any failure attributable to the transmission or receipt of the facsimile Offer including, but not limited to the following:

(A) Receipt of garbled or incomplete documents;

(B) Availability or condition of the receiving facsimile machine;

(C) Incompatibility between the sending and receiving facsimile machine;

(D) Delay in transmission or receipt of documents;

(E) Failure of the Offeror to properly identify the Offer documents;

(F) Illegibility of Offer documents; and

(G) Security and confidentiality of data.

**137-47-0330 E-Procurement**

(1) Electronic Procurement Authorized.

(a) The District may conduct all phases of a Procurement, including without limitation, the posting of Electronic Advertisements and the receipt of Electronic Offers, by electronic methods if and to the extent the District specifies in a Solicitation Document, a request for Quotes, or any other Writing that instructs Persons how to participate in the Procurement.

(b) The District must open an Electronic Offer in accordance with electronic security measures in effect at the District at the time of its receipt of the Electronic Offer. Unless the District provides procedures for the secure receipt of Electronic Offers, the Person submitting the Electronic Offer assumes the

risk of premature disclosure due to submission in unsealed form.

(c) The District's use of electronic Signatures must be consistent with applicable statutes and rules. The District must authorize, and may limit the use of electronic methods of conducting a Procurement based on the best interests of the District, as determined by the District.

(d) If the District determines that Bid or Proposal security is or will be required, the District should not authorize Electronic Offers unless the District has another method for receipt of such security.

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

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

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(A) Following receipt of the first Electronic Offer after the day and time the District first receives Electronic Offers, the District must post and update on a real time basis:

(i) The prices of the other Bidders or the price of the most competitive Bidder;

(ii) The rank of each Bidder (e.g., (i) “winning” or “not winning” or (ii) “1st, 2nd, or higher”); (iii) The scores of the Bidders if the District chooses to use a scoring model that weighs non-price factors in addition to price; or

(iv) Any combination of (i), (ii) and (iii) above. At any time before the date and time after which the District will no longer receive Electronic Offers, a Person may revise its Electronic Offer, except that a Person may not lower its price unless that price is below the then lowest Electronic Offer.

(B) A Person may not increase the price set forth in an Electronic Offer after the 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 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 137-47-0660, or may extend the date and time for receipt of Electronic Offers by providing notice of the extension immediately after the System becomes available.

(7) Reverse Auctions. The requirements of 137-47-0288(11) apply to Reverse Auctions. In the event of conflict or ambiguity, the more specific requirements of 137-47-0288(11) take precedence over the more general requirements of this Rule.

#### **BID AND PROPOSAL PREPARATION**

##### **137-47-0400 Offer Preparation**

(1) Instructions. Offerors must submit and Sign their Offers in accordance with the instructions set forth in the Solicitation Document. Offerors must initial and submit any corrections or erasures to their Offers prior to Opening in accordance with the requirements for submitting an Offer set forth in the Solicitation Document.

(2) Forms. Offerors must submit their Offer on the form(s) provided in the Solicitation Document, unless Offerors are otherwise instructed in the Solicitation Document.

(3) Documents. Offerors must provide the District with all documents and Descriptive Literature required by the Solicitation Document.

(4) Electronic Submissions. If the Solicitation Document permitted Electronic Offers under 137-47-0330, Offerors may submit their Offers electronically. The District must not consider Electronic Offers unless authorized by the Solicitation Document.

##### **137-47-0410 Offer Submission**

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

(2) Identification of Offers.

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

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

(3) Receipt of Offers. Offerors are responsible for ensuring the District receives their Offers at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

##### **137-47-0420 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 must be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference.

(4) Statements Not Binding. Statements made by the District’s representative at the pre-Offer conference do not change the Solicitation Document unless the District confirms such statements with a Written Addendum to the Solicitation Document.

(5) District Announcement. The District must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with 137-47-0255(2) or 137-47-0260(2).

##### **137-47-0430 Addenda to Solicitation Document**

(1) Issuance; Receipt. The District may change a Solicitation Document only by Written Addenda. An Offeror must provide Written acknowledgment of receipt of all issued Addenda with its Offer, unless the District otherwise specifies in the Addenda.

(2) Notice and Distribution. The District must notify prospective Offerors of Addenda in a manner intended to foster competition and to make prospective Offerors aware of the Addenda. The Solicitation Document must specify how the District will provide notice of Addenda and how the District will make the Addenda available before Closing, and at each

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subsequent step or Phase of evaluation if the District will engage in a Multistep Competitive Sealed Bidding process in accordance with 137-47-0256, or a Multi-tiered or Multistep Competitive Sealed Proposals process in accordance with 137-47-0261.

(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 must 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 step or Phase of competition under a Multistep Sealed Bidding or Multistep Sealed Proposals, issued in accordance with 137-47-0256 or 137-47-0261, 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 the Offerors to prepare for that step or Phase of competition. The District must document the factors it considered in making that determination, which may include, without limitation, the scope of the changes to the Solicitation Document, the location of the remaining eligible Proposers, or whether shortening the period between issuing an Addendum and the beginning of the next step or Phase of competition favors or disfavors any particular Proposer or Proposers.

(4) Request for Change or Protest. Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in 137-47-0730, 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 137-47-0730, 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 137-47-0730, then the District may only consider an Offerors request for change or protest to the Addendum, and the District must not consider a request for change or protest to matters not added or modified by the Addendum. Notwithstanding any provision of this Subsection (4) of this Rule, the District is not required to provide a protest period for Addenda issued after initial Closing during a or multistep Procurement Process conducted pursuant to ORS 279B.055 or ORS 279B.060 and their respective rules.

#### **137-47-0440 Pre-Closing Modification or Withdrawal of Offers**

(1) Modifications. An Offeror may modify its Offer in Writing prior to the Closing. An Offeror must prepare and submit any modification to its Offer to the District in accordance with 137-47-0400 and 137-47-0410, unless otherwise specified in the Solicitation Document. Any modification must include the Offerors statement that the

modification amends and supersedes the prior Offer. The Offeror must mark the submitted modification as follows:

(a) Bid (or Proposal) Modification; and

(b) Solicitation 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 Offerors 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 must mark the Written request to withdraw an Offer as follows:

(i) Bid (or Proposal) Withdrawal; and

(ii) Solicitation Document Number (or Other Identification as specified in the Solicitation Document).

(3) Documentation. The District must include all documents relating to the modification or withdrawal of Offers in the appropriate Procurement File in accordance with 137-46-0355.

#### **137-47-0450 Receipt, Opening, and Recording of Offers**

(1) Receipt. The District must electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The District must not open the Offer or modification, but must maintain it as confidential and secure until Opening. If the District inadvertently opens an Offer or a modification prior to the Opening, the District must return the Offer or modification to its secure and confidential state until Opening. The District must document the resealing for the Procurement File in accordance with 137-46-0355 (e.g., "District inadvertently opened the Offer due to improper identification of the Offer").

(2) Opening and Recording. The District must publicly open Offers including any modifications made to the Offer pursuant to 137-47-0440(1). In the case of Invitations to Bid, to the extent practicable, the District must read aloud the name of each Bidder, and such other information as the District considers appropriate. However, the District may withhold from disclosure information 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.

#### **137-47-0460 Late Offers, Late Withdrawals, and Late Modifications**

Any Offer received after Closing is late. An Offerors request for withdrawal or modification of an Offer received after Closing is late. The District must not consider late Offers,

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withdrawals or modifications except as permitted in 137-47-0470 or 137-47-0261.

#### **137-47-0470 Mistakes**

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

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

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

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

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

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

(b) The District may correct a clerical error if the error is evident on the face of the Offer, or other documents submitted with the Offer, and the Offeror confirms the District's correction in Writing. A clerical error is an Offerors 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 must 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 must determine whether the District will permit an Offeror to withdraw its Offer after Closing. These criteria also must apply to the question whether the District will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or Proposal security), or without liability to the District based on the difference between the amount of the Offerors Offer and the amount of the Contract actually awarded by the District, whether by Award to the next lowest Responsive and Responsible Bidder the most Advantageous Responsive and Responsible Proposer, or by resort to a new Solicitation.

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

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

#### **137-47-0480 Time for District Acceptance**

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

#### **137-47-0490 Extension of Time for Acceptance of Offer**

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

### **QUALIFICATIONS AND DUTIES**

#### **137-47-0500 Responsibility of Offerors**

(1) Determination. Before awarding a Contract, the District must determine that the Offeror submitting the lowest Bid or Proposal or most Advantageous Offer is Responsible. The District must use the standards set forth in ORS 279B.110 and 137-47-0640(1)(c)(F) to determine if an Offeror is Responsible. In the event the District determines an Offeror is not Responsible, it must prepare a Written determination of

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non- Responsibility as required by ORS 279B.110 and must reject the Offer.

(2) Independent Contractor Status, Tax Compliance, and Requirements to Transact Business in Oregon. For these responsibilities of Offerors, see 137-46-0330.

#### **137-47-0525 Qualified Products Lists**

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

#### **137-47-0550 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) Provide that the District may, at any time during the Solicitation process, reject any or all Proposals or cancel the Solicitation without liability if it is in the public interest to do so; and

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

#### **137-47-0575 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 their affiliate or affiliates having a Contract with a prospective Offeror to the prospective Offeror for purposes of Debarment where the impropriety occurred in connection with the Person's duty for or on behalf of, or with the knowledge, approval, or acquiescence of, the prospective Offeror.

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

### **OFFER EVALUATION AND AWARD**

#### **137-47-0600 Offer Evaluation and Award**

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

(a) Evaluation of Bids.

(A) Nonresident Bidders. In determining the lowest Responsive Bid, the District must apply the reciprocal preference set forth in ORS 279A.120(2)(b) and 137-46-0310 for nonresident Bidders.

(B) Public Printing. The District must, for the purpose of evaluating Bids, apply the public printing preference set forth in ORS 282.210 (printing shall be performed within the state).

(C) Award When Bids are Identical. If the District determines that one or more Bids are identical under 137-46-0300, the District must award a Contract in accordance with the procedures set forth in 137-46-0300.

(b) Evaluation of Proposals.

(A) Award When Proposals are Identical. If the District determines that one or more Proposals are identical under 137-

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46-0300, the District must award a Contract in accordance with the procedures set forth in 137-46-0300.

(B) Public Printing. The District must for the purpose of evaluating Proposals apply the public printing preference set forth in ORS 282.210 (printing shall be performed within the state).

(c) Recycled Materials. When procuring Goods, the District may give preference for Recycled Materials as set forth in ORS 279A.125 and 137-46-0322.

