

MARION COUNTY



O R E G O N

PUBLIC CONTRACTING RULES

Effective March 1, 2005

Adopted: 3/2005

Adopted Revision: 12/12/2007, 1/25/2010, 1/4/2012, 1/8/2014, 5/6/2015, 8/24/2016, 12/2018, 2/2020

Preface

Marion County Public Contracting Rules are adopted by the local contract review board pursuant to the authority set forth in ORS Chapter 279, 279A, 279B, and 279C to govern county procedures with respect to purchasing, contracting and the competitive process.

The 1999 Oregon legislature enacted several bills that modified and added provisions to the public contracting laws. House Bill 2024 made it mandatory for all public contracting agencies to follow the Oregon Attorney General's Model Rules of Procedures or opt out and adopt its own rules. These model rules govern procedural matters concerning the preparation, submission, receipt and award of bids and proposals. Marion County adopted its own set of rules to govern public contracting and opted out of the model rules.

The 2003 Oregon Legislature adopted House Bill 2341, which reorganized and modified the public contracting laws. The revision of the state public contracting laws applicable to state and local public procurement was be operative March 1, 2005.

In response to the legislative changes, the Oregon Attorney General's Model Rules were revised and filed on September 1, 2004.

Legislative changes were made during the 2005 and 2007 legislative sessions that affect public contracting code. The public contracting code changes that occurred during the 2007 legislative session became effective on January 1, 2008.

The 2009 Oregon legislature adopted Oregon Laws 2009 chapter 880, which contains changes affecting public contracting code. The public contracting code changes that occurred during the 2009 legislative session became effective on January 1, 2010.

The 2011 Oregon legislature adopted legislative changes affecting public contracting code. The public contracting code changes that occurred during the 2011 legislative session became effective on January 1, 2012.

The 2013 Oregon legislature adopted legislative changes affecting public contracting code. The public contracting code changes that occurred during the 2013 legislative session became effective on January 1, 2014.

The 2014 Oregon legislature adopted legislative changes affecting public contracting code. The public contracting code changes that occurred during the 2014 legislative session became effective on July 1, 2014.

The 2015 Oregon legislature adopted legislative changes affecting public contracting code. The public contracting code changes that occurred during the 2015 legislative session became effective on January 1, 2016.

The 2017 Oregon legislature adopted legislative changes affecting public contracting code. The public contracting code changes that occurred during the 2017 legislative session became effective on January 1, 2018.

The 2019 Oregon legislature adopted legislative changes affecting public contracting code. The public contracting code changes that occurred during the 2019 legislative session became effective on January 1, 2020.

Marion County has revised its public contracting rules to meet the new statutory requirements outlined in the recent legislative changes.

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Section 10 General Provisions

10-0100 Purpose and Statutory Authority

(1) These rules set forth policy and procedure for public contracting for Marion County. These rules consist of the following four sections:

- (a) Section 10, which is applicable to all public contracting;
- (b) Section 20, which describes procedures for public contracting for goods or services, as defined in ORS 279B.005, and for personal services other than architectural, engineering and land surveying services and related services;
- (c) Section 30, which describes procedures for public contracting for architectural, engineering and land surveying services and related services; and
- (d) Section 40, which describe procedures for public contracting for construction services.

(2) In the event of conflict between rules in this section 10 and rules in sections 20, 30 and 40, the rules in sections 20, 30 and 40 take precedence over the rules in this section 10.

(3) Except as otherwise expressly provided in ORS 279C.800 through ORS 279C.870, and notwithstanding ORS Chapters 279A, 279B, and ORS 279C.005 through 279C.670, applicable federal statutes and regulations govern when federal funds are involved and

the federal statutes or regulations conflict with any provision of ORS Chapters 279A, 279B, and ORS 279C.005 through 279C.670 or these rules, or require additional conditions in public contracts not authorized by ORS Chapters 279A, 279B, and ORS 279C.005 through 279C.670 or these rules.

(4) The Marion County Board of Commissioners shall serve as the local contract review board for the county.

10-0110 Definitions / Glossary

Addendum or Addenda: An addition or deletion to, a material change in, or general interest explanation of the invitation to bid (ITB) or request for proposals (RFP) document. Addenda shall be labeled as such and distributed to all participating parties in accordance with these rules.

Administering Contracting Agency: The contracting agency that solicits and establishes the original contract price for procurement of goods, services, or public improvements in a cooperative procurement.

Advertise: To make a public announcement (such as in a newspaper of general circulation; a trade publication, the Daily Journal of Commerce; or electronic posting e.g. OregonBuys) of the intent to purchase goods, services or construction, for the purpose of notifying interested parties and expanding competition.

Affected Person: A person whose ability to participate in procurement is adversely affected by the county's decision.

Agenda: The document identifying the items scheduled for the Board's consideration at an upcoming public meeting.

Agreement: An understanding, in writing, between two or more competent parties, under which one party agrees to certain performance as defined in the agreement and the second party agrees to consideration for the performance rendered in accordance with the conditions of the agreement.

Amendment: A written modification (addition, deletion or supplement) to terms and conditions of an existing contract.

Appropriation: A budgeted sum of money set aside for a specific purpose.

Award: The act or occurrence of the county's identification of the person, firm or organization with which the county will enter into a contract following the resolution of any protest of the county's selection of the person, firm or organization, and the completion of all contract negotiations executed and delivered by the county.

Bid: A written offer submitted in response to an invitation to bid (ITB).

Bidder: A contractor that submits a bid in response to an ITB.

Blanket Purchase Order: A purchase order placed with a supplier for an established dollar amount to supply various supplies on an as-needed basis within a specified time period.

Board: The Marion County Board of County Commissioners.

Boilerplate: The pre-approved standard terms and conditions incorporated in solicitations, contracts, or purchase orders.

Bond:

Bid Security (Bond): A written agreement or check by which a third party guarantees that a bidder will honor its bid if a contract is awarded.

Payment Bond: A bond equal to the full contract price required of a contractor to assure fulfillment of the contractor's obligation to pay all persons supplying labor or materials in the performance of the work provided for in a contract.

Performance Bond: A bond, equal to the full contract price, executed subsequent to award by a successful bidder or proposer to protect the county from loss due to the bidder's or proposer's inability or refusal to complete the contract as agreed.

Brand Name or Equal Specification: As defined in ORS 279B.200(1), 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 Agency's requirements and that authorizes the offerors to offer supplies and services that are equivalent or superior to those named or described in the specification.

Brand Name Specification: As defined in ORS 279B.200(2), a specification limited to one or more products, brand names, makes, manufacturer's names, catalog numbers or similar identifying characteristics.

Business Day: 8:00 a.m. to 5:00 p.m., Pacific time, Monday through Friday, excluding Marion County recognized holidays.

Certification Office of Business Inclusion and Diversity or COBID: As defined in ORS 200.025 and 200.055, the office that administers the certification process for the disadvantaged business enterprise (DBE), minority business enterprise/women business enterprise (MBE/WBE), emerging small business (ESB) programs, and service disabled veteran (VE). COBID is the sole authority providing certification for disadvantaged, minority and woman-owned businesses, emerging small business and service disabled veterans.

Change Order: A written order authorizing a change in plans, specifications, or quantities within the scope of the original contract.

Class Special Procurement: A contracting procedure that differs from the procedures otherwise described in these rules 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.

Client: Any individual, family or provider: a) for whom the county must provide services and incidental or specialized goods, in any combination, according to state, federal law, rule, and policy. Those services and incidental supplies include but are not limited to treatment, care, protection, and support without regard to the proximity of the services being provided; b) who in fact receives and utilizes services provided by the county primarily for that individual's or family's benefit; c) who is under the custody, care or both of the county; or d) who provides direct care or services and is a proxy or representative of the non-provider client.

Client Services: Any services that directly or primarily support a client, whether the client is the recipient through the provision of voluntary or mandatory services. Client services also means any goods that are incidental or specialized in relation to any services defined in this subsection. Client services may include but are not limited to (where terms are used in another statute, they must have that meaning): (a) housing, including utilities, rent or mortgage or assistance to pay rent, mortgage or utilities; (b) sustenance, including clothing; (c) employment training or skills training to improve employability; (d) services for people with disabilities; (e) foster care or foster care facilities; (f) residential care or residential care facilities; (g) community housing; (h) in-home care including home delivered meals; (i) medical care, services and treatment including but not limited to: (A) medical, dental, hospital, psychological, psychiatric, therapy, vision; (B) alcohol and drug treatment; (C) smoking cessation; (D) drugs, prescriptions and non-prescription; and (E) nursing services and facilities; (j) transportation or relocation; (k) quality of life, living skills training; (l) personal care; (m) legal services and expert witnesses services; (n) religious practices, traditions and services, separately or in any combination thereof; and (o) educational services. The term "Client Services" does not include benefits or services provided as a condition of employment with the county.

Closing: The date and time announced in the solicitation document as the deadline for submitting offers.

Code: The "Public Contracting Code" as defined in ORS 279A.010(1)(bb) and "Code" means ORS Chapters 279, 279A, 279B, and 279C.

Commodity Code: A system of words and numbers established to easily identify and list products or services.

Competitive Bidding: The issuing of an ITB that consists of the formal process of advertising, bid and bid opening required by ORS 279A, ORS 279B, ORS 279C and these rules.

Competitive Quotes: The sourcing method according to sections 20-0270, 30-0210 and 40.0160.

Competitive Range: The proposers with whom the county will conduct discussions, interview/presentations or negotiations, if the county intends to conduct discussions, interview/presentations or negotiations in accordance with section 20-0261 or section 40-0650.

Competitive Process: The ITB, RFP and informal quote or proposal process, as indicated by the context.

Competitive Proposal: The issuing of an RFP that consists of the formal process of advertising, proposal, proposal opening and evaluation required by ORS 279A, ORS 279B, ORS 279C and these rules.

Conduct Disqualification: A disqualification from consideration of award based on particular federal or state convictions or violations of contract provisions pursuant to ORS 279C.440.

Consultant: The person with whom the county enters into a contract for the purposes of consulting, conferring, or deliberating on one or more subjects, and who provides advice or opinion.

Contract: An agreement in writing between parties, with binding legal and moral force; usually exchanging goods or services for money or other consideration.

Contract Administration: The management of all facets of a contract, including amendments, which must be taken to assure compliance by all parties. This includes monitoring service or goods, maintaining open communication, making prompt payment, monitoring budget requirements and closing out the contract when completed.

Contracts Officer: The Chief Financial Officer for Marion County.

Contracts Officer or designee: The Chief Financial Officer and the Contracts and Procurement Manager for Marion County.

Contract Price: The maximum monetary obligation that the county either will or may incur under a contract, including bonuses, incentives, and contingency amounts, if the contractor fully performs under the contract.

Contract Review Process: The process in which every county contract is reviewed and approved as to form, as well as compliance with these rules. Review is done by the individual department administrator, Finance Department contract staff, County Legal Counsel, Risk Management, Deputy Administrative Officer, Chief Administrative Officer and/or the Board of Commissioners as set forth in section 10-0170 below.

Contract Review Board: The Marion County Board of Commissioners.

Contract Signature: For purposes of these rules, contract signature shall mean an original ink, scanned, facsimile or electronic signature when executing final contract documents and subsequent contract and amending activities. (see section 10-0550.)

Contractor: A person, including a consultant as defined in OAR 137-048-0110(1), with whom a contracting agency enters into a contract who agrees to furnish goods or services to the county; may include a prime contractor and/or a subcontractor.

Contract-Specific Special Procurement: A contracting procedure that differs from the procedures described in these rules and is for the purpose of entering into a single

contract or number of related contracts for the acquisition of specified goods or services on a one-time basis or for a single project.

Cooperative Procurement: A procurement conducted by or on behalf of one or more contracting agencies. "Cooperative procurement" includes but is not limited to multi-party contracts and price agreements.

Cooperative Procurement Group: A group of contracting agencies joined through an intergovernmental agreement for the purposes of facilitating cooperative procurements.

County: Marion County, a political subdivision of the State of Oregon, and any other entity for which the Board serves as the local contract review authority.

Day: Unless otherwise defined, "day" is a calendar day.

Descriptive Literature: Written information submitted with the offer that addresses the goods and services included in the offer.

Disqualification: The preclusion of a supplier from contracting with the county for a period of time.

Electronic Advertisement: A solicitation document or request for quotes, request for information or other document inviting participation in the county's procurements made available over the internet via: (a) the world wide web or some other internet protocol; or (b) the county's electronic procurement system.

Electronic Offer: A response to the county's solicitation document or request for quotes submitted to the county via (a) the internet; or (b) the county's electronic procurement system.

Electronic Procurement System: An information system that persons may access through the internet using the internet or that persons may otherwise remotely access using a computer, that enables persons to send electronic offers and the county to post electronic advertisements, receive electronic offers, and conduct other activities related to a procurement.

Emergency Declaration: Based on the severity of unforeseen circumstances (e.g., flooding, earthquakes, etc.), notwithstanding the Marion County Emergency Operations Plan, the Board or Chief Administrative Officer (CAO) may declare an emergency and approve public contracts without going through the standard purchasing processes.

Emergency Situation: Circumstances that are unforeseen and require immediate action to minimize risk of property damage, personal injury or substantial extraordinary expense to the county or to the public.

Exemptions: Materials or services exempt from a competitive process pursuant to ORS 279C.335, 279A.025 and/or these rules.

Findings: (1) As defined in ORS 279C.330, the justification for the county'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. (2) The justification for a conclusion that the county, in seeking an exemption from the competitive bidding requirement of ORS 279C.335(1), reaches based on the considerations set forth in ORS 279C.335(2).

Fiscal Year: The twelve-month budget-period starting July 1 and ending June 30.

Foreign Contractor: A contractor that is not domiciled in or registered to do business in the State of Oregon.

Goods: Supplies, equipment, or materials, and any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, that the county is authorized by law to procure.

Grant: As defined in ORS 279A.010(1)(k)(A), (a) an agreement under which the county 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 county 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 county 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 county 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 public improvement for public works, as defined in ORS 279C.800 or (B) for emergency work, minor alterations or ordinary repair or maintenance necessary to preserve a public improvement, when under the public contract: (i) the county pays moneys that the county 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 county.

Informal Quote: An informal written or verbal solicitation for pricing of goods or services.

Informality: A minor defect or variation found in a bid document or proposal response that does not affect the required specifications or scope of work.

Intergovernmental Agreement: As defined in ORS 190.010, the county may enter into a written agreement with any other unit or units of local government for the performance of any or all functions and activities that a party to the agreement, its officers or agencies, have authority to perform. The agreement may provide for the performance of a function or activity: (a) by a consolidated department; (b) by jointly providing for administrative officers; (c) by means of facilities or equipment jointly constructed, owned, leased or operated; (d) by one of the parties for any other party; (e) by an intergovernmental entity created by the agreement and governed by a board or commission appointed by,

responsible to and acting on behalf of the units of local government that are parties to the agreement; or (f) by a combination of the methods described in this section.

Interstate Cooperative Procurement: A permissive cooperative procurement in which the administering contracting agency is a governmental body, domestic or foreign, that is authorized under the governmental body's laws, rules or regulations to enter into public contracts and in which one or more of the participating agencies are located outside the State of Oregon.

Invitation to Bid (ITB): A solicitation document calling for offers from prospective contractors pursuant to either ORS 279B.055 or 279C.335.

Joint Cooperative Procurement: A cooperative procurement in which the participating contracting agencies or the cooperative procurement group and the agencies' or group's contract requirements or estimated contract requirements for price agreements are identified.

Lease: A contract by which one party (lessee) enters into a contract with a second party (lessor) for possession and use of real or personal property for a specified period of time at a predetermined cost.

Legally Flawed: As defined in ORS 279B.405(1)(b), a solicitation document contains terms or conditions that are contrary to law.

Letter of Intent: A letter from a potential contractor declaring its intention to respond to an ITB or RFP.

Lowest Responsible Bidder: A bidder is defined in ORS 279A.010(1)(r), 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 sections 20-0640 and 40-0390; (c) has not been debarred or disqualified by the county under sections 20-0575 or 40-0430; 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.

Mandatory: The term used to identify requirements in a bid or proposal that cannot be waived.

Multi-Step or Multi-Tier Process: The term used to describe more than one step, phase, tier, or round in a solicitation process used in competitive sealed bidding and/or competitive sealed proposals according to ORS 279B and these rules, where the process is staged in phases.

Negotiation: The bargaining process between two or more parties seeking to reach a mutually satisfactory agreement or settlement.

Nonresident Bidder/Offeror: A(n) bidder/offeror who is not a resident bidder/offeror. For the meaning of residency, see the definition of Resident Bidder/Offeror.

Offer: A written offer to provide goods or services in response to a solicitation document.

Offeror: A person who submits an offer in response to an ITB or RFP.

Offering: The county's request for a bid, proposal or quote.

Opening: The date, time, and place announced in the solicitation document for the public opening of offers.

OregonBuys: The e-procurement system administered by the Oregon Department of Administrative Services, State Procurement Office, as further defined in OAR 125-246-0500. By this rule, OregonBuys is the county's Electronic Procurement System.

Original Contract: The initial contract or price agreement solicited and awarded during a cooperative procurement by an administering contracting agency.

Permissive Cooperative Procurement: A cooperative procurement in which the purchasing contracting agencies are not identified.

Person: An individual, corporation, partnership, trust, estate, limited liability company association, joint venture, government agency, public corporation or other entity with legal capacity to enter into a contract

Personal Services: Services that are performed by an independent contractor in a personal or professional capacity; including but not limited to, services provided by an accountant, attorney, physician, counselor, consultant or architect, and as further described in section 10-0335.

Personal Services Contract: A contract or a class of contracts for personal services, as defined in section 10-0335 Personal Services.

Personal Property: Everything subject to ownership that is not real property and has exchangeable value.

Photogrammetrist: a professional who uses photographic technology to extract measurements, make maps, and interprets data from images or photographs, especially in construction of maps from aerial photographs.

Photogrammetric mapping: process of making precise measurements for surveying, map-making, or scale drawings, especially in construction of maps from aerial photographs.

Pre-Bid or Pre-Proposal Conference: A meeting held with prospective bidders/proposers prior to solicitation of bids or proposals, to review, discuss and clarify technical considerations, specifications and standards.

Pre-Qualification: The process in which suppliers or products are evaluated for future purchase opportunities, thereby limiting consideration for future contracts to only those suppliers or products.

Prevailing Wages: Prevailing wage rates are the minimum wages that must be paid to all workers employed in any public works project exceeding \$50,000. Notice of prevailing wage requirements must be included in bid and contract documents for projects of \$50,000 or more.

Price Agreement: As defined in ORS 279A.010(1)(v), 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 authorized agency does not guarantee a minimum or maximum additional purchase. (b) The set price may exist at the outset or be determined later by an ordering Instrument. (c) A price agreement as a public contract may collectively consist of an initial agreement, together with later ordering instruments, if any. (A) The initial agreement may be known as an agreement to agree, a master agreement, a price agreement for any supplies or services, a services agreement, or a retainer agreement, if such agreement meets the requirements of this rule's definition. (B) The ordering Instrument may be known as a work order, purchase order or task order, or by another name for ordering purposes and related to the initial agreement.

Procurement Process: The act of purchasing, leasing, renting or otherwise acquiring or selling: goods and services; architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services; and public improvements. Procurement process includes each function and procedure undertaken or required to be undertaken by the county to enter into, administer and obtain the performance of a contract under the public contracting code and these rules. The procurement process includes contract administration, contract amendments and contract closeout.

Procurement File: Any of the following files maintained by the county: a solicitation, contract, amendment, work order, or contract administration file, separately or collectively.

Product Sample: The exact goods or a representative portion of the goods offered in an offer, or the goods requested in the solicitation document as a sample.

Professional Services: See section 10-0335 Personal Services.

Project: A specific plan or task with clearly defined limits.

Proposal: A written offer submitted in response to an RFP.

Proposer: A person that submits a proposal in response to a request for proposals.

Protest: A complaint received from a bidder or proposer regarding a governmental administrative action or decision; normally in relation to bid or proposal processes and/or contract awards.

Provider: The supplier, contractor, or consultant, providing goods and/or services or public improvements.

Public Agency: Any agency, political subdivision, or municipal corporation of the State of Oregon.

Public Contract: A contract as defined in ORS 279A.010 and means a sale or other disposal, or a purchase, lease, rental or other acquisition for 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.

Public Contract Review Board: The Board of County Commissioners serving as the local contract review board (LCRB) pursuant to ORS 279A.060.

Public Improvement: Projects for construction, reconstruction or major renovation on real property by or for the county.

Public Improvement Contract: A public contract for a public improvement. A 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.

Public Work: Construction or improvements by the county of publicly owned, roadways, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for or by the county, to serve the public interest, but does not include the reconstruction or renovation of privately owned property that is leased by the county, as defined in ORS 279C.800 (5).

Purchasing Contracting Agency: A contracting agency that procures goods, services or public improvements from a contractor based on the original contract established by an administering contracting agency.

Quotes: A written or oral response to a request for prices, rates, or other conditions under which an offeror would provide goods and services, personal services, or public improvements as described in the informal solicitation document.

Reinstatement of Expired Contracts: The action of reinstatement of an expired contract that was previously properly executed containing all the required approval signatures.

Related Services: Personal services, other than architectural, engineering and land surveying services, that are related to the planning, design, engineering or oversight of public improvement projects or components thereof, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, environmental impact studies, hazardous substances or hazardous waste or toxic substances testing services, wetland delineation studies, wetland mitigation studies, native American studies, historical research services, endangered species studies, rare plant studies, biological services, archaeological services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner's representative services or land-use planning services.

Request for Information (RFI): Typically used to determine if sufficient information exists to develop specifications for an RFP. It is primarily used for highly technical projects.

Request for Proposals (RFP): A written solicitation document issued by the county requesting competitive proposals to be used as the basis in making an acquisition or entering into a contract when criteria other than specification and pricing may be the predominant factor for award recommendation.

Request for Qualifications (RFQu): A written document issued by the county to which potential consultants respond in writing by describing their experience with and qualifications for services, personal services or architectural, engineering and land surveying services or related services described in the document.

Requirements Contract: A contract in which the supplier agrees to supply all of the county's requirements that arise for an item or items within a specified time period.

Requisition: An internal document that details goods and/or services desired by the initiator and allows for encumbering of funds for the stated purpose.

Resident Bidder/Offeror: A(n) bidder/offeror who 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 offer whether the bidder/offeror is a resident bidder/offeror" under this paragraph.

Responsible: Meeting the standards set forth in sections 20-0640 or 40-0390(2) and not debarred or disqualified by the county under section 20-0575 or 40-0370.

Responsible Offeror: Person, as the context requires providing a responsible bid, responsible proposal or a person who has submitted an offer and meets the standards set forth in section 20-0640 or section 40-0390(2) and who has not been debarred or disqualified by the county.

Responsive: Meeting the characteristics of substantial compliance in all material respects with applicable solicitation requirements.

Responsive Offer: As the context requires, a responsive bid, responsive proposal or other offer that substantially complies in all material respects with applicable solicitation requirements.

Retroactive Approval of a Public Contract: The action of the Board, Chief Administrative Officer (CAO) or Deputy Chief Administrative Officer (DCAO) retroactively approving a contract containing all the required approval signatures that was not previously properly executed.

Signature: Any Written mark, word or symbol that is made or adopted by a person with the intent to be bound and that is attached to or logically associated with a written document to which the person intends to be bound.

Signed: As the context requires, that a written document contains a signature or that the act of making a signature has occurred.

Scope: The extent or range of view, outlook, application, operation, or effectiveness. Scope does not include the dollar amount of the contract.

Service: Work performed to meet a demand.

Service Contract: A contract that calls primarily for the contractor's time and effort rather than for an end product.

Solicitation: (a) A request by the county for the purpose of soliciting offers. This request may take the form of an invitation to bid, a request for proposal, a request for quotes, or a similar document; or (b) the process of notifying prospective offerors that the county requests such offers; or (c) the solicitation document itself. A solicitation and award process uses methods for procurement of all goods and services, including construction identified in these rules in sections 10 through 40.

Solicitation Document: An invitation to bid or request for proposal or other document issued to invite offers from prospective offerors pursuant to ORS chapter 279B or 279C. The solicitation document includes related documents attached or incorporated by reference, and any changes thereto, issued by the county to establish an original contract that forms the basis for the county's participation in a procurement. The following are not solicitation documents: request for qualifications, a prequalification of bidders, and a request for product prequalification.

Special Procurement: A class special procurement, a contract-specific special procurement, or both as authorized by these rules.

Specification: The description of the physical or functional characteristics of the item or service being solicited, including any requirement for inspecting, testing or preparing a supply, service or construction item for delivery and the quantities or qualities of materials to be furnished under a contract.

State Price Agreement (SPA): A state agreement for materials or services that allows other public agencies to utilize the contract; thereby obtaining volume pricing.

Supplies and Services: Collectively means goods, trade services, personal services, and ordinary construction services separately or in any combination of these terms thereof as appropriate within the context of these rules. Supplies and services includes the terms "goods and services," "goods or services," and "personal services" contained in ORS 279A and 279B. This term does not include public improvements or architectural, engineering, photogrammetric mapping, transportation planning, and land surveying services, and related services, governed under ORS 279C.

Surplus Property: All personal property, vehicles and titled equipment owned by the county and no longer being used for conducting the county's business.

Trade Services: Services performed that do not meet the definition of personal services as defined in these rules. Trade Services may include but are not limited to, electrical,

mechanical, and/or plumbing services required to provide minor alterations, ordinary repairs or routine maintenance.

Work: The furnishing of all materials, equipment, labor, and incidentals necessary to successfully complete any individual item or the entire contract and the carrying out and completion of all duties and obligations imposed by the contract.

Writing: Letters, characters and symbols inscribed on paper by hand, print, type or other method of impression, intended to represent or convey particular ideas or meanings. "Writing," when required or permitted by law, or required or permitted in a solicitation document, also means letters, characters and symbols made in electronic form and intended to represent or convey particular ideas or meanings.

Written: Exists in writing.

10-0120 Policy

Marion County shall conduct public contracting as set forth by state statute, these rules or as authorized by the Marion County Board of Commissioners.

10-0130 Application of Code / Model Rules

(1) The Oregon Attorney General's Model Rules adopted by the Oregon Department of Justice pursuant to ORS 279A.065 shall not apply to Marion County unless specifically referenced herein.

10-0170 Delegation of Authority

(1) This rule clarifies responsibilities and implements the code.

(2) (A) **Definition.** For the purpose of 10-0170(2)(a), designee shall mean deputy director or division director with a limitation to authorize contracts and intergovernmental agreements. The Board may delegate its authority to enter into certain contract(s) as follows:

(a) Elected and appointed department heads or designee may authorize contracts and intergovernmental agreements that are not more than \$50,000.

(b) The Chief Administrative Officer (CAO) or Deputy Chief Administrative Officer (DCAO) may authorize:

(A) Contracts, intergovernmental agreements or grants that are not more than \$100,000.

(B) Sole source procurements and special procurements that are not more than \$100,000.

(C) Bid award notices to lowest responsible bidders, formal proposal award notices to the highest ranking proposers and rejections of all bids and rejections of all proposals when it is in the county's best interest.

(D) Memoranda of understanding relating to Board approved projects.

(E) All grant applications and forward any application requiring review and approval by the governing body.

(F) All grant awards that are not more than \$100,000 and forward any grant award requiring review and approval by the governing body.

(G) Amendments on original contracts and leases of real property, where the original contract or lease is more than \$100,000 in the following situations:

(i) Extension of time only

- (ii) Price increase/decrease of not more than 25% of the original contract amount that does not increase/decrease the contract by more than \$100,000 per amendment.
- (H) Resolve issues, discrepancies, mistakes on procurements of not more than \$100,000.
- (c) County Legal Counsel may enter into a contract for retaining outside legal counsel.
- (d) County Contracts Officer may waive or permit an offeror to correct a minor informality on procurements.
- (3) Only those persons authorized to do so, pursuant to these rules, may enter into a binding agreement or contract, including a purchase order, for the purchase, sale, or lease of goods, services or real property on the part of the county.
- (4) The county's Finance Department is delegated the responsibility to establish procedures and guidelines for the contracting and procurement process as reviewed by the Board.

10-0200 Disadvantaged Business Enterprises, Minority-Owned Businesses, Woman-Owned Businesses, Businesses That Service-Disabled Veterans Own And Emerging Small Businesses

The county 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 as set forth in ORS 279A.100(3) .

10-0300 Preference for Oregon Supplies and Services; Nonresident Bidders

When offers are identical in price, fitness, availability and quality, the county will award the contract based on the Attorney General's Model Rules, OAR 137-046-0300, Preference for Oregon Goods and Services.

10-0310 Reciprocal Preference

When evaluating bids pursuant to ORS 279A.120, the county will add a percent 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.

10-0320 Preference for Recycled Materials

(1) Notwithstanding provisions of law requiring the county to award a contract to the lowest responsible bidder or best proposer or provider of a quotation, and in accordance with subsection (2) of this section, the county shall give preference to the procurement of goods manufactured from recycled materials when the county uses competitive bidding or competitive proposals pursuant to ORS 279B.055 or ORS 279B.060.

(2) In comparing goods from two or more offerors, if at least one offer provides goods manufactured from recycled materials, and at least one offer does not, the county shall select the offer of 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 specifications;
- (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 (5) percent or a higher percentage if a written determination is approved by the Chief Administrative Officer or Deputy Administrative Officer and set forth in the solicitation document.

**10-0335 Personal Services Contracts
Authority and Standards for Personal Services Contracts**

(1) Personal service contracts are not public contracts for purposes of ORS chapters 279A, 279B, 279C, and these rules. For the purposes of this subsection only, "personal services" includes architectural, engineering, photogrammetric mapping, transportation planning, and land surveying services, and related services.

(2) In the event of uncertainty or disagreement as to the status of any particular contract or class of contracts, the Contracts Officer or designee may determine whether the scope of work calls for the performance of personal services.

(3) The county may contract for personal services with providers who are independent contractors. An independent contractor is a person who provides services to the county and the county does not control nor has the right to control the means by or manner in which the work is performed.

(4) When the county is contemplating contracting for work performed by county employees represented by a labor organization, the county must review the relevant collective bargaining agreement to ensure the contract complies with the provisions, and if applicable, the requirements of ORS 279A.140. County departments shall contact Business Services Human Resources for procedures regarding contracting out services performed by county employees.

(5) The following are personal services contracts:

(a) Contracts for service performed as an independent contractor in a professional capacity, including, but not limited to, the services of an accountant, attorney, architect, photogrammetrist, transportation planner, or land use planning consultant, physician or dentist, registered professional engineer, appraiser or surveyor, passenger aircraft pilot, aerial photographer, timber cruiser, data processing consultant or broadcaster.

(b) Contracts for services as an artist in the performing or fine arts, including, but not limited to persons identified as photographer, filmmaker, painter, weaver or sculptor.

(c) Contracts for services of a specialized, creative and research-oriented, noncommercial nature.

(d) Contracts for services as a consultant.

(e) Contracts for educational and human custodial care services.

(6) The following are not personal services contracts:

(a) Contracts, even though for services performed in a professional capacity, if predominately for a product, e.g. a contract with a landscape architect to design a garden is for personal services, but a contract to design and supply all the shrubs and trees, is predominately for a tangible product.

(b) A service contract to supply labor that is of a type that can generally be done by a competent worker, e.g. janitorial, security guard, laundry and landscape maintenance service contracts.

(c) Contracts for a trade-related activity, even though a specific license is required to engage in the activity. Examples are repair and/or maintenance of all types of equipment or structures.

(7) Procedures for personal services contracts

(a) The county shall follow the procedures set forth in section 30 of these rules when contracting for architectural, engineering and land surveying services and related services. For all other personal services contracts, the county shall select from the seven methods available pursuant to ORS 279B.055 through 279B.085, and follow the screening, selection, evaluation and award procedures set forth for the selected sourcing method in section 20 of these rules.

(b) Personal services contracts in an amount of not more than \$30,000 may be awarded as a small procurement without a competitive solicitation process.

(c) Procedures for amendments and reinstatements to personal services contracts are found in section 10-0560 and 10-0570 respectively and amendments and reinstatements for architectural, engineering and land surveying services and related services are found in section 30-0320.

10-0360 Federal Procurement Programs

(1) The county may purchase certain authorized goods and services through General Service Administration (GSA) federal programs or federal contracts without competitive sealed bidding, competitive sealed proposals or other competitive processes required under ORS 279B.050 to 279B.085, provided that the county has federal authorization to purchase through the federal program and follows the procedures set forth in OAR 125-246-0360(3).

(2) The county may enter into public contracts under a federal program described in ORS 279A.180 without following procedures set for in ORS 279B.050 through 279B.085 if the procurement is made under 10 USC 381, the Electronic Government Act of 2002 (PL 107-347) or other federal law that the Board determines to be similar.

10-0400 Cooperative Procurements

(1) **Purpose.** The county may use one of the three cooperative procurement methods: joint cooperative procurements, permissive cooperative procurements and interstate cooperative procurements. An administering authorized agency's original contract or a participating authorized agency's contract with a provider in a cooperative procurement is subject to ORS 279A and these rules, unlike agreements solely between governmental agencies pursuant to ORS 190 *et seq.* and excepted from the code pursuant to ORS 279A.025.

(2) **Definitions.** The following definitions apply to cooperative procurement:

(a) **Administering Authorized Agency:** A governmental body in this state or in another jurisdiction that solicits and establishes the original contract for the procurement of goods, 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 authorized agency.

(c) **Cooperative Procurement:** A procurement conducted by the state procurement office or an authorized agency 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:** 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 procurement pursuant to ORS 279A.200.

(e) **Interstate Cooperative Procurement:** A permissive cooperative procurement in which the administering authorized 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:** A cooperative procurement that identifies:

(A) The participating authorized agencies or the cooperative procurement group; and

(B) The contract requirements or estimated contract requirements for the original contract.

(g) **Material Change or Material Alteration:** 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 supplies and services or public improvements.

(h) **Original Contract:** The initial contract or price agreement as solicited and awarded during a cooperative procurement by an administering authorized agency.

(i) **Participating Authorized Agency or Purchasing Authorized Agency:** The State Procurement Office; another governmental body, domestic or foreign, approved by State Procurement Office; or an authorized agency having delegated authority pursuant to OAR 125-246-0170, which procures supplies and services or public improvements from a provider based on an original contract established by an administering authorized agency in a cooperative procurement.

(j) **Permissive Cooperative Procurement:** A cooperative procurement in which the participating authorized agencies is not identified.

10-0420 Joint Cooperative Procurements

The county may choose to participate in, sponsor, conduct or administer a joint cooperative procurement only in accordance with ORS 279A.210.

10-0430 Permissive Cooperative Procurements

The county may choose to participate in, sponsor, conduct or administer a permissive cooperative procurement only in accordance with ORS 279A.215.

10-0440 Advertisements of Intent to Establish Contracts or Price Agreements through a Permissive Cooperative Procurement

(1) When the county wishes to enter into a contract or price agreement arising out of a permissive cooperative procurement it shall publish notice of its intent to do so if the county department responsible for the contract estimates that it will spend in excess of \$250,000 on goods and services or personal services acquired under the contract or price agreement.

(2) The notice of intent required by section 10-0440 (a) shall contain the information required by ORS 279A.215(2) (b) and shall be advertised in the same manner as provided in ORS 279B.055(4) (b) and (c). The county shall give the notice required by this section no fewer than seven (7) days before the deadline for submitting comments regarding the county's intent to establish a contract through a permissive cooperative procurement.

