

## **CONTRACTING (Chapter 3)**

---

### **TABLE OF CONTENTS**

---

Introduction .....	20
Defining "Public Contract" .....	20
Laws, Rules, And Requirements.....	21
Decision-Making Authority .....	23
Competitive Bidding Requirements; Exemptions.....	24
Formal Bidding Processes .....	27
Personal Services Contracts.....	30
Public Improvement Contracts (Construction).....	31
Prequalification Of Products Or Bidders.....	35
Debarment Or Disqualification Of Bidders .....	36
Contract Documents .....	37
Contract Preferences .....	38
Disposal Of Surplus Property .....	40
Protests And Disputes.....	40
Legal Remedies .....	40

## INTRODUCTION

As public agencies, special districts in Oregon are required to comply with public contracting laws for construction projects and when purchasing goods and services. Public contracting laws are intended to promote fair competition for public contracts; prioritize transparency in expenditures of public funds; take advantage of market conditions and innovations; and make sure public agencies get the best quality they can at the best price.

The information in this chapter pertains to the public contracting laws of the State of Oregon. Expenditures of federal funds may require compliance with federal contracting laws and procedures, which are not addressed here.

**This chapter is designed to present an overview of the laws as they pertain to special districts, and to provide basic guidance for satisfying legal requirements. It does not describe all legal requirements for all circumstances. It should not be used as a substitute for assistance of qualified legal counsel or, when appropriate, assistance from experienced construction professionals.**

## DEFINING "PUBLIC CONTRACT"

Every expenditure of public funds is a public contract (whether or not there is a written agreement), so unless the law provides otherwise, some kind of process will be required for the expenditure.

Exceptions from the Public Contracting Code. According to the Public Contracting Code, the following types of common contracts are not "public contracts," so the Code does not apply:

- Employee compensation
- Intergovernmental agreements (ORS chapter 190)
- Contracts for the purchase and sale of real estate (ORS chapter 271)
- Contracts where no funds of the public agency are used
- Grants (meaning the grant process itself; *expenditures* of grant funds are public contracts)
- Energy-saving performance contracts (see ORS 279A.010(1)(g))
- Contracts relating to the incurring of debt or investment of public funds
- Contracts for employee benefit plans
- Purchases through federal purchasing programs, provided the agency's local rules authorize such purchases
- Contracts with qualified nonprofit agencies providing employment opportunities for disabled individuals. ORS 279A.025(l)(4) requires a local contracting agency to check the list of qualified products maintained by the Department of Administrative Services before procuring any product or service. If the product or service needed is listed, and if

it is of the appropriate specifications and is available when needed, the contracting agency must obtain the product or service from the qualified non-profit agency. The purchase may not be competitively bid.

- Contracts for professional or expert witnesses in litigation
- Sole-source expenditures when rates are set by law for purposes of source selection

Although no competitive bidding processes are required for the types of contracts listed above, other statutes or rules may apply. Districts should obtain legal counsel or other appropriate professional guidance before entering into these contracts.

Contracts Subject to the Code. Contracts not specifically excluded from the Public Contracting Code will take one of three forms:

1. Personal Services (also called Professional Services): Contracts with professionals hired for their knowledge, expertise, training, or other unique qualifications, to provide services of a specialized nature to the district. Typical examples are engineers, architects, attorneys, accountants, surveyors, auditors, consultants, and instructors.
2. Procurements. Contracts for purchases of goods, and of services that are not Personal Services. Examples include bookkeeping, janitorial services, and grounds maintenance.
3. Public Improvements. Contracts for construction, reconstruction, remodeling, and painting of real property, performed by or for a public agency.

The district's first step is to determine the type of contract that is being considered. Once the planned expenditure is categorized, the laws and rules specific to that type of contract will direct the process to be followed in awarding the contract.

### **LAWS, RULES, AND REQUIREMENTS**

Laws. Oregon's Public Contracting Code (ORS 279A, 279B, and 279C) contains the primary statutes that govern public contracting procedures. The Code requires all public bodies to procure public contracts through a competitive process unless a specific exception or exemption applies.

The Public Contracting Code is divided into the following three chapters, which align with the contract categories described in Section 1:

- **ORS 279A. General Provisions.** Applies to all public contracts. Includes, among other things, the requirement to adopt Local Rules, and that the Local Rules govern the agency's processes for awarding personal services contracts.

- **ORS 279B. Public Procurement.** Applies to the purchase of goods, and routine services that are not personal services, including repairs, maintenance, and minor renovations to real estate (“Procurements”).
- **ORS 279C. Public Improvements.** Applies to contracts for construction, reconstruction, or major renovation of real property by or for a public agency. Also applies to contracts for construction-related services such as architectural, engineering, photogrammetric mapping, transportation planning or land surveying and related services.

Contracting Rules. The Public Contracting Code requires each public agency to adopt contracting rules ("Local Rules" or "Local Contracting Rules") that spell out the criteria and procedures that will be used to carry out public contracting requirements. The rules must meet the threshold requirements of the Public Contracting Code, but otherwise may be tailored to the needs of the local agency.

