

RESOLUTION NO. 2824

A RESOLUTION RELATING TO THE PROCUREMENT OF PUBLIC CONTRACTS, CONTRACTORS' STANDARDS OF CONDUCT, SUPPLIER DIVERSITY, AND SURPLUS PERSONAL PROPERTY

WHEREAS, public contracting in the City of Hillsboro is governed by the Oregon Public Contracting Code (ORS Chapters 279, 279A, 279B, and 279C) and by rules the City has adopted in accordance with Oregon Law; and,

WHEREAS, the City last revised its Public Contracting Rules in 2021, through Ordinance No. 6368; and,

WHEREAS, Ordinance No. 6368 provided the opportunity for the City to adopt revisions to its Public Contracting Rules via Council Resolution in lieu of a City Ordinance; and,

WHEREAS, the City wants to adopt revisions to its Public Contracting Rules to respond to changes the Oregon Legislature has made to the Oregon Public Contracting Code since 2021 and to clarify portions of the City's Public Contracting Rules; and,

WHEREAS, the City is committed to fostering and maintaining a work environment in which all individuals are treated with respect, courtesy, and dignity, and therefore wants to adopt a policy on the standards of conduct for its independent contractors; and,

WHEREAS, the City wants to amend its Supplier Diversity Policy to remove the "Service-Disabled" condition from the "Veteran-Owned Business" certification in accordance with recent changes the Oregon Legislature has made to ORS Chapters 200, 279A, 279C, 285, and other Oregon statutes; and,

WHEREAS, the City also wants to amend its Surplus Personal Property Policy to modernize its property disposition methods and align the policy with current City practices, and,

WHEREAS, the following additional policies are attached to this Resolution for which no changes are sought so as to maintain a comprehensive package of the City's Public Contracting Rules and related policies: the City's Policy Governing Intergovernmental Agreements and the City's Real Property Acquisition and Disposition Policy.

NOW, THEREFORE, THE CITY OF HILLSBORO RESOLVES AS FOLLOWS:

Section 1. The City Council adopts the "City of Hillsboro 2023 Public Contracting Rules" attached as Exhibit A. These rules replace the City of Hillsboro 2021 Public Contracting Rules.

Section 2. The City Council adopts the revised "Supplier Diversity Policy" attached as Exhibit B. This policy replaces the City's 2022 Supplier Diversity Policy previously approved through Resolution No. 2768.

Section 3. The City Council adopts the new “Standards of Conduct for Independent Contractors Policy” attached as Exhibit C.

Section 4. The City Council adopts the revised “Surplus Personal Property Policy” attached as Exhibit D. This policy replaces the City’s 2000 policy of the same name.

Section 5. The City Council hereby delegates to the City Manager the authority to make minor changes of an administrative nature to the policies referenced in Sections 2 – 4 of this Resolution.

Section 6. This Resolution is effective immediately upon adoption.

Approved and adopted by the Hillsboro City Council at a regular meeting held on the 21st day of November 2023.

Steve Callaway, Mayor

ATTEST: _____
Amber Ames, City Recorder

EXHIBIT A TO RESOLUTION 2824
CITY OF HILLSBORO
2023 PUBLIC CONTRACTING RULES

Table of Contents

DIVISION 45..... 1

CITY CONTRACTS GENERALLY 1

 COH-45-0000 Generally 2

 COH-45-0100 Definitions 2

AUTHORITY TO APPROVE AND EXECUTE CITY CONTRACTS 2

 COH-45-0200 Authority to Approve City Contracts; Delegation of Authority to City Manager,
 Department Managers and Individual Employees 2

 COH-45-0210 Intergovernmental Agreements..... 4

 COH-45-0220 Agreements Concerning Real Property 4

ETHICS IN CONTRACTING 4

 COH-45-0300 Policy addressing Ethics in the Solicitation and Award of City Contracts 4

PROCUREMENT FROM QUALIFIED NONPROFIT AGENCIES ("QNA") 4

 COH-45-0405 QNA Definitions..... 4

 COH-45-0410 Required Procurement of QNA Products or Services 4

 COH-45-0450 Vending Facilities on City Property 5

 COH-45-0500 Contract Extensions..... 5

MIXED CONTRACTS 5

 COH-45-0600 Contracts for “Mixed” Services and/or Goods and Services 5

DIVISION 46..... 7

GENERAL RULES APPLYING TO ALL PUBLIC CONTRACTS AND 7

SPECIFIC RULES FOR PERSONAL SERVICES CONTRACTS 7

 COH-46-0000 Generally 8

 COH-46-0100 Application; Federal Law Supremacy 8

 COH-46-0110 Definitions 9

 COH-46-0120 Policy 21

 COH-46-0125 Standards of Conduct for Independent Contractors..... 21

 COH-46-0130 Application of the Code and Rules; Exceptions..... 21

 COH-46-0210 Subcontracting to and Contracting with Emerging Small Businesses; Disqualification23

CONTRACT PREFERENCES 25

 COH-46-0300 Preference for Oregon Goods and Services; Nonresident Bidders 25

 COH-46-0310 Reciprocal Preferences..... 27

2023 City of Hillsboro Public Contracting Rules – Table of Contents

COH-46-0320 Preference for Recycled Materials 27

COH-46-0330 Federally Funded Projects 28

COH-46-0335 Compliance with City and Federal Environmental Policies..... 35

COOPERATIVE PROCUREMENT 36

COH-46-0400 Authority for Cooperative Procurements 36

COH-46-0410 Responsibilities of Administering Contracting Agencies..... 36

COH-46-0420 Joint Cooperative Procurements..... 37

COH-46-0430 Permissive Cooperative Procurements 37

COH-46-0440 Required Public Notice if Permissive Cooperative Procurement is over \$250,000 38

COH-46-0450 Interstate Cooperative Procurements 39

COH-46-0460 Advertisements of Interstate Cooperative Procurements..... 40

COH-46-0470 Protest and Disputes; Cooperative Procurements..... 41

COH-46-0480 Contract Amendments; Cooperative Procurements..... 41

SURPLUS PERSONAL PROPERTY..... 41

COH-46-0490 Disposition of Surplus Personal Property..... 41

PERSONAL SERVICES CONTRACTS 42

COH-46-0500 Personal Services Contract Definition 42

COH-46-0510 Personal Service Contract Formal Selection Procedures 42

COH-46-0520 Personal Service Contract Informal Selection Procedures..... 43

COH-46-0530 Other Approved Solicitation Methods 43

COH-46-0540 Personal Services Contracts: Selection by Negotiation..... 45

COH-46-0545 No Offers Received..... 46

COH-46-0550 Personal Services Contract Requirements 47

COH-46-0560 Contract Amendments 47

COH-46-0600 Independent and Objective Oversight Required 48

DIVISION 47..... 49

CONTRACTS FOR GOODS AND/OR SERVICES OTHER THAN PROFESSIONAL SERVICES 49

COH-47-0000 Generally 50

COH-47-0100 Definitions 50

COH-47-0250 Methods of Source Selection 50

COH-47-0252 Procurement of Service Contracts over \$250,000 51

COH-47-0255 Competitive Sealed Bidding; One-Step Solicitations..... 54

2023 City of Hillsboro Public Contracting Rules – Table of Contents

COH-47-0257 Competitive Sealed Bidding; Multi-Step Solicitations/Multi-Step Sealed Bidding 57

COH-47-0260 Competitive Sealed Proposals; One-Step Solicitations 58

COH-47-0261 Procedures for Competitive Range; Multi-Tiered and Multi-Step Solicitations..... 63

COH-47-0265 Small Procurements 68

COH-47-0270 Intermediate Procurements 68

COH-47-0275 Sole-Source Procurements..... 69

COH-47-0280 Emergency Procurements 69

SPECIAL PROCUREMENTS (CONTRACTING EXEMPTIONS) 70

COH-47-0285 Special Procurements; Purpose and Application 70

COH-47-0287 Special Procurements; Request Procedures 70

COH-47-0288 Approved Class Special Procurements 71

COH-47-0290 Cooperative Procurements 78

PROCUREMENT PROCESS 78

COH-47-0300 Public Notice of Solicitation Documents 78

COH-47-0310 Bids or Proposals are Offers 80

COH-47-0320 Facsimile Bids and Proposals..... 80

COH-47-0330 E-Procurement 82

BID AND PROPOSAL PREPARATION 83

COH-47-0400 Offer Preparation 83

COH-47-0410 Offer Submission 83

COH-47-0420 Pre-Offer Conferences..... 84

COH-47-0430 Addenda to Solicitation Document 84

COH-47-0440 Pre-Closing Modification or Withdrawal of Offers..... 85

COH-47-0450 Receipt, Opening, and Recording of Offers; Confidentiality of Offers 86

COH-47-0455 No Offers Received..... 86

COH-47-0460 Late Offers, Late Withdrawals, and Late Modifications..... 87

COH-47-0470 Mistakes 87

COH-47-0480 Time for City Acceptance 89

COH-47-0490 Extension of Time for Acceptance of Offer 89

QUALIFICATIONS AND DUTIES 89

COH-47-0500 Responsibility of Offerors..... 89

COH-47-0525 Qualified Products Lists 89

2023 City of Hillsboro Public Contracting Rules – Table of Contents

COH-47-0560 Personal Services Contract to Provide Specifications 90

COH-47-0565 Request for Qualifications (RFQ)..... 91

COH-47-0575 Debarment of Prospective Offerors 92

OFFER EVALUATION AND AWARD 93

COH-47-0600 Offer Evaluation and Award 93

COH-47-0610 Notice of Intent to Award 96

COH-47-0620 Documentation of Award 96

COH-47-0630 Availability of Award Decisions 97

COH-47-0640 Rejection of an Offer 97

COH-47-0650 Rejection of All Offers 100

COH-47-0660 Cancellation of a Procurement or Solicitation 100

COH-47-0670 Disposition of Offers if Solicitation Cancelled 101

LEGAL REMEDIES 101

COH-47-0700 Protests and Judicial Review of Special Procurements 101

COH-47-0710 Protests and Judicial Review of Sole-Source Procurements 102

COH-47-0720 Protests and Judicial Review of Multi-Tiered and Multi-Step Solicitations 102

COH-47-0730 Protests and Judicial Review of Solicitations 103

COH-47-0740 Protests and Judicial Review of Contract Award..... 104

COH-47-0745 Protests and Judicial Review of Qualified Products List Decisions..... 105

COH-47-0750 Judicial Review of Other Violations 106

COH-47-0760 Review of Prequalification and Debarment Decisions 106

COH-47-0800 Amendments to Goods or Services Contracts and Price Agreements 107

DIVISION 48..... 109

CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING, 109

PHOTOGRAMMETRIC MAPPING, TRANSPORTATION PLANNING OR LAND 109

SURVEYING SERVICES AND RELATED SERVICES CONTRACTS..... 109

COH-48-0100 Application 110

COH-48-0110 Definitions 110

COH-48-0120 List of Interested Consultants; Performance Record 112

COH-48-0130 Applicable Selection Procedures 112

SELECTION PROCEDURES 117

COH-48-0200 Direct Appointment Procedure 117

2023 City of Hillsboro Public Contracting Rules – Table of Contents

COH-48-0210 Informal Selection Procedure 119

COH-48-0220 Formal Selection Procedure 124

COH-48-0230 Ties Among Proposers..... 134

COH-48-0240 Protest Procedures..... 134

COH-48-0250 Solicitation Cancellation, Delay, or Suspension; 136

COH-48-0270 Price Agreements 136

POST-SELECTION CONSIDERATIONS 137

 COH-48-0300 Prohibited Payment Methodology; Purchase Restrictions 137

 COH-48-0310 Expired or Terminated Contracts; Reinstatement 138

 COH-48-0320 Contract Amendments 139

DIVISION 49..... 140

CONSTRUCTION AND PUBLIC IMPROVEMENT 140

 COH-49-0100 Application 141

 COH-49-0110 Policies..... 141

 COH-49-0120 Definitions 141

 COH-49-0130 Competitive Bidding Requirement..... 141

 COH-49-0140 Contracts for Construction Other Than Public Improvements; Emergency
Construction Contracts 142

 COH-49-0145 Exemptions From Competitive Bidding..... 142

 COH-49-0150 Emergency Contracts; Bidding and Bonding Exemptions 144

 COH-49-0160 Intermediate Procurements; Competitive Quotes and Amendments..... 145

FORMAL PROCUREMENT RULES 145

 COH-49-0200 Solicitation Documents; Required Provisions; Assignment or Transfer..... 145

 COH-49-0210 Notice and Advertising Requirements; Posting 149

 COH-49-0220 Prequalification of Offerors..... 150

 COH-49-0230 Eligibility to Bid or Propose; Registration or License 152

 COH-49-0240 Pre-Offer Conferences..... 152

 COH-49-0250 Addenda to Solicitation Documents 153

 COH-49-0260 Request for Clarification or Change; Solicitation Protests..... 153

 COH-49-0270 Cancellation of Solicitation Document..... 155

 COH-49-0280 Offer Submissions..... 155

 COH-49-0290 Bid or Proposal Security 157

2023 City of Hillsboro Public Contracting Rules – Table of Contents

COH-49-0300 Electronic Bids and Proposals 157

COH-49-0310 Electronic Procurement 159

COH-49-0320 Pre-Closing Modification or Withdrawal of Offers..... 159

COH-49-0330 Receipt, Opening, and Recording of Offers; Confidentiality of Offers..... 160

COH-49-0340 Late Bids, Late Withdrawals, and Late Modifications 160

COH-49-0350 Mistakes 160

COH-49-0360 First-Tier Subcontractors; Disclosure and Substitution; ITB 162

COH-49-0370 Disqualification of Persons 164

COH-49-0380 Bid or Proposal Evaluation Criteria 167

COH-49-0390 Offer Evaluation and Award; Determination of Responsibility 167

COH-49-0395 Notice of Intent to Award 169

COH-49-0400 Documentation of Award; Availability of Award Decisions 170

COH-49-0410 Time for City Acceptance; Extension..... 171

COH-49-0420 Negotiation With Bidders Prohibited 171

COH-49-0430 Negotiation When Bids Exceed Cost Estimate 171

COH-49-0440 Rejection of Offers 173

COH-49-0450 Protest of Contractor Selection, Contract Award 175

COH-49-0460 Performance and Payment Security; Maintenance Bond; Waiver 177

COH-49-0470 Substitute Contractor 178

COH-49-0490 Foreign Contractor 178

ALTERNATIVE CONTRACTING METHODS 178

COH-49-0600 Alternative Contracting Methods; Purpose 178

COH-49-0610 Definitions for Alternative Contracting Methods 179

COH-49-0620 Use of Alternative Contracting Methods 181

COH-49-0630 Findings, Notice, and Hearing 182

COH-49-0640 Competitive Proposals; Procedure..... 184

COH-49-0645 Requests for Qualifications ("RFQ") 186

COH-49-0650 Requests for Proposals ("RFP") 186

COH-49-0660 RFP Pricing Mechanisms..... 191

COH-49-0670 Design-Build Contracts 192

COH-49-0680 Energy Savings Performance Contracts 194

COH-49-0690 Construction Manager/General Contractor ("CM/GC")..... 197

2023 City of Hillsboro Public Contracting Rules – Table of Contents

CONTRACT PROVISIONS 197

COH-49-0800 Required Contract Clauses 197

COH-49-0810 Waiver of Delay Damages against Public Policy..... 197

COH-49-0815 BOLI Public Works Bond 197

COH-49-0820 Retainage..... 197

COH-49-0830 Contractor Progress Payments..... 200

COH-49-0840 Interest 200

COH-49-0850 Final Inspection 201

COH-49-0860 Public Works Contracts 201

COH-49-0870 Specifications; Brand Name Products 202

COH-49-0880 Records Maintenance; Right to Audit Records 203

COH-49-0890 City Payment for Unpaid Labor or Supplies 203

COH-49-0900 Contract Suspension; Termination Procedures 203

CONTRACT AMENDMENTS AND CHANGE ORDERS 204

COH-49-0910 Public Improvement Contract Amendments and Changes to the Work 204

DIVISION 45

CITY CONTRACTS GENERALLY

COH-45-0000 Generally

Except as may be expressly provided herein or in other City of Hillsboro ordinances and policies, COH Divisions 45, 46, 47, 48, and 49 (collectively, the “City of Hillsboro’s Public Contracting Rules” or “Rules”) govern all City Contracts. These Division 45 Rules address delegation of contracting authority under ORS 279A.075 and Procurement from Qualified Nonprofit Agencies. Divisions 46, 47, 48, and 49 govern Public Contracts as defined in ORS Chapters 279A, 279B, and 279C (the “Oregon Public Contracting Code” or “Public Contracting Code”).

These Rules apply to Public Contracts as of November 22, 2023.

COH-45-0100 Definitions

As used in the Public Contracting Code and Divisions 45, 46, 47, 48, and 49 of these Rules.

- (1) **“City Contract”** means all Contracts entered into by the City, including Public Contracts subject to the Public Contracting Code and Divisions 46, 47, 48, and 49 and all other Contracts or agreements entered into by the City. For the purpose of these Public Contracting Rules, “City Contract” does not include:
 - (a) Settlements of lawsuits or other claims against the City.
 - (b) Collective bargaining agreements.
 - (c) Agreements with other governmental bodies. These agreements are governed by the City’s “Policy Governing Intergovernmental Agreements.”
 - (d) Agreements related to the purchase, conveyance, acceptance, sale, or lease of real property or an interest in real property. Real property acquisitions and dispositions are governed by the City’s “Real Property Acquisition and Disposition Policy.”
- (2) **“City”** means the City of Hillsboro and the Utilities Commission (UC). “City” also means the Barney Reservoir Joint Ownership Commission (BRJOC) and the Joint Water Commission (JWC), unless the JWC or the BRJOC adopt alternative rules to govern their public contracting activities.
- (3) **“Council”** means the City of Hillsboro’s City Council, or, the Commission for the BRJOC or JWC unless the JWC or the BRJOC adopt alternative rules to govern their public contracting activities.

AUTHORITY TO APPROVE AND EXECUTE CITY CONTRACTS

COH-45-0200 Authority to Approve City Contracts; Delegation of Authority to City Manager, Department Managers and Individual Employees

- (1) The commissioners for the UC are the Local Contract Review Board for City Contracts within its jurisdiction. For all other City Contracts, the Council is the Local Contract Review Board.
- (2) The powers and duties of the City under the Rules shall be exercised and performed by the City Manager as that term is defined in these Rules, except where another City employee position is specified in these Rules or where the City Manager has delegated that authority to another designee.

2023 City of Hillsboro Public Contracting Rules – Division 45

- (3) Except as provided in Section (4) of this Rule or as otherwise expressly authorized in these Rules or expressly authorized by resolution, the relevant Local Contract Review Board identified in COH-45-0200(1) must approve all City Contracts within their jurisdiction.
- (4) Pursuant to ORS 279A.075 and except as expressly limited by other Council policy, the Council delegates to the City Manager the authority to execute and approve payment on City Contracts in the following circumstances:
 - (a) The City Contract is within appropriations made by the City and is not a collective bargaining agreement or a Service Contract that includes the provision of labor performed by employees of the City, as defined in ORS 332.075(3); and
 - (b) In any of the following circumstances:
 - (A) The City Contract is for routine and customary expenditures, including but not limited to payroll, payroll taxes and benefits, utility bills, and postage;
 - (B) Advance authorization has been given by the Local Contract Review Board for the City Manager to execute a particular City Contract or class of City Contracts;
 - (C) The City Contract is an Emergency Procurement (see applicable rules for an Emergency Procurement herein);
 - (D) These Rules otherwise expressly authorize the City Manager to approve the Contract;
 - (E) The City Contract does not exceed \$500,000;
 - (F) A Change Order or Contract amendment to a Contract not previously approved by Council where the cumulative Contract total (i.e., original contract value plus subsequent changes) does not exceed \$500,000; or
 - (G) A Change Order or Contract amendment to a Contract previously approved by Council where:
 - (i) the total cumulative changes are no more than 20% of the maximum approved contract value, including contingency; and
 - (ii) the Change Order or Contract amendment does not exceed \$500,000.
- (5) Pursuant to ORS 279A.075 and except as expressly limited by other Council policy, the Council authorizes the City Manager to subdelegate the responsibilities of the City Manager outlined in these rules as the City Manager sees fit, including but not limited to subdelegating certain responsibilities through Schedules of Authority, which includes the Schedule of Contract Signature Authority.
 - (a) Upon the commencing of a Procurement, such Procurement may not be artificially divided or fragmented so as to circumvent the requirements of any Schedule of Authority.

COH-45-0210 Intergovernmental Agreements

- (1) These Rules do not apply to agreements the City may enter into with other governmental bodies, including agreements with the State of Oregon or another unit of local government, including another city, a county, a district or an intergovernmental entity. Instead, intergovernmental agreements are governed by the City’s “Policy Governing Intergovernmental Agreements.”

COH-45-0220 Agreements Concerning Real Property

- (1) These Rules do not apply to agreements the City may enter into concerning the acquisition or purchase of real property, the disposition or sale of real property, or the acquisition or disposition of any interest in real property, such as easements and licenses to use real property. Instead, agreements concerning real property are governed by the City’s “Real Property Acquisition and Disposition Policy.”

ETHICS IN CONTRACTING

COH-45-0300 Policy addressing Ethics in the Solicitation and Award of City Contracts

Service as a public official is a public trust and that, as one safeguard for that trust, the people require all public officials to comply with the applicable provisions of ORS chapter 244. “Public official” means any person who, when an alleged violation of ORS 244 occurs, is serving the State of Oregon or any of its political subdivisions (including the City of Hillsboro) or any other public body as defined in ORS 174.109 as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services. Ethics in contracting and solicitation is addressed in the City of Hillsboro Personnel Policy Manual, section 7.2.

PROCUREMENT FROM QUALIFIED NONPROFIT AGENCIES ("QNA")

COH-45-0405 QNA Definitions

- (1) **“QNA”** (formerly, "QRF") means a qualified nonprofit agency for individuals with disabilities that offers to sell goods and services to various public agencies and has been designated as such by the Oregon Department of Administrative Services under OAR 125-055-0015 to participate in the Oregon Forward Program.
- (2) **"QNA Procurement List"** means a listing of those nonprofit agencies for disabled individuals who currently are qualified, under OAR 125-055-0015, to participate in the Oregon Forward Program created by ORS 279.835 through 279.850 and includes, as required by ORS 279.850(1), a list of the products and services offered by QNAs and determined by the State Procurement Office, under OAR 125-055-0020, to be suitable for purchase by Contracting Agencies such as the City.
- (3) **“Oregon Forward Program”** means the program created by ORS 279.835 to 279.855.

COH-45-0410 Required Procurement of QNA Products or Services

- (1) As required by ORS 279.850(1), if the City intends to procure a Product or Service that is listed on the QNA Procurement List, the City must procure that Product or Service, at the Price

determined by the State of Oregon Procurement Office, from a QNA if the Product or Service is of Specifications appropriate to the City's Procurement needs and is available within the time required by the City.

- (2) The most current QNA Procurement List may be reviewed at the State of Oregon Procurement Office. At the time of publication of these Rules the QNA Procurement List may be accessed at <https://www.oregon.gov/das/Procurement/Pages/OregonForward.aspx>
- (3) The Public Contracting Code does not apply to Oregon Forward Program Procurements pursuant to ORS 279A.025(4).
- (4) Oregon Forward Program Procurements are therefore exempt from Divisions 46, 47, 48, and 49 of these Rules.

COH-45-0450 Vending Facilities on City Property

- (1) Pursuant to ORS 346.510 through 346.570, if the City intends to place on City property any vending facilities, as defined by ORS 346.510(6), it must do so under Oregon Administrative Rules 585-015-000 through 585-015-0055, unless otherwise released from the requirements of ORS 346.510 through 346.570.

COH-45-0500 Contract Extensions

Except as otherwise provided in these Rules:

- (1) A Current Contract may be extended to complete the Contract Work. If it appears that a City Contract will expire according to its terms before the Work provided under the Contract will be completed, the City Manager or designee may extend the Contract for such period of time necessary to complete the Work.
- (2) An Expired Contract may be reinstated to complete the Contract Work. If a City Contract inadvertently expires according to its terms before the Work provided under the Contract is completed, the City Manager or designee may reinstate the Contract for such period of time necessary to complete the Work. The reinstated Contract shall be deemed to begin upon the expiration of the prior Contract and end upon the termination date set forth in the extension.
- (3) A Contract Extension may not substantially amend or change the scope of the Contract or increase the price of the Contract, except as otherwise may be allowed in these Rules. Contract amendments are subject to COH-46-0480, COH-47-0800, or COH-49-0910, depending on the type of Contract.

MIXED CONTRACTS

COH-45-0600 Contracts for “Mixed” Services and/or Goods and Services

A mixed Public Contract requires the contractor to render certain services and also to provide the City other types of services, goods or products. Classification of a mixed Public Contract as a Personal Services Contract, Architectural and Engineering Services Contract, Information Technology Contract, or other type of Public Contract is determined by the Contract's predominant purpose. The City will specify the predominant purpose of the Contract by

2023 City of Hillsboro Public Contracting Rules – Division 45

determining which of the Services involves the majority of the total estimated costs to be paid under the Contract.

END OF DIVISION 45

DIVISION 46

**GENERAL RULES APPLYING TO ALL PUBLIC CONTRACTS AND
SPECIFIC RULES FOR PERSONAL SERVICES CONTRACTS**

COH-46-0000 Generally

These Division 46 Rules are intended to implement the provisions of ORS 279A applicable to all public Procurements. Division 46 also addresses delegation of contracting authority under ORS 279A.075 and 332.075, Contracts for Personal Services.

COH-46-0100 Application; Federal Law Supremacy

- (1) Pursuant to ORS 279A.065(5), the City hereby adopts these Rules. Pursuant to ORS 279A.065(1), the Attorney General's Model Rules do not apply to the City, except as provided by ORS 279C.337, which requires the City to procure CM/GC services in accordance with the Model Rules. The Model Rules do however provide context for these Rules and the City may consult them, as well as relevant orders, opinions or cases interpreting them, to resolve any ambiguities or conflicts in these Rules. These Rules consist of the following four divisions:
 - (a) Division 46 applies to all Public Contracts and implements ORS 279A.
 - (b) Division 47 applies only to Public Contracts for Goods and Services and implements ORS 279B.
 - (c) Division 48 applies to Public Contracts for architectural, engineering, photogrammetric mapping, transportation planning or land surveying services and related services and implements ORS 279C.100 through 279C.125.
 - (d) Division 49 applies only to Public Contracts for construction services and implements the balance of ORS 279C not implemented by Division 48 of these rules.
- (2) Most of these Rules are adapted from the Attorney General's Model Rules and the numbering generally tracks the numbering in OAR Chapter 137 Divisions 46, 47, 48 and 49. Except where these Rules differ from the Model Rules, the City intends its Rules to be interpreted consistently with the Model Rules.
- (3) The City shall review the Rules each time the Attorney General modifies the Model Rules to ensure compliance with statutory changes. The City may adopt other Rules, and modify as necessary, to carry out the provisions of the Public Contracting Code pursuant to ORS 279A.070.
- (4) Except as otherwise expressly provided in ORS 279C.800 through 279C.870, and notwithstanding ORS 279A, 279B, and 279C.005 through 279C.670, applicable federal statutes and regulations govern when federal funds are involved and federal statutes or regulations conflict with any provision of ORS 279A, 279B, and 279C.005 through 279C.670 or these Rules, or require additional conditions in Public Contracts not required by ORS 279A, 279B, and 279C.005 through 279C.670 or these Rules.

