# Comparison of Solicitation Methods (Goods and Services)

Pursuant to ORS 279B.050, contracting agencies may choose whether to solicit competitive sealed bids using an invitation to bid (“ITB”) under ORS 279B.055, or to solicit competitive sealed proposals using a request for proposals (“RFP) under ORS 279B.060. In both cases, the ITB or RFP spells out the requirements of the bid or proposal. However, whereas ultimately the ITB seeks to obtain the best price, the RFP seeks to obtain the best value, considering all criteria, one of which may be price. Ultimately, if the RFP process is used, the contract will be awarded to the proposer who makes the offer “most advantageous” to the contracting agency.

Note: It is important to remember that the process described above applies to procurements of goods and services, *not* public improvement contracts. The process for obtaining public improvements must follow the provisions of ORS 279C.

|  |  |
| --- | --- |
| **Competitive Sealed Bidding** | **Competitive Sealed Proposals** |
| **Contents of Solicitation Document** | |
| A contracting agency may solicit and award a public contract for goods and services. The request must include: | A contracting agency issues an RFP, which must include: |
| (a) Specify a time and date by which the sealed bids/proposals must be received, and a place at which the bids/proposals must be submitted. The contracting agency, in the contracting agency's sole discretion, may receive bids/proposals by electronic means, or direct or permit a bidder to submit bids/proposals by electronic means;  (b) Specify the name and title of the person designated to receive bids/proposals and the person the contracting agency designates as the contact person for the procurement, if different;  (c) Describe the procurement. In the description, the contracting agency shall identify the scope of work included within the procurement, outline the contractor's anticipated duties and set expectations for the contractor's performance. Unless the contracting agency for good cause specifies otherwise, the scope of work shall require the contractor to meet the highest standards prevalent in the industry or business that most closely involved in providing the appropriate goods and services;  (d) Specify a time, date and place for prequalification applications, if any, to be filed and the classes of work, if any, for which bidders must be prequalified in accordance with ORS 279B.120;  (e) State that the contracting agency may cancel the procurement or reject any or all bids/proposals in accordance with ORS 279B.100;  (f) State that “Contractors must use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document” if a state contracting agency issues the invitation to bid.  (g) Require the contractor or subcontractor to possess an asbestos abatement license, if required under ORS 468A.710; and  (h) Include all contractual terms and conditions applicable to the procurement. The contract terms and conditions shall specify clear consequences for a contractor's failure to perform the scope of work identified in the invitation to bid or the contractor's failure to meet established performance standards. The consequences may include, but are not limited to:    A. Reducing or withholding payment;    B. Requiring the contractor to perform, at the contractor's expense, additional work necessary to perform the identified scope of work or meet the established performance standards; or  C. Declaring a default, terminating the public contract and seeking damages and other relief available under the terms of the public contract or other applicable law. | |

|  |  |
| --- | --- |
|  | The request for proposals also may:  (A) Identify contractual terms or conditions that the contracting agency reserves for negotiation;  (B) Request that proposers propose contractual terms and conditions that relate to the identified subject matter;  (C) Contain or incorporate the form and content of the contract that the contracting agency will accept, or suggest contract terms and conditions that nevertheless may be the subject of negotiations with proposers;  (D) Announce the method the contracting agency will use to select the contractor, which may include, but is not limited to, negotiating with the highest ranked pro-poser, competitive negotiations, a multiple-tiered competition that is designed to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or a combination of methods, as authorized or prescribed by rules adopted under ORS 279A.065; and  (E) Describe the manner in which the contracting agency evaluate proposals identifying the relative importance of price and other factors the contracting agency will use to evaluate and rate the proposals in the first tier of competition. If the contracting agency uses more than one tier of competitive evaluation, the request for proposals must describe the process the contracting agency will use to evaluate pro-posals in the subsequent tiers. |

|  |  |
| --- | --- |
| **Bid Security** | |
| The contracting agency may require bid security if the contracting agency determines that bid security is reasonably necessary or prudent to protect the interests of the contracting agency.  The contracting agency must return the bid security to all bidders upon the execution of the contract.  The contracting agency must retain the bid security if a bidder who is awarded a contract fails to promptly and properly execute the contract. For purposes of this paragraph, prompt and proper execution of the contract includes all action by a bidder that is necessary to form a contract in accordance with the invitation to bid, including posting per-formance security and submitting proof of insurance when the invitation to bid requires the submission. | The contracting agency may require proposal security in any form the contracting agency deems prudent. Proposal security must serve the same function with respect to requests for proposals as bid security serves with respect to invitations to bid under ORS 279B.055.  The contracting agency must return the proposal security to all proposers upon the execution of the contract.  The contracting agency must retain the proposal security if a proposer who is awarded a contract fails to promptly and properly execute the contract. For purposes of this paragraph, prompt and proper execution of the contract includes all action by a proposer that is necessary to form a contract in accordance with the request for proposals, including posting performance security and submitting proof of insurance when the request for proposals requires the submission. If contract negotiations or competitive negotiations are conducted, the failure, prior to award, of a contracting agency and a proposer to reach agreement does not constitute grounds for retaining proposal security. |