The Local Rules govern the agency's internal processes; they do not apply directly to vendors, contractors, or potential contractors. [Those requirements will be communicated in the solicitation for competitive bids and proposals, which is discussed in Section \_\_\_ of this chapter.] Because they are an internal policy of the District, Local Contracting Rules should be adopted by resolution of the board of directors and should likewise be amended by resolution.

Carefully drafted and properly adopted Local Rules can give the public agency helpful flexibility with its contracting processes, particularly in the procurement of goods and services. For example, local contracting agencies can and should adopt rules that address the following:

- Definition of “personal services” and procedures for granting personal services contracts;
- Delegation of authority for decision-making in the award of public contracts;
- Procedures for awarding contracts in an emergency, including defining "emergency";
- Procedures for disposal of surplus property.

The Oregon Attorney General has established Model Public Contracting Rules ("Model Rules") that apply to purchases by state agencies and departments. Because the Public Contracting Code requires every contracting agency to have contracting rules, the Model Rules will apply by default to any public entity that has not adopted its own Local Rules. Local governments may expressly decline to adopt the Model Rules and adopt different rules, or adopt some combination of the Model Rules and their own rules, provided all of the rules are consistent with Oregon law and are formally adopted by the board. Whether a contracting agency adopts the Model Rules affirmatively or adopts its own rules, it must review any changes to statutes or the Model Rules to determine if the Local Rules likewise need to be updated or modified.

The Model Rules can be found in Oregon Administrative Rules (OAR) chapter 137. Like the Public Contracting Code, the Model Rules are divided based on the type of contract:

- **Division 46. General Provisions.** Applies to all public contracts.
- **Division 47. Public Procurements for Goods and Services.** Applies to contracts for purchases of goods, and for services that are not personal services.
- **Division 48. Consultant Selection: Architectural, Engineering and Land Surveying and Related Services Contracts.** Applies to the selection of construction-related professional services.
- **Division 49. General Provisions Related to Public Contracts for Construction Services.** Applies to contracts for construction, including reconstruction, remodeling, and painting of public buildings.

The Model Rules can be reviewed for free on-line at <https://secure.sos.state.or.us/oard/displayChapterRules.action>. A hard copy of the Oregon Attorney General's Public Contracting Manual (2010), which includes the Public Contracting Code, the Model Rules, and case law summaries, may be purchased for \$65 at *All Forms, Manuals & Reports - Oregon Department of Justice (state.or.us)*.

#### **DECISION-MAKING AUTHORITY**

Local Contract Review Board. Every local contracting agency must establish a Local Contract Review Board ("LCRB"), which has certain specific authorities under the Public Contracting Code that cannot be delegated elsewhere, including:

- Granting exemptions from competitive bidding;
- Granting waivers from bonding requirements;
- Holding hearings on exemptions, when necessary; and
- Hearing and deciding appeals of disqualified bidders.

ORS 279A.060 provides that unless the governing body of a local contracting agency takes formal action to authorize a different LCRB, the governing body (i.e., the board of directors) is the LCRB for the District. Thus, in nearly every case the board of directors and the LCRB are the same people, who when exercising LCRB duties are wearing their "LCRB hat." The LCRB may act within a regularly scheduled board meeting; no special meeting or agenda is required to exercise these duties. The meeting minutes should reflect, however, that the board is "acting as the Local Contract Review Board" when it performs these duties.

Board of Directors. Only the governing body of the District (i.e., the board) is authorized to enter into legally binding agreements unless it formally delegates some of this authority. Therefore, all public contracts of the district must either be approved by the board, or the board must make a clear delegation of authority to enter into these contracts.

Delegation. Unlike the duties specifically given to the LCRB, which cannot be delegated elsewhere, ORS 279A.075 authorizes the board of directors to delegate certain administrative contracting responsibilities to someone else, such as a district manager or purchasing officer. If the board chooses to delegate some of its contracting authority, the nature and scope of the delegation should be clearly spelled out in the Local Rules. For example, "The District Manager may solicit and approve contracts for personal services not to exceed \$10,000 without further approval from the board of directors. Personal services contracts exceeding this amount must be approved by the board." A well-crafted delegation rule gives clear guidance to staff about the limits of their authority, which helps to protect both the board and the staff member from legal exposure for improper spending. The rules also should state who, other than the board, is authorized to approve contracts in an emergency (see "Emergency Contracts" in the next section).

### **COMPETITIVE BIDDING REQUIREMENTS; EXEMPTIONS**

Unless a specific exception from the Public Contracting Code exists (see Section 1, above), or unless exempted from competitive bidding as provided in the applicable statute (see later discussion), public contracts must be awarded using a competitive, sealed bidding or proposal process (collectively referred to as "the solicitation"), with the contract awarded to the lowest responsive, responsible bidder.

A "responsive" bid or proposal substantially complies with the requirements spelled out in the solicitation. A "responsible" bidder or proposer has met all legal requirements to do the work; has not been disqualified from bidding; and has demonstrated the ability and the capacity to do the work. Bidders or proposers who are not responsive and responsible must be disqualified.