COH-46-0110 Definitions

As used in the Public Contracting Code and Divisions 45, 46, 47, 48, and 49 of these Rules, unless the context or a specifically applicable definition requires otherwise:

- (1) **“Addendum” or “Addenda”** means an addition or deletion to, a material change in, or general interest explanation of a Solicitation Document.
- (2) **“Administering Contracting Agency”** has the meaning set forth in ORS 279A.200(1)(a) and means a governmental body in this state or in another jurisdiction that solicits and establishes the Original Contract for Procurement of Goods, Services, or Public Improvements in a Cooperative Procurement. "Administering Contracting Agency" includes, for Interstate Cooperative Procurements, any governmental body, domestic or foreign, that is authorized under the governmental body's laws, rules, or regulations, to enter into Public Contracts.
- (3) **“Architectural and Engineering Services Contract”** means a Public Contract for architectural, engineering and land surveying services as defined in ORS 279C.100(2) or related services as defined in 279C.100(6).
- (4) **“Award”** means, as the context requires, either the act or occurrence of the City's identification of the Person with whom the City will enter into a Contract following the resolution of any protest of the City's selection of that Person and the completion of all Contract negotiations.
- (5) **“Bid”** means a Written response to an Invitation to Bid.
- (6) **“Bidder”** means a Person who submits a Bid in response to an Invitation to Bid. May also mean a Person who submits a Quote in response to an Invitation to a Request for Quotation.
- (7) **“Brand Name or Equal Specification”** is defined in ORS 279B.200(1) and means a Specification that uses one or more manufacturers' names, makes, catalog numbers, or similar identifying characteristics to describe the standard of quality, performance, functionality, or other characteristics needed to meet the City's requirements, and that authorizes Offerors to offer Goods and Services that are equivalent or superior to those named or described in the Specification.
- (8) **“Brand Name Specification”** is defined in ORS 279B.200(2) and means a Specification limited to one or more products, Brand Names, makes, manufacturers' names, catalog numbers, or similar identifying characteristics
- (9) **“City”** is defined at COH-45-0100(2).
- (10) **“City Council” or “Council”** is defined at COH-45-0100(3).
- (11) **“City Manager”** for the purposes of these Rules, and as the context requires, means:
 - (a) the City Manager as defined by City of Hillsboro Charter, Chapter VIII, Section 33, or that officer's designee in accordance with COH-45-0200(5);
 - (b) the administrative head of the UC if the UC has appointed an administrative head separate from the City Manager;

- (c) the general manager of the JWC;
 - (d) the general manager of the BRJOC; or
 - (e) a designee of any of the above.
- (12) **"City Price Agreement"** means a Price Agreement issued by the City. Such Agreements may result from a Cooperative Procurement.
- (13) **"Class Special Procurement"** is defined in ORS 279B.085 and means a contracting procedure that differs from the procedures described in ORS 279B.055, 279B.060, 279B.065, and 279B.070, and is for the purpose of entering into a series of Contracts over time or for multiple Projects for the acquisition of a specified class of Goods or Services.
- (14) **"Closing"** means the date and time announced in a Solicitation Document as the deadline for submitting Offers.
- (15) **"Code" or "Public Contracting Code"** is defined in ORS 279A.005 and means ORS Chapters 279A, 279B, and 279C.
- (16) **"Competitive Sealed Bidding"** is a formal solicitation process where a Contract for goods or services is awarded based on price, in compliance with ORS 279B.055.
- (17) **"Competitive Range"** means the Proposers with whom the City will conduct discussions or negotiations if the City intends to conduct discussions or negotiations in accordance with COH-47-0261 or COH-49-0650.
- (18) **"Contract Price"** means, as the context requires, the maximum monetary obligation that the City either will or may incur under a Contract, including bonuses, incentives, and contingency amounts, if the Contractor fully performs under the Contract.
- (19) **"Contract Review Board" or "Local Contract Review Board"** means the applicable Contract Review Board identified in COH-45-0200(1).
- (20) **"Contracting Agency"** is defined in ORS 279A.010(1)(b) and means a Public Body authorized by law to conduct a Procurement. For the purposes of these Rules, the "Contracting Agency" is the City, acting by and through the City Manager or his or her designee. All references to the City Manager in these Rules include a designee of the City Manager, unless the Rules clearly state to the contrary.
- (21) **"Contractor"** means the Person, including a Consultant as defined in COH-48-0110, with whom the City enters into a Contract.
- (22) **"Cooperative Procurement"** is defined in ORS 279A.200 and means a Procurement conducted by an Administering Contracting Agency on behalf of one or more governmental bodies. "Cooperative Procurement" includes, but is not limited to, multi-party Contracts and Price Agreements. "Cooperative Procurement" does not include an agreement formed among only governmental bodies under ORS Chapter 190 or other legal authority for establishing

agreements between or among governmental bodies or agencies or tribal governing bodies or agencies.

- (23) **"Cooperative Procurement Group"** means a group of authorized Contracting Agencies or other governmental body, domestic or foreign, joined through an intergovernmental agreement for the purposes of facilitating Cooperative Procurements pursuant to ORS 279A.200.
- (24) **"Days"** is defined in ORS 279A.010(c) and means calendar Days.
- (25) **"Disqualification"** means a disqualification, suspension, or debarment pursuant to ORS 200.065, ORS 200.075, ORS 279A.110, or COH-46-0210.
- (26) **"Designated Procurement Officer"** means the individual designated and authorized by the City Manager to perform certain Procurement functions described in these Rules.
- (27) **"Descriptive Literature"** means the Offeror's materials submitted to provide information concerning the Goods and Services available in response to a solicitation.
- (28) **"Electronic Advertisement"** means the City's Solicitation Documents or Request for Quotes, Request for Information, or other document inviting participation in the City's Procurements available over the Internet via (a) the World Wide Web, (b) ORPIN, or (c) an Electronic Procurement System other than ORPIN.
- (29) **"Electronic Offer"** means a response to the City's Solicitation Documents or Request for Quotes submitted to the City via (a) the World Wide Web or some other Internet protocol or (b) an Electronic Procurement System utilized by the City.
- (30) **"Electronic Procurement System"** means ORPIN or other system constituting an information system that Persons may access through the Internet, using HTTP (i.e., the World Wide Web), Telnet, or some other Internet protocol, or that Persons may otherwise remotely access using a computer. An Electronic Procurement System enables the City to post Electronic Advertisements, receive Electronic Offers, and conduct any activities related to Procurement.
- (31) **"Emergency"** is defined in ORS 279A.010(f) and means circumstances that:
 - (a) Could not have been reasonably foreseen;
 - (b) Create a substantial risk of loss, damage, or interruption of services or a substantial threat to property, public health, welfare, or safety; and
 - (c) Require prompt execution of a Contract to remedy the condition.
- (32) **"Emergency Procurement"** means a sourcing method pursuant to ORS 279B.080.
- (33) **"Energy Savings Performance Contract"** is defined in ORS 279A.010(g) and means a Public Contract between the City 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.

- (34) **"Engineer"** is defined in ORS 279C.100 and means a Person who is registered and holds a valid certificate in the practice of engineering in the State of Oregon, as provided under ORS 672.002 through 672.325, and includes all terms listed in ORS 672.002(2).
- (35) **"Facsimile"** means an exact reproduction or copy of graphic or verbal material converted into electrical signals that are transmitted via telephone to produce a paper copy of the material on the receiving fax machine.
- (36) **"Federal Cooperative Agreement"** means a Public Contract under which the City receives money or property from a federal agency for the purpose of supporting or stimulating a City program or activity and substantial involvement is expected between the federal agency and the Agency when carrying out the program or activity contemplated in the agreement. A Federal Cooperative Agreement does not include a procurement contract under 31 U.S.C. section 6303.
- (37) **"Findings"** is defined in ORS 279C.330 and means the justification for an exemption from Competitive Bidding for a Contract for a Public Improvement 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.
- (38) **"Fringe Benefits"** is defined in ORS 279C.800 and means the amount of:
- (a) The rate of contribution irrevocably made by a Contractor or subcontractor to a trustee or to a third person under a plan, fund, or program; and
 - (b) The rate of costs to the Contractor or subcontractor that may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program that is committed in Writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide Fringe Benefits, but only when the Contractor or subcontractor is not required by other federal, state, or local law to provide any of these benefits.

- (39) **"Good-Faith Dispute"** is defined in ORS 279C.580 and means a documented dispute concerning:
- (a) Unsatisfactory job progress;
 - (b) Defective Work not remedied;
 - (c) Third-party claims filed or reasonable evidence that claims will be filed;
 - (d) Failure to make timely payments for labor, equipment, and materials;
 - (e) Damage to the prime Contractor or subcontractor; or
 - (f) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.
- (40) **"Goods"** is defined in ORS 279A.010(1)(i) and means supplies, equipment, materials, and personal property, including any tangible, intangible, and intellectual property and rights and licenses in relation thereto, and combinations of any of the items identified herein.
- (41) **"Goods and Services" or "Goods or Services"** is defined in ORS 279A.010(1)(j) and means any combinations of any of the items identified in the definitions of "Goods" and "Services."
- (42) **"Grant"** is defined in ORS 279A.010(k) and means:
- (a) An agreement under which the City 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 City and in which no substantial involvement by the grantor is anticipated in the program or activity other than involvement associated with monitoring compliance with the Grant conditions; or
 - (b) An agreement under which the City provides money, property, or other assistance including, but not limited to, federal assistance that is characterized as a Grant by federal laws 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 City is anticipated in the program or activity other than involvement associated with monitoring compliance with the Grant conditions.
 - (c) "Grant" does not include a Public Contract:
 - (A) For a Public Improvement or 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 City pays moneys that the City 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 City.
- (43) **"Interstate Cooperative Procurement"** is defined in ORS 279A.200 and means a Permissive Cooperative Procurement in which the Administering Contracting Agency is a governmental body, domestic or foreign, 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 governmental bodies are located outside of their state.
- (44) **"Invitation to Bid"** or "ITB" means all documents, whether attached or incorporated by reference, used for soliciting bids in accordance with either ORS 279B.055 or 279C.335 and related rules.
- (45) **"Joint Cooperative Procurement"** is defined in ORS 279A.200 and means a Cooperative Procurement that identifies:
 - (a) The participating governmental bodies or the Cooperative Procurement Group; and
 - (b) The Contract requirements or estimated Contract requirements for Price Agreements.
- (46) **"Land Surveyor"** is defined in ORS 279C.100(4) and means a Person who is registered and holds a valid certificate in the practice of land surveying in the State of Oregon as provided under ORS 672.002 through 672.325, and includes all terms listed in ORS 672.002(5).
- (47) **"Life-Cycle Cost"** means the total cost to the City of acquiring, operating, supporting, and (if applicable) disposing of the items being acquired.
- (48) **"Life-Cycle Costing"** means the various quantifiable cost factors, in addition to the acquisition cost of Goods and Services (also referred to in this Rule as "product, equipment, and service, separately or in any combination thereof").
- (49) **"Locality"** is defined in ORS 279C.800 and means the following district in which the Public Works, or the major portion thereof, is to be performed. For the City's purposes, Locality is defined as District 2, composed of Clackamas, Multnomah, and Washington Counties.
- (50) **"Lowest Responsible Bidder"** means the lowest Bidder who:
 - (a) Has substantially complied with all prescribed Public Contracting procedures and requirements;
 - (b) Has met the standards of responsibility set forth in ORS 279B.110 or 279C.375;
 - (c) Has not been debarred or disqualified by the City under ORS 279B.130 or 279C.440; and
 - (d) Is not on the list created by the Oregon Construction Contractors Board under ORS 701.227, if the advertised Contract is a Public Improvement Contract.

- (51) **"Model Rules"** means the Attorney General's Model Rules of procedure for Public Contracting as pursuant to ORS 279A.065.
- (52) **"Nonprofit Procurement Organization"** means a local, state, or national organization formed as a tax-exempt entity under the United States Internal Revenue Code for the purpose of conducting large-scale or volume-competitive Procurements as an agent for its governmental and/or nonprofit members in order to obtain the most favorable pricing or terms.
- (53) **"Nonresident Bidder"** is defined in ORS 279A.120 and means a Bidder who is not a resident Bidder.
- (54) **"OAR"** means the Oregon Administrative Rules.
- (55) **"Offer"** means a Written Offer to provide Goods or Services in response to a Solicitation Document.
- (56) **"Offeror"** means a Person who submits an Offer.
- (57) **"Opening"** means the date, time, and place announced in the Solicitation Document for the public opening of Offers.
- (58) **"ORPIN"** means the current on-line electronic Oregon Procurement Information Network administered by the State of Oregon Department of Administrative Services, or other State of Oregon managed equivalent electronic system.
- (59) **"ORS"** means the Oregon Revised Statutes.
- (60) **"Original Contract"** is defined in ORS 279A.200(f) and means the initial Contract or Price Agreement solicited and Awarded during a Cooperative Procurement by an Administering Contracting Agency.
- (61) **"Permissive Cooperative Procurement"** is defined in ORS 279A.200 and means a Cooperative Procurement in which the Purchasing Contracting Agencies are not identified.
- (62) **"Person"** means any of the following with legal capacity to enter into a Contract: individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity. "Person" is also defined in ORS 279C.500 and 279C.815 and means any employer, labor organization, or any official representative of an employee or employer association.
- (63) **"Personal Services"** Services that are performed under a Personal Services Contract as defined in COH-46-0500. May be used interchangeably with the term "Professional Services".
- (64) **"Personal Services Contract"** means a Personal Services Contract as outlined in COH-46-0500 and is a contract for the provision of Personal Services.
- (65) **"Prevailing Rate of Wage"** is defined in ORS 279C.800 and means the rate of hourly wage, including all Fringe Benefits, paid in the Locality to the majority of workers employed on projects

of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries.

- (66) **"Price Agreement"** means a Public Contract for the Procurement of Goods and Services at a set price with:
- (a) No guarantee of a minimum or maximum purchase; or
 - (b) An initial order or minimum purchase combined with a continuing Contractor obligation to provide Goods and Services in which the City does not guarantee a minimum or maximum additional purchase.
- (67) **"Procurement"** is defined in ORS 279A.010(1)(w) and means the act of purchasing, leasing, renting, or otherwise acquiring Goods or Services. "Procurement" includes each function and procedure undertaken or required to be undertaken by the City to enter into a Public Contract, administer a Public Contract, and obtain the performance of a Public Contract under the Public Contracting Code.
- (68) **"Procurement Description"** is defined in ORS 279B.005(1)(b) and means the words used in a solicitation to describe the Goods or Services to be procured. "Procurement Description" includes Specifications attached to or made a part of the solicitation.
- (69) **"Procurement File"** is a file, containing documents relating to a specific Procurement or Procurements, that is maintained in the City's Purchasing Division or in another City department or division that is responsible for the Procurement.
- (70) **"Product Sample"** means the exact Goods or a representative portion of the Goods offered in an Offer, or the Goods requested in the Solicitation Documents as a sample.
- (71) **"Professional Services"** is the term the City historically used to describe "Personal Services" and may be used interchangeably with that term.
- (72) **"Proposal"** means a Written response to a Request for Proposals.
- (73) **"Proposer"** means a Person who submits a Proposal in response to a Request for Proposals.
- (74) **"Public Agency"** is defined in ORS 279C.800(5) and means the State of Oregon or any political subdivision thereof, or any county, city, district, authority, public corporation, or entity, and any instrumentality thereof organized and existing under law or charter.
- (75) **"Public Body"** is defined in ORS 279A.010(1)(y) and has the meaning given that term in ORS 174.109 and means state government bodies, local government bodies and special government bodies.
- (76) **"Public Contract" or "Contract"** means, except where these Rules otherwise expressly indicate, a "Public Contract" as defined in ORS 279A.010 and means a sale or other disposal, or a purchase, lease, rental, or other acquisition by the City of personal property, Services, including Personal Services, Public Improvements, Public Works, minor alterations, or ordinary repair or

maintenance necessary to preserve a Public Improvement. "Public Contract" does not include Grants.

- (77) **"Public Contracting"** is defined in ORS 279A.010(1)(a) and means Procurement activities described in the Public Contracting Code relating to obtaining, modifying, or administering Public Contracts or Price Agreements.
- (78) **"Public Improvement"** is defined in ORS 279A.010 and means a Project for construction, reconstruction, or major renovation on real property by or for the City. "Public Improvement" does not include:
- (a) Projects for which no funds of the City are directly or indirectly used, except for participation that is incidental or related primarily to Project design or inspection; or
 - (b) Emergency Work, minor alteration, or ordinary repair or maintenance necessary to preserve a Public Improvement.
- (79) **"Public Improvement Contract"** means a Public Contract for a Public Improvement. "Public Improvement Contract" does not include a Public Contract for Emergency Work, minor alterations, or ordinary repair or maintenance necessary to preserve a Public Improvement.
- (80) **"Public Works"** is defined in ORS 279C.800 and includes, but is not limited to:
- (a) Roads, highways, buildings, structures, and improvements of all types, the construction, reconstruction, major renovation, or painting of which is carried on or contracted for by any Public Agency to serve the public interest;
 - (b) A project that uses \$750,000 or more of funds of a Public Agency for constructing, reconstructing, painting or performing a major renovation on a road, highway, building, structure or improvement of any type.
 - (c) A project that uses funds of a private entity for constructing a privately owned road, highway, building, structure, or improvement of any type in which a Public Agency will use or occupy 25 percent or more of the square footage of the completed project.
 - (d) Notwithstanding the provisions of ORS 279C.810(2)(a), (b) and (c), a device, structure or mechanism, or a combination of devices, structures or mechanisms that:
 - (A) Uses solar radiation as a source for generating heat, cooling or electrical energy; and
 - (B) Is constructed or installed, with or without using funds of a Public Agency, on land, premises, structures or buildings that a public body, as defined in ORS 174.109, owns;
 - (e) Notwithstanding paragraph (b)(A) of this subsection and ORS 279C.810(2)(b) and (c), construction, reconstruction, painting or major renovation of a road, highway, building, structure or improvement of any type that occurs, with or without using

funds of a Public Agency, on real property that a public university listed in ORS 352.002 owns; or

- (f) demolition of, or removal of hazardous waste from, a road, highway, building, structure or improvement of any type that uses \$750,000 or more in funds of a public agency, or that occurs on real property that a state agency owns, but that does not involve constructing, reconstructing, renovating or painting a road, highway, building, structure or improvement.
 - (g) "Public Works" does not include:
 - (A) The reconstruction or renovation of privately owned real property that a Public Agency leases; or
 - (B) A private nonprofit entity's renovation of publicly owned real property that is more than 75 years old if:
 - (i) The real property is leased to the private nonprofit entity for more than 25 years;
 - (ii) Funds of a Public Agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and
 - (iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before July 13, 2007.
- (81) **"Purchase Order"** means the City's document to formalize a purchase transaction with a Contractor. Acceptance of a Purchase Order constitutes a Public Contract. The City's use of a Purchase Order must comply with the Public Contracting Code and these Rules.
- (82) **"Purchasing Contracting Agency"** is defined in ORS 279A.200(1)(h) and means a governmental body that procures Goods, Services, or Public Improvements from a Contractor based on the Original Contract established by an Administering Contracting Agency.
- (83) **"QBS"** means the qualifications-based selection process mandated by ORS 279C.110 for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services and Related Services Contracts under certain circumstances.
- (84) **"Recycled Materials"** means recycled paper (as defined in ORS 279A.010(1)(g)), recycled PETE products (as defined in ORS 279A.010(1)(h)), and other recycled plastic resin products and recycled products (as defined in ORS 279A.010(1)(ii)). "Recycled Product" is defined in ORS 279A.010(1)(ii) and means all materials, Goods, and supplies, not less than 50% of the total weight of which consists of secondary and post-consumer waste, with not less than 10% of its total weight consisting of Post-consumer Waste. "Recycled Product" includes any product that could have been disposed of as solid waste, having completed its life cycle as a consumer item, but otherwise is refurbished for reuse without substantial alteration of the product's form.

- (85) **"Request for Proposals" or "RFP"** is defined in ORS 279B.005 and means all documents, either attached or incorporated by reference, and any Addenda thereto, used for soliciting Proposals in accordance with either ORS 279B.060 or 279C.405 and related rules.
- (86) **"Request for Qualifications" or "RFQ"** means a Written document issued by the City to which providers respond in Writing by describing their experience with and qualifications for the Work described in the Solicitation Document.
- (87) **"Request for Quotes"** means a Written or oral request for prices, rates, or other conditions under which a potential Contractor would provide Goods or perform Services, Personal Services, or Public Improvements described in the request.
- (88) **"Responsible"** means meeting the standards set forth in COH-47-0640 or COH-49-0390(2), and not debarred or disqualified by the City under COH-47-0575 or COH-49-0370.
- (89) **"Resident Bidder"** is defined in ORS 279A.120 and means a Bidder that has paid unemployment taxes or income taxes in this state during the 12 calendar months immediately preceding submission of the Bid, has a business address in this state, and has stated in the Bid whether the Bidder is a "Resident Bidder."
- (90) **"Responsible Offeror"** (also "Responsible Bidder" or "Responsible Proposer" as applicable) means, as the context requires, a Responsible Bidder, Responsible Proposer or a Person who has submitted an Offer and meets the standards set forth in COH-47-0640 or COH-49-0390(2), and who has not been debarred or disqualified by the City under COH-47-0575 or COH-49-0370.
- (91) **"Responsive"** means having the characteristics of substantial completion in all material respects with applicable solicitation requirements.
- (92) **"Responsive Offer"** (also, "Responsive Bid" or "Responsive Proposal," as applicable) means an Offer that substantially complies in all material respects with applicable solicitation requirements.
- (93) **"Retainage"** is defined in ORS 279C.550 and means the difference between the amount earned by a Contractor on a Public Contract and the amount paid on the Contract by the City.
- (94) **"Revenue Contract"** means a Contract where the City is providing Goods or Services to another party for compensation.
- (95) **"Schedule of Authority"** means a schedule authorized by the City Manager, delegating certain of his or her public contracting responsibilities to City directors which allows those to sub-delegate certain of those responsibilities to specific managers and staff members. There may be more than one type of schedule the City Manager authorizes to delegate authority pursuant to these Rules.
- (96) **"Schedule of Contract Signature Authority"** means a schedule authorized by the City Manager, delegating the approval and signing of Contracts to City directors which allows those directors to sub-delegate certain of those responsibilities to specific managers and staff members.

- (97) **"Secondary Waste Content"** or "Secondary Waste Materials" is defined in ORS 279A.010(1)(j) and means fragments of products or finished products of a manufacturing process that has converted a virgin resource into a commodity of real economic value. "Secondary Waste Materials" includes post-consumer waste. "Secondary Waste Materials" does not include excess virgin resources of the manufacturing process. For paper, "Secondary Waste Materials" does not include fibrous waste generated during the manufacturing process, such as fibers recovered from waste water or trimmings of paper machine rolls, mill broke, wood slabs, chips, sawdust, or other wood residue from a manufacturing process.
- (98) **"Services"** is defined in ORS 279A.010(1) and means Services other than Personal Services designated under COH-46-0500 and ORS 279A.055.
- (99) **"Signature"** means any Written mark, word, or symbol that is made or adopted by a Person with the intent to be bound and that is attached or logically associated with a Written document to which the Person intends to be bound.
- (100) **"Signed"** means, as the context requires, that a Written document contains a Signature or that the act of making a Signature has occurred.
- (101) **"Solicitation Document"** means an Invitation to Bid, a Request for Proposals, Request for Quotes, or other similar document issued to invite Offers from prospective Contractors pursuant to ORS Chapters 279B or 279C. The following are not "Solicitation Documents" unless they invite Offers from prospective Contractors: a Request for Qualifications, a prequalification of Bidders, a request for information, a sole source notice, an approval of a Special Procurement, or a request for product prequalification.
- (102) **"Specifications"** means, with respect to Goods or Services, any description of the physical or functional characteristics of, or of the nature of, Goods and Services to be procured by the City, including any requirement for inspecting, testing, or preparing Goods or Services for delivery and the quantities or qualities of materials to be furnished under the Contract. See ORS 279B.200(3). With respect to Public Improvements, "Specifications" generally means any description of the result to be obtained and may, on occasion, describe the method and manner of doing the Work to be performed.
- (103) **"Trade Services"** means construction services that are not Public Improvements, as provided under OAR 137-049-0140.
- (104) **"Vendor"** mean any Person who sells Goods or Services, including Personal Services and construction services.
- (105) **"Work"** means the furnishing of all materials, equipment, labor, and incidentals necessary to successfully complete any individual item or the entire Contract, and successful completion of all duties and obligations imposed by the Contract.
- (106) **"Writing"** means 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.

(107) **"Written"** means existing in Writing.

COH-46-0120 Policy

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

COH-46-0125 Standards of Conduct for Independent Contractors

- (1) Every Public Contract executed pursuant to these Rules is subject to the City’s “Standards of Conduct for Independent Contractors Policy.” The City intends to incorporate this Policy into the terms of each Public Contract; however the Policy applies regardless of whether it is expressly incorporated into a particular contract.
- (2) If, in the City’s reasonable judgement, a Contractor is in violation of Standards of Conduct for Independent Contractors Policy, City may seek any remedies available to the City under law, the Policy or these Rules, including but not limited to, contract termination and debarment as provided in these Rules.
- (3) At the discretion of the City Manager, the City Manager may update the “Standards of Conduct for Independent Contractors Policy,” to which each existing contract, and all future contracts shall be subject.