(2) Clarification of Bids. After the Bid Opening, the District may conduct Discussions with apparent Responsive Bidders for the purpose of clarification and to assure full understanding of the Bid. All Bids, at the District's sole discretion, needing clarification must be afforded such an opportunity. The District must document clarification of any Bidder's Bid in the Procurement File in accordance with 137-46-0355.

(3) Negotiations Prohibited.

(a) Bids . Except as permitted by Section 3(b), the District must not negotiate with any Bidder. After Award of the Contract, the District and Contractor may only modify the Contract in accordance with 137-46-0560.

(b) Requests for Proposals. The District may only conduct Discussions or negotiate with Proposers in accordance with ORS 279B.060(6)(b) and 137-47-0261. After Award of the Contract, the District and Contractor may only modify the Contract in accordance with 137-46-0560.

(4) Award.

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

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

(c) Multiple Awards; Bids.

(A) Notwithstanding 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. A multiple Award may be made if the Award to two or more Bidders is beneficial for adequate availability, delivery, service, competition, pricing, product capabilities, or other factors deemed significant by the District. Multiple Awards may not be allowed for user preference unrelated to utility or economy. A notice to prospective Bidders that multiple Contracts may be awarded for any Invitation to Bid must not preclude the District from awarding a single Contract for such Invitation to Bid.

(B) If an Invitation to Bid permits the Award of multiple Contracts, the District must specify in the Invitation to Bid the

criteria it will use to choose from the multiple Contracts when purchasing Goods and 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. A multiple Award may be made if the Award to two or more Proposers is beneficial for adequate availability, delivery, service, competition, pricing, product capabilities, or other factors deemed significant by the District. Multiple Awards may not be allowed for user preference unrelated to utility or economy. A notice to prospective Proposers that multiple Contracts may be awarded for any Request for Proposals must not preclude the District from awarding a single Contract for such Request for Proposals.

(B) If a Request for Proposals permits the Award of multiple Contracts, the District must specify in the Request for Proposals the criteria it will use to choose from the multiple Contracts when purchasing Goods and 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 no Offers if the evaluation shows an all or no Award to be the lowest cost for Bids or the most Advantageous for Proposals of those submitted.

#### **137-47-0610 Notice of Intent to Award**

(1) Notice of Intent to Award. The District must provide Written notice of its intent to Award to all Offerors pursuant to ORS 279B.135 at least five (5) 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 in accordance with 137-46-0355.

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

(a) The expiration of the protest period provided pursuant to 137-47-0740; or

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

#### **137-47-0620 Documentation of Award**

(1) Basis of Award. After Award, the District must make a record showing the basis for determining the successful Offeror as part of the District's Procurement File in accordance with 137-46-0355.

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

(a) For Bids:

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- (i) Bids;
  - (ii) Completed Bid tabulation sheet; and
  - (iii) Written justification for any rejection of lower Bids.
- (b) For Proposals:
- (i) Proposals;
  - (ii) The completed evaluation of the Proposals;
  - (iii) Written justification for any rejection of higher scoring Proposals; and
  - (iv) If the District engaged in any of the methods of Contractor selection described in ORS 279B.060(6)(b) and 137-47-0261, Written documentation of the content of any Discussions, Negotiations, best and final Offers, or any other procedures the District used to select a Proposer to which the District Awarded a Contract.

#### **137-47-0630 Availability of Award Decisions**

- (1) Contract Documents. To the extent required by the Solicitation Document, the District must deliver to the successful Offeror a Contract, a Signed Purchase Order, Price Agreement, or other Contract documents as applicable.
- (2) Availability of Award Decisions. A Person may obtain tabulations of awarded Bids or evaluation summaries of Proposals for a minimal charge, in person or by submitting to the District a Written request accompanied by payment. The requesting Person must provide the Solicitation Document number and enclose a self-addressed, stamped envelope.
- (3) Availability of Procurement Files. After notice of intent to award, the District must make Procurement Files, in accordance with 137-46-0355, available in accordance with applicable law.

#### **137-47-0640 Rejection of an Offer**

- (1) Rejection.
- (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 and Services that fail to meet the Specifications of the Solicitation Document;
  - (E) Is late;
  - (F) Is not in substantial compliance with the Solicitation Document; or
  - (G) Is not in substantial compliance with all prescribed public procurement procedures.
- (c) The District must reject an Offer upon the District's finding that the Offeror:

- (A) Has not been prequalified 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 137-46-0210(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;
  - (ii) Has a satisfactory record of contract performance. The District should carefully scrutinize an Offerors record of contract performance if the Offeror is or recently has been materially deficient in contract performance. In reviewing the Offerors performance, the District should determine whether the Offerors deficient performance was expressly excused under the terms of the contract, or whether the Offeror took appropriate corrective action. The District may review the Offerors performance on both private and Public Contracts in determining the Offerors record of contract performance. Pursuant to ORS 279B.110(2)(b), the District must make its basis for determining an Offeror non-Responsible under this subparagraph part of the Procurement File in accordance with 137-46-0355;
  - (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 Offerors 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 Offerors integrity. Pursuant to ORS 279B.110(2)(c), the District must make its basis for determining that an Offeror is non-Responsible under this subparagraph part of the Procurement File in accordance with 137-46-0355;
  - (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 must base the

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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.

#### **137-47-0650 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 137-47-0660; or

(f) Any other circumstance indicating that awarding the Contract would not be in the public interest.

#### **137-47-0660 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 must:

(a) Identify the Solicitation Document;

(b) Briefly explain the reason for cancellation; and

(c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.

(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.

#### **137-47-0670 Disposition of Offers if Solicitation Cancelled**

(1) Prior to Opening. If the District cancels a Procurement or Solicitation prior to Opening, the District must return all Offers it received to Offerors unopened, provided the Offerors

submitted their Offers in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the District must open the Offer to determine the source and then return it to the Offeror. For Electronic Offers, the District must delete the Offers from ORPIN or other approved Electronic Procurement System.

(2) After Opening. If the District cancels a Procurement or Solicitation after Opening, the District:

(i) May return Proposals in accordance with ORS 279B.060(5)(c); and

(ii) Must keep Bids in the Procurement File in accordance with 137-46-0355.

(3) Rejection of All Offers. If the District rejects all Offers, the District must keep all Proposals and Bids in the Procurement File.

### **LEGAL REMEDIES**

#### **137-47-0720 Protests and Judicial Review of Multiple-Tiered and Multistep Solicitations**

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

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

(3) Delivery. Unless otherwise specified in the Solicitation Document, an Affected Offeror must deliver a Written protest to the District within five (5) Days after issuance of the notice of the Competitive Range or notice of subsequent tiers, steps or Phases.

(4) Content of Protest. The Affected Offerors protest must be in Writing and must specify the grounds upon which the protest is based.

(5) District Response. The District must not consider an Affected Offerors 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



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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 137-47-0430 reflecting its disposition or cancel the Procurement or Solicitation under 137-47-0660.

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

#### **137-47-0730 Protests and Judicial Review of Solicitations**

(1) Protests.

(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 five (5) Days prior to Closing.

(3) Content of Protest. In addition to the information required by ORS 279B.405(4), a prospective Offerors Written protest must 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 must not consider a Prospective Offerors 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 137-47-0430 or cancel the Procurement or Solicitation under 137-47-0660.

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

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

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

#### **137-47-0740 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 five (5) Days after issuance of the notice of intent to award the Contract.

(3) Content of Protest. An Offerors Written protest must specify the grounds for the protest to be considered by the District pursuant to ORS 279B.410(2).

(4) District Response. The District must not consider an Offerors 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 must be in accordance with ORS 279B.415.

#### **137-47-0750 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.

#### **137-47-0760 Review of Prequalification and Debarment Decisions**

Review of the District's prequalification and Debarment decisions must be as set forth in ORS 279B.425.

#### **137-47-0770 Dispute Resolution**

The District is authorized to use dispute resolution pursuant to 137-46-0580.

End of Division

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### **Division 49 - General Provisions Related To Public Contracts For Construction Services**

#### **137-49-0100 Application; Federal Override; Effective Date**

(1) In addition to the general requirements set forth in Division 46 of these Rules, the Rules in this 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) The Rules as a whole implement the Oregon Public Contracting Code (Code), as defined in ORS 279A.010. This Division 49 of the Rules specifically addresses matters covered in ORS Chapter 279C.005, 279C.010, 279C.300 through 279C.870. Rules related to Architectural, Engineering, Land Surveying, and Related Services are found in Division 46 (personal services).

(3) Pursuant to 137-46-0100 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.

#### **137-49-0110 Policies**

In addition to the policies of the Code as set forth in ORS 279A.015, the policy on competition as provided in ORS 279C.300 applies to this Division, except as provided in ORS 279C.335. The policy on least-cost for Public Improvements applies as described within ORS 279C.305.

#### **137-49-0120 Definitions**

The definitions for this Division 49 are found in 137-46-0100, except the following Rule and definitions apply only to this Division 49:

Capitalized terms used in this Division 49 of the Rules must have the meaning set forth below or within the Sections in which they appear (such as the Section on Alternative Contracting Methods beginning at 137-49-0600, and if not defined there, then the meaning set forth in Division 46 of the Rules, and if not defined there, then the meaning set forth in the Code at ORS 279A.010 (general definitions) or 279C.330 (for the term Findings).

(1) “Competitive Range” means the number of Proposers with whom the District will conduct Discussions or Negotiations if the District intends to conduct Discussions or Negotiations in accordance with 137-49-0390. The size of the Competitive Range must be stated in the Solicitation Document, but will be decreased if the number of Proposers that submit Proposals is less than the specified number, or may be increased by the District in accordance with 137-49-0390.

(2) “Conduct Disqualification” means a Disqualification pursuant to ORS 279C.440.

(3) “Disqualification” means the preclusion of a Person from contracting with the District for a period of time. Disqualification may be a Conduct Disqualification or DBE Disqualification. The District is authorized to disqualify a Person in accordance with 137-49-0370.

(4) “Foreign Contractor” means a Contractor that is not domiciled in or registered to do business in the State of Oregon. See 137-49-0480.

(5) “Notice” means any of the alternative forms of public announcement of Procurements, as described 137-49-0210.

(6) “Responsible Offeror” (also, Responsible Bidder or Responsible Proposer, as applicable) means a Person that has submitted an Offer and meets the standards set forth in 137-49-0390(2) and that has not been disqualified by the District under 137-49-0370. When used alone, “Responsible” means meeting the aforementioned standards.

(7) “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.

#### **137-49-0130 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, ORS 279A.030 on federal law overrides, or ORS 279A.100 on affirmative action. Also see 137-49-0600 to 137-49-0690 regarding the use of Alternative Contracting Methods and the exemption process.