The Public Contracting Code specifically allows the following contracts to be awarded without competitive bidding:

- Contracts for Personal Services. Direct award (no competitive process required) is allowed for personal services contracts, provided the contracting agency's adopted Local Rules allow for this. (See Section 6.)
- Emergency Contracts. Emergency contracts for any reason, provided the emergency is documented in writing either before or as soon as possible after the emergency, and the process for awarding emergency contracts that is set forth in the Local Rules has been followed. The public agency is required to encourage competition as much as possible under the circumstances.
- Small Procurements.
  - For procurements of goods and routine services that are not personal services, the contract value will not exceed \$10,000

- For public improvements, the contract value will not exceed \$5,000

The contract may be awarded in any way that is practical and convenient for the contracting agency.

- Intermediate Procurements (Informal Bids Required). Bids, quotes, or proposals have been sought from at least three qualified contractors (if less than three can be found, document efforts made to find them), and the contract:
  - For procurements, will not exceed \$150,000. The contract is awarded to the bidder or proposer whose bid or proposal is "most advantageous" to the contracting agency, whether or not it is the lowest bid.
  - For public improvements, will not exceed \$100,000. The contract is awarded to the bidder or proposer "whose quote will best serve the interests of the contracting agency, taking into account price as well as any other applicable factors such as, but not limited to, experience, specific expertise, availability, project understanding, contractor capacity and responsibility." If an award is not made to the contractor offering the lowest price, the contracting agency must make a written record of the basis for award.

Requests for informal bids or quotes should be made in writing so that all bidders receive the same specifications. All bids or quotes should also be submitted in writing so that the district has the required written record of the bids received.

- LCRB Exemption. Any contract or class of contracts, if the Local Contract Review Board has followed the required procedures for declaring an exemption from bidding.
  - For procurements, see ORS 279.085, "Special Procurements"
  - For public improvements, see ORS 279C.335(2), "Exemptions"

Written findings are required to be made, and in some cases a public hearing is required. Refer to the statute or applicable Model Rules for specific requirements.

- Sole-Source Contract. When proper findings have been made to declare a sole source contract.
  - For procurements, see ORS 279B.075
  - For construction specifications, see ORS 279C.345
- Alternative Construction Methods. For construction projects when an alternative contracting process, such as Design-Build or Construction Manager/General Contractor

(CM/GC) will be used, and requirements for declaring an exemption in ORS 279C.335, 279C.337, and applicable administrative rules have been met.

- Transfers of Fire Protection Equipment. Whether the equipment is sold or given at no cost, transfers of fire protection equipment between regularly organized fire departments may be made without competitive bidding provided:
  - The recipient department makes a written request for the fire protection equipment to the transferor department;
  - The equipment is surplus to or unusable by the transferor;
  - The total fair market value of the equipment does not exceed \$50,000 per calendar year; and
  - The transferor holds a public hearing, with hearing notice published in at least one trade newspaper of general statewide circulation a minimum of 14 days before the hearing, and finds that the public contract is in the public’s interest.
- "In-House" Projects. The contracting agency may use its own qualified personnel to perform needed construction work, provided the following requirements are met:
  - If the cost of the work exceeds \$5,000, the district must adopt and apply a cost accounting system that complies with the model cost accounting guidelines developed by the Oregon Department of Administrative Services.
  - If the project is estimated to cost more than \$125,000, the district must demonstrate that doing the work itself is the least costly alternative, by preparing adequate plans and specifications and the estimated unit cost for each classification of work. The estimated cost must include a reasonable allowance for the cost, including investment cost, of any equipment used. "Adequate" plans and specifications are those “sufficient to control the performance of the work and to assure satisfactory quality of construction by the public district personnel.”
  - The district must keep an accurate account of the costs of performing the work, including all engineering and administration expenses and costs, including investment costs, and make proper reports to the Bureau of Labor and Industries (BOLI).
- Purchasing Through the State of Oregon. Districts may purchase certain supplies and equipment through the State Department of Administrative Services without going through the bidding process. The Department of Administrative Services is authorized to acquire, warehouse and distribute surplus property to all eligible governmental units



and certain nonprofit organizations. To obtain information contact the Department of Administrative Services, (503) 378-4642; *State of Oregon: Department of Administrative Services - Home*.

- Cooperative Procurements ("Piggybacking"). Contracting agencies may participate in cooperative procurements whereby at least one of the participating agencies conducts required bidding processes and enters into a contract for the product or service, and other public agencies can procure the product or service on the same terms as conditions stated in the contract without going through a separate competitive bidding process. Cooperative procurements may be "joint" procurements (all participants are identified so the contract applies only to them) or "permissive" procurements (all participants are not identified so other unnamed parties may use it). Interstate cooperative procurements are also authorized between public entities in Oregon and those from other states. Specific requirements for each process are spelled out in ORS 279A.200 to 279A.225.

### **FORMAL BIDDING PROCESSES**

If no exemption or exception applies to the contract, formal competitive bidding procedures must be followed for procurements in excess of \$150,000, and for public improvements in excess of \$100,000. They also can be used for smaller projects, or anytime competitive bidding is not required, if the contracting agency chooses.

In summary, formal bidding procedures include:

- Advertising the solicitation (invitation to bid or request for proposals);
- Preparing and issuing the solicitation to interested bidders or proposers in the manner required by the Code;
- Holding hearings if required by statute;
- Publicly opening bids or proposals;
- Scoring and evaluating submitted bids or proposals;
- Issuing a notice of intent to award the contract;
- Procuring performance and payment bonds from the successful bidder or proposer, if required or advisable; and
- Issuing the contract.