COH-46-0130 Application of the Code and Rules; Exceptions

- (1) Except as set forth in this Section, the City must exercise all rights, powers, and authority related to Public Contracting in accordance with the Public Contracting Code and these Rules.
- (2) The City may make a Procurement without Competitive Sealed Bidding, Competitive Sealed Proposals, or other competition required under ORS 279B.050 through ORS 279B.085 or COH-47-0255 through COH-47-0670, provided the Procurement is made under 10 U.S.C. 381, the Electronic Government Act of 2002 (P.L. 107-347), or other federal law that is, as determined by the Local Contract Review Board, similar to 10 U.S.C. 381 or section 211 of the Electronic Government Act of 2002, in effectuating or promoting transfers of property to the City.
- (3) Except as expressly provided herein, these Rules do not apply to the Contracts or classes of Contracts described in ORS 279A.025(2), including the following City Contracts:
 - (a) Contracts between the City and:
 - (A) Another Contracting Agency;
 - (B) The Oregon Health and Science University;
 - (C) A public university listed in ORS 352.002;
 - (D) The Oregon State Bar;
 - (E) A governmental body of another state;

- (F) The federal government;
- (G) An American Indian tribe or an agency of an American Indian tribe;
- (H) A nation, or a governmental body in a nation, other than the United States; or
- (I) An intergovernmental entity formed between or among:
 - (i) Governmental bodies of this or another state;
 - (ii) The federal government;
 - (iii) An American Indian tribe or an agency of an American Indian tribe;
 - (iv) A nation other than the United States; or
 - (v) A governmental body in a nation other than the United States.
- (b) Agreements authorized by ORS Chapter 190 or by a statute, charter provision, ordinance, or other authority for establishing agreements between or among governmental bodies or agencies or tribal governing bodies or agencies;
- (c) Insurance and Service Contracts as provided for under ORS 414.115, 414.125, 414.135, and 414.145 for purposes of source selection;
- (d) Grants;
- (e) Contracts for professional or expert witnesses or Consultants to provide Services or testimony relating to existing or potential litigation or legal matters in which a Public Body is or may become interested;
- (f) Acquisitions or disposals of real property or interest in real property, including the leasing of real property;
- (g) Sole-source expenditures when rates are set by law or ordinance for purposes of source selection;
- (h) Procurements by the City from an Oregon Corrections Enterprises program;
- (i) Contracts, agreements, or other documents entered into, issued, or established in connection with:
 - (A) The issuance of obligations, as defined in ORS 286A.100 and 287A.310, of a Public Body;
 - (B) The making of program loans and similar extensions or advances of funds, aid, or assistance by a Public Body to a public or private body for the purpose of carrying out, promoting, or sustaining activities or programs authorized by law; or

- (C) The investment of funds by a Public Body as authorized by law, and other financial transactions of a Public Body that by their character cannot practically be established under the competitive Contractor selection procedures of ORS 279B.050 through 279B.085;
 - (j) Contracts for employee benefit plans as provided in ORS 243.105(1), 243.125(4), 243.221, 243.275, 243.291, 243.303, and 243.565;
 - (k) Contracts for employee benefit plans as provided in ORS 243.860 through 243.886; or
 - (l) Any other Public Contracting of a Public Body specifically exempted from the Code by another provision of law.
- (4) Except as expressly provided herein, these Rules do not apply to Contracts entered into pursuant to ORS 279.835 through 279.855.

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

- (1) For purposes of ORS 279A.105, a subcontractor certified under ORS 200.055 as an emerging small business is located in or draws its workforce from economically distressed areas if:
- (a) Its principal place of business is located in an area designated as economically distressed under administrative rules adopted by the Oregon Business Development Department; or
 - (b) The Contractor certifies in a Signed Writing to the City that a substantial number of the subcontractor's employees or subcontractors that will manufacture or provide the Goods or perform the Services or Personal Services under the Contract reside in an area designated as economically distressed under administrative rules adopted by the Oregon Business Development Department. For the purposes of making the foregoing determination, the City shall determine in each particular instance what proportion of a Contractor's subcontractor's employees or subcontractors constitutes a substantial number.
- (2) The City shall include in each Solicitation Document a requirement that Offerors certify in their Offers, in a form prescribed by the City, that the Offeror has not discriminated, and will not discriminate, against a subcontractor in the awarding of a subcontract because the subcontractor is certified under ORS 200.055 as a disadvantaged business enterprise, a minority-owned business, a woman-owned business, an emerging small business, or a veteran-owned business.
- (3) Disqualification.
- (a) The City may disqualify a Person from consideration for Award of City Contracts under ORS 200.065(5), or suspend a Person's right to bid on or participate in any Contract under ORS 200.075(1), after providing the Person with notice and a reasonable opportunity to be heard in accordance with subsections (b) and (c) of this Section.

- (b) The City shall provide Written notice to the Person of a proposed Disqualification. The City shall deliver the Written notice by personal service or by registered or certified mail, return receipt requested. This notice shall:
 - (A) State that the City intends to disqualify or suspend 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 City does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived the right to a hearing;
 - (D) Include a statement of the authority under which the hearing will be held;
 - (E) Include a reference to the particular sections of the statutes and rules involved;
 - (F) State the proposed Disqualification period; and
 - (G) State that the Person may be represented by legal counsel.
- (c) Hearing. The City shall schedule a hearing upon the City's receipt of the Person's timely hearing request. Within a reasonable time prior to the hearing, the City 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.
- (d) Notice of Disqualification. The City shall provide Written notice of the Disqualification to the Person. The City shall deliver the Written notice by personal service 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.
- (4) Contract and Subcontract Conditions. If the City awards a Contract to an Offeror that has been determined to be responsible under ORS 200.005(8) and 200.045(3), or awards a Contract under ORS 279A.100:
 - (a) The City must provide, as a material condition of the Contract:
 - (A) That the Contractor must maintain its certification under ORS 200.055 throughout the term of the Contract and any extensions (if the City used the certification as a factor in or as a basis for the award of the Contract);

- (B) That the Contractor must promptly pay each subcontractor that is certified under ORS 200.055 in accordance with ORS 279B.220, or 279C.570 and ORS 279C.580, whichever apply to the Contract;
 - (C) That the Contractor must include, in any subcontract the Contractor establishes in connection with the Contract, a provision that requires the subcontractor to maintain the subcontractor's certification under ORS 200.055 throughout the term of the subcontract and any extensions (if the Contractor used the certification as a factor in or as a basis for the award of the subcontract);
 - (D) That the City may require the Contractor to terminate a subcontract with a subcontractor that fails to maintain its certification under ORS 200.055 throughout the term of the subcontract and any extensions.
- (b) In the administration of Contracts that are subject to section (4) of this rule, the City must verify the Contractor's and any subcontractor's compliance with subsection (4)(a) of this rule.
 - (c) Subparagraph (4)(a)(A) of this section does not apply to an emerging small business that ceases to qualify as a tier one firm or a tier two firm (as ORS 200.005 defines those terms) due to the growth in the business's number of full-time equivalent employees or in average annual gross receipts during the term of the Contract. This section (4) does not apply to an emerging small business for which a certification under ORS 200.055 expires during the term of the Contract or any extensions.

SUPPLIER DIVERSITY PROGRAM

COH-46-0215 Preference for Oregon Goods and Services; Nonresident Bidders

- (1) The City is working to advance racial equity through its Supplier Diversity Policy, previously adopted by Resolution No. 2768. The City's Supplier Diversity Policy provides an opportunity for the City to operationalize equity practices by addressing barriers faced by minority-owned businesses, women-owned businesses, veteran-owned businesses, and other disadvantaged business enterprises seeking to do business with the City.
- (2) At the discretion of the City Manager, the City Manager may update the City's Supplier Diversity Policy to implement best practices or for other good cause.

CONTRACT PREFERENCES

COH-46-0300 Preference for Oregon Goods and Services; Nonresident Bidders

- (1) **Tiebreaker Preference and Award When Offers Identical.** Under ORS 279A.120, when the City receives Offers that are identical in price, fitness, availability, and quality and chooses to Award a Contract, the City must Award the Contract based on the following order of precedence:
 - (a) The City must Award the Contract to the Offeror among those submitting identical Offers that is offering Goods and Services that are manufactured, produced, or to be performed in Oregon.

- (b) If two or more Offerors submit identical Offers and they all offer Goods or Services, or both, or Personal Services, that are manufactured, produced, or to be performed in Oregon, the City must Award the Contract by drawing lots among the identical Offers. The City will provide the Offerors who submitted the identical Offers notice of the date, time, and location of the drawing of lots, and an opportunity for these Offerors to be present when lots are drawn.
 - (c) If the City receives identical Offers and none of the identical Offers offer Goods or Services, or both, or Personal Services, that are manufactured, produced, or to be performed in Oregon, then the City must Award the Contract by drawing lots among the identical Offers. The City will provide to the Offerors who submitted the identical Offers notice of the date, time, and location of the drawing of lots, and an opportunity for these Offerors to be present when lots are drawn.
- (2) **Determining if Offers are Identical.** The City will consider Offers identical in price, fitness, availability, and quality as follows:
 - (a) Bids received in response to an Invitation to Bid are identical in price, fitness, availability, and quality if the Bids are Responsive and offer the Goods or Services, or both, or Personal Services, described in the Invitation to Bid at the same price.
 - (b) Proposals received in response to a Request for Proposals are identical in price, fitness, availability, and quality if they are Responsive and achieve equal scores when scored in accordance with the evaluation criteria set forth in the Request for Proposals.
 - (c) Offers received in response to a Special Procurement conducted under ORS 279B.085 are identical in price, fitness, availability, and quality if, after completing the contracting procedure approved by the Contract Review Board, the City determines, in Writing, that two or more Proposals are equally advantageous to the City.
 - (d) Offers received in response to an Intermediate Procurement conducted pursuant to ORS 279B.070 are identical if the Offers equally best serve the interests of the City in accordance with 279B.070(4).
- (3) **Determining if Goods or Services or Personal Services are Manufactured or Produced in Oregon.** In applying Section (1) of this Rule, the City will determine whether a Contract is predominantly for Goods, Services, or Personal Services and then use the predominant purpose to determine if the Goods, Services, or Personal Services are manufactured, produced, or performed in Oregon. The City may request, either in a Solicitation Document, following Closing, or at any other time the City determines is appropriate, any information the City may need to determine if the Goods, Services, or Personal Services are manufactured or produced in Oregon. The City may use any reasonable criteria to determine if Goods, Services, or Personal Services are manufactured, produced, or performed in Oregon provided that the criteria reasonably relate to that determination, and provided that the City applies those criteria equally to each Offer.
- (4) **Procedure for Drawing Lots.** When this Rule calls for the drawing of lots, the City shall draw lots by a procedure that affords each Offeror subject to the drawing a substantially equal probability

of selection and that does not allow the Person making the selection the opportunity to manipulate the drawing of lots to increase the probability of selecting one Offeror over another.

- (5) **Discretionary Preference and Award.** Under ORS 279A.128, the City may provide, in a Solicitation Document for Goods, Services, or Personal Services, a specified percentage preference of not more than 10% for Goods fabricated or processed entirely in Oregon or Services or Personal Services performed entirely in Oregon. When the City provides for a preference under this Section and more than one Offeror qualifies for the preference, the City may give a further preference to a qualifying Offeror that resides in or is headquartered in Oregon. The City may establish a preference percentage higher than 10% by Written order that finds good cause to establish the higher percentage and that explains the City's reasons and evidence for finding good cause to establish a higher percentage. The City may not apply the preferences described in this Section in a Procurement for Emergency Work, minor alterations, ordinary repairs or maintenance of public improvements, or construction Work that is described in ORS 297C.320.

COH-46-0310 Reciprocal Preferences

- (1) When evaluating Bids pursuant to COH-47-0255 through COH-47-0257, COH-49-0390, or COH-49-0640 through COH-49-0660, the City must add a percentage increase to the Bid of a Nonresident Bidder equal to the percentage, if any, of the preference that would be given to that Bidder in the state in which the Bidder resides. The City may rely on the list prepared and maintained by the state pursuant to ORS 279A.120(4) to determine both whether the Nonresident Bidder's state gives preference to in-state Bidders and the amount of such preference.

COH-46-0320 Preference for Recycled Materials

- (1) Notwithstanding provisions of law requiring the City to Award a Contract to the lowest or best Offeror, and in accordance with Section (2) of this Rule, the City may give preference to the Procurement of Goods manufactured from Recycled Materials whenever the City uses Competitive Sealed Bidding or Competitive Sealed Proposals and as set forth in this Rule.
- (2) In comparing Goods from two or more Offerors, if at least one Offeror offers Goods manufactured from Recycled Materials and at least one Offeror does not, the City may select the Offeror offering Goods manufactured from Recycled Materials if each of the following four conditions exists:
 - (a) The Recycled Product is available;
 - (b) The Recycled Product meets applicable standards;
 - (c) The Recycled Product can be substituted for a comparable non-recycled product; and
 - (d) The Recycled Product's costs do not exceed the costs of non-recycled products by more than 5%, or a higher percentage if a Written determination is made by the City and set forth in the Solicitation Document. For purposes of making the foregoing determination, the City must consider the costs of the Goods following any

adjustments the City makes to the price of the Goods for purposes of evaluation pursuant to COH-46-0310.

- (3) Offerors must certify in their Offers:
 - (a) The minimum, if not exact, percentage of Recycled Product in all materials and supplies offered; and
 - (b) Both the post-consumer and Secondary Waste Content thereof.
- (4) To be eligible for a preference under ORS 279A.125 and this Rule:
 - (a) The Offeror must indicate which materials and supplies contain verifiable recycled content; and
 - (b) Such products must meet the requirements of ORS 279A.125 and this Rule.
- (5) A preference under ORS 279A.125 will only be applied to those products in the Offer that contain verifiable recycled content.
- (6) Offers that contain false information about:
 - (a) The percentage of Recycled Product, post-consumer, and Secondary Waste Content or
 - (b) Verifiable recycled content, must be rejected as non-responsive, and the Offeror offering false information may be deemed non-responsible.

COH-46-0330 Federally Funded Projects

- (1) In addition to complying with these Rules as a whole, the City will comply with the following when soliciting, awarding, or administering a contract awarded to the City by a Federal Agency under the Federal Acquisition Regulation:
 - (a) No City employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if they have a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract.
 - (b) When the City is conducting a procurement using federal money, where appropriate, an analysis will be made of lease versus purchase alternatives and any other appropriate analysis to determine most economical approach.
 - (c) City will award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

- (d) City will retain records sufficient to detail the history of the procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejections, and the basis for the contract price.
- (e) Time and materials contracts.
 - (A) City may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and materials type contract means a contract whose cost to a City is the sum of:
 - (i) The actual cost of materials; and
 - (ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.
 - (B) Since this formula generates an open-ended contract price, a time and materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the City awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.
- (f) The City shall conduct these procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State of Oregon licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.
- (g) Prequalification. If Prequalification is utilized: The City must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the City must not preclude potential bidders from qualifying during the solicitation period.
- (h) Procurement methods. The City will use one of the following methods of procurement:
 - (A) Federally funded Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold.¹ To the extent practicable, the City must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the City considers the

¹ Title 2 CFR §200.67

price to be reasonable. At time of publication of these Rules, the federal micro-purchase threshold is \$10,000.

- (B) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources. At time of publication of these Rules, the federal Simplified Acquisition Threshold is \$250,000. For these procurements the City shall follow its: Informal Selection Procedures, pursuant to COH-46-0520; Intermediate Procurement procedures, pursuant to COH-47-0270; its Informal Selection Procedure, COH-48-0210; or its procedure for Intermediate Procurements; Competitive Quotes and Amendments, COH-49-0160.
- (C) Procurement by sealed bids (formal advertising). The City will follow its policies for Competitive Sealed Bidding, pursuant to COH-47-0255 or COH-49-0200.
- (D) Procurement by competitive proposals. The City will follow its policies for Competitive Sealed Proposals, found in COH-47-0260 and COH-47-0261.
- (E) Procurement by noncompetitive proposals.
 - (i) Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:
 1. The item is available only from a single source.
 2. The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
 3. The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the City; or
 4. After solicitation of a number of sources, competition is determined inadequate.
 - (ii) When procuring by non-competitive proposals, the City will adhere to the following, as applicable:
 1. Personal Services: COH-46-0540 Selection by Negotiation;
 2. Consultant Services: COH-48-0200 Direct Appointment procedures;
 3. Sole-source Procurement, Goods or Construction: COH-47-0275 or COH-49-0150;
 4. Emergency Procurement, Goods or Construction: COH-47-0275 or COH-49-0150.

- (F) In the event of a conflict between a federal procurement threshold (small purchase or Simplified Acquisition Threshold) and a City procurement threshold (shown in these Rules), the lesser dollar threshold will apply.
- (i) Contracting with small and minority businesses, women’s business enterprises, and labor surplus area firms:
 - (A) For federally funded procurements, the City must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.
 - (B) Affirmative steps must include:
 - (i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
 - (ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
 - (iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
 - (iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
 - (v) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
 - (vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (i) through (v) of this section.
- (j) Contract cost and price.²
 - (A) City must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the City must make independent estimates before receiving bids or proposals.
 - (B) City must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of

² Title 2 CFR §200.323

past performance, and industry profit rates in the surrounding geographical area for similar work.

- (C) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the City under Subpart E—Cost Principles of this part. The City may reference its own cost principles that comply with the Federal cost principles.
 - (D) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.
- (k) Federal awarding agency or pass through review:
- (A) The City must make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the City desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.
 - (B) City must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:
 - (i) City's procurement procedures or operation fails to comply with the procurement standards in this part;
 - (ii) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
 - (iii) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a "brand name" product;
 - (iv) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
 - (v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.
 - (C) City is exempt from the pre-procurement review in paragraph (b) of this section if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part.

- (i) City may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding, and third party contracts are awarded on a regular basis;
 - (ii) City may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the City that it is complying with these standards. The City must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review
- (l) In addition to other provisions required by the Federal agency or City, all contracts made by the City under the Federal award must contain provisions covering the following, as applicable.
- (A) Contracts for more than the simplified acquisition threshold currently set at \$250,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.
 - (B) All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.
 - (C) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of “federally assisted construction contract” in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, “Equal Employment Opportunity” (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and implementing regulations at 41 CFR part 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”
 - (D) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction”). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current

prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland “Anti-Kickback” Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which they are otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

- (E) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.
- (F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of “funding agreement” under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.
- (G) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

- (H) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the government-wide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.
 - (I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier, up to the non-Federal award.
- (2) Federally Funded Transit Projects. The City, in its Solicitation Documents to award a contract for a transit project that will be funded in whole or in part with funds from the federal government or a federal government agency, may provide for the application of a preference in favor of an Offeror whose bid or proposal exceeds the applicable federal Buy America requirements.
- (a) The City has discretion to adjust the amount or character of the preference to account for variations in the nature of the contract or project, and the degree to which each Offeror’s bid or proposal exceeds the federal Buy America requirements.
 - (b) For example, in an Invitation to Bid procurement the City may authorize a range of preference price percentages to account for the various degrees to which the bidders might exceed the federal Buy America requirements. In no event, however, may the percentage preference given to a bidder exceed ten percent of the total bid price.
 - (c) Similarly, under a Request for Proposals, the City may allocate and award evaluation points to reflect the degrees to which the proposers might exceed the applicable federal Buy America requirements. In no event, however, may those percentage points exceed ten percent of the total number of points available for award under the Request for Proposals.

COH-46-0335 Compliance with City and Federal Environmental Policies.

- (1) The City shall develop specifications for and procure Goods, Services, and Public Improvements in compliance with the applicable City environmental and sustainability policies.
- (2) When contracting with federal funds, the City and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage

of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

COOPERATIVE PROCUREMENT

COH-46-0400 Authority for Cooperative Procurements

- (1) The City may participate in, sponsor, conduct, or administer any of the following:
 - (a) Joint Cooperative Procurements to establish Original Contracts or Contracts for the acquisition of Goods and Services using a source-selection method substantially equivalent to those set forth in ORS 279B.055, 279B.060, or 279B.085, or to establish Original Contracts or Contracts for Public Improvements that use a Competitive Bidding process substantially equivalent to that set forth in ORS 279C.005 through 279C.870.
 - (b) Permissive Cooperative Procurements to establish Original Contracts or Contracts for the acquisition of Goods and Services, Personal Services, or Consultant Services, using a source-selection method substantially equivalent to those set forth in ORS 279B.055 or 279B.060.
 - (c) Interstate Cooperative Procurements to establish Original Contracts or Contracts for the acquisition of Goods and Services only, using a source selection method substantially equivalent to those set forth in ORS 279B.055 or 279B.060.
- (2) The City must determine, in Writing, whether the solicitation and Award process for an Original Contract arising out of a Cooperative Procurement is substantially equivalent to those identified in ORS 279B.055, ORS 279B.060, or ORS 279B.085 in accordance with ORS 279A.200(2). This Written documentation must be maintained in the City's Procurement File.

COH-46-0410 Responsibilities of Administering Contracting Agencies

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

- (3) If the City is acting as a Purchasing Contracting Agency and enters into a Contract based on a Cooperative Procurement, the City shall comply with the Code and these Rules, including, without limitation, those sections of the Code and these Rules that govern:
 - (a) The extent to which the Purchasing Contracting Agency may participate in the Cooperative Procurement;
 - (b) The advertisement of the Solicitation Document related to the Cooperative Procurement; and
 - (c) Public notice of the Purchasing Contracting Agency's intent to establish Contracts based on a Cooperative Procurement.

COH-46-0420 Joint Cooperative Procurements

- (1) **Applicability.** The City may participate in, sponsor, conduct, or administer a Joint Cooperative Procurement for the purchase of Goods or Services or Public Improvements. The City must comply with the procedures set out in ORS 279A.210 and these Rules to procure Goods and Services or Public Improvements using a Joint Cooperative Procurement. Only the Participating Public Agencies listed in the solicitation and original Contract Documents may enter into a Contract through a Joint Cooperative Procurement. A Joint Cooperative Procurement may not be a Permissive Cooperative Procurement.
- (2) **Solicitation Requirements.** The City may administer or participate in a Joint Cooperative Procurement only if:
 - (a) The Administering Contracting Agency's solicitation and Award process for the Original Contract is an open and impartial competitive process and uses source-selection methods substantially equivalent to those specified in ORS 279B.055, 279B.060, or 279B.085, or uses a Competitive Bidding process substantially equivalent to the Competitive Bidding process in ORS 279C;
 - (b) The Administering Contracting Agency's solicitation and the Original Contract or Price Agreement identifies the Cooperative Procurement Group or each participating Purchasing Contracting Agency and specifies the estimated Contract requirements; and
 - (c) No material change is made in the terms, conditions, or prices of the Contract between the Contractor and the Purchasing Contracting Agency from the terms, conditions, and prices of the Original Contract between the Contractor and the Administering Contracting Agency.

COH-46-0430 Permissive Cooperative Procurements

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

- (2) **Solicitation Requirements.** The City may establish or participate in a Contract or Price Agreement through a Permissive Cooperative Procurement only if:
- (a) The Administering Contracting Agency's solicitation and Award process for the Original Contract is an open and impartial competitive process and uses source-selection methods substantially equivalent to those specified in ORS 279B.055 or 279B.060;
 - (b) The Administering Contracting Agency's solicitation and the Original Contract allow other Contracting Agencies to establish Contracts or Price Agreements under the terms, conditions, and prices of the Original Contract;
 - (c) The Contractor agrees to extend the terms, conditions, and prices of the Original Contract to the Purchasing Contracting Agency; and
 - (d) No material change is made in the terms, conditions, or prices of the Contract or Price Agreement between the Contractor and the Purchasing Contracting Agency from the terms, conditions, and prices of the Original Contract between the Contractor and the Administering Contracting Agency.

COH-46-0440 Required Public Notice if Permissive Cooperative Procurement is over \$250,000

- (1) The City must publish a notice of its intent to enter into a Contract through a Permissive Cooperative Procurement if the City estimates that it will spend in excess of \$250,000 for the purchase of the Goods and Services to be acquired under the Contract.
- (2) For purposes of determining if the City must give a notice of intent, the City will spend in excess of \$250,000 for Goods and Services procured under the Contract if:
 - (a) The City intends to make payments, in aggregate, over the term of the Contract in excess of \$250,000, whether or not the total amount or value of the payments is expressly stated in the Contract;
 - (b) The City's Contract expressly provides for payment, whether a fixed or maximum price, in excess of \$250,000; or
 - (c) At the time the City enters into the Contract, the City reasonably contemplates, based on historical or other data available to the City, that the total payments it will make for the Goods or Services, or Personal Services, under the Contract will, in aggregate, exceed \$250,000 over the anticipated duration of the Contract.
- (3) The notice of intent must contain the following information:
 - (a) A description of the Procurement;
 - (b) An estimated amount of the Procurement;
 - (c) The name of the Administering Contracting Agency, and

- (d) A time, place, and date by which comments must be submitted to the City regarding the notice of intent to establish a Contract or Price Agreement through the Permissive Cooperative Procurement.
- (4) The notice must be published:
- (a) At least once in at least one newspaper of general circulation in the City or electronically in the same manner as the City publishes electronic notices of Invitations to Bid or Requests for Proposals; and
 - (b) No fewer than seven Days before the deadline for submission of comments regarding the notice of intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement.
- (5) Any vendor wishing to comment on the City’s intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement must submit comments within seven Days after the notice of intent is published.
- (6) If the City receives comments on its intent to establish a Contract, the City must, prior to establishing a Contract or Price Agreement:
- (a) Make a Written determination that establishing a Contract is in the best interest of the City.
 - (b) Provide a copy of the Written determination to all vendors that submitted comments.

COH-46-0450 Interstate Cooperative Procurements

- (1) **Applicability.** The City may only participate in an Interstate Cooperative Procurement for the purchase of Goods and Services pursuant to ORS 279A.220 and these Rules to procure Goods or Services, but not Public Improvements.
- (2) **Solicitation Requirements.** The City may establish a Contract or Price Agreement through an Interstate Cooperative Procurement only if:
- (a) The Administering Contracting Agency's solicitation and Award process for the Original Contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055 or 279B.060;
 - (b) The Administering Contracting Agency's solicitation and the Original Contract allows other governmental bodies to establish Contracts or Price Agreements under the terms, conditions, and prices of the Original Contract; and
 - (c) The Administering Contracting Agency permits the Contractor to extend the use of the terms, conditions, and prices of the Original Contract to the Purchasing Contracting Agency.