10-0450 Interstate Cooperative Procurements

The county may choose to participate in, sponsor, conduct or administer an interstate cooperative procurement only in accordance with ORS 279A.220.

10-0460 Advertisement of Interstate Cooperative Procurements

The county may participate in an interstate cooperative procurement only if at least one of the following occurs:

(1) The solicitation document lists the county or the cooperative procurement group of which the county is a member as a party that may enter into contracts 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).

(2) If the solicitation document was not advertised in accordance with subsection (1) of this section, the county 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) and the county shall

advertise the notice in the same manner as provided in ORS 279B.055(4) (b) and (c). This notice shall be given no fewer than seven (7) days before the deadline for submitting comments regarding the county's intent to establish a contract or price agreement through an interstate cooperative procurement.

10-0470 Protests and Disputes

An offeror or potential offeror wishing to protest the procurement process, the contents of a solicitation document related to a cooperative procurement or the award or proposed award of an original contract, shall make the protest in accordance with sections 20-0740 and 40-0450. If the county is not the administering contracting agency, then a protest or dispute must be made through the administering contracting agency that issued the original solicitation.

10-0480 Contract Amendment Authority

The county may amend a contract entered into pursuant to a cooperative procurement as set forth in these rules.

CONTRACT ADMINISTRATION

10-0550 General Definitions

(1) **Contract Administration:** All functions related to a given contract between the county 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:** 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) **Contract Signature:** For purposes of these rules, contract signature shall mean an original ink signature scanned, facsimile or electronic signature when executing final contract documents and subsequent contract and amending activities. The county may accept contract signatures to execute final contracting documents when:

(a) Contracting activities comply with all statutory requirements and these rules.

(b) The county demonstrates evidence that the contract signature in fact indicates the person's intent to be bound to the specifically identified contract document. The county may meet this requirement by: (A) requiring receipt of the entire contract document with signature page or (B) requiring signature page only when accompanied by a signed statement acknowledging receipt of contract in question between contractor and county and statement that contractor signed the printed form of the contract without change from the electronically transmitted document.

10-0556 Procurement File

The county will maintain a procurement file in the contract management system for each procurement made by the county. The file must at a minimum, include a solicitation document, contract, amendments thereto, work order, change order, and documentation of communications between county and offeror.

(1) The county departments are responsible for maintaining and uploading into the county's electronic contract management system all intermediate solicitation files and all contract administration files, and if applicable, all formal solicitation files.

(2) The county's Finance Department is responsible for maintaining all formal solicitation files and all contracts, intergovernmental agreements and grants executed by the county.

10-0560 Amendments

(1) Definitions

(a) **Amendment:** A written modification to a contract or agreement, other than by changes to the work pursuant to sections 20-0800, 30-0320 and 40-0910 that is reasonably related to the scope of the original procurement and requires the mutual agreement between the county and the contractor.

(b) **Anticipated Amendment:** When the county has stated in writing in any solicitation document and the original contract that the county may amend the contract.

(c) **Unanticipated Amendment:** An amendment that is not described in any solicitation document and/or the original contract.

(2) The county may make one or more amendments to a contract without any additional competitive process as long as the work is reasonably related to the original solicitation document or original contract.

(3) Amendments under this section may not increase the contract beyond the limit of any threshold established in these sections, unless expressly stated in sections 20, 30 or 40 of these rules.

(4) All amendments must be signed by the authorized representatives of the parties to the contract and must receive all required approvals before the amendment will be binding on the county.

10-0570 Reinstatement of Expired Contracts

(1) The county may approve reinstatement of an expired contract upon submission of a concise written statement justifying that:

(a) The failure to extend or renew the contract in a timely manner was due to unforeseen or unavoidable conditions;

(b) The written request for reinstatement is presented within ninety (90) days after the expiration of the original contract; and

(c) The contractor's completion of the work after the expiration of the contract, affirming that there is no change in the statement of work, and either:

(A) The reinstatement is exclusively for the purpose of permitting completion of the work or additional services for no additional compensation; or

(B) When the services are of a continuing or repetitive nature that are compensated at an hourly, daily or similar periodic rate, the reinstatement either:

(i) Does not increase the rate of compensation; or

(ii) Does not increase the rate of compensation so as to exceed the rate of the increase determined by comparing the Western Region Consumer Price Index (all items) published immediately prior to the date the original contract was established with the same index published immediately prior to the date of the reinstatement and extension.

(2) When a contract is reinstated pursuant to this section, the county may compensate the contractor, at the rate of compensation established in the original contract, for work performed in the interim between the expiration of the original contract and the execution and approval(s) of the extension or amendment.

(3) Only one reinstatement of a contract may be allowed.

(4) If the reinstatement of a contract pursuant to this rule raises the aggregate amount of compensation to a level that requires Board approval, Board approval must be obtained before the extension becomes binding and before any services may be performed under the reinstated contract.

(5) Once a contract is reinstated, it is in full force and effect, as if it had not expired.

10-0580 Retroactive Approvals

(1) This section applies to all contracts that must have the approval of the Board, county CAO, or DCAO pursuant to these rules.

(2) Before the Board, county CAO or DCAO may consider retroactive approval of a contract, the county department seeking approval of contract must submit a copy of the contract to be reviewed and a written request for contract retroactive approval consideration containing:

(a) An explanation of why the contract was not submitted before performance began;

(b) A description of the steps being taken to prevent similar occurrences in the future; and

(c) A proposed retroactive approval of the contract.

10-0590 Contract Term

(1) The term of a public contract shall be a maximum of three years, unless otherwise specified in the ITB or other solicitation document for the project or as otherwise provided in these rules. This rule shall not apply to contracts or agreements regarding real property.

(2) The term of a personal services contract shall be a maximum of five years unless otherwise specified in state or federal program regulations or the Board specifically waives the five-year limitation.

10-0600 Ethics Policy

(1) 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 public contracting under the code and these rules.

(2) Any county officer, employee or agent is prohibited from using his or her official position for personal advancement, financial gain, or for the financial gain of family members.

(3) County officer, employee or agent may not commit the county to any provision of services or expenditure of funds for any purpose unless it has been authorized in the budget or by approval of the Board. Any county officer, employee, or agent who makes an unauthorized commitment of county services or funds may be held personally responsible for paying for those expenditures.

10-0630 Fragmentations

A procurement may not be artificially divided or fragmented so as to make it several small procurements pursuant to ORS 279B.065 or intermediate procurements pursuant to ORS 279B.070. The cumulative total of the original contract amount, all amendments, and renewals shall not exceed the solicitation limit.

10-0635 County Communication with Providers/Suppliers

(1) **Research Phase.** Prior to the release of a solicitation, the county encourages research with providers who can meet the county's needs. This research includes but is not limited to: meetings, industry presentations, and demonstrations with any providers that, in the county's discretion, may be able to meet the county's need. The county must document the items discussed during the research phase of solicitation development. The research phase ends the day of a solicitation release or request for a quote according to an intermediate procurement, unless the solicitation or intermediate procurement provides for a different process that permits on-going research.

(2) **Solicitation and Contracting Phase.** Any communication between the county and providers regarding a solicitation, that occurs after the solicitation release or request for a quote and before the award of a contract must be made only within the context of the solicitation document or intermediate procurement requirements (communication). This communication may allow for discussions, negotiations, addenda, providers' questions, and the county's answers to providers' questions about terms and conditions, specifications, amendments, or related matters. During this phase, telephone conversations and meetings must be documented in the procurement file. Written inquiries regarding the solicitation should be responded to by the county in writing. A record of all material communications regarding the solicitation by interested providers must be made a part of the procurement file according to section 10-0556.

Section 20 Public Procurements for Goods or Services

20-0100 General Provisions

(1) These rules implement ORS chapter 279B, Public Procurements and apply to the procurement of goods or services. The county will procure personal services, except for architectural, engineering, land surveying and related services, pursuant to these section 20 rules.

20-0110 Feasibility Determination/Cost Analysis and County Report

(1) Application.

(a) This rule does not apply to the procurement of services that the county estimates will have a value less than \$250,000 for the entire term of the contract, including incidental costs related to the services, and anticipated amendments.

(b) This rule applies to a procurement for services that the county estimates will result in one or more contracts with a value of more than \$250,000 for the estimated term of the contract(s), including incidental costs related to the services, and anticipated amendments, but not unanticipated amendments. The county must not fragment to avoid this threshold (see section 10-0630 Fragmentations).

(c) If a procurement is conducted in accordance with this rule, an award is made, and one or more unanticipated amendments then increase the estimated contract's value more than \$250,000, a feasibility determination or cost analysis is not required at that time.

(d) "Services" has the meaning as defined in section 10-0110, except that for purposes of this rule only:

(A) "Services" does not include the services of an architect, engineer, photogrammetrist, transportation planner, land surveyor or provider of related services as defined in ORS 279C.100; and

(B) "Services" does not include client services, defined in Subsection 3 (a)(D).

(e) This rule applies to all solicitations released and contracts awarded on or after January 1, 2010.

(2) Generally.

(a) Before conducting a procurement for services, the county must make a determination pursuant to these rules.

(b) If it is determined that this rule does not apply pursuant to section (1)(a) above, the county may proceed with the procurement of services and will document that the rule does not apply on the contract review sheet when the contract is submitted to the Finance Department for review.

(c) Feasibility determinations or cost analysis will require the review and approval by the county's Contracts Officer or designee. The Finance Department is delegated the responsibility to establish procedures and guidelines for the feasibility determination/cost analysis required under these rules.

(d) All written exemptions, feasibility determinations, and cost analysis required by this rule must be made a part of the county's procurement file and will become a public record subject to the Oregon public records laws.

(3) Exemptions.

(a) A procurement for services estimated to be more than \$250,000 will be exempt from this rule if the contract is:

(A) Exempt from competitive process under ORS 279A.025.

(B) A contract for personal services as defined in section 10-0335.

- (C) A contract solicited under sections 30 and 40 of these rules for construction services.
- (D) A contract solicited for client services defined as follows:
 - (i) Client: Any individual, family or provider:
 - (I) For whom the county must provide services and incidental or specialized goods, in any combination thereof ("services and incidental supplies"), according to state, federal law, rule, and policy. Those services and incidental supplies include but are not limited to treatment, care, protection, and support without regard to the proximity of the services being provided;
 - (II) Who in fact receives and utilizes services provided by the county primarily for that individual's or family's benefit;
 - (III) Who is under the custody, care, or both of the county; or
 - (IV) Who provides direct care or services and is a proxy or representative of the non-provider client.
 - (ii) Client Services: Any services that directly or primarily support a client, whether the client is the recipient through the provision of voluntary or mandatory services. Client services also means any goods that are incidental or specialized in relation to any services defined in this subsection. Client services may include but are not limited to:
 - (I) Housing, including utilities, rent or mortgage or assistance to pay rent, mortgage or utilities;
 - (II) Sustenance, including clothing;
 - (III) Employment training or skills training to improve employability;
 - (IV) Services for people with disabilities;
 - (V) Foster care or foster care facilities;
 - (VI) Residential care or residential care facilities;
 - (VII) Community housing;
 - (VIII) In-home care including home delivered meals;
 - (IX) Medical care, services and treatment, including but not limited to:
 - (aa) Medical, dental, hospital, psychological, psychiatric, therapy, vision;
 - (bb) Alcohol and drug treatment;
 - (cc) Smoking cessation;
 - (dd) Drugs, prescriptions and non-prescription;
 - (ee) Nursing services and facilities;
 - (ff) Transportation or relocation;
 - (gg) Quality of life, living skills training;
 - (hh) Personal care;
 - (ii) Legal services and expert witness services;
 - (jj) Religious practices, traditions and services, separately or in any combination thereof; and
 - (kk) Educational services. The term "client services" does not include benefits or services provided as a condition of employment with the county.
- (b) The county shall document the exemption on the Marion County Feasibility Determination/Cost Analysis form and submit for review and authorization by the county Contracts Officer or designee prior to moving forward with the procurement of services.
- (4) **Feasibility Determination**
 - (a) If the procurement of services exceeds \$250,000 and is not an exempt category as defined in subsection (3) of this rule, the county may proceed with the procurement of services only after making a written determination that one or more special circumstances make the county's use of its own personnel and resources to provide the services not feasible (Feasibility Determination).

(A) **Special Circumstances.** Special circumstances include any circumstances, conditions or occurrences that would make the services, if performed by the county's employees, incapable of being managed, utilized or dealt with successfully in terms of the quality, timeliness of completion, success in obtaining desired results, or other reasonable needs of the county. Special circumstances may include, but are not limited to, the following circumstances:

(i) **Expertise.** The county lacks the specialized capabilities, experience, or technical or other expertise necessary to perform the services. In making the finding, the county must compare the county's capability, experience or expertise in the field most closely involved in performing the services with a potential contractor's capability, experience or expertise in the same or a similar field.

(ii) **Funding Requirement.** The terms under which the county receives a grant or other funds for use in a procurement require the county to obtain services through an independent contractor.

(iii) **Law Requirement.** Other state or federal laws require the county to procure services through an independent contractor.

(iv) **Real or Personal Property.** The procurement is for services that are incidental to a contract for purchasing or leasing real or personal property, including service and maintenance agreements for equipment that is leased or rented.

(v) **Conflict of Interest; Unbiased Review.** The county cannot implement policy, administrative or legal requirements, including but not limited to (1) avoiding conflicts of interest, or (2) ensuring independent or unbiased findings in cases when using the county's existing personnel, or (3) persons the county could hire through a regular or ordinary recruitment process, would not be suitable.

(vi) **Emergency Procurement.** The procurement is for services to which the provisions of ORS 279B.080 apply.

(vii) **Delay.** The procurement is for services, the need for which is so urgent, temporary or occasional that attempting to perform the services with the county's own personnel or resources would cause a delay that would frustrate the purpose for obtaining the services.

(viii) **Services Completed within Six Months.** The services that the County intends to procure will be completed within six months after the date on which the contract for the services is executed.

(B) **Authorization of Written Feasibility Determination.** Once the county makes a determination that it is not feasible to perform the required services in-house, the county shall complete the Feasibility Determination/Cost Analysis form and send to the county's Contracts Officer or designee for review and approval prior to moving forward with the procurement of the services.

(c) **Procurement File.** All written feasibility determinations required in section (3) must be made a part of the county's procurement file and submitted as supporting documentation for all purchase orders and contracts submitted for review and approval by the Finance Department.

(5) **Cost Analysis: Estimation of County and Contractor Data.**

(a) This rule applies to any procurement of services that exceed \$250,000 that have been determined to be feasible for the county to perform the services in-house. If this rule applies, then the county must complete a cost analysis.

(b) **Costs of Using County's Own Personnel and Resources.** The county must estimate the county's cost of performing the services and consider cost factors that include:

(A) **Salaries or Wages and Benefits.** The salary or wage and benefit costs for the employees of the county who would be directly involved in performing the services, to the

extent those costs reflect the proportion of the activity of those employees in the direct provision of the services. These costs include those salary or wage and benefit costs of the employees who inspect, supervise or monitor the performance of the services, to the extent those costs reflect the proportion of the activity of those employees in the direct inspection, supervision or monitoring of the performance of the services.

(B) **Material Costs.** The material costs necessary to the performance of the services, including the costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies used or consumed in the provision of the services.

(C) **Related Costs.**

(i) Costs incurred in planning for, training for, starting up, implementing, transporting and delivering the services.

(ii) Any costs related to stopping and dismantling a project or operation because the county intends to procure a limited quantity of services or to procure the services within a defined or limited period of time.

(iii) The miscellaneous costs related to performing the services, including but not limited to reasonably foreseeable fluctuations in the costs for the items identified in this subsection (5)(b) over the expected duration of the procurement. These costs exclude the county's indirect overhead costs for existing salaries or wages and benefits for administrators and exclude costs for rent, equipment, utilities and materials, except to the extent the cost items identified in this sentence are attributed solely to performing the services and would not be incurred unless the county performed the services.

(D) **Other Information.** The county's costs described in this subsection (5)(b) does not constitute an exclusive list of cost information. The county may consider other reliable information that bears on the cost to the county of performing the services. For example, if the county has accounted for its actual costs of performing the services under consideration, or reasonably comparable services, in a relatively recent services project, the county may consider those actual costs in making its estimate.

(c) **Costs a Potential Contractor Would Incur.** The county must estimate the cost a potential contractor would incur in performing the services and consider cost factors that include:

(A) **Salaries or Wages and Benefits.** The estimated salary or wage and benefit costs for a potential contractor and potential contractor's employees who work in the business or industry most closely involved in performing the services; and who would be necessary and directly involved in performing the services or who would inspect, supervise, or monitor the performance of the services.

(i) The county may, but is not required to, communicate with any actual contractor for information related to this estimate (see section 10-0635).

(ii) The county may consider in making this estimate any public source of information, including but not limited to:

(I) Other contracts of the county for reasonably comparable services;

(II) Trade or other marketplace websites;

(III) Industry or professional associations and publications;

(IV) The Oregon Bureau of Labor and Industries or an agency of another jurisdiction that performs comparable functions; and

(V) A survey of persons who provide reasonably comparable services by means including but not limited to internet or telephone searches.

(B) **Material Costs.** The material costs necessary to the performance of the services, including the costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies used or consumed in the provision of the services.

(C) **Related Costs.** The miscellaneous costs related to performing the services. These miscellaneous costs include but are not limited to reasonably foreseeable fluctuations in the costs listed in subsections (5)(c)(A) through (C) over the expected duration of the procurement.

(D) **Other Information.** The potential contractor's costs described in subsection (5)(c) does not constitute an exclusive list of cost information. The county may consider other reliable information that bears on the costs a potential contractor would incur. For example, if in the recent past, the county conducted a solicitation that required cost information or permitted negotiation of price based on a cost analysis for services reasonably comparable to the current services, the county may use that cost information in estimating the costs of current services.

(6) **Decision: Comparison of Compensation and Other Costs.**

(a) The county must compare:

(A) The county's estimated costs under subsection (5)(b) and

(B) The contractor's estimated costs under subsection (5)(c).

(b) **Decision.** If the county's costs exceed the contractor's costs under subsection (6)(a) for the sole reason that the contractor's costs for salaries or wages and benefits under Subsection (5)(c)(A) are lower than the county's costs for salaries or wages and benefits under Subsection (5)(b)(A), then the county may not conduct the procurement.

(c) This determination must be documented on the Feasibility Determination/Cost Analysis form and submitted to the county's Contracts Officer or designee for review and approval.

(7) **Decision: Comparison of County and Contracting Costs.**

(a) If subsection (6)(b) does not apply, the county must compare:

(A) The county's estimated costs under subsection (5)(b) and

(B) The total estimated costs that the county would incur in procuring the services from a contractor (contracting costs).

(b) **Profit Included.** Contracting costs include the county's estimate of contractor's profit in addition to the estimate of contractor's costs under subsection (5)(c). If the county, in the reasonably near past, received bids or proposals for the performance of the services under consideration, or reasonably comparable services, the county may consider the pricing offered in those bids or proposals in making its estimate. Similarly, the county may consider what it actually paid under a contract for the same or similar services. For the purposes of these examples, the reasonably near past is limited to contracts, bids or proposals entered into or received within the five (5) years preceding the date of the cost estimate. The county must take into account, when considering the pricing offered in previous bids, proposals, or contracts, adjustments to the pricing in light of measures of market price adjustments that apply to the services, such as the consumer price indexes.

(c) **Decision.**

(A) If the county's estimated contracting cost under this section is lower than the county's cost under subsection (5)(b), then the county may conduct the procurement. If the county's contracting cost is higher than the county's cost under subsection (5)(b), the county may not conduct the procurement, unless the exception of subsection (7)(d) applies.

(B) This determination must be documented on the Feasibility Determination/Cost Analysis form and submitted to the county's Contracts Officer or designee for review and approval.

(d) **Exception Based on Lack of County Personnel and Resources; Reporting.** If the county determines that it must provide the services in-house through the cost comparison analysis, the county may still conduct the procurement if the county determines that it lacks personnel and resources to perform the services within the time

the county requires the services (exception). Before the county conducts a procurement under this exception, the county must first:

(A) Make and document the exception determination on the Feasibility Determination/Cost Analysis form that it lacks personnel and resources to perform the services within the time the county requires the services. The form must include the basis for the county's decision to conduct the procurement; and

(B) Send the Feasibility Determination/Cost Analysis form documenting the exception to the county's Contracts Officer or designee before conducting a department-specific procurement or a county-wide procurement.

(e) **Reporting.**

(A) The county's Contracts Officer or designee, each calendar quarter, will provide a report of each cost analysis, exception, and any other records described in this subsection (6)(d) to the Marion County Contract Review Board.

(B) Marion County will cooperate with the State of Oregon Department of Administrative Services to provide any county documentation regarding this rule upon request to do so.

20-0200 Purchasing Considerations.

(1) Except when compliance with subsection (3) of this section is required, the county shall purchase through one of the following methods: county surplus property; Oregon Corrections Enterprises; cooperative procurements including State of Oregon price agreements; intergovernmental agreements (including interstate and tribal agreements); or purchase through the open market.

(2) The county shall consider a variety of options to determine the most beneficial method of purchasing supplies and services. A method may be beneficial to the county for a variety of reasons, including but not limited to: opportunity for best value, highest quality, timeliness, most efficient purchasing process, a combination of these benefits.

(3) The county shall comply with section 50-0300 Qualified Rehabilitation Facilities.

20-0250 Methods of Source Selection.

The county will award a public contract for supplies and services and personal service contracts by one of the seven sourcing methods as follows in accordance with county and state rules:

(1) Competitive sealed bidding pursuant to ORS 279B.055

(2) Competitive sealed proposals pursuant to ORS 279B.060

(3) Small procurements pursuant to ORS 279B.065

(4) Intermediate procurements pursuant to ORS 279B.070

(5) Sole source procurements pursuant to ORS 297B.075

(6) Emergency procurements pursuant to ORS 279B.080

(7) Special procurements pursuant to ORS 279B.085;

20-0255 Competitive Sealed Bidding: One Step Solicitations

(1) **Generally.** An Invitation to Bid (ITB) shall be used to initiate a competitive sealed bidding solicitation for procurements more than \$100,000 and must contain information required by ORS 279B.055(2) and by subsection (2) of this rule. The county shall provide public notice of the solicitation as set forth in section 20-0300.

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

(a) **General Information**

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

- (i) The time, date and location of any pre-offer conference
 - (ii) Whether attendance at the conference will be mandatory or voluntary; and
 - (iii) A provision that provides that statements made by the county's representatives at the conference are not binding upon the county 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 as defined by these rules.
- (C) The time, date and place of opening of bids;
- (D) The office where the solicitation document may be reviewed or obtained;
- (E) A statement that each bidder must identify whether the bidder is a "resident bidder" as defined in ORS 279A.120(1);
- (F) Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4); and
- (G) How the county will notify bidders of addenda and how the county will make addenda available.
- (H) The anticipated solicitation schedule, deadlines, protest process and evaluation process.
- (I) If the county intends to award contracts to more than one bidder pursuant to section 20-0600 of these rules, the county shall identify in the solicitation document the manner in which it will determine the number of contracts it will award.
- (J) All contractual terms and conditions in the form of contract provisions the county determines are applicable to the procurement. As required by Oregon Laws 2009, chapter 880, section 5, the contract terms and conditions must specify the consequences of the contractor's failure to perform the scope of work or to meet the performance standards established by the resulting contract. Those consequences may include, but are not limited to:
- (i) The county's reduction or withholding of payment under the contract;
 - (ii) The county's right to require the contractor to perform, at the contractor's expense, any additional work necessary to perform the statement of work or to meet the performance standards established by the resulting contract; and
 - (iii) The county's rights, which the county may assert individually or in combination, to declare a default of the resulting contract, to terminate the resulting contract, and to seek damages and other relief available under the resulting contract or applicable law.
- (b) **County's Need to Purchase.** The character of the goods or services the county is purchasing, including, if applicable, a description of the acquisition, specifications, delivery or performance schedule, inspection and acceptance requirements. As required by Oregon Laws 2009, Chapter 880, section, 5, the county's description of its need to purchase must:
- (A) Identify the scope of work to be performed under the resulting contract, if the county awards one;
 - (B) Outline the anticipated duties of the contractor under any resulting contract;
 - (C) Establish the expectations for the contractor's performance of any resulting contract; and
 - (D) Unless the county for good cause specifies otherwise, the scope of work must require the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the goods or services that the county is purchasing.
- (3) **Good Cause.** For the purposes of this rule, good cause means a reasonable explanation for not requiring a contractor to meet the highest standards, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of the county. The county shall document in the procurement file the basis for the determination of good cause for

specification otherwise. The county will have good cause to specify otherwise under the following circumstances:

(a) The use or purpose to which the goods or services will be put does not justify a requirement that the contractor meet the highest prevalent standards in performing the contract;

(b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the goods or services will be compatible with or will operate efficiently or effectively with components, equipment, parts, services or information technology including hardware, services or software with which the goods or services will be used, integrated, or coordinated;

(c) The circumstances of the industry or business that provides the goods or services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, scientific developments, that a reliable highest prevalent standard does not exist or has not been developed;

(d) Any other circumstances in which the county's interest in achieving economy, efficiency, compatibility or availability in the procurement of goods or services reasonably outweighs the county's practical need for the highest prevalent standard in the applicable or closest industry or business that supplies the goods or services to be delivered under the resulting contract.

(4) **Bid Security.** All ITB's offers for a public contract shall be accompanied by a surety bond, cashier's check, certified check, or irrevocable letter of credit by an insured institution, as defined in ORS 706.008, of the bidder in the amount of ten (10%) of the bid unless the contract for which the bid was submitted has been exempted from this requirement as set forth in these rules.

(a) The county shall return the bid security to all bidders upon the execution of the contract.

(b) The county shall retain bid security if a bidder who is awarded a contract fails to promptly and properly execute the contract.

(5) **Public Notice.** The county shall give public notice of an ITB issued under this section.

(a) Public notice must be published in at least one newspaper of general circulation in the area where the contract is to be performed;

(b) Public notice may be provided electronically, when authorized, through the county website and/or utilizing the Oregon Procurement Information Network known as OregonBuys, an internet based, on-line system as the official publication forum when available to the county;

(c) Unless otherwise specified, the county shall give public notice at least seven (7) days before the solicitation closing date.

(6) **Public Bid Opening and Disclosure.**

(a) The bids shall be opened and read publicly at the time, date, and place designated in the ITB. When authorized by and in accordance with procedures established by the Finance Department and consistent with ORS 279A.065, bids may be submitted, received and opened through electronic means.

(b) The amount of a bid, the name of the bidder and other relevant information shall be recorded by the county and the record shall be open to public inspection.

(c) The county may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in the bid.

20-0257 Multistep Sealed Bids

(1) **Generally.** The county may procure goods or services by using multistep competitive sealed bids pursuant to ORS 279B.055.

(2) **Phased Process.** Multistep bidding is a phased process that seeks necessary information or unpriced submittals in the first phase combined with regular competitive sealed bidding, inviting bidders who submitted technically eligible unpriced submittals in the first phase to submit competitive sealed price bids in the second phase. Phase one may include multiple steps at the discretion of the county in order to obtain necessary information or unpriced submittals to determine the eligibility of the bidders to submit priced bids. After this determination, the county may begin phase two by issuing a subsequent ITB, limited to those bidders eligible to submit priced bids. The contract shall be awarded to the lowest responsible bidder or to multiple responsible bidders in accordance with ORS 279B.055(10). If time is a factor, bidders may submit a separate sealed price bid during the initial phase to be opened after the evaluation of unpriced submittals.

(3) **Public Notice.** When a multistep ITB is used, public notice for phase one must be given in accordance with section 20-0300. Public notice is not required for subsequent steps in phase one, unless a step in phase one expands the number of bidders, and then public notice is required. The county shall give notice of subsequent phases to all bidders, inform bidders of the right to protest addenda issued after initial closing pursuant to section 20-0300 and inform bidders excluded from the subsequent phases of the right, if any, to protest their exclusion pursuant to section 20-0720.

(4) **Procedures Generally.** In addition to the procedures set forth in these rules, the county shall employ the procedures set forth in this section for multistep bidding:

(a) **Solicitation Protest.** Prior to the closing of phase one, the county shall provide an opportunity to protest the solicitation under ORS 279B.405 and section 20-0720(2).

(b) **Addenda Protest.** The county may provide an opportunity to protest any addenda issued during phase two pursuant to section 20-0720(2).

(c) **Exclusion Protest.** The county 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 section 20-0720.

(d) **Administrative Remedy.** A bidder may submit a protest to any addenda or to any action taken by the county that has the effect of excluding the bidder 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 county.

(e) **Award Protest.** The county shall provide an opportunity to protest its intent to award a contract pursuant to ORS 279B.410 and section 20-0740. An affected bidder may protest, for any of the bases set forth in section 20-0720(2), its exclusion from the second phase of a multistep sealed bid, or an addendum issued following initial closing, if the county did not previously provide bidders the opportunity to protest the 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. The multistep ITB shall provide:

(A) That the solicitation is a multistep sealed bid procurement and describe the process that the county will use to conduct the procurement;

- (B) That the county requests unpriced submittals and that the county will consider price bids only in the second phase and only from those bidders whose unpriced submittals are found eligible in the first phase;
- (C) Whether price bids are to be submitted at the same time as unpriced technical bids; if they are, that the price bid shall be submitted in a separate sealed envelope;
- (D) The criteria to be used in the evaluation of unpriced technical bids;
- (b) **Evaluation.** The county shall evaluate unpriced submittals in accordance with the criteria set forth in the invitation to bid.
- (A) That the county, to the extent that it finds necessary, may conduct oral or written discussions for the purposes of clarification of the unpriced technical bids;
- (B) That unpriced technical bids shall be categorized as:
- (i) Eligible;
- (ii) Potentially eligible; that is, reasonably susceptible of being made eligible; or
- (iii) Ineligible. The county shall record in writing the basis for determining a bid ineligible and make it part of the procurement file.
- (C) Whether bidders excluded from subsequent phases have a right to protest the exclusion before the notice of intent to award. This information can be given or changed by addenda.
- (c) **Addenda to the ITB.** After receipt of unpriced technical bids, addenda to the ITB shall be distributed only to bidders who submitted unpriced technical bids.
- (d) **Receipt and Handling of Unpriced Technical Bids.** Unpriced technical bids need not be opened publicly.
- (e) The county may initiate phase two of the procedure if, in the county's opinion, there are sufficient eligible unpriced technical bids to assure effective price competition in the second phase without technical discussions. If the county finds that such is not the case, the county may issue an addendum to the invitation to bid or engage in technical discussions as set forth in this section.
- (f) **Discussion of Unpriced Technical Bids.** The county may seek clarification of a technical bid by an eligible, or potentially eligible bidder. During the course of these discussions, the county shall not disclose any information derived from one unpriced technical bid to any other bidder. Once discussions have 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 county. Submissions may be made at the request of the county or upon the bidder's own initiative.
- (g) **Notice of Ineligible Unpriced Technical Bid.** When the county determines a bidder's unpriced technical bid to be ineligible, that bidder shall not be afforded an additional opportunity to supplement its technical bids.
- (h) **Mistakes during multistep sealed bidding.** Mistakes may be corrected or bids may be withdrawn during phase one:
- (i) Before unpriced technical bids are considered.
- (ii) After any discussions have commenced under subsection (c)(v).
- (iii) When responding to any addenda of the ITB; or
- (iv) Pursuant to section 20-0470.
- (i) **Revisions to solicitation specifications.** After closing of phase one, the county may issue addenda that modify the specifications for the goods or services being procured or that modify other terms and conditions of the ITB. The county shall provide all addenda to all offerors who initially submitted unpriced technical bids. The county may then require offerors to submit revised unpriced technical bids.
- (6) **Procedure for phase two of multistep sealed bids:**

- (a) **Initiation.** Upon the completion of phase one the county shall either:
 - (A) Open price bids submitted in phase one (if price bids were required to be submitted) from bidders whose unpriced 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 section or the invitation to bid; and
 - (B) No public notice need be given of the invitation to submit price bids, because notice was previously given.

20-0260 Competitive Sealed Proposals

- (1) **Generally.** The county may procure goods or services by competitive sealed proposals for procurements more than \$100,000 as set forth in ORS 279B.060. A request for proposals (RFP) shall be used to initiate a competitive sealed proposal solicitation and shall contain the information required by ORS 279B.060(2) and by subsection 2 of this section. The county shall provide public notice of the competitive sealed proposal as set forth in section 20-0300.
- (2) **Request for proposals (RFP).** In addition to the provisions required by ORS 279B.060(2), the RFP shall include the following:
 - (a) General Information.
 - (A) Notice of any pre-offer conference as follows:
 - (i) The time, date and location of any pre-offer conference; and
 - (ii) Whether attendance at the conference will be mandatory or voluntary; and
 - (iii) A provision that provides that statements made by the county's representatives at the conference are not binding upon the county unless confirmed by a written addendum.
 - (B) The form and instructions for submission of proposals and any other special information, e.g., whether proposals may be submitted by electronic means (see section 20-0330 for required provisions of electronic proposals);
 - (C) The time, date and place of opening;
 - (D) The office where the solicitation document may be reviewed;
 - (E) Proposer's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4); and
 - (F) The means by which the county will notify proposers of addenda and by which the county will make addenda available. (See section 20-0430).
 - (b) **County Need to Purchase.** The character of the goods or services the county is purchasing including, if applicable, a description of the acquisition, specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.060(2)(c), the county's description of its need to purchase must:
 - (A) Identify the scope of the work to be performed under the resulting contract, if the county awards one;
 - (B) Outline the anticipated duties of the contractor under any resulting contract;
 - (C) Establish the expectations for the contractor's performance of any resulting contract; and
 - (D) Unless the contractor under resulting contract will provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services that are subject to ORS 279C.100 to 279C.125, or the county for good cause specifies otherwise, the scope of work must require the contractor to meet the highest

standards prevalent in the industry or business most closely involved in providing the goods or services that the county is purchasing.

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

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

(B) The county shall set forth selection criteria in the solicitation document in accordance with the requirements of ORS 279B.060(2)(3)(c). Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, these factors shall be reasonable estimates of actual future costs based on information available to the county; and

(i) Afford the county the ability to compare the proposals and proposers, applying the same standards of comparison to all proposers;

(ii) Rationally reflect proposers' abilities to perform the resulting contract in compliance with the contract's requirements; and

(iii) Permit the county to determine the relative pricing offered by the proposers, and to reasonably estimate the costs to the county of entering into a contract based on each proposal, considering information available to the county and subject to the understanding that the actual contract costs may vary as a result of the statement of work ultimately negotiated or the quantity of goods or services for which the county contracts.

(C) If the county's solicitation process calls for the county to establish a competitive range, the county shall generally describe, in the solicitation document, the criteria or parameters the county will apply to determine the competitive range. The county, however, subsequently may determine or adjust the number of proposers in the competitive range in accordance with section 20-0261(6).

(d) Applicable preferences including those described in ORS 279A.125(2) and 282.210.

(e) All contract terms and conditions that the county determines are applicable to the procurement. The county's determination of contractual terms and conditions that are applicable to the procurement may take into consideration, as authorized by ORS 279B.060(3) those contractual terms and conditions the county will not include in the request for proposal because the county either will reserve them for negotiation, or will request proposers to offer or suggest those terms or conditions.

(f) As required ORS 279B.060(2)(h), the contract terms and conditions must specify the consequences of the contractor's failure to perform the scope of work or to meet the performance standards established by the resulting contract. Those consequences may include, but are not limited to:

(A) The county's reduction or withholding of payment under the contract;

(B) The county's right to require the contractor to perform, at the contractor's expense, any additional work necessary to perform the scope of work or to meet the performance standards established by the resulting contract; and

(C) The county's rights, which the county may assert individually or in combination, to declare a default of the resulting contract, to terminate the resulting contract, and to seek damages and other relief available under the resulting contract or applicable law.