Formal bidding procedures, particularly for public improvements, require strict adherence to statutory requirements and should be undertaken only with professional guidance, such as from a project manager, architect, or engineer experienced with similar projects. Solicitation documents, including the proposed contract documents, should be reviewed by a knowledgeable attorney before they are issued.

Advertisements. Advertisements for bids or proposals must be published at least once in a newspaper of general circulation in the area where the contract is to be performed. The LCRB may, by rule or order, authorize advertisements for public improvement contracts to be

published electronically instead of in a newspaper of general circulation, if the LCRB determines that doing so is likely to be cost-effective. The LCRB also may require an advertisement to be published more than once or in one or more additional publications.

If the contract is for a public improvement with an estimated cost in excess of \$125,000, the advertisement must also be published in a trade journal or newspaper of statewide circulation, such as the *Daily Journal of Commerce*.

At minimum, all advertisements must contain the following information:

- A description of the project or service;
- For public improvements, the office where the specifications for the work may be reviewed.
- If the contract requires prequalification of bidders, a date by which all prequalification applications must be filed and the class or classes of work for which bidders must be prequalified.
- The date and time by which all bids must be received in order to be eligible for the contract. For public improvements, the date and time must not be set less than five (5) days from the date the advertisement is published. For procurements, the solicitation deadline must be at least seven (7) days from the date of advertisement. In either case, the advertisement may permit bidders to submit bids by electronic means.
- The name and title of the person who is to receive the bids.
- The date, time and place that the district will publicly open the bids.
- If the contract is for a public works project, a statement that it is subject to ORS 279C.800 to 279C.870 or the Davis Bacon Act (40 U.S.C. 3141 et. seq.) [prevailing wage laws].

#### Solicitation Documents.

- Procurements. The contracting agency may choose whether to use an invitation to bid ("ITB") or a request for proposals ("RFP") (ORS 279B.060). Specific requirements for each are provided in ORS 279B.055 and ORS 279B.060, respectively.

As a general rule, ITBs are easiest and most efficient when the item to be procured is not particularly unique, and price will be paramount in making the award decision. RFPs may be more useful when something other than price is important to the procurement of the good or service, such as unique qualifications and experience of the proposer, or

when the approach to providing the good or service can vary and the contracting agency is open to creative solutions. The solicitation document should clearly spell out the criteria on which bids or proposals will be evaluated, and the basis for the award.

- Public Improvements. The solicitation document for a public improvement contract must, at minimum, include the following:
  - A description of the project.
  - The office where the specifications for the work, material or things may be reviewed.
  - If the contract requires prequalification of bidders, the date when all prequalification applications must be filed and the class or classes of work for which bidders must be pre-qualified.
  - The date and time by which all bids must be received in order to be eligible for the project. The date and time must not be set less than five days from the date the advertisement is published.
  - The name and title of the person who is to receive the bids.
  - The date, time and place that the district will publicly open the bids.
  - A statement that if the contract is for a public works project subject to ORS 279C.800 to 279C.850 (state prevailing wage requirements) or federal prevailing wage rates under the Davis Bacon Act (40 U.S.C. 3141 et. seq.), no bid will be received or considered unless the bid contains a statement by the bidder that it will comply with these laws.
  - A statement that each bid must identify whether the bidder is a resident bidder, as defined in ORS 279A.120.
  - A statement that the public contracting agency may reject any bid not in compliance with all public bidding procedures and requirements and may reject for good cause any or all bids upon a finding that it is in the public interest to do so.
  - Information addressing whether a contractor or subcontractor must be licensed under ORS 468A.720 (asbestos removal).
  - A statement that no bid for a construction contract shall be received or considered by the public contracting district unless the bidder is registered with the

Construction Contractors Board or licensed by the State Landscape Contractors Board as required by ORS 671.530.

- Bid or proposal security requirements. For public improvement contracts of \$100,000 or more, bid bonds, payment bonds, and performance bonds all are required unless waived by the board.
- The method by which the district will provide addenda to the Solicitation Document.
- For a public improvement contract of \$100,000 or more, a requirement that the bidder or proposer disclose its first-tier subcontractors who will be furnishing labor, or labor and materials, in connection with the contract and whose contract value is equal to or greater than 5 percent of the total project bid, or \$15,000, whichever is larger; or \$350,000, regardless of the percentage of the total bid. When this requirement applies, the solicitation must designate a deadline for submission of bids on a Tuesday, Wednesday, or Thursday between 2 p.m. and 5 p.m. The subcontractor disclosure must include the name of each subcontractor, the category of work that each subcontractor will perform and the dollar value of each subcontract.

**Bid Opening.** All bids or proposals must comply with all requirements of the solicitation, and also must be:

- In writing.
- Filed with the person designated by the district to receive the bids.
- Opened publicly by the contracting agency at the specific time designated in the advertisement for the bid.
- Filed for public inspection after they have been opened.
- For public improvement contracts, include a surety bond, cashier's check, or certified check for bid security unless the contract has been exempted from the requirement. Bid security may not exceed 10 percent of the amount bid for the contract.