COH-46-0460 Advertisements of Interstate Cooperative Procurements

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

- (1) The Solicitation Document for the Interstate Cooperative Procurement lists the City, or the Cooperative Procurement Group of which the City is a member, as a party that may establish Contracts or Price Agreements under the terms, conditions, and prices of the Original Contract, and the Solicitation Document is advertised in Oregon in compliance with 279B.055(4) or 279B.060(4) by:
 - (a) The Administering Contracting Agency;
 - (b) The City;
 - (c) The Cooperative Procurement Group, or a member of the Cooperative Procurement Group of which the City is a member; or
 - (d) Another Purchasing Contracting Agency that is subject to the Code, so long as such advertisement would, if given by the Purchasing Contracting Agency, comply with ORS 279B.055(4) or 279B.060(4) with respect to the Purchasing Contracting Agency.
- (2) If the Solicitation Document issued by the Administering Contracting Agency was not advertised in accordance with COH-46-0460(1), the City gives notice of its intent to enter into a Public Contract or Price Agreement based on the terms of the Interstate Cooperative Procurement.
 - (a) The notice of intent must contain the following information:
 - (A) A description of the Procurement;
 - (B) An estimated amount of the Procurement;
 - (C) The name of the Administering Contracting Agency, and;
 - (D) A time, place, and date by which comments must be submitted to the City regarding the notice of intent to establish a Contract or Price Agreement through the Interstate Cooperative Procurement.
 - (b) The notice must be published:
 - (A) At least once in at least one newspaper of general circulation in the City or electronically in the same manner as the City publishes electronic notices of ITB or RFP; and
 - (B) No fewer than seven Days before the deadline for submission of comments regarding the notice of intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement.
 - (c) Vendors must submit comments within seven Days after the notice of intent is published.

- (d) If the City receives comments on its Intent to establish a Contract, the City must, prior to establishing a Contract or Price Agreement:
 - (A) Make a Written determination that establishing a Contract is in the best interest of the City.
 - (B) Provide a copy of the Written determination to all vendors that submitted comments.

COH-46-0470 Protest and Disputes; Cooperative Procurements

- (1) 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 ORS 279B.400 through 279B.425, unless the Administering Contracting Agency is not subject to the Code. If the Administering Contracting Agency is not subject to the Code, then the Offeror or potential Offeror shall make the protest in accordance with the processes and procedures established by the Administering Contracting Agency.
- (2) Any other protests related to a Cooperative Procurement, or disputes related to a Contract arising out of a Cooperative Procurement, shall be made and resolved as set forth in ORS 279A.225.
- (3) The failure of the City or other Purchasing Contracting Agency to exercise any rights or remedies it has under a Contract entered into through a Cooperative Procurement shall not affect the rights or remedies of the City or any other Contracting Agency that participates in the Cooperative Procurement, including the Administering Contracting Agency, and shall not prevent any other Purchasing Contracting Agency from exercising any rights or seeking any remedies that may be available to it under its own Contract arising out of the Cooperative Procurement.

COH-46-0480 Contract Amendments; Cooperative Procurements

The City may amend a Contract entered into pursuant to a Cooperative Procurement as set forth in COH-47-0800 or COH-49-0910, as applicable.

SURPLUS PERSONAL PROPERTY

COH-46-0490 Disposition of Surplus Personal Property

- (1) Through the conduct of its ordinary course of business, the City acquires ownership of a variety of personal property.
- (2) Notwithstanding anything to the contrary within these Rules, pursuant to ORS 279A.070 and 279A.185, the disposition of City personal property is subject to the City's "Surplus Personal Property Policy," and the City must follow the Policy for the disposition of all City personal property.

- (3) At the discretion of the City Manager, the City Manager may update the City’s “Surplus Personal Property Policy,” to which all City personal property will be subject.

PERSONAL SERVICES CONTRACTS

COH-46-0500 Personal Services Contract Definition

- (1) Pursuant to ORS 279A.055(2), a Contract for Personal Services is a Contract primarily for the provision of Services that require specialized technical, creative, professional, or communication skills or talents, unique and specialized knowledge, or the exercise of discretionary judgment skills, and for which the quality of Services depends on attributes that are unique to the service provider.
- (2) Personal Services Contracts that fall within the definition in Section (1) of this Rule include, but are not limited to, the following:
 - (a) Contracts for Services performed in a professional capacity, including services of an accountant, attorney, medical professional (e.g., doctor, dentist, nurse, counselor), information technology consultant, or broadcaster, except for Architectural, Engineering, Photogrammetric Mapping or Land Surveying Services and other construction-related professional services subject to Division 48 of these Rules;
 - (b) Contracts for Services as an artist in the performing or fine arts, including any Person identified as a photographer, filmmaker, actor, director, painter, weaver, or sculptor;
 - (c) Contracts for Services that are specialized, creative, or research-oriented;
 - (d) Contracts for educational services;
 - (e) Contracts for human custodial care, childcare, mental health care, health services, social and emergency human services, and other human services; and
 - (f) Contracts for other professional or technical consulting services not listed above.
- (3) Council delegates to the City Manager the discretion to decide whether particular type of Contract or Service falls within the definition of "Personal Services Contract" as set forth in Sections (1) and (2) of this Rule.
- (4) The City shall not use Personal Services Contracts to obtain and pay for the Services of a City employee. A Personal Services Contract may be used only to obtain and pay for the Services of an independent Contractor.

COH-46-0510 Personal Service Contract Formal Selection Procedures

The City will use a formal selection procedure if the estimated contract amount of a Personal Services Contract is greater than \$250,000 and is not otherwise exempt from competition under these Rules. Such formal solicitations must comply with the requirements for Competitive Sealed Proposals contained in ORS 279B.060 and may be solicited, processed, and reviewed through any of the Sealed Proposal Procurement methods set forth in COH-47-0260 to COH-47-0263.

COH-46-0520 Personal Service Contract Informal Selection Procedures

The City may use an informal selection process to obtain Personal Services when the Contract Price exceeds \$100,000 but does not exceed \$250,000.

- (1) The informal selection process must solicit responses/Proposals from at least three qualified Contractors offering the required Services. If three Proposals are not reasonably available, fewer will suffice provided the City makes a Written record of the effort made to obtain at least three Proposals.
- (2) The informal selection process is intended to be competitive. The selection and ranking may be based on criteria including, but not limited to, each Proposer's:
 - (a) Particular capability to perform the Services required;
 - (b) Experienced staff available to perform the Services required, including each Proposer's recent, current, and projected workloads;
 - (c) Performance history;
 - (d) Approach and philosophy used in providing Services;
 - (e) Fees or costs;
 - (f) Geographic proximity to the Project or the area where the Services are to be performed; and
 - (g) Work volume previously Awarded by the City, with the object of effecting an equitable distribution of Contracts among qualified Contractors. But distribution must not violate the policy of selecting the most highly qualified Contractor to perform the Services at a fair and reasonable price.
- (3) Written confirmation of solicitation attempts and responses with Contractor names and addresses shall be maintained in the City's Procurement File.

COH-46-0530 Other Approved Solicitation Methods

- (1) **Request for Qualifications Procedure.** The City may use the Request for Qualifications (RFQ) procedure to evaluate potential contractors and establish a short list of qualified personal services providers to whom the City may issue an RFP for some or all of the personal services described in the RFQ.
 - (a) **Mandatory RFQ Requirements.** The City shall include the following, at a minimum, in each RFQ:
 - (A) A brief description of the project or work for which the City is seeking service providers;
 - (B) A description of the personal services the City seeks for the work;

- (C) The deadline for submitting a response to the RFQ;
 - (D) A description of required service provider qualifications for the work which the City seeks;
 - (E) The RFQ evaluation criteria, including weights, points, or other classifications applicable to each criterion;
 - (F) A statement whether or not the City will hold a prequalification meeting for all interested service providers to discuss the work and personal services described in the RFQ, and if a prequalification meeting will be held, the location of the meeting and whether or not attendance is mandatory; and
 - (G) A statement that service providers responding to the RFQ do so solely at their expense, and that the City is not responsible for any respondent expenses associated with the RFQ.
- (b) Optional RFQ Requirements. The City may include a request for any or all of the following in each RFQ:
- (A) A statement describing providers' general qualifications and related performance information;
 - (B) A description of providers' specific qualifications to perform personal services in the RFQ, including providers' committed resources and recent, current, and projected workloads;
 - (C) A list of similar contracts and references concerning past performance, including but not limited to price and cost data from previous contracts, quality of work, ability to meet schedules, cost control, and contract administration;
 - (D) A copy of all records, if any, of providers' performance under contracts with any other Contracting Agency;
 - (E) The number of providers' experienced staff committed to perform the personal 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) Providers' ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;
 - (G) Providers' pricing policies and pricing Proposals, or other pricing information, including the number of hours estimated for the services required, expenses, hourly rates, and overhead;
 - (H) Any other information the City deems reasonably necessary to evaluate providers' qualifications.

- (c) RFQ Evaluation Committee. The City shall establish an RFQ evaluation committee of at least two individuals to review, score, and rank the submitted RFQ materials according to the evaluation criteria. The City may appoint to the evaluation committee City employees or employees of other public agencies with experience with the scope of work, similar services or Public Contracting. If the City procedure permits, the City may include on the evaluation committee private practitioners of the same or related professions. The City shall designate one member of the evaluation committee as the evaluation committee chairperson.
 - (d) The City may use any reasonable screening or evaluation method to establish a short list of qualified Consultants, including, but not limited to, the following:
 - (A) Requiring respondents' 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 respondents on a short list;
 - (C) Placing on a short list only those respondents with certain essential qualifications or experience, whose practice is limited to a particular subject area, provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFQ.
 - (e) After the evaluation committee reviews, scores, and ranks the responding service providers, the City shall establish a short list of at least three qualified service providers, if feasible, provided however, that if four or fewer providers responded to the RFQ or if fewer than three providers fail to meet the City's minimum requirements, then:
 - (A) The City may establish a short list of fewer than three qualified service providers; or
 - (B) The City may cancel the RFQ and issue an RFP.
 - (f) No service provider will be eligible for placement on the City's short list established under this subsection if the provider or any of provider's principals, partners, or associates are members of the City's RFQ evaluation committee.
- (2) **Price Agreements.** The City may enter into Price Agreements for Personal Services. Such Price Agreements shall be solicited as otherwise required by these Rules based on the maximum Contract amount.
 - (3) **Cooperative Procurement.** The City may contract for Personal Services pursuant to a Cooperative Procurement in compliance with COH-46-0400 to COH-46-0480.

COH-46-0540 Personal Services Contracts: Selection by Negotiation

Notwithstanding the requirements of COH-46-0510 and COH-46-0520, the City Manager may procure Personal Services with Contractors through direct negotiation in any of the following circumstances:

- (1) The Contract Price does not exceed \$100,000;

2023 City of Hillsboro Public Contracting Rules – Division 46

- (2) The nature of the Work is not Project-driven but requires an ongoing, long-term relationship of knowledge and trust. Examples of such Work include legal services, insurance brokerage/agent of record services, medical services, financial audit and other audit services, services of a financial advisor, services of an investment advisor, bond counsel services, and banking services;
- (3) The services of an artist or writer, when the City is purchasing a creative product, such as, but not limited to: a painting, sculpture, mixed media artwork or work of creative writing;
- (4) The Contractor possesses unique knowledge and/or expertise in a specialized service area, making competition impractical;
- (5) A Contract for which a non-City funding source, e.g., a Grant or a federal, state, or city contract, identifies the Contractor in the funding award or makes a funding award conditioned upon the Service being performed by a specific Contractor. The following must be documented to the Procurement File:
 - (a) The name of the external funding source;
 - (b) The background on how the funding source selected the Contractor(s); and
 - (c) A copy of the funder's document naming the Contractor;
- (6) A Contract where another third-party participant selects the service provider as established by state statute, and the process for selecting qualified Contractors has been approved in advance by the City Manager;
- (7) A Contract after the City conducted a competitive process to award a Personal Services Contract, but no Offers were received (see COH-46-0545 below); or
- (8) The Contract is entered into pursuant to an emergency declared by the City Manager.

COH-46-0545 No Offers Received

- (1) **No Offers Received.** Provided the City has made good faith efforts to obtain Offers for Personal Services through the Procurement procedures described in this Division 46, in the event no offers are received in response to a competitive process pursuant to COH-46-0510, COH-46-0520, or COH-46-0530, the City may enter into direct negotiations with a Vendor to fulfill the needs described in the Solicitation Documents under the following conditions.
- (2) **Conditions.** Direct negotiations with a Vendor in the event that no Offers are received are conditioned on the following:
 - (a) The value of the negotiated Contract:
 - (A) Does not exceed the maximum amount applicable to the solicitation method the City used; and,
 - (B) In all cases, does not exceed \$500,000.

- (b) The City may only procure Personal Services under this rule within six (6) months of the date Offers for the request for bids, quotes, or proposal were due;
 - (c) The scope of the Contract is substantially the same as the scope described in the Solicitation documents; and,
 - (d) Adequate documentation is included in the Solicitation File.
- (3) **Documentation.** The City must document the rationale for any Contract awarded pursuant to this rule. The documentation must:
- (a) Summarize the efforts the City initially took to obtain Offers, including the Personal Services requested; if, how, and when any advertising or Vendor outreach was conducted; and the date that bids, quotes, or proposals were due;
 - (b) Identify the Vendor from whom it seeks to purchase Personal Services with an explanation of why this Vendor was selected; and,
 - (c) The anticipated Contract duration and maximum amount of the awarded Contract.

COH-46-0550 Personal Services Contract Requirements

City Personal Services Contracts must contain the mandatory Contract provisions set forth in ORS 279B.020(5), 279B.220, 279B.230, 279B.235(3), and, if the Contract involves lawn or landscape maintenance, 279B.225.

COH-46-0560 Contract Amendments

- (1) The City may amend any Contract if the City, in its sole discretion, determines that the Amendment is within the scope of the Solicitation Document and that the Amendment would not materially impact the field of competition for the Personal Services described in the final form of the original Procurement document. In making this determination, the City 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 Solicitation Document if the City reasonably believes that the number of Proposers would not significantly increase if the Procurement document were re-issued to include the additional Services.
- (2) The City 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 which affect performance of the Original Contract.
- (3) All Amendments to Contracts must be in Writing, must be signed by an authorized representative of the Contractor and the City, and must receive all required approvals before the Amendments will be binding on the City.
- (4) Contract Amendment Authority. Cumulative contract amendments shall be approved as per the City's Schedule of Contract Signature Authority.

COH-46-0600 Independent and Objective Oversight Required

- (1) When the scope of a Public Contract for Personal Services includes administering, managing, monitoring, inspecting, evaluating compliance with, or otherwise overseeing another Contract the following conditions shall apply:
 - (a) Contractor or its affiliates providing City the Personal Services listed in COH-46-0600(1) shall be excluded from competing for, or receiving award of, the contracts or work being administered, managed, monitored, inspected, evaluated or overseen.
 - (b) Contractor or its affiliates that develop or draft specifications, requirements, statements of work, Invitations to Bid (competitive sealed bidding), Requests for Proposals or other formal solicitations (or their content) must be excluded from competing for such solicitations.
- (2) The Procurement of Personal Services subject to the restrictions of COH-46-0600(1) include, but are not limited to, the following:
 - (a) Procurements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, which involve overseeing or monitoring the performance of a construction Contractor under a Public Contract for construction services;
 - (b) Procurements for commissioning services, which involve monitoring, inspecting, evaluating or otherwise overseeing the performance of a Contractor providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or the performance of a construction Contractor under a Public Contract for construction services;
 - (c) Procurements for project management services, which involve administration, management, monitoring, inspecting, evaluating compliance with, or otherwise overseeing the performance of a Contractor providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, construction services, commissioning services, or other Related Services for a Project;
 - (d) Procurements for special inspections and testing services, which involve inspecting, testing, or otherwise overseeing the performance of a construction Contractor under a Public Contract for construction services; or
 - (e) Procurements for other Related Services or Personal Services, which involve administering, managing, monitoring, inspecting, evaluating compliance with, or otherwise overseeing City Public Contracts.
- (3) This Article applies to all Divisions of these Public Contracting Rules.

END OF DIVISION 46

DIVISION 47

CONTRACTS FOR GOODS AND/OR SERVICES OTHER THAN PROFESSIONAL SERVICES

COH-47-0000 Generally

These Division 47 Rules implement ORS 279B applicable to public Procurements for Goods or Services, or both.

COH-47-0100 Definitions

- (1) **"Advantageous"** means in the City's best interests, as assessed according to the judgment of the City.
- (2) **"Affected Person" or "Affected Offeror"** means a Person whose ability to participate in a Procurement is adversely affected by a City decision. See ORS 279B.410.
- (3) **"Used Personal Property or Equipment"** means property or equipment that has been placed in its intended use by a previous owner or user for a time recognized in the relevant trade or industry as qualifying the personal property or equipment as "used" at the time of the City purchase. Used Personal Property or Equipment generally does not include property or equipment if the City was the previous user, whether under a lease, as part of a demonstration, trial, or pilot project, or under a similar arrangement.

COH-47-0250 Methods of Source Selection

- (1) Except as permitted in these Rules, the City must Award a Public Contract for Goods or Services, or both, by one of the following sourcing methods:
 - (a) Competitive Sealed Bidding (also known as Invitation to Bid or ITB) pursuant to ORS 279B.055 and COH-47-0255 and -0257;
 - (b) Competitive Sealed Proposals (also known as Request for Proposals or RFP) pursuant to ORS 279B.060 and COH-47-0260 through COH-47-0263;
 - (c) Small Procurements (\$25,000 or less) pursuant to ORS 279B.065 and COH-47-0265;
 - (d) Intermediate Procurements (more than \$25,000, up to and including \$250,000) pursuant to ORS 279B.070 and COH-47-0270;
 - (e) Sole-source Procurement pursuant to ORS 279B.075 and COH-47-0275;
 - (f) Emergency Procurement pursuant to ORS 279B.080 and COH-47-0280;
 - (g) Special Procurement pursuant to ORS 279B.085 and COH-47-0285, including the Class Special Procurements;
 - (h) Procurements set forth in COH-47-0288; or
 - (i) Cooperative Procurement pursuant to ORS 279A.200 and COH-46-0400 through COH-46-0480.

COH-47-0252 Procurement of Service Contracts over \$250,000

- (1) In compliance with ORS 279B.030 through ORS 279B.036: Unless the City determines that it is not feasible to perform the Services with the City's own personnel and resources pursuant to Section (4) of this Rule, before conducting a Procurement of a Contract for Services with an estimated Contract Price that exceeds \$250,000 the City shall conduct a Written cost analysis in accordance with Section (2) of this rule. The cost analysis must compare an estimate of the City's cost in performing the Services with an estimate of the cost that a potential Contractor would incur in performing the Services. The City may proceed with the Procurement only if it determines that the City would incur more cost in performing the Services with its own personnel and resources than in procuring the Services from a Contractor. For the purposes of this Section, "Contract for Services" does not include:
 - (a) Contracts for Personal Services as defined in COH-46-0500.
 - (b) Contracts for Services exempted from compliance with the Public Contracting Code by ORS 197.025 or other state statute.
- (2) In the cost analysis required under Section (1) of this Rule, the City shall consider cost factors that include the following:
 - (a) Cost of using the City's own personnel and resources. When estimating the City's costs of performing the Services, the City will consider cost factors that include:
 - (A) Salary or wage and benefit costs for City employees who are directly involved in performing the Services, including 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 subject Services.
 - (B) The material costs necessary for the performance of the Services, including costs for the space, energy, transportation, storage, raw and finished materials, equipment, and supplies used or consumed in the provision of the Services.
 - (C) Costs incurred in planning for, training for, starting up, implementing, transporting, and delivering the Services.
 - (D) Any costs related to stopping and dismantling a Project or operation because the City intends to procure a limited quantity of Services or procure the Services within a defined or limited period of time.
 - (E) The miscellaneous costs related to performing the Services. These costs exclude the City's indirect overhead costs for existing salaries or wages and benefits for administrators, and costs for rent, equipment, utilities, and materials except to the extent that the costs are attributable solely to performing the Services and would not exist unless the City performs the Services.
 - (F) Oregon Laws 2009, chapter 880, section 3(1)(a) provides that an estimate of the City's costs of performing the Services includes the costs described in subsections

(2)(a)(A)-(E) of this Rule. Therefore, those costs do not constitute an exclusive list of cost information. The City may consider other reliable information that bears on the cost to the City of performing the Services. For example, if the City has accounted for its actual costs for performing the Services under consideration, or reasonably comparable Services in a relatively recent Services Project, the City may consider those actual costs in making its estimate.

(b) Costs of a Potential Contractor. When estimating a Contractor's costs of performing the Services, the City will consider cost factors that include:

(A) The average or actual salary or wage and benefit costs for Contractors and employees:

- (i) Who work in the industry or business most closely involved in performing the Services; and
- (ii) Who would be necessary and directly involved in performing the Services or who would inspect, supervise, or monitor the performance of the Services;

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

(C) The miscellaneous costs related to performing the Services, including, but not limited to, reasonably foreseeable fluctuations in the costs for the items in Sections (i) through (ii) of this Rule.

(D) Oregon Laws 2009, chapter 880, section 3(1)(a) provides that an estimate of the City costs of performing the Services includes the costs described in subsections (2)(b)(A)-(C) of this Rule. Therefore, those costs do not constitute an exclusive list of cost information.

(E) The City may consider other reliable information that bears on the cost to the City of performing the Services. For example, if the City, in the reasonably near past, received Bids or Proposals for the performance of Services under consideration, or reasonably comparable Services, the City may consider the pricing offered in those Bids or Proposals in making its estimate. Similarly, the City may consider what it actually paid out under a Contract for the same or similar Services.

(3) Exceptions.

(a) Exception Based on Salaries or Wages and Benefits. If the sole reason that the costs estimated in Section (2)(b) of this Rule are lower than the costs estimated in Section (2)(a) of this Rule is because the average or actual salary or wage and benefit costs for Contractors and employees estimated in Section (2)(b)(i) of this Rule are lower than the salary or wage and benefit costs for employees of the City estimated in Section (2)(a)(i) of this Rule, the City may not proceed with the Procurement.

- (b) Exception Based on Lack of City Personnel and Resources; Reporting. In cases where the City determines that it would incur less cost in providing the Services with the City's own personnel and resources, the City may nevertheless proceed with the Procurement if, at the time the City intends to conduct a Procurement, the City determines that it lacks personnel and resources that are necessary to perform the Services within the time in which the Services are required. If the City conducts Procurement under this Section, the City will:
 - (A) Make and keep a Written determination that it lacks personnel and resources to perform the Services within the time the City requires them and the basis for the City's decision to proceed with the Procurement.
 - (B) Provide to the Contract Review Board, each calendar quarter, copies of each Written cost analysis and Written determination.
- (4) Provision of Services by City not Feasible. The City may proceed with a Procurement of a Contract for Services without conducting a cost analysis required under Sections (1) and (2) of this Rule if the City makes Written Findings that use of the City's own personnel or resources to perform the Services is not feasible. Reasons include, but are not limited to, the following:
 - (a) The City lacks the specialized capabilities, experience, or technical or other expertise necessary to perform the Services. In making the Finding, the City shall compare the City'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.
 - (b) Special circumstances require the City to procure the Services by Contract. Special circumstances may include, but are not limited to, the following:
 - (A) The terms under which the City receives a Grant or other funds for use in a Procurement require the City to obtain Services through an independent contractor;
 - (B) Other state or federal law requires the City to procure Services through an independent contractor;
 - (C) 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;
 - (D) The City cannot accomplish policy, administrative, or legal goals, including, but not limited to, avoiding conflicts of interest or ensuring independent or unbiased Findings in cases when using the City's existing personnel or Persons that the City could hire through a regular or ordinary process would not be suitable;
 - (E) The Procurement is for Emergency Services pursuant to COH-47-0280;
 - (F) The Procurement is for Services, the need for which is so urgent, temporary, or occasional that attempting to perform the Services with the City's own personnel or

resources would cause a delay that would frustrate the purpose for obtaining the Services;

- (G) The Services that the City intends to procure will be completed within six months after the date on which the Contract for the Services is executed; or
- (H) Any other circumstances, conditions, or occurrences that would make the Services, if performed by the City's own employees and resources, incapable of being managed, utilized, or dealt with successfully in terms of the quantity, timeliness of completion, success in obtaining desired results, or other reasonable needs of the City.

COH-47-0255 Competitive Sealed Bidding; One-Step Solicitations

- (1) **Generally.** The City may procure Goods and Services by Competitive Sealed Bidding as set forth in ORS 279B.055. An Invitation to Bid is used to initiate a Competitive Sealed Bidding solicitation and must contain the information required by ORS 279B.055(2) and by Section (2) of this Rule. The City must provide public notice of the Competitive Sealed Bidding solicitation as set forth in COH-47-0300.
- (2) **Invitation to Bid.** In accordance with ORS 279B.055(2), an Invitation to Bid must include the following:
 - (a) General Information.
 - (A) Notice of any pre-Offer conference as follows:
 - (i) The time, date, and location of any pre-Offer conference;
 - (ii) Whether attendance at the conference will be mandatory or optional; and
 - (iii) A provision that provides that statements made by the City's representatives at the conference are not binding on the City unless confirmed by Written Addendum.
 - (B) The form and instructions for submission of Bids, including the time, date, and place that Bids are due, and any other special information, e.g., whether Bids may be submitted by electronic means (see COH-47-0330 for required provisions of electronic Bids);
 - (C) The time, date, and place of Opening;
 - (D) The office or location where the Solicitation Documents may be reviewed;
 - (E) The name and title of the person designated by the City as the contact person for the Procurement, and the name and title of the person designated to receive Bids, if this person is not the same as the contact person.

2023 City of Hillsboro Public Contracting Rules – Division 47

- (F) A statement that each Bidder must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120(1);
- (G) Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4);
- (H) How the City will notify Bidders of Addenda, and how the City will make Addenda available (see COH-47-0430);
- (I) A time, date, and place that prequalification applications, if any, must be filed, and the classes of work, if any, for which Bidders must be prequalified in accordance with ORS 279B.120;
- (J) The following statements:
 - (i) "The City may cancel the Procurement or reject any or all Bids in accordance with ORS 279B.100."
 - (ii) A statement that requires the Contractor or subcontractor to possess an asbestos abatement license if required under ORS 468A.710.
- (b) City Need to Purchase. The character of the Goods or Services that the City is purchasing including, if applicable, a description of the acquisition, Specifications, delivery, performance schedule, inspection, and acceptance requirements. As required by Oregon Laws 2009, chapter 880, section 5, the City's description of its need to purchase must:
 - (A) Identify the scope of Work to be performed under the resulting Contract, if the City wards 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 City 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 City is purchasing.
- (c) Bidding and Evaluation Process.
 - (A) The anticipated solicitation schedule, deadlines, protest process and evaluation process;
 - (B) The City must set forth objective evaluation criteria in the Solicitation Document in accordance with the requirements of ORS 279B.055(6)(a). Evaluation criteria need not be precise predictors of actual future costs, but to the extent possible, the evaluation factors shall be reasonable estimates of actual future costs based on information that the City has available concerning future use; and

- (C) If the City intends to Award Contracts to more than one Bidder pursuant to COH-47-0600(4)(c), the City must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. This may be left to the City's discretion at the time of the Award, provided it is so described in the Solicitation Document.
 - (d) Applicable Preferences Pursuant to ORS 279B.055(6)(b).
 - (A) Preference for Oregon Goods and Services pursuant to ORS 279A.120 and COH-46-0300 and COH-46-0310; and
 - (B) Preference for Recycled Materials pursuant to ORS 279A.125 and COH-46-0320.
 - (e) For Contracting Agencies subject to ORS 305.385, Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.
 - (f) Terms and Conditions. All contractual terms and conditions in the form of Contract provisions that the City 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:
 - (A) The City's reduction or withholding of payment under the Contract;
 - (B) The City'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
 - (C) The City's rights, which the City 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.
 - (g) Whether Bid Security is required.
- (3) **Good Cause.** For the purposes of this Rule, "good cause" means a reasonable explanation for not requiring 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 City. The City shall document in the Procurement File the basis for the determination of good cause for specification otherwise. The City 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, or scientific developments that a reliable highest-prevalent standard does not exist or has not been developed;
- (d) Any other circumstances in which the City's interest in achieving economy, efficiency, compatibility, or availability in the Procurement of the Goods or Services reasonably outweighs the City'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.