|  |  |
| --- | --- |
| **Advertisement** | |
| The contracting agency’s public contracting rules must prescribe the requirements for providing public notice of solicitations. Unless otherwise specified in the rules, the contracting agency must give public notice at least 7 days before the solicitation closing date.  Invitations to bid must be made available to prospective bidders.  A public notice must be published at least once in at least one newspaper of general circulation in the area where the contract is to be performed.    A local contract review board may, by rule or order, authorize public notice of bids or proposals to be published electronically instead of in a newspaper of general circulation if the board determines that electronically providing public notice of bids or proposals is likely to be cost-effective.  In addition, the contracting agency may use any other medium reasonably calculated to reach prospective bidders or proposers.  Rules adopted under 279A.065 must prescribe the requirements for providing public notice of solicitations.  Unless otherwise specified in rules adopted under ORS 279A.065, the contracting agency shall give public notice at least seven days before the solicitation closing date.  **Bid or Proposal Opening** | |
| The contracting agency must open bids publicly at the time, date and place designated in the invitation to bid. When authorized by, and in accordance with, rules adopted under ORS 279A.065, bids may be submitted, received and opened through electronic means.  The contracting agency shall record the amount of a bid, the name of the bidder and other relevant information specified by rule adopted under ORS 279A.065. The record must be open to public inspection.  Notwithstanding a requirement to make bids open to public inspection after the contracting agency issues of notice of intent to award a contract, a contracting agency 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 a bid. | Notwithstanding ORS 192.410 to 192.505, proposals may be opened in a manner to avoid disclosing contents to competing proposers during, when applicable, the process of negotiation, but the contracting agency must record and make available the identity of all proposers as part of the contracting agency’s public records after the proposals are opened.  Notwithstanding ORS 192.410 to 192.505, proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued. The fact that proposals are opened at a meeting, as defined in ORS 192.610, does not make the contents of the proposals subject to disclosure, regardless of whether the public body opening the proposals fails to give notice of or provide for an executive session for the purpose of opening proposals.  Notwithstanding a requirement to make proposals open to public inspection after the contracting agency issues notice of intent to award a contract, a contracting agency may withhold from disclosure to the public materials included in a proposal that are exempt or conditionally exempt from disclosure under ORS 192.501 or 192.502.  If an RFP is canceled under ORS 279B.100 after proposals are received or if a proposal is rejected, the contracting agency may return a proposal to the proposer that made the proposal. The contracting agency must keep a list of returned proposals in the file for the solicitation.  As provided in the request for proposals or in written addenda, the contracting agency may conduct site tours, demonstrations, individual or group discussions and other informational activities with proposers before or after the opening of proposals for the purpose of clarification to ensure full understanding of, and responsiveness to, the solicitation requirements or to consider and respond to requests for modifications of the proposal requirements. The contracting agency must use procedures designed to accord proposers fair and equal treatment with respect to any opportunity for discussion and revision of proposals. |