(3) **Terms and Conditions.** The county may include the applicable contractual terms and conditions in the form of contract provisions, or legal concepts to be included in the resulting contract. Further the county may specify that it will include or use proposer's terms and conditions that have been pre-negotiated under section 20-055(3), but the county may only include or use a proposer's pre-negotiated terms and conditions in the resulting contract to the extent those terms and conditions do not materially conflict with the applicable contract terms and conditions. The county shall not agree to any

proposer's terms and conditions that were expressly rejected in a solicitation protest under section 20-0730.

(4) **Multiple Awards.** For multiple award contracts, the county may enter into contracts with different terms and conditions with each contractor to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. The county shall not agree to any proposer's terms and conditions that were expressly rejected in a solicitation protest under section 20-0730.

(5) **Good Cause.** A reasonable explanation for not requiring the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the goods or services under the contract, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of the county. The county shall document in the procurement file the basis for the determination of good cause for specifying otherwise. The county will have good cause to specify otherwise when the county determines:

(a) The use or purpose to which the goods or services will be put does not justify a requirement that the contractor meet the highest prevalent standards in performing the contract;

(b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the goods or services will be compatible with or will operate efficiently or effectively with components, equipment, parts, services or information technology including hardware, services or software with which the goods or services will be used, integrated, or coordinated;

(c) The circumstances of the industry or business that provides the goods or services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, scientific developments, that a reliable highest prevalent standard does not exist or has not been developed; or

(d) That other circumstances exist in which the county's interest in achieving economy, efficiency, compatibility or availability in the procurement of goods or services reasonably outweighs the county's practical need for the highest prevalent standard in the applicable or closest industry or business that supplies the goods or services to be delivered under the resulting contract.

20-0261 Procedures for Competitive Range, Multi-tiered and Multistep Proposals

(1) **Generally.** The county may procure goods or services employing any combination of the methods of contractor selection as set forth in ORS 279B.060(8) and these rules to procure goods or services. In addition to the procedures set forth in these rules for methods of contractor selection, the county may utilize a multi-tiered or multistep selection process that permits award to the highest ranked proposer at any tier or step that call for the establishment of a competitive range or permits either serial or competitive simultaneous discussions or negotiations with one or more proposers. The county may use one or more or any combination of the procedures set forth in this rule for competitive range, multi-tiered and multistep proposals.

(2) ORS 279B.060(3)(d), (e), and (8) authorize the county to use methods of contractor selection that include, but are not limited to, multi-tiered or multistep processes that embrace:

(a) The evaluation of proposals only, including the evaluations of serial proposals (a series of more than one proposal from each proposer that remains eligible in the competition at the particular tier of the competition);

(b) The use of proposals in connection with discussions with proposers that lead to best and final offers;

(c) The use of proposals in connection with serial negotiations with proposers that lead to best and final offers or to the award of a contract;

(d) The use of proposals in connection with competitive negotiations with proposers that lead to best and final offers or to the award of a contract; and

(e) The use of proposals in multi-tiered or multistep competition the county may use any combination or series of proposals, discussions, negotiations, demonstrations, offers, or other means of soliciting information from proposers that bear on the selection of a contractor or contractors. In multi-tiered and multistep competitions, the county may use these means of soliciting information from prospective proposers and proposers in any sequence or order, as determined by the discretion of the county.

(3) When the county's request for proposals prescribes a multi-tiered or multistep contractor selection process, the county, may, at the completion of any stage in the competition and on determining the most advantageous proposer (or, in multiple-award situations, on determining the awardees of the public contracts) award a contract (or contracts) and conclude the procurement without proceeding to subsequent stages. The county also may, at any time, cancel the procurement under ORS 279B.100.

(4) **Exclusion Protest.** The county 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 section 20-0720.

(5) **Award Protest.** The county shall provide an opportunity to protest its intent to award a contract pursuant to ORS 279B.410 and section 20-0740. An affected proposer may protest, for any of the bases set forth in section 20-0720(2), its exclusion from the competitive range or any phase of a multi-tiered or multistep sealed proposal process, or an addendum issued following initial closing, if the county did not previously provide proposers the opportunity to protest the exclusion or addendum. The failure to protest shall be considered the proposer's failure to pursue an administrative remedy made available to the proposer by the county.

(6) **Competitive Range.** When the county's solicitation process conducted pursuant to ORS 279B.060(8) calls for the county to establish a competitive range at any stage in the procurement process, it may do so as follows:

(a) **Determining Competitive Range.**

(A) The county may establish a competitive range after evaluating all responsive proposals in accordance with the evaluation criteria in the RFP. After evaluation of all proposals in accordance with the criteria in the RFP, the county shall determine and rank the proposers in the competitive range. Notwithstanding the foregoing, however, in instances in which the county determines that a single proposer has a reasonable chance of being determined the most advantageous proposer, the county need not determine or rank proposers in the competitive range. In addition, notwithstanding the foregoing, the county may establish a competitive range of all proposers to enter into discussions with proposer to correct deficiencies in the proposals.

(B) The county may establish the number of proposers in the competitive range in light of whether the county's evaluation of proposals identifies a number of proposers who have a reasonable chance of being determined the most advantageous proposers, or whether the evaluation establishes a natural break in the scores of proposers that indicates that a particular number of proposers are closely competitive, or have a reasonable chance of being determined the most advantageous proposer.

(b) **Protesting Competitive Range.** The county shall provide written notice to all proposers identifying proposers in the competitive range. The county may provide an opportunity for proposers excluded from the competitive range to protest the county's

evaluation and determination of the competitive range in accordance with section 20-0720.

(7) **Discussions.** The county may initiate oral or written discussions with all "eligible proposers" on subject matter within the general scope of the request for proposals. In conducting discussions, the county:

(a) Shall treat all eligible proposers fairly and shall not favor any eligible proposer over another;

(b) May disclose other eligible proposer's proposals or discussions only in accordance with 279B.060(8)(b) or (c);

(c) May adjust the evaluation of a proposal as a result of discussions. The conditions, terms, or price of the proposal may be changed during the course of the discussions provided the changes are within the scope of the RFP.

(d) At any time during the time allowed for discussions, the county may:

(A) Continue discussions with a particular eligible proposer;

(B) Terminate discussions with a particular eligible proposer and continue discussions with other eligible proposers; or

(C) Conclude discussions with all remaining eligible proposers and provide to the then-eligible proposers, notice requesting best and final offers.

(8) **Negotiations.** The county may commence serial negotiations with the highest-ranked eligible proposer or commence simultaneous negotiations with all eligible proposers. The county 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 RFP or addenda thereto. Proposers shall not submit for negotiation, and the county shall not accept, any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the RFP or any addendum.

(9) **Terminating Negotiations.** At any time during discussions or negotiations that the county conducts under this rule, the county may terminate discussions or negotiations with the highest-ranked proposer, or the eligible proposer with whom it is currently discussing or negotiating, if the county reasonably believes that:

(a) The eligible proposer is not discussing or negotiating in good faith; or

(b) Further discussions or negotiations with the eligible proposer will not result in the parties agreeing to the terms and conditions of a contract in a timely manner.

(c) Continuing Serial Negotiations. If the county is conducting serial negotiations and the county terminates negotiations with an eligible proposer the county may then commence negotiations with the next highest scoring eligible proposer, and continue the sequential process until the county has either:

(A) Determined to award the contract to the eligible proposer with whom it is currently discussing or negotiating; or

(B) Decided to cancel the Procurement under ORS 279B.100.

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

(A) Shall treat all eligible proposers fairly and shall not favor any eligible proposer over another;

(B) May disclose other eligible proposer's proposals or the substance of negotiations with other eligible proposers only if the county notifies all of the eligible proposers with whom the county will engage in negotiations of the county's intent to disclose before engaging in negotiations with any eligible proposer.

(e) Any oral modification of a proposal resulting from negotiations shall be reduced to writing by the proposer.

(10) **Best and Final Offers.** If best and final offers are authorized, the county shall establish a common date and time by which eligible proposers must submit best and final offers. If the county is dissatisfied with the best and final offers, the county may make a written determination that it is in the county's best interest to conduct additional discussions, negotiations or change the county's requirements and require another submission of best and final offers. The county shall inform all eligible proposers that if they do not submit notice of withdrawal or another best and final offer, its immediately previous offer will be construed as its best and final offer. The county shall evaluate offers as modified by the best and final offers. The county shall conduct the evaluations as described in section 20-0600. The county shall not modify evaluation factors or its relative importance after the date and time that best and final offers are due.

(11) **Multistep Sealed Proposals.** The county may procure goods or services by using multistep competitive sealed proposals pursuant to ORS 279.060(8)(b)(G). Multistep sealed proposals is a phased procurement process that seeks necessary information or unpriced technical proposals in the initial phase and invites proposers who submitted technically qualified proposals in the initial phase to submit competitive sealed price proposals on the technical proposals in the second phase. The contract shall be awarded to the responsible proposer submitting the most advantageous proposal in accordance with the terms of the solicitation document applicable to the second phase. If time is a factor, the county may require proposers to submit a separate sealed price proposal during the initial phase to be opened after the technical evaluation.

(a) **Public Notice.** When multistep sealed proposals are used, public notice for the first phase shall be given in accordance with section 20-0300. Public notice is not required for the subsequent phases. The county shall give notice of the subsequent phases to all proposers and inform any proposers excluded from the subsequent phases of the right, if any, to protest exclusion pursuant to section 20-0720.

(b) **Procedure for Phase One of Multistep Sealed Proposals.** The county shall initiate a multistep sealed proposal solicitation by the issuing of a request for proposals in the form and manner required for competitive sealed proposals except as provided in this section. In addition to the requirements set forth in section 20-0260(2), the multistep RFP shall state:

(A) That unpriced technical proposals are requested;

(B) That the solicitation is a multistep sealed proposal procurement, and that in the second phase, price proposals will be accepted only from those proposers whose unpriced technical proposals are found qualified in the first phase;

(C) The criteria to be used in the evaluation of unpriced technical proposals;

(D) That the goods or services being procured shall be furnished generally in accordance with the proposer's technical proposal as found to be finally qualified and shall meet the requirements of the RFP.

(c) **Addenda to the RFP.** After receipt of unpriced technical proposals, addenda to the RFP shall be distributed only to proposers who submitted unpriced technical proposals.

(d) **Receipt and Handling of Unpriced Technical Proposals.** Unpriced technical proposals need not be opened publicly.

(e) **Evaluation of Unpriced Technical Proposals.** Unpriced technical proposals shall be evaluated solely in accordance with the criteria set forth in the RFP

(f) **Discussion of Unpriced Technical Proposals.** The county may seek clarification of a technical proposal of any proposer who submits a qualified, or potentially qualified

technical proposal. During the course of such discussions, the county shall not disclose any information derived from one unpriced technical proposal to any other proposer.

(g) **Methods of Contractor Selection for Phase One.** In conducting phase one, the county may employ any combination of the methods of contractor selection that call for the establishment of a competitive range or include discussions, negotiations, or best and final offers as set forth in this rule.

(h) **Procedures for Phase Two.** Upon the completion of phase one, the county shall either:

(A) Open price proposals submitted in phase one (if price proposals were required to be submitted) from proposers whose unpriced technical proposals were found to be qualified; or

(B) If price proposals have not been submitted, technical discussions have been held, or addenda to the RFP have been issued, invite each qualified proposer to submit price proposals.

(C) Phase two shall be conducted as any other competitive sealed proposal solicitation except as specifically set forth in this rule; and

(i) No public notice need be given of the request to submit price proposals, because notice was previously given.

20-0265 Small Procurements

(1) Generally.

(a) When the amount of a purchase of goods or services is not more than \$10,000, the county may award a contract in any manner deemed practical or convenient by the county, including direct selection or award. Competitive quotes may be used when feasible.

(b) Personal service contracts pursuant to section 10-335(7)(b) that are not more than \$30,000 may be made as a small procurement and awarded in any manner deemed practical or convenient by the county, including direct selection or award.

(2) Amendments.

(a) The county may amend a public contract awarded as a small procurement in accordance with section 20-0800, but the cumulative amendments shall not increase the total contract to a sum that is greater than twenty-five percent (25%) of the original contract price or an amount greater than \$12,500 without obtaining additional quotes.

(b) The county may amend a personal services contract awarded as a small procurement in accordance with section 20-0800, but the cumulative amendments shall not increase the total contract to a sum that is greater than twenty-five percent (25%) of the original contract price or an amount greater than \$37,500, without obtaining additional quotes.

(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).

20-0270 Intermediate Procurements

(1) Generally.

(a) When the amount of a public contract for the purchase of goods or services is more than \$10,000, but not more than \$25,000, the county shall seek at least three verbal competitive price quotes or proposals.

(b) When the amount of a public contract for the purchase of goods or services or a personal services contract is greater than \$25,000, but \$100,000 or less, the county shall seek at least three written competitive price quotes or proposals.

(c) If three quotes or proposals are not reasonably available, fewer will suffice, but the county will make a written record of the effort made to obtain the quotes or proposals.

(2) **Negotiations.** The county may only negotiate with a proposer to clarify its quote or proposal or to effect modifications that will make the quote or proposal acceptable or make the quote or proposal more advantageous to the county.

(3) **Amendments.** The county may amend a public contract or personal services contract awarded as an intermediate procurement in accordance with section 20-0800, 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 unless authorized by the Board, CAO or DCAO.

20-0275 Sole Source Procurements

(1) The county may award a contract without competition as sole source procurement pursuant to the requirements of ORS 279B.075.

(2) The county Contracts Officer or designee shall verify that the goods or services, or class of goods or services, are available from only one source. The county's determination of a sole source must be based on written findings that may include:

(a) The efficient utilization of existing goods or services requires the acquisition of compatible goods or services;

(b) The goods or services required for the exchange of software or data with other public or private agencies are available from only one source;

(c) The goods or services are for use in a pilot or an experimental project; or

(d) Other findings that support the conclusion that the goods or services are available from only one source.

(3) To the extent feasible, the county shall negotiate with the sole-source to obtain contact terms advantageous to the county.

(4) If the county determines that it may enter into a contract as a sole-source that the county would be required to select a contractor using source selection methods set forth in these rules for contracts more than \$100,000, the county shall give public notice of the Board's determination that the goods or services or class of goods or services are available from only one source. The county shall publish such notice in a manner similar to public notice of competitive sealed bids under ORS 279B.055(4) and section 20-0300. 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. Affected persons shall have at least seven (7) days from the date of the notice of the sole-source determination to protest the sole-source determination.

(5) An affected person may protest the county's determination that the goods or services or class of goods or services are available from only one source in accordance with section 20-0710.

20-0280 Emergency Procurements

(1) The county may award a public contract as an emergency procurement pursuant to the requirements of ORS 279B.080. When an emergency procurement is authorized, the procurement shall be made with competition that is practical under the circumstances.

(2) Notwithstanding the policy and procedures outlined in the Marion County Emergency Operation Plan, except as provided in subsection (3) of this section, the Board of Commissioners shall adopt a resolution indicating the existence of the emergency.

(3) The CAO may declare an emergency, and execute a contract, without prior Board approval, if it is determined that the standards set forth in Subsection (1) above are met and findings are made that the nature of the emergency is such that waiting for Board action likely would result in significant risk of property damage, personal injury or substantial extraordinary expense to the county or the public. The CAO shall, as soon as

practical, formally notify the Board of any contract entered into pursuant to this provision, documenting the nature of the emergency and the method used for selection of the particular contractor.

(4) Any contract under this exemption shall be executed within sixty days following declaration of the emergency, unless the Board grants an exemption.

(5) Although no dollar limit applies to emergency contracts, the scope of the contract shall be limited to work or purchases that are necessary and appropriate to address the conditions creating the emergency as described in the resolution.

(6) 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 or purchases necessary and appropriate for related emergency circumstances.

(7) Pursuant to ORS 279C.380(4) and these rules, the emergency declaration may also state that, in the case of a public improvement, the county may waive the requirement of furnishing a performance bond and payment bond for the emergency contract. After the county makes an emergency declaration, the bonding requirements may be excused for the procurement.

20-0285 Special Procurements

(1) **Generally.** The county may award a contract as a special procurement pursuant to the requirements of ORS 279B.085.

(2) The county's Contracts Officer or designee shall verify that the goods or services, or class of goods or services justification are subject to the requirements of ORS 279B.085.

(3) **Public Notice.** The county shall give public notice of the request for approval of a special procurement in a manner similar to public notice of competitive sealed bids under ORS 279B.055(4) and section 20-0300.

(a) The notice shall describe the goods or services or class of goods or services to be acquired through special procurement.

(b) The county shall give public notice of a request for approval of a special procurement at least seven (7) days prior to the approval of the special procurement by the Board.

(c) The county shall give public notice of the approval of a special procurement at least seven (7) days before award of the contract.

(3) Length of time. Special procurements must state length of time/duration for the intended special procurement.

(4) **Protest.** An affected person may protest the approval of or request for approval of a special procurement in accordance with ORS 279B.400 and section 20-0700.

20-0290 Cooperative Procurements

The county may participate in, sponsor, conduct, or administer cooperative procurements as set forth in ORS 279A.200 through 279A.225 and these rules.

Procurement Process

20-0300 Public Notice of Solicitation Document

(1) **Notice of Solicitation Documents.** The county shall provide public notice of every formal competitive solicitation document in accordance with section (2) of this rule. The county 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 who have expressed an interest in the county's procurements;

- (b) Placing notice on the county's electronic procurement system; or
- (c) Placing notice on the county's internet world-wide-web site.
- (2) **Advertising.** The county shall advertise every notice of a formal competitive solicitation document as follows:
 - (a) By placing the notice on the county's electronic procurement system (OregonBuys);
 - (b) The county may additionally publish the advertisement for offers in a newspaper of general circulation.
- (3) **Content of Advertisement.** All advertisements for formal competitive offers shall set forth:
 - (a) Where, when, how, and for how long the solicitation documents 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 documentation given in accordance with Subsection (2)(a) or (b) above and closing, which shall be no less than seven (7) days for an ITB or for an RFP as set forth in ORS 279B.055(4)(f).
 - (d) The date that persons must file applications for pre-qualifications if a requirement and the class of goods or services is one requiring 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 county to receive offers;
 - (g) The scheduled opening; and
 - (h) Any other information the county deems appropriate.
- (4) **Posting Advertisement for Offers.** An offeror may obtain a copy of the advertisement for offers upon request.
- (5) **Fees.** The county may charge a fee or require a deposit for the solicitation document.
- (6) **Notice of Addenda.** The county shall provide potential offerors notice of any addenda to a solicitation document in accordance with these rules.

20-0310 Bids or Proposals are Offers

- (1) **Offer and Acceptance.** The bid or proposal is the bidder's or proposer's offer to enter into a contract.
 - (a) In competitive bidding and competitive proposals, the offer is always a firm offer, i.e. the offer shall be held open by the offeror for the county's acceptance for the period specified in section 20-0480. The county may accept the offer at any time during the specified period and the county's award of the contract constitutes acceptance of the offer and binds the offeror to the contract.
 - (b) Notwithstanding the fact that a competitive proposal is a firm offer for the period specified in section 20-0480, the county may elect to discuss or negotiate certain contractual provisions, as identified in these rules or in the solicitation document with the proposer. Where negotiation is permitted by these rules or the solicitation document, proposers are obligated to negotiate in good faith and only on those terms that the rules or the solicitation document have reserved for negotiation.
- (2) **Contingent Offers.** Except to the extent the proposer is authorized to propose certain terms and conditions pursuant to section 20-0261 of these rules, a proposer shall not make its offer contingent upon the county's acceptance of any terms or conditions (including specifications) other than those contained in the solicitation document.
- (3) **Offeror's Acknowledgement.** By signing and returning the offer, the offeror acknowledges it has read and understands the terms and conditions contained in the solicitation document and that it accepts and agrees to be bound by the terms and

conditions of the solicitation document. If the RFP permits proposal of alternative terms or conditions under section 20-0261, the proposer agrees to be bound by the non-negotiable terms and conditions of the contract and any proposed terms and conditions offered for negotiation upon the county's written acceptance of the proposed terms and conditions.

20-0320 Facsimile Submission of Bids or Proposals

(1) The county may authorize bidders and proposers to submit facsimile offers. If the county determines that ITB or RFP security is or will be required, the county will describe another method for receipt of such security in the solicitation document.

(2) All facsimile responses, when authorized, must arrive at the place and by the time specified in the solicitation document.

(3) The bidder or proposer must sign all facsimile offers.

(4) The county may award a contract based solely upon a facsimile offer. However, the offeror must, upon request of the county, promptly submit its complete original signed offer.

(5) Before authorizing facsimile offers for ITB or RFP, the county Finance Department will establish procedures and controls for receiving, identifying, recording, and safeguarding facsimile offers, to ensure timely delivery of the offers to the opening location and to preserve the "sealed" requirement of competitive procurement.

(6) The county is not responsible for any failure attributed to the transmission or receipt of the facsimile or electronic 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.

20-0330 Electronic Procurement

(1) Electronic procurement authorized.

(a) The county may conduct all phases of a procurement, including the posting of electronic advertisements and the receipt of electronic offers by electronic methods, when authorized, if and to the extent the county specifies in a solicitation document, a request for quotes, or any other written instructions on how to participate in the procurement.

(b) The county shall open an electronic offer when authorized, in accordance with electronic security measures in effect at the county at the time of its receipt of the electronic offer. Unless the county 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 county may limit the use of electronic methods of conducting procurement as advantageous to the county. The county's use of electronic contract signatures shall be consistent with applicable statutes and rules.

(d) If the county determines that bid or proposal security is or will be required, the county will not authorize electronic offers unless it provides another method for receipt of such security.

(2) The county shall conduct all portions of an electronic procurement in compliance with section 20 of these rules, unless otherwise set forth in this rule.

(3) Before authorizing electronic offers, the county's Finance Department will establish procedures and controls for receiving, identifying, recording, and safeguarding electronic offers, to ensure timely delivery of the offers to the opening location and to preserve the "sealed" requirement of competitive procurement.

(4) The county 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 county specifies that persons may submit multiple electronic offers during a specified period of time, the county 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 county will accept electronic offers for a period of time, then at the designated date and time that the county will first receive electronic offers, the county must begin to accept real time electronic offers on the county's electronic procurement system, and shall continue to accept electronic offers in accordance with section (5)(b) of this rule until the date and time specified by the county, after which the county will no longer accept electronic offers.

(5) Receipt of electronic offers.

(a) When the county conducts an electronic procurement that provides that all electronic offers must be submitted by a particular date and time, the county shall receive the electronic offers in accordance with these section 20 rules.

(b) When the county specifies that persons may submit multiple electronic offers during a period of time, the county shall accept electronic offers, and persons may submit electronic offers, in accordance with the following:

(A) Following receipt of the first electronic offer after the day and time the county first receives electronic offers the county shall post on the county 's electronic procurement system, and updated on a real time basis, the lowest electronic offer price or the highest ranking electronic offer. At any time before the date and time after which the county 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 county first accepts electronic offers.

(C) A person may withdraw an electronic offer only in compliance with these section 20 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) In the event of a failure of the county's method of electronic procurement system that interferes with the ability of persons to submit electronic offers, protest or to otherwise participate in the procurement, the county may cancel the procurement in accordance with section 20-0660, or may extend the date and time for receipt of electronic offers by providing notice of the extension immediately after the electronic procurement system becomes available.

Bid and Proposal Preparation

20-0400 Offer Preparation

(1) **Instructions.** An offeror shall submit and sign its offer according to the instructions set forth in the solicitation document. An offeror shall initial and submit any correction or

erasure to its offer prior to opening according to the instructions provided in the solicitation document.

(2) **Forms.** An offeror shall submit its offer on the form(s) provided in the solicitation document, unless instructed otherwise by the solicitation document.

(3) **Documents.** An offeror shall provide the county with all documents and descriptive literature required by the solicitation document.

(4) **Electronic Submissions.** If authorized by the county, the offeror may submit its offer electronically. The county shall not consider electronic offers unless they are authorized by the solicitation document.

20-0410 Offer Submission

(1) The county may require product samples or descriptive literature if the county determines that either one or both is necessary or desirable to evaluate the quality, features or characteristics of an offer. The county 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 special handling, offers shall be submitted in a sealed envelope appropriately marked. If facsimile or electronic offers are permitted in the solicitation document, the supplier may submit and identify facsimile or electronic offers in accordance with the solicitation document.

(b) The county shall not be responsible for offers submitted in any manner, format or to any delivery point other than as required in the solicitation document.

(3) The offeror is responsible for ensuring that the county receives its offer at the required delivery point prior to closing, regardless of the method used to submit or transmit the offer.

20-0420 Pre-Offer Conferences

(1) The county may hold pre-offer conferences with prospective offerors prior to closing to explain the procurement requirements, obtain information or to conduct site inspections.

(2) The county may require attendance at the pre-offer conference as a condition for making an offer.

(3) If the county holds a pre-offer conference, it shall be held within a reasonable time after the solicitation has been issued, but sufficiently before the closing to allow offers to consider information provided at the conference.

(4) Statements made by the county representative at the pre-offer conference do not change the solicitation document unless the county confirms such statements with a written addendum to the solicitation document.

(5) The county shall provide notice of any pre-offer conference in the solicitation document as set forth in section 20-0255(2) or 20-0260(2).

20-0430 Addenda to Solicitation Document

(1) **Issuance; Receipt.** The county may change a solicitation document only by written addenda. An offeror shall provide written acknowledgment of the receipt of all issued addenda with its offer, unless the county otherwise specifies in the addenda.

(2) **Notice and Distribution.** The county shall notify prospective offerors of addenda in a manner intended to foster competition and to make prospective Offerors aware of the Addenda. The solicitation documentation shall specify how the county will provide notice and how the county will make addenda available to offerors. The county will provide

addenda by electronic transmission or other manner identified in the solicitation document to all offerors known to have obtained the solicitation document or to have attended any mandatory pre-offer conference.

(3) Timelines; Extensions.

(a) The county shall not issue an addendum less than 72 hours before closing, unless the addendum also extends the closing for a reasonable time, to allow prospective offerors to consider the addenda in preparing their offers. The county may extend the closing if the county determines prospective offerors need additional time to review addenda.

(b) Notwithstanding subsection (3)(a) of this rule, an addendum that modifies the evaluation criteria, selection process or procedure for any tier of competition under a multistep sealed bid or a multi-tiered or multistep sealed proposal issued in accordance with ORS 279B.060(8) and section 20-0261 of these rules must be issued no fewer than five (5) days before the beginning of that tier or step of competition. The county shall 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 tier or step 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 addenda, offeror may submit a written request for change or protest to an addendum as provided in the solicitation document, within 24 hours following issuance of the addendum, or up to the last day allowed to submit a request for change or protest under section 20-0730, whichever date is later. The county shall consider only an offeror's request for change or protest to the addendum; the county shall not consider a request for change or protest to matters not added or modified by addenda.

20-0440 Pre-Closing Modification or Withdrawal of Offers

(1) Modifications. An offeror may modify its offer in writing prior to the closing. An offeror shall prepare and submit any modification to its offer to the county in accordance with these rules, unless otherwise specified in the solicitation document. Any modification must include the offeror's statement that the modification amends and supersedes the prior offer. The offeror shall mark the submitted modification as follows:

- (a) Bid or proposal modification and
- (b) Solicitation number or name.

(2) Withdrawals.

(d) The offeror may withdraw its offer by written notice submitted and delivered on the offeror's letterhead, signed by an authorized representative of the offeror and received by the county prior to the closing. The offeror or authorized representative may also withdraw its offer in person prior to the closing upon presentation of the appropriate identification.

(e) The county will release an unopened offer withdrawn under subsection (2)(a) to the offeror after voiding any date and time stamp mark;

(c) The offeror shall mark the written request to withdraw an offer as follows:

- (A) Bid or proposal withdrawal
- (B) Solicitation number or name

(3) Documentation. The county shall include all documents relating to the modification or withdrawal of offers in the appropriate procurement file.

20-0450 Receipt, Opening, and Recording of Offers; Confidentiality of Offers

(1) **Receipt.** All offers must be received by either the soliciting department or the Finance Department, unless otherwise stated in the solicitation document. The county shall electronically or mechanically time-stamp or hand-mark each offer and any modification upon receipt. Offers shall be stored in a secure place until opening. If the offer is inadvertently opened prior the opening, (e.g., county inadvertently opened the offer due to improper identification of the offer) the county shall document the resealing for the procurement file.

(2) **Opening and Recording.** The county shall publicly open offers including any modifications made to the offer pursuant to section 20-0440(1). In the case of ITB to the extent practical, the county shall read aloud the name of each bidder, and such other information as the county considers appropriate. The county will not read aloud in the case of RFP or voluminous bids, if the solicitation document so provides.

(3) **Availability.**

(a) After opening, the county shall make the offers available for public inspection except for those portions of an offer that the offeror designates as trade secrets or as confidential proprietary data in accordance with application law. (ORS 192.501(2); ORS 646.461 to 646.475). To the extent the county determines this designation is not in accordance with applicable law, the county shall make those portions available for public inspection. The offeror shall separate information designated as confidential from other non-confidential information at the time of submitting its offer. Prices, makes, model, or catalog numbers of items offered, scheduled delivery dates, and terms of payment shall not be confidential, but shall be publicly available regardless of an offeror's designation to the contrary.

(b) RFPs will not be made available for public inspection until the notice of intent to award has been published. Proposers must designate any trade secrets or confidential proprietary data as outlined above.

20-0460 Late Offers, Withdrawals, and Modifications

Any offer received after closing is late. An offeror's request to withdraw or modify an offer received after closing is late. The county shall not consider late offers, withdrawals or modifications, except as permitted in sections 20-0470 or 20-0261.

20-0470 Mistakes

(1) **General.** To protect the integrity of the competitive procurement process and to assure fair treatment of offerors, the county will carefully consider whether to permit waiver, correction or withdrawal of offers for certain mistakes.

(2) **County Treatment of Mistakes.** The county shall not allow an offeror to correct or withdraw an offer for an error in judgment. If the county discovers certain mistakes in an offer after opening, but before award of the contract, the county may take the following action:

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

(A) Return the correct number of signed offers or the correct number of other documents required by the solicitation document;

(B) Sign the offer in the designated block, provided a signature appears 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 county may, but is not required to correct a clerical error if the intended offer and the error are evident on the face of the offer, or other documents submitted with the offer, and the offeror verifies the county's correction in writing. A clerical error is an offeror's error in drafting its offer. In the event of a discrepancy between the extended prices and unit prices, unit prices shall prevail over extended prices, unless the correct amount is evident.

(c) The county may permit an offeror to withdraw an offer based on other errors only if the offeror shows by clear and convincing evidence:

(A) The nature of the error;

(B) That the error is not a judgment error, minor informality or clerical error.

(C) The error cannot be waived or corrected pursuant to subsections (a) and (b) of this section;

(D) The offeror acted in good faith in submitting an offer that contained a claimed error and in claiming the alleged error in the offer exists;

(E) The offeror acted without gross negligence in submitting an offer that contained a claimed error;

(F) The offeror will suffer substantial detriment if the county does not grant the offeror permission to withdraw the offer;

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

(H) The offeror promptly gave notice of the claimed error to the county.

(d) The criteria in subsection (2)(c) of this rule shall determine whether the county will permit an offeror to withdraw its offer after closing. These criteria also shall apply to the question of whether the county 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 county based on the difference between the amount of the offeror's offer and the amount of the contract actually awarded by the county, whether by award to the next lowest responsive and responsible bidder or the most advantageous responsive and responsible proposer or by resort to a new solicitation.

(3) **Rejection for mistakes.** The county shall reject any offer in which a mistake is evident on the face of the offer and the intended correct offer is not evident or cannot be substantiated from documents accompanying the offer, i.e., documents submitted with the offer, pursuant to solicitation requirements.

(4) **Identification of Mistakes After Award.** The procedures and criteria set forth above are offeror's only opportunity to correct mistakes or withdraw offers because of a mistake. Following award, an offeror is bound by its offer, and may withdraw its offer or rescind a contract entered into pursuant to section 20 rules only to the extent permitted by applicable law.

20-0480 Time for County Acceptance

An offer is a firm offer, irrevocable, valid and binding on the offeror for not less than 60 days from closing unless otherwise specified in the solicitation document.

20-0490 Extension of Time for Acceptance of Offer

The county may request, orally or in writing that an offeror extend in writing the time during which the county may accept its offer. If an offeror agrees to an extension, the offer shall be irrevocable, valid and binding for the agreed upon extension.

20-0500 Responsibility of Bidders and Proposers

Before awarding a contract, the county shall determine that the bidder submitting the lowest bid or the proposer submitting the most advantageous proposal is responsible. The county shall use the standards as set forth in ORS 279B.110 to make this determination. In the event the county determines an offeror is not responsible, it shall prepare a written determination as required by ORS 279B.110 and shall reject the offer.

20-0525 Qualified Products Lists

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

20-0550 Prequalification of Prospective Offerors; Pre-Negotiation of Contract Terms and Conditions

(1) The county may prequalify prospective offerors pursuant to ORS 279B.120 and 279B.125.

(2) Notwithstanding the prohibition against revocation of prequalification in ORS 279B.120(3), the county may determine that a prequalified offeror is not responsible prior to contract award.

(3) The county may pre-negotiate some or all contract terms and conditions including prospective proposer contract forms such as license agreements, maintenance and support agreements or similar documents for use in future procurements. Such pre-negotiation of contract terms and conditions (including prospective proposer forms) may be part of the prequalification process of a proposer in section (1) or the pre-negotiation may be a separate process and not part of a prequalification process. Unless required as part of the prequalification process, the failure of the county and the prospective proposer to reach agreement on pre-negotiated contract terms and conditions does not prohibit the prospective proposer from responding to procurements. The county may agree to different pre-negotiated contract terms and conditions with different prospective proposers. When the county has pre-negotiated different terms and conditions with proposers or when permitted, proposers offer different terms and conditions, the county may consider the terms and conditions in the proposal evaluation process.

20-0575 Debarment of Prospective Offerors

The county may debar prospective offerors as defined in OAR 137-047-0575.

20-0600 Offer, Evaluation and Award

(1) The county shall evaluate offers only as set forth in the solicitation document pursuant to sections 20-0255 and 20-0260 and applicable law.

(a) Evaluation of Bids.

(A) Non-resident bidders. The county shall apply the reciprocal preference set forth in ORS 279A.120(2)(b) and these rules for non-resident bidders.

(B) Awards when bids are identical. If the county determines that one or more bids are identical under section 10-0320, the county will award a contract in accordance to procedures outlined in these rules.

(b) Evaluation of Proposals.

(A) Award when proposals are identical. If the county determines that one or more proposals are identical under section 10-0300, the county shall award a contract in accordance to procedures outline in these rules.

(B) Recycled materials. When procuring goods, the county shall give preference for recycled materials as set forth in section 10-0300.

(2) Clarification of bids or proposals. After opening, the county may conduct discussions with apparent responsive offerors for the purpose of clarification to assure full

understanding of the bids or proposals. All bids or proposals, in the county's sole discretion, needing clarification may be accorded such an opportunity at the county's sole discretion. The county shall document clarification of any offeror's bid or proposal in the procurement file.

(3) **Negotiations.**

(a) **Bids.** The county shall not negotiate with any bidder. After award of the contract, the county may only modify a contract in accordance with section 20-0800.