COH-47-0257 Competitive Sealed Bidding; Multi-Step Solicitations/Multi-Step Sealed Bidding

- (1) **Generally.** The City may procure Goods or Services by using multi-step Sealed Bidding under ORS 279B.055(12).
- (2) **Phased Process.** Multi-step Sealed Bidding is a phased Procurement process that seeks information or unpriced submittals in the first phase combined with regular competitive Sealed Bidding, inviting Bidders who submitted technically eligible submittals in the first phase to submit Competitive Sealed Price Bids in the second phase. The Contract must be awarded to the lowest Responsible Bidder.
- (3) **Public Notice.** When The City uses multi-step Sealed Bidding, the City shall give public notice for the first phase in accordance with COH-47-0300. Public notice is not required for the second phase. However, the City shall give notice of the second phase to all Bidders, inform Bidders of the right to protest Addenda issued after the initial Closing under COH-47-0430, and inform Bidders excluded from the second phase of the right, if any, to protest their exclusion under COH-47-0720.
- (4) **Procedures Generally.** In addition to the procedures set forth in COH-47-0300 through COH-47-0490, the City shall employ the procedures set forth in this rule for multi-step Sealed Bidding and in the Invitation to Bid.
- (5) **Procedure for Phase One of Multi-step Sealed Bidding.**
 - (a) Form. The City shall initiate multi-step Sealed Bidding by issuing an Invitation to Bid in the form and manner required for Competitive Sealed Bids except as provided in this Rule. In addition to the requirements set forth in COH-47-0255(2), the multi-step Invitation to Bid must state:
 - (A) That the solicitation is a multi-step Sealed Bid Procurement and describe the process that the City will use to conduct the Procurement;
 - (B) That the City requests unpriced submittals and that the City 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 Bidders must submit price Bids at the same time as unpriced submittals and, if so, that Bidders must submit the price Bids in a separate sealed envelope; and
 - (D) The criteria to be used in the evaluation of unpriced submittals.
- (b) Evaluation. The City shall evaluate unpriced submittals in accordance with the criteria set forth in the Invitation to Bid.
- (6) **Procedure for Phase Two of Multi-step Sealed Bidding.**
- (a) After the completion of phase one, if the City does not cancel the solicitation, the City shall invite each eligible Bidder to submit a price Bid.
 - (b) The City shall conduct phase two as any other Competitive Sealed Bid Procurement except:
 - (A) As specifically set forth in this Rule or the Invitation to Bid;
 - (B) No public notice need be given of the invitation to submit price Bids because such notice was previously given.

COH-47-0260 Competitive Sealed Proposals; One-Step Solicitations

- (1) **Generally.** The City may procure Goods and Services by Competitive Sealed Proposals as set forth in ORS 279B.060. The City shall use a Request for Proposal to initiate a Competitive Sealed Proposal. The Request for Proposal must contain the information required by ORS 279B.060(2) and by Section (2) of this Rule. The City shall provide public notice of the Request for Proposals as set forth in COH-47-0300.
- (2) **Request for Proposal.** In accordance with the provisions required by ORS 279B.060(2), the Request for Proposal must include the following:
- (a) General Information.
 - (A) Notice of any pre-Offer conference as follows:
 - (i) The time, date, and location of any pre-Offer conference;
 - (ii) Whether attendance at the conference will be mandatory or voluntary;
 - (iii) A provision that provides that statements made by the City's representatives at the conference are not binding on the City unless confirmed by Written Addendum; and
 - (iv) A time, date, and place that prequalification applications, if any, must be filed, and the classes of work, if any, for which Bidders must be prequalified in accordance with ORS 279B.120.

2023 City of Hillsboro Public Contracting Rules – Division 47

- (B) The form and instructions for submission of Proposals, including the time, date, and place that Proposals are due, and any other special information, e.g., whether Proposals may be submitted by electronic means;
 - (C) The time, date, and place of Opening;
 - (D) The office where the Solicitation Document may be reviewed;
 - (E) Proposers' certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4);
 - (F) How the City will notify Proposers of Addenda and how the City will make Addenda available. (See COH-47-0430); and
 - (G) The following statements;
 - (i) "The City may cancel the Procurement or reject any or all Proposals in accordance with ORS 279B.100."
 - (ii) When applicable, a statement that requires the Contractor or subcontractor to possess an asbestos abatement license if required under ORS 468A.710.
- (b) City Need to Purchase. The character of the Goods or Services the City 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 City's description of its need to purchase must:
- (A) Identify the scope of Work to be performed under the resulting Contract, if the City awards one; and outline the anticipated duties of the Contractor under any resulting Contract; and
 - (B) Establish the expectations for the Contractor's performance of any resulting Contract; and
 - (C) Unless the Contractor under any resulting Contract will provide architectural, engineering, photogrammetric mapping, Transportation Planning or Land Surveying Services or Related Services that are subject to ORS 279C.100 through 279C.125 or COH-46-0500 through COH-46-0525, or the City 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 City is purchasing.
- (c) Proposal and Evaluation Process.
- (A) The anticipated solicitation schedule, deadlines, protest process, and evaluation process.
 - (B) The City must set forth selection criteria in the Solicitation Document in accordance with the requirements of ORS 279B.060(3)(e), including the relative importance of

price and any other evaluation factors used to rate the Proposals in the first tier of competition, and if more than one tier of competitive evaluation may be used, a description of the process under which the Proposals will be evaluated in the subsequent tiers. Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible the factors must be reasonable estimates of actual future costs based on information available to the City

- (i) Afford the City 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 City to determine the relative pricing offered by the Proposers, and to reasonably estimate the costs to the Contracting Agency of entering into a Contract based on each Proposal, considering information available to the City 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 City contracts.
- (C) If the City's solicitation process calls for the City to establish a Competitive Range the City shall generally describe, in the Solicitation Document, the criteria or parameters that the City will apply to determine the Competitive Range. The City, however, may subsequently determine or adjust the number of Proposers in the Competitive Range in accordance with COH-47-0261(6)(a)(B).
- (d) Applicable Preferences, including those described in ORS 279A.120, 279A.125(2), and 282.210.
- (A) Preference for Oregon Goods and Services, pursuant to ORS 279A.120 and COH-46-0300 and COH-46-0310;
 - (B) Preference for Recycled Materials, pursuant to ORS 279A.125 and COH-46-0320; and
 - (C) Performance within the state of public printing, binding, and stationery Work, pursuant to ORS 282.210.
- (e) For Contracting Agencies subject to ORS 305.385, the Proposer's certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
- (f) Contractual Terms and Conditions. All contractual terms and conditions the City determines are applicable to the Procurement. The City'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 that the City will not include in the Request for Proposals because the City either will reserve them for negotiation or will request Proposers to offer or suggest those terms or conditions. (See COH-47-0260(3)).

- (g) Consequences of Failure to Perform. As required by 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 City's reduction or withholding of payment under the Contract;
 - (B) The City'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 City's rights, which the City 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.
 - (h) Whether Proposal security is required.
- (3) **The City 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 City may specify that it will include or use Proposers' terms and conditions that have been pre-negotiated under COH-47-0525(4), but the City may only include or use a Proposer's pre-negotiated terms and conditions in the resulting Contract to the extent that those terms and conditions do not materially conflict with the applicable Contract terms and conditions. The City shall not agree to any Proposer's terms and conditions that were expressly rejected in a solicitation protest under COH-47-0730.
- (4) **For multiple Award Contracts.** The City 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 City shall not agree to any Proposer's terms and conditions that were expressly rejected in a solicitation protest under COH-47-0730.
- (5) **Good Cause.** For the purposes of this Rule, "good cause" means 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 City. The City shall document in the Procurement File the basis for the determination of good cause or for specifying otherwise. The City will have good cause to specify otherwise when the City determines that:
- (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, associated information technology, hardware, software, components, equipment, parts, or ongoing Services 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, or scientific developments, that a reliable highest-prevalent standard does not exist or has not been developed;
- (d) That other circumstances in which the City's interest in achieving economy, efficiency, compatibility, or availability in the Procurement of the Goods or Services reasonably outweighs the City'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.

(6) Optional Proposal Requirements.

- (a) As provided in the Request for Proposals or in Written Addenda issued thereunder, the City 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 City shall use procedures designed to accord Proposers fair and equal treatment with respect to any opportunity for discussion and revision of Proposals.
- (b) For purposes of evaluation, when provided for in the Request for Proposals, the City may employ methods of Contractor selection that include, but are not limited to:
 - (A) An Award or Awards based solely on the ranking of Proposals;
 - (B) Discussions leading to best and final Offers, in which the City may not disclose private discussions leading to best and final Offers;
 - (C) Discussions leading to best and final Offers, in which the City may not disclose information derived from Proposals submitted by competing Proposers;
 - (D) Serial negotiations, beginning with the highest-ranked Proposer;
 - (E) Competitive simultaneous negotiations;
 - (F) Multi-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;
 - (G) A Multi-step Request for Proposals requesting the submission of unpriced technical submittals, and then later issuing a Request for Proposals limited to the Proposers whose technical submittals the City had determined to be qualified under the criteria set forth in the initial Request for Proposals; or
 - (H) Any combination of methods described in this paragraph as authorized or prescribed by these Rules.

- (c) 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.
 - (d) After the opening of Proposals, the City 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 City shall 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 City shall issue or post the Addendum at least five Days before the start of the subject tier of competition or as otherwise determined by the City to be adequate to allow eligible Proposers to prepare for the competition in accordance with rules adopted under ORS 279A.065.
- (7) **In the Request for Proposals.** The City shall describe the methods by which the City will make the results of each tier of competitive evaluation available to the Proposers who competed in the tier. The City shall include a description of the manner in which the Proposers who are eliminated from further competition may protest or otherwise object to the City's decision.
 - (8) **Notice of Intent to Award.** The City shall 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.
 - (9) **If a Contract is Awarded.** The City shall Award the Contract to the responsible Proposer whose Proposal the City determines in Writing to be the most advantageous to the City 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 the Award of multiple Public Contracts, the City shall Award Public Contracts to the responsible Proposers who qualify for the Award of a Contract under the terms of the Request for Proposals.
 - (10) The City may issue a request for information, a request for interest, a Request for Qualifications, or other preliminary documents to obtain information useful in the preparation of a Request for Proposals.

COH-47-0261 Procedures for Competitive Range; Multi-Tiered and Multi-Step Solicitations

- (1) **Generally.** The City may use one or more, or any combination, of the methods of Contractor selection set forth in ORS 279B.060(7), 279B.060(8) and this rule to procure Goods or Services. In addition to the procedures set forth in COH-47-0300 through COH-47-0490 for methods of Contractor selection, the City may provide for a multi-tiered or multistep selection process that permits award to the highest ranked Proposer at any tier or step, calls for the establishment of a Competitive Range, or permits either serial or competitive simultaneous discussions or negotiations with one or more Proposers.
- (2) **Methods.** When conducting a multi-tiered or multi-step selection process, the City may use any combination or series of Proposals, discussions, negotiations, demonstrations, offers, or other means of soliciting information from Proposers that bears on the selection of a Contractor or Contractors. In multi-tiered and multi-step competitions, the City may use these means of

soliciting information from prospective Proposers in any sequence or order, and at any stage of the selection process, as determined in the discretion of the City.

- (3) **City may Elect to Award Contract Prior to Completion of Stages.** When the City's Request for Proposals prescribes a multi-tiered or multi-step Contractor selection process, the City nevertheless 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 City also may, at any time, cancel the Procurement under ORS 279B.100.
- (4) **Exclusion Protest.** The City 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 Multi-Step Sealed Proposals as set forth in COH-47-0720.
- (5) **Award Protest.** The City shall provide an opportunity to protest its Intent to Award a Contract pursuant to ORS 279B.410 and COH-47-0740. An Affected Offeror may protest, for any of the bases set forth in COH-47-0720(2), its exclusion from the Competitive Range or from any phase of a multi-tiered or multi-step Sealed Proposal process, or may protest an Addendum issued following initial Closing, if the City 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 City.
- (6) **Competitive Range.** When the City's solicitation process conducted under ORS 279B.060(8) calls for the City to establish a Competitive Range at any stage in the Procurement process, the City may do so as follows:
 - (a) Determining Competitive Range.
 - (A) The City may establish a Competitive Range after evaluating all Responsive Proposals in accordance with the evaluation criteria in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria in the Request for Proposals, the City may determine and rank the Proposers in the Competitive Range. Notwithstanding the foregoing, however, in instances in which the City determines that a single Proposer has a reasonable chance of being determined the most advantageous Proposer, the City need not determine or rank Proposers in the Competitive Range. In addition, notwithstanding the foregoing, the City may establish a Competitive Range of all Proposers to enter into discussions to correct deficiencies in Proposals.
 - (B) The City may establish the number of Proposers in the Competitive Range in light of whether the City's evaluation of Proposals identifies a number of Proposers who have a reasonable chance of being determined the most advantageous Proposer, 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 City must provide Written notice to all Proposers identifying Proposers in the Competitive Range. The City may provide an opportunity

for Proposers excluded from the Competitive Range to protest the City's evaluation and determination of the Competitive Range in accordance with COH-47-0720.

- (7) **Discussions.** The City 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 City:
- (a) Shall treat all eligible Proposers fairly and shall not favor any eligible Proposer over another;
 - (b) May disclose other eligible Proposers' Proposals or discussions only in accordance with ORS 279B.060(8)(b) or;
 - (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 Request for Proposals.
 - (d) At any time during the time allowed for discussions, the City 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.**
- (a) **Serial Negotiations Allowed.** The City may commence serial negotiations with the highest ranked eligible Proposer or commence simultaneous negotiations with all eligible Proposers. The City may negotiate:
 - (A) The statement of Work;
 - (B) The Contract Price as it is affected by negotiating the statement of work and other terms and conditions authorized for negotiation in the Request for Proposals or Addenda thereto; and
 - (C) Any other terms and conditions reasonably related to those authorized for negotiation in the Request for Proposals or Addenda thereto. Proposers shall not submit for negotiation, and the City shall not accept, alternative terms and conditions that are not reasonably related to those authorized for negotiation in the Request for Proposals or any Addendum.
 - (b) **Terminating Negotiations.** At any time during discussions or negotiations the City conducts under this Rule, the City may terminate discussions or negotiations with the highest-ranked Proposer, or the eligible Proposer with whom it is currently discussing or negotiating, if the City reasonably believes that:

2023 City of Hillsboro Public Contracting Rules – Division 47

- (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 City is conducting serial negotiations and the City terminates negotiations with an eligible Proposer, the City may then commence negotiations with the next highest-scoring eligible Proposer, and continue the sequential process until the City 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 City chooses to conduct competitive negotiations, the City may negotiate simultaneously with competing eligible Proposers. The City:
 - (A) Shall treat all eligible Proposers fairly and shall not favor any eligible Proposer over another;
 - (B) May disclose other eligible Proposers' Proposals or the substance of negotiations with other eligible Proposers only if the City notifies all of the eligible Proposers with whom the City will engage in negotiations of the City's intent to disclose before engaging in negotiations with any eligible Proposer.
 - (e) Any oral modification of a Proposal resulting from negotiations must be reduced to Writing.
- (9) **Best and Final Offers.** If the City requires best and final Offers, the City must establish a common date and time by which eligible Proposers must submit best and final Offers. If the City is dissatisfied with the best and final Offers, the City may make a Written determination that it is in the City's best interest to conduct additional discussions, negotiations or change the City's requirements and require another submission of best and final Offers. The City must inform all eligible Proposers that if they do not submit notice of withdrawal or another best and final Offer, their immediately previous Offer will be considered their best and final Offer. The City shall evaluate Offers as modified by the best and final Offers. The City shall conduct the evaluations as described in COH-47-0600. The City may not modify evaluation factors or their relative importance after the date and time that best and final Offers are due.
- (10) **Multi-step Sealed Proposals.** The City may procure Goods or Services by using Multi-step Competitive Sealed Proposals under ORS 279B.060(8)(b)(g). Multi-step Sealed Proposals is a phased Procurement process that seeks necessary information or unpriced technical Proposals in the first phase and, in the second phase, invites Proposers who submitted technically qualified Proposals to submit Competitive Sealed Price Proposals on the technical Proposals. The City must Award the Contract to the Responsible Proposer submitting the most advantageous Proposal in accordance with the terms of the Solicitation Document applicable to the second phase.

2023 City of Hillsboro Public Contracting Rules – Division 47

- (a) Public Notice. When the City uses Multi-step Sealed Proposals, the City shall give public notice for the first phase in accordance with COH-47-0300. Public notice is not required for the second phase. However, the City shall give notice of the subsequent phases to all Proposers and inform any Proposers excluded from the second phase of the right, if any, to protest exclusion under COH-47-0720.
- (b) Procedure for Phase One of Multi-step Sealed Proposals. The City may initiate a Multi-step Sealed Proposals Procurement by issuing a Request for Proposals in the form and manner required for Competitive Sealed Proposals except as provided in this Rule. In addition to the requirements required for Competitive Sealed Proposals, the Multi-step Request for Proposals must state:
 - (A) That unpriced technical Proposals are requested;
 - (B) That the solicitation is a Multi-step Sealed Proposal Procurement and that, in the second phase, priced Proposals will be accepted only from those Proposers whose unpriced technical Proposals are found qualified in the first phase;
 - (C) The criteria for the evaluation of unpriced technical Proposals; and
 - (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 Request for Proposals.
- (c) Addenda to the Request for Proposals. After receipt of unpriced technical Proposals, Addenda to the Request for Proposals 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 Request for Proposals.
- (f) Discussion of Unpriced Technical Proposals. The City 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 City 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 City 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) Procedure for Phase Two. On the completion of phase one, the City shall invite each qualified Proposer to submit price Proposals. The City shall conduct phase two as any other Competitive Sealed Proposal Procurement except as set forth in this Rule.

- (i) No public notice need be given of the request to submit Price Proposals because such notice was previously given.

COH-47-0265 Small Procurements

- (1) **Generally.** For Procurements of Goods and Services less than or equal to \$25,000, the City may Award a Contract as a Small Procurement in any manner deemed practical or convenient by the City, including by direct selection or Award.
- (2) **Amendments.** The City may amend a Contract Awarded as a Small Procurement in accordance with COH-47-0800, but the cumulative amendments may not increase the total Contract Price to greater than \$31,250.
- (3) **No Fragmentation.** Procurement may not be artificially divided or fragmented so as to constitute a Small Procurement. See ORS 279B.065(2).

COH-47-0270 Intermediate Procurements

- (1) **Generally.** For Procurements of Goods and Services greater than \$25,000 and less than or equal to \$250,000 the City may Award a Contract as an Intermediate Procurement pursuant to ORS 279B.070.
- (2) **Intermediate Solicitation Process.** When conducting an Intermediate Procurement, the City shall seek at least three informally solicited Competitive Price Quotes or Competitive Proposals from prospective Contractors. The City shall keep a Written record of the sources of the Quotes or Proposals received. If three Quotes or Proposals are not reasonably available, fewer will suffice, but the City shall make a Written record of the effort made to obtain the Quotes or Proposals.
- (3) **Written Solicitations.** For Intermediate Procurements equal to or exceeding \$75,000, the City shall use a Written solicitation to obtain Quotes, Bids, or Proposals.
- (4) **Negotiations.** The City may negotiate with a prospective Contractor who offers to provide Goods or Services in response to an Intermediate Procurement to clarify its Quote or Offer or to effect modifications that will make the quote or Offer more Advantageous to the City.
- (5) **Award.** If a Contract is Awarded, the City shall Award the Contract to the Offeror whose quote or Proposal will best serve the interests of the City, taking into account price as well as considerations including, but not limited to, experience, expertise, product functionality, suitability for a particular purpose, and Contractor responsibility under ORS 279B.110.
- (6) **Amendments.** The City may amend a Contract Awarded as an Intermediate Procurement in accordance with COH-47-0800, but the cumulative amendments may not increase the total contract price to a sum that exceeds \$250,000 or 125% of the original Contract Price, whichever is greater.
- (7) **No Fragmentation.** A Procurement may not be artificially divided or fragmented so as to constitute an Intermediate Procurement. See ORS 279B.070(2).

COH-47-0275 Sole-Source Procurements

- (1) **Generally.** The City Manager is delegated the authority to determine whether Goods and Services or a class of Goods and Services are available from only one source pursuant to ORS 279B.075. The City Manager's determination must be based on Written Findings that may include information that:
 - (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.
- (2) **Public Notice.** If the Contract amount is greater than \$250,000:
 - (a) The City shall give public notice of the City Manager's determination that the Goods or Services or class of Goods or Services are available from only one source. The City shall publish such notice in a manner similar to public notice of Competitive Sealed Bids under ORS 279B.055(4) and COH-47-0300.
 - (b) The public notice shall describe the Goods or Services to be acquired by a Sole-Source Procurement, identify the prospective Contractor, and include the date, time, and place that protests are due. The City shall give affected Persons at least seven Days from the date of the notice of the determination that the Goods or Services are available from only one source to protest the Sole-Source determination.
- (3) **Protest.** An affected Person may protest the City Manager's determination that the Goods or Services or class of Goods or Services are available from only one source in accordance with COH-47-0710.

COH-47-0280 Emergency Procurements

- (1) **Generally.** The City Manager or designee 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 should be made with competition that is reasonable and appropriate under the circumstances. The City Manager will document the nature of the emergency and describe the method used for selection of the particular Contractor.
- (2) **Construction Services.** For an Emergency Procurement of construction Services that are not Public Improvements, the City shall ensure competition for a Contract for the Emergency Work that is reasonable and appropriate under the emergency circumstances. In conducting the Procurement, the City shall set a solicitation time period that the City determines to be reasonable under the Emergency circumstances, and may issue Written or oral requests for

Offers or make direct appointments without competition in cases of extreme necessity. See COH-49-0150.

SPECIAL PROCUREMENTS (CONTRACTING EXEMPTIONS)

COH-47-0285 Special Procurements; Purpose and Application

- (1) The City may Award a Public Contract as a Special Procurement pursuant to the requirements of ORS 279B.085 without using Competitive Sealed Bidding or Competitive Sealed Proposals or other competitive procedures as otherwise required by these Rules. The Contract Review Board must approve Special Procurements. The Contract Review Board may approve the following two types of Special Procurements:
 - (a) A "Class Special Procurement" is a Procurement procedure for entering into a series of Contracts over time or for multiple Projects based on the classification of the Contract.
 - (b) A "Contract-Specific Special Procurement" is a Procurement procedure for the purpose of entering into a single Contract or a number of related Contracts on a one-time basis or for a single Project.

COH-47-0287 Special Procurements; Request Procedures

- (1) To seek approval of an additional Special Procurement, the City Manager or designee shall submit a Written request to the Contract Review Board. The request must describe the contracting procedure, the Goods and Services or class of Goods and Services that are the subject of the Special Procurement, and the circumstances that justify the use of a Special Procurement under the standards set forth in Section (2) of this Rule.
- (2) The Contract Review Board shall review and may approve a request for a Special Procurement if the Contract Review Board finds that the use of the Special Procurement:
 - (a) Is unlikely to encourage favoritism in the Awarding of Public Contracts or to substantially diminish competition for Public Contracts; and
 - (b) Is reasonably expected to result in substantial cost savings to the City or to the public; or
 - (c) Otherwise substantially promotes the public interest in a manner that could not practicably be realized by complying with Procurement requirements that would otherwise be applicable to the Procurement under Division 47 of these Rules.
- (3) The City shall give public notice of approval of a Special Procurement in the manner provided in COH-47-0300. The notice will describe the Goods or Services or class of Goods or Services subject to the Special Procurement, and shall give affected Persons at least seven Days from the date of notice of the approval of the Special Procurement to protest the Special Procurement.
- (4) An affected Person may protest the approval of a Special Procurement in accordance with ORS 279B.400 and COH-47-0700.

- (5) An approved Class Special Procurement shall be added to enumerated Class Special Procurements in COH-47-0288.

COH-47-0288 Approved Class Special Procurements

The Contract Review Board declares the following classes of Contracts for Goods or Services listed in this Section as Class Special Procurements for which Contracts may be Awarded without compliance with the competitive Procurement requirements that would otherwise be applicable to the Procurement under Division 47 of these Rules.

- (1) Unless an alternative Procurement process is particularly specified in these Rules, the selection procedures for such Class Special Procurements shall be as the City Manager or designee determines will result in a Contract that will best serve the interests of the City.
- (2) Prior to utilizing a Class Special Procurement, the City Manager or designee will document in Writing in the Procurement File the reasons why the Contract qualifies as a Class Special Procurement under these Rules, including any required Findings.
- (3) Except as otherwise provided in this Rule, the Council must approve any Contracts Awarded pursuant to Special Procurement if the Contract Price exceeds the City Manager's delegated authority under COH-45-0200.
- (4) The Contract Review Board hereby designates the following classes of Contracts for Special Procurement:
 - (a) **Advertising Contracts.** The City may purchase advertising in any medium, regardless of the dollar value of the Contract. The City may sell advertising for City publications or activities, regardless of the dollar value of the Contract.
 - (b) **Equipment Repair/Overhaul.** The City may enter into a Public Contract for equipment repair or overhaul without competitive Procurement, subject to the following conditions:
 - (A) Where the extent of the repair or overhaul is unknown or not easily identified; or
 - (B) Where service or parts requirements are unpredictable; or
 - (C) Service or parts required are for equipment for which specially trained personnel are required, and such personnel are available from only one source; and conducting a competitive process is impractical. The City must document in the Procurement File the reasons why a competitive process was deemed to be impractical.
 - (c) **Specifications.**
 - (A) "Or Equal" Specification.
 - (i) A Brand Name or Equal Specification may be used when the use of a Brand Name or Equal Specification is advantageous to the City, because the Brand

Name describes the standard of quality, performance, functionality, and other characteristics of the product needed by the City.