#### **137-49-0140 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, other than Emergency Contracts regulated under ORS 279C.335(5) and 137-49-0150, 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, 655, 660 and 670); and all of the Prevailing Wage Rates requirements (ORS 279C.800 through 870) for Public Works Contracts.

#### **137-49-0145 Exemptions From Competitive Bidding – Public Improvement Contracts.**

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### **Division 49 - General Provisions Related To Public Contracts For Construction Services**

All Public Improvement contracts must be based on competitive bidding, except the following:

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

(2) Class Exemptions. Contracts covered by class exemptions approved under ORS 279C.335.

#### **Exemption Procedures**

(1) Request for Exemption. The Superintendent may request a resolution from the Contract Review Board exempting a particular public improvement contract or class of contracts from competitive bidding if the contract or contracts are not otherwise exempted under these rules.

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

(a) The nature of the project;

(b) Estimated cost of the project;

(c) Findings supporting the substantial cost savings anticipated by the exemption from competitive bidding as required by ORS 279C.335(2)(b);

(d) Findings supporting why it is unlikely that an exemption from competitive bidding would encourage favoritism or diminish competition for the public contract as required by ORS 279C.335(2)(a);

(e) Information regarding the following factors as required by ORS 279C.330:

(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.

(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.

(3) Hearing Required.

(a) The District must hold a public hearing prior to adoption of the findings required by subsections (1) and (2).

(b) Notification of the public hearing must be published in at least one trade newspaper of general statewide circulation at least 14 Days before the hearing.

(c) The notice must state that the public hearing is for the purpose of taking comments on the District's draft findings for an exemption from the competitive bidding requirement. At the time of the notice, copies of the draft findings must be made available to the public.

(d) At the public hearing, the District must offer an opportunity for any interested party to appear and present comment.

(e) If a District is required to act promptly due to circumstances beyond its control that do not constitute an emergency, notification of the public hearing can be published simultaneously with the District's solicitation of contractors for the alternative public contracting method, as long as responses to the solicitation are due at least five Days after the meeting and approval of the findings.

(4) Exempted Public Improvements in Excess of \$100,000. Upon completion of and final payment for any Public Improvement contract in excess of \$100,000 for which the District did not use the competitive bidding process, the District must prepare and deliver to the Contract Review Board an evaluation of the Public Improvement project pursuant to (3), above.

#### **137-049-0146 Class Exemptions – Public Improvement Contracts**

The School Board declares the following contracts listed in this chapter as classes of Public Improvement contracts exempt from competitive bidding

(1) Donated Public Improvements. The District may authorize a person to construct a Public Improvement without Competitive Bidding or other competitive process and regardless of dollar amount, if:

(a) The person has agreed to donate all or a significant portion of the materials or services necessary to construct the Public Improvement or perform the service; and

(b) The person enters into a license or agreement with the District whereby the person agrees to comply with the public contract requirements applicable to the particular project and any requirements that the District deems necessary or beneficial to protect the District.

#### **137-49-0150 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 must be made at an administrative level consistent with the District's internal policies, by a Written declaration that describes the circumstances creating the Emergency as that term is defined at ORS 279A.010(1)(f), and the anticipated harm from failure to enter into an Emergency Contract. The Emergency declaration must exempt the Public Contract from the competitive bidding requirements of ORS 279C.335(1) and must 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.

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(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) Excusing Bonds. Pursuant to ORS 279C.380(4) and this Rule, the Emergency declaration may also state that the District waives the requirement of furnishing a performance bond and payment bond for the Emergency Contract. After making such an Emergency declaration the bonding requirements are excused for the Procurement.

#### **137-49-0160 Intermediate Procurements; Competitive Quotes and Amendments**

(1) General. Public Improvement Contracts estimated by the District not to exceed \$50,000 may be Awarded in accordance with intermediate level procurement procedures for competitive quotes established by this Rule.

(2) Selection Criteria. The selection criteria may be limited to price or some combination of price, experience, specific expertise, availability, project understanding, Contractor capacity, responsibility and similar factors.

(3) Request for Quotes. The District must utilize Written requests for quotes whenever reasonably practicable. Written request for quotes must include the selection criteria to be utilized in selecting a Contractor and, if the criteria are not of equal value, their relative value or ranking. When requesting 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 the 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 the District issuance of a Change to the Work or Amendment, pursuant to 137-49-0910, within the following limitations:

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

(b) Up to an aggregate Contract Price increase of 50% over the Original Contract amount, when the District's contracting officer determines that a price increase is warranted for additional reasonably related Work and the District official,

board or governing body with administrative or review authority over the contracting officer approves the increase.

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

### **FORMAL PROCUREMENT RULES**

#### **137-49-0200 Solicitation Documents; Required Provisions; Assignment or Transfer**

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

(a) General Information.

(i) Identification of the Public Improvement project, including the character of the Work, and applicable plans, Specifications and other contract documents;

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

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

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

(C) That statements made by the District's representatives at the conference are not binding upon the District unless confirmed by Written Addendum.

(iii) The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be prequalified if prequalification is a requirement;

(iv) The name and title of the District Person designated for receipt of Offers and contact Person (if different);

(v) 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 137-49-0300 regarding Facsimile Bids or Proposals and 137-49-0310 regarding electronic Procurement);

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

(vii) The time and date of Closing after which the District will not accept Offers, which time must be not less than five Days after the date of the last publication of the advertisement. Although a minimum of five Days is proscribed, The District are encouraged to use at least a 14 Day Solicitation period when feasible. If the District is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$50,000, the District must designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and 137-49-0360. For timing issues relating to Addenda, see 137-49-0250;

(viii) The office where the Specifications for the Work may be reviewed;

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

(x) 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.";

(xi) 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 137-49-0230;

(xii) Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;

(xiii) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See 137-49-0440(3));

(xiv) How the District will notify Offerors of Addenda and how the District will make Addenda available (See 137-49-0250); and

(xv) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirement s, as set forth in 137-49-0360.

#### **(b) Evaluation Process.**

(i) 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;

(ii) The anticipated Solicitation schedule, deadlines, protest process, and evaluation process, if any;

(iii) 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 137-49-0620), along with the process the District will use to determine acceptability of the Work;

(A) If the Solicitation Document is an Invitation to Bid, the District must set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade- in allowances, cash discounts, depreciation allowances, cartage penalties, and ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors must be objective, reasonable estimates based upon information the District has available concerning future use;

(B) If the Solicitation Document is a Request for Proposals, the District must refer to the additional requirements of 137-49-0650; and

(c) Contract Provisions. The District must include all contract terms and conditions, including warranties, insurance and bonding requirements, that the District considers appropriate for the Public Improvement project. The District must also include all applicable contract provisions required by Oregon law as follows:

(i) Prompt payment to all Persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279.505(1));

(ii) Demonstrate that an employee drug testing program is in place (ORS 279C.505(2));

(iii) 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;

(iv) 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));

(v) Payment of claims by public officers (ORS 279C.515(1));

(vi) Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515(2), including the rate of interest;

(vii) 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));

(viii) Hours of labor in compliance with ORS 279C.520;

(ix) Environmental and natural resources regulations (279C.525);

(x) Payment for medical care and attention to employees (ORS 279C.530(1));

(xi) A contract provision substantially as follows: "All employers, including Contractor, that employ subject workers who Work under this Contract in the State of Oregon must comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor must ensure that each of its subcontractors complies with these requirements." (ORS 279C.530(2));

(xii) Maximum hours, holidays and overtime (ORS 279C.540);

(xiii) Time limitation on claims for overtime (ORS 279C.545);

(xiv) Prevailing wage rates (ORS 279C.800 to 279C.870);

(xv) Fee paid to BOLI (ORS 279C.830);

(xvi) Retainage (ORS 279C.550 to 279C.570);

(xvii) Prompt payment policy, progress payments, rate of interest (ORS 279C.570);

(xviii) Contractor's relations with subcontractors (ORS 279C.580);

(xix) Notice of claim (ORS 279C.605);

(xx) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385; and

(xxi) 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

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701.055 before the subcontractors commence Work under the Contract.

(2) Assignment or Transfer Restricted. Unless otherwise provided in the Contract, the Contractor must not assign, sell, dispose of, or transfer rights, nor delegate duties under the Contract, either in whole or in part, without the District's prior Written consent. Unless otherwise agreed by the District in Writing, such consent must not relieve the Contractor of any obligations under the Contract. Any assignee or transferee must be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If the District consents in Writing to an assignment, sale, disposal or transfer of the Contractor's rights or delegation of Contractor's duties, the Contractor and its surety, if any, must remain liable to the District for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the District otherwise agrees in Writing.

#### **137-49-0210 Notice and Advertising Requirements; Posting**

(1) Notice and Distribution Fee. The District shall 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 shall advertise every Solicitation for competitive Bids or competitive Proposals for a Public Improvement Contract, unless the Board has exempted the Solicitation from the advertisement requirement as part of a competitive Bidding exemption under ORS 279C.335.

(a) Unless the District publishes by Electronic Advertisement as permitted under subsection 2(b), the District shall publish the advertisement for Offers at least once in at least one newspaper of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as the District may determine to be necessary or desirable to foster and promote competition.

(b) The District may publish by Electronic Advertisement if the Board 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 shall also publish an advertisement for Offers in at least one trade newspaper of

general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000.

(d) All advertisements for Offers shall set forth:

- (A) The Public Improvement project;
- (B) The office where Contract terms, conditions and Specifications may be reviewed;
- (C) The date that Persons must file applications for prequalification under ORS 279C.340, if prequalification is a requirement, and the class or classes of Work for which Persons must be prequalified;
- (D) The scheduled Closing, which shall not be less than five Days after the date of the last publication of the advertisement;
- (E) The name, title and address of the District Person authorized to receive Offers;
- (F) The scheduled Opening; and
- (G) If applicable, that the Contract is for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 276(a)).

#### **137-49-0220 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 State Procurement Office. 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 must not consider an Offer from a Person that is not prequalified if the District required prequalification.

(b) Permissive Prequalification. The District may prequalify a Person for the District's Solicitation list on forms prescribed by the State Procurement Office, but in permissive prequalification the District must not limit distribution of a Solicitation to that list.

(2) Prequalification Presumed. If an Offeror is currently prequalified by either the Oregon District of Transportation or the District to perform Contracts, the Offeror must be reputedly presumed qualified to perform similar Work for other The District.

(3) 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 137-49-0390(2) regarding standards of responsibility).