(b) **Requests for Proposals.** The county may conduct discussions or negotiate with proposers only in accordance with section 20-0261. After award of the contract, the county may only modify a contract in accordance with section 20-0800.

(4) **Award.**

(a) **General.** The county shall award a contract to the responsible bidder submitting the lowest, responsible bid or the responsible proposer submitting the most advantageous, responsive proposal. The county 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 ITB or RFP may call for pricing of multiple items of similar or related type with award based on individual line item, group total of certain items, a "market basket" of items representative of the county's expected purchases, or grand total of all items.

(c) **Multiple Awards – Bids or Proposals.**

(A) The county may award multiple contracts under an ITB or RFP if it is set forth in the solicitation document. Multiple awards shall not be made if a single award will meet the county's needs, including but not limited to adequate availability, delivery, service, or product compatibility. A multiple award may be made if two or more offerors of similar goods or services is necessary for adequate availability, delivery, service or product compatibility and skills. Multiple awards may not be made for the purpose of dividing the procurement into multiple solicitations or to allow for user preference unrelated to utility or economy. A notice to offerors that multiple contracts may be awarded for any bid or proposal shall not preclude the county from awarding a single contract.

(B) The county shall specify in the solicitation document the criteria it will use to choose from multiple contracts when purchasing goods or services.

(d) **Partial Awards.** If after reviewing offers, the county determines that an acceptable offer has been received for only parts of the requirements of the solicitation document:

(A) The county may award a contract for which acceptable offers have been received; or

(B) The county may reject all offers and may issue a new solicitation document on the same or revised terms, conditions and specifications.

(e) **All or None Offers.** The county may award all or none offers if the evaluation shows an all or none award to be the lowest cost for bids or the most advantageous for proposals of those submitted.

20-0610 Notice of Intent to Award

(1) Unless otherwise provided in the solicitation document, the county shall provide notice of its intent to award to all offerors pursuant to ORS 279B.135 at least seven (7) days before the award of a contract, unless the county determines that circumstances require the prompt execution of the contract, in which case the county may provide a shorter notice period. This section does not apply to contracts awarded as a small procurement (20-0265) or an intermediate procurement (20-0270).

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

(a) The expiration of the protest period provided pursuant to section 20-0740; or

(b) The county provides written responses to all timely filed protests denying the protests and affirming the award.

20-0620 Documentation of Award

(1) **Basis of Award.** After award, the county shall make a record showing the basis for determining the successful offeror part of the county's procurement file.

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

(a) For bids: The bids, completed tabulation sheet and written justification for any rejection of lower bids.

(b) For proposals: The proposals, the completed evaluation of proposals, written justification for any rejection of higher scoring proposals and if the county engaged in any of the methods of contractor selection described in ORS 279B.060(8) and section 20-0261, written documentation of the content of any discussions, negotiations, best and final offers or any other procedures the county used to select a proposer to which the county awarded a contract.

20-0630 Availability of Award Decisions

(1) **Contract Documents.** To the extent required by the solicitation document, the county shall deliver a contract, signed purchase order, or other contract documents, as applicable, to the successful offeror.

(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 county a written request accompanied by payment. The requesting person shall provide the solicitation document number. In addition, the county may make available tabulations of bids and proposals through the electronic procurement system of the county or the county's website.

20-0640 Rejection of an Offer

(1) **Rejection of an Offer.**

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

(b) The county shall reject an offer upon finding that the offer:

(A) Is contingent upon county'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 breach of the terms and conditions of the solicitation document or applicable law.

(D) Offers goods or services that fail to meet the specifications of the solicitation document.

(E) Is late;

(F) Is not in substantial compliance with the solicitation document

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

(c) The county shall reject an offer upon the county's findings that the offeror:

(A) Has not been pre-qualified under ORS 279B.120 and the county's required mandatory prequalification;

(B) Has been debarred as set forth in ORS 279B.130.

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

(D) Has not submitted properly executed bid or proposal security as required.

(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 its ability to perform satisfactorily under a contract. Before awarding a contract, the county must have information that indicates that the offeror meets the applicable standards of responsibility. To determine that an offeror is responsible, the county must determine, pursuant to ORS 279B.110 that the offeror:

(i) Has available or the ability to obtain the appropriate financial, material, equipment, facility and personnel resources and expertise, necessary to meet all contractual responsibilities; and

(ii) Has completed previous contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that to the extent the costs associated with and time available to perform a previous contract were within the offeror's control, the offeror stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. The county should carefully scrutinize an offeror's record of contract performance if the offeror is or recently has been materially deficient in contract performance. In reviewing the offeror's performance, the county should determine whether the offeror's deficient performance was expressly excused under the terms of the contract, or whether the offeror took appropriate corrective action. The county may review the offeror's performance on both private and public contracts in determining the offeror's record of contract performance. The county shall make its basis for determining an offeror is non-responsible under this subparagraph part of the procurement file pursuant to ORS 279B.110(2)(b)

(iii) Has a satisfactory record of integrity. An offeror may be found to lack integrity if the county determines the offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to a contracting agency. The county may find an offeror not-responsible based on the lack of integrity of any person having influence or control over the offeror (such as a key employee of the offeror that has the authority to significantly influence the offeror's performance of the contract or a parent company, predecessor or successor person). The standards for debarment under ORS 279B.130 may be used to determine an offeror's integrity. The county may find an offeror not-responsible based on previous convictions of offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the offeror's performance of a contract or subcontract. The county shall make its basis for determining that an offeror is not-responsible under this subparagraph part of the procurement file pursuant to 279B.110(2)(c).

(iv) Is legally qualified to contract with the county;

(v) Has attested in writing that the offeror complied with the tax laws of this state and of political subdivisions of this state;

(vi) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the offeror fails to promptly supply information requested by the county concerning responsibility, the county shall base the determination of responsibility on any available information, or may find the offeror non-responsible.

(2) For the purposes of subparagraph (1)(c)(F)(v) of this rule:

(a) The period for which the offeror must attest that it complied with the applicable tax laws must extend no fewer than six years into the past from the date of the closing.

(b) Tax laws include, but are not limited to, ORS 305.620, ORS chapters 316, 317 and 318, any tax provisions imposed by a political subdivision that apply to the offeror or to the performance of the contract, and any rules and regulations that implement or enforce those tax laws.

(c) The county may exercise discretion in determining whether a particular form of attesting to compliance with the tax laws is "credible and convenient" under ORS

279B.110(2)(e), taking into consideration the circumstances in which the attestation is made and the consequences of making a false attestation. Therefore, the county may accept forms of attestation that range from a notarized statement to a less formal document that records the offeror's attestation.

(3) **Form of Business Entity.** The county may investigate any person submitting an offer to determine application of this subsection or to apply the debarment provisions of ORS 279B.130. The investigation may include that company's officers, directors, owners, affiliates, or any other person acquiring ownership of the person to determine application of this section or to apply the debarment provisions of section 20-0575.

20-0650 Rejection of All Offers

(1) The county may reject all offers upon a written finding it is in the public interest to do so. The county will notify all offerors of the rejection of all offers, along with the justification and finding.

(2) The county 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 offeror 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 unintentional errors in the solicitation document;

(e) The solicitation was canceled in accordance with section 20-0660; or

(f) Any other circumstance indicating completion of the solicitation would not be in the public interest.

20-0655 Suspension of Solicitation

(1) **Suspension of Solicitation.** The county may suspend a solicitation if the county finds that it is in the public's interest to suspend the solicitation until further notice. The reasons for the suspension shall be made part of the procurement file.

(2) **Notice of Suspension.** If the county suspends the solicitation, written notice shall be provided through a written addendum and delivered pursuant to section 40-0250 of these rules. The addendum shall include the reason for suspension and anticipated length of suspension period.

20-0660 Cancellation of Procurement of Solicitation

(1) **Cancellation in the Public Interest.** The county may cancel a solicitation if the county finds that cancellation is in the public interest. The county's reasons for cancellation will be made part of the solicitation file.

(2) **Notice of Cancellation.** If the county cancels a solicitation prior to the opening, the county shall provide notice of cancellation. Notice of cancellation will:

(a) Identify the solicitation;

(b) Briefly explain the reason for cancellation;

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

(3) **Notice of Cancellation after Opening.** If the county cancels a procurement or solicitation after opening, the county shall provide written notice of cancellation to all offerors who submitted offers.

20-0670 Disposition of Offers if Procurement or Solicitation Canceled

(1) **Prior to Opening.** If the county cancels a solicitation prior to opening, the county will return all offers it received unopened, provided the offers were submitted in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the county will open the offer to determine the source and then return it.

(2) **After Opening.** If the county cancels a procurement or solicitation after opening, the county,

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

(b) Shall keep records of the cancellation actions in the procurement file.

(3) If the county rejects all offers, the county will retain the offers as part of the county's solicitation file.

Legal Remedies

20-0700 Protests and Judicial Review of Special Procurements

(1) **Purpose.** An affected person may protest the approval of or the request for approval of a special procurement. Pursuant to ORS 279B.400(1), before seeking judicial review of the approval or request for approval of a special procurement, an affected person must file a written protest with the contract review board or designee and exhaust all administrative remedies.

(2) **Delivery.**

(a) Protest of request for approval of a special procurement. An affected person must deliver a written protest to the contract review board or designee within seven (7) days after the first date of public notice of a proposed special procurement, unless a different protest period is provided in the public notice of the proposed special procurement.

(b) Protest of approval of a special procurement. Notwithstanding the requirements for filing a writ of review under ORS chapter 34 pursuant to ORS 279B.400(4)(a), an affected person must deliver a written protest to the contract review board or designee within seven (7) days after the first date of public notice of the approval of a special procurement by the contract review board or designee, unless a different protest period is provided in the public notice of the approval of the special procurement.

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

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

(b) A description of the resulting harm to the affected person; and

(c) The relief requested.

(4) **Contract Review Board Response.**

(a) Protest of request for approval of a special procurement: The contract review board or designee shall not consider an affected person's protest of the county's request for approval of a special procurement submitted after the timeline established for submitting a protest under this rule or under the different time period as may be provided in the public notice of the request for approval of a proposed special procurement. The contract review board or designee shall issue a written disposition of the protest in a timely manner. If the contract review board or designee upholds the protest, in whole or in part, it may in its sole discretion implement the sustained protest in the approval of the special procurement, or deny the request for approval of the special procurement.

(b) Protest of approval of a special procurement: The contract review board or designee shall not consider an affected person's protest of the approval of a special procurement submitted after the timeline established for submitting such protest under this rule or under the different time period as may be provided in the public notice of the approval of a special procurement. The contract review board or designee shall issue a written disposition of the protest in a timely manner. If the contract review board or designee upholds the protest, in whole or in part, it may in its sole discretion implement the sustained protest in the approval of the special procurement, or revoke the approval of the special procurement.

(5) **Judicial Review.** An affected person may not seek judicial review of the contract review board's or designee denial of a protest of a request for approval of a special procurement. An affected person may seek judicial review of the contract review board's or designee's decision relating to a protest of the approval of a special procurement in accordance with ORS 279B.400.

20-0710 Protests and Judicial Review of Sole Source Procurements

(1) **Purpose.** For sole-source procurements requiring public notice under section 20-0275, an affected person may protest the determination of the contract review board or designee that the goods or services or class of goods or services are available from only one source. Pursuant to ORS 279B.420(3)(f), before seeking judicial review, an affected person must file a written protest with the contract review board or designee and exhaust all administrative remedies.

(2) **Delivery.** Unless otherwise specified in the public notice of the sole-source procurement, an offeror must deliver a written protest to the contract review board or designee within seven (7) days after the first date of public notice of the sole-source procurement, unless a different protest period is provided in the public notice of a sole-source procurement.

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

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

(4) **Contract Review Board Response.** The contract review board or designee shall not consider an affected person's sole source procurement protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the public notice of the sole source procurement. The contract review board or designee shall issue a written disposition of the protest in a timely manner. If the contract review board or designee upholds the protest, in whole or in part, the county shall not enter into a sole-source contract.

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

20-0720 Protests and Judicial Review of Multi-Tiered and Multistep Solicitations

(1) **Purpose.** An affected offeror may protest exclusion from the competitive range or from subsequent 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 county and exhaust all administrative remedies.

(2) **Basis for Protest.** An affected offeror may protest its exclusion from a tier or step of competition only if the offeror is a responsible offeror and submitted a responsive offer

and, but for the county's mistake in evaluating the offeror's or other offerors' offers, the protesting offeror would have been eligible to participate in the next tier or step 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 county committed a substantial violation of a provision in the solicitation document or of an applicable procurement 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 county within seven (7) days after issuance of the notice of the competitive range or notice of subsequent tiers or steps.

(4) **Content of Protest.** The affected offeror's protest shall be in writing and must specify the grounds upon which the protest is based.

(5) **County Response.** The county shall not consider an affected offeror's multi-tiered or multistep solicitation protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the solicitation document. The county shall issue a written disposition of the protest in a timely manner. If the county upholds the protest, in whole or in part, the county may in its sole discretion either issue an addendum under section 20-0430 reflecting its disposition or cancel the procurement or solicitation under section 20-0660.

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

20-0730 Protests and Judicial Review of Solicitations

(1) **Purpose.**

(a) A prospective offeror may protest the procurement process or the solicitation document for a contract solicited under ORS 279B.055, 279B.060 and 279B.085 as set forth in ORS 279B.405(2) Pursuant to ORS 279B.405(3), before seeking judicial review, a prospective offeror must file a written protest with the county 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).

(2) **Delivery.** Unless otherwise specified in the solicitation document, a prospective offeror must deliver a written protest to the county not less than ten (10) days prior to closing.

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

(4) **County Response.** The county shall not consider a prospective offeror's solicitation protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the solicitation document. The county shall consider the protest if it is timely filed and meets the conditions set forth in ORS 279B.405(4). The county shall issue a written disposition of the protest in accordance with the timeline set forth in ORS 279B.405(6). If the county upholds the protest, in whole or in part, the county may in its sole discretion either issue an addendum reflecting its disposition under section 20-0430 or cancel the procurement or solicitation under section 20-0660.

(5) **Extension of Closing.** If the county receives a protest from a prospective offeror in accordance with this rule, the county may extend closing if the county 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 county clarify any provision of the solicitation document. The county's clarification to an offeror, whether orally or in writing, does not change the solicitation document and is not binding on the county unless the county amends the solicitation document by addendum.

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

20-0740 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 county and exhaust all administrative remedies before seeking judicial review of the county's contract award decision.

(2) **Delivery.** Unless otherwise specified in the solicitation document, an offeror must deliver a written protest to the county within seven (7) days after issuance of the notice of intent to award the contract.

(3) **Content of Protest.** An offeror's written protest shall specify the grounds for the protest to be considered by the county pursuant to ORS 279B.410(2).

(4) **County Response.** The county shall not consider an offeror's contract award protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the solicitation document. The county shall issue a written disposition of the protest in a timely manner as set forth in ORS 279B.410(4). If the county upholds the protest, in whole or in part, the county 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 county's decision relating to a contract award protest shall be in accordance with ORS 279B.415.

20-0745 Protests and Judicial Review of Qualified Products List Decisions

(1) **Purpose.** A prospective offeror may protest the county's decision to exclude the prospective offeror's goods from the county's qualified products list under ORS 279B.115. A prospective offeror must file a written protest and exhaust all administrative remedies before seeking judicial review of the county's qualified products list decision.

(2) **Delivery.** Unless otherwise stated in the county's notice to prospective offerors of the opportunity to submit goods for inclusion on the qualified products list, a prospective offeror must deliver a written protest to the county within seven (7) days after issuance of the county's decision to exclude the prospective offeror's goods from the qualified products list.

(3) **Content of Protest.** The prospective offeror's protest shall be in writing and must specify the grounds upon which the protest is based.

(4) **County Response.** The county shall not consider a prospective offeror's qualified products list protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the county's notice to prospective offerors of the opportunity to submit goods for inclusion on the qualified products list. The county shall issue a written disposition of the protest in a timely

manner. If the county upholds the protest, it shall include the successful protestor's goods on the qualified products list.

(5) **Judicial Review.** Judicial review of the county's decision relating to a qualified products list protest shall be in accordance with ORS 279B.425.

20-0750 Judicial Review of Other Violations

Any violation of ORS chapter 279A or 279B by the county 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.

20-0760 Review of Prequalification and Debarment Decisions

Review of the county's prequalification and debarment decisions shall be as set forth in ORS 279B.425.

20-0800 Contract Amendments

(1) **Additional Goods or Services.** The county may amend a contract without additional competition in any of the following circumstances:

(a) The county may amend a contract without additional competition to add additional goods or services within the scope of the solicitation document, the sole-source notice or the contract, or the approval of special procurement in that order. An amendment is not within the scope of the procurement if the county determines that the changes to be made by amendment had been described in the procurement documents, it would likely have increased competition or affected award of the contract.

(b) These rules otherwise permit the county to award a contract without competition for the goods or services to be procured under the amendment.

(c) The amendment is necessary to comply with a change in law that affects performance of the contract.

(d) The amendment results from renegotiation of the terms and conditions, including the contract price, of a contract and the amendment is advantageous to the county, all subject to the following conditions:

(A) The goods or services to be provided are within the scope of the procurement and the unamended contract.

(B) The county determines that, with all things considered, the amended contract is at least as favourable to the county as the unamended contract.

(C) The amended contract does not have a total term greater than allowed in the solicitation document, sole source notice, or approval of a special procurement after combining the initial and extended terms. For example, a one-year contract, renewable each year for up to four additional years, may be renegotiated as a two to five-year contract, but not beyond a total of five years. Also, if multiple contracts with a single contractor are restated as a single contract, the term of the single contract may not have a total term greater than the longest term of any of the prior contracts.

(2) **Small or Intermediate Contract.** The county may amend a contract awarded as small or intermediate procurement pursuant to section (1) of this rule, provided that the total increase in contract price does not exceed the amount set forth in section 20-0265 for small procurements or section 20-0270 for intermediate procurements.

(3) **Price Agreements.** The county may amend a price agreement as follows:

(a) As permitted by the price agreement;

(b) If the circumstances set forth in ORS 279B.140(2) exist; or

(c) As permitted by applicable law.

20-0870 Termination of Price Agreements

The county may terminate a price agreement as follows:

- (1) As permitted by the price agreement;
- (2) If the circumstances set forth in ORS 279B.140(2) exist; or
- (3) As permitted by applicable law.

Section 30 Consultant Selection: Architects, Engineers, Photogrammetrists, Transportation Planners, or Land Surveyors, and Related Services Contracts

30-0100 Application

These section 30 rules apply to the screening and selection of architects, engineers, photogrammetrists, transportation planners, or land surveyors, and providers of related services.

These section 30 rules set forth the procedures the county will use to select consultants to perform architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, and providers of related services.

30-0110 Definitions

In addition to the definitions set forth in ORS 279A.010, ORS 279C.100, and section 10-0110, the following definitions apply to these section 30 rules:

(1) **A&E Services:** for purposes of this section 30, services is limited to mean architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services,

(2) **Consultant:** An architect, engineer, photogrammetrist, transportation planner, land surveyor, or provider of related services. A consultant includes a business entity that employs architects, engineers, photogrammetrists, transportation planners, land surveyors or providers of related services, or any combination of the foregoing.

(3) **Estimated Fee:** The county's reasonably projected fee to be paid for a consultant's services under the anticipated contract, excluding all anticipated reimbursable or other non-professional fee expenses. The estimated fee is used solely to determine the applicable contract solicitation method and is distinct from the total amount payable under the contract. The estimated fee shall not be used as a basis to resolve other public contracting issues, including without limitation, direct purchasing authority or public contract review and approval under ORS 291.047.

(4) **Price Agreement:** for purposes of this section 30, is limited to mean an agreement related to the procurement of architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services, under agreed-upon terms and conditions, including, but not limited to terms and conditions of later work orders or task orders for project-specific services, and which may include consultant compensation information, with:

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

(b) An initial work order, task order, or minimum purchase, combined with a continuing Consultant obligation to provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services, in which the county does not guarantee a minimum or a maximum additional purchase.

(5) **Project:** All components of the county's planned undertaking that gives rise to the need for a consultant's architectural, engineering, photogrammetric mapping, transportation planning, land surveying services, or related services under a contract.

(6) **Proposer:** A consultant who submits a proposal to the county in response to a request for proposals.

(7) **Request for Qualifications or RFQ:** A written document issued by the county to which consultants respond with a description of its experience with and qualifications for the architectural, engineering, photogrammetric mapping, transportation planning, land

surveying services, or related services described in the RFQ and from which the county creates a list of consultants who are qualified to perform those services, but which is not intended to result in a contract between a consultant and the county.

(8) **Transportation Planning Services:** Transportation planning services are defined in ORS 279C.100. Transportation planning services include only project-specific transportation planning involved in the preparation of categorical exclusions, environmental assessments, environmental impact statements, and other documents required for compliance with the National Environmental Policy Act, 42 USC 4321 et. seq. Transportation planning services do not include transportation planning for corridor plans, transportation system plans, interchange area management plans, refinement plans, and other transportation plans not directly associated with an individual project that will require compliance with the National Environmental Policy Act, 42 USC 4321 et. seq. Transportation planning services also do not include transportation planning for projects not subject to the National Environmental Policy Act, 42 USC 4321 et. seq.

30-0120 List of Interested Consultants; Performance Record

The county may compile a list of interested consultants as defined in OAR 137-048-0120.

30-0130 Applicable Selection Procedures; Pricing Information; Disclosure of Proposals; Conflicts of Interest

(1) When selecting the most qualified consultants to perform A&E services under the conditions of ORS 279C.110(2), the county shall follow the applicable selection procedure under either section 30-0200 (Direct Appointment Procedure), section 30-0210 (Informal Selection Procedure), or section 30-0220 (Formal Selection Procedure). In following the direct appointment procedures under section 30-0200, the county may base its initial selection of a consultant on any information available to the county prior to beginning the direct appointment procedure for the project involved. The county may solicit or use pricing policies and pricing Proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead in any of the county's selection procedures to select consultants to perform A&E services, pursuant to the requirements of ORS 279C.110(5).

(2) When selecting the most qualified consultants to perform related services, the county shall follow one of the following selection procedures:

(a) When selecting a consultant on the basis of qualifications alone, the county shall follow the applicable selection procedure under section 30-0200 (Direct Appointment Procedure), section 30-0210 (Informal Selection Procedure), or section 30-0220 (Formal Selection Procedure).

(b) When selecting a consultant on the basis of price competition alone, the county shall follow either the provisions section 20 for obtaining and evaluating bids, or Section 30-0200 (Direct Appointment Procedure); and

(c) When selecting a consultant on the basis of price and qualifications, the county shall follow either the provisions under section 20 for obtaining and evaluating proposals, or section 30-0200 (Direct Appointment Procedure). The county may request and consider proposer's pricing policies, pricing proposal or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates, and overhead, submitted with a proposal.

(3) The county is not required to follow the procedures in section (1) or section (2) of this rule, when the county has established price agreements with more than one consultant and is selecting a single consultant to perform A&E services under an individual work order or task order. Provided, however, the criteria and procedures the county uses

to select a single consultant, when the county has established price agreements with more than one consultant, must meet the requirements of section 30-0270 Price Agreements.

(4) The county may use electronic methods to screen and select a consultant if authorized by the county under section 20-0330 Electronic Procurement.

(5) For the purposes of these section 30 rules, a "mixed" contract is one requiring the consultant to perform A&E services, other services or other related goods under the contract. The county's classification of a procurement that will involve a "mixed" contract will be determined by the predominant purpose of the contract. The county will determine the predominant purpose of the contract by determining which services involves the majority of the total estimated fee to be paid under the contract. If the majority of the total estimated fee to be paid under the contract is for architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, the county shall comply with the requirements of ORS 279C.110 and section (1) of this rule. If the majority of the total estimated fee to be paid under the contract is for related services, the county shall comply with the requirements of ORS 279C.120 and section (2) of this rule. If the majority of the total estimated fee to be paid under the contract is for some other services or goods under the public contracting code, the county shall comply with the applicable provisions of the public contracting code and sections 20, 30, and 40 of the Marion County Public Contracting Rules that match the predominant purpose of the contract.

(6) Where a consultant will be performing A&E services for the county by providing analysis, testing services, testimony, or similar services for a project that is, or is reasonably anticipated to be, the subject of a claim, lawsuit, mediation, arbitration, or other form of action or alternative dispute resolution process, whether legal, equitable, administrative, or otherwise, the county shall comply with these section 30 rules in procuring those services.

(7) Consistent with the requirements of ORS 279C.107 and the remaining requirements of ORS 279C.100, 279C.105 and 279C.110 through 279C.125, the following provisions apply to proposals received by the county for A&E services:

(a) The term "competitive proposal", for purposes ORS279C.107 includes proposals under section 30-0200 (Direct Appointment Procedure), 30-0210 (Informal Selection Procedure), section 30-0220 (Formal Section Procedure) or section 30-0130(2)(c) (selection based on price and qualifications) and any proposals submitted in response to a selection process for a work order or task order under section 30-0270 Price Agreements.

(b) For purposes of proposals received by the county under section 30-0200 (Direct Appointment Procedure), a formal notice of intent to award is not required. As a result, section 30-0200 proposals are not required to be open for public inspection until after the county has executed a contract with the selected consultant.

(c) In the limited circumstances permitted by ORS 279C.110, 279C.115 and 279C.120, where the county is conducting discussions or negotiations with proposers who submit proposals that the county has determined to be closely competitive or to have a reasonable chance of being selected for award, the county may open proposals so as to avoid disclosure of proposal contents to competing proposers, consistent with the requirements of ORS 279C.107. Otherwise, the county may open proposals in such a way as to avoid disclosure of the contents until after the county executes a contract with the selected consultant.

(d) Disclosure of proposals and proposal information is otherwise governed by ORS 279C.107.

(8) As required by ORS 279C.307, pertaining to requirements to ensure the objectivity and independence of providers of certain personal services that are procured under ORS 279C, the county may not:

(a) Procure the personal services identified in ORS 279C.307 from a contractor or an affiliate of a contractor who is a party to the public contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the personal services; or

(b) Procure the personal services identified in ORS 279C.307 through the same public contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the personal services.

(9) The requirements of ORS 279C.307 and section (8) of this rule apply in the following circumstances, except as provided in section (10) of this rule:

(a) The procurement of personal services that the county requires for the purpose of administering, managing, monitoring, inspecting, evaluating the compliance with or otherwise overseeing a public contract or performance under a public contract that is subject to ORS 279C. A public contract that is "subject to ORS Chapter 279C" includes a public contract for A&E services defined in this section 30, or a public contract for construction services under ORS Chapter 279C.

(b) The procurements of personal services subject to the restrictions of ORS 279C.307 include but are not limited to, the following:

(A) Procurements for A&E services defined in this section 30 that involve overseeing or monitoring the performance of a construction contractor under a public contract for construction services subject to ORS 279C.

(B) Procurements for commissioning services that involve monitoring, inspecting, evaluating or otherwise overseeing the performance of a contractor providing A&E services or the performance of a construction contractor under a public contract for construction services subject to ORS 279C;

(C) Procurements for project management services that involve administration, management, monitoring, inspecting, evaluating compliance with or otherwise overseeing the performance of a contractor providing A&E services, construction services subject to ORS 279C, commission services or other related services for a project;

(D) Procurements for special inspections and testing services that involve inspecting, testing or otherwise overseeing the performance of a construction contractor under a public contract for construction services subject to ORS 279C; and

(E) Procurements for other related services or personal services that involve administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing the contracts described in section (9)(a) of this rule.

(10) The restrictions of ORS 279C.307 do not apply in the following circumstances, except as further specified below:

(a) To the county's procurement of both design services and construction services through single "design-build" procurement as that term is defined in section 40-0670. The design-build procurement includes a procurement under an energy savings performance contract, as defined in ORS 2709A.010 and section 40-0680 of these rules. Provided, however, the restrictions of ORS 279C.307 do apply to the county's procurement of personal services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a design-build contract or performance under such a contract resulting from a design-build procurement.

(b) To the county's procurement of both pre-construction services and construction services through a single "construction manager/general contractor" procurement as defined in section 40-0690. Provided, however, the restrictions of ORS 279C.307 do

apply to the county's procurement of personal services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a construction manager/general contractor contract or performance under such a contract resulting from a construction manager/general contractor procurement.

30-0200 Direct Appointment Procedures

(1) The county may enter into a contract with a consultant without following the selection procedures set forth elsewhere in these rules if;

- (a) The county finds that an emergency exists; or
- (b) The estimated fee to be paid under the contract is not more than \$25,000; or
- (c) The A&E services to be performed under the contract:

(A) Consist of or are related to A&E services that have been substantially described, planned or otherwise previously studied in an earlier contract with the same consultant and are rendered for the same project as the A&E services rendered under the earlier contract; and

(B) The county used a formal selection procedure described in the county's rules, whichever were in effect at the time of the selection of the consultant for the earlier contract; or

(C) The consultant will be assisting the county by providing analysis, testing services, testimony or similar services for a project that is, or is reasonably anticipated to be, the subject of a claim, lawsuit or other form of action, whether legal, equitable, administrative or otherwise.

(2) The county may select consultants for contracts under this rule from the following sources:

(a) A list of consultants, including its qualifications and related performance information, maintained by the county.

(b) Another contracting agency's list of consultants created under OAR 125-248-0120 with written consent of that contracting agency; or

(c) All consultants offering the required A&E services that the county reasonably can identify under the circumstances.

(3) The county shall direct negotiations with consultants selected under this rule toward obtaining written agreement on:

(a) Consultant's performance obligations and performance schedule;

(b) Payment methodology, consultant's rates and number of hours, and a maximum amount payment to consultant for services required that is fair and reasonable to the county, as determined solely by the county, taking into account the value, scope, complexity and nature of the architectural, engineering, and land surveying services, or related services; and

(c) Any other provisions the county believes to be in the county's best interest to negotiate.

30-0210 Informal Selection Procedures

(1) The county may use the informal selection procedure described in this rule to obtain a contract if the estimated fee is expected to be more than \$25,000, but not more than \$100,000.

(2) When using the informal selection procedure, the county shall:

(a) Create an Informal Request for Proposals (IRFP) that includes at a minimum the following:

(A) A description of the project for which consultant's A&E services are needed and a description of the A&E services that will be required under the resulting contract;

- (B) Anticipated contract performance schedule;
- (C) Conditions or limitations, if any, that may constrain or prohibit the selected consultant's ability to provide additional services related to the project, including construction services;
- (D) Date and time proposals are due and other directions for submitting proposals;
- (E) Criteria upon which the most qualified consultant will be selected. Selection criteria may include, but are not limited to, the following:
 - (i) The amount and type of resources and number of experienced staff consultant has available to perform the A&E services described in the IRFP within the applicable time limits, including the current and projected workloads of the staff and the proportion of time the staff would have available for the A&E services;
 - (ii) Proposed management techniques for the A&E services described in the IRFP;
 - (iii) Consultants' capability, experience and past performance history and record in providing similar A&E services, including but not limited to quality of work, ability to meet schedules, cost control methods and contract administration practices;
 - (iv) Consultants' approach to A&E services described in the IRFP and design philosophy, if applicable;
 - (v) Consultant's geographic proximity to and familiarity with the physical location of the project;
 - (vi) Volume of work, if any, previously awarded to consultant with the objective of effecting equitable distribution of contracts among qualified consultants, provided such distribution does not violate the principle of selecting the most qualified consultant for the type of professional services required;
 - (vii) Consultant's ownership status and employment practices regarding minority, women, and emerging small businesses or historically underutilized businesses;
 - (viii) Pricing policies, pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates, and overhead, if the total estimated fee does not exceed \$100,000.
- (F) A statement that proposers responding to the IRFP do so solely at its expense, and the county is not responsible for any proposer expenses associated with the IRFP; and
- (G) A statement directing proposers to the protest procedures set forth in these section 30 rules.
- (H) A sample form of the contract.
 - (b) Provide the IRFP to a minimum of three (3) prospective consultants drawn from:
 - (A) County's list of consultants that is created and maintained pursuant to OAR 137-048-0120 (List of Interested Consultants; Performance Record);
 - (B) Another contracting agency's list of consultants that is created and maintained pursuant to OAR 137-048-0120 (List of Interested Consultants; Performance Record); or
 - (C) All consultants the county reasonably can locate that offer the desired A&E services, or any combination of the foregoing.
 - (c) Review and rank all proposals received according to the criteria set forth in the RFP, and select the number of highest ranked proposers as set forth in the IRFP.
- (3) If the county does not cancel the IRFP after it reviews and ranks each proposer, the county will begin negotiating a contract with the highest ranked proposer. The county shall direct negotiations toward obtaining written agreement on:
 - (a) Consultant's performance obligations and performance schedule;
 - (b) Payment methodology, consultant's rates and number of hours, and a maximum amount payable to contractor for the A&E services required under the contract that is fair and reasonable to the county as determined solely by the county, taking into account the value, scope, complexity and nature of the A&E services; and

(c) Any other provisions the county believes to be in the county's best interest to negotiate.

(4) The county shall, either orally or in writing, formally terminate negotiations with the highest ranked proposer if the county and proposer are unable for any reason to reach agreement on a contract within a reasonable amount of time. The county may thereafter negotiate with the second ranked proposer, and if necessary, with the third ranked proposer, in accordance with section (3) of this rule, until negotiations result in a contract. If negotiations with any of the top three proposers do not result in a contract within a reasonable amount of time, the county may end the particular informal solicitation and thereafter may proceed with a new informal solicitation under this rule or proceed with a formal solicitation under section 30-0220 (Formal Selection Procedure).

(5) The county shall terminate the informal selection procedure and proceed with the formal selection procedure under section 30-0220 if the scope of the anticipated contract is revised during negotiations so that the estimated fee will exceed \$100,000. Notwithstanding the foregoing, the county may continue contract negotiations with the proposer selected under the informal selection procedure if the county makes written determinations that contracting with that proposer will:

(a) Promote efficient use of the county's resources and result in substantial cost savings to the county; and

(b) Protect the integrity of the public contracting process and the competitive nature of the procurement by not encouraging favoritism or substantially diminishing competition in the award of the contract.

30-0220 Formal Selection Procedures

(1) Subject to section 30-0130 (Applicable Selection Procedures; Pricing Information; Disclosure of Proposals), the county shall use the formal selection procedure described in this rule to select consultants if the consultants cannot be selected under either section 30-0200 (Direct Appointment Procedure) or under section 30-0210 (Informal Selection Procedure). The formal selection procedure described in this rule may otherwise be used at the county's discretion.

(2) When using the formal selection procedure, the county shall obtain contracts through public advertisement of an RFP, or an RFQ followed by an RFP.

(a) Except as provided in subsection (b) of this section, the county shall advertise each RFP and RFQ at least once in at least one newspaper of general circulation in the area where the project is located and in as many other issues and publications as may be necessary or desirable to achieve adequate competition. Other issues and publications may include, but are not limited to, local newspapers, trade journals, and publications targeted to reach the disadvantaged business enterprise, minority, women, service disabled veterans, and emerging small business enterprise audiences.

(A) The county shall publish the advertisement within a reasonable time before the deadline for the proposal submission or response to the RFP or RFQ but in any event no fewer than seven (7) days before the closing date set forth in the RFP or RFQ.

(B) The county shall include a brief description of the following items in the advertisement:

(i) The project;

(ii) A description of the A&E services the county seeks;

(iii) How and where consultants may obtain a copy of the RFP or RFQ; and

(iv) The deadline for submitting a proposal or response to the RFP or RFQ.