- (ii) The City Manager is entitled to determine what constitutes a product that is equal or superior to the product specified, and any such determination is final.
 - (iii) Nothing in this Section may be construed as prohibiting the City Manager from specifying one or more comparable products as examples of the quality, performance, functionality, or other characteristics of the product needed by the City.
- (B) Specifying a Particular Make or Product. A Brand Name Specification may be prepared and used only if the City Manager determines for a solicitation or a class of solicitations that only the identified Brand Name Specification will meet the needs of the City based on one or more of the following Findings:
- (i) That use of a Brand Name Specification is unlikely to encourage favoritism in the Awarding of Public Contracts or substantially diminish competition for Public Contracts;
 - (ii) That use of a Brand Name Specification would result in substantial cost savings to the City;
 - (iii) That there is only one manufacturer or seller of the product of the quality, performance, or functionality required;
 - (iv) That efficient utilization of existing Goods requires the acquisition of compatible Goods or Services. For the purposes of this Finding, "compatibility" includes, without limitation, technical compatibility, technological equity, and equivalent ease of training, durability, and use.
- (d) **Copyrighted Materials and Creative Works.** The City may directly purchase copyrighted materials or creative works regardless of dollar value if available from only one source. Examples of copyrighted materials covered by this exemption may include, but are not necessarily limited to: original artwork, music, creative written works, reference materials, books, periodicals, audio and visual media, and non-mass-marketed software.
- (e) **Insurance and Employee Benefits.** The City may purchase liability, property damage, workers' compensation, and other insurance and insurance Services Contracts, and employee benefits, without competitive procurement and regardless of dollar amount, by selecting either a vendor directly or by appointing an agent of record. For the purpose of this Special Procurement, "employee benefits" includes, but is not limited to, "employee benefit plans" as defined in ORS 243.105(1), or other benefits, including, but not limited to: life, supplemental medical, supplemental dental, optical, accidental death or disability insurance plans, long-term care insurance, health care coverage to retired officers, employees, spouses, and children, employee assistance plans, and expense reimbursement plans.

- (f) **Spot Buys.** This Special Procurement provides a process for the City to procure products that are available for a limited period of time at "lower-than-normal" prices (also referred to as "spot buys").
- (A) Regardless of dollar value and without Competitive Procurement, the City may purchase "spot buys."
- (B) Conditions. The City may procure an unlimited dollar value of products when any of the following conditions are present:
- (i) A non-exclusive mandatory-use Contract or regularly scheduled Bid process already exists for the item being purchased;
 - (ii) The proposed unit price of the item(s) to be purchased is significantly less than a comparable item's price on an existing mandatory-use Contract, recent Bid, or based on obtaining at least three Quotes, and the amount saved exceeds any additional administrative costs incurred to purchase the item using this Special Procurement;
 - (iii) The product being purchased has limited availability (i.e., the product may no longer be available or available at the special price upon completion of normal Bid processes); or
 - (iv) Any mandatory-use Contract currently in place for the item being purchased either:
 - 1. Does not contain language prohibit such spot buys; or
 - 2. Contains language permitting the use of spot buys.
- (C) Notwithstanding subsection (4)(f)(B) of this Section, the City may not purchase a spot buy if doing so would jeopardize fulfillment of a guaranteed minimum volume under an existing mandatory use Contract;
- (D) Documentation. Purchases may only be made under this Special Procurement if the City Manager documents to the Procurement File that the conditions set forth in Section (4)(f)(B) apply to the proposed purchase.
- (E) Notwithstanding COH-45-0200, the Council hereby authorizes the City Manager to enter into and approve payment on "spot-buy" Contracts in any dollar amount, as the City's budget may permit.
- (g) **Concession Agreements.**
- (A) The City may establish Concession Agreements as a result of direct negotiation or a competitive process when these Agreements:
- (i) Will total \$10,000 in cost or less in a fiscal year, or

- (ii) Are for the purpose of selling or promoting food, beverages, merchandise or Services to the public at a single public event.
- (B) All other Concession Agreements are subject to the competitive requirements of these Division 47 Rules.
- (h) **Price Agreements.**
 - (A) Price Agreements may be established for the purposes of minimizing paperwork, achieving continuity of product, securing a source of supply, reducing inventory, combining City requirements for volume discounts, creating standardization among agencies, and reducing lead time for ordering. The City Manager may enter into Price Agreements to purchase Goods or Services for an anticipated need at a predetermined price, but the Contract must be let by a Competitive Procurement process pursuant to the requirements of these Rules.
 - (B) The City Manager may purchase the Goods and Services from a Contractor Awarded a Price Agreement without first undertaking additional Competitive solicitation up to the amount set forth in the Price Agreement.
 - (C) The City Manager may use the Price Agreement entered into by another Public Agency when the Original Contract was let pursuant to COH-46-0400 through COH-46-0480 (cooperative procurement);
 - (D) The term of the Price Agreement, including renewals, may not exceed the term stated in the original solicitation.
- (i) **Purchase of Used Personal Property.**
 - (A) The City Manager may purchase Used Personal Property or Equipment, not to exceed \$250,000 in cost, without seeking competition. The City Manager may purchase Used Personal Property or Equipment equal to or greater than \$250,000 in cost, but must seek competition as per the intermediate Procurement process in COH-47-0270, unless the purchase is otherwise exempt from competition under these rules.
- (j) **Reverse Auctions.**
 - (A) A reverse auction means a process for the purchase of Goods and Services from the lowest Bidder. The City must conduct reverse auctions by first publishing a solicitation that describes its requirements and Contract terms and conditions. Then the City must solicit online Bids from all interested Bidders through an Internet-based program. The solicitation must set forth a start and end time for Bids and specify the following type of information to be disclosed to Bidders during the reverse auction:
 - (i) The prices of the other Bidders or the price of the most Competitive Bidder;

- (ii) The rank of each Bidder (e.g., (i) “winning” or “not winning” or (ii) “1st, 2nd, or higher”);
 - (iii) The scores of the Bidders if the City chooses to use a scoring model that weighs non-price factors in addition to price; or
 - (iv) Any combination of (A), (B), and (C) above.
- (B) Before the reverse auction commences, Bidders must be required by the City to assent to the Contract terms and conditions, either in Writing or by an Internet “click-through” agreement. The Bidders then compete for the Award of a Contract by offering successively lower prices, informed by the price(s), ranks, and scores, separately or in any combination thereof, disclosed by the City. The identity of the Bidders must not be revealed during this process. Only the successively lower price(s), ranks, scores, and related details, separately or in any combination thereof, will be revealed to the participants. The City may cancel this solicitation if the City determines that it is in the City's best interest. At the end of this Bidding process, the City must Award any potential Contract to the lowest Responsible Bidder, or in the case of multiple Awards, lowest Responsible Bidders pursuant to ORS 279A.055(10)(b). This process allows the City to test and determine the suitability of the Goods and Services before making the Award.
- (k) **Existing Technology Systems.** The City Manager may enter into a Contract and may renew existing Contracts for proprietary information technology and telecommunications Services, and hardware or software maintenance, upgrades, modules, or software components, where the efficient utilization of existing equipment or systems requires the acquisition of compatible Goods or Services, or where Goods or Services are available from only one source. The City Manager must make a Finding supporting this conclusion as required in COH-47-0275 or COH-47-0288(3)(b). In making this determination, the City Manager may consider the functionality of the existing system with upgrades or continued service, long-term cost, ease of use, integration with existing technology or systems, or other factors.
- (l) **Hazardous Material Abatement.**
- (A) The City Manager may enter into Public Contracts without Competitive Procurement, regardless of dollar amount, when ordered to clean up oil, asbestos-containing materials, or hazardous waste pursuant to the authority granted by the Oregon Department of Environmental Quality (“DEQ”) under ORS Chapter 466, especially ORS 466.605 through 466.680. In exercising its authority under this exemption:
- (i) The City Manager must, to the extent reasonable under the circumstances, encourage competition by attempting to obtain informal Quotes from potential suppliers of Goods and Services.
 - (ii) The department responsible for managing or coordinating the clean-up must submit a Written description of the circumstances that require the clean-up and

a copy of the DEQ order for the clean-up, along with a requisition and Purchase Order, authorizing the Contract, to the City Purchasing Division.

- (iii) The City Purchasing Division must record the measures taken under Section (11)(b) of this Rule to encourage competition, the amount of the Quotes or Proposals obtained, if any, and the reason for selecting the Contractor to whom Award is made.
 - (iv) The City may not contract pursuant to this exemption in the absence of an order from the DEQ to clean up a site that includes a time limit that would not allow the City to hire a Contractor under normal Competitive Procurement procedures. Goods and Services to perform other hazardous material removal or clean-up will be purchased in accordance with normal Competitive Procurement procedures as described in these Rules and policies.
 - (v) Notwithstanding COH-45-0200, the Council hereby authorizes the City Manager to enter into and approve payment on a Contract for hazardous material abatement in any dollar amount, but will report the nature and amount of the Contract to the Council as provided in COH-45-0200(6).
- (m) **Donated Materials or Services.** The City may directly negotiate a Contract with a Person to perform Services or provide Goods or Services regardless of dollar amount, if:
- (A) The Person has agreed to donate all or a significant portion of the materials or Services necessary to perform the Work; and
 - (B) The Person enters into a license or agreement with the City whereby the Person agrees to comply with the Public Contract requirements applicable to the particular Project and any requirements that the City deems necessary or beneficial to protect the City.
- (n) **Purchases through Federal Programs.** The City may purchase certain authorized Goods and Services through General Service Administration federal programs or federal contracts, provided that the City has federal authorization to purchase through the federal program and the federal contract was solicited in a manner substantially equivalent to the requirements of COH Division 47 and the Public Contracting Code.
- (o) **Purchases under Contracts Solicited by Nonprofit Procurement Organizations of which the City is a Member.** The City may purchase Goods and/or Services under a Contract or Procurement solicited by a Nonprofit Procurement Organization of which it is a member. For the purposes of this Special Procurement, such a Procurement Organization will be considered to be an "Administering Contracting Agency" and a "Contracting Purchasing Group" under COH-46-0400 through COH-46-0480. Such Procurement must otherwise comply with the requirements for permissive, joint, or Interstate Cooperative Procurements, as applicable, pursuant to COH-46-0400 through COH-46-0480.

- (p) **Contracts for Price-Regulated Items.** The City Manager may contract for the direct purchase of Goods or Services where the rate or price for the Goods or Services being purchased is established by federal, state, or local regulatory authority without competitive solicitation.
- (q) **Investment Contracts.** The City Manager may contract for the investment of City funds or the borrowing of funds by the City when such investment or borrowing is contracted pursuant to statute, rule, or constitution. The City Manager shall use competitive methods where possible to achieve the best value for the City.
- (r) **Rating Agency Contracts.** The City may purchase the Services of Moody's Investors Service, Standard & Poor's, or similar rating agencies.
- (s) **Expedited Contracting Process in Order to Access State, Federal, or Grant Funding.** The City Manager may waive any or all of the solicitation procedures under this Division 47 in the following circumstances:
 - (A) The state or federal government or a granting entity has adopted a funding program or made funding available to assist the City in purchasing Goods and/or Services and has attached a time deadline to have a Contract in place or underway or completed in order for the City to access or be eligible for those funds.
 - (B) The City Manager determines that compliance with the solicitation procedures in this Rule could jeopardize the City's ability to access or be eligible for such funding under the timeline established by the state or federal government or granting entity. The City Manager provides for an alternative contracting process. The reasons for and extent of the waiver are documented in the Procurement File.
 - (C) Notwithstanding COH-45-0200, the Council hereby authorizes the City Manager to enter into and approve payment on Contracts subject to this exemption in any dollar amount as the City's budget may permit, but will report the nature and amount of the Contract to the Council if the Contract is over the City Manager's delegated authority as set forth in COH-45-0200(4)(b)(A).
- (t) **Police Animals.** The City Manager may contract for the direct purchase of police animals without competitive solicitation.
- (u) **Prefabricated Transitional Shelter Products.** The City may establish a Prefabricated Transitional Shelter Qualified Product List for the procurement of "Shelter Pods," meaning private sleeping units, for one or more individuals and their pets, with secure personal storage; "Service Structures," meaning units with showers, flush toilets, kitchen and laundry facilities for those using the shelter pods; and other goods or materials reasonably related to Shelter Pods and Services Structures.
 - (A) The Prefabricated Transitional Shelter Qualified Product List will be established for the purpose of examination and/or testing of product designs and products to assure such designs or products will meet the City's needs and are compliant with relevant building and fire/life safety codes.

- (B) The City may establish such a list by directly contacting suppliers or sellers of such products or designs or through a public notice, in accordance with ORS 279B.055 (4), to provide contractors, suppliers or sellers of such products an opportunity to submit goods or product designs for consideration. Any potential contractor, seller or supplier, even though not solicited, may offer its goods for consideration.
- (C) After establishing such a list, the City will periodically consider additions to the list in the same manner described in subsection (B).
- (D) The City may solicit offers for goods on the Prefabricated Transitional Shelter Qualified Product List utilizing intermediate solicitation procedures provided in COH-47-0270, regardless of the dollar value of the contract.
- (E) The City Manager may waive any or all of the solicitation procedures under this Division 47 based on one or more of the following Findings:
 - (i) There is only one manufacturer or seller of the product of the quality, performance or functionality required;
 - (ii) Efficient utilization of existing goods requires the acquisition of compatible goods or services. For the purpose of this finding “compatibility” includes, without limitation, technical compatibility, technological equity and equivalent ease of training, durability and use.

COH-47-0290 Cooperative Procurements

- (1) The City may participate in, sponsor, conduct, or administer Cooperative Procurements as set forth in ORS 279A.200 through 279A.225 and COH-46-0400 through COH-46-0480.

PROCUREMENT PROCESS

COH-47-0300 Public Notice of Solicitation Documents

- (1) **Notice of Solicitation Documents.** The City shall provide public notice of every solicitation for Goods and Services, by Competitive Sealed Bidding or Competitive Sealed Proposals, in accordance with section (2) of this rule. The City may give additional notice using any method it determines appropriate to foster and promote competition, including:
 - (a) Mailing notice of the availability of the solicitation document to Persons that have expressed an interest in the City's Procurements;
 - (b) Placing notice on the City's Electronic Procurement System; or
 - (c) Placing notice on the City's Internet World Wide Web site.
- (2) **Advertising.** The City shall advertise every notice of a Solicitation Document as follows:
 - (a) The City shall publish the advertisement for Offers in accordance with the requirements of ORS 279B.055(4) and 279B.060(4) in at least one newspaper of

general circulation in the City and in as many other publications as the City may determine; or

(b) The City may publish the advertisement for Offers on the City's designated Electronic Procurement System(s) instead of publishing notice in a newspaper of general circulation as required by ORS 279B.055(4)(b) if, by rule or order, the City's Contract Review Board has authorized the City to publish notice of Solicitation Documents on the City's Electronic Procurement System.

(c) Notice shall be given at least seven Days prior to the solicitation Closing day.

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

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

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

(c) The interval between the first date of notice of the Solicitation Document given in accordance with Sections (2)(a) or (b) above and Closing, which shall not be less than seven Days for an Invitation to Bid and fourteen (14) Days for a Request for Proposals, unless the City determines that a shorter interval is in the public's interest, and that a shorter interval will not substantially affect competition. However, in no event shall the interval between the first date of notice of the solicitation document given in accordance with Section (2)(a) or (b) above and Closing be less than seven Days as set forth in ORS 279B.055(4)(f). The City shall document the specific reasons for the shorter public notice period in the Procurement File;

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

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

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

(g) The scheduled Opening; and

(h) Any other information the City deems appropriate.

(4) **Posting Advertisement for Offers.** The City shall post a copy of each advertisement for Offers at the principal business office of the City. An Offeror may obtain a copy of the advertisement for Offers upon request.

(5) **Fees and Deposits.** The City may charge a fee or require a deposit for the Solicitation Document.

(6) **Notice of Addenda.** The City shall provide potential Offerors notice of any Addenda to a Solicitation Document in accordance with COH-47-0430.

COH-47-0310 Bids or Proposals are Offers

- (1) **Offer and Acceptance.** The Bid or Proposal is the Bidder's or Proposer's Offer to enter into a Contract.
 - (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 City's acceptance for the period specified in COH-47-0480. The City may elect to accept the Offer at any time during the specified period, and the City'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 COH-47-0480, the City 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 the Rules or the Solicitation Document, Proposers are obligated to negotiate in good faith and only on those terms or conditions that the Rules or the Solicitation Document have reserved for negotiation.
- (2) **Contingent Offers.** Except to the extent that the Proposer is authorized to propose certain terms and conditions pursuant to COH-47-0261, a Proposer must not make its Offer contingent upon the City's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.
- (3) **Offeror's Acknowledgment.** By Signing and returning the Offer, the Offeror acknowledges that it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits Proposers to propose alternative terms or conditions under COH-47-0261, the Offeror's Offer shall include any nonnegotiable terms and conditions, any proposed terms and conditions offered for negotiation upon and to the extent accepted by the City in Writing, and Offeror's agreement to perform the scope of Work and meet the performance standards set forth in the final negotiated scope of Work.

COH-47-0320 Facsimile Bids and Proposals

- (1) **City Authorization.** The City may authorize Offerors to submit Facsimile Offers. If the City determines that Bid or Proposal security is or will be required, the City should not authorize Facsimile Offers unless the City has another method for receipt of such security. Prior to authorizing the submission of Facsimile Offers, the City must determine that the City's equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time. In addition, the City must establish administrative procedures and controls:
 - (a) To receive, identify, record, and safeguard Facsimile Offers;
 - (b) To ensure timely delivery of Offers to the location of Opening; and
 - (c) To preserve the Offers as sealed.

- (2) **Provisions to be Included in Solicitation Document.** In addition to all other requirements, if the City authorizes a Facsimile Offer, the City will include in the Solicitation Document the following:
- (a) A provision substantially in the form of the following: "A 'Facsimile Offer,' as used in this Solicitation Document, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by the City via a facsimile machine";
 - (b) A provision substantially in the form of the following: "Offerors may submit Facsimile Offers in response to this Solicitation Document. The entire response must arrive at the place and by the time specified in this Solicitation Document";
 - (c) A provision that requires Offerors to Sign their Facsimile Offers;
 - (d) A provision substantially in the form of the following: "The City reserves the right to Award the Contract solely on the basis of a Facsimile Offer." However, upon the City's request the apparent successful Offeror must promptly submit its complete original Signed Offer;
 - (e) The data and compatibility characteristics of the City's receiving facsimile machine as follows:
 - (A) Telephone number; and
 - (B) Compatibility characteristics, e.g., make and model number, receiving speed, and communications protocol.
 - (f) A provision that provides that the City 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.

COH-47-0330 E-Procurement

(1) Electronic Procurement Authorized.

- (a) The City may conduct all phases of a Procurement, including, without limitation, the posting of Electronic Advertisements and the receipt of Electronic Offers, by electronic methods if and to the extent the City specifies in a Solicitation Document, a Request for Quotes, or any other Writing that instructs Persons how to participate in the Procurement.
- (b) The City must open an Electronic Offer in accordance with electronic security measures in effect at the City at the time of its receipt of the Electronic Offer. Unless the City 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 City's use of electronic Signatures must be consistent with applicable statutes and Rules. The City may limit the use of electronic methods of conducting a Procurement as Advantageous to the City.
- (d) If the City determines that Bid or Proposal security is or will be required, the City should not authorize Electronic Offers unless the City has another method for receipt of such security.

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

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

(4) Offer Process. The City 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 City specifies that Persons may submit multiple Electronic Offers during a specified period of time, the City 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 City will accept Electronic Offers for a period of time other than at the designated date and time that the City will first receive Electronic Offers, the City must begin to accept real time Electronic Offers on an Electronic Procurement System, and must continue to accept Electronic Offers in accordance with Section (5)(b) of this Rule until the date and time specified by the City, after which the City will no longer accept Electronic Offers.

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

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

(6) **Failure of the E-Procurement System.** In the event of a failure that interferes with the ability of Persons to submit Electronic Offers, protest, or to otherwise participate in the Procurement, the City may cancel the Procurement in accordance with COH-47-0660, or may extend the date and time for receipt of Electronic Offers by providing notice of the extension immediately after the system becomes available.

BID AND PROPOSAL PREPARATION

COH-47-0400 Offer Preparation

- (1) **Instructions.** An Offeror must submit and Sign its Offer in accordance with the instructions set forth in the Solicitation Document. An Offeror must initial any corrections or erasures to its Offer prior to Opening in accordance with the requirements for submitting an Offer, set forth in the Solicitation Document.
- (2) **Forms.** An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.
- (3) **Documents.** An Offeror shall provide the City with all documents and Descriptive Literature required by the Solicitation Document.

COH-47-0410 Offer Submission

- (1) **Product Samples and Descriptive Literature.** The City may require Product Samples or Descriptive Literature if the City determines either is necessary or desirable to evaluate the quality, features, or characteristics of an Offer. The City will dispose of Product Samples, or make them available for the Offeror to retrieve, in accordance with the Solicitation Document.
- (2) **Identification of Offers.**
 - (a) To ensure proper identification and handling, Offers must be submitted in a sealed envelope appropriately marked. If the City permits Electronic Offers or Facsimile Offers in the Solicitation Document, the Offeror may submit and identify Electronic Offers or Facsimile Offers in accordance with these Division 47 Rules and the instructions set forth in the Solicitation Document. The City will not consider Facsimile or Electronic Offers unless authorized by the Solicitation Document.
 - (b) The City is not responsible for Offers submitted in any manner, format, or to any delivery point other than as required in the Solicitation Document.
- (3) **Receipt of Offers.** The Offeror is responsible for ensuring that the City receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

COH-47-0420 Pre-Offer Conferences

- (1) **Purpose.** The City 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 City may require attendance at the pre-Offer conference as a condition for making an Offer.
- (3) **Scheduled Time.** If the City holds a pre-Offer conference, it must be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference.
- (4) **Statements Not Binding.** Statements made by the City's representative at the pre-Offer conference do not change the Solicitation Document unless the City confirms such statements with a Written Addendum to the Solicitation Document.
- (5) **City Announcement.** The City must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with COH-47-0255(2) or COH-47-0260(2).

COH-47-0430 Addenda to Solicitation Document

- (1) **Issuance; Receipt.** The City may change a Solicitation Document only by Written Addenda. An Offeror must provide Written acknowledgment of receipt of all issued Addenda with its Offer, unless the City otherwise specifies in the Addenda.
- (2) **Notice and Distribution.** The City must notify prospective Offerors of Addenda in a manner intended to foster competition and to make prospective Offerors aware of the Addenda. The Solicitation Document must specify how the City will provide notice of Addenda and how the City will make the Addenda available before Closing, and at each subsequent step or phase of evaluation if the City will engage in a multi-step competitive sealed Bidding process in accordance with COH-47-0257, or a multi-tiered or multi-step competitive sealed Proposal process in accordance with COH-47-0261. The following is an example: "The City will not mail notice of Addenda, but will post public notice of any Addenda on the City's Web site. Offerors should frequently check the City's Web site until Closing, i.e., at least once weekly until the week of Closing and at least once daily the week of Closing."
- (3) **Timelines; Extensions.**
 - (a) The City shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The City may extend the Closing if the City determines that prospective Offerors need additional time to review and respond to Addenda. Except to the extent justified by a countervailing public interest, the City must not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.
 - (b) Notwithstanding Section (3)(a) of this Rule, an Addendum that modifies the evaluation criteria, selection process, or procedure for any step or phase of competition under a Multi-step Sealed Bidding or Multi-step Sealed Proposals process issued in accordance with COH-47-0257 or COH-47-0261 must be issued no fewer than five Days before the

beginning of that step or phase of competition, unless the City determines that a shorter period is sufficient to allow the Offerors to prepare for that step or phase of competition. The City must document the factors it considered in making that determination, which may include, without limitation, the scope of the changes to the Solicitation Document, the location of the remaining eligible Proposers, or whether shortening the period between issuing an Addendum and the beginning of the next step or phase of competition favors or disfavors any particular Proposer or Proposers.

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

COH-47-0440 Pre-Closing Modification or Withdrawal of Offers

- (1) **Modifications.** An Offeror may modify its Offer in Writing prior to the Closing. An Offeror must prepare and submit any modification to its Offer to the City in accordance with COH-47-0400 and COH-47-0410, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror must mark the submitted modification as follows:
- (a) Bid (or Proposal) Modification; and
 - (b) Solicitation Document Number (or other identification as specified in the Solicitation Document).
- (2) **Withdrawals.**
- (a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, Signed by an authorized representative of the Offeror, delivered to the individual and location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by the City prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in person prior to the Closing upon presentation of appropriate identification and evidence of authority satisfactory to the City.
 - (b) The City may release an unopened Offer withdrawn under Section (2)(a) of this Rule to the Offeror or its authorized representative, after voiding any date and time-stamp mark.
 - (c) The Offeror must mark the Written request to withdraw an Offer as follows:

- (A) Bid (or Proposal) Withdrawal; and
 - (B) Solicitation Document Number (or other identification as specified in the Solicitation Document).
- (3) **Documentation.** The City must include all documents relating to the modification or withdrawal of Offers in the appropriate Procurement File.

COH-47-0450 Receipt, Opening, and Recording of Offers; Confidentiality of Offers

- (1) **Receipt.** The City shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The City shall not open the Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If the City inadvertently opens an Offer or a modification prior to the Opening, the City shall return the Offer or modification to its secure and confidential state until Opening. The City shall document the resealing for the Procurement File (e.g., "City inadvertently opened the Offer due to improper identification of the Offer").
- (2) **Opening and Recording.** The City shall publicly open Offers including any modifications made to the Offer pursuant to COH-47-0440(1). In the case of Invitations to Bid, to the extent practicable, the City shall read aloud the name of each Bidder and such other information as the City considers appropriate. However, the City may withhold from disclosure information marked by the Offeror as "confidential" or a "trade secret" in accordance with ORS 279B.055(5)(c) and 279B.060(5). And if the Oregon Public Records Act allows the City to withhold the information. In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the City will not read Offers aloud.