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

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#### **137-49-0230 Eligibility to Bid or Propose; Registration or License**

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

#### **137-49-0240 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 Person identifying themselves as a representative of an offering firm is present.
- (3) Scheduled Time. If the District holds a pre-Offer conference, it must be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference.
- (4) Statements Not Binding. Statements made by the District's representative at the pre-Offer conference do not change the Solicitation Document unless the District confirms such statements with a Written Addendum to the Solicitation Document.
- (5) District Announcement. The District must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with 137-49-0200(1)(a)(B).

#### **137-49-0250 Addenda to Solicitation Documents**

- (1) Issuance; Receipt. The District may change a Solicitation Document only by Written Addenda. An Offeror must provide Written acknowledgement of receipt of all issued Addenda with its Offer, unless the District otherwise specifies in the Addenda or in the Solicitation Document.
- (2) Notice and Distribution. The District must notify prospective Offerors of Addenda consistent with the standards of Notice set forth in 137-49-0210(1). The Solicitation Document must specify how the District will provide notice of Addenda and how the District will make the Addenda available (see, 137-49-0200(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 must not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.
- (4) Request for Change or Protest. Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in 137-49-0260, 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 137-49-0260, whichever date is later. The District must consider only an Offerors request for change or protest to the Addendum; the District must not consider a request for change or protest to matters not added or modified by the Addendum, unless the Offeror submits the request for change or protest before the deadline for the District's receipt of request for change or protests as set forth in 137-49-0260(2) and (3).

#### **137-49-0260 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 Offerors Written request for change must include a statement of the requested change(s) to the contract terms and conditions, including any Specifications, together with the reason for the requested change.
    - (B) An Offeror must mark its request for change as follows:
      - (i) "Contract Provision Request for Change"; and
      - (ii) Solicitation Document number (or other identification as specified in the Solicitation Document).
  - (3) Protest.
    - (a) Delivery. An Offeror may protest Specifications or contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest on those matters to the District not less than 10 Days prior to Closing;

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#### **(b) Content of Protest.**

##### **(A) An Offerors Written protest must include:**

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

(ii) A description of the resulting prejudice to the Offeror; and

(iii) A statement of the desired changes to the contract terms and conditions, including any Specifications.

##### **(B) An Offeror must mark its protest as follows:**

(i) "Contract Provision Protest"; and

(ii) Solicitation Document number (or other identification as specified in the Solicitation Document)

(4) The Response. The District is not required to consider an Offerors 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 137-49-0260 or cancel the Solicitation under 137-49-0270.

(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.

#### **137-49-0270 Cancellation of Solicitation Document**

(1) Cancellation in the Public Interest. The District may cancel a Solicitation for good cause if the District finds that cancellation is in the public interest. The District's reasons for cancellation must be made part of the 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 137-49-0210(1). Such notice of cancellation must:

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

(b) After Offer Opening. If the District rejects all Offers, the District will retain all such Offers as part of the District's Solicitation file.

#### **137-49-0280 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 must be held open by the Offeror for the District's acceptance for the period specified in 137-49-0410.

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 must describe whether Offers are to be made and considered as "Firm Offers" that may be accepted without Negotiation, as in the case of competitive Bidding, or whether Offers are subject to Discussion, Negotiation or otherwise are not to be considered as final offers. See 137-49-0650 on Requests for Proposals and 137-49-0290 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 137-49-0650, an Offeror must not make an Offer contingent upon the District's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

(4) Offerors Acknowledgement. By signing and returning the Offer, the Offeror acknowledges they have read and understand the terms and conditions contained in the Solicitation Document and that they accept and agree to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits proposal of alternative terms under 137-49-0650, the Offerors 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 . Offerors must submit and Sign their Offers in accordance with the Solicitation Document. Offerors must initial and submit any corrections or erasures to their Offers prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document.

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

(7) Documents. Offerors must provide the District with all documents and descriptive literature required under the Solicitation Document.

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

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

##### **(10) Identification of Offers**

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



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(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 Offerors are responsible for ensuring that the District receives their Offers at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

#### **137-49-0290 Bid or Proposal Security**

(1) Security Amount. If the District requires Bid or Proposal security, it must be not more than 10% or less than 5% of the Offerors Bid or Proposal, consisting of the base Bid or Proposal together with all additive alternates. The District must not use Bid or Proposal security to discourage competition. The District must clearly state any Bid or Proposal security requirements in its Solicitation Document. The Offeror must forfeit Bid or Proposal security after Award if the Offeror fails to execute the Contract and promptly return it with any required Performance Bond and Payment Bond and, in the case of Proposal security, with any required proof of insurance. See ORS 279C.365(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 137-49-0280(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 Offerors 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.

#### **137-49-0300 Facsimile Bids and Proposals**

(1) The District Authorization. The District may authorize Offerors to submit facsimile Offers. If the District determines that Bid or Proposal security is or will be required, the District must not authorize facsimile Offers unless the District has established a method for receipt of such security. Prior to authorizing the submission of facsimile Offers, the District must determine that the District's equipment and personnel are

capable of receiving the size and volume of anticipated Offers within a short period of time. In addition, the District must establish administrative procedures and controls:

(a) To receive, identify record and safeguard facsimile Offers;

(b) To ensure timely delivery of Offers to the location of Opening; and

(c) To preserve the Offers as sealed.

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

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

(b) A provision substantially in the form of the following: "Offerors may submit facsimile Offers in response to this Solicitation Document. The entire response must arrive at the place and by the time specified in this Solicitation Document.";

(c) A provision that requires Offerors to Sign their facsimile Offers;

(d) A provision substantially in the form of the following: "The District reserves the right to award the Contract solely on the basis of the facsimile Offer. However, upon the District's request the apparent successful Offeror must promptly submit its complete original Signed Offer. ";

(e) The data and compatibility characteristics of the District's receiving facsimile machine as follows:

(A) Telephone number; and

(B) Compatibility characteristics, e.g., make and model number, receiving speed, communications protocol; and

(f) A provision that the District is not responsible for any failure attributable to the transmission or receipt of the facsimile Offer including, but not limited to the following:

(A) Receipt of garbled or incomplete documents;

(B) Availability or condition of the receiving facsimile machine;

(C) Incompatibility between the sending and receiving facsimile machine;

(D) Delay in transmission or receipt of documents;

(E) Failure of the Offeror to properly identify the Offer documents;

(F) Illegibility of Offer documents; and

(G) Security and confidentiality of data.

#### **137-49-0310 Electronic Procurement**

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

(2) Alternative Procedures. In the event that the District desires to allow Electronic Offers for a Public Improvement

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Contract, it must first promulgate supporting procedures substantially in conformance with 137-47-0330 (Electronic Procurement under ORS Chapter 279B), taking into account ORS Chapter 279C requirements for Written bids, opening bids publicly, bid security, first-tier subcontractor disclosure and inclusion of prevailing wage rates.

(3) Interpretation. Nothing in this Rule must be construed as prohibiting The District from making Procurement Documents for Public Improvement Contracts available in electronic format as well as in hard copy when Bids are to be submitted only in hard copy.

#### **137-49-0320 Pre-Closing Modification or Withdrawal of Offers**

(1) Modifications . An Offeror may modify its Offer in Writing prior to the Closing. An Offeror must prepare and submit any modification to its Offer to the District in accordance with 137-49-0280, unless otherwise specified in the Solicitation Document. Any modification must include the Offerors statement that the modification amends and supersedes the prior Offer. The Offeror must mark the submitted modification as follows:

(a) Bid (or Proposal) Modification; and  
(b) Solicitation Number (or Other Identification as specified in the Solicitation Document).

(2) Withdrawals.

(a) An Offeror may withdraw its Offer by Written notice submitted on the Offerors 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 must mark the Written request to withdraw an Offer as follows:

(A) Bid (or Proposal) Withdrawal; and  
(B) Solicitation Number (or Other Identification as specified in the Solicitation Document).

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

#### **137-49-0330 Receipt, Opening and Recording of Offers; Confidentiality of Offers**

(1) Receipt. The District must electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The District must not open the Offer or modification upon receipt, but must maintain it as confidential and secure until Opening. If the District inadvertently opens an Offer or a modification prior to the Opening, the District must return the Offer or modification to its secure and confidential state until Opening. The District must document the resealing for the Procurement File in accordance with 137-

46-0355 (e.g. "The District inadvertently opened the Offer due to improper identification of the Offer").

(2) Opening and Recording. The District must publicly open Offers including any modifications made to the Offer pursuant to 137-49-0320. 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 must separate information designated as confidential from other non-confidential information at the time of submitting its Offer. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and must be publicly available regardless of an Offerors designation to the contrary.

#### **137-49-0340 Late Bids, Late Withdrawals and Late Modifications**

Any Offer received after Closing is late. An Offerors request for withdrawal or modification of an Offer received after Closing is late. The District must not consider late Offers, withdrawals or modifications except as permitted in 137-49-0350 or 137-49-0390.

#### **137-49-0350 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) The District Treatment of Mistakes. The District must not allow an Offeror to correct or withdraw an Offer for an error in judgment. If the District discovers certain mistakes in an Offer after Opening, but before Award of the Contract, the District may take the following action:

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

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

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(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 Offerors 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 must 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 must determine whether the District will permit an Offeror to withdraw its Offer after Closing. These criteria also must apply to the question of whether the District will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to the District based on the difference between the amount of the Offerors 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 Offerors 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 249 only to the extent permitted by applicable law.

#### **137-49-0360 First-Tier Subcontractors; Disclosure and Substitution; ITB**

(1) Required Disclosure. Within two Working hours after the Bid Closing on an ITB for a Public Improvement having a Contract Price anticipated by the District to exceed \$100,000, all Bidders must submit to the District a disclosure form as described by ORS 279C.370(2), identifying any first-tier subcontractors (those Entities that would be contracting directly with the prime Contractor) that will be furnishing labor or labor and materials on the Contract, if Awarded, whose subcontract value would be equal to or greater than:

(a) 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., except that these Bid Closing restrictions do not apply to an ITB for maintenance or construction of highways, bridges or other transportation facilities, and provided that the two- hour disclosure deadline described by this Rule would not then fall on a legal holiday;

(b) Open Bids publicly immediately after the Bid Closing; and

(c) Consider for Contract Award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed by the District.

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

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

(b) Provide instructions in a notice substantially similar to the following: "Instructions for First- Tier Subcontractor Disclosure." Bidders are required to disclose information about certain first- tier subcontractors when the contract value for a Public Improvement is greater than \$100,000 (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:

(A) The subcontractor's name,

(B) The category of Work that the subcontractor would be performing, and

(C) The dollar value of the subcontract.

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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 137-040-0017)."