### **PERSONAL SERVICES CONTRACTS**

The Attorney General's Model Public Contracting Rules for personal services contracts expressly do not apply to local contracting agencies. Thus, there are no "default" rules for personal services contracts. Without rules that say otherwise, a local government entity must competitively bid all personal services contracts, regardless of the size of the contract.

Special districts can give themselves lots of latitude for awarding personal services contracts by creating and following specific rules in their Local Contracting Rules for evaluating and awarding these types of contracts. ORS 279A.055 allows local governments to include in their Local Rules a definition of "personal services" that will apply to that entity. This definition should include the standard professions of architect, engineer, attorney, accountant, auditor, etc., but also can

include other professions that commonly provide assistance to that particular type of district, such as consultants, trainers, and artists.

The Local Rules must include criteria for evaluating, screening, and selecting individuals or firms that provide these services, and describe the procedures the district will follow to award the contract. With the exception of construction-related professional services (see below), these procedures can include awarding the contract directly (without competition) to a selected contractor who meets the criteria described in the Rules.

Construction-Related Professional Services; QBS. The ability to award a contract for personal services directly is limited by statute for certain types of construction-related personal services: Architects, engineers, surveyors, and photogrammetrists (aerial surveying and mapping) and "related services" as defined in the statute. The part of the Public Contracting Code that governs construction contracts (ORS chapter 279C) permits contracts of this kind to be awarded according to the local agency's Local Rules, including by direct appointment (no bidding). However, ORS 279C.110 sets out specific criteria that must be considered when awarding these types of contracts and requires a competitive process (no direct appointment) if the amount of the contract is expected to exceed \$100,000. For these larger contracts, the agency must apply a qualification-based-selection (QBS) process described in ORS 279C.110 that considers qualifications first and negotiate price only after the most qualified candidate or candidates has/have been selected. ORS 279C.110 also lists certain requirements that must be included in the request for proposals. Districts anticipating entering into large contracts of this nature should carefully review these requirements before soliciting proposals and obtain legal review if appropriate.

### **PUBLIC IMPROVEMENT CONTRACTS (CONSTRUCTION)**

Construction projects for public entities are subject to a long list of legal requirements, from preliminary filings with state agencies, to requirements that must be included in the solicitation documents, to specific bidding procedures that must be followed, to requirements that must be included in the contract itself.

These requirements increase with the size of the contract, such as \$50,000 (prevailing wages apply), \$100,000 (formal bidding required, including bid security, performance bonds, and payment bonds). The larger and more complex the project, the more important it is for districts to enlist the help of qualified professionals (architects, engineers, project managers, construction managers, attorneys) early in the process to ensure the process proceeds smoothly and with minimal exposure to liability and legal challenges.

Definitions. A public improvement is "a project for construction, reconstruction or major renovation on real property by or for a contracting agency." Public improvements do not include contracts for emergency work, minor alterations, or ordinary repair and maintenance needed to preserve the public improvement, which are awarded in the manner used to contract for Procurements pursuant to ORS chapter 279B.

The definition of "public improvement" also specifically excludes projects for which no funds of a contracting agency are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspections are excluded. This addresses situations when the public entity is offered or receives a donation of construction services, when a project is being entirely funded by a private source, such as under a public-private partnership agreement.

Public improvement contracts costing \$50,000 or more are "public works" under the Public Contracting Code, meaning that payment of prevailing wages is required.

Prevailing Wages. For public works of \$50,000 or more, the prevailing wage rate must be paid by all contractors and subcontractors. Oregon's prevailing wages laws are addressed in ORS 279C.800 through 279C.870, and are enforced by the Oregon Bureau of Labor and Industries (BOLI).

"Public works" includes, but is not limited to:

- Roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting which is carried on or contracted for by a public agency to serve the public interest;
- A project for the construction, reconstruction, major renovation or painting of a privately- owned road, highway, building structure or improvement of any type that uses funds of a private entity and \$750,000 or more funds of a public agency; or
- A project for the construction of a privately-owned road, highway, building structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.

Complying with prevailing wage requirements is the responsibility of the contractor or subcontractor. The contracting agency's responsibilities under the prevailing wage laws are:

- Include this requirement in both the solicitation document and the ensuing contract
- Cite the applicable rates (year, region) in the solicitation
- Incorporate the applicable rates into the contract, either by incorporating an electronic link or attaching a hard copy of the rates to the contract

- If both state and federal prevailing wage rates must be included in the bid specifications, include information showing which prevailing wage rate is higher for workers in each trade or occupation in each locality. [ORS 279C.815(2)(a)]
- Notify BOLI – on forms provided by BOLI – within 30 days of awarding a contract subject to prevailing wage. Include subcontractor disclosure forms.
- While the contract is being performed, receive and review certified payroll reports to verify prevailing wages are being paid

BOLI Filings. On an annual basis, districts must prepare and file with the Commissioner of the Bureau of Labor and Industries (BOLI) a list of every public improvement that the district plans to fund in the upcoming budget year. For each project, the district must indicate whether it intends to do the work itself or hire a private contractor.

If the district intends to do its own work on a project estimated to cost over \$125,000, it must show that the decision to perform the construction using district personnel and equipment is the least cost to the district.