(b) In the alternative to advertising in a newspaper as described in Subsection 2(a) of this rule, the county may publish each RFP and RFQ by one or more of the electronic

methods identified in section 20-0330. The county shall comply with these rules when publishing advertisements by electronic methods.

(c) The county may send notice of the RFP or RFQ directly to all consultants on the county's list of consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record).

(3) **Request for qualifications procedure.** The county may use the RFQ procedure to evaluate potential consultants and establish a short list of qualified consultants to whom the county may issue an RFP for some or all of the A&E services described in the RFQ.

(a) The county shall include the following, at a minimum, in each RFQ:

(A) A brief description of the project for which the county is seeking consultants;

(B) A description of the A&E services sought for the project;

(C) Conditions or limitations, if any, that may constrain or prohibit the selected consultant's ability to provide additional services related to the project, including, but not limited to construction services;

(D) The deadline for submitting a response to the RFQ;

(E) A description of required consultant qualifications for the A&E services sought;

(F) The RFQ evaluation criteria, including weights or points applicable to each criterion);

(G) A statement whether or not the county will hold a pre-qualification meeting for all interested consultants to discuss the project and the A&E services described in the RFQ and if a pre-qualification meeting will be held, the location of the meeting and whether or not attendance is mandatory; and

(H) A statement that consultants responding to the RFQ do so solely at its expense, and that the county is not responsible for any consultant expenses associated with the RFQ.

(b) The county may include a request for any or all of the following in each RFQ:

(A) A statement describing consultant's general qualifications and related performance information;

(B) A description of consultant's specific qualifications to perform the A&E services described in the RFQ including consultant's available resources and recent, current and projected workloads;

(C) A list of similar A&E services and references concerning past performance, including but not limited to price and cost data from previous projects, quality of work, ability to meet schedules, cost control and contract administration;

(D) A copy of all records, if any, of consultant's performance under contracts with any other public agency;

(E) The number of consultant's experienced staff available to perform the A&E services described in the RFQ, including such personnel's specific qualifications and experience and an estimate of the proportion of time that such personnel would spend on those services;

(F) Consultant's approach to A&E services described in the RFQ and design philosophy, if applicable;

(G) Consultant's geographic proximity to and familiarity with the physical location of the project;

(H) Consultant's ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;

(I) Consultant's pricing policies, pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead, if the RFQ is for Services subject to section 30-0130(2) of these rules;

(J) Consultants' ability to assist the county in complying with the energy technology requirements of ORS 279C.527 and 279C.528; and

(K) Any other information the county deems reasonable and necessary to evaluate consultants' qualifications.

(c) RFQ evaluation committee. The county shall establish an RFQ evaluation committee of at least two individuals to review, score, and rank the responding consultants according to the evaluation criteria. The county may appoint to the evaluation committee county employees or employees of other public agencies with experience in the A&E services, construction or public contracting. The county may include on the evaluation committee private practitioners of the A&E services or related professions. The county shall designate one member of the evaluation committee as the evaluation committee chairperson.

(d) The county may use any reasonable screening or evaluation method to establish a short list of qualified consultants, including but not limited to:

(A) Requiring consultants responding to an RFQ to achieve a threshold score before qualifying for placement on the short list;

(B) Placing a pre-determined number of the highest scoring consultants on a short list;

(C) Placing on a short list only those consultants with certain essential qualifications or experience, whose practice is limited to a particular subject area, or who practice in a particular geographic locale or region, provided that these factors are material, would not unduly restrict competition, and were announced as dispositive in the RFP.

(e) After the evaluation committee reviews, scores and ranks the responding consultants, the county shall establish a short list of at least three qualified consultants, provided however, that if four or fewer consultants responded to the RFQ, then:

(A) County may establish a short list of fewer than three qualified consultants; or

(B) County may cancel the RFQ and issue an RFP.

(f) No consultant will be eligible for placement on the county's short list established under subsection (3)(d) of this rule if consultant or any of consultant's principals, partners or associates are members of the county's RFQ evaluation committee.

(g) Except when the RFQ is cancelled, the county shall provide a copy of the subsequent RFP to each consultant on the short list.

(4) **Formal selection of consultants through request for proposals.** The county shall use the procedure described in subsection (4) of this rule when issuing an RFP for a contract described in subsections (1) and (2) of this rule.

(a) **RFP required contents.** The county using the formal selection procedures shall include at least the following in each RFP, whether or not the RFP is preceded by an RFQ:

(A) General background information, including a description of the project and the specific A&E services sought for the project, the estimated project cost, the estimated time period during which the project is to be completed, and the estimated time period in which the specific A&E services sought will be performed.

(B) The RFP evaluation process and criteria which will be used to select the most qualified proposer, including the number of points applicable to each criterion. If the county does not indicate the applicable number of points, then each criterion is worth the same number of points. Evaluation criteria may include, but are not limited to, the following:

(i) Proposer's availability and capability to perform the A&E services described in the RFP;

(ii) Experience of proposer's key staff persons in providing similar A&E services on comparable projects;

(iii) The amount and type of resources, and number of experienced staff persons proposer has committed to perform the A&E services described in the RFP;

(iv) The recent, current and projected workloads of the staff and resources referenced in section (4)(a)(B)(iii), above;

(v) The proportion of time proposer estimates that the staff referenced in section (4)(a)(B)(iii), above, would spend on the A&E services described in the RFP;

- (vi) Proposer's demonstrated ability to complete successfully similar A&E services on time and within budget, including whether or not there is a record of satisfactory performance under OAR 125-248-0120 (List of Interested Consultants; Performance Record);
- (vii) References and recommendations from past clients;
- (viii) Proposer's performance history in meeting deadlines, submitting accurate estimates, producing high quality work, and meeting financial obligations;
- (ix) Status and quality of any required license or certification;
- (x) Proposer's knowledge and understanding of the project and A&E services described in the RFP as shown in proposer's approach to staffing and scheduling needs for the A&E services and proposed solutions to any perceived design and constructability issues;
- (xi) Results from interviews, if conducted;
- (xii) Design philosophy, if applicable, and approach to the A&E services described in the RFP;
- (xiii) If the county is selecting a consultant to provide related services, pricing policies, pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead; and
- (xiv) Any other criteria that the county seems relevant to the project and A&E services described in the RFP, including, where the nature and budget of the project so warrant, a design competition between competing proposers. Provided, however, that these additional criteria cannot include pricing policies, pricing proposals, or other pricing information, including number of hours proposed for the services required, expenses, hourly rates, and overhead, when the sole purpose or predominate purpose of the RFP is to obtain A&E services.
- (C) Conditions or limitations, if any, that may constrain or prohibit the selected consultant's ability to provide additional services related to the project, including, but not limited to, construction services;
- (D) Whether interviews are possible and if so, the weight or points applicable to the potential interview;
- (E) The date and time proposals are due, and the delivery location for proposals;
- (F) Reservation of the right to seek clarifications of each proposal;
- (G) Reservation of the right to negotiate a final contract that is in the best interest of the county;
- (H) Reservation of the right to reject any or all proposals and reservation of the right to cancel the RFP at any time if doing either would be in the public interest as determined by the county;
- (I) A statement that proposers responding to the RFP do so solely at its expense, and the county is not responsible for any proposer expenses associated with the RFP;
- (J) A statement directing proposers to the protest procedures set forth in these rules;
- (K) Special contract requirements, including but not limited to disadvantaged business enterprise ("DBE"), minority business enterprise ("MBE"), women business enterprise ("WBE"), businesses that service-disabled veterans own ("VE"), and emerging small business enterprise ("ESB") participation goals or good faith efforts with respect to DBE, MBE, WBE, VE and ESB participation, and federal requirements when federal funds are involved;
- (L) A statement whether or not the county will hold a pre-proposal meeting for all interested consultants to discuss the project and the A&E services described in the RFP and if a pre-proposal meeting will be held, the location of the meeting and whether or not attendance is mandatory;

(M) A request for any information the county deems reasonably necessary to permit the county to evaluate, rank and select the most qualified proposer to perform the A&E services described in the RFP; and

(N) A sample form of the contract.

(b) **RFP Contents for Related Services Selections Based on Price Only.** The county using the formal selection procedure shall include at least the following in each RFP, whether or not the RFP is preceded by an RFQ, when the formal selection procedure is for related services selected on the basis of price proposals and other pricing information only:

(A) General background information, including a description of the project and the specific related services sought for the project, the estimated project cost, the estimated time period during which the project is to be completed, and the estimated time period in which the specific related services sought will be performed;

(B) The RFP evaluation process and the price criteria which will be used to select the highest ranked proposer, including the weights, points or other classifications applicable to each criterion. If the county does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value. Evaluation price criteria may include, but are not limited to, the total price for the related services described in the RFP, consultant pricing policies, and other pricing information such as the consultant's estimated number of staff hours needed to perform the related services described in the RFP, expenses, hourly rates and overhead;

(C) Any minimum or pass-fail qualifications that the proposers must meet, including but not limited to any such qualifications in the subject matter areas described in section (4)(a)(B)(i) through section (4)(a)(B)(xii) of this rule; and

(D) The information listed in section (4)(a)(C) through section (4)(a)(N) of this rule pertaining to the related services described in the RFP.

(c) RFP evaluation committee. The county shall establish a committee of at least three (3) individuals to review, score and rank proposals according to the evaluation criteria set forth in the RFP. If the RFP has followed an RFQ, the county may include the same members who served on the RFQ evaluation committee. The county may appoint to the evaluation committee county employees or employees of other public agencies with experience in A&E services, construction services or public contracting. At least one member of the evaluation committee must be a county employee. The county may include on the evaluation committee private practitioners of the A&E services or related professions. The county shall designate one of its employees who also is a member of the evaluation committee as the evaluation committee chairperson.

(A) No proposer will be eligible for award of the contract under the RFP if proposer or any of proposer's principals, partners or associates is a member of the county's RFP evaluation committee for the contract;

(B) If the RFP provides for the possibility of proposer interviews, the evaluation committee may elect to interview proposers if the evaluation committee considers it necessary or desirable. If the evaluation committee conducts interviews, it shall award weights, points, or other classifications indicated in the RFP for the anticipated interview; and

(C) The evaluation committee shall provide to the county the results of the scoring and ranking for each proposer.

(d) If the county does not cancel the RFP after it receives the results of the scoring and ranking for each proposer, the county will begin negotiating a contract with the highest ranked proposer. The county shall direct negotiations toward obtaining written agreement on:

- (A) Consultant's performance obligations and performance schedule;
 - (B) Payment methodology, consultant's rates and number of hours, and a maximum amount payable to the consultant for the A&E services required under the contract that is fair and reasonable to the county as determined solely by the county, taking into account the value, scope, complexity and nature of the A&E services; and
 - (C) Any other provisions the county believes to be in the county's best interest to negotiate.
- (e) The county shall, either orally or in writing, formally terminate negotiations with the highest ranked proposer if the county and proposer are unable for any reason to reach agreement on a contract within a reasonable amount of time. The county may thereafter negotiate with the second ranked proposer, and if necessary, with the third ranked proposer, and so on, in accordance with section (4)(c) of this rule, until negotiations result in a contract. If negotiations with any proposer do not result in a contract within a reasonable amount of time, the county may end the particular formal solicitation. Nothing in this rule precludes the county from proceeding with a new formal solicitation for the same A&E services described in the RFP that failed to result in a contract.

30-0230 Ties Among Proposers

- (1) If the county is selecting a consultant on the basis of qualifications alone and determines after the ranking of proposers that two or more proposers are equally qualified, the county may select a candidate through any process that the county believes will result in the best value for the county taking into account the scope, complexity and nature of the A&E services. Once a tie is broken, the county and the selected proposer shall proceed with negotiations under section 30-0210(3) or section 30-0220(4)(c), as applicable.
- (2) If the county is selecting a consultant on the basis of price alone, or on the basis of price and qualifications, and determines after the ranking of proposers that two or more proposers are identical in terms of price or are identical in terms of price and qualifications, then the county shall follow the procedure set forth in section 10-0300, (Preferences for Oregon Goods and Services; Nonresident Bidders) to select the consultant.

30-0240 Protest Procedures

- (1) **RFP Protest and Request for Change.** Pursuant to ORS 279C.110(8), Consultants may submit a written protest of anything contained in an RFP and may request a change to any provision, specification or contract term contained in an RFP, no later than seven (7) days prior to the date proposals are due unless a different deadline is indicated in the RFP. Each protest and request for change must include the reasons for the protest or request, and any proposed changes to the RFP provisions, specifications or contract terms. The county will not consider any protest or request for change that is submitted after the submission deadline.
- (2) **Protest of Consultant Selection.** Pursuant to ORS 279C.110(8), consultant's may submit a written protest of the county's selection of consultant for award of a contract as follows:
- (a) **Single Award.** In the event of an award to a single proposer, the county shall provide to all proposers a copy of the selection notice that the county sent to the highest ranked proposer. A proposer who claims to have been adversely affected or aggrieved by the selection of the highest ranked proposer may submit a written protest of the selection to the county no later than seven (7) calendar days after the date of the selection notice unless a different deadline is indicated in the RFP. A proposer submitting a protest must

claim that the protesting proposer is the highest ranked proposer because the proposals of all higher ranked proposers failed to meet the requirements of the RFP or because the higher ranked proposers otherwise are not qualified to perform the A&E services described in the RFP. The county will not consider any protest that is submitted after the submission deadline.

(b) **Multiple Award.** In the event of an award to more than one proposer, the county shall provide to all proposers copies of the selection notices that the county sent to the highest ranked proposers. A proposer who claims to have been adversely affected or aggrieved by the selection of the highest ranked proposers may submit a written protest of the selection to the county no later than seven (7) calendar days after the date of the selection notices, unless a different deadline is indicated in the RFP. A proposer submitting a protest must claim that the protesting proposer is one of the highest ranked proposers because the proposals of all higher ranked proposers failed to meet the requirements of the RFP. In the alternative, a proposer submitting a protest must claim that the proposals of all higher ranked proposers, or a sufficient number of higher ranked proposers to include the protesting proposer in the group of highest ranked proposers, otherwise are not qualified to perform the A&E services described in the RFP.

(c) **Effect of Protest Submission Deadline.** The county will not consider any protest that is submitted after the submission deadline.

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

30-0250 Solicitation Cancellation, Delay or Suspension; Rejection of All Proposals or Responses; Consultant Responsibility for Costs

The county may cancel, delay or suspend a solicitation, RFQ or other preliminary procurement document, whether related to a Direct Appointment Procedure (section 30-0200), Informal Selection Procedure (section 30-0210), or Formal Selection Procedure (section 30-0220), or reject all proposals, responses to RFQs, responses to other preliminary procurement documents or any combination of the foregoing, if the county believes it is in the public interest to do so. In the event of such cancellation, delay, suspension or rejection, the county is not liable to any proposer for any loss or expense caused by or resulting from any such cancellation, delay, suspension or rejection. Consultants responding to either solicitations, RFQs, or other preliminary procurement documents are responsible for all costs they may incur in connection with submitting proposals, responses to RFQs or responses to other preliminary procurement documents.

30-0260 Two-Tiered Selection Procedures for the County Public Improvement Projects

(1) **Generally.** If the county requires a consultant to perform A&E services for a public improvement owned and maintained by the county, and a state agency will serve as the lead contracting agency and will enter into contracts with consultants for A&E services, for that public improvement, the state contracting agency shall utilize the two-tiered selection process described below to obtain these contracts with consultants.

(2) **Tier One.** The state contracting agency shall, when feasible, identify no fewer than the three (3) most qualified proposers responding to an RFP that was issued under the applicable selection procedures described in OAR 137-048-0210 (Informal Selection Procedure) and OAR 137-048-0220 (Formal Selection Procedure), or from among

consultants identified under OAR 137-048-0200(Direct Appointment Procedure), and shall notify the county of the consultants selected.

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

(a) Select an architect, engineer, photogrammetrist, transportation planner, or land surveyor to perform the A&E services for the county's public improvement through an alternative process adopted by the county, consistent with the provisions of the applicable RFP, if any, and these section 30 rules. The county's alternative process must be described in the applicable RFP, may be structured to take into account the unique circumstances of the county and may include provisions to allow the county to perform its tier two responsibilities efficiently and economically, alone or in cooperation with other local contracting agencies. The county's alternative process may include, but is not limited to one or more of the following methods:

(A) A general written direction from the county to the state contracting agency, prior to the advertisement of a procurement or series of procurements or during the course of the procurement or series of procurements, that the county's two tier selection shall be the highest-ranked firm identified by the state contracting agency during the tier one process and that no further coordination or consultation with the county is required. However, the county may provide written notice to the state contracting agency that the county's general written direction is not to be applied for a particular procurement and describe the process that the county will utilize for the particular procurement. In order for a written direction from the county consistent with this subsection to be effective for a particular procurement, it must be received by the state contracting agency with adequate time for the state contracting agency to revise the RFP in order for proposers to be notified of the tier two process to be utilized in the procurement. In the event of a multiple award under the terms of the applicable procurement, the written direction from the county may apply to the highest ranked firms that are selected under the terms of the procurement document.

(B) An intergovernmental agreement between the county and the state contracting agency outlining the alternative process that the county has adopted for procurement or series of procurements.

(C) Where multiple local government agencies are involved in a two tier selection procedure, the local government agencies may name one or more authorized representative(s) to act on behalf of all the local government agencies, whether the local government agencies are acting collectively or individually, to select the architect, engineer, photogrammetrist, transportation planner, or land surveyor to perform the A&E services under the tier two selection process. In the event of a multiple award under the terms of the applicable procurement, the authorized representative(s) of the local contracting agencies may act on behalf of the local contracting agencies to select the highest ranked firms that are required under the terms of the procurement document, as part of the tier two selection process.

(4) The state contracting agency shall thereafter begin contract negotiations with the selected consultant in accordance with the negotiation provisions in OAR 137-048-0220(4)(c).

(5) Nothing in these section 30 rules should be construed to deny or limit the county's ability to contract directly with architects, engineers, photogrammetrists, transportation planners, or land surveyors pursuant to ORS 279C.125(4), through a selection process established by the county.

30-0270 Price Agreements

(1) The county may establish price agreements for A&E services, when the county cannot determine the precise quantities of those services which the county will require over a specified time period.

(2) When establishing price agreements under this rule, the county shall select no fewer than three consultants, when feasible. The selection procedures for establishing price agreements shall be in accordance with section 20-0130(1) or section 20-0130(2), as applicable. The county may select a single consultant, when a price agreement is awarded to obtain services for a specific project or a closely-related group of projects.

(3) In addition to any other applicable solicitation requirements set forth in these section 30 rules, solicitation materials and the terms and conditions for a price agreement for the A&E services must:

(a) Include a scope of services, menu of services, a specification for services, or a similar description of the nature, general scope, complexity, and purpose of the procurement that will reasonably enable a prospective bidder or proposer to decide whether to submit a bid or a proposal;

(b) Specify whether the county intends to award a price agreement to one consultant or multiple consultants. If the county will award a price agreement to more than one consultant, the solicitation document and price agreement shall describe the criteria and procedures the county will use to select a consultant for each individual work order or task order. Subject to the requirements of ORS 279C.110, the criteria and procedures to assign work orders or task orders that only involve or predominantly involve A&E are at the county's sole discretion; provided, however, in circumstances where a direct contract is not permitted under section 30-0200 (Direct Appointment Procedure) or section 30-0210 (Informal Selection Procedure), the selection criteria cannot be based on pricing policies, pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates and overhead. In accordance with section 30-0130(2) applicable to related services procurements, the selection criteria and procedures may be based solely on the qualifications of the consultants, solely on pricing information, or a combination of both qualifications and pricing information. Pricing information for the county's solicitation of A&E services, may include the number of hours proposed for the services required, expenses, hourly rates, the number of hours, overhead, and other price factors. Work order or task order assignment procedures under price agreements may include direct appointments, subject to the requirements of section 30-0200; and

(c) Specify the maximum term for assigning A&E services under the price agreement.

(4) All A&E services assigned under a price agreement require a written work order or task order issued by the county. Any work order or task order assigned under a price agreement must include, at a minimum, the following:

(a) The consultant's performance obligations and performance schedule;

(b) The payment methodology, consultant's rates and number of hours, and a maximum amount payable to the consultant for the A&E services required under the work order or task order that is fair and reasonable to the county, as determined solely by the county, taking into account the value, scope, complexity, and nature of the A&E services;

(c) Language that incorporates all applicable terms and conditions of the price agreement into the work order or task order; and

(d) Any other provisions the county believes to be in the county's best interest.

30-0275 Mistakes

(1) **General.** To protect the integrity of the competitive procurement process and to assure fair treatment of offerors, the county will carefully consider whether to permit waiver, correction or withdrawal of offers for certain mistakes.

(2) **County Treatment of Mistakes.** The county shall not allow an offeror to correct or withdraw an offer for an error in judgment. If the county discovers certain mistakes in an offer after opening, but before award of the contract, the county may take the following action:

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

(A) Return the correct number of signed offers or the correct number of other documents required by the solicitation document;

(B) Sign the offer in the designated block, provided a signature appears 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 county may, but is not required to correct a clerical error if the intended offer and the error are evident on the face of the offer, or other documents submitted with the offer, and the offeror verifies the county's correction in writing. A clerical error is an offeror's error in drafting its offer. In the event of a discrepancy between the extended prices and unit prices, unit prices shall prevail over extended prices, unless the correct amount is evident.

(c) The county may permit an offeror to withdraw an offer based on other errors only if the offeror shows by clear and convincing evidence:

(A) The nature of the error;

(B) That the error is not a judgment error, minor informality or clerical error.

(C) The error cannot be waived or corrected pursuant to Subsections (a) and (b) of this section;

(D) The offeror acted in good faith in submitting an offer that contained a claimed error and in claiming the alleged error in the offer exists;

(E) The offeror acted without gross negligence in submitting an offer that contained a claimed error;

(F) The offeror will suffer substantial detriment if the county does not grant the offeror permission to withdraw the offer;

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

(H) The offeror promptly gave notice of the claimed error to the county.

(d) The criteria in Subsection (2)(c) of this rule shall determine whether the county will permit an offeror to withdraw its offer after closing. These criteria also shall apply to the question of whether the county 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 county based on the difference between the amount of the offeror's offer and the amount of the contract actually awarded by the county, whether by award to the next lowest responsive and responsible bidder or the most advantageous responsive and responsible proposer or by resort to a new solicitation.

(5) **Rejection for mistakes.** The county shall reject any offer in which a mistake is evident on the face of the offer and the intended correct offer is not evident or cannot be substantiated from documents accompanying the offer, *i.e.*, documents submitted with the offer, pursuant to solicitation requirements.

(6) **Identification of Mistakes After Award.** The procedures and criteria set forth above are offeror's only opportunity to correct mistakes or withdraw offers because of a mistake. Following award, an offeror is bound by its offer, and may withdraw its offer or rescind a contract entered into pursuant to section 20 rules only to the extent permitted by applicable law.

POST-SELECTION CONSIDERATIONS

30-0300 Prohibited Payment Methodology; Purchase Restrictions

(1) Except as otherwise allowed by law, the county shall not enter into any contract that includes compensation provisions that expressly provide for payment of:

(a) Consultant's costs under the contract plus a percentage of those costs; or (b) A percentage of the project construction costs or total project costs.

(2) Except as otherwise allowed by law, the county shall not enter into any contract in which:

(a) The compensation paid under the contract is solely based on or limited to the consultant's hourly rates for the consultant's personnel working on the project and reimbursable expenses incurred during the performance of work on the project (sometimes referred to as a "time and materials" contract); and

(b) The contract does not include a maximum amount payable to the consultant for the A&E services required under the contract.

(3) Except in cases of emergency or in the particular instances noted in the subsections below, the county shall not purchase any building materials, supplies or equipment for any building, structure or facility constructed by or for the county from any consultant under a contract with the county to perform A&E services, for the building, structure or facility. This prohibition does not apply if either of the following circumstances exists:

(a) Consultant is providing A&E services under a contract with the county to perform design-build services or energy savings contract services (see section 40-0670 and section 40-0680).

(b) That portion of the contract relating to the acquisition of building materials, supplies or equipment was awarded to consultant pursuant to applicable law governing the award of such a contract.

30-0310 Expired or Terminated Contracts; Reinstatement

(1) If the county enters into a contract for A&E services and that contract subsequently expires or is terminated the county may proceed as follows, subject to the requirements of subsection (2) of this rule:

(a) **Expired Contracts.** If the contract has expired as a result of project delay caused by the county or caused by any other occurrence outside the reasonable control of the county or the consultant, if no more than one year has passed since the contract expiration date, the county may amend the contract to extend the contract expiration date, revise the description of the A&E services required under the contract to reflect any material alteration of the project made as a result of the delay, and revise the applicable performance schedule. Beginning on the effective date of the amendment, the county and the consultant shall continue performance under the contract as amended; or

(b) **Terminated Contracts.** If the county or both parties to the contract have terminated the contract for any reason and if no more than one year has passed since the contract termination date, the county may enter into a new contract with the same consultant to perform the remaining A&E services not completed under the original contract or to perform any remaining A&E services not completed under the contract as adjusted to reflect a material alteration of the project.

(2) The county may proceed under subsection (1)(a) or subsection (1)(b) of this rule only after making written findings that amending the existing contract or entering into a new contract with consultant will:

(a) Promote efficient use of public funds and resources and result in substantial cost savings to county;

(b) Protect the integrity of the public contracting process and the competitive nature of the procurement process by not encouraging favoritism or substantially diminishing competition in the award of contracts; and

(c) Result in a contract that is still within the scope of the final form of the original procurement document.

30-0320 Contract Amendments

(1) The county may amend any contract if the county, in its sole discretion, determines that the amendment is within the scope of services of the solicitation document and that the amendment would not materially impact the field of competition for the services described in the original solicitation document. In making this determination, the county shall consider potential alternative methods of procuring the services contemplated under the proposed amendment. An amendment would not materially impact the field of competition for the services described in the RFP if the county reasonably believes that the number of proposers would not significantly increase if the solicitation document were re-issued to include the additional services.

(2) The county may amend any contract if the additional services are required by reason of existing or new laws, rules, regulations or ordinances of federal, state or local agencies, that affect performance of the original contract.

(3) All amendments to contracts must be in writing, must be signed by an authorized representative of the consultant and the county and must receive all required approvals before the amendments will be binding on the county.

Section 40 General Provisions Related to Public Contracts for Construction Services

40-0100 Application

(1) These section 40 rules apply to public improvement contracts as well as public contracts for ordinary construction services that are not public improvements.

(a) These section 40 rules apply to contracts for construction manager/general contractor services, whether the initial contract between the parties includes both pre-construction services and construction services, or only contains pre-construction services, since the underlying procurement for construction manager/general contractor services authorizes the county to enter into contracts for both pre-construction and construction services.

(2) These section 40 rules address matters covered in ORS Chapter 279C (with the exception of architectural, engineering, photogrammetric mapping, transportation planning, land surveying and related services, all of which are addressed in section 30 of these rules.)

40-0110 Policies

In addition to the general code policies set forth in ORS 279A.015, the ORS 279C.300 policy on competition and the ORS 279C.305 policy on least-cost for public improvements apply to these section 40 rules.

40-0120 Definitions

(1) **Conduct Disqualification:** A disqualification pursuant to ORS 279C.440.

(2) **Disqualification:** The preclusion of an offeror from contracting with the county for a period of time in accordance with section 40-0370. Disqualification may be a conduct disqualification or DBE disqualification.

(3) **Foreign Contractor:** A contractor that is not domiciled in or registered to do business in the State of Oregon. See section 40-0480.

(4) **Notice:** Any of the alternative forms of public announcement of procurements, as described in section 40-0210.

(5) **Work.** The furnishing of all services, materials, equipment, labor, and incidentals necessary to successfully complete any individual item or the entire contract and the carrying out and completion of all duties and obligations imposed by the contract.

40-0130 Competitive Bidding Requirements

The county shall solicit bids for public improvement contracts by 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 section 40-0600 to 40-0690 regarding the use of alternative contracting methods, use of alternative contracting methods for projects which are exempt from the competitive bidding process, use of alternative contracting methods within the competitive bidding process and the process for obtaining an exemption from competitive bidding requirements.

40-0140 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 may be procured and amended as general trade services under the provisions of ORS Chapter 279B and section 20 rules, rather than under the provisions of ORS Chapter 279C and these section 40

rules. Emergency contracts for construction services are not public improvement contracts and are regulated under ORS 279B.080.

(2) Application of ORS Chapter 279C. Non-procurement provisions of ORS Chapter 279C and these section 40 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, 510, 515, 520, 525, 530, and 535); Hours of Labor (ORS 279C.540 and 545); Retainage (ORS 279C.550, 560 , 565, and 570); Subcontracts (ORS 279C.580 and 590); Action on Payment Bonds (ORS 279C.600, 605, 610, 615, 620 and 625); Termination (ORS 279C.650, 655, 660, 665, and 670); and all of the Prevailing Wage Rates requirements (ORS 279C.800 through 870) for Public Works contracts.

40-0150 Emergency Contracts; Bidding and Bonding Exemptions

(1) **Emergency Declaration.** Pursuant to ORS 279C.335(6) and this rule, the county may declare that emergency circumstances exist that require prompt execution of a public contract for emergency construction or repair work. The declaration shall be made at an administrative level consistent with the county's emergency operations plan, by a written declaration that describes the circumstances creating the emergency and the anticipated harm from failure to enter into an emergency contract. The emergency declaration shall be kept on file as a public record.

(2) **Competition for Emergency Contracts.** Pursuant to ORS 279C.320(1), emergency contracts are regulated under ORS 279B.080, which provides that, for an emergency procurement of construction services, the county shall ensure competition that is reasonable and appropriate under the emergency circumstances, and may include written requests for offers, oral requests for offers or direct appointments without competition in cases of extreme necessity, in whatever solicitation time periods the county considers reasonable in responding to the emergency.

(3) **Contract Award.** Any contract award under this rule must be awarded within 60 days after declaration of the emergency, unless an extension is granted under ORS 279C.335(6).

(4) **Emergency Contract Scope.** Although no dollar limitation applies to emergency contracts, the scope of the contract must be limited to work that is necessary and appropriate to remedy the conditions creating the emergency as described in the declaration.

(5) **Emergency Contract Modification.** Emergency contracts may be modified by change order or amendment to address the conditions described in the original declaration or an amended declaration that further describes additional work necessary and appropriate for related emergency circumstances.

(6) **Excusing Bonds.** Pursuant to ORS 279C.380(4) and this rule, the emergency declaration may also state that the County waives the requirement of furnishing a performance bond and payment bond for the emergency contract. After the county makes such an emergency declaration, the bonding requirements are excused for the procurement, but this emergency declaration does not affect the separate public works bond requirement for the benefit of the Bureau of Labor and Industries (BOLI) in enforcing prevailing wage rate and overtime payment requirements (OAR 137-049-0815 and BOLI Rules at 839-025-0015).

40-0160 Intermediate Procurements; Competitive Quotes and Amendments

(1) **General.** Public improvement contracts estimated by the county not to exceed \$100,000, may be awarded in accordance with intermediate level procurement procedures for competitive quotes established by this rule.

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

(3) **Request for Quotes/Proposals.** The county shall utilize written requests for quotes or proposals whenever reasonably practicable. Written request for quotes or proposals shall include the following:

(a) Identification of the public improvement project, including the character of the work, and applicable plans, specifications and other contract documents;

(b) Notice of any pre-conference meeting, including date, time, location and whether attendance is voluntary or mandatory and that statements made by the county's representatives at the conference are not binding upon the county unless confirmed by written addendum;

(c) The name and title of the authorized county representative designated for receipt of offers and contact person for inquiries and questions if different;

(d) Instructions and information concerning the form and submission of offers, including the address of the office to which offers must be delivered, any bid/quote/proposal security requirements and other required information or special information, e.g., whether offers may be submitted by facsimile or electronic means;

(e) The time and date of closing after which the county will not accept offers, which shall not be less than five (5 days) after the date of the last publication of the release of the solicitation;

(f) The office where the specifications for the work may be reviewed if not included in the solicitation;

(g) A statement that each offeror must identify whether the offeror is a "resident bidder" as defined in ORS 279A.120;

(h) If the project will be for a public work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 USC 3141 to 3148), a statement that no offer will be received or considered by the county unless the offer contains a statement by the offeror as a part of its offer that "contractor agrees to be bound by and will comply with the provisions of ORS 279C.838, ORS 279C.840 or 40 USC 3141 to 3148;

(i) A statement that the county 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;

(j) Whether a contractor or a subcontractor under the contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;

(k) Contractor's certification of non-discrimination in obtaining required subcontractors in accordance with ORS 279A.110(4);

(l) The method the county will notify offerors of addenda and how the county will make addenda available; and

(m) The selection criteria to be utilized in selecting a contractor and, if the criteria are not of equal value, its relative value or ranking. When requesting quotations orally, prior to requesting the price quote, the county shall state any additional selection criteria and, if the criteria are not of equal value, its 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 (BOLI). BOLI prevailing wage rates must be applied to any public improvement project \$50,000 or greater.

(4) **Number of Quotes Required.** The county shall seek at least three competitive quotes or proposals, and keep a written record of the sources and amounts of the offers received. If three offers are not reasonably available, the county shall make a written record of the effort made to obtain those offers.

(5) **Bonding Requirements.** Any solicitation for a public works contract that exceeds \$50,000 in value and requires the inclusion of prevailing wage rates in the solicitation document, the solicitation document must also include the following:

(a) **Bid/Quote/Proposal Security.** The security shall be in the amount of 10% of the offeror's offer. The county shall not use bid/quote/proposal security requirements to discourage competition. The offeror shall forfeit bid/quote/proposal security after award, if the offeror fails to execute the contract and promptly return the contract with any required performance bond and payment bond or any combination bond.

(A) Unless the county has otherwise exempted a solicitation or class of solicitations from bid/quote/proposal security pursuant to ORS 279C.390, the county shall require bid/quote/proposal security for its solicitations of intermediate procurements for public improvements and public works contracts. The county may require bid/quote/proposal security even if it has exempted a class of solicitations from this requirement.

(B) **Form of Bid/Quote/Proposal Security.** The county may accept only the following forms of bid/quote/proposal security:

(i) A surety bond from a surety company authorized to do business in the State of Oregon. The bond must be an original document using the approved county format with appropriate certified copy of the agent's power-of-attorney attached.

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

(iii) A cashier's check or offeror's certified check.

(C) **Return of Security.** The county shall return or release the bid/quote/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 county may return the bid/quote/proposal security of unsuccessful offerors prior to the award if the return does not prejudice contract award. The security of at least the offerors with the three lowest offers or three highest scoring offers is retained pending execution of a contract.

(b) **Performance and Payment Bond.** Unless the bonding requirement is waived under ORS 279C.380(1)(a), excused in cases of emergency under ORS 279C.380(4), or unless the Board exempts a contract or classes of contracts from the established bonding requirements pursuant to ORS 279C.390, the contractor shall execute and deliver to the county an original combined performance and payment bond on a county approved form with appropriate certified copy of the agent's power-of-attorney attached. The required bonds must be delivered at the time the resulting contract is executed and must be in an amount equal to the full contract price. If the offeror fails to furnish the bond requirements as requested, the county may reject the offer and award the contract to the responsible offeror with the next lowest responsive offer and at the county's discretion, the offeror shall forfeit its bid/quote/proposal security. This requirement applies to all public works contracts other than road, highways and bridges contracts, that are more than \$50,000, but \$100,000 or less. It does not apply to public improvement projects (roads, highways and bridges) that are not more than \$50,000 in total.