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

(5) Responsiveness. Compliance with the disclosure and submittal requirements of ORS

279C.370 and this Rule is a matter of Responsiveness. Bids which are submitted by Bid Closing, but for which the disclosure submittal has not been made by the specified deadline, are not Responsive and must 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 must 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 do 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.

#### **137-49-0370 Disqualification of Persons**

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

(a) Standards for Conduct Disqualification. As provided in ORS 279C.440, the District may disqualify a Person for:

(A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private Contract or subcontract, or in the performance of such Contract or subcontract.

(B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the Person's responsibility as a Contractor.

(C) Conviction under state or federal antitrust statutes.

(D) Violation of a contract provision that is regarded by the District to be so serious as to justify Disqualification. A violation under this Subsection 2(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 District pursuant to ORS 200.065.

(B) For a DBE Disqualification under ORS 200.075, the District may disqualify a Person upon finding that:

(i) The Person has entered into an agreement representing that a disadvantaged, minority, women, or emerging small business enterprise, certified pursuant to ORS 200.055 ("Certified Enterprise"), will perform or supply materials under a Public Improvement Contract without the knowledge and consent of the Certified Enterprise; or

(ii) The Person exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any Certified Enterprise; or

(iii) The Person uses a Certified Enterprise to perform services under a Contract or to provide supplies under a Public Improvement Contract to meet an established Certified Enterprise goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the Contract.

(iv) If a Person is Disqualified for a DBE Disqualification under ORS 200.075, the affected District must not permit such Person to participate in that District's Contracts.

(C) For a DBE Disqualification under ORS 279A.110, the District may disqualify a Person if the District finds that the Person discriminated against minority, women, or emerging small business enterprises in awarding a subcontract under a Contract with that District.

(2) Notice of Intent to Disqualify. The District must notify the Person in Writing of a proposed Disqualification personally or by registered or certified mail, return receipt requested. This notice must:

(a) State that the District intends to disqualify the Person;

(b) Set forth the reasons for the Disqualification;

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

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- (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 the District 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 must contain:
- (a) The effective date and period of Disqualification;
  - (b) The grounds for Disqualification; and
  - (c) A statement of the Person's appeal rights and applicable appeal deadlines. 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.

#### **137-49-0380 Bid or Proposal Evaluation Criteria**

- (1) General. A Public Improvement Contract, if Awarded, must be Awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. See 137-49-0390, and Rules for Alternative Contracting Methods at 137-49-0600 to 137-49-0690.
- (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 must be compared on the basis of lump-sum prices, or lump-sum base Bid prices, as applicable. If the ITB calls for a lump-sum base Bid, plus additive or deductive alternates, the total Bid price must be calculated by adding to or deducting from the base Bid those alternates selected by the District, for the purpose of comparing Bids.
- (b) Unit Price. If the Bid includes unit pricing for estimated quantities, the total Bid price must be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by the District, for the purpose of comparing Bids. The District must specify within the Solicitation Document the estimated quantity of the Procurement to be used for determination of the low Bidder. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price must govern. See 137-49-0350(2)(b).
- (3) Proposal Evaluation Criteria. If the State Procurement Office 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 137-49-0650, 137-49-0650, ORS 279C.335 and 279C.405.

#### **137-49-0390 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) 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) Has a satisfactory record of contract performance. The District should carefully scrutinize an Offerors record of contract performance if the Offeror is or recently has been materially deficient in contract performance. In reviewing the Offerors performance, the District should determine whether the Offerors deficient performance was expressly excused under the terms of Contract, or whether the Offeror took appropriate corrective action. The District may review the Offerors performance on both private and Public Contracts in determining the Offerors 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) 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 Offerors performance of the Contract or a parent company, predecessor or successor Person). The standards for Conduct Disqualification under 137-49-0370 may be used to determine Offerors 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

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(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 must 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:

(i) Demonstration, inspection or testing of a product prior to award for characteristics such as compatibility, quality or Workmanship;

(ii) Examination of such elements as appearance or finish; or

(iii) 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 add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.

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

(c) Negotiation Prohibited. The District must not negotiate scope of Work or other terms or conditions under an Invitation to Bid process prior to award.

(6) Evaluation of Proposals. See 137-49-0650 regarding rules applicable to Requests for Proposals.

(7) Independent Contractor Status, Tax Compliance, and Requirements to Transact Business in Oregon. For these responsibilities of Offerors, see 137-46-0330.

#### **137-49-0400 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 must include:

(a) Bids.

(b) Completed Bid tabulation sheet; and

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

(3) Contents of Award Record for Proposals. Where the use of Requests for Proposals is authorized as set forth in 137-49-0650, the District's record must include:

(a) Proposals.

(b) The completed evaluation of the Proposals;

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

(d) If the District permitted Negotiations in accordance with 137-49-0650, 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.

(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.

#### **137-49-0410 Time for District Acceptance; Extension**

(1) Time for Offer Acceptance. An Offeror's Bid, or Proposal submitted as a Firm Offer (see 137-49-0280), is irrevocable, valid and binding on the Offeror for not less than 60 Days from Closing unless otherwise specified in the Solicitation Document.

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

#### **137-49-0420 Negotiation With Bidders Prohibited**

(1) Bids. Except as permitted by ORS 279C.340 and 137-49-0430 when all bids exceed the cost estimate, the District must not negotiate with any Bidder prior to Contract Award. After Award of the Contract, the District and Contractor may only

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modify the Contract by change order or Amendment to the Contract in accordance with 137-49-0860.

(2) Requests for Proposals. The District may only conduct Discussions or Negotiations with Proposers in accordance with the requirements of 137-49-0650.

#### **137-49-0430 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 137-49-0360 do not apply to Negotiations under this Rule.

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

(a) "Cost Estimate" means the District's most recent pre-Bid, good faith assessment of anticipated contract costs, consisting either of an estimate of an architect, engineer or other qualified professional, or confidential cost calculation Worksheets, where available, and otherwise consisting of formal planning or budgetary documents.

(b) "Other Options" means those items generally considered appropriate for Negotiation in the RFP process, relating to the details of contract performance as specified in 137-49-0650, but excluding any material requirements previously announced in the Solicitation process that would likely affect the field of competition.

(c) "Project" means a Public Improvement.

(d) "Value Engineering" means the identification of alternative methods, materials or systems which provide for comparable function at reduced initial or life-time cost. It includes proposed changes to the plans, Specifications, or other contract requirements which may be made, consistent with industry practice, under the Original Contract by mutual agreement in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the Public Improvement. Cost savings include those resulting from life cycle costing, which may either increase or decrease absolute costs over varying time periods.

(3) Rejection of Bids. In determining whether all Responsive Bids from Responsible Bidders exceed the Cost Estimate, only those Bids that have been formally rejected, or Bids from Bidders who have been formally disqualified by the District, must be excluded from consideration.

(4) Scope of Negotiations. The District must not proceed with Contract Award if the scope of the Project is significantly changed from the original Bid. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other Bidders would have been expected by the District to participate in the Bidding process had the change been made during the Solicitation process rather than during Negotiation. This Rule must not be construed to prohibit Solicitation of trade subcontracts.

(5) Discontinuing Negotiations. The District may discontinue Negotiations at any time, and must do so if it appears to the

District that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to re-bid any portion of the project, or to obtain subcontractor pricing information upon request, must be considered a lack of good faith.

(6) Limitation. Negotiations may be undertaken only with the lowest Responsive, Responsible Bidder pursuant to ORS 279C.340. That statute does not provide any additional authority to further negotiate with Bidders next in line for Contract Award.

(7) Public Records. To the extent that a Bidder's records used in contract Negotiations under ORS 279C.340 are public records, they are exempt from disclosure until after the negotiated Contract has been awarded or the Negotiation process has been terminated, at which time they are subject to disclosure pursuant to the provisions of the Oregon Public Records Law, ORS 192.410 to 192.505.

#### **137-49-0440 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, or

(B) Takes exception to terms and conditions (including Specifications), or

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

(D) Offers Work or goods that fail to meet the Specifications of the Solicitation Document; or

(E) Is late; or

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

(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; or

(B) Has been Disqualified; or

(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; or

(D) Is listed as not qualified by the Construction Contractors Board, if the Contract is for a Public Improvement; or

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

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

(G) Has failed to provide the certification required under Section 3 of this Rule; or

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(H) Is not Responsible. See 137-49-0390(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 137-49-0370.

(3) Certification of Non-Discrimination. The Offeror must certify and deliver to the District Written certification, as part of the Offer that the Offeror has not discriminated against minority, women or emerging small business enterprises in obtaining any required subcontracts. Failure to do so must be grounds for disqualification.

(4) Rejection of all Offers. The District may reject all Offers for good cause upon the District's Written finding 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 137-49-0270; or

(f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

#### **137-49-0450 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 137-49-0650, the District must provide Written notice to all Proposers of the District's determination of the Proposers included in the Competitive Range. The District's notice of the Proposers included in the Competitive Range must not be final until the later of the following:

(a) Ten (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 must not be final until the later of the following:

(a) Seven (7) 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 (7) 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 Offerors 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 non-responsive; or

(B) The District committed a substantial violation of a provision in the Solicitation Document or of an applicable procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been the Responsible Bidder offering the lowest Bid or the Responsible Proposer offering the highest-ranked Proposal.

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

(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 (7) 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 137-49-0650.)

(b) The Proposer's protest must 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



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

(6) Authority to Resolve Protests. The head of the District, or such Person's 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 head of the District, or such Person's designee, must promptly issue a Written decision on the protest. Judicial review of this decision will be available if provided by statute.

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

#### **137-49-0460 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 State Procurement Office exempts a Contract or classes of Contracts from the required performance bond and payment bond pursuant to ORS 279C.390, the Contractor must execute and deliver to the District a performance bond and a payment bond each in a sum equal to the Contract Price for all Public Improvement Contracts. However, under ORS 279C.390(3)(b) the Director of the Oregon District of Transportation may reduce the performance bond amount for Contracts financed from the proceeds of bonds issued under ORS 367.620(3)(a).

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

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

(4) Time for Submission. The apparent successful Offeror must promptly furnish the required performance security upon the District's request. If the Offeror fails to furnish the security as requested, the District may reject the Offer and award the Contract to the Responsible Bidder with the next lowest

Responsive Bid or the Responsible Proposer with the next highest-scoring Responsive Proposal, and, at the District's discretion, the Offeror must forfeit its Bid or Proposal security.