The information must be filed at least 30 days prior to adoption of the district’s budget and should include a description of the improvement and an estimate of the total on-site construction costs.

Current law requires that the contracting agency also notify BOLI when it has awarded a public works contracts, and at the time of notification pay a fee to BOLI to cover the costs of surveys, administration, and education relating to prevailing wage laws. The fee is 0.1% of each contract, with a minimum of \$250 and a maximum of \$7,500.

Filings should be made with the Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon Street #1045, Portland, Oregon 97232. Forms for providing this information (WH-118 and WH-119) can be found in the back of every PWR rate book and on BOLI’s website at [www.oregon.gov/BOLI](http://www.oregon.gov/BOLI). ORS 279C.305; OAR 839-025-0008

Rejection of Bids. The solicitation document should state that the district may reject any bid not in compliance with all public bidding procedures and requirements. The district also may reject all bids for good cause if it makes written findings showing that it is in the public interest to do so. If all of the bids are rejected and the contract is not abandoned, the district may call for new bids.

Negotiation With Lowest Bidder. As a general rule, the district may not negotiate with the low bidder in a public improvement contract. However, according to ORS 279C.340, if all bids exceed the district’s estimate of what the contract will cost, the district may, according to its adopted rules, negotiate with the lowest responsive, responsible bidder prior to awarding the

contract in order to attempt to bring the price within the district's estimate, provided the negotiation does not result in a significant change in the scope of work. Bidder records used in negotiating the contract are not subject to public inspection until after the contract has been awarded or the negotiation process terminated.

#### Performance and Payment Bonds.

- Performance Bonds. Performance bonds provide recourse to get the job done if the contractor fails or is unable to do so under the contract. Performance bonds are required for public improvement contracts of \$100,000 or more unless specifically waived by the contracting agency. They can be required for other contracts at the agency's discretion when it may be advisable to do so, such as for purchases of a substantial size.
- Payment Bonds. Payment bonds also are required for public improvement contracts of \$100,000 or more unless specifically waived. Payment bonds ensure that all laborers and suppliers under a contract are paid if the contractor fails to do so. In the absence of a payment bond, those who supplied or performed work on a public contract may bring a claim against the district for unpaid compensation.

Each performance bond and each payment bond must be executed solely by a surety company or companies holding a certificate of authority to transact surety business in Oregon. The performance and payment bonds must be payable to the contracting agency or to the public agency or agencies for whose benefit the contract was awarded and be in a form approved by the contracting agency.

Performance and payment bonds may be excused in cases of an emergency, or when the interest or property of the contracting agency would suffer material injury or delay or other cause. A declaration of the emergency must be made in accordance with ORS 279A.065.

A local contract review board can exempt certain contracts or classes of contracts from all or a portion of the requirement that good and sufficient bonds be furnished to ensure performance of the contract and payment of obligations incurred in the performance of the contract.

RFPs/Competitive Proposals. When authorized or required by an exemption granted under ORS 279C.335 after proper findings, a contracting agency may award a public improvement contract by competitive proposals instead of by traditional invitation to bid. A contract awarded under this section may be amended only in accordance with rules adopted by the contracting agency in accordance with ORS 279A.065.

With limited exceptions, competitive proposals are not subject to the following requirements of competitive bidding that might otherwise apply:



- First-tier subcontractor disclosure under ORS 279C.370; and
- Reciprocal preference under ORS 279A.120.

If the RFP allows, a contracting agency may award the contract to the responsible proposer whose proposal “is determined in writing to be the most advantageous to the contracting agency based on the evaluation factors set forth in the request for proposals and, when applicable, the outcome of any negotiations authorized by the request for proposals.” Price does not have to be determinative, but the RFP should describe how pricing will be evaluated.

When provided for in the RFP, the contracting agency may employ methods of contractor selection including, but not limited to, award based solely on the ranking of proposals, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition 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 any combination of methods, as authorized or prescribed in the Local Rules.

Notwithstanding the public records law, proposals may be opened so as to avoid disclosure of contents to competing proposers during, when applicable, the process of negotiation. Proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued.

At least seven (7) days before the award of a public contract, unless the contracting agency determines that seven days is impractical under rules adopted under ORS 279A.065, the contracting agency must issue to each proposer or post, electronically or otherwise, a notice of intent to award.

### **PREQUALIFICATION OF PRODUCTS OR BIDDERS**

Qualified Products List. A contracting agency may develop and maintain a qualified products list when it is necessary or desirable to test or examine goods before initiating a procurement.

In developing a qualified products list, the agency must first comply with ORS 279B.055(4) by giving public notice of the opportunity for potential suppliers to submit goods for testing and examination to determine their acceptability for inclusion on the list. The contracting agency may send a written solicitation to representative groups of potential contractors, sellers or suppliers, inviting them to submit goods for testing and examination, but a potential supplier may offer goods or services for consideration even if not invited to do so.

Inclusion of goods on a qualified products list must be based on the results of tests or examinations. Notwithstanding public records rules, a contracting agency may make the test or examination results public in a manner that protects the identity of the potential contractor, seller or supplier, and may keep confidential trade secrets, test data and similar information provided if requested in writing to do so by the potential contractor, seller or supplier.