(6) **Award.** If it awards a contract, the county shall award the contract to the prospective contractor whose offer will best serve the interests of the county, taking into account the announced selection criteria. If award is not made to the offeror with the lowest price, the county shall make a written record of the basis for award.

(7) **Price Increases.** Intermediate level public improvement contracts obtained by competitive offers may be increased above the original amount of award by the issuance of a change to the work (change order) or amendment, pursuant to section 40-0910, within the following limitations:

(a) Up to an aggregate contract price increase of 25% over the original contract amount when the county's contracts officer or designee determines that a price increase is warranted for additional reasonably related work, up to the threshold for an intermediate procurement.

(b) Up to an aggregate contract price increase of 25% over the original contract amount or the aggregate contract price and amendment exceeds the threshold for an intermediate procurement, when the county's contracts officer or designee determines that a price increase is warranted for additional reasonably related work and the CAO or designee approves the increase.

(c) An aggregate price increase greater than 25% over the original contract amount or the aggregate contract price and amendment exceeds the threshold for an intermediate procurement, when the CAO or designee determines that a price increase is warranted for additional reasonable related work and the Board approves the increase.

(8) **Amendments.** Amendments of intermediate level public improvement contracts that exceed the thresholds stated in subsection (1) are specifically authorized by the code, when made in accordance with this rule. Accordingly, these amendments are not considered new procurements and do not require an exemption from competitive bidding.

FORMAL PROCUREMENT RULES

40-0200 Solicitation Documents; Required Provisions; Assignment or Transfer

(1) **Solicitation Document.** Pursuant to ORS 279C.365 and this rule, the solicitation document shall include the following:

(a) **General information.**

(A) Identification of the public improvement project, including the character of the work, and applicable plans, specifications and other contract documents;

(B) Notice of any pre-offer conference as follows:

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

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

(iii) That statements made by the county's representatives at the conference are not binding upon the county unless confirmed by written addendum.

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

(D) The name and title of the authorized county person designated for receipt of offers and contact person (if different);

(E) Instructions and information concerning the form and submission of offers, including the address of the office to which offers must be delivered, any bid or proposal security requirements, and any other required information or special information, e.g., whether offers may be submitted by facsimile or electronic means (see section 40-0300 regarding facsimile bids or proposals and section 40-0310 regarding electronic procurement);

(F) The time, date and place of opening;

(G) The time and date of closing after which the county will not accept offers, which time shall be not less than five (5) days after the date of the last publication of the advertisement. If the county is issuing an ITB that may result in a public improvement contract with a value in excess of \$100,000, the county shall designate a time of closing

consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and section 40-0360. For timing issues relating to addenda, see section 40-0250;

(H) The office where the specifications for the work may be reviewed;

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

(J) If the contract resulting from a solicitation will be a contract for a public work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148), a statement that no offer will be received or considered by the county unless the offer contains a statement by the offeror as a part of its offer that "contractor agrees to be bound by and will comply with the provisions of ORS 279C.838, ORS 279C.840 or 40 U.S.C. 3141 to 3148;"

(K) A statement that the county 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 section 40-0230;

(L) Whether a contractor or a subcontractor under the contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;

(M) Contractor's certification of non-discrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (see section 40-0440(3));

(N) The method the county will notify offerors of addenda and how the county will make addenda available (see section 40-0250); and

(O) When applicable, instructions and forms regarding first-tier subcontractor disclosure requirements, as set forth in section 40-0360.

(b) **Evaluation Process.**

(A) A statement that the county may reject any offer not in compliance with all prescribed public contracting procedures and requirements, including the requirement to demonstrate the bidder's responsibility under section 40-0390, and may reject all offers for good cause after finding that doing so is in the public interest;

(B) The anticipated solicitation schedule, deadlines, protest process and evaluation process, if any;

(C) Evaluation criteria, including the relative value applicable to each criterion, that the county 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 section 40-0620), along with the process the county will use to determine acceptability of the work;

(i) If the solicitation document is an ITB, the county shall set forth any special price evaluation factors in the solicitation document. Examples of these such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors shall be objective, reasonable estimates based upon information the county has available concerning future use;

(ii) If the solicitation document is an RFP, the county shall refer to the additional requirements of section 40-0650.

(c) **Contract Provisions.** The county shall include all contract terms and conditions, including warranties, insurance and bonding requirements, that the county considers appropriate for the public improvement project. The county must also include all applicable contract provisions required by Oregon law as follows:

- (A) Prompt payment to all persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279.505(1));
 - (B) Demonstrate that an employee drug testing program is in place (ORS 279C.505(2));
 - (C) If the contract calls for demolition work described in ORS 279C.510(1), a condition requiring the contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;
 - (D) If the contract calls for lawn or landscape maintenance, a condition requiring the contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective (ORS 279C.510(2));
 - (E) Payment of claims by public officers (ORS 279C.515(1));
 - (F) Contractor and first-tier subcontractor liability for late payment on public improvement contracts pursuant to ORS 279C.515(2), including the rate of interest;
 - (G) A person's right to file a complaint with the Construction Contractors Board for all contracts related to a public improvement contract (ORS 279C.515(3));
 - (H) Hours of labor in compliance with ORS 279C.520;
 - (I) Environmental and natural resources regulations (279C.525);
 - (J) Payment for medical care and attention to employees (ORS 279C.530(1));
 - (K) A contract provision substantially as follows: "All employers, including contractor, that employ subject workers who work under this contract in the State of Oregon shall comply with ORS 656.017 and provide the required workers' compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements." (ORS 279C.530(2));
 - (L) Maximum hours, holidays and overtime (ORS 279C.540);
 - (M) Time limitation on claims for overtime (ORS 279C.545);
 - (N) Prevailing wage rates (ORS 279C.800 to 279C.870);
 - (O) BOLI Public Works bond (ORS 279C.830(3))
 - (P) Retainage (ORS 279C.550 to 279C.570);
 - (Q) Prompt payment policy, progress payments, rate of interest (ORS 279C.570);
 - (R) Contractor's relations with subcontractors (ORS 279C.580);
 - (S) Notice of claim (ORS 279C.605);
 - (T) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385; and
 - (U) Contractor's certification that all subcontractors performing work described in ORS 701.005(2) (i.e., construction work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence work under the contract.
 - (V) 1.5% requirement for incorporating green technology (ORS 279C.527.)
- (2) **Assignment or Transfer Restricted.** Unless otherwise provided in the contract, the contractor shall not assign, sell, dispose of, or transfer rights, nor delegate duties under the contract, either in whole or in part, without the county 's prior written consent. Unless otherwise agreed by the county in writing, consent shall not relieve the contractor of any obligations under the contract. Any assignee or transferee shall be considered the agent of the contractor and be bound to abide by all provisions of the contract. If the county consents in writing to an assignment, sale, disposal or transfer of the contractor's rights or delegation of contractor's duties, the contractor and its surety, if any, shall remain liable to the county for complete performance of the contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the county otherwise agrees in writing.

40-0210 Notice and Advertising Requirements; Posting

- (1) **Notice and Distribution Fee.** The county 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 county may charge a fee or require a deposit for the solicitation document. The county may furnish notice using any method determined to foster and promote competition, including:
- (a) Mailing notice of the availability of solicitation documents to persons who have expressed an interest in the county 's procurements;
 - (b) Placing notice on the county's electronic procurement system; or
 - (c) Placing notice on the county's internet web site.
- (2) **Advertising.** Pursuant to ORS 279C.360 and this rule, the county 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 county publishes by electronic advertisement as permitted under subsection 2(b), the county 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 county may determine to be necessary or desirable to foster and promote competition.
- (b) The county may publish by electronic advertisement if the county determines electronic advertisement is likely to be cost effective.
- (c) In addition to the county 's publication required under subsection 2(a) or 2(b), the county 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.430, if prequalification is a requirement, and the class or classes of work for which persons must be prequalified;
 - (D) The scheduled closing, which shall not be less than five (5) days after the date of the last publication of the advertisement;
 - (E) The name, title and address of the county 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)).

40-0220 Prequalification of Offerors

- (1) **Prequalification.** Pursuant to ORS 279C.430 and this rule, two types of prequalification are authorized:
- (a) **Mandatory Prequalification.** The county may, by rule, resolution, ordinance or other law or regulation, require mandatory prequalification of offerors on forms prescribed by the Board. The county must indicate in the solicitation document if it will require mandatory prequalification. Mandatory prequalification is when the county conditions a person's submission of an offer upon the person's prequalification. The county shall not consider an offer from a person who is not prequalified if the county required prequalification.

(b) Permissive prequalification. The county may prequalify a person for the county's solicitation list on forms prescribed by the Board, but in permissive prequalification the county shall not limit distribution of a solicitation to that list.

(2) **Prequalification Presumed.** If an offeror is currently prequalified by either the Oregon Department of Transportation or the Oregon Department of Administrative Services to perform contracts, the offeror shall be rebuttably presumed qualified to perform similar work for other the county.

(3) **Standards for Prequalification.** A person may prequalify by demonstrating to the county '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 county.

(see section 40-0390(2) regarding standards of responsibility.)

(4) **Notice of Denial.** If a person fails to prequalify for a mandatory prequalification, the county shall notify the person, 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.

40-0230 Eligibility to Bid or Propose; Registration or License

(1) **Construction Contracts.** The county shall not consider a person's offer to do work as a contractor, as defined in ORS 701.005(2), unless the person has a current, valid certificate of registration issued by the Construction Contractors Board at the time the offer is made.

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

(3) **Noncomplying Entities.** The county shall deem an offer received from a person that fails to comply with this rule nonresponsive and shall reject the offer as stated in ORS 279C.365(1)(k), unless contrary to federal law or subject to different timing requirements set by federal funding agencies.

40-0240 Pre-Offer Conferences

(1) **Purpose.** The county 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 county 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 met if, at any time during the mandatory meeting, a representative of an offering firm is present.

(3) **Scheduled Time.** If the county holds a pre-offer conference, it shall be held within a reasonable time after the solicitation document has been issued, but sufficiently before the closing to allow offerors to consider information provided at that conference.

(4) **Statements not Binding.** Statements made by the county's representative at the pre-offer conference do not change the solicitation document unless the county confirms such statements with a written addendum to the solicitation document.

(5) **Announcement.** The county must set forth notice of any pre-offer conference in the solicitation document in accordance with section 40-0200(1)(a)(B).

40-0250 Addenda to Solicitation Documents

(1) **Issuance; Receipt.** The county may change a solicitation document only by written addenda. An offeror shall provide written acknowledgement of receipt of all issued addenda with its offer, unless the county otherwise specifies in the addenda or in the solicitation document.

(2) **Notice and Distribution.** The county shall notify prospective offerors of addenda consistent with the standards of notice set forth in section 40-0210(1). The solicitation document shall specify how the county will provide notice of addenda and how the county will make the addenda available (section 40-0200(1)(a)). For example, "county will not mail notice of addenda, but will publish notice of any addenda on county's web site. Addenda may be downloaded off the county's web site. Offerors should frequently check the county'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 county shall issue addenda within a reasonable time to allow prospective offerors to consider the addenda in preparing its offers. The county may extend the closing if the county determines prospective offerors need additional time to review and respond to addenda. Except to the extent required by public interest, the county shall not issue an addendum 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 section 40-0260, by the close of the county'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 section 40-0260, whichever date is later. The county shall consider only an offeror's request for change or protest to the addendum; the county shall not consider a request for change or protest to matters not added or modified by the addendum, unless the offeror submits the request for change or protest before the deadline for the county's receipt of request for change or protests as set forth in section 40-0260(2) and (3).

40-0260 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 county clarify any provision of the solicitation document. The county's clarification to an offeror, whether orally or in writing, does not change the solicitation document and is not binding on the county unless the county 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 county not less than 10 days prior to closing;

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

(A) An offeror's written request for change shall include a statement of the requested change(s) to the contract terms and conditions, including any specifications, together with the reason for the requested change.

(B) An offeror shall mark its request for change as follows:

(i) "Contract provision request for change;" and

(ii) Solicitation document number (or other identification as specified in the solicitation document).

(3) **Protest.**

(a) **Delivery.** An offeror may protest specifications or contract terms and conditions. Unless otherwise specified in the solicitation document, an offeror must deliver a written protest on those matters to the county not less than seven (7) days prior to closing;

(b) **Content of protest.**

(A) An offeror's written protest shall include:

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

(ii) A description of the resulting prejudice to the offeror; and

(iii) A statement of the desired changes to the contract terms and conditions, including any specifications.

(B) An offeror shall mark its protest as follows:

(i) "Contract provision protest;" and

(ii) Solicitation document number (or other identification as specified in the solicitation document)

(4) **County Response.** The county is not required to consider an offeror's request for change or protest after the deadline established for submitting such request or protest. The county shall provide notice to the applicable person if it entirely rejects a protest. If the county agrees with the person's request or protest, in whole or in part, the county shall either issue an addendum reflecting its determination under section 40-0260, suspend the procurement under section 40-0265, or cancel the solicitation under section 40-0270.

(5) **Extension of Closing.** If the county receives a written request for change or protest from an offeror in accordance with this rule, the county may extend closing if the county determines an extension is necessary to consider the request or protest and issue an addendum, if any, to the solicitation document.

40-0265 Suspension of Solicitation

(1) **Suspension of Solicitation.** The county may suspend a solicitation if the county finds that it is in the public's interest to suspend the solicitation until further notice. The reasons for the suspension shall be made part of the procurement file.

(2) **Notice of Suspension.** If the county suspends the solicitation, written notice shall be provided through a written addendum and delivered pursuant to section 40-0250 of these rules. The addendum shall include the reason for suspension and anticipated length of suspension period.

40-0270 Cancellation of Solicitation Document

(1) **Cancellation in the Public Interest.** The county may cancel a solicitation if the county finds that cancellation is in the public interest. The county's reasons for cancellation shall be made part of the solicitation file.

(2) **Notice of Cancellation.** If the county cancels a solicitation prior to opening, the county shall provide notice of cancellation in accordance with section 40-0210(1). Notice of cancellation shall:

(a) Identify the solicitation;

(b) Briefly explain the reason for cancellation; and

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

(3) **Disposition of Offers.**

(a) Prior to offer opening. If the county cancels a solicitation prior to offer opening, the county shall return all offers it received to offerors unopened, provided the offeror submitted its offer in a hard copy format with a clearly visible return address. If there is

no return address on the envelope, the county shall open the offer to determine the source and then return it to the offeror.

(b) After offer opening. If the county rejects all offers, the county shall retain all offers as part of the county's solicitation file.

40-0280 Offer Submissions

(1) **Offer and Acceptance.** The bid or proposal is the bidder's or proposer's offer to enter into a contract.

(a) In competitive bidding and competitive proposals, the offer is always a "firm offer," i.e., the offer shall be held open by the offeror for the county's acceptance for the period specified in section 40-0410. The county may elect to accept the offer at any time during the specific period and the county's award of the contract to a bidder constitutes acceptance of the offer and binds the offeror to the contract.

(b) Notwithstanding the fact that a competitive proposal is a "firm offer" for the period specified in section 40-0410, the county may elect to discuss or negotiate certain contractual provisions, as identified in these rules or in the solicitation document with the proposer. See section 40-0650 on requests for proposals and section 40-0290 for bid or proposal security. Where negotiation is permitted by the rules or the solicitation document, proposers are bound to an obligation to negotiate in good faith and only on those terms that the rules or the solicitation document has reserved for negotiation.

(2) **Responsive Offer.** The county 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 section 40-0650 an offeror shall not make an offer contingent upon the county's acceptance of any terms or conditions (including specifications) other than those contained in the solicitation document.

(4) **Offeror's Acknowledgement.** By signing and returning the offer, the offeror acknowledges it has read and understands the terms and conditions contained in the solicitation document and that it accepts and agrees to be bound by the terms and conditions of the solicitation document. If the RFP permits proposal of alternative terms under section 40-0650, the offeror's offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the county in writing.

(5) **Instructions.** An offeror shall submit and sign its offer in accordance with the solicitation document. An offeror shall initial and submit any correction or erasure to its offer prior to the opening in accordance with the requirements for submitting an offer under the solicitation document.

(6) **Forms.** An offeror shall submit its offer on the form(s) provided in the solicitation document, unless the offeror is otherwise instructed in the solicitation document.

(7) **Documents.** An offeror shall provide the county with all documents and descriptive literature required under the solicitation document.

(8) **Facsimile or Electronic Submissions.** If the county permits facsimile or electronic offers in the solicitation document, the offeror may submit facsimile or electronic offers in accordance with the solicitation document. The county shall not consider facsimile or electronic offers unless authorized by the solicitation document.

(9) **Product Samples and Descriptive Literature.** The county 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 county will dispose of product samples, or return or make available for return product samples to the offeror in accordance with the solicitation document.

(10) **Identification of Offers:**

(a) To ensure proper identification and handling, offers shall be submitted in a sealed envelope appropriately marked.

(b) The county is not responsible for offers submitted in any manner, format or to any delivery point other than as required in the solicitation document.

(11) **Receipt of Offers.** The offeror is responsible for ensuring that the county receives its offer at the required delivery point prior to the closing, regardless of the method used to submit or transmit the offer.

40-0290 Bid or Proposal Security

(1) **Security Amount.** If the county requires bid or proposal security, it shall be not more than 10% or less than 5% of the offeror's bid or proposal, consisting of the base bid or proposal together with all additive alternates. The county shall not use bid or proposal security to discourage competition. The county shall clearly state any bid or proposal security requirements in its solicitation document. The offeror shall forfeit bid or proposal security after award if the offeror fails to execute the contract and promptly return it with any required performance bond and payment bond and, in the case of proposal security, with any required proof of insurance. (ORS 279C.365(4) and ORS 279C.385)

(2) **Requirement for Bid Security** (optional for proposals). Unless the county has otherwise exempted a solicitation or class of solicitations from bid security pursuant to ORS 279C.390, the county shall require bid security for its solicitation of bids for public improvements. The county may require bid security even if it has exempted a class of solicitations from bid security. The county may require proposal security in RFPs. (ORS 279C.400(5))

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

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

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

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

(4) **Return of Security.** The county shall 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 county 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.

40-0300 Facsimile Bids and Proposals

(1) **County Authorization.** The county may authorize offerors to submit facsimile offers. If the county determines that bid or proposal security is or will be required, the county shall not authorize facsimile offers unless the Finance Department has established a method for receipt of such security. Prior to authorizing the submission of facsimile offers, the county shall determine that the county's equipment and personnel are capable of receiving the size and volume of anticipated offers within a short period of time. In addition, the Finance Department shall 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 county authorizes a facsimile offer for bids or proposals, the county shall 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 county 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 its facsimile offers;

(d) A provision substantially in the form of the following: "the county reserves the right to award the contract solely on the basis of the facsimile offer. Upon the county's request the apparent successful offeror shall promptly submit its complete original signed offer."

(e) The data and compatibility characteristics of the county'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 county 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.

40-0310 Electronic Procurement

(1) **General.** The county may utilize electronic advertisement of public improvement contracts in accordance with ORS 279C.360(1), provided that advertisement of these contracts with an estimated contract price of more than \$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 county desires to allow electronic offers for a public improvement contract, supporting procedures will be established by the Finance Department that are substantially in conformance with section 20-0330 (Electronic Procurement under ORS Chapter 279B), and 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 shall be construed as prohibiting the county 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.

40-0320 Pre-Closing Modification or Withdrawal of Offers

(1) **Modifications.** An offeror may modify its offer in writing prior to the closing. An offeror shall prepare and submit any modification to its offer to the county in accordance with section 40-0280 unless otherwise specified in the solicitation document. Any

modification must include the offeror's statement that the modification amends and supersedes the prior offer. The offeror shall mark the submitted modification as follows:

- (a) Bid (or proposal) modification; and
- (b) Solicitation number (or other identification as specified in the solicitation document).

(2) **Withdrawals.**

(a) An offeror may withdraw its offer by written notice submitted on the offeror's letterhead, signed by an authorized representative of the offeror, delivered to the location specified in the solicitation document (or the place of closing if no location is specified), and received by the county 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 county may release an unopened offer withdrawn under subsection 2(a) to the offeror or its authorized representative, after voiding any date and time stamp mark.

(c) The offeror shall mark the written request to withdraw an offer as follows:

- (A) Bid (or proposal) withdrawal; and
- (B) Solicitation number (or other identification as specified in the solicitation document).

(3) **Documentation.** The county shall include all documents relating to the modification or withdrawal of offers in the appropriate solicitation file.

40-0330 Receipt, Opening and Recording of Offers; Confidentiality of Offers

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

(2) **Opening and Recording.** The county contracts officer or designee shall publicly open offers including any modifications made to the offer pursuant to section 40-0320. In the case of ITB, to the extent practicable, the county shall read aloud the name of each bidder, the bid price(s), and such other information, as the county considers appropriate. In the case of an RFP or voluminous bids, if the solicitation document so provides, the county will not read offers aloud.

(3) **Availability.** After opening, the county shall make bids available for public inspection, but pursuant to ORS 279C.410 proposals are not required to be available for public inspection until after notice of intent to award is issued. In any event the county 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. (ORS 192.501(2) and ORS 646.461 to 646.475). To the extent the county determines this designation is not in accordance with applicable law, the county shall make those portions available for public inspection. The offeror shall separate information designated as confidential from other nonconfidential information at the time of submitting its offer. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and shall be publicly available regardless of an offeror's designation to the contrary.

40-0340 Late Bids, Late Withdrawals and Late Modifications

Any offer received after closing is late. An offeror's request for withdrawal or modification of an offer received after closing is late. The county shall not consider late offers, withdrawals or modifications except as permitted in section 40-0350 or 40-390.

40-0350 Mistakes

(1) **Generally.** To protect the integrity of the competitive procurement process and to assure fair treatment of offerors, the county should carefully consider whether to permit waiver, correction or withdrawal of offers for certain mistakes.

(2) **County Treatment of Mistakes.** The county shall not allow an offeror to correct or withdraw an offer for an error in judgment. If the county discovers certain mistakes in an offer after opening, but before award of the contract, the county may take the following action:

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

(A) Return the correct number of signed offers or the correct number of other documents required by the solicitation document;

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

(C) Acknowledge receipt of an addendum to the solicitation document, provided that it is clear on the face of the offer that the offeror received the addendum and intended to be bound by its terms; or the addendum involved did not affect price, quality or delivery.

(b) The county 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 county's correction in writing. A clerical error is an offeror's error in transcribing its offer. Unit prices shall prevail over extended prices in the event of a discrepancy between extended prices and unit prices.

(c) The county 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 county does not grant the offeror permission to withdraw the offer;

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

(H) That the offeror promptly gave notice of the claimed error to the county.

(d) The criteria in subsection (2)(c) of this rule shall determine whether the county will permit an offeror to withdraw its offer after closing. These criteria also shall apply to the question of whether the county 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 county based on the difference between the amount of the offeror's offer and the amount of the contract actually awarded by the county, 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 county shall reject any offer in which a mistake is evident on the face of the offer and the intended correct offer is not evident or cannot be substantiated from documents submitted with the offer.

(4) **Identification of Mistakes After Award.** The procedures and criteria set forth above are offeror's only opportunity to correct mistakes or withdraw offers because of a mistake. Following award, an offeror is bound by its offer, and may withdraw its offer or rescind a contract entered into pursuant to this Section 40 only to the extent permitted by applicable law.

40-0360 First-Tier Subcontractors; Disclosure and Substitution

(1) **Required Disclosure.** Within two working hours after the bid closing on an ITB for a public improvement having a contract price anticipated by the county to exceed \$100,000, all bidders shall submit to the county 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 county shall:

- (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 county.

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

- (a) Prescribe the disclosure form that must be utilized, substantially in the form set forth in ORS 279C.370(2); and
- (b) Provide instructions in a notice substantially similar to the following: "Instructions for First-Tier Subcontractor Disclosure," bidders are required to disclose information about certain first-tier subcontractors (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:

- 5% of the project bid, but at least \$15,000, or
- \$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:
 - The subcontractor's name,
 - The category of work that the subcontractor would be performing, and
 - The dollar value of the subcontract.

If the bidder will not be using any subcontractors that are subject to the above disclosure requirements, the bidder is required to indicate 'NONE' on the accompanying form. The county must reject a bid if the bidder fails to submit the disclosure form with this information by the stated deadline (Section 40-0360).

(4) **Submission.** A bidder shall submit the disclosure form required by this Rule either in its bid submission, or within two working hours after bid closing in the manner specified by the ITB.

(5) **Responsiveness.** Compliance with the disclosure and submittal requirements of ORS 279C.370 and this Rule is a matter of responsiveness. Bids that are submitted by bid closing, but for which the disclosure submittal has not been made by the specified deadline, are not responsive and shall not be considered for contract award.

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

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

40-0370 Disqualification of Persons

(1) **Authority.** The county may disqualify a person from consideration of award of the County'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 county may disqualify a person for:

(A) Conviction for the commission of a criminal offence 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 offence 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 County to be so serious as to justify conduct disqualification. A violation under this subsection 1(a)(D) may include but is not limited to material failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. 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 Disqualification.** As provided in ORS 200.065, 200.075 or 279A.110, the county may disqualify a person's right to submit an offer or to participate in a contract (e.g. subcontractors) as follows:

(A) For a disqualification under ORS 200.065, the county 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, service-disabled veterans 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 public agency pursuant to ORS 200.065.

(B) For a disqualification under ORS 200.075, the county 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 disqualification under ORS 200.075, the County shall not permit that person to participate in the County's contracts.

(C) For a disqualification under ORS 279A.110, the county may disqualify a person if the county finds that the person discriminated against minority, women, service-disabled veterans or emerging small business enterprises in awarding a subcontract under a contract with the county.

(2) **Notice of Intent to Disqualify.** The county shall notify the person in writing of a proposed disqualification personally or by registered or certified mail, return receipt requested. This notice shall:

(a) State that the county 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 County does not receive the person's written request for a hearing within the time stated, the person shall have waived its right to a hearing;

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

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

(f) State the proposed disqualification period; and

(g) State that legal counsel may represent the person.

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

(4) **Notice of Disqualification.** The county will notify the person in writing of its disqualification, personally or by registered or certified mail, return receipt requested. The notice shall contain:

(a) The effective date and period of disqualification;

(b) The grounds for disqualification; and

(c) A statement of the person's appeal rights and applicable appeal deadlines. For a Conduct Disqualification or a disqualification under ORS 279A.110, the disqualified person must notify the county in writing within three business days after receipt of the county's notice of disqualification if the person intends to appeal the county's decision.

40-0380 Bid or Proposal Evaluation Criteria

(1) **General.** A public improvement contract, if awarded, shall be awarded to the responsible bidder submitting the lowest responsive bid, or to the responsible proposer submitting the best responsive proposal. See section 40-0390 and rules for Alternative Contracting Methods in section 40-0600 to 40-0690.

(2) **Bid Evaluation Criteria.** ITB 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 County elects not to award additive or deductive alternates, bids shall be compared on the basis of lump-sum prices, or lump-sum base bid prices, as applicable. If the ITB calls for a lump-sum base bid, plus additive or deductive alternates, the total bid price shall be calculated by adding to or deducting from the base bid, those alternates selected by the county, for the purpose of comparing bids.

(b) **Unit Price.** If the bid includes unit pricing for estimated quantities, the total bid price shall be calculated by multiplying the estimated quantities by the unit prices submitted by the bidder, and adjusting for any additive or deductive alternates selected by the county, for the purpose of comparing bids. The county shall specify within the solicitation document the estimated quantity of the procurement to be used for determination of the low bidder. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the bidder, the unit price shall govern. (Section 40-0350(2)).

(3) **Proposal Evaluation Criteria.** If the Board has exempted the procurement of a public improvement from the competitive bidding requirements of ORS 279C.335(1), and has directed the county to use an alternative contracting method under ORS 279C.335, the county shall set forth the evaluation criteria in the solicitation documents. (Section 40-0640, 40-0650, 40-0670, 40-0690, ORS 279C.335 and 279C.405).

40-0390 Offer Evaluation and Award; Determination of Responsibility

(1) **General.** If it awards a contract, the county shall award the contract to the responsible bidder submitting the lowest, responsive bid or the responsible proposer or proposers submitting the best responsive proposal or proposals, provided that person is not listed by the Construction Contractors Board as disqualified to hold a public improvement contract (ORS 279C.375(3)). The county may award by item, groups of items or the entire offer provided the award is consistent with the solicitation document and in the public interest. When the award is based on competitive bids, ORS 279C.375(5) permits multiple contract awards when specified in the ITB.

(2) **Determination of Responsibility.** Offerors are required to demonstrate their ability to perform satisfactorily under a contract. Before awarding a contract, the county must have information that indicates that the offeror meets the standards of responsibility set forth in ORS 279.375(3)(b). To find that an offeror is a responsible offeror, the county must determine that it:

(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 completed previous contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that to the extent the costs associated with and time available to perform a previous contract were within the offeror's control, the offeror stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. The county should carefully scrutinize an offeror's record of contract performance if the offeror is or recently has been

materially deficient in contract performance. In reviewing the offeror's performance, the county should determine whether the offeror's deficient performance was expressly excused under the terms of contract, or whether the offeror took appropriate corrective action. The county may review the offeror's performance on both private and public contracts in determining the offeror's record of contract performance. The county shall 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 be found to lack integrity if the County determines the offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to the county. The county may find an offeror not responsible based on the lack of integrity of any person having influence or control over the offeror (such as a key employee of the offeror that has the authority to significantly influence the offeror's performance of the contract or a parent company, predecessor or successor person). The standards for conduct disqualification under section 40-0370 may be used to determine an offeror's integrity. The county may find an offeror non-responsible based on previous convictions of offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the offeror's performance of a contract or subcontract. The county shall make its basis for determining that an offeror is not responsible under this paragraph part of the solicitation file;

(d) Is legally qualified to contract with the county; and

(e) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the offeror fails to promptly supply information requested by the county concerning responsibility, the county shall base the determination of responsibility upon any available information, or may find the offeror not responsible.

(3) **Documenting County Determinations.** The county shall document its compliance with ORS 279C.375(3) and the above sections of this Rule on a Responsibility Determination Form substantially as set forth in ORS 279C.375(3)(c) and file that form with the Construction Contractors Board within 30 days after contract award.

(4) **County Evaluation.** The county shall evaluate an offer only as set forth in the solicitation document and in accordance with applicable law. The county shall not evaluate an offer using any other requirement or criterion.

(5) **Offeror Submissions.**

(a) The county may require an offeror to submit product samples, descriptive literature, technical data, or other material and may also require any of the following prior to award:

(A) Demonstration, inspection or testing of a product prior to award for characteristics such as compatibility, quality or workmanship;

(B) Examination of such elements as appearance or finish; or

(C) Other examinations to determine whether the product conforms to specifications.

(b) The county shall evaluate product acceptability only in accordance with the criteria disclosed in the solicitation document to determine that a product is acceptable. The county shall reject an offer providing any product that does not meet the solicitation document requirements. The county's rejection of an offer because it offers nonconforming work or materials is not disqualification and is not appealable under ORS 279C.445.

(6) **Evaluation of Bids.** The county shall use only objective criteria to evaluate bids as set forth in the ITB. The county shall evaluate bids to determine which responsible offeror offers the lowest responsive bid.

(a) Nonresident bidders. In determining the lowest responsive bid, the county shall, in accordance with Section 40-0200, 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 county may seek information from a bidder only to clarify the bidder's bid. Clarification shall not vary, contradict or supplement the bid. A bidder must submit written and signed clarifications and these clarifications shall become part of the bidder's bid.

(c) **Negotiation prohibited.** The county shall not negotiate scope of work or other terms or conditions under an ITB process prior to award.

(7) **Evaluation of Proposals.** See Section 40-0650 regarding rules applicable to RFPs.

40-0395 Notice of Intent to Award

(1) **Notice.** At least seven (7) days before the award of a public improvement contract, the county shall issue to each bidder (pursuant to ORS 279C.375(2)) and each proposer (pursuant to ORS 279C.410(7)), or post electronically or otherwise, a notice of the county's intent to award the contract. This requirement does not apply to award of a small (under \$10,000) or intermediate (informal competitive quotes) public improvement contract awarded under ORS279C.335(1)(c) or (d).

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

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

(a) Seven (7) days after the date of the notice, unless the solicitation documented provided a different period for protest; or

(b) The county provides a written response to all timely-filed protests that denies the protest and affirms the award.

(4) **Prior notice impractical.** Posting of notice of intent to award shall not be required when the county determines that it is impractical due to unusual time constraints in making a prompt award for its immediate procurement needs, documents the contract file as to the reasons for that determination, and posts notice of that action as soon as reasonably practical.

40-0400 Documentation of Award; Availability of Award Decisions

(1) **Basis of Award.** After award, the county shall make a record showing the basis for determining the successful offeror part of the county's procurement file.

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

(a) All submitted bids;

(b) Completed bid tabulation sheet; and

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

(3) **Contents of Award Record for Proposals.** Where the use of an RFP is authorized as set forth in Section 40-0650, the county's record shall include:

(a) All submitted proposals.

(b) The completed evaluation of the proposals;

(c) Written justification for any rejection of higher scoring proposals or for failing to meet mandatory requirements of the RFP; and

(d) If the county permitted negotiations in accordance with Section 40-0650, the county's completed evaluation of the initial proposals and the county's completed evaluation of final proposals.

(4) **Contract Document.** The county shall 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 county shall provide tabulations of awarded bids or evaluation summaries of proposals for a nominal charge which may be payable in advance. Requests must contain the solicitation document number and, if requested, be accompanied by a self-addressed, stamped envelope. The county may also provide tabulations of bids and proposals awarded on designated web sites or on the county's electronic procurement system.

(6) **Availability of Procurement Files.** The county shall make completed solicitation files available for public review at the county.

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

40-0410 Time for County's Acceptance; Extension

(1) **Time for Offer Acceptance.** An offeror's bid, or proposal submitted as a firm offer (see section 40-0280), is irrevocable, valid and binding on the offeror for not less than 30 days from closing unless otherwise specified in the solicitation document.

(2) **Extension of Acceptance Time.** The county may request, orally or in writing that offerors extend, in writing, the time during which the county may consider and accept its offer. If an offeror agrees to an extension, the offer shall continue as a firm offer, irrevocable, valid and binding on the offeror for the agreed-upon extension period.

40-0420 Negotiation With Bidders Prohibited

(1) **Bids.** The county shall not negotiate with any bidder prior to contract award, except as permitted by ORS 279C.340 and section 40-430, when all bids exceed the cost estimate. After award of the contract, the county and contractor may modify the contract only by change order or amendment to the contract in accordance with OAR 137-049-0910.

(2) **Requests for Proposals.** The county may conduct discussions or negotiations with proposers only in accordance with the requirements of Section 40-0650.

40-0430 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 county's cost estimate, prior to contract award, the county 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 county's cost estimate. The subcontractor disclosure and substitution requirements of section 40-0360 do not apply to negotiations under this Rule.

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

(a) **Cost Estimate:** The county'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:** Those items generally considered appropriate for negotiation in the RFP process, relating to the details of contract performance as specified in section 40-0650, but excluding any material requirements previously announced in the solicitation process that would likely affect the field of competition.

(c) **Project:** A public improvement.

(d) **Value Engineering:** The identification of alternative methods, materials or systems that provide for comparable function at reduced initial or lifetime cost. It includes proposed changes to the plans, specifications, or other contract requirements that may be made, consistent with industry practice, under the original contract by mutual agreement

in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the public improvement. Cost savings include those resulting from life cycle costing, which may 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, the county shall exclude only those bids that have been formally rejected, or bids from bidders who have been formally disqualified by the county from consideration.