COH-47-0455 No Offers Received

- (1) **No Offers Received.** Provided the City has made good faith efforts to obtain Offers for Goods and/or Services through the Procurement procedures described in this Division 47, in the event no offers are received in response to a competitive process pursuant to COH-47-0252, COH-47-0255, COH-47-0257, COH-47-0260, or COH-47-0270, the City may enter into direct negotiations with a Vendor to fulfill the needs described in the Solicitation Documents under the following conditions.
- (2) **Conditions.** Direct negotiations with a Vendor in the event that no Offers are received are conditioned on the following:
- (a) The value of the negotiated Contract:
 - (A) Does not exceed the maximum amount applicable to the solicitation method the City used; and,
 - (B) In all cases, does not exceed \$500,000.
 - (b) The City may only procure Goods and/or Services under this rule within six (6) months of the date Offers for the request for bids, quotes, or proposal were due; and,

- (c) The scope of the Contract is substantially the same as the scope described in the Solicitation documents; and,
 - (d) Adequate documentation is included in the Solicitation File.
- (3) **Documentation.** The City must document the rationale for any Contract awarded pursuant to this rule. The documentation must:
- (a) Summarize the efforts the City initially took to obtain Offers, including the Goods and/or Services requested; if, how, and when any advertising or Vendor outreach was made; and, the date that bids, quotes, or proposals were due;
 - (b) Identify the Vendor from whom it seeks to purchase with an explanation of why this Vendor was selected; and,
 - (c) The anticipated Contract duration and maximum amount of the awarded Contract.

COH-47-0460 Late Offers, Late Withdrawals, and Late Modifications

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. The City must not consider late Offers, withdrawals, or modifications except as permitted in COH-47-0470 or COH-47-0261.

COH-47-0470 Mistakes

- (1) **General.** To protect the integrity of the Competitive Procurement process and to ensure fair treatment of Offerors, the City should carefully consider whether to permit waiver, correction, or withdrawal of Offers for certain mistakes.
- (2) **City Treatment of Mistakes.** The City must not allow an Offeror to correct or withdraw an Offer for an error in judgment. If the City discovers certain mistakes in an Offer after Opening but before the Award of the Contract, the City may take the following action:
 - (a) The City 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: 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 City 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 City's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example a missing unit price may be established by dividing the total price for the units by the quantity of units for that item, or a missing or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). Unit prices will prevail over extended prices in the event of a discrepancy between extended prices and unit prices.
 - (c) The City 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 Section or an error in judgment;
 - (C) That the error cannot be corrected or waived under Section (b) of this Rule;
 - (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 City does not grant the Offeror permission to withdraw the Offer;
 - (G) That the City's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on the City or the public it represents; and
 - (H) That the Offeror promptly gave notice of the claimed error to the City.
 - (d) The criteria in Section (2)(c) of this Rule must determine whether the City will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether the City 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 City based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually Awarded by the City, 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 City must reject any Offer in which a mistake is evident on the face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents submitted with the Offer.

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

COH-47-0480 Time for City Acceptance

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

COH-47-0490 Extension of Time for Acceptance of Offer

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

QUALIFICATIONS AND DUTIES

COH-47-0500 Responsibility of Offerors

- (1) **Determination.** Before Awarding a Contract, the City shall determine that the Offeror submitting the lowest Bid or Proposal or most advantageous Offer is Responsible. The City must use the standards set forth in ORS 279B.110 and COH-47-0640(1)(c)(F) to determine if an Offeror is Responsible. In the event the City determines an Offeror is not Responsible, it shall prepare a Written determination of non-Responsibility as required by ORS 279B.110 and shall reject the Offer.
- (2) In addition to making the responsibility determination under ORS 279B.110 and OAR 137-047-0640(1)(c)(F), the City may consider (as authorized by House Bill 2094 (2019 Oregon Laws, chapter 124)), as part of the City's evaluation of a Bid or Proposal, whether the Bidder or Proposer owes a liquidated and delinquent debt to the state.

COH-47-0525 Qualified Products Lists

- (1) **Authority.** The City may develop and maintain a qualified products list pursuant to ORS 279B.115 COH-47-0525 Prequalification of Prospective Offerors; Pre-negotiation of Contract Terms and Conditions. The City may prequalify prospective Offerors pursuant to ORS 279B.120 and 279B.125.
- (2) If a solicitation is used in conjunction with prequalification, the City will not preclude potential bidders from qualifying during the solicitation period.
- (3) Notwithstanding the prohibition against revocation of prequalification in ORS 279B.120(3), the City may determine that a prequalified Offeror is not Responsible prior to Contract Award.
- (4) The City 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 City 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 City may agree to different pre-negotiated Contract terms and conditions with different prospective Proposers. When the City has pre-negotiated different terms and conditions with Proposers or when permitted, Proposers offer different terms and conditions, the City Agency may consider the terms and conditions in the Proposal evaluation process.

COH-47-0560 Personal Services Contract to Provide Specifications

City Disqualification as Bidder or Proposer:

- (1) The City elects to subject itself to ORS 279B.040. This statute generally prohibits a contractor from making an Offer on a solicitation if the contractor provided Personal Services to an agency in order to assist the agency with the preparation of that particular solicitation.
- (2) For the purposes of ORS 279B.040(1), a reasonable person would believe that a person who assisted the City, under a Personal Services contract, in the development of a solicitation for Goods or Services (or that person's affiliate), would have an advantage in obtaining the public contract that is the subject of the solicitation if:
 - (a) The specifications recommended by the personal service contractor for the sequence of Services, incorporation of special service or fabrication techniques, or design of any Goods or components or elements of Goods that the City published in its solicitation documents call for, expressly or implicitly, requirements that only the Personal Services contractor (or the contractor's affiliate), or a limited class of individuals in the contractor's area of specialty, have the ability to perform or produce or have the rights to perform or produce.
 - (b) The rendering of solicitation document development assistance under the Personal Services contract gives the contractor knowledge of the City's special needs or procedures, not generally known to the public, that give the contractor (or the contractor's affiliate) a material competitive advantage in competing for the contract for Goods or Services.
 - (c) The rendering of solicitation document development assistance under the Personal Services contract gives the contractor, significantly in advance of other prospective bidders or proposers, knowledge of the solicitation document requirements that would allow the Personal Services contractor (or the contractor's affiliate) a materially longer period in which to craft or refine a proposal in response to the solicitation documents.
- (3) For the purposes of ORS 279B.040(1), a reasonable person would believe that a person who assisted the City, under a Personal Services contract, in the development of a solicitation for Goods or Services (or that person's affiliate) would appear to have an advantage in obtaining the public contract that is the subject of the solicitation if:

- (a) Taking into account the Personal Services contractor’s announced areas of specialization, expertise or experience, the personal service contractor (or the contractor’s affiliate), or only a limited class of individuals in the contractor’s area of specialty, appear to have the capability to conform closely with the solicitation document requirements.
 - (b) Taking into account the Personal Services contractor’s announced areas of specialization, expertise or experience, the personal service contractor (or the contractor’s affiliate), or only a severely limited class of individuals in the contractor’s area of specialty, appear to have the qualifications, training, experience or capacity to satisfy any minimum requirements that may be stated in the solicitation documents.
 - (c) The solicitation documents for a contract for Goods or Services contain restrictions, deadlines or requirements that do not, when viewed objectively, reasonably promote rational procurement objectives of the City.
- (4) If the City engages a Personal Services contractor to advise or assist in the development of solicitation documents for a public contract for Goods or Services and the Personal Services contractor is engaged in the business of providing Goods or Services described in the solicitation documents, and the agency wishes to accept a bid or proposal from the Personal Services contractor under conditions described in section (2) or section (3) of this rule, the City department must appeal to the City Manager for an exemption from the disqualification from the ability to submit a bid or proposal.

COH-47-0565 Request for Qualifications (RFQ)

For purposes of this section, an RFQ may be used without the RFQ constituting a prequalification pursuant to COH-47-0525, if the City establishes the RFQ to determine whether competition exists to perform the needed Services or to establish a nonbinding, open list of qualified Contractors in addition to the general public and in order to expand the pool of qualified Contractors, prior to issuing an RFP. If the City establishes a closed, exclusive, or binding list of qualified Contractors, then the City must comply with Section (1) of this Rule. The City is not required to issue an RFQ and may elect to forego using an RFQ before issuing an RFP.

- (1) **Content of RFQ.** At a minimum, the RFQ must describe the particular specialty desired, the qualifications the Contractor(s) must have in order to be considered, and the evaluation factors and their relative importance. The RFQ may require information including, but not limited to: the Contractor's particular capability to perform the required Services; the number of experienced staff available to perform the required Services, including specific qualifications and experience of personnel; a list of similar Services the Contractor has completed, with references concerning past performance; and any other information deemed necessary by the City to evaluate Contractor qualifications. All RFQs must:
- (a) Be in Writing;
 - (b) Provide that the City may, at any time during the solicitation process, reject any or all Proposals or cancel the solicitation without liability if it is in the public interest to do so; and

- (c) Provide that the City is not responsible for any costs of any Proposers incurred while submitting Proposals, and that all Proposers who respond to solicitations do so solely at their own expense, unless compensation is expressly provided for in the Solicitation Document.
- (2) **Pre-Submission Meeting.** A qualifications pre-submission meeting, voluntary or mandatory, may be held for all interested Contractors to discuss the proposed Services. The RFQ must include the date, time, and place of the meeting(s).
- (3) **Notice and Opportunity to Submit RFQ.** Unless the RFQ establishes that competition does not exist or unless the solicitation process is canceled or all qualification statements are rejected, all respondents who met the published qualifications must receive a notice, or other materials as appropriate, in addition to the general public, of any required Services and have an opportunity to submit a Proposal in response to the City's subsequent RFP.

COH-47-0575 Debarment of Prospective Offerors

- (1) **Generally.** The City may debar prospective Offerors for the reasons of discriminating against a subcontractor in the Awarding of a Contract because the subcontractor is a minority, women or emerging small business enterprise as set forth in ORS 279A.110, or after providing notice and the opportunity for hearing as set forth in Sections (5)-(8).
- (2) **Responsibility.** Notwithstanding the limitation on the term for debarment in ORS 279B.130(1)(b), the City may determine that a previously debarred Offeror is not Responsible prior to Contract Award.
- (3) **Imputed Knowledge.** The City may attribute improper conduct of a Person or their affiliate or affiliates having a Contract with a prospective Offeror to the prospective Offeror for purposes of debarment where the impropriety occurred in connection with the Person's duty for or on behalf of, or with the knowledge, approval, or acquiescence of, the prospective Offeror.
- (4) **Limited Participation.** The City may allow a debarred Person to participate in solicitations and Contracts on a limited basis during the debarment period upon Written determination that participation is advantageous to the City. The determination must specify the factors on which it is based and define the extent of the limits imposed.
- (5) **Debarment Process.** The City may debar a prospective Bidder or Proposer from consideration for Award of the City's Contracts for the reasons listed in Section (6) of this Rule after providing the prospective Bidder or Proposer with notice and a reasonable opportunity to be heard.
 - (a) The City may not debar a prospective Bidder or Proposer under this Section for more than three years.
- (6) **Reasons for Debarment.** A prospective Bidder or Proposer may be debarred from consideration for Award of the City's Contracts if:
 - (a) The prospective Bidder or Proposer has been convicted of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract or in the performance of a public or private contract or subcontract.

- (b) The prospective Bidder or Proposer has been convicted 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.
 - (c) The prospective Bidder or Proposer has been convicted under state or federal antitrust statutes.
 - (d) The prospective Bidder or Proposer has committed a violation of a Contract provision that is regarded by the City or the Construction Contractors Board to be so serious as to justify disqualification. A violation may include, but is not limited to, a failure to perform the terms of a Contract or an unsatisfactory performance in accordance with the terms of the Contract, including a violation of the City's policy on Standards of Conduct for Independent Contractors. However, a failure to perform or an unsatisfactory performance caused by acts beyond the control of the Contractor may not be considered to be a basis for debarment.
 - (e) The prospective Bidder or Proposer does not carry workers' compensation or unemployment insurance as required by statute.
- (7) **Written Debarment Decision Required.** The City shall issue a Written decision to debar a prospective Bidder or Proposer under this Section. The decision must:
- (a) State the reasons for the action taken;
 - (b) Inform the debarred prospective Bidder or Proposer of the appeal rights of the prospective Bidder or Proposer under COH-47-0760; and
 - (c) Be mailed or otherwise furnished immediately to the debarred prospective Bidder or Proposer.
- (8) A prospective Bidder or Proposer that wishes to appeal debarment shall, within three business Days after receipt of notice of debarment, notify the City that the prospective Bidder or Proposer appeals the debarment as provided in COH-47-0760.

OFFER EVALUATION AND AWARD

COH-47-0600 Offer Evaluation and Award

- (1) **City Evaluation.** The City must evaluate Offers only as set forth in the Solicitation Document pursuant to ORS 279B.055(6)(a) and 279B.060(6)(b) based on the requirements set forth in the ITB or RFP, and in accordance with applicable law. The City must not evaluate Offers using any other requirement or criterion.
- (a) Evaluation of Bids.

- (A) Nonresident Bidders: In determining the lowest Responsive Bid, the City must apply the reciprocal preference set forth in ORS 279A.120(2)(b) and COH-46-0310 for nonresident Bidders.
 - (B) Public Printing: The City must, for the purpose of evaluating Bids, apply the public printing preference set forth in ORS 282.210 (printing shall be performed within the state).
 - (C) Award When Bids are Identical: If the City determines that one or more Bids are identical under COH-46-0300, the City must Award a Contract in accordance with the procedures set forth in COH-46-0300.
- (b) Evaluation of Proposals.
- (A) Award When Proposals are Identical: If the City determines that one or more Proposals are identical under COH-46-0300, the City must Award a Contract in accordance with the procedures set forth in COH-46-0300.
 - (B) Public Printing: The City must, for the purpose of evaluating Proposals, apply the public printing preference set forth in ORS 282.210 (printing shall be performed within the state).
- (c) Recycled Materials. When procuring Goods, the City shall give preference for Recycled Materials as set forth in ORS 279A.125 if:
- (d) The Recycled Product is available;
 - (e) The Recycled Product meets applicable standards;
 - (f) The Recycled Product can be substituted for a comparable non-recycled product; and
 - (g) The Recycled Product's costs do not exceed the costs of non-recycled products by more than 5%, or a higher percentage if the City makes a Written determination.
- (2) **Clarification of Bids or Proposals.** After the Opening, the City 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 City's sole discretion, needing clarification must be afforded such an opportunity. The City must document clarification of any Offeror's Bid or Proposal in the Procurement File.
- (3) **Negotiations.**
- (a) Bids. The City shall not negotiate with any Bidder. After Award of the Contract, the City and Contractor may only modify the Contract in accordance with COH-47-0800.
 - (b) Requests for Proposals. The City may only conduct discussions or negotiate with Proposers in accordance with ORS 279B.060(6)(b) and COH-47-0261. After Award of the Contract, the City and Contractor may only modify the Contract in accordance with COH-47-0800.

(4) **Award.**

- (a) General. If Awarded, the City must Award the Contract to the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer submitting the most advantageous Responsive Proposal. The City may Award by item, groups of items, or the entire Offer, provided such Award is consistent with the Solicitation Document and in the public interest.
- (b) Multiple Items. An Invitation to Bid or Request for Proposals may call for pricing of multiple items of similar or related type with the Award based on individual line item, group total of certain items, a “market basket” of items representative of the City’s expected purchases, or grand total of all items.
- (c) Multiple Awards - Bids.
 - (A) Notwithstanding Section (4)(a) of this Rule, the City may Award multiple Contracts under an Invitation to Bid in accordance with the criteria set forth in the Invitation to Bid. A multiple Award may be made if the Award to two or more Bidders is beneficial for adequate availability, delivery, service, competition, pricing, product capabilities, or other factors deemed significant by the City. Multiple Awards may not be allowed for user preference unrelated to utility or economy. A notice to prospective Bidders that multiple Contracts may be Awarded for any Invitation to Bid shall not preclude the City from Awarding a single Contract for such Invitation to Bid.
 - (B) If an Invitation to Bid permits the Award of multiple Contracts, the City shall specify in the Invitation to Bid the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services.
- (d) Multiple Awards - Proposals.
 - (A) Notwithstanding Section (4)(a) of this Rule, the City may Award multiple Contracts under a Request for Proposals in accordance with the criteria set forth in the Request for Proposals. A multiple Award may be made if the Award to two or more Proposers is beneficial for adequate availability, delivery, service, competition, pricing, product capabilities, or other factors deemed significant by the City. Multiple Awards may not be allowed for user preference unrelated to utility or economy. A notice to prospective Proposers that multiple Contracts may be Awarded for any Request for Proposals must not preclude the City from Awarding a single Contract for such Request for Proposals.
 - (B) If a Request for Proposals permits the Award of multiple Contracts, the City shall specify in the Request for Proposals the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services, which may include consideration and evaluation of the Contract terms and conditions agreed to by the Contractors.

- (e) **Partial Awards.** If after evaluation of Offers the City determines that an acceptable Offer has been received for only parts of the requirements of the Solicitation Document:
 - (A) The City may Award a Contract for the parts of the Solicitation Document for which acceptable Offers have been received; or
 - (B) The City may reject all Offers and may issue a new Solicitation Document on the same or revised terms, conditions, and Specifications.
- (f) **All-or-none Offers.** The City 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.

COH-47-0610 Notice of Intent to Award

- (1) **Notice of Intent to Award.** The City must provide Written notice to all Offerors of its intent to Award pursuant to ORS 279B.135 at least seven Days before the Award of a Contract, unless the City determines that circumstances justify prompt execution of the Contract, in which case the City may provide a shorter notice period. The City must document the specific reasons for the shorter notice period in the Procurement file. This Section does not apply to a Contract Awarded as a Small Procurement, an Intermediate Procurement, a Sole-Source Procurement, an Emergency Procurement, or a Special Procurement.
- (2) **Finality.** The City's Award shall not be final until the later of the following:
 - (a) The expiration of the protest period provided pursuant to COH-47-0740; or
 - (b) The City provides Written responses to all timely filed protests denying the protests and affirming the Award.

COH-47-0620 Documentation of Award

- (1) **Basis of Award.** After Award, the City must make a record showing the basis for determining the successful Offeror as part of the City's Procurement File.
- (2) **Contents of Award Record.** The City's record shall include:
 - (a) For Bids.
 - (A) Bids;
 - (B) Completed Bid tabulation sheet; and
 - (C) Written justification for any rejection of lower Bids.
 - (b) For Proposals.
 - (A) Proposals;

- (B) The completed evaluation of the Proposals;
- (C) Written justification for any rejection of higher-scoring Proposals; and
- (D) If the City engaged in any of the methods of Contractor selection described in ORS 279B.060(6)(b) and COH-47-0261, Written documentation of the content of any discussions, negotiations, best and final Offers, or any other procedures the City used to select a Proposer to which the City Awarded a Contract.

COH-47-0630 Availability of Award Decisions

- (1) **Contract Documents.** To the extent required by the Solicitation Document, the City shall deliver to the successful Offeror a Contract, a Signed Purchase Order, Price Agreement, or other Contract documents as applicable.
- (2) **Availability of Award Decisions.** A Person may obtain tabulations of Awarded Bids or evaluation summaries of Proposals for a minimal charge in person or by submitting to the City a Written request accompanied by payment. The requesting Person must provide the Solicitation Document number. In addition, the City may make available tabulations of Bids and Proposals through the City’s Electronic Procurement System or the City’s website.
- (3) **Availability of Procurement Files.** After notice of intent to Award, the City shall make Procurement Files available in accordance with applicable law.

COH-47-0640 Rejection of an Offer

- (1) **Rejection of an Offer.**
 - (a) The City may reject any Offer as set forth in ORS 279B.100. Specifically: Any solicitation or Procurement described in a 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 City as determined by the City. The reasons for the cancellation or rejection must be made part of the Procurement File. The City 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.
 - (b) The City shall reject an Offer upon the City’s finding that the Offer:
 - (A) Is contingent upon the City’s acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;
 - (B) Takes exception to terms and conditions (including Specifications) set forth in the Solicitation Document;
 - (C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of the Solicitation Document or in contravention of applicable law;
 - (D) Offers Goods or Services that fail to meet the Specifications of the Solicitation Document;

- (E) Is late;
 - (F) Is not in substantial compliance with the Solicitation Document; or
 - (G) Is not in substantial compliance with all prescribed public Procurement procedures.
- (c) The City shall reject an Offer upon the City's Finding that the Offeror:
- (A) Has not been prequalified and the City required mandatory prequalification;
 - (B) Has been debarred as set forth in ORS 279B.130 or has been disqualified pursuant to COH-46-0210(4) (Disqualification);
 - (C) Has not met the requirements of ORS 279A.105 (emerging small business), if required by the Solicitation Document;
 - (D) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;
 - (E) Has failed to provide the certification of non-discrimination required under ORS 279A.110(4); or
 - (F) Is non-Responsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the City must have information that indicates that the Offeror meets the applicable standards of responsibility. In order for the City to determine that an Offeror is responsible, the Offeror must demonstrate to the City that the Offeror:
 - (i) Has available the appropriate financial, material, equipment, facility and personnel resources, and expertise, or ability to obtain the resources and expertise, necessary to meet all contractual responsibilities;
 - (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 City 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 City 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 City may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. Pursuant to ORS 279B.110(2)(b), the City shall make its basis for determining an Offeror non-Responsible (under this section) part of the Procurement File;

- (iii) Has a satisfactory record of integrity. An Offeror may lack integrity if the City determines the Offeror demonstrates a lack of business ethics, such as violation of state environmental laws or false certifications made to the City. The City may find an Offeror non-Responsible based on the lack of integrity of any person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor, or successor person). The standards for debarment under ORS 279B.130 may be used to determine an Offeror's integrity. The City 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. Pursuant to ORS 279B.110(2)(c), the City shall make its basis for determining that an Offeror is non-Responsible (under this section) part of the Procurement file pursuant to 279B.110(2)(c);
 - (iv) Is legally qualified to contract with the City;
 - (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 City concerning Responsibility, the City must base the determination of Responsibility on any available information, or may find the Offeror non-Responsible For the purposes of subparagraph (1)(c)(F)(v) of this rule:
- (d) 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.
 - (e) 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.
 - (f) The City 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 City may accept forms of attestation that range from a notarized statement to a less formal document that records the Offeror's attestation.
- (2) **Form of Business Entity.** For purposes of this rule, the City may investigate any Person submitting an Offer. The investigation may include that Person's officers, directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this rule or to apply the Debarment provisions of this rule and ORS 279B.130

COH-47-0650 Rejection of All Offers

- (1) **Rejection of All Offers.** The City may reject all Offers when the rejection is in the best interest of the City as determined by the City. The reasons for the rejection must be made part of the Procurement File. The City 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. ORS 279B.100. The City must notify all Offerors of the rejection of all Offers, along with the reasons for rejection of all Offers.
- (2) **Criteria.** The City may reject all Offers based upon the following criteria:
 - (a) The content of or an error in the Solicitation Document or the Procurement process unnecessarily restricted competition for the Contract;
 - (b) The price, quality, or performance presented by the Offerors are too costly or of insufficient quality to justify acceptance of any Offer;
 - (c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;
 - (d) Causes other than legitimate market forces threaten the integrity of the competitive process. These causes may include, without limitation, those that tend to limit competition, such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the Solicitation Document;
 - (e) The City cancels the Procurement or solicitation in accordance with COH-47-0660; or
 - (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

COH-47-0660 Cancellation of a Procurement or Solicitation

- (1) **Cancellation in the City Interest.** The City may cancel a Procurement or solicitation when the cancellation is in the best interest of the City as determined by the City. The reasons for the cancellation must be made part of the Procurement File. The City 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.
- (2) **Notice of Cancellation Before Opening.** If the City cancels a Procurement or solicitation prior to Opening, the City must provide Written notice of cancellation in the same manner that the City initially provided notice of the solicitation. Such notice of cancellation must:
 - (a) Identify the Solicitation Document;
 - (b) Briefly explain the reason for cancellation; and
 - (c) If appropriate, explain that an opportunity will be given to compete on any re-solicitation.

- (3) **Notice of Cancellation After Opening.** If the City cancels a Procurement or solicitation after Opening, the City must provide Written notice of cancellation to all Offerors who submitted Offers.

COH-47-0670 Disposition of Offers if Solicitation Cancelled

- (1) **Prior to Opening.** If the City cancels a Procurement or solicitation prior to Opening, the City must return all Offers it received to Offerors unopened, provided the Offerors submitted their Offers in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the City must open the Offer to determine the source and then return it to the Offeror. For Electronic Offers, the City must delete the Offers from ORPIN or other approved Electronic Procurement System.
- (2) **After Opening.** If the City cancels a Procurement or solicitation after Opening, the City:
 - (a) May return Proposals in accordance with ORS 279B.060(6)(c); and
 - (b) Must keep a list of all Offers received in the Procurement File.
- (3) **Rejection of All Offers.** If the City rejects all Offers, the City must keep all Proposals and Bids in the Procurement file.

LEGAL REMEDIES

COH-47-0700 Protests and Judicial Review of Special Procurements

- (1) **Purpose.** An Affected Person may protest the approval of a Special Procurement. Pursuant to ORS 279B.400(1), before seeking judicial review of the approval of a Special Procurement, an Affected Person must file a Written protest with the City Manager and exhaust all administrative remedies.
- (2) **Delivery.** 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 City within seven Days after the first date of public notice of the approval of a Special Procurement by the Contract Review Board unless a different protest period is provided in the public notice of the approval of a Special Procurement.
- (3) **Content of Protest.** The Written protest must include:
 - (a) A detailed statement of the legal and factual grounds for the protest;
 - (b) A description of the resulting harm to the Affected Person; and
 - (c) The relief requested.
- (4) **Contract Review Board Response.** The Contract Review Board shall not consider an Affected Person's protest of the approval of a Special Procurement submitted after the timeline established for submitting such protest under this rule or such different time period as may be provided in the public notice of the approval of a Special Procurement. The Contract Review

Board shall issue a Written disposition of the protest in a timely manner. If the Contract Review Board 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 seek judicial review of the Contract Review Board's decision relating to a protest of the approval of a Special Procurement in accordance with ORS 279B.400.

COH-47-0710 Protests and Judicial Review of Sole-Source Procurements

- (1) **Purpose.** For Sole-Source Procurements requiring public notice under COH-47-0275, an Affected Person may protest the determination of the City Manager 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 City Manager or designee and exhaust all administrative remedies.
- (2) **Delivery.** Unless otherwise specified in the public notice of the Sole-Source Procurement, an affected Person must deliver a Written protest to the City Manager or designee within seven 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) **Response.** The City Manager 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 City Manager or designee shall issue a Written disposition of the protest in a timely manner. If the City Manager or designee upholds the protest, in whole or in part, the City Manager shall not enter into a Sole-Source Contract.
- (5) **Judicial Review.** Judicial review of the City Manager's or designee's disposition of a Sole-Source Procurement protest shall be in accordance with ORS 279B.420.

COH-47-0720 Protests and Judicial Review of Multi-Tiered and Multi-Step 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 City and exhaust all administrative remedies.