The qualified products list is used to define products that are acceptable for the district's intended use. A comparable process is available to prequalify contractors, even if they sell or supply the goods on the qualified products list.

Prequalifying Bidders. Districts have the option of prequalifying all bidders for a particular contract or type of contract. For procurement of goods and routine services, ORS 279B.120 provides that the method of submitting prequalification applications, information required in order to be prequalified, and the forms to be used for submitting prequalification information, are determined by the contracting agency or otherwise prescribed by rules adopted by the LCRB. For public improvements, 279C.430 permits the contracting agency to adopt a rule or ordinance requiring prequalification for construction projects, and the statute describes the procedures that must be followed.

If the contracting agency denies prequalification, or revokes prequalification from a vendor or supplier who was previously prequalified, the applicant must be notified in writing as provided in the applicable statute and notified of the right to a hearing on the denial. Appeals of the denial decision are made to the LCRB, according to hearing procedures spelled out in ORS 279B.425 (for procurements) and ORS 279C.450 (for public improvements).

#### **DEBARMENT OR DISQUALIFICATION OF BIDDERS**

After providing the bidder with written notice and a reasonable opportunity to be heard, a district may disqualify a bidder from bidding on district contracts for a period of up to three years, for any of the following reasons:

- Conviction of a criminal offense in obtaining or attempting to obtain or perform a public or private contract or subcontract.
- Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously, and directly affects the prospective bidder's or proposer's responsibility as a contractor.
- Conviction under state or federal anti-trust statutes.
- Violation of a contract provision, and debarment for such violation was listed in the contract terms and conditions as a potential penalty. A violation may include but is not limited to a failure to perform the terms of a contract or an unsatisfactory performance, provided the failure is not caused by acts beyond the control of the contractor.
- The prospective bidder or proposer does not carry workers' compensation or unemployment insurance as required by law.

Disqualification decisions must be in writing and mailed or otherwise furnished to the disqualified person and must state the reasons for disqualification and inform the bidder of their right to appeal. The disqualified person has three business days after receipt of the disqualification submit a written request for appeal to the district. Upon receipt of the notice, the district must immediately notify the LCRB, which conducts the appeal hearing. The hearing procedure is spelled out in ORS 279B.425 (for procurements) and 279C.450 (for public improvements).

### **CONTRACT DOCUMENTS**

A public contract is generally assumed to incorporate the terms of the solicitation and the winning bid or proposal, so careful drafting of the solicitation document is nearly as important as the contract itself. Some of the basic requirements for a formal solicitation are discussed in Section 5, Formal Bidding Process.

Once the winning contractor is selected, he or she should always be required to sign a written contract before any work begins. In most cases the district should provide its own contract document, but if opts to use one provided by the contractor, the district should obtain legal review to make sure the agreement is fair and includes necessary protections for the district.

Districts are strongly discouraged from preparing their own contracts, or from borrowing and recycling contracts from other agencies, without the help of knowledgeable advisors. Public contracts, particularly significant construction projects, are not interchangeable, and are subject to a variety of laws and requirements that increase in complexity with the size of the contract. For example, the Public Contracting Code requires certain clauses to be included in certain public contracts, such as:

#### For procurements:

- **279B.045.** Contractor warranty and covenant concerning tax law compliance.
- **279B.220.** Conditions concerning payment, contributions, liens, withholding.
- **279B.225.** Condition concerning salvaging, recycling, composting or mulching yard waste material.
- **279B.230.** Condition concerning payment for medical care and providing workers' compensation.
- **279B.235.** Condition concerning hours of labor; compliance with pay equity provisions; employee discussions of rate of pay or benefits.

#### For construction contracts:

- **279C.505.** Conditions concerning payment, contributions, liens, withholding, drug testing.
- **279C.510.** Demolition contracts to require material salvage; lawn and landscape maintenance contracts to require composting or mulching.
- **279C.515.** Conditions concerning payment of claims by public officers, payment to persons furnishing labor or materials and complaints.

- **279C.520.** Condition concerning hours of labor; compliance with pay equity provisions; employee discussions of rate of pay or benefits.
- **279C.525.** Provisions concerning environmental and natural resources laws; remedies.
- **279C.527.** Inclusion of amount for green energy technology or woody biomass energy technology in public improvement contract; written determination of appropriateness; conditions, exemptions and limitations; rules.
- **279C.528.** State Department of Energy requirements and specifications; record keeping requirements; rules.
- **279C.530.** Condition concerning payment for medical care and providing workers' compensation.
- **279C.533.** Condition concerning employment of apprentices to perform percentage of work hours that workers in apprenticeable occupations perform on public improvements.
- **279C.537.** Condition concerning use of diesel engines in motor vehicles used in performing certain public improvement contracts; rules.
- **279C.830.** Provisions concerning prevailing rate of wage in specifications, contracts and subcontracts; applicability of prevailing wage; bond.

## **CONTRACT PREFERENCES**

The Public Contracting Code states certain preferences that contracting agencies either may or must grant when awarding public contracts.

- Preference for Oregon goods and services; Resident Bidder (ORS 279A.120). A “resident bidder” is a bidder that does business in Oregon – i.e., has paid unemployment taxes or income taxes in Oregon during the 12 calendar months immediately preceding submission of the bid and has a business address in Oregon. Bidders who do not meet these criteria are “non-resident bidders.”