(4) **Scope of Negotiations.** The county shall not proceed with contract award if the scope of the project is significantly changed from the original bid. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other bidders would have been expected by the county to participate in the bidding process had the change been made during the solicitation process rather than during negotiation. This Rule shall not be construed to prohibit re-solicitation of trade subcontracts.

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

(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.

40-0440 Rejection of Offers

(1) **Rejection of an Offer.**

(a) The county may reject any offer upon finding that to accept the offer could impair the integrity of the procurement process or that rejecting the offer is in the public interest.

(b) The county shall reject an offer upon the county's finding that the offer:

(A) Is contingent upon the county's acceptance of terms and conditions (including specifications) that differ from the solicitation document;

(B) Takes exception to terms and conditions (including specifications);

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

(D) Offers work or goods that fail to meet the specifications of the solicitation document;

(E) Is late;

(F) Is not in substantial compliance with the solicitation documents;

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

(c) The county shall reject an offer upon the county's finding that the offeror:

(A) Has not been prequalified under ORS 279C.430 and the county required mandatory prequalification;

(B) Has been disqualified;

(C) Has been declared ineligible under ORS 279C.860 by the Commissioner of Bureau of Labor and Industries and the contract is for a public work;

(D) Is listed as not qualified by the Construction Contractors Board, if the contract is for a public improvement;

(E) Has not met the requirements of ORS 279A.105 if required to do so by the solicitation document;

(F) Has not submitted properly executed bid or proposal security as required by the solicitation document;

(G) Has failed to provide the certification required under subsection (3) of this Rule;

(H) Is not responsible. See section 40-0390(2) regarding the county's determination that the offeror has met statutory standards of responsibility.

(2) **Form of Business.** For purposes of this Rule, the county 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 section 40-0370.

(3) **Certification of Non-Discrimination.** The offeror shall certify and deliver to the county written certification, as part of the offer that the offeror has not discriminated and will not discriminate against disadvantaged business enterprise, minority, women, service-disabled veterans or emerging small business enterprises in obtaining any required subcontracts. Failure to do so shall be grounds for disqualification.

(4) **Rejection of all Offers.** The county may reject all offers upon the county's written finding it is in the public interest to do so. The county shall notify all offerors of the rejection of all offers, along with the justification and finding.

(5) **Criteria for Rejection of all Offers.** The county 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 county has canceled the solicitation in accordance with section 40-0270; or

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

40-0450 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 county'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 Section 40-0650, the county shall provide written notice to all proposers of the county's determination of the proposers included in the competitive range. The county's notice of the proposers included in the competitive range shall not be final until the later of the following:

(a) Seven (7) days after the date of the notice, unless otherwise provided therein; or

(b) Until the county 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 county shall provide written notice to all offerors of the county's intent to award the contract. The county's award shall 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 county 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 county a written protest of the county'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 offeror's protest must be in writing and must specify the grounds upon which the protest is based.

(c) An offeror is adversely affected or aggrieved only if the offeror is eligible for award of the contract as the responsible bidder submitting the lowest responsive bid or the responsible proposer submitting the best responsive proposal and is next in line for award, i.e., the protesting offeror must claim that all lower bidders or higher-scored proposers are ineligible for award:

(A) Because its offers were nonresponsive; or

(B) The county committed a substantial violation of a provision in the solicitation document or of an applicable procurement statute or county 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 county shall not consider a protest submitted after the time period established in this Rule or such different period as may be provided in the solicitation document. A proposer may not protest a county'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 county a written protest of the county'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 in Section 40-0650.)

(b) The proposer's protest shall be in writing and must specify the grounds upon which the protest is based.

(c) A proposer is adversely affected only if the proposer is responsible and submitted a responsive proposal and is eligible for inclusion in the competitive range, i.e., the protesting proposer must claim it is eligible for inclusion in the competitive range if all ineligible higher-scoring proposers are removed from consideration, and that those ineligible proposers are ineligible for inclusion in the competitive range because:

(A) Its proposals were not responsive; or

(B) The county committed a substantial violation of a provision in the RFP or of an applicable procurement statute or Rule, and the protesting proposer was unfairly evaluated and would have, but for such substantial violation, been included in the competitive range.

(d) The county shall not consider a protest submitted after the time period established in this Rule or such different period as may be provided in the solicitation document. A

proposer may not protest the county'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 county contracts officer or 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 county shall promptly issue a written decision on the protest. Judicial review of this decision will be available if provided by statute.

(8) **Award.** The successful offeror shall promptly execute the contract after the award is final. The county shall execute the contract only after it has obtained all applicable required documents and approvals.

40-0460 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 Board exempts a contract or classes of contracts from the required performance bond and payment bond pursuant to ORS 279C.390, the contractor shall execute and deliver to the county a performance bond and a payment bond each in a sum equal to the contract price for all public improvement contracts. This requirement applies only to public improvement contracts estimated by the county to have a value of more than \$100,000 or in the case of contracts for highways, bridges, and other transportation projects, more than \$50,000. Also see section 40-0815 and BOLI Rules at OAR 839-025-0015 regarding the separate requirement for a public works bond.

(2) **Other Construction Contracts.** The county may require performance security for other construction contracts that are not public improvement contracts. These requirements shall be expressly set forth in the solicitation document.

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

(4) **Time for Submission.** The apparent successful offeror must promptly furnish the required performance security upon the county's request. If the offeror fails to furnish the performance security as requested, the county 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 county's discretion, the offeror shall forfeit its bid or proposal security.

40-0470 Substitute Contractor

If the contractor provided a performance bond, the county may afford the contractor's surety the opportunity to provide a substitute contractor to complete performance of the contract. A substitute contractor shall perform all remaining contract work and comply with all terms and conditions of the contract, including the provisions of the performance bond and the payment bond. Substitute performance does not involve the award of a new contract and shall not be subject to the competitive procurement provisions of ORS Chapter 279C.

40-0480 Foreign Contractor

If the contract price exceeds \$10,000 and the contractor is a foreign contractor, the contractor shall promptly report to the Oregon Department of Revenue on forms provided

by the Department of Revenue, the contract price, terms of payment, contract duration and such other information as the Department of Revenue may require before final payment can be made on the contract. A copy of the report shall be forwarded to the county. The county shall satisfy itself that the above requirements have been complied with before it issues final payment on the contract.

ALTERNATIVE CONTRACTING METHODS

40-0600 Purpose

Section 40-0600 to 40-0690 are intended to provide guidance regarding the use of alternative contracting methods for public improvement contracts, as may be directed by the Board under ORS 279C.335. These Alternative Contracting Methods include, but are not limited to, the following forms of contracting: design-build, Energy Savings Performance and the Construction Manager/General Contractor Method. As to ESPC contracting, these Section 40-0600 to 40-0690 rules implement the requirements of ORS 279C.335 govern the procedures for entering into ESPCs. As to contracting for Construction Manager/General Contractor Services requiring an exemption from competitive bidding under 279C.335(2), Section 40-0600 to 40-0690 include mandatory and optional provisions pertaining to the procurement of Construction Manager/General Contractor Services, pursuant to the requirements of ORS 279C.337.

40-0610 Definitions for Alternative Contracting Methods

The following definitions shall apply to section 40-0600 to 40-0690 rules, unless the context requires otherwise:

(1) Affiliate has the meaning set forth in ORS 279C.332(1).

(2) **Alternative Contracting Methods:** Innovative techniques for procuring or performing public improvement contracts, utilizing processes other than the traditional methods involved in the design-bid-build construction contracting method (with award of a Public Improvement Contract 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 responsible bidder submitting the lowest responsive bid, and the project is built in accordance with those documents). In industry practice, such methods commonly include variations of design-build contracting, CM/GC forms of contracting and ESPCs, which are specifically addressed in these rules. These methods also include other developing techniques which include but are not limited to general "performance contracting," "cost plus time" contracting, (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(I) and "qualifications plus project approach" contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(II)). Procedural requirements for these methods are identified in these section 40-0600 to 40-0690 rules, when the county uses an Alternative Contracting Method in a procurement that requires an exemption from competitive bidding under ORS 279C.335(2) or in an ESPC procurement that is excepted from competitive bidding under ORS 279C.335(1).

(3) Construction Manager/General Contractor (or "CM/GC") has the meaning set forth in ORS 279C.332(2).

(4) Construction Manager/General Contractor Method (or "CM/GC Method"): The Alternative Contracting Method which involves the county's selection of a CM/GC to perform CM/GC services for a project or projects.

(5) Construction Manager/General Contractor Services (or "CM/GC Services") has the meaning set forth in ORS 279C.332(3).

(6) **Design-Build:** 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 county, and manages both design and construction. In this form of contract, a single person provides the county with all of the personal services and construction work necessary to design and construct the project.

(7) **Early Work:** Construction services, construction materials and other Work authorized by the parties to be performed under the CM/GC contract in advance of the establishment of the GMP, fixed price or other maximum, not-to-exceed price for the project. Permissible Early Work shall be limited to early procurement of materials and supplies, early release of bid or proposal packages for site development and related activities, and any other advance work related to important components of the project for which performance prior to establishment of the GMP will materially and positively affect the development or completion of the project.

(8) **Energy Conservation Measures (ECM) (also known as "energy efficiency measures"):** 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 section 40-0600 to 40-0690 of these rules, use of either or both of the terms "building" or "structure" shall be deemed to include existing energy, water and waste disposal systems connected or related to or otherwise used for the building or structure when such system(s) are included in the project, either as part of the project together with the building or structure, or when such system(s) are the focus of the project. Maintenance services are not energy conservation measures, for purposes of section 40-0600 to 40-0690 of these rules.

(9) **Energy Savings Guarantee:** The energy savings and performance guarantee provided by the ESCO under an ESPC procurement, which guarantees to the county that certain energy savings and performance will be achieved for the project covered by the RFP, through the installation and implementation of the agreed-upon ECMs for the project. The energy savings guarantee shall include, but shall not be limited to, the specific energy savings and performance levels and amounts that will be guaranteed, provisions related to the financial remedies available to the county 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 county after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.

(10) **Energy Savings Performance Contract (ESPC):** A public improvement contract between the county 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.

(11) General Conditions Work (or "GC Work") means a general grouping of project work required to support construction operations on the project that is not included within the contractor's overhead or fee.

(12) **Guaranteed Maximum Price (GMP):** has the meaning set forth in ORS 279C.332(4), pertaining to the procurements for CM/GC Services. For Alternative Contracting Methods other than the CM/GC Method, Guaranteed Maximum Price or GMP is the total maximum price provided to the County by the contractor, and accepted by the county, that includes all reimbursable costs of and fees for completion of the contract

work and any particularly identified contingency amounts, as defined by the public improvement contract.

(13) **Measurement and Verification (M & V):** 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.

(14) **Project Development Plan:** 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.

(15) **Qualified Energy Service Company (ESCO):** As used in ESPC procurement, a company, firm or other legal person with the following characteristics: demonstrated technical, operational, financial and managerial capabilities to design, install, construct, commission, manage, measure and verify, and otherwise implement energy conservation measures and other work on building systems or building components that are directly related to the ECMs in existing buildings and structures; a prior record of successfully performing ESPCs on projects involving existing buildings and structures that are comparable to the project under consideration by the county; 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.

(16) Savings has the meaning set forth in ORS 279C.337(4), pertaining to CM/GC Services procurements. For other Alternative Contracting Methods, savings is a positive difference between a Guaranteed Maximum Price or other maximum not-to-exceed price set forth in a Public Improvement Contract and the actual cost of the contractor's performance of the contract work payable by the county under the terms of the contract, including costs for which the county reimburses a contractor and fees, profits or other payments the contractor earns.

(17) **Technical Energy Audit:** As used in ESPC Procurement, the initial phase of services to be performed by an ESCO that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the county 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.

40-0620 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 from the competitive bidding process, or an individual contract has been exempted from the competitive bidding process, in accordance with ORS 279C.335 and any applicable county rules. Use of alternative contracting methods may be directed by the Board if that use is within the competitive bidding process, if feasible, or through an available statutory exception to the competitive bidding process. Use of Alternative Contracting Methods must be directed by the Board however, when the use of the Alternative Contracting Method requires an exemption to

the prescribed competitive bidding requirement of ORS 279C.335. In any of these circumstances, use of Alternative Contracting Methods must be justified in accordance with any applicable Code and section 40-0600 to 40-0690 rules. See section 40-0630 regarding required findings and restrictions on exemptions from the competitive bidding requirement under ORS 279C.335.

(2) **Energy Savings Performance Contracts.** ESPC's are excepted from the from the competitive bidding requirements for public improvement contracts pursuant to ORS 279C.335(1)(f), if the county complies with the procedures set forth in Section 40-0600 to 40-0690 related to the solicitation, negotiation and contracting for ESPC services.

(3) **Post-Project Evaluation.** ORS 279C.355 requires that the county prepare a formal post-project evaluation of public improvement projects in excess of \$100,000 when the county does not use the competitive bidding process required by ORS 279C.335. The purpose of this evaluation is to determine whether it was actually in the county's best interest to use an alternative contracting method outside the competitive bidding process. The evaluation must be delivered to the Board within 30 days of the date the county "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 contract 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.

40-0630 Findings, Notice and Hearing

(1) **Cost Savings and Other Substantial Benefits.** When findings are required under ORS 279C.335 to exempt a contract or class of contracts from the competitive bidding requirements, the "substantial cost savings" and other substantial benefits criteria at ORS 279C.335(2)(b) require consideration of the type, cost, and to the extent applicable, the other factors set forth in 279C.335(2)(b). If a particular factor has no application whatsoever to the particular public improvement contract or class of public improvement contracts, the Board does not need to consider that factor, and the county is not required to address the factor, other than to explain why the factor has no application whatsoever to the particular public improvement contract or class of public improvement contracts.

(2) **Required Information.** The statutory definition of "findings" at ORS 279.330 which applies to exemptions from competitive bidding means the justification for the county conclusion regarding the factors listed in both ORS 279C.335(2)(a) and 279C.335(2)(b) or, in the alternative, both 279C.335(2)(a) and 279C.335(2)(c).

(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 and other substantial benefits" requirement may be addressed by a combination of:

- (a) Specified findings that address the factors and other information specifically identified by statute, including, but not limited to, an analysis or reasonable forecast of present and future cost savings and other substantial benefits; 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, these findings shall relate back to the specific characteristics of the project or projects at issue in the exemption request.

(c) As an alternative to the "substantial cost savings and other substantial benefits" requirement in ORS 279C.335(2)(b), if an alternative contracting method has not been previously used, the county may make a finding that identifies the project as a "pilot project" under ORS 279C.335(2)(c). Nevertheless, the county must still make the findings required in ORS 279C.335(2)(a).

(4) **Favoritism and Competition.** The criteria at ORS 279C.335(2)(a) that the exemption "is unlikely to 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) **Descriptions.** Findings supporting a competitive bidding exemption must describe with specificity any alternative contracting method to be used in lieu of competitive bidding, including, but not limited to, whether a one-step (request for proposal) or two step (beginning with a Request for Qualifications, followed by a Request for Proposals) or other solicitation process will be utilized. The findings may also describe anticipated characteristics or features of the resulting public improvement contract. However, the purpose of an exemption from competitive bidding is limited to a determination of the procurement method. Any unnecessary or incidental descriptions of the specific details of the anticipated contract within the supporting findings are not binding upon the county. The parameters of the public improvement contract are those characteristics or specifics that are announced in the solicitation document.

(6) **Class Exemptions.** In making the findings supporting a class exemption the county shall clearly identify the "class" with respect to its defining characteristics, pursuant to the requirements of ORS 279C.335(3). The class must meet the following requirements:

(a) The class cannot be based on a single characteristic or factor, so that the county directly or indirectly creates a class whereby the county uses, for example, the CM/GC Method for all county construction projects or all county construction projects over a particular dollar amount, unidentified future county construction projects of a particular work category, or all county construction projects from a particular funding source such as the sale of bonds; and

(b) The class must include a combination of factors, be defined by the county through characteristics that reasonably relate to the exemption criteria set forth in ORS 279C.335(2) and must reflect a detailed evaluation of those characteristics so that the class is defined in a limited way that effectively meets the county's objectives while allowing for impartial and open competition, and protecting the integrity of the exemption process. An example of a class that might be permitted under the statute is a series of projects, such as a specific group of building renovation projects, that

(A) Involve renovations for a common purpose;

(B) Require completion on a related schedule in order to avoid unnecessary disruption of the county operations;

(C) Share common characteristics, such as historic building considerations, the presence of asbestos or other hazardous substances, or the presence of county staff during construction;

(D) Otherwise possess characteristics that meet the requirements of ORS 279C.335(2); and

(E) Otherwise meet the requirements of the Board, as applicable.

(7) **Public Hearing.** Before final adoption of findings exempting a public improvement contract from the requirement of competitive bidding, the county shall give notice and hold a public hearing as required by ORS 279C.335(5). The hearing shall be for the purpose of receiving public comment on the county's draft findings.

(8) **Prior Review of Draft Findings.** The county shall submit draft findings to the contract review board for review and concurrence prior to advertising the public hearing required by ORS 279C.335(5).

40-0640 Competitive Proposals; Procedure

The county 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.330 to 279C.337, ORS 279C.400 to 279C.410 and section 40-0600 to 40-0690, unless other applicable statutes control the county's use of competitive proposals for public improvement contracts. Also see the subsection of rules in this section entitled Formal Procurement Rules; section 40-0200 to 40-0480, and RFP related rules under the alternative contracting methods subsection of section 40-0640 to 40-0660. For ESPCs, the following RFP process as further specified in section 40-0645, 40-0650, 40-0660 and 40-0680 shall be utilized if the county 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 section 40-0600 to 40-0690 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. Proposal evaluation shall be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall:

(a) Be reasonable estimates based on information available to the county;

(b) Treat all proposals equitably; and

(c) Recognize that public policy requires that public improvements be constructed at the least overall cost to the county. See ORS 279C.305. For ESPC Proposal evaluations, the county may provide in the RFP that qualifications-based evaluation factors will outweigh the county'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. For CM/GC Services Proposal evaluations, the county must comply with ORS 279C.337.

(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 could affect the cost or quality of the work.

(b) In CM/GC contracting, in addition to subsection (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, analyze and propose value engineering options, analyze and propose energy efficiency measures or alternative energy options, coordinate multiple disciplines on the project, effectively utilize the time available to commence and complete the improvement, and related matters that could affect cost or quality of the work.

(c) In design-build contracting, in addition to subsections (a) and (b) above, those factors may also include design professional qualifications, specialized experience,

preliminary design submittals, technical merit, design-builder team experience and related matters that affect cost or quality.

(d) In ESPC contracting, in addition to the factors set forth in subsections (a), (b) and (c) above, those factors may also include sample technical energy audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP, financial statements and related information of joint venturers comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting energy guarantee contract levels, the specific person that will provide the energy savings guarantee to be offered by the ESCO, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the Work under the ESPC, the ESCO's team members and consultants to be assigned to the project, the ESCO's experience in the energy savings performance contracting field, the ESCO's experience acting as the prime contractor on previous ESPC projects (as opposed to a sub-contractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular project between the county 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 section 40-0600 to 40-0690, 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 section 40-0650. Terms that may be negotiated consist of details of contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that could affect cost or quality of the work. For the CM/GC Method, terms that may be negotiated also include the specific scope of pre-construction services, the GC work, any Early Work and other construction work to be performed by the CM/GC, and any other terms that the county has identified as being subject to negotiation, consistent with the requirements of Section 40-0690. In ESPC contracting, terms that may be negotiated also include the scope of preliminary design of ECMs to be evaluated by the parties during the technical energy audit phase of the work, the scope of services to be performed by the ESCO during the project development plan phase of the work, the detailed provisions of the energy savings guarantee to be provided by the ESCO and scope of work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the work, consistent with the requirements of Section 40-0650, below.

40-0645 Request for Qualifications (RFQ)

As provided by ORS 279C.405(1), the county may utilize requests for qualifications (RFQs) to obtain information useful in the preparation or distribution of requests for proposal (RFPs). When using an RFQs as the first step in a two-step solicitation process, in which distribution of the RFPs will be limited to the firms identified as most qualified

through their submitted statements of qualification, the county shall first advertise and provide notice of the RFQ in the same manner in which RFPs are advertised, specifically stating that RFPs will be distributed only to the selected firms in the RFQ process. In such cases the county shall also provide within the RFQ a protest provision substantially in the form of section 40-0450(5) regarding protests of the competitive range. Thereafter, the county may distribute RFPs to the selected firms without further advertisement of the solicitation.

40-0650 Requests for Proposals (RFP)

(1) **Generally.** The use of competitive proposals must be specially authorized for a public improvement contract under the competitive bidding exception and exemption requirements of ORS 279C.335, section 40-0130 and 40-0600 to 40-0690. Also see ORS 279C.337 and ORS 279C.400 to 279C.410 for statutory requirements regarding competitive proposals and Section 40-0640 regarding competitive proposal procedures.

(2) **Solicitation Documents.** In addition to the solicitation document requirements of section 40-0200, this Rule applies to the requirements for RFPs. RFP solicitation documents shall conform to the following standards:

(a) The county shall 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 section 40-0640 regarding proposal evaluation and evaluation factors.) Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates based on information available to the county. Subject to ORS 279C.410(4), the solicitation document may provide for discussions with proposers to be conducted for the purpose of proposal evaluation prior to award or prior to the establishment of any competitive range;

(b) When the county is willing to negotiate terms and conditions of the contract or allow submission of revised proposals following discussions, the county 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 County has identified as authorized for negotiation. The county must describe the evaluation and discussion or negotiation process, including how the county will establish the competitive range;

(c) The anticipated size of any competitive range must be stated in the solicitation document, but may be decreased if the number of proposers that submit responsive proposals is less than the specified number, or may be increased as provided in section 40-650(4)(a)(B).

(d) When the county intends to award contracts to more than one proposer, the county must identify in the solicitation document the manner in which it will determine the number of contracts it will award. The county shall also include the criteria it will use to determine how the county will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular contractor to provide goods or services from those contractors awarded contracts.

(d) When the county intends to award contracts to more than one proposer, the county must identify in the solicitation document the manner in which it will determine the number of contracts it will award. The county shall also include the criteria it will use to determine how the county will endeavour to achieve optimal value, utility and substantial

fairness when selecting a particular contractor to provide personal services or work from those contractors awarded contracts.

(3) Evaluation of Proposals.

(a) Evaluation. The county shall evaluate proposals only in accordance with criteria set forth in the RFP and applicable law. The county shall evaluate proposals to determine the responsible proposer or proposers submitting the best responsive proposal or proposals.

(A) Clarifications. In evaluating proposals, the county may seek information from a proposer to clarify the proposer's proposal. A proposer must submit written and signed clarifications and such clarifications shall become part of the proposer's proposal.

(B) Limited negotiation. If the county did not permit negotiation in its RFP, the county 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 section does not apply to this limited negotiation.

(b) Discussions; negotiations. If the county permitted discussions or negotiations in the Request for Proposals, the county shall 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 county's discretion, the county may forego discussions and negotiations and evaluate all proposals in accordance with this Rule.

(B) If the county proceeds with discussions or negotiations, the county shall establish a negotiation team tailored for the acquisition. The county's team may include legal, technical, auditing and negotiating personnel.

(c) Cancellation. Nothing in this Rule shall restrict or prohibit the county from cancelling the solicitation at any time.

(4) Competitive Range; Protest; Award.

(a) Determining Competitive Range.

(A) If the county does not cancel the solicitation, after the opening, the county will evaluate all proposals in accordance with the evaluation criteria set forth in the RFPs. After evaluation of all proposals in accordance with the criteria set forth in the RFPs, the county will rank the proposers based on the county's scoring and determine the competitive range.

(B) The county may increase the number of proposers in the competitive range if the county'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 county's evaluation of revised proposals submitted in accordance with the process described in this Rule.

(b) **Protesting Competitive Range.** The county shall provide written notice to all proposers identifying proposers in the competitive range. A proposer that is not within the competitive range may protest the county's evaluation and determination of the competitive range in accordance with section 40-0450.

(c) Intent to award; discuss or negotiate. After the protest period provided in accordance with these rules expires, or after the county has provided a final response to any protest, whichever date is later, the county 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 county's intent to award in accordance with section 40-0450.
- (ii) After the protest period provided in accordance with section 40-0450 expires, or after the county has provided a final response to any protest, whichever date is later, the county shall 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, 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 county chooses to enter into discussions with and receive revised proposals from the proposers in the competitive range, the county shall proceed as follows:
 - (a) **Initiating Discussions.** The county shall initiate oral or written discussions with all of the proposers in the competitive range regarding its proposals with respect to the provisions of the RFP that the county identified in the RFP as the subject of discussions. The county may conduct discussions for the following purposes:
 - (A) Informing proposers of deficiencies in its initial proposals;
 - (B) Notifying proposers of parts of its proposals for which the county would like additional information; and
 - (C) Otherwise allowing proposers to develop revised proposals that will allow the county to obtain the best proposal based on the requirements and evaluation criteria set forth in the Request for Proposals.
 - (b) **Conducting Discussions.** The county 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 county may terminate discussions with any proposer in the competitive range at any time. The county shall offer all proposers in the competitive range the opportunity to discuss its proposals with county before the county notifies proposers of the date and time pursuant to this section that revised proposals will be due.
 - (A) In conducting discussions, the county:
 - (i) Shall treat all proposers fairly and shall not favor any proposer over another;
 - (ii) Shall not discuss other proposers' proposals;
 - (iii) Shall not suggest specific revisions that a proposer should make to its proposal, and shall not otherwise direct the proposer to make any specific revisions to its proposal.
 - (B) At any time during the time allowed for discussions, the county 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 county does not cancel the solicitation at the conclusion of the county discussions with all remaining proposers in the competitive range, the county shall 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 county's termination of discussions, and proposers must submit revised proposals by the date and time set forth in the county's notice.
 - (A) Upon receipt of the revised proposals, the county shall evaluate the revised proposals based upon the evaluation criteria set forth in the Request for Proposals, and rank the revised proposals based on the county's scoring.

(B) The county 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 county shall provide written notice to all proposers in the competitive range of the county's intent to award the contract. An unsuccessful proposer may protest the county's intent to award in accordance with section 40-0450. After the protest period provided in accordance with that Rule expires, or after the county has provided a final response to any protest, whichever date is later, the county shall commence final contract negotiations.

(6) **Negotiations.**

(a) **Initiating Negotiations.** The county 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 County may negotiate:

(i) The statement of work;

(ii) The contract price as it is affected by negotiating the statement of work; and

(iii) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the RFP. Accordingly, proposers shall not submit, and the county shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the RFP.

(c) **Continuing Negotiations.** If the county terminates discussions or negotiations with a proposer, the county may then commence negotiations with the next highest scoring proposer in the competitive range, and continue the process described in this Rule until the county has either:

(A) Determined to award the contract to the proposer with whom it is currently discussing or negotiating; or

(B) Completed one round of discussions or negotiations with all proposers in the competitive range, unless the county provided for more than one round of discussions or negotiations in the RFP, in which case the county may proceed with any authorized further rounds of discussions or negotiations.

(d) **Terminating Negotiations.** At any time during discussions or negotiations that the county conducts in accordance with this Rule, the county may terminate discussions or negotiations with the proposer with whom it is currently discussing or negotiating, if the county 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.

40-0660 RFP Pricing Mechanisms

(1) An RFP may result in a contract with a lump sum contract price or a fixed contract price, as in the case of competitive bidding. Alternatively, a request for proposals may result in a cost reimbursement contract with a GMP or some other maximum price specified in the contract.

(2) Economic incentives or disincentives may be included to reflect stated county purposes related to time of completion, safety or other public contracting objectives, including but not limited to total least cost mechanisms such as life cycle costing.

(3) A guaranteed maximum price may be used as the pricing mechanism for CM/GC services contracts where a total contract price is provided in the design phase in order to assist the county in determining whether the project scope is within the county's budget, and allowing for design changes during preliminary design rather than after final design services have been completed.

(a) If the collaborative process described above in this section (3) is successful, the contractor shall propose a final GMP, which may be accepted by the county and included within the contract.

(b) If the collaborative process described above in this section (3) is not successful, and no mutually agreeable resolution on the GMP for the project construction work can be achieved with the contractor, then the county shall terminate the contract. The county 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 county shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

40-0670 Design-Build Contracts

(1) **General.** The design-build form of contracting, as defined at section 40-0610(3), has technical complexities that are not readily apparent. The county shall 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 county 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 it has 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 county shall utilize the design-build form of contracting only in accordance with the requirements of Section 40-0600 to 40-0690 rules. See particularly section 40-0620 Use of Alternative Contracting Methods and section 40-0680 pertaining to ESPCs.

(3) **Selection.** Design-build selection criteria may include those factors set forth above in section 40-0640(2)(a), (b) and (c).

(4) **Qualification-Based Selection (QBS) Inapplicable.** Because the value of construction services predominates the design-build form of contracting, the qualifications-based selection (QBS) process outlined in ORS 279C.110 for obtaining certain consultant services is not applicable.

(5) **Licensing.** If a design-build contractor is not an Oregon licensed design professional, the county shall 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 who will provide design services. See ORS 671.030(2)(g) 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 Finance Department shall establish design-build contracting practices to include the following requirements:

(a) **Design Services.** The level or type of design services required must be clearly defined within the procurement documents and contract, along with a description of the level or type of design services previously performed for the project. The services to be performed shall be clearly delineated as either design specifications or performance standards, and performance measurements must be identified.

(b) **Professional Liability.** The contract shall clearly identify the liability of design professionals with respect to the design-build contractor and the county, as well as requirements for professional liability insurance.

(c) **Risk Allocation.** The contract shall clearly identify the extent to which the county requires an express indemnification from the design-build contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty work claims.

(d) **Warranties.** The contract shall clearly identify any express warranties made to the county regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.

(e) **Incentives.** The contract shall clearly identify any economic incentives and disincentives, the specific criteria that apply and its 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 county is benefited from such deliverables.

40-0680 Energy Savings Performance Contracts (ESPC)

(1) **Generally.** This section 40-0680 includes a limited, efficient method for the county 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 county chooses not to utilize the ESPC procurement method provided for by these section 40-0600 to 40-0690 rules, the county 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 contracting agency not subject to all the requirements of ORS 279C.335.

(2) **ESPC Contracting Method.** The ESPC form of contracting, as defined at section 40-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the county, as well as the additional technical complexities associated with a design-build contract. The county shall utilize the ESPC contracting method only with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the ESPC contracting process, the county 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 remodelling contract; and

(h) Satisfying local energy efficiency design criteria or requirements.

(3) **Authority.** The county desiring to pursue an exemption from the competitive bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086) shall utilize the ESPC form of contracting only in accordance with the requirements of section 40-0600 to 40-0690 rules.

(4) **No Findings Required.** The county is required only to comply with the ESPC contracting procedures set forth in section 40-0600 to 40-0690 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 county is subject to the requirements of ORS 279C.335 and chooses not to comply with the ESPC contracting procedures set forth in section 40-0600 to 40-0690 rules.

(5) **Selection.** ESPC selection criteria may include those factors set forth above in section 40-0640(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 its 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 contracting agencies in obtaining certain consultant services is not applicable.

(7) **Licensing.** If the ESCO is not an Oregon licensed design professional, the county shall require that the ESCO disclose in the ESPC that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and ORS 672.060(11) regarding the offer of engineering services that are appurtenant to construction services.

(8) **Performance Security.** At the point in the ESPC when the parties enter into a binding contract that constitutes a design-build contract, the ESCO must provide a performance bond and a payment bond, each for 100% of the full contract price, including the construction and design and related professional services specified in the ESPC design-build contract, pursuant to ORS 279C.380(1)(a). For ESPC design-build contracts, these "design and related professional services" include conventional design services, commissioning services, training services for the county'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 county 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 county so provides in the RFP.

(9) **Contracting Requirements.** The Finance Department shall establish ESPC contracting practices to include 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 county, 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 county shall ensure the design-build contracting practices are consistent with the design-build contracting requirements set forth in section 40-0670.

(c) Pricing alternatives. The county 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 county, the ESCO's M & V services may be terminated prior to the completion of the M & V/energy savings guarantee period and the county'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 rules does not include maintenance services for the project facility.

40-0690 Construction Manager/General Contractor Services (CM/GC Services)

(1) **General.** The CM/GC method is a technically complex project delivery system. The county shall use this contracting method only with the assistance of legal counsel with substantial experience and necessary expertise in using the CM/GC method, as well as knowledgeable staff, consultants or both staff and 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 method does not contemplate a "single point of responsibility" under which the CM/GC 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 county and design professional, although with the CM/GC method there is a separate contract between the county and design professional. In order to utilize the CM/GC method, the county must be able to reasonably anticipate the following types of benefits:

(a) **Time Savings.** With the CM/GC method, 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 county 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.** With the CM/GC method, early CM/GC input during the design process is expected to contribute to significant cost savings. The county may consider value engineering, building systems analysis, life cycle costing analysis and construction planning that lead to cost savings. The county shall 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.** With the CM/GC method, the public improvement presents significant technical complexities that are best addressed by a collaborative or team effort between the county, design professionals, any county project management or technical consultants and the CM/GC, in which the CM/GC will assist in addressing specific project challenges through pre-construction services. The county may consider the need for CM/GC 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 remodelling projects and projects requiring complex phasing or highly coordinated scheduling.

(2) **Authority.** The county shall use the CM/GC form of contracting only in accordance with the requirements of these rules and ORS 279C.337 when a competitive bidding exception is approved. See particularly section 40-0600 on "Purpose" and section 40-0620 Use of Alternative Contracting Methods.

(3) **Selection.** CM/GC selection criteria may include those factors set forth above in Section 40-0640(2)(b)

(4) **Basis for Payment.** The CM/GC process adds specified construction manager services to traditional design-bid-build general contractor work, requiring full contract performance within a negotiated GMP, fixed contract price or other maximum contract price. For a GMP pricing method, the basis for payment is reimbursable direct costs as defined under the contract, plus a fee constituting full payment for construction work and services rendered, which together shall not exceed the GMP. See GMP definition at section 40-0610 and pricing mechanisms at section 40-0660.

(5) **Contract Requirements.** The county shall conform its CM/GC contracting practices to the following requirements:

(a) **Nature of the Initial CM/GC Services Contract Document.** A solicitation for CM/GC services is a procurement for a public improvement, since the scope of the procurement includes not only pre-construction services to be performed by the CM/GC, but also construction work that is expected to result in a completed public improvement. In the traditional CM/GC services contracting approach, the text of the resulting CM/GC services contract will include comprehensive contract provisions that will not only fully govern the relationship between the county and the CM/GC for the pre-construction services, but will also include the general contract provisions that will control the CM/GC's providing of the construction work necessary to complete the project (with any remaining necessary construction-related contract provisions being added through early work amendments to the contract, the GMP amendment to the contract or, if necessary, a conventional amendment to the contract). The traditional CM/GC services contracting approach, however, also contemplates that the county will only authorize the CM/GC to perform the pre-construction services when the contract is first executed unless construction work is specifically included in the initial CM/GC contract. Under this approach, the construction phase or phases of the CM/GC services project are not yet authorized and the contract only becomes a public improvement contract once the parties amend the contract, through an early work or a GMP amendment, to authorize the construction of a portion of the project or the entire project. See also OAR 839-025-0020, regarding the Bureau of Labor and Industries' determination of when a contract for CM/GC services becomes a "public works" contract for purposes of paying prevailing wage rates for construction work under the CM/GC contract.