(5) Public Improvement Contracts Under \$100,000. The District having delegated purchasing authority pursuant to 137-46-0170 may, in its discretion, waive the bid security requirements and performance bond requirements if the amount of the Contract for the Public Improvement is less than \$100,000. The Superintendent may, in the Superintendent's discretion, waive the bid security, performance bond, payment bond requirements of ORS 279C.380 if the amount of the Public Improvement Contract is less than \$75,000

#### **137-49-0470 Substitute Contractor**

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

#### **137-49-0490 Foreign Contractor**

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

### **ALTERNATIVE CONTRACTING METHODS**

#### **137-49-0600 Alternative Contracting Methods: Purpose**

These 137-49-0600 to 137-49-0690 Oregon Administrative Rules 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 State Procurement Office 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 137-49-0600 to 137-49-0690 Rules implement the requirements of ORS 279C.335 pertaining to the adoption of Rules appropriate for use by all The District to govern the procedures for entering into ESPCs.

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#### **137-49-0610 Definitions for Alternative Contracting Methods**

The following definitions must apply to Rules 137-49-0600 to 137-49-0690, unless the context requires otherwise:

(1) "Alternative Contracting Methods" mean innovative procurement techniques for obtaining Public Improvement Contracts, utilizing processes other than the traditional method of Design- Bid-Build (with Award based solely on price, in which a final design is issued with formal Bid documents, construction services are obtained by sealed Bid Awarded to the lowest Responsive, Responsible Bidder, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design- Build contracting, CM/GC forms of contracting and ESPCs, which are specifically addressed in these 137-49-0600 to 137-49-0690 Rules, as well as other developing techniques such as general "performance contracting" and "cost plus time" contracting, for which procedural requirements are identified under these 137-49-0600 to 137-49-0690 Rules.

(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 constructs 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 137-49-0600 to 137-49-0690 Rules, use of either or both of the terms "building" or "structure" must be deemed to include existing energy, water and waste disposal systems connected or related to or otherwise used for the building 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 137-49-0600 to 137-49-0690 Rules.

(5) "Energy Savings Guarantee" means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the District that certain energy savings and performance will be achieved for the project covered by the RFP, through the installation and implementation of the agreed-upon ECMs for the project. The Energy Savings Guarantee must include, but must not be limited to, the specific energy savings and performance levels and amounts that will be guaranteed, provisions related to the financial remedies available to the District in the event the guaranteed savings and performance are not achieved, the specific conditions under which the ESCO will guarantee energy savings and performance (including the specific responsibilities of the District after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.

(6) "Energy Savings Performance Contract (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 to the District by the Contractor, and accepted by the District, that includes all reimbursable costs of and fees for completion of the contract Work, as defined by the Public Improvement Contract, except for material changes in the scope of Work. It may also include particularly identified contingency amounts.

(8) "Measurement and Verification (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,

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measure and verify, and otherwise implement Energy Conservation Measures and other Work on building systems or building components that are directly related to the ECMs in existing buildings and structures; a prior record of successfully performing ESPCs on projects involving existing buildings and structures that are comparable to the project under consideration by the District; and the financial strength to effectively guarantee energy savings and performance under the ESPC for the project in question, or the ability to secure necessary financial measures to effectively guarantee energy savings under an ESPC for that project.

(11) "Technical Energy Audit," as used in ESPC Procurement, means the initial phase of services to be performed by an ESCO that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the District of the ESCO's Findings during this initial phase of the Work; the term "Technical Energy Audit" can also refer to the report provided by the ESCO at the conclusion of this phase of the Work.

#### **137-49-0620 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 State Procurement Office as an exception to the prescribed Public Contracting practices in Oregon, and their use must be justified in accordance with the Public Contract law and these 137-49-0600 to 137-49-0690 Rules. See 137-49-0630 regarding required Findings and restrictions on class exemptions.

(2) Energy Savings Performance Contracts. Unlike other Alternative Contracting Methods covered by these 137-49-0600 to 137-49-0690 Rules, 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 these 137-49-0600 to 137-49-0690 Rules 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 \$100,000 for which the competitive Bidding process was not used. The purpose of this evaluation is to determine whether it was actually in the District's best interest to use an Alternative Contracting Method. The evaluation must be delivered to the Director of the District as applicable within 30 Days of the date the District "accepts" the Public Improvement project, which event is typically defined in the Contract. In the absence of such definition, acceptance of the Project occurs on the later of the date of final payment or the date of final completion of the Work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:

- (a) Financial information, consisting of cost estimates, any 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.

#### **137-49-0630 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 must 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 must include some combination of Project descriptions or locations, time periods, contract values or method of Procurement or other factors that distinguish the limited and related class of Projects from the District's overall construction program. Classes must not be defined solely by funding sources, such as a particular bond fund, or by method of Procurement, but must be defined by characteristics that reasonably relate to the exemption criteria set forth in ORS 279C.335(2).

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(6) Public Hearing. Before final adoption of Findings exempting a Public Improvement Contract from the requirement of competitive bidding, the District must give notice and hold a public hearing as required by ORS 279C.335(4). The hearing must be for the purpose of receiving public comment on the District's draft Findings.

#### **137-49-0640 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 137-49-0600 to 137-49-690, 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, 137-49-0200 to 137-49-0480, and RFP related Rules under the Alternative Contracting Methods Subdivision at 137-49-0640 to 137-49-0660. For ESPCs, the following RFP process must be utilized if the District desires the Procurement Process to be exempt from the competitive Bidding requirements of ORS 279C.335. The RFP process for the Alternative Contracting Methods identified in 137-49-0600 to 137-49-0690 includes the following steps:

(1) Proposal Evaluation. Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. For ESPC Proposal evaluations, the District may provide in the RFP that qualifications-based evaluation factors will outweigh the District's consideration of price-related factors, due to the fact that prices for the major components of the Work to be performed during the ESPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation. Proposal evaluation must be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors must:

(a) Be reasonable estimates based on information available to the District;

(b) Treat all Proposals equitably; and

(c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the District. See ORS 279C.305.

(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 venture's comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline Consultant), past performance of the ESCO in meeting energy guarantee contract levels, the specific Person that will provide the Energy Savings Guarantee to be offered by the ESCO, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the Work under the ESPC, the ESCO's team members and Consultants to be assigned to the project, the ESCO's experience in the Energy Savings Performance contracting field, the ESCO's experience acting as the prime Contractor on previous ESPC projects (as opposed to a subcontractor or Consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V Consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular project between the District and the ESCO, the ESCO's equipment performance guarantee policies and procedures, the ESCO's energy savings and cost savings guarantee policies and procedures, the ESCO's project cost guarantee policies and procedures, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the Work and the ESCO's fee structure for all phases of the ESPC.

(3) Contract Negotiations. Contract terms may be negotiated to the extent allowed by the RFP and 137-49-0600 to 137-49-0690, 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 137-49-0650. Terms that may be negotiated consist of details of contract performance, methods of construction, timing, and assignment of risk in specified areas, fee, and other matters that affect cost or quality. In ESPC contracting, terms that may be negotiated also include the scope of preliminary design of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the scope of services to be performed by the ESCO during the Project Development Plan phase of the Work, the detailed provisions of the Energy Savings Guarantee to be provided by the ESCO and scope of Work, methodologies and

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compensation terms and conditions during the design and construction phase and M & V phase of the Work, consistent with the requirements of 137-49-0680 below.

#### **137-49-0650 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), 137-49-0130 and 137-49-0600 to 137-49-0690. Also see ORS 279C.400 to 279C.410 for statutory requirements regarding competitive Proposals, and 137-49-0640 regarding competitive Proposal procedures.

(2) Solicitation Documents. In addition to the Solicitation Document requirements of 137- 49-0200, this Rule applies to the requirements for Requests for Proposals. RFP Solicitation Documents must conform to the following standards:

(a) The District must set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references and warranty provisions. See 137-49-0640. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors must be reasonable estimates based on information available to the District;

(b) When the District is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following Discussions, the District must identify the specific terms and conditions in or provisions of the Solicitation Document that are subject to Negotiation or Discussion and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions the District has identified as authorized for Negotiation. The District must describe the evaluation and Discussion or Negotiation process, including how the District will establish the Competitive Range;

(c) When the District intends to award Contracts to more than one Proposer, the District must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. The District must also include the criteria it will use to determine how the District will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular Contractor to provide Goods and Services from those Contractors Awarded Contracts.

#### **(3) Evaluation of Proposals.**

(a) Evaluation. The District must evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. The District must evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.

(A) Clarifications. In evaluating Proposals, the District may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer must submit Written and Signed clarifications and such clarifications must become part of the Proposer's Proposal.

(B) Limited Negotiation. If the District did not permit Negotiation in its Request for Proposals, the District may, nonetheless, negotiate with the highest-ranked Proposer, but may then only negotiate the:

(i) Statement of Work; and

(ii) Contract Price as it is affected by negotiating the statement of Work.

(iii) The process for Discussions or Negotiations that is outlined and explained in 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 must restrict or prohibit the District from canceling the Solicitation at any time.

(4) Competitive Range; Protest; Award.

(a) Determining Competitive Range.

(A) If the District does not cancel the Solicitation, after the Opening the District will evaluate all Proposals in accordance with the evaluation criteria set forth in the 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 137-49-0450.

(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 137-49-0450.

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(ii) After the protest period provided in accordance with 137-49-0450 expires, or after the District has provided a final response to any protest, whichever date is later, the District must commence final contract Negotiations with the highest-ranked Proposer in the Competitive Range; or

(B) Engage in Discussions with Proposers in the Competitive Range and accept revised Proposals from them, and, following such Discussions and receipt and evaluation of revised Proposals, conduct Negotiations with the Proposers in the Competitive Range.

(5) Discussions; Revised Proposals. If the District chooses to enter into Discussions with and receive revised Proposals from the Proposers in the Competitive Range, the District must proceed as follows:

(a) Initiating Discussions. The District must initiate oral or Written Discussions with all of the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP that the District identified in the RFP as the subject of Discussions. The District may conduct Discussions for the following purposes:

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

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

(C) Otherwise allowing Proposers to develop revised Proposals that will allow the District to obtain the best Proposal based on the requirements and evaluation criteria set forth in the 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) Must treat all Proposers fairly and must not favor any Proposer over another;

(ii) Must not discuss other Proposers' Proposals;

(iii) Must not suggest specific revisions that a Proposer should make to its Proposal, and must not otherwise direct the Proposer to make any specific revisions to its Proposal.

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

(i) Continue Discussions with a particular Proposer;

(ii) Terminate Discussions with a particular Proposer and continue Discussions with other Proposers in the Competitive Range; or

(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 137-49-0450. After the protest period provided in accordance with that Rule expires, or after the District has provided a final response to any protest, whichever date is later, the District must commence final contract Negotiations.