All things being equal—including price, fitness, availability and quality—districts must “prefer” goods that have been manufactured or produced in Oregon, or services that are performed by a resident bidder. This is done by adding to the non-resident bidder’s bid a percentage equal to the preference, if any, given to the bidder in the state where the bidder resides.

When contracts in excess of \$10,000 are awarded to a non-resident bidder, the contractor is required to report the total contract price, terms of payment, length of the contract and any other information required by the Oregon Department of Revenue. Districts must be satisfied that this requirement has been met before they issue a final payment on a contract. This can be done by requesting a copy of the required notice.

For public improvement contracts, bid documents must require bidders to state whether they are resident bidders, and indicate the percentage amount that a bid will be increased for non-resident bidders.

Each year the Oregon State Department of Administrative Services publishes a list of states that give preference to in-state bidders, with the percent increase applied in each state. The contracting agency that relies on this document in its bidding process cannot be held liable to any bidder when determining the lowest responsible bidder.

- Preference for recycled materials (ORS 279A.125). When procuring goods, a contracting agency must give preference to goods manufactured from recycled materials if:
  - (a) The recycled product is available;
  - (b) The recycled product meets applicable standards;
  - (c) The recycled product can be substituted for a comparable nonrecycled product;and
  - (d) The recycled product's costs do not exceed the costs of nonrecycled products by more than five percent, or a higher percentage if a written determination is made by the contracting agency.
  
- Preference for goods fabricated or processed, or services performed, within Oregon (ORS 279A.128). When purchasing services, including personal services, a contracting agency may give preference to procuring goods that are fabricated or processed, or services that are performed, entirely within Oregon if the goods or services cost not more than 10 percent more than goods fabricated or processed, or services performed, not entirely within Oregon. If more than one bidder or proposer qualifies for the preference described in this subsection, the contracting agency may give a further preference to a qualifying bidder or proposer that resides in or is headquartered in Oregon.

The board of directors may set a percentage higher than 10 percent if it makes a written determination that there is good cause to set the higher percentage, and explains its reasons. This preference does not apply, however, to emergency work, minor alterations, ordinary repairs or maintenance work for public improvements or to other construction contracts described in ORS 279C.320(1).

- Preference for exceeding Buy America requirements for transit projects; rules (ORS 279A.130). A contracting agency that receives and uses federal funds for a transit project may give preference to a bidder or proposer that exceeds federal Buy America requirements that apply to federally funded transit projects.
  
- Subcontracting to Emerging Small Businesses or Businesses Owned or Controlled by Disabled Veterans. A contracting agency may require a contractor to subcontract some part of a contract to, or to obtain materials to be used in performing the contract from,

a business enterprise that is certified under ORS 200.055 as an emerging small business or a business enterprise that is owned or controlled by a disabled veteran, as defined in ORS 408.225.

### **DISPOSAL OF SURPLUS PROPERTY**

"Surplus property" is anything (other than real estate, which is disposed of according to ORS chapter 271) that the contracting agency no longer needs and wants to dispose of. Because publicly owned property belongs to the public, the Public Contracting Code directs how local agencies may dispose of it.

The Model Public Contracting Rules do not address disposition of surplus property, so no rule will apply by default if a contracting agency does not adopt its own rules. If no rules are adopted, the contracting agency has no authority to dispose of surplus property except through the bidding processes provided by statute.

Under ORS 279A.185, local contracting agencies may dispose of surplus property in accordance with their Local Rules. These may include donating the property; throwing it away; or selling it in any way the rules allow. For items with substantial value, the district should consider whether to require an appraisal of the item's value before selling it. The Local Rules also should state whether board approval of the disposal will be required, and when.

### **PROTESTS AND DISPUTES**

A protest regarding the procurement process, the contents of solicitation documents or the award or proposed award of any original contract must first be directed to the administering contracting agency. The protest must be in accordance with the provisions of ORS 279B.400 to 279B.425.

A protest regarding the use of a cooperative procurement by a purchasing contracting agency after the execution of an original contract may only be directed to the purchasing contracting agency. The protest must be in accordance with the provisions of ORS 279B.400 to 279B.425 and is limited in scope to the purchasing contracting agency's authority to enter into a cooperative procurement contract.

### **LEGAL REMEDIES**

Legal remedies for violations of public contracting laws are provided in the following statutes. Other remedies may also apply:

- ORS 279A.225. Protests and disputes regarding cooperative procurements
- ORS 279B.400. Judicial review of approvals of special procurements
- ORS 279B.405. Protests and judicial review of solicitations
- ORS 279B.410. Protests of contract award

- ORS 279B.415. Judicial review of protests of contract award
- ORS 279B.420. Judicial review of other violations
- ORS 279B.425. Review of prequalification and debarment decisions (procurements)
- ORS 279C.350. Appeal of exemption decision
- ORS 279C.445. Appeal of disqualification
- ORS 279C.450. Appeal of prequalification decisions (public improvements)
- ORS 279C.460. Suit by or on behalf of adversely affected bidder or proposer
- ORS 279C.465. Action against successful bidder
- ORS 279C.470. Compensation for contractor when contract declared void