(b) **Setting the GMP, Fixed Contract Price or Other Maximum Contract Price.** The GMP, fixed contract price or other maximum contract price shall be set at an identified time consistent with industry practice and project conditions and after supporting information reasonably considered necessary to its use has been developed, which will normally take place at the end of the design development phase of the project. The supporting information for the GMP must define with particularity both what services and construction work are included and excluded from the GMP, fixed contract price or other maximum contract price. A set of project drawings and specifications shall be produced establishing the scope of construction work contemplated by the GMP, fixed contract price or other maximum contract price.

(c) **Adjustments to the GMP, Fixed Contract Price or Other Maximum Contract Price.** The contract shall clearly identify the standards or factors under which changes or additional construction work will be considered outside of the work scope that warrants an increase in the GMP, fixed contract price or other maximum contract price, as well as criteria for decreasing the GMP, fixed contract price or other maximum contract price. The GMP, fixed contract price or other maximum contract price shall not be increased without a concomitant increase to the scope of the work defined at the establishment of the GMP, fixed contract price or other maximum contract price or most recent amendment to the GMP, fixed contract price or other maximum contract price. An increase to the scope of the work may take the form of conventional additions to the project scope, as well as corrections to the contract terms and conditions, additions to insurance coverage required by the County and other changes to the work.

(d) **Cost Savings.** The contract shall clearly identify the disposition of any cost savings resulting from completion of the work below the GMP, fixed contract price or other maximum contract price; that is, under what circumstances, if any, the CM/GC might share in those cost savings, or whether the cost savings accrue only to the County 's benefit. (Unless there is a clearly articulated reason for sharing the cost savings set forth in the contract, the cost savings must accrue to the County.)

(e) **Cost Reimbursement.** The contract shall clearly identify what items or categories of items are eligible for cost reimbursement within the GMP or other maximum contract price, including any category of GC work costs (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.

(f) **Audit.** Cost reimbursements shall be made subject to final audit adjustment, and the contract shall establish an audit process to ensure that contract costs are allowable, properly allocated and reasonable.

(g) **Fee.** Compensation for the CM/GC's services and construction work, where the contract uses a GMP, shall be paid on the basis of a fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee shall be expressly defined in the contract terms and conditions at the time the County selects the CM/GC. The fee, which may be expressed as either a fixed dollar amount or as a proposed percentage of all reimbursable costs, shall be identified during and become an element of the selection process. It shall subsequently be expressed as a fixed amount for particular construction work authorized to be performed, when early work is added to the contract through an amendment and when the GMP is established. The CM/GC fee does not include any fee paid to the CM/GC for performing pre-construction services during a separate pre-construction phase.

(h) **Incentives.** The contract shall clearly identify any economic incentives, the specific criteria that apply and its relationship to other financial elements of the contract (including the GMP, fixed contract price or other maximum contract price).

(i) **Controlled Insurance Programs.** For projects where an owner-controlled or contractor-controlled insurance program is permitted under ORS 737.602, the contract shall clearly identify whether an owner controlled or contractor controlled insurance program is anticipated or allowable. If so, the contract shall clearly identify (1) anticipated cost savings from reduced premiums, claims reductions and other factors, (2) the allocation of cost savings, and (3) safety responsibilities, incentives or both safety responsibilities and incentives.

(j) **Early Work.** The RFP shall clearly identify, whenever feasible, the circumstances under which any early work may be authorized and undertaken for compensation prior to establishing the GMP, fixed contract price or other maximum contract price.

(k) **Subcontractor Selection.** Subcontracts under the contract are not public contracts within the meaning of these rules. However, the contract must include provisions that clearly meet the requirements of ORS 279C.337(3) and other county requirements. Within the scope of ORS 279C.337(3), the CM/GC's subcontractor selection process must meet the following parameters:

(A) Absent a written justification prepared by the CM/GC and approved by the county as more particularly provided for in this section, the CM/GC's subcontractor selection process must be "competitive", meaning that the process should include publicly-advertised subcontractor solicitations and be based on a low-bid competitive method, a low-quote competitive method for contracts in a specified dollar range agreeable to the county, or a method whereby both price and qualifications of the subcontractors are evaluated in a competitive environment, consistent with the RFP and contract requirements;

(B) When the subcontractor selection process for a particular work package will not be "competitive" as provided for in this section, the process must meet the following requirements:

(i) The CM/GC must prepare and submit a written justification to the county, explaining the project circumstances that support a non-competitive subcontractor selection process for a particular work package, including, but not limited to, emergency circumstances, the CM/GC's need to utilize a key subcontractor member of the CM/GC's project team consistent with the CM/GC's project proposal, the need to meet other specified contract requirements, the continuation or expansion of an existing subcontractor agreement that was awarded through a "competitive process" along with facts supporting the continuation or expansion of the subcontractor agreement, or a "sole source" justification;

(ii) For a "sole source" selection of a subcontractor to proceed, the county must evaluate the written justification provided by the CM/GC and must find that critical project efficiencies require utilization of labor, services or materials from one subcontractor; that technical compatibility issues on the project require labor, services or materials from one subcontractor; that particular labor, services or materials are needed as part of an experimental or pilot project or as part of an experimental or pilot aspect of the project; or that other project circumstances exist to support the conclusion that the labor, services or materials are available from only one subcontractor;

(iii) The CM/GC must provide an independent cost estimate for the work package that will be subject to the non-competitive process, if required by the county;

(iv) The CM/GC must fully respond to any questions or comments submitted to the CM/GC by the county; and

(v) The county must approve the CM/GC's use of the non-competitive subcontractor selection process prior to the CM/GC's pursuit of the non-competitive process.

(C) A competitive selection process may be preceded by a publicly advertised subcontractor pre-qualification process, with only those subcontractors meeting the pre-qualification requirements being invited to participate in the later competitive process

through which the CM/GC will select the subcontractor to perform the construction work described in the selection process;

(D) If the CM/GC or an affiliate or subsidiary of the CM/GC will be included in the subcontractor selection process to perform particular construction work on the project, the CM/GC must disclose that fact in the selection process documents and announcements. The contract must also identify the conditions, processes and procedures the CM/GC will utilize in that competitive process in order to make the process impartial, competitive and fair, including but not limited to objective, independent review and opening of bids or proposals for the elements of work involved, by a representative of the county or another independent third party.

(I) **Subcontractor Approvals and Protests.** The contract shall clearly establish whether the County must approve subcontract awards, and to what extent, if any, the county will resolve or be involved in the resolution of protests of the CM/GC's selection of subcontractors and suppliers. The procedures and reporting mechanisms related to the resolution of sub-contractor and supplier protests shall be established in the contract with certainty, including the CM/GC's roles and responsibilities in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the county must retain the right to monitor the subcontracting process in order to protect county's interests and to confirm the CM/GC's compliance with the contract and with applicable statutes, administrative rules and other legal requirements.

(m) **CM/GC Self-Performance** or Performance by CM/GC affiliates or subsidiaries. Consistent with the requirements of ORS 279C.337(3)(c), the contract must establish the conditions under which the CM/GC or an affiliate or subsidiary of the CM/GC may perform elements of the construction work without competition from subcontractors, including, for example, job site GC work. Other than for GC work, in order for the CM/GC or an affiliate or subsidiary of the CM/GC to perform elements of the construction work without competition from subcontractors, the CM/GC must provide, or must have included in the CM/GC's RFP proposal to perform CM/GC services for the project, a detailed proposal for performance of the work by the CM/GC or an affiliate or subsidiary of the CM/GC. If required by the county, the CM/GC's proposal to perform the construction work must be supported by at least one independent cost estimate prior to the work being included in the contract.

(n) Unsuccessful Subcontractor Briefing. ORS 279C.337(3)(e) is designed to allow a subcontractor who was not selected by the CM/GC to perform a particular element of the construction work to obtain specific information from the CM/GC, and meet with the CM/GC to discuss the subcontractor qualification and selection process involved and the CM/GC's subcontractor selection decisions, in order to better understand why the subcontractor was not successful in being selected to perform the particular element of the work and to improve the subcontractor's substantive qualifications or the subcontractor's methods in competing for elements of the Work for the particular project involved, or for future projects. The briefing meetings may be held with individual subcontractors or, if the subcontractors agree, in groups of subcontractors, with those groups established by bid package or other designation agreed to by the county and the CM/GC. Nevertheless, the CM/GC is not obligated to provide this briefing opportunity unless the CM/GC receives a written request from a subcontractor to discuss the subcontractor qualification and selection process involved. Unless the county and the CM/GC agree on a different schedule, the CM/GC Contract should include provisions:

(A) Allowing a subcontractor 60 days from the CM/GC's notice of award of a subcontract for a particular work package to request, in writing, a post-selection meeting with the CM/GC under this section; and

(B) Requiring the CM/GC to set a meeting with the subcontractor under this section within 45 days of the subcontractor's written request.

(o) **Performance and Payment Bonds.** Provided no construction work is included with the pre-construction services to be performed under the initial form of the CM/GC contract, no performance bond or payment bond is required to be provided by the CM/GC at the time of contract signing, consistent with ORS 279C.380. Once construction work is included in the contract and authorized by the county to be performed by the CM/GC, however, the CM/GC must provide a performance bond and payment bond each in the full amount of any early work to be performed by the CM/GC, or the full amount of the GMP, fixed contract price or other maximum contract price, as applicable. Furthermore, in the event additional early work is added to the CM/GC contract after the initial early work or in the event an amendment to the CM/GC contract is made so that the GMP, fixed contract price or other maximum contract price must be increased, the performance bond and the payment bond must each be increased in an amount equal to the additional early work or the increased GMP, fixed contract price or other maximum contract price.

(p) **Independent Review of CM/GC Performance; Conflicts of Interest.** If county requires independent review, monitoring, inspection or other oversight of a CM/GC's performance of pre-construction services, construction work or both pre-construction services and construction work, the county must obtain those independent review services from a contractor independent of the CM/GC, the CM/GC's affiliates and the CM/GC's subcontractors, pursuant to the requirements of ORS 279C.307. However, ORS 279C.307 does not prohibit the following:

(A) The CM/GC's performance of both pre-construction services and construction work that are included within the definition of CM/GC services, consistent with ORS 279C.307(2); or

(B) The CM/GC's performance of internal quality control services, quality assurance services or other internal peer review of CM/GC work product that is intended to confirm the CM/GC's performance of the CM/GC contract according to its terms.

(q) **Socio-Economic Programs.** The contract shall clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and the county.

CONTRACT PROVISIONS

40-0800 Required Contract Clauses

Except as provided for in sections 40-0150 and 40-0160, the county shall include in all solicitation documents for public improvement contracts, all of the ORS Chapter 279C required contract clauses, as set forth in the checklist contained in section 40-0200(1)(c) regarding solicitation documents. The following series of rules provide further guidance regarding particular public contract provisions.

40-0810 Waiver of Delay Damages Against Public Policy

The county shall not place any provision in a public improvement contract purporting to waive, release, or extinguish the rights of a contractor to damages resulting from the county's unreasonable delay in performing the contract. 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.

40-0815 BOLI Public Works Bond

Pursuant to ORS 279C.830(3), the specifications for every public works contract shall contain a provision stating that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project, unless otherwise exempt. This bond is in addition to performance bond and payment bond requirements. See BOLI Rule at OAR 839-025-0015.

40-0820 Retainage

(1) **Withholding of Retainage.** The county shall not retain an amount in excess of five percent of the contract price for work completed. If the contractor has performed at least 50 percent of the contract work and is progressing satisfactorily, upon the contractor's submission of written application containing the surety's written approval, the county may, in its discretion, reduce or eliminate retainage on any remaining progress payments. The county shall respond in writing to all such applications within a reasonable time. When the contract work is 97-1/2 percent completed, the county may, at its discretion and without application by the contractor, reduce the retained amount to 100 percent of the value of the remaining unperformed contract work. The county may at any time reinstate retainage. Retainage shall be included in the final payment of the contract price.

(2) **Form of Retainage.** Unless the county reserves an amount as retainage or finds in writing that accepting a bond or instrument described in part (a) or (b) of this section poses an extraordinary risk that is not typically associated with the bond or instrument, the county, in lieu of withholding moneys from payment, shall accept from the contractor:

(a) Bonds, securities, or other instruments that are deposited and accepted as provided in Subsection (4)(a) of this Rule; or

(b) A surety bond deposited as provided in subsection (4)(b) of this Rule.

(3) **Deposit in Interest-Bearing Accounts.** Upon request of the contractor, the county shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the county. Earnings on this account shall accrue to the contractor.

(4) **Alternatives to Cash Retainage.** In lieu of cash retainage to be held by a county, the contractor may substitute one of the following:

(a) Deposit of bonds, securities, or other instruments:

(A) The contractor may deposit bonds, securities, or other instruments with the county or in any bank or trust company to be held for the benefit of the county. If the county accepts the deposit, the county shall reduce the cash retainage by an amount equal to the value of the bonds, securities and other instruments, and reimburse the excess to the contractor.

(B) Bonds, securities, and other instruments deposited or acquired in lieu of cash retainage must be of a character approved by the Oregon Department of Administrative Services, which may include, without limitation:

(i) Bills, certificates, notes or bonds of the United States.

(ii) Other obligations of the United States or agencies of the United States.

(iii) Obligations of a corporation wholly owned by the federal government.

(iv) Indebtedness of the Federal National Mortgage Association.

(v) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.

(vi) Irrevocable letters of credit issued by an insured institution as defined in ORS 706.008/

(C) Upon the county's determination that all requirements for the protection of the county's interests have been fulfilled, it shall release to the contractor all bonds, securities, and other instruments deposited in lieu of cash retainage.

(b) **Deposit of Surety Bond.** The county, at its discretion, may allow the contractor to deposit a surety bond in a form acceptable to the county in lieu of all or a portion of funds retained or to be retained. A contractor depositing such a bond shall accept surety bonds from its subcontractors and suppliers in lieu of cash retainage. In such cases, cash retainage shall be reduced by an amount equal to the value of the bond, and the excess shall be reimbursed.

(5) **Deposit in Interest-Bearing Escrow Accounts.** If the contract price exceeds \$500,000, the county shall deposit cash retainage in an interest-bearing account pursuant to ORS 279C.560 and subsection (3) of this rule. If, however, the contract price exceeds \$500,000 and the contractor requests that the county deposit cash retainage into an interest-bearing escrow account, pursuant to ORS 279C.570(2), or the contractor elects to deposit bonds, securities or other instruments in lieu of cash retainage pursuant to ORS 279C.560 and subsection (4)(a) of this rule, or the contractor elects to provide a surety bond in lieu of cash retainage pursuant to ORS 279C.560 and subsection (4)(b) of this rule, the county shall accept the contractor's alternative retainage method in lieu of depositing the retainage in an interest-bearing account, subject to the limitations and requirements of ORS 279C.560 and this rule.

(6) **Recovery of Costs.** The county may recover from the contractor all costs incurred in the proper handling of retainage, by reduction of the final payment.

(7) **Additional Retainage when Certified Payroll Statements Not Filed.**

(a) Pursuant to ORS 279C.845(7), if a contractor is required to file certified payroll statements and fails to do so, the county shall retain 25 percent of any amount earned by the contractor on a public works contract until the contractor has filed such statements with the county. The county shall pay the contractor the amount retained under this provision within fourteen (14) days after the contractor files the certified statement, regardless of whether a subcontractor has filed such statements (but see ORS 27C.845(1) regarding the requirement for both contractors and subcontractors to file certified statements with the county.) See BOLI Rule at OAR 839-025-0100.

(b) Notwithstanding ORS 279C.555, the contractor shall retain 25 percent of any amount earned by a first-tier subcontractor on a public works contract until the subcontractor has filed with the county certified statements as required by this section. The contractor shall verify that the first-tier subcontractor has filed the certified statements before the contractor may pay the subcontractor any amount retained under this subsection. The contractor shall pay the first-tier subcontractor the amount retained under this subsection within 14 days after the subcontractor files the certified statements as required by this section. Neither the county nor the contractor is required to verify the truth of the contents of certified statements filed by a first-tier subcontractor under this section.

40-0830 Contractor Progress Payments

(1) **Request for Progress Payments.** Each month the contractor shall submit to the county its written request for a progress payment based upon an estimated percentage of contract completion. At the county's discretion, this request may also include the value of material to be incorporated in the completed work that has been delivered to the premises and appropriately stored. The sum of these estimates is referred to as the "value of completed work." With these estimates as a base, the county will make a progress payment to the contractor, which shall be equal to: (i) the value of completed work; (ii) less those amounts that have been previously paid; (iii) less other amounts that may be

deductible or owing and due to the county for any cause; and (iv) less the appropriate amount of retainage.

(2) **Progress Payments do not mean Acceptance of Work.** Progress payments shall not be construed as an acceptance or approval of any part of the work, and shall not relieve the contractor of responsibility for defective workmanship or material.

40-0840 Interest

(1) **Prompt Payment Policy.** The county shall pay promptly all payments due and owing to the contractor on contracts for public improvements.

(2) **Interest on Progress Payments.** Late payment interest shall begin to accrue on payments due and owing on the earlier of 30 days after receipt of invoice or 15 days after the county's approval of payment (the "progress payment due date"). The interest rate shall equal three times the discount rate on 90-day commercial paper in effect on the progress payment due date at the Federal Reserve Bank in the Federal Reserve District that includes Oregon, up to a maximum rate of 30 percent.

(3) **Interest on Final Payment.** Final payment on the contract price, including retainage, shall be due and owing no later than 30 days after contract completion and acceptance of the work. Late-payment interest on the final payment shall thereafter accrue at the rate of one and one-half percent per month until paid.

(4) **Settlement or Judgment Interest.** In the event of a dispute as to compensation due a contractor for work performed, upon settlement or judgment in favor of the contractor, interest on the amount of the settlement or judgment shall be added to, and not made part of, the settlement or judgment. This interest, at the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District that includes Oregon, shall accrue from the later of the progress payment due date, or thirty days after the contractor submitted a claim for payment to the county in writing or otherwise in accordance with the contract requirements.

40-0850 Final Inspection

(1) **Notification of Completion; Inspection.** The contractor shall notify the county in writing when the contractor considers the contract work completed. Within 15 days of receiving contractor's notice, the county 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 county finds that all work required under the contract has been completed satisfactorily, the county shall acknowledge acceptance of the work in writing.

40-0860 Public Works Contracts

(1) **Generally.** ORS 279C.800 to 279C.870 regulate 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) County 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).

(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 state prevailing rate of wage and if applicable, the federal prevailing rate of wage, as required by ORS 279C.830(1)(a):

- (i) Physically contained within or attached to hard copies of procurement specifications,
- (ii) Included by a statement incorporating the applicable wage rate publication into the specifications by reference, in compliance with OAR 839-025-0020; or,
- (iii) When the rates are available electronically or by internet access, the rates may be incorporated into the specifications by referring to the rates and providing adequate information on how to access them in compliance with OAR 839-025-0020.(b). If both state and federal prevailing rates of wage apply, a requirement that the contractor shall pay the higher of the applicable state or federal prevailing rate of wage to all workers. See BOLI rules at OAR 839-035-0020 and 0035.

(4) **County Requirements.**

(a) The county is responsible to pay a fee not less than \$250 nor more than \$7,500 regardless of the contract price to BOLI on the prescribed form, as set forth in ORS 279C.830(2) and administrative Rule of the BOLI commissioner. (OAR 839-025-0200) This fee shall be paid on all public works contracts, including all projects subject to prevailing wage rates when the county acts as the general contractor.

(b) The county shall submit the required Notice of Public Works Form, WH-81, to the Prevailing Wage Rate Unit of BOLI within 30 days of date public improvement contract is awarded as set forth in ORS 279C.835.

40-0870 Specifications; Brand Name Products

(1) **Generally.** The county 's solicitation document shall not expressly or implicitly require any product by brand name or mark, nor shall it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279C.345(2).

(2) **Equivalentents.** The county may identify products by brand names as long as the following language: "approved equal"; "or equal"; "approved equivalent" or "equivalent," or similar language is included in the solicitation document. The County shall determine, in its sole discretion, whether an offeror's alternate product is "equal" or "equivalent."

40-0880 Records Maintenance; Right to Audit Records

(1) **Records Maintenance; Access.** Contractors and subcontractors shall maintain all fiscal records relating to contracts in accordance with generally accepted accounting principles (GAAP). In addition, contractors and subcontractors shall maintain all other records necessary to clearly document (i) its performance; and (ii) any claims arising from or relating to its performance under a public contract. Contractors and subcontractors shall make all records pertaining to its performance and any claims under a contract (the books, fiscal records and all other records, hereafter referred to as "Records") accessible to the county at reasonable times and places, whether or not litigation has been filed as to such claims.

(2) **Inspection and Audit.** The county may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the records of any person that has submitted cost or pricing data according to the terms of a contract to the

extent that the records relate to such cost or pricing data. If the person must provide cost or pricing data under a contract, the person shall maintain such records that relate to the cost or pricing data for 3 years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

(3) **Records Inspection; Contract Audit.** The county, and its authorized representatives, shall be entitled to inspect, examine, copy, and audit any contractor's or subcontractor's records, as provided in subsection (1) of this Rule. The contractor and subcontractor shall maintain the records and keep the records accessible and available at reasonable times and places for a minimum period of three (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.

40-0890 County Payment for Unpaid Labor or Supplies

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

(2) **Contract Completed.** If the contract has been completed and all funds disbursed to the prime contractor, all claims shall be referred to the contractor's surety for resolution. The county shall not make payments to subcontractors or suppliers for work already paid for by the county.

40-0900 Contract Suspension; Termination Procedures

(1) **Suspension of Work.** In the event the county suspends performance of work for any reason considered by the county to be in the public interest other than a labor dispute, the contractor shall be entitled to a reasonable extension of contract time, and to reasonable compensation for all costs, including a reasonable allowance for related overhead, incurred by the contractor as a result of the suspension.

(2) Termination of Contract by Mutual Agreement for Reasons Other than Default.

(a) Reasons for termination. The parties may agree to terminate the contract or a divisible portion thereof if:

(A) The county 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 subsection (2), the county shall pay the contractor a reasonable amount of compensation for preparatory work completed, and for costs and expenses arising out of termination. The county shall also pay for all work completed, based on the contract price. Unless the work completed is subject to unit or itemized pricing under the contract, payment shall be calculated based on percent of contract completed. No claim for loss of anticipated profits will be allowed.

(3) **Public Interest Termination by County.** The county may include in its contracts terms detailing the circumstances under which the contractor shall be entitled to

compensation as a matter of right in the event the county unilaterally terminates the contract for any reason considered by the county to be in the public interest.

(4) **Responsibility for Completed Work.** Termination of the contract or a divisible portion thereof pursuant to this Rule shall not relieve either the contractor or its surety of liability for claims arising out of the work performed.

(5) **Remedies Cumulative.** The county 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.

40-0910 Changes to the Work and Contract Amendments

(1) **Definitions for Rule.** As used in this Rule:

(a) **Amendment:** 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 county and the contractor.

(b) **Changes to the Work:** A mutually agreed upon change order, or a construction change directive or other written order issued by the county or its authorized representatives to the contractor requiring a change in the work within the general scope of a public improvement contract and issued under its changes provisions in administering the contract and, if applicable, adjusting the contract price or contract time for the changed work.

(2) **Change Provisions.** Changes to the work are anticipated in construction and, accordingly, the county shall include changes provisions in all public improvement contracts that detail the scope of the changes clause, provide pricing mechanisms, authorize the county 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 its issuance by the county.

(3) **Change Order Authority.** The county may amend a contract made under this section as follows:

(a) Up to an aggregate contract price increase of 25% over the original contract amount when the county's contracts officer or designee determines that a price increase is warranted for additional reasonably related work and the CAO or DCAO approves the increase; or

(b) Up to an aggregate contract price increase greater than 25% over the original contract amount when the county's contracts officer or designee determines that a price increase is warranted for additional reasonably related work and the Board or designee approves the increase.

(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.

SECTION 50 Other

General Exemptions and Class Special Procurements

50-0010 - General Exemptions

- (1) The following contracts are exempt from the competitive process:
- (a) Contracts made with other public agencies or with the federal government. (ORS 279A.025(2)(a))
 - (b) Contracts made with qualified rehabilitation facilities (QRF) per ORS 279A.025(4);
 - (c) Contracts for goods or services if the value of the contract is less than \$10,000. ORS 279C.335(1)(c); or less than \$30,000 for personal service contracts;
 - (d) A public improvement contract that is less than \$100,000, made under procedures for competitive quotes pursuant to 40-0160 of these rules.
 - (e) Sole source contracts;
 - (f) Acquisitions or disposals of real property or interest in real property per ORS 279A.025(2)(f);
 - (g) Contracts for professional or expert witnesses or consultants to provide services or testimony relating to existing or potential litigation or legal matters in which a public body may be interested per ORS 279A.025(2)(e); and
 - (h) Grants.

50-0015 Memberships and Professional Associations

(1) Authorization. The county and selected individuals within the county may join professional associations and organizations when such membership will enhance professionalism, encourage networking with other professionals, or otherwise provide access to valuable and necessary information to accomplish their jobs or maintain their professional standing while employed with the county. (2) Process and Criteria. Annually, the county shall state in the Procurement File the subsection of the Rule which authorizes the Procurement. The county shall identify in the procurement file the specific business need and/or professional certification requirements that will be met through membership in the organization or association.

50-0020 A&E Services Consultants for Public Works Department and Business Services Facilities

(1) The Public Works Department and Business Services Facilities may enter into a contract by direct appointment with an A&E Services consultant for projects if the estimated fee to be paid on the contract is not more than \$100,000. (2) The Public Works Department and Business Services Facilities may use the informal selection procedure described in section 30-0210 to obtain a contract if the estimated fee is expected to be more than \$100,000, but not more than \$200,000.

50-0030 Contracts for Petroleum Products and Crushed Rock

The county may initiate contracts for the purchase of gasoline, diesel fuel, heating oil, lubricants, asphalt and crushed rock, if quotes have been sought from a majority of suppliers in the area and purchase is made from the least expensive source with justification for the purchase being retained for at least three (3) years.

50-0040 Equipment Repair and Overhaul

(1) The county may purchase equipment repair or overhaul, and routine maintenance (i.e. maintenance agreements or warranties) without a competitive process if the purchase meets one of the following conditions:

(2) The service and/or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing; or

(3) The service and/or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source.

(4) If the purchase exceeds \$75,000, the county shall document in the county procurement file the reasons why competitive bids or quotes were deemed to be impractical.

50-0050 Copyrighted Materials

The county may purchase copyrighted materials without a competitive process if there is only one known supplier. The county may specify a copyrighted product. This exemption does not include patented or trademark material.

50-0060 Library System Materials

The county may purchase library circulation materials without a competitive process. The county may purchase subscriptions for periodicals, including journals, magazines, and similar publications, including electronic media without a competitive process.

50-0070 Purchases of Used Personal Property

The county may purchase used personal property for under \$100,000, without a competitive process, if the Finance Department has determined that the direct purchase without a competitive process will result in cost savings. For purchases of used personal property over \$100,000, three competitive quotes shall be obtained. If three quotes are not available, a written record must be made of the attempt to obtain quotes.

50-0080 Advertising Contracts

The county may purchase advertising and legal notices in newspapers and other publications without a competitive process.

50-0090 Election Supplies and Services

The county may purchase printing services and the purchase of ballots, ballot pages, envelopes and other similar products and services without a competitive process.

50-0100 Investment Contracts

The county may enter into contracts for the purpose of investment of public funds or the borrowing of funds without a competitive process.

50-0110 Insurance Contracts

The county may enter into contracts for insurance services and/or coverage without a competitive process.

50-0120 Attorney Contracts

The county may enter into contracts for retaining outside legal counsel without a competitive process.

50-0125 Financial Auditor Contracts

The county may enter into contracts for services to conduct financial audits without a competitive process.

50-0130 Price Regulated Items 279A.025(2)(g)

The county may purchase goods or services without a competitive process when the rate or price is established by federal, state, or other regulatory authority by law or ordinance.

50-0140 Marion County Sheriff's Office Canines

The Marion County Sheriff's Office canines shall be exempted from these rules for the purchase and disposition of personal property.

50-0150 Employee Benefits

The county may enter into contracts for providing employee benefit services including but not limited to medical and dental insurance coverage and retirement savings programs. The procurement method used for employee benefit services will depend on the nature of the benefit services solicited. Employee benefit services are subject to collective bargaining and the programs provided are subject to review by management/employee committees and the Board.

50-0160 Health Provider Contracts

The county may enter into contracts to provide medical services to Marion County clients for public health service, community corrections and juvenile detention programs. Types of medical providers exempt under this provision, include, but are not limited to, doctors, dentists, nurses, psychologists, psychiatrists, etc. The selection process will depend on the nature of the service to be provided and the availability of qualified providers willing to provide the service. The county may purchase third party referred medical services for inmates through a purchase order.

50-0170 Rescinded 2014

50-0180 Oil or Hazardous Material Removal

The county may enter into public contracts without competitive bidding when ordered to cleanup oil or hazardous waste pursuant to the authority granted the Department of Environmental Quality (DEQ) under ORS Chapter 466, especially ORS 466.605 through 466.680 and this order necessitates the prompt establishment and performance of the contract in order to comply with the statutes regarding spill or release of oil or hazardous material that have created an emergency condition. Comprehensive cleanup rules are set forth at OAR 340-122-205 to 340-122-360. In exercising its authority under this exemption the County shall:

- (1) To the extent reasonable under the circumstances, encourage competition by attempting to make informal solicitations or to obtain informal quotes from potential suppliers of goods and services;
- (2) Make written findings describing the circumstances requiring cleanup or a copy of the DEQ order ordering such cleanup;
- (3) Record the measures taken under subsection (1) to encourage competition, the amount of the quotes or proposals obtained, if any, and the reason for selecting the contractor awarded the contract.
- (4) The county shall not contract pursuant to this exemption in the absence of an order from the DEQ to cleanup a site with a time limitation that would not permit hiring a contractor under the usual competitive procedures outlined in these rules.

50-0190 Food Procurements

The county may purchase food and household commodities annually for Marion County clients. Types of Marion County client services exempt under this provision, include, but are not limited to, residential services, respite and Tuberculosis treatment, etc. The food selection process will depend on the location of the client.

Contract Review Procedures

50-0200 County Contract Review and Feasibility Determination/Cost Analysis

(1) **Generally.** Contracts shall be completed, executed and approved, as required by these rules before any contractor or provider shall provide materials or services to the county.

(2) **Responsibility.**

(a) The county's central services (Finance Department, Legal Counsel, Deputy Chief Administrative Officer, Chief Administrative Officer and the Board of Commissioners) are responsible for the review of all contracts, subcontracts, agreements, grants, leases, amendments and other documents reflecting county commitments.

(b) The Finance Department will have the responsibility for assisting with the development and administering the review of these documents. The Finance Department will be:

(A) Able to provide assistance to departments in the development of contracts.

(B) The document custodian throughout the document review process.

(C) The central depository for copies of all contracts and will be responsible for helping the public to obtain copies.

(c)The Board may direct Legal Counsel to prepare contracts and documents outside the contract review process for unique and specialized matters.

(3) **Procedures.**

(a) All departments will contact the Finance Department for review and processing of all referenced documents in subsection (2)(a) above.

(A) Review. The Finance Department will review all contracts and will coordinate the contract review process for all documents with Risk Management, Legal Counsel, CAO, DCAO and the Board, as appropriate. Any questions or problem resolution will be coordinated through the Finance Department.

(i) Contracts with a value of more than \$25,000 will require Legal Counsel review as to form.

(ii) Contracts not using and/or meeting standard county indemnification language or requiring additional insurance requirements will require Legal Counsel review.

(iii) Contracts not using and/or meeting standard county insurance requirements or requiring additional insurance requirements will require Risk Management review.

Qualified Rehabilitation Program (QRF)

50-0300 QRF Program

(1) Definitions

(a) **Department:** The Oregon Department of Administrative Services.

(b) **Direct Labor:** All work required for preparation, processing and packing, but not supervision, administration, inspection and shipping.

(c) **Disabled Individual:** An individual who, because of the nature of disabilities, is not able to participate fully in competitive employment, and for whom specialized employment opportunities must be provided.

(d) **Public Agency or Public Contracting Agency:** The same meaning contained in ORS 279.011.

(e) **Qualified Nonprofit Agency for Disabled Individual:** A nonprofit activity center or rehabilitation facility:

(A) Organized under the laws of the United States or of this state and operated in the interest of disabled individuals, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;

(B) That complies with any applicable occupational health and safety standard required by the laws of the United States or of this state; and

(C) That in the manufacture of products and in the provision of services, whether or not the products or services are procured under ORS 279.835 to 279.855 and ORS 279A.025, during the fiscal year employs disabled individuals for not less than 75 percent of the work hours of direct labor required for the manufacture or provision of the products or services.

(2) Policy. The purpose of these rules is to encourage and assist disabled individuals to achieve maximum personal independence through useful and productive gainful employment by assuring an expanded and constant market for sheltered workshop and activity center products and services, thereby enhancing its dignity and capacity for self-support and minimizing its dependence on welfare and need for costly institutionalization.

(3) It is the responsibility of the State of Oregon Department of Administrative Services (DAS) to

(a) Determine the price of all products manufactured and all services offered for sale to the public agencies by a qualified nonprofit agency for disabled individuals.

(b) Establish and publish a list of sources and potential sources of products produced by any qualified nonprofit agency for disabled individuals.

(4) If the county intends to procure any product or service on the procurement list prepared by DAS, the county will procure such product or service, at the price established by DAS, from a qualified nonprofit agency for disabled individuals provided the product or service is of the appropriate specifications and is available within in the period required by the county. In determining whether a service is of the appropriate specifications, the county may consider qualifications, education, experience, training, service product, references and any other relevant factor. Procedures for procuring goods and services through the state set-aside QRF program can be obtained from the county's Finance Department.

50-0400 Use of County Procurement Cards

The Finance Department is delegated the responsibility of administering the county's procurement card program and will establish procedures and guidelines for this program.

50-0500 Surplus Personal Property Disposition

(1) All personal property owned by the county and identified as surplus property shall be turned over to the Business Services Department. The Business Services Department shall reassign the personal property to other county departments, lease or store the property, use the property as a trade for the purchase or acquisition of other personal property, or declare the property to be surplus to the county needs.

(a) If the property is declared surplus, Business Services Department shall arrange for the pickup and disposition of the property.

(b) If the property is to be used as a trade for purchase or acquisition of other personal property, the department must make a written request to the Chief Financial Officer for authorization to do so prior to the purchase or acquisition of new equipment.

(2) Any personal property held by the Sheriff's Office as a result of alleged criminal activities shall be disposed of in accordance with subsection (1) or state law.

(3) No county employee directly responsible for the storage, sale or disposition of surplus shall obtain or authorize purchase of said property unless specifically authorized by the Board.

(4) Surplus of county vehicles will be done in accordance to procedures established by Finance and Public Works Departments under the county fleet program.

50-0600 Leasing Real Property

General Provisions. In the event the county does not have adequate space for performing the essential county services, leasing of additional real property will be done according to procedures and guidelines established and coordinated by the Marion County Finance Department.

50-0700 False Claims Act – Prohibiting Medicaid Fraud, Waste and Abuse

The county will ensure that all contracts entered into with contractors, subcontractors and/or agents providing Medicaid health care goods or services shall include language provisions certifying compliance if subject to Section 6032, Deficit Reduction Act 2005.

50-0800 Health Insurance Portability and Accountability Act

The county shall ensure that all contracts subject to the Health Insurance Portability and Accountability Act (HIPAA) of 1996, 42 USC 1320d -1320d-8, PL 104-191, sec. 262 & sec. 264, as it may be amended from time to time, contain appropriate contract provisions to meet HIPAA requirements.