(6) Negotiation .

(a) Initiating Negotiations. The District may determine to commence Negotiations with the highest-ranked Proposer in the Competitive Range following the:

(A) Initial determination of the Competitive Range; or

(B) Conclusion of Discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.

(b) Conducting Negotiations.

(A) Scope. The District may negotiate:

(i) The statement of Work;

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

(iii) Any other terms and conditions reasonably related to those expressly authorized for Negotiation in the Request for Proposals. Accordingly, Proposers must not submit, and the District must not accept, for Negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for Negotiation in the 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

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(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.

#### **137-49-0660 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 pursuant to 137-47-0210.

(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 must propose a final GMP, which may be accepted by the District and included within the Contract.

(b) If this collaborative process is not successful, and no mutually agreeable resolution on GMP can be achieved with the Contractor, then the District must terminate the Contract. The public 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.

#### **137-49-0670 Design-Build Contracts**

(1) General. The Design-Build form of contracting, as defined at 137-49-0610(3), has technical complexities that are not readily apparent. The District must use this contracting method only with the assistance of knowledgeable staff or Consultants who are experienced in its use. In order to use the Design-Build process, the District must be able to reasonably anticipate the following types of benefits:

(a) Obtaining, through a Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;

(b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing contract changes;

(c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing contract claims;

(d) Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance Work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased projects); or

(e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.

(2) Authority. The District must utilize the Design- Build form of contracting only in accordance with the requirements of these 137-49-0600 to 137-49-0690 Rules. See particularly 137-49-0620 on "Use of Alternative Contracting Methods" and 137-49-0680 pertaining to ESPCs.

(3) Selection. Design-Build selection criteria may include those factors set forth above in 137-49-0640(2)(a), (b) and (c).

(4) QBS Inapplicable. Because the value of construction services predominates the Design- Build form of contracting, the qualifications based selection (QBS) process mandated by ORS 279C.110 for The District in obtaining certain Consultant services is not applicable.

(5) Licensing. If a Design- Build Contractor is not an Oregon licensed design professional, the District must require that the Design-Build Contractor disclose in its Written Offer that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and ORS 672.060(11) regarding the offer of engineering services that are appurtenant to construction services.

(6) Performance Security. ORS 279C.380(1)(a) provides that for Design- Build Contracts the surety's obligation on performance bonds, or the Bidder's obligation on cashier's or certified checks accepted in lieu thereof, includes the preparation and completion of design and related professional services specified in the Contract. This additional obligation, beyond performance of construction services, extends only to the provision of professional services and related design revisions, corrective Work and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage.

(7) Contract Requirements. The District must conform their Design- Build contracting practices to the following requirements:

(a) Design Services. The level or type of design services required must be clearly defined within the Procurement Documents and Contract, along with a description of the level or type of design services previously performed for the project. The services to be performed must be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.

(b) Professional Liability. The Contract must clearly identify the liability of design professionals with respect to the Design-Build Contractor and the District, as well as requirements for professional liability insurance.

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(c) Risk Allocation. The Contract must clearly identify the extent to which the District requires an express indemnification from the Design- Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.

(d) Warranties. The Contract must clearly identify any express warranties made to the District regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.

(e) Incentives. The Contract must clearly identify any economic incentives and disincentives, the specific criteria that apply and their relationship to other financial elements of the Contract.

(f) Honoraria. If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the Solicitation process on the basis that the District is benefited from such deliverables.

#### **137-49-0680 Energy Savings Performance Contracts (ESPC)**

(1) Generally. These 137-49-0600 to 137-49-0690 Rules include a limited, efficient method for Public Contract 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 137-49-0600 to 137-49-0690 Rules, the District may still enter into an ESPC by complying with the competitive Bidding exemption process set forth in ORS 279C.335, or by otherwise complying with the procurement requirements applicable to any District not subject to all the requirements of ORS 279C.335.

(2) ESPC Contracting Method. The ESPC form of contracting, as defined at 137-49- 0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the District, as well as the additional technical complexities associated with a Design- Build Contract. The District must only utilize the ESPC contracting method with the assistance of knowledgeable staff or Consultants who are experienced in its use. In order to utilize the ESPC contracting process, the District must be able to reasonably anticipate one or more of the following types of benefits:

(a) Obtaining, through an ESCO, the following types of integrated services: facility profiling, energy baseline studies, ECMs, Technical Energy Audits, project development planning, engineering design, plan preparation, cost estimating, life cycle costing, construction administration, project management, construction, quality control, operations and maintenance staff training, commissioning services, M & V services and required documentation as a fully integrated function with a single point of responsibility;

(b) Obtaining, through an ESCO, an Energy Savings Guarantee;

(c) Integrating the Technical Energy Audit phase and the Project Development Plan phase into the design and construction phase of Work on the project;

(d) Reducing the risk of design flaws, misunderstandings and conflicts inherent in the construction process, through the integration of ESPC services;

(e) Obtaining innovative design solutions through the collaboration of the members of the ESCO integrated ESPC services team;

(f) Integrating cost-effective ECMs into an existing building or structure, so that the ECMs pay for themselves through savings realized over the useful life of the ECMs;

(g) Preliminary design, development, implementation and an Energy Savings Guarantee of ECMs into an existing building or structure through an ESPC, as a distinct part of a major remodel of that building or structure that is being performed under a separate remodeling Contract; and

(h) Satisfying local energy efficiency design criteria or requirements.

(3) Authority. The District desiring to pursue an exemption from the competitive Bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086), must utilize the ESPC form of contracting only in accordance with the requirements of these 137-49-0600 to 137-49-0690 Rules.

(4) No Findings Required. The District is only required to comply with the ESPC contracting procedures set forth in these 137-49-0600 to 137-49-0690 Rules in order for the ESPC to be exempt from the competitive Bidding processes of ORS 279C.335. No Findings are required for an ESPC to be exempt from the competitive Bidding process for Public Improvement Contracts pursuant to ORS 279C.335, unless the District is subject to the requirements of ORS 279C.335 and chooses not to comply with the ESPC contracting procedures set forth in these 137-49-0600 to 137-49-0690 Rules.

(5) Selection. ESPC selection criteria may include those factors set forth above in 137-49-0640(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) QBS Inapplicable. Because the value of construction services predominates in the ESPC method of contracting, the qualifications based selection (QBS) process mandated by ORS 279C.110 for The District in obtaining certain Consultant services is not applicable.

(7) Licensing. If the ESCO is not an Oregon licensed design professional, the District must require that the ESCO disclose in the ESPC that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and ORS 672.060(11) regarding the offer of engineering services that are appurtenant to construction services.



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(8) Performance Security. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the ESCO must provide a performance bond and a payment bond, each for 100% of the full Contract Price, including the construction and design and related professional services specified in the ESPC Design- Build Contract, pursuant to ORS 279C.380(1)(a). For ESPC Design- Build Contracts, these "design and related professional services" include conventional design services, commissioning services, training services for the District's operations and maintenance staff, and any similar professional services provided by the ESCO under the ESPC Design- Build Contract prior to final completion of construction. M & V services, and any services associated with the ESCO's Energy Savings Guarantee are not included in these ORS 279C.380(1)(a) "design and related professional services." Nevertheless, the District may require that the ESCO provide performance security for M & V services and any services associated with the ESCO's Energy Savings Guarantee, if the District so provides in the RFP.

(9) Contracting Requirements. The District must conform their ESPC contracting practices to the following requirements:

(a) General ESPC Contracting Practices. An ESPC involves a multi-phase project, which includes the following contractual elements:

(A) A contractual structure which includes general contract terms describing the relationship of the parties, the various phases of the Work, the contractual terms governing the Technical Energy Audit for the project, the contractual terms governing the Project Development Plan for the project, the contractual terms governing the final design and construction of the project, the contractual terms governing the performance of the M & V services for the project, and the detailed provisions of the ESCO's Energy Savings Guarantee for the project.

(B) The various phases of the ESCO's Work will include the following:

- (i) The Technical Energy Audit phase of the Work;
- (ii) The Project Development Plan phase of the Work;
- (iii) A third phase of the Work that constitutes a Design- Build Contract, during which the ESCO completes any plans and Specifications required to implement the ECMs that have been agreed to by the parties to the ESPC, and the ESCO performs all construction, commissioning, construction administration and related services to actually construct the project; and
- (iv) A final phase of the Work, whereby the ESCO, independently or in cooperation with an independent Consultant hired by the District, performs M & V services to ensure 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 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 137-49-0600 to 137-49-0690 Rules does not include maintenance services for the project facility.

#### **137-49-0690 Construction Manager/General Contractor (CM/GC)**

(1) General. The CM/GC form of contracting, as defined at 137-49-0610(2), is a technically complex project delivery system. The District must use this contracting method only with the assistance of knowledgeable staff or Consultants who have a demonstrated capability of managing the CM/GC process in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, Public Contracting and project management. Unlike the Design-Build form of contracting, the CM/GC form of contracting does not contemplate a "single point of responsibility" under which the Contractor is responsible for successful completion of all Work related to a performance Specification. The CM/GC has defined contract obligations, including responsibilities as part of the project team along with the District and design professional, although in 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

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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 137-49-0620 on "Use of Alternative Contracting Methods".

(3) Selection. CM/GC selection criteria may include those factors set forth above in 137-49-0640(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 must not exceed the GMP. See GMP definition at 137-49-0610(7) and Pricing Mechanisms at 137-49-0660.

(5) Contract Requirements. The District must conform their CM/GC contracting practices to the following requirements:

(a) Setting the GMP. The GMP must be set at an identified time consistent with industry practice, after supporting information reasonably considered necessary to its use has been developed, and the supporting information must define with particularity both what is included and excluded from the GMP. A set of drawings and Specifications must be produced establishing the GMP scope.

(b) Adjustments to the GMP. The Contract must clearly identify the standards or factors under which changes or additional Work will be considered outside of the Work scope that warrants an increase in the GMP, as well as criteria for decreasing the GMP. The GMP must not be increased without a concomitant increase to the scope defined at the establishment of the GMP or most recent GMP Amendment.

(c) Cost Savings. The Contract must clearly identify the disposition of any cost savings resulting from completion of

the Work below the GMP; that is, under what circumstances, if any, the CM/GC might share in those cost savings, or whether they accrue only to the District's benefit. (Note that unless there is a clearly articulated reason for sharing such cost savings, they should accrue to the District.)

(d) Cost Reimbursement. The Contract must clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, including any category of "General Conditions" (a general grouping of direct costs that are not separately invoiced, subcontracted or included within either overhead or fee), and may also incorporate a mutually-agreeable cost-reimbursement standard.