|  |  |  |
| --- | --- | --- |
| **Bid or Proposal Evaluation** | | |
| The contracting agency must evaluate all bids that are received before the time and date indicated for bid opening in the invitation to bid, based on the requirements set forth in the invitation to bid.  The requirements may include, in addition to the information described earlier in this section, criteria to determine minimum acceptability, such as inspection, testing, quality and suitability for intended use or purpose. Criteria that will affect the bid price and will be considered in evaluation for award including, but not limited to, discounts, transportation costs and total costs of ownership or operation of a product over the life of the product must be objectively measurable.  The invitation to bid must set forth the evaluation criteria to be used. No criteria may be used in a bid evaluation that are not set forth in the invitation to bid or in a qualified products list maintained under ORS 279B.115.  The contracting agency may not consider for award bids received after the time and date indicated for bid opening in the invitation to bid. The contracting agency may retain bids or copies of bids received after the bid time and date indicated in the invitation to bid.  The contracting agency must, for the purpose of evaluating bids, apply any applicable preference described in ORS 279A.120, 279A.125 or 282.210. | For purposes of evaluation, when provided for in the request for proposals, the contracting agency may employ methods of contractor selection that include, but are not limited to:   * An award or awards based solely on the ranking of proposals; * Discussions leading to best and final offers, in which the contracting agency may not disclose private discussions leading to best and final offers; * Discussions leading to best and final offers, in which the contracting agency may not disclose information derived from proposals submitted by competing proposers; * Serial negotiations, beginning with the highest ranked proposer; * Competitive simultaneous negotiations; * Multiple-tiered competition designed to identify, at each level, a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers; * A multi-step request for proposals requesting the submission of unpriced technical submittals, and then later issuing an RFP limited to the proposers whose technical submittals the contracting agency had determined to be qualified under the criteria set forth in the initial request for proposals; or * Any combination of methods described in this subsection, as authorized or prescribed by rules adopted under ORS 279A.065. | |
| **Mistakes, Modifications** | | |
| Adopted rules must provide for and regulate the correction and withdrawal of bids before and after bid opening and the cancellation of awards or contracts based on bid mistakes.  After bid opening, changes in bids prejudicial to the interests of the public or fair competition are not permitted. A contracting agency that permits a bidder to correct or withdraw a bid or that cancels an award or a contract based on bid mistakes, must support the decision with a written determination by the contracting agency that states the reasons for the action taken. | Revisions of proposals may be permitted after the submission of proposals and before award for the purpose of obtaining best offers or best and final offers.  After the opening of proposals, a contracting agency may issue or electronically post an addendum to the request for proposals that modifies the criteria, rating process and procedure for any tier of competition before the start of the tier to which the addendum applies. The contracting agency must send an addendum that is issued by a method other than electronic posting to all proposers who are eligible to compete under the addendum. The contracting agency must issue or post the addendum at least five days before the start of the subject tier of competition or as the contracting agency otherwise determines is adequate to allow eligible proposers to prepare for the competition in accordance with rules adopted under ORS 279A.065. | |
| **Cancellation of Solicitation** | | |
| The cancellation of the solicitation and the rejection of bids or proposals must be in accordance with ORS 279B.100, which provides that any solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part, when the cancellation or rejection is in the best interest of the contracting agency as determined by the contracting agency. The reasons for the cancellation or rejection must be made part of the solicitation file. A contracting agency is not liable to any bidder or proposer for any loss or expense caused by or resulting from the cancellation or rejection of a solicitation, bid, proposal or award.  Any solicitation or procurement described in a solicitation may be delayed or suspended when the delay or suspension is in the best interest of the contracting agency as determined by the contracting agency. The contracting agency must make the reasons for the delay or suspension part of the solicitation file. A contracting agency is not liable to any bidder or proposer for any loss or expense caused by or resulting from the delay or suspension of a solicitation, bid, proposal or award. | | |
| **Notice to Bidders and Proposers; Contract Award** | | |
| The contracting agency must, in accordance with ORS 279B.135, issue to each bidder or must post, electronically or otherwise, a notice of intent to award.  If a contracting agency awards a contract the contracting agency shall award the contract:   * To the lowest responsible bidder whose bid substantially complies with the requirements and criteria set forth in the invitation to bid and with all prescribed public procurement procedures and requirements; or * If the invitation to bid specifies or authorizes the award of multiple contracts, to the responsible bidders: * Whose bids substantially comply with the requirements and criteria set forth in the invitation to bid and with all pre-scribed public procurement procedures and requirements; and * Who qualifies for the award of a public contract under the terms of the invitation to bid.   The successful bidder must promptly execute a contract. The successful bidder’s duty to promptly execute a contract includes the duty to take all action that is necessary to form a contract in accordance with the invitation to bid, including posting performance security and submitting proof of insurance when the invitation to bid requires the submission and agreeing to perform the scope of work and meet the performance standards set forth in the invitation to bid. | | In the request for proposals, the contracting agency must describe the methods by which the agency will make the results of each tier of competitive evaluation available to the proposers who competed in the tier. The contracting agency must include a description of the manner in which the proposers who are eliminated from further competition may protest or otherwise object to the contracting agency’s decision.  The contracting agency must issue or electronically post the notice of intent to award described in ORS 279B.135 to each proposer who was evaluated in the final competitive tier.  If the contracting agency awards a contract, the contracting agency must award the contract to the responsible proposer whose proposal the contracting agency determines in writing to be the most advantageous to the contracting agency based on the evaluation process and evaluation factors described in the request for proposals, any applicable preferences described in ORS 279A.120 and 279A.125 and, when applicable, the outcome of any negotiations authorized by the request for proposals. Other factors may not be used in the evaluation. When the request for proposals specifies or authorizes awarding multiple public contracts, the contracting agency must award public contracts to the responsible proposers who qualify for the award of a contract under the terms of the request for proposals. |