(e) Audit. Cost reimbursements must be made subject to final audit adjustment, and the Contract must establish an audit process to ensure that Contract costs are allowable, properly allocated and reasonable.

(f) Fee. Compensation for the CM/GC's services must be paid on the basis of a fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee should be expressly defined wherever possible. The fee, first expressed as a proposed percentage of all reimbursable costs, must be identified during and become an element of the selection process. It must subsequently be expressed as a fixed amount when the GMP is established.

(g) Incentives. The Contract must clearly identify any economic incentives, the specific criteria that apply and their relationship to other financial elements of the Contract (including the GMP).

(h) Controlled Insurance Programs. For projects anticipated to exceed \$75 Million, the Contract must clearly identify whether an Owner Controlled or Contractor Controlled Insurance Program is anticipated or allowable. If so, the Contract must clearly identify (1) anticipated cost savings from reduced premiums, claims reductions and other factors, (2) the allocation of cost savings, and (3) safety responsibilities and incentives, separately or combined.

(i) Early Work. The RFP must clearly identify, whenever feasible, the circumstances under which any of the following activities may be authorized and undertaken for compensation prior to establishing the GMP:

(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 must clearly describe the methods by which the CM/GC must publicly receive, open and record Bids or price quotations, and competitively select subcontractors to perform the Contract Work based upon price, as well as the mechanisms by which the District may waive those requirements. The documents must also describe completely the methods by which the CM/GC and its affiliated or subsidiary entities may compete to perform the Work, including, at a minimum, advance notice to the public of the CM/GC's intent to compete and a public Opening of Bids or quotations by an independent party.

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(k) Subcontractor Approvals and Protests. The Contract must clearly establish whether the District must approve subcontract awards, and to what extent, if any, the District will resolve procurement protests of subcontractors and suppliers. The related procedures and reporting mechanisms must be established with certainty, including whether the CM/GC acts as the District's representative in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the District must retain the right to monitor the subcontracting process in order to protect the District's interests.

(l) CM/GC Self-Performance. Whenever feasible, the Contract must establish the elements of Work the CM/GC may self-perform without competition, including, for example, the Work of the job-site general conditions. In the alternative, the Contract must include a process for District approval of CM/GC self-performance.

(m) Socio-Economic Programs. The Contract must clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and the District.

### **CONTRACT PROVISIONS**

#### **137-49-0800 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 137-49-0200(1)(c) regarding Solicitation Documents. The following series of rules provide further guidance regarding particular Public Contract provisions.

#### **137-49-0810 Waiver of Delay Damages against Public Policy**

The District must not place any provision in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from the District's unreasonable delay in performing the Contract. However, Contract provisions requiring notice of delay, providing for alternative dispute resolution such as arbitration (where allowable) or mediation, providing other procedures for settling contract disputes, or providing for reasonable liquidated damages, are permissible.

#### **137-49-0820 Retainage**

(1) Withholding of Retainage. Except to the extent the District's enabling laws require otherwise, the District must not retain an amount in excess of five percent (5%) of the Contract Price for Work completed. If the Contractor has performed at least fifty percent (50%) of the contract Work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written approval, the District may, in its discretion, reduce or eliminate Retainage on any remaining progress payments. The

District must respond in Writing to all such applications within a reasonable time. When the contract Work is ninety seven and one half percent (97-1/2 %) completed, the District may, at its discretion and without application by the Contractor, reduce the retained amount to one hundred percent (100%) of the value of the remaining unperformed contract Work. The District may at any time reinstate Retainage. Retainage must be included in the final payment of the Contract Price.

(2) Deposit in interest-bearing accounts. Upon request of the Contractor, the District must deposit cash Retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the District. Earnings on such account must accrue to the Contractor. State The District must establish the account through the State Treasurer.

(3) Alternatives to cash Retainage. In lieu of cash Retainage to be held by a District, the Contractor may substitute one of the following:

(a) Deposit of Securities:

(i) 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.

(ii) Bonds and securities deposited or acquired in lieu of Retainage must be of a character approved by the District, including but not limited to:

(A) Bills, certificates, notes or bonds of the United States.

(B) Other obligations of the United States or its The District.

(C) Obligations of any corporation wholly owned by the Federal Government.

(D) Indebtedness of the Federal National Mortgage Association.

(iii) Upon the District's determination that all requirements for the protection of the District's interests have been fulfilled, it must release to the Contractor all bonds and securities deposited in lieu of Retainage.

(b) Deposit of Surety Bond. The District, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the District in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond must accept surety bonds from its subcontractors and suppliers in lieu of Retainage. In such cases, Retainage must be reduced by an amount equal to the value of the bond, and the excess must be reimbursed.

(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.

#### **137-49-0830 Contractor Progress Payments**

(1) Request for Progress Payments. Each month the Contractor must submit to the District, their Written request for a progress payment based 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, which has been delivered to the premises and appropriately stored. The sum of these estimates is

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referred to as the "value of completed Work." With these estimates as a base, the District will make a progress payment to the Contractor, which must be equal to:

- (a) The value of completed Work;
  - (b) Less those amounts that have been previously paid;
  - (c) Less other amounts that may be deductible or owing and due to the District for any cause; and
  - (d) Less the appropriate amount of Retainage.
- (2) Progress Payments Do Not Mean Acceptance of Work. Progress payments must not be construed as an acceptance or approval of any part of the Work, and must not relieve the Contractor of responsibility for defective Workmanship or material.

#### **137-49-0840 Interest**

- (1) Prompt Payment Policy. The District must pay promptly all payments due and owing to the Contractor on Contracts for Public Improvements.
- (2) Interest on Progress Payments. Late payment interest must begin to accrue on payments due and owing on the earlier of 30 Days after receipt of invoice or 15 Days after District approval of payment (the "Progress Payment Due Date"). The interest rate must equal three times the discount rate on 90-day commercial paper in effect on the Progress Payment Due Date at the Federal Reserve Bank in the Federal Reserve district that includes Oregon, up to a maximum rate of 30 percent.
- (3) Interest on Final Payment. Final payment on the Contract Price, including Retainage, must be due and owing no later than 30 Days after Contract completion and acceptance of the Work. Late-payment interest on such final payment must thereafter accrue at the rate of 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 must be added to, and not made part of, the settlement or judgment. Such interest, at the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District that includes Oregon, must accrue from the later of the Progress Payment Due Date, or thirty Days after the Contractor submitted a claim for payment to the District in Writing or otherwise in accordance with the contract requirements.

#### **137-49-0850 Final Inspection**

- (1) Notification of Completion; Inspection. The Contractor must notify the District in Writing when the Contractor considers the contract Work completed. Within 15 Days of receiving 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.

#### **137-49-0860 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) 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).

#### **137-49-0870 Specifications; Brand Name Products**

- (1) Generally. The District's Solicitation Document must not expressly or implicitly require any product by brand name or mark, nor must it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279C.345(2).
- (2) 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 Offerors alternate product is "equal" or "equivalent."

#### **137-49-0880 Records Maintenance; Right to Audit Records**

- (1) Records Maintenance; Access. Contractors and subcontractors must maintain all fiscal records relating to Contracts in accordance with generally accepted accounting principles ("GAAP"). In addition, Contractors and subcontractors must maintain all other records necessary to clearly document:

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- (a) Their performance; and
- (b) Any claims arising from or relating to their performance under a Public Contract. Contractors and subcontractors must make all records pertaining to their performance and any claims under a Contract (the books, fiscal records and all other records, hereafter referred to as "Records") accessible to the District at reasonable times and places, whether or not litigation has been filed as to such claims.
- (2) Inspection and Audit. The District may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the Records of any Person that has submitted cost or pricing data according to the terms of a Contract to the extent that the Records relate to such cost or pricing data. If the Person must provide cost or pricing data under a Contract, the Person must maintain such Records that relate to the cost or pricing data for 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, must be entitled to inspect, examine, copy, and audit any Contractor's or subcontractor's Records, as provided in Section 1 of this Rule. The Contractor and subcontractor must maintain the Records and keep the Records accessible and available at reasonable times and places for a minimum period of 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.

#### **137-49-0890 District Payment for Unpaid Labor or Supplies**

- (1) Contract Incomplete. If the Contract is still in force, the District may, in accordance with ORS 279C.515(1), pay a valid claim to the Person furnishing the labor or services, and charge the amount against payments due or to become due to the Contractor under the Contract. If the District chooses to make such a payment as provided in ORS 279C.515(1), the Contractor and the Contractor's surety must not be relieved from liability for unpaid claims.
- (2) Contract Completed. If the Contract has been completed and all funds disbursed to the prime Contractor, all claims must be referred to the Contractor's surety for resolution. The District must not make payments to subcontractors or suppliers for Work already paid for by the District.

#### **137-49-0900 Contract Suspension; Termination Procedures**

- (1) Suspension of Work. In the event the District suspends performance of Work for any reason considered by the District to be in the public interest other than a labor dispute, the Contractor must be entitled to a reasonable extension of contract time, and to reasonable compensation for all costs, including a reasonable allowance for related overhead, incurred by the Contractor as a result of the suspension.
- (2) Termination of Contract by Mutual Agreement for Reasons Other Than Default.

- (a) Reasons for termination. The parties may agree to terminate the Contract or a divisible portion thereof if:
  - (A) The District suspends Work under the Contract for any reason considered to be in the public interest (other than a labor dispute, or any judicial proceeding relating to the Work filed to resolve a labor dispute); and
  - (B) Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the Work.
- (b) Payment. When a Contract, or any divisible portion thereof, is terminated pursuant to this Section (2), the District must pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. The District must also pay for all Work completed, based on the Contract Price. Unless the Work completed is subject to unit or itemized pricing under the Contract, payment must be calculated based on percent of Contract completed. No claim for loss of anticipated profits will be allowed.
- (3) Public Interest Termination by the District. The District may include in its Contracts terms detailing the circumstances under which the Contractor must be entitled to compensation as a matter of right in the event the District unilaterally terminates the Contract for any reason considered by the District to be in the public interest.
- (4) Responsibility for Completed Work. Termination of the Contract or a divisible portion thereof pursuant to this Rule must not relieve either the Contractor or its surety of liability for claims arising out of the Work performed.
- (5) Remedies Cumulative. The District may, at its discretion, avail itself of any or all rights or remedies set forth in these Rules, in the Contract, or available at law or in equity.

#### **137-49-0910 Changes to the Work and Contract Amendments**

- (1) Definitions. 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

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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 establishes internal limitations and delegations for authorizing Changes to the Work, including dollar limitations in 137-46-0560 and 137-49-0160.

(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.

End of Division