- (2) **Basis for Protest.** An Affected Offeror may only protest its exclusion from a tier or step of competition if the Offeror is Responsible and submitted a Responsive Offer and, but for the City's mistake in evaluating the Offerors or other Offerors' Offers, the protesting Offeror would have been eligible to participate in the next tier, step, or phase of competition. For example, the protesting Offeror must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Offerors are removed from consideration, and that those ineligible Offerors are ineligible for inclusion in the Competitive Range because their Proposals were not Responsive, or the City committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.
- (3) **Delivery.** Unless otherwise specified in the Solicitation Document, an affected Offeror must deliver a Written protest to the City within seven Days after issuance of the notice of the Competitive Range or notice of subsequent tiers, steps, or phases.
- (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) **City Response.** The City shall not consider an affected Offeror's multi-tiered or multi-step 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 City shall issue a Written disposition of the protest in a timely manner. If the City upholds the protest, in whole or in part, the City may in its sole discretion either issue an Addendum under COH-47-0430 reflecting its disposition or cancel the Procurement or solicitation under COH-47-0660.
- (6) **Judicial Review.** Judicial review of the City's decision relating to a multi-tiered or multi-step solicitation protest shall be in accordance with ORS 279B.420.

COH-47-0730 Protests and Judicial Review of Solicitations

- (1) **Purpose.** 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 City and exhaust all administrative remedies.
- (2) **Delivery.** Unless otherwise specified in the Solicitation Document, a prospective Offeror must deliver a written protest to the City not less than seven days prior to Closing.
- (3) **Content of Protest.** The prospective Offeror's Written protest must include:
 - (a) Sufficient information to identify the solicitation that is the subject of the protest;
 - (b) The grounds that demonstrate how the Procurement process is contrary to law or how the Solicitation Document is unnecessarily restrictive, is legally flawed, or improperly specifies a Brand Name;

- (c) Evidence or supporting documentation that supports the grounds on which the protest is based; and
 - (d) 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) **City Response.** The City will not consider a Prospective Offeror’s solicitation protest submitted after the timeline established for submitting such protest under this rule, or such different time period as may be provided in the Solicitation Document. The City must consider the protest if it is timely filed and meets the conditions set forth in Section (3) of this rule. The City will issue a Written disposition of the protest no fewer than three (3) business days before Offers are due. If the City upholds the protest, in whole or in part, the City may in its sole discretion either issue an Addendum reflecting its disposition under COH-47-0430 or cancel the Procurement or solicitation under COH-47-0660.
- (5) **Extension of Closing.** If the City receives a protest from a prospective Offeror in accordance with this rule, the City may extend Closing if the City 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 City clarify any provision of the Solicitation Document. The City’s clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on the City unless the City amends the Solicitation Document by Addendum.
- (7) **Judicial Review.** Judicial review of the City’s decision relating to a solicitation protest shall be in accordance with ORS 279B.405.
- (8) **Failure to Protest or Request a Clarification Precludes Protest of Award on Such Issue.** An Offeror cannot protest an Award based on any issue that could have, but was not, raised as a Request for Clarification or Protest of solicitation pursuant to this Section.

COH-47-0740 Protests and Judicial Review of Contract Award

- (1) **Purpose.** An Offeror may protest the Award of a Contract, or the intent to Award a Contract, whichever occurs first, if:
- (a) The Bidder or Proposer is adversely affected because the Bidder or Proposer would be eligible to be Awarded the Public Contract in the event that the protest were successful; and the reason for the protest is that:
 - (A) All lower Bids or higher-ranked Proposals are non-Responsive;
 - (B) The City has failed to conduct the evaluation of Proposals in accordance with the criteria or processes described in the solicitation materials;
 - (C) The City has abused its discretion in rejecting the protestor’s Bid or Proposal as non-Responsive; or

(D) The City's evaluation of Bids or Proposals or the City's subsequent determination of Award is otherwise in violation of these Rules or the Public Contracting Code.

- (2) **Delivery.** An Offeror must file a Written protest with the City and exhaust all administrative remedies before seeking judicial review of the City's Contract Award decision. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest to the City within seven Days after the Award of a Contract, or issuance of the notice of intent to Award the Contract, whichever occurs first.
- (3) **Content of Protest.** An Offeror's Written protest shall specify the grounds for the protest to be considered by the City pursuant to Section (1) of this rule.
- (4) **City Response.** The City 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 City shall issue a Written disposition of the protest in a timely manner as set forth in ORS 279B.410. If the City upholds the protest, in whole or in part, the City 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 City's decision relating to a Contract Award protest shall be in accordance with ORS 279B.415.

COH-47-0745 Protests and Judicial Review of Qualified Products List Decisions

- (1) **Purpose.** A prospective Offeror may protest the City's decision to exclude the prospective Offeror's Goods from the City'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 City's qualified products list decision.
- (2) **Delivery.** Unless otherwise stated in the City'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 City within seven Days after issuance of the City'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) **City Response.** The City 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 City's notice to prospective Offerors of the opportunity to submit Goods for inclusion on the qualified products list. The City shall issue a Written disposition of the protest in a timely manner. If the City upholds the protest, it shall include the successful protestor's Goods on the qualified products list.
- (5) **Judicial Review.** Judicial review of the City's decision relating to a qualified products list protest shall be in accordance with ORS 279B.420.

COH-47-0750 Judicial Review of Other Violations

Any alleged violation of ORS Chapter 279A or 279B by the City, 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.

COH-47-0760 Review of Prequalification and Debarment Decisions

- (1) Upon receipt of a notice from the City of a prequalification decision under ORS 279B.125 or of a decision to debar under ORS 279B.130, a prospective Bidder or Proposer that wishes to appeal the decision shall, within three Days after receipt of the notice, notify the City that the prospective Bidder or Proposer appeals the decision as provided in this Section.
- (2) Immediately upon receipt of the prospective Bidder's or Proposer's notice of appeal, the City shall notify the appropriate Local Contract Review Board.
- (3) Upon the receipt of notice from the City under Section (2) of this Rule, the Contract Review Board shall promptly notify the Person appealing and the City of the time and place of the hearing. The Contract Review Board shall conduct the hearing and decide the appeal within 30 Days after receiving the notice from the City. The Contract Review Board shall set forth in Writing the reasons for the hearing decision.
- (4) At the hearing, the Contract Review Board shall consider de novo the notice of denial, revocation, or revision of a prequalification or the notice of debarment, the standards of responsibility listed in ORS 279B.110(2) on which the City based the denial, revocation or revision of the prequalification or the reasons listed in ORS 279B.130(2) on which the City based the debarment, and any evidence provided by the parties. Hearings before the Contract Review Board shall be conducted under rules of procedure adopted by the Contract Review Board.
- (5) The Contract Review Board may allocate the Contract Review Board's costs for the hearing between the Person appealing and the City. The allocation shall be based on facts found by the Contract Review Board and stated in the final order that, in the Contract Review Board's opinion, warrant such allocation of costs. If the final order does not allocate the costs for the hearing, the costs shall be paid as follows:
 - (a) If the decision to deny, revoke, or revise a prequalification of a Person as a Bidder or the decision to debar a Person is upheld, the costs shall be paid by the Person appealing the decision.
 - (b) If the decision to deny, revoke, or revise a prequalification of a Person as a Bidder or the decision to debar a Person is reversed, the costs shall be paid by the City.
- (6) Judicial review of the City's prequalification and debarment decisions must be as set forth in ORS 279B.425.

COH-47-0800 Amendments to Goods or Services Contracts and Price Agreements

- (1) **Generally.** The City may amend a Contract for Goods or Services without additional competition in any of the following circumstances:
 - (a) The amendment is within the scope of the Procurement as described in the Solicitation Documents, if any, or if no Solicitation Documents, as described in the Sole-Source notice or the approved Special Procurement, or the Contract, if any. An amendment is not within the scope of the Procurement if the City determines that if it had described in the Procurement the changes to be made by the amendment, it would likely have increased competition or affected Award of the Contract.
 - (b) These Rules otherwise permit the City 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 City, subject to all of the following conditions:
 - (A) The Goods or Services to be provided under the amended Contract are the same as the Goods or Services to be provided under the unamended Contract.
 - (B) The City determines that, with all things considered, the amended Contract is at least as favorable to the City as the unamended Contract.
 - (C) The amended Contract does not have a total term greater than allowed in the Solicitation Documents, if any, or if no Solicitation Documents, as described in the Sole-Source notice or the approved Special Procurement, if any, after combining the initial and extended terms. For example, a one-year Contract described as 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.
- (2) **Small or Intermediate Contract.** The City may amend a Contract Awarded as a 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 COH-47-0265 for Small Procurements or COH-47-0270 for Intermediate Procurements.
- (3) **Price Agreements.** The City may amend or terminate a Price Agreement as follows:
 - (a) As permitted by the Price Agreement;
 - (b) If the circumstances set forth in ORS 279B.140(2) exist, as follows:
 - (A) The City fails to receive funding or appropriations to sustain purchases at the levels contemplated at the time of contracting; or

2023 City of Hillsboro Public Contracting Rules – Division 47

- (B) The applicable program is terminated or the law changes so that purchases under the Price Agreement are no longer authorized or appropriate for the City's use; or
 - (c) As permitted by applicable law.
- (4) **Contract Amendment Authority.**
 - (a) Contract amendments shall be approved as per the City's Schedule of Contract Signature Authority.

END OF DIVISION 47

DIVISION 48

**CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING,
PHOTOGRAMMETRIC MAPPING, TRANSPORTATION PLANNING OR LAND
SURVEYING SERVICES AND RELATED SERVICES CONTRACTS**

COH-48-0100 Application

- (1) These Division 48 Rules apply to the screening and selection of Architects, Engineers, Photogrammetrists, Transportation Planners, Land Surveyors, and providers of Related Services under Contracts as set forth in the following procedures:
 - (a) Procedures through which the City selects Consultants to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, Land Surveying Services, or Related Services; and Two-tiered procedures for selection of Photogrammetrists, Transportation Planners, Land Surveyors, and providers of Related Services for certain public improvements owned and maintained by the City.

COH-48-0110 Definitions

In addition to the definitions set forth in ORS 279A.010, 279C.100 and COH-46-0110, the following definitions apply to these Division 48 Rules:

- (1) **"Architect"** is defined in ORS 279C.100 and means a Person who is registered and holds a valid certificate in the practice of architecture in the State of Oregon, as provided under ORS 671.010 through 671.220, and includes, without limitation, the terms "Architect," "licensed Architect," and "registered Architect."
- (2) **"Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services"** is defined in ORS 279C.100 and means services that are legally required to be performed by an Architect, Engineer, Photogrammetrist, Transportation Planner or Land Surveyor.
- (3) **"Consultant"** means 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. Provided, however, when the City is entering into a direct Contract under COH-48-0200(1)(c) or (d), the "Consultant" must be an Architect, Engineer, Photogrammetrist, Transportation Planner or Land Surveyor, as required by ORS 279C.115(1).
- (4) **"Engineer"** means an individual who is registered and holds a valid certificate to practice engineering in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002(2).
- (5) **"Estimated Fee"** means The City'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.
- (6) **"Land Surveyor"** means a Person who is registered and holds a valid certificate in the practice of land surveying in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002(5).

- (7) **"Photogrammetric Mapping"** means an evaluating and measuring of land that is limited to the determination of the topography, area, contours, and location of planimetric features, by using photogrammetric methods or similar remote sensing technology, including but not limited to using existing ground control points incidental to the photogrammetric or remote sensing mapping process, as provided under ORS 672.002.
- (8) **"Photogrammetrist"** means an individual who is registered and holds a valid certificate to practice photogrammetric mapping in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002(8).
- (9) **"Price Agreement"** for purposes of this Division 48 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 City does not guarantee a minimum or maximum additional purchase.
- (10) **"Project"** means all components of the City's planned undertaking that gives rise to the need for a Consultant's Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, under a Contract.
- (11) **"Related Services"** means Services, other than Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services that are related to planning, designing, engineering, or overseeing public improvement projects or components of public improvement projects, including but not limited to landscape architectural services, facilities planning services, energy planning services, space planning services, hazardous substances or hazardous waste or toxic substances testing services, cost-estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services, and owner's representation services, or land-use planning services.
- (12) **"Transportation Planning Services"** means Transportation Planning Services for Projects that require compliance with the National Environmental Policy Act, 42 U.S.C. 4321 et seq. 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. Without limitation, Transportation Planning Services do not include transportation planning for Projects not subject to the National Environmental Policy Act, 42 USC 4321 et. seq.

COH-48-0120 List of Interested Consultants; Performance Record

- (1) Consultants who are engaged in the lawful practice of their profession and who are interested in providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services may annually submit a statement describing their qualifications and related performance information to the City. The City shall use this information to create a list of prospective Consultants and shall update this list at least once every two years.
- (2) The City may compile and maintain a record of each Consultant's performance under Contracts with the City and with other Contracting Agencies, including information obtained from Consultants during an exit interview and information pertaining to whether the Consultant owes a liquidated and delinquent debt to the State of Oregon. Upon request and in accordance with the Oregon Public Records Law (ORS 192.410 through 192.505), the City may make available copies of the records.

COH-48-0130 Applicable Selection Procedures

- (1) **Selection of Architects, Engineers, Photogrammetrists, Transportation Planners, or Land Surveyors.** When selecting the most qualified Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, the City shall follow the applicable selection procedure under COH-48-0200 (Direct Appointment Procedure), COH-48-0205 (House Bill 2769 Procedure), COH-48-0210 (Informal Selection Procedure), or COH-48-0220 (Formal Selection Procedure). When selecting such services under this section (1), and except as permitted under COH-48-0205, the City 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, to determine a Consultant's compensation only after the City has selected the most qualified Consultant in accordance with the applicable selection procedure; provided however, this restriction on a City's solicitation or use of pricing policies, pricing proposals or other pricing information does not apply to selection procedures used by the City to select a Consultant when the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, or Land Surveying Services for the Project do not exceed \$100,000 or in an Emergency, pursuant to ORS 279C.0110(8) and (9). In following the Direct Appointment Procedure under COH-48-0200, the City may base its selection of a Consultant on any information available to the City prior to beginning the Direct Appointment Procedure for the Project involved. Notwithstanding anything to the contrary in these Rules, the City 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 Local Contracting Agencies' selection procedures to select Consultants to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, in accordance with ORS 279C.110(5).
- (2) **Selection of Consultants to Perform Related Services.** When selecting a Consultant to perform Related Services, the City shall follow one of the following selection procedures:
 - (a) When selecting a Consultant on the basis of qualifications alone, the City shall follow the applicable selection procedure under either COH-48-0200 (Direct Appointment

Procedure), COH-48-0205 (House Bill 2769 Procedure), COH-48-0210 (Informal Selection Procedure), or COH-48-0220 (Formal Selection Procedure);

- (b) When selecting a Consultant on the basis of price competition alone, the City shall follow the applicable provisions under COH-48-0200 (Direct Appointment Procedure), the applicable provisions under COH-48-210 (Informal Selection Procedure) pertaining to obtaining and evaluating price Proposals and other pricing information, or the applicable provisions of COH-48-0220 (Formal Selection Procedure) pertaining to obtaining and evaluating price Proposals and other pricing information; and
 - (c) When selecting a Consultant on the basis of price and qualifications, the City shall follow the applicable provisions under COH-48-0200 (Direct Appointment Procedure), COH-48-0205 (House Bill 2769 Procedure), the applicable provisions of COH-48-0210 (Informal Selection Procedure) pertaining to obtaining and evaluating price and qualifications Proposals, or the applicable provisions of COH-48-0220 (Formal Selection Procedure) pertaining to obtaining and evaluating price and qualifications Proposals. For selections under the informal selection procedure of COH-48-0210, the City may use an Informal Request for Proposals that nevertheless meets the requirements of COH-48-0210, when the City determines in its sole discretion, that the characteristics of the Project and the Related Services required by the City would be adequately addressed by an Informal Request for Proposals document, generally comparable to the intermediate Procurement procedures and related documentation under ORS 279B.070 and COH-47-0270. The City may request and consider a Proposer's pricing policies and pricing Proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates, and overhead, submitted with a Proposal.
- (3) **Sections (1) and (2) do not apply to Price Agreements.** The City is not required to follow the procedures in Section (1) or Section (2) of COH-48-0130 when the City has established Price Agreements with more than one Consultant and is selecting a single Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under an individual work order or task order. Provided, however, the criteria and procedures the City uses to select a single Consultant, when the City has established Price Agreements with more than one Consultant, must meet the requirements of COH-48-0270 (Price Agreements).
 - (4) **Electronic Selection.** The City may use electronic methods to screen and select a Consultant in accordance with the procedures described in sections (1) and (2) of COH-48-0130. If The City uses electronic methods to screen and select a Consultant, the City shall first promulgate rules for conducting the screening and selection procedure by electronic means, substantially in conformance with COH-47-0330 (Electronic Procurement).
 - (5) **Contracts for "Mixed" Services.** For purposes of these division 48 rules, a "mixed" Contract is one requiring the Consultant to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, and also provide Related Services, other Services or other related Goods under the Contract. The City's classification of a procurement that will involve a "mixed" Contract will be determined by the predominant purpose of the Contract. The City will determine the predominant purpose of the Contract by determining

which of the 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 City shall comply with the requirements of ORS 279C.110 and section (1) of COH-48-0130. If the majority of the total Estimated Fee to be paid under the Contract is for Related Services, the City shall comply with the requirements of ORS 279C.120 and section (2) of COH-48-0130. 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 City shall comply with the applicable provisions of the Public Contracting Code and COH divisions 46, 47 and 49 of these rules that match the predominant purpose of the Contract.

- (6) **Disclosure Requirements for Proposals under Division 48.** 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 City for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services:
- (a) "Competitive Proposals" Means all Proposals Solicited under Division 48. The term "competitive proposal", for purposes of ORS 279C.107, includes Proposals under COH-48-0200 (Direct Appointment Procedure), COH-48-0210 (Informal Selection Procedure), COH-48-0220 (Formal Selection Procedure) or COH-48-0130(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 COH-48-0270 (Price Agreements).
 - (b) Direct Appointments. For purposes of proposals received by the City under COH-48-0200 (Direct Appointment Procedure), a formal notice of intent to award is not required. As a result, while the City may make Proposals under COH-48-0200 (Direct Appointment Procedure) open for public inspection following the City's decision to begin Contract negotiations with the selected Consultant, Proposals are not required to be open for public inspection until after the City has executed a Contract with the selected Consultant.
 - (c) Closely Competitive Proposals. In the limited circumstances permitted by ORS 279C.110, 279C.115 and 279C.120 where the City is conducting discussions or negotiations with Proposers who submit Proposals that the City has determined to be closely competitive or to have a reasonable chance of being selected for award, the City may open Proposals so as to avoid disclosure of Proposal contents to competing Proposers, consistent with the requirements of ORS 279C.107. Otherwise, the City may open Proposals in such a way as to avoid disclosure of the contents until after the City executes a Contract with the selected Consultant. If the City determines that it is in the best interest of the City to do so, the City may make Proposals available for public inspection following the City's issuance of a notice of Intent to Award a Contract to a Consultant; and
 - (d) ORS 279C.107 Requirements. Disclosure of Proposals and Proposal information is otherwise governed by ORS 279C.107 as follows:

- (A) The City may open Proposals so as to avoid disclosing contents to competing Proposers during, where applicable, the process of negotiation.
 - (B) The City need not open Proposals for public inspection until after the City executes a Contract. Regardless of when Proposals are opened for public inspection, the City shall withhold from disclosure trade secrets as defined in ORS 192.501, and information submitted to the City in confidence as described in ORS 192.502, assuming withholding such information is consistent with ORS Chapter 192.
 - (C) Opening a Proposal at a public meeting of City Council, Joint Water Commission or other body subject to the Public Meetings Law does not make the contents of the Proposal subject to disclosure regardless of whether an executive session has been called.
 - (D) If a request for Proposals is cancelled after Proposals are received, the City shall, subject to ORS 192.501 and 192.502, return a Proposal and all copies of the Proposal to the Proposer. The City shall keep a list of returned Proposals in the Procurement File.
- (7) **Independent and Objective Oversight Required.** Pursuant to ORS 279C.307, to ensure the objectivity and independence of providers when the City contracts for Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with, or otherwise overseeing a Contract subject to COH divisions 48 or 49 ("ORS 279C.307 Services"), the City may not:
- (a) Procure the 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 contract; or
 - (b) Procure the ORS 279C.307 Services through the Public Contract that is subject to administration, management, monitoring, inspection, evaluation, or oversight by means of the Personal Services Contract.
- (8) **Application of Section (7).** The requirements of ORS 279C.307 and section (7) of this rule applies in the following circumstances, except as provided in section (9) of this rule:
- (a) The City requires the Procurement of Personal Services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with, or otherwise overseeing a Public Contract or performance under a Public Contract that is subject to ORS chapter 279C. A Public Contract that is "subject to ORS chapter 279C" includes a Public Contract for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, a Public Contract for Related Services, or a Public Contract for construction services under ORS chapter 279C.
 - (b) The Procurement of Personal Services subject to the restrictions of ORS 279C.307 include, but are not limited to, the following:

- (A) Procurements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, which involve overseeing or monitoring the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C;
 - (B) Procurements for commissioning services, which involve monitoring, inspecting, evaluating or otherwise overseeing the performance of a Contractor providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C;
 - (C) Procurements for project management services, which involve administration, management, monitoring, inspecting, evaluating compliance with, or otherwise overseeing the performance of a Contractor providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, construction services subject to ORS chapter 279C, commissioning services, or other Related Services for a Project;
 - (D) Procurements for special inspections and testing services, which involve inspecting, testing, or otherwise overseeing the performance of a construction Contractor under a Public Contract for construction services subject to ORS chapter 279C; and
 - (E) Procurements for other Related Services or Personal Services, which involve administering, managing, monitoring, inspecting, evaluating compliance with, or otherwise overseeing the Public Contracts described in section (9)(a) of this rule.
- (9) **Design-Build and CM/GC Contract Solicitations Exempt.** The restrictions of ORS 279C.307 set forth in Sections (7) and (8) of COH-48-0130 do not apply, except as further specified below:
- (a) To the City's Procurement of both design services and construction services through a single "Design-Build" Procurement, as that term is defined in COH-49-0610. Such a Design-Build Procurement includes a Procurement under an Energy Savings Performance Contract, as defined in ORS 279A.010. Provided, however, the restrictions of sections (8) and (9) of COH-48-0130 do apply to the City'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; or
 - (b) To the City's Procurement of both pre-construction services and construction services through a single "Construction Manager/General Contractor" Procurement, as defined in COH-49-0610. Provided, however, the restrictions of sections (7) and (8) of COH-48-0130 do apply to the City'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.

SELECTION PROCEDURES

COH-48-0200 Direct Appointment Procedure

- (1) The City may enter into a Contract directly with a Consultant without following the selection procedures set forth elsewhere in these rules in the following circumstances:
 - (a) Emergency. The City finds that an emergency exists;
 - (b) Small Estimated Fee. The Estimated Fee to be paid under the Contract does not exceed \$100,000;
 - (c) Continuation of Project with an Intermediate Estimated Fee (Estimated Fee of \$250,000 or Less). The City may directly enter into a Contract with a Consultant if:
 - (A) The services consist of or are related to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services rendered under the earlier Contract;
 - (B) The Estimated Fee to be made under the Contract does not exceed \$250,000; and
 - (C) The City used either the formal selection procedure under COH-48-0220 (Formal Selection Procedure) or the formal selection procedure applicable to selection of the Consultant at the time of original selection to select the Consultant for the earlier Contract.
 - (d) Continuation of Project with an Estimated Fee Greater than \$250,000. The City may directly enter into a Contract with a Consultant when an Estimated Fee is greater than \$250,000 if:
 - (A) The services consist of or are related to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that have been substantially described, planned, or otherwise previously studied under an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services rendered under the earlier Contract;
 - (B) The City used either the formal selection procedure under COH-48-0220 (Formal Selection Procedure) or the formal selection procedure applicable to selection of the Consultant at the time of original selection to select the Consultant for the earlier Contract; and

- (C) The City makes written findings that entering into a Contract with the Consultant, whether in the form of an amendment to an existing Contract or a separate Contract for the additional scope of services, will:
 - (i) Promote efficient use of public funds and resources and result in substantial cost savings to the City; and
 - (ii) 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.
- (2) The City may select a Consultant for a Contract under this Rule from the following sources:
 - (a) City's list of Consultants that is created under COH-48-0120;
 - (b) Another City's list of Consultants that the City created under a local rule similar to COH-48-0120, with written consent of that Contracting Agency; or
 - (c) All Consultants offering the required Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that the City reasonably can identify under the circumstances.
- (3) As part of the City's assessment of the qualifications of any Consultant being considered for award of a Contract under this rule, the City may, at any time before entering into a contract with the Consultant, consider information pertaining to whether the Consultant owes a liquidated and delinquent debt to the State of Oregon.
- (4) The City shall direct negotiations with Consultants selected under this Rule toward discussing, refining and finalizing the following:
 - (a) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be provided by the Consultant
 - (b) The Consultants' performance obligations and performance schedule;
 - (c) Payment methodology, Consultant's rates and number of hours, and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the City as determined solely by the City, taking into account the value, scope, complexity, and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and
 - (d) Any other provisions that the City believes to be in the City's best interest to negotiate.

COH-48-0210 Informal Selection Procedure

- (1) The City may use the informal selection procedure described in this Rule to obtain a Public Contract if the Estimated Fee is expected not to exceed \$250,000.
- (2) When using the informal selection procedure on the basis of qualifications alone, or for Related Services on the basis of price and qualifications, the City shall:
 - (a) Create an Informal Request for Proposals that includes at a minimum the following:
 - (A) Description of the Project for which a Consultant's Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services are needed and a description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services that will be required under the resulting Contract;
 - (B) The 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. The date and time Proposals are due and other directions for submitting Proposals;
 - (D) The 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 the Consultant has committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the Request for Proposals within the applicable time limits, including the current and projected workloads of such staff and the proportion of time such staff would have available for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services;
 - (ii) Proposed management techniques for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the Request for Proposals;
 - (iii) A Consultant's capability, experience, and past performance history and record in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, including, but not limited to, quality of work, ability to meet schedules, cost control methods, and contract administration practices;
 - (iv) A Consultant's approach to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related

Services described in the Request for Proposals and design philosophy, if applicable;

- (v) A Consultant's geographic proximity to and familiarity with the physical location of the Project;
 - (vi) Volume of work, if any, previously awarded to a 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) A Consultant's ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;
 - (viii) Whether the Consultant owes a liquidated and delinquent debt to the State of Oregon;
 - (ix) For Related Services only: If the City is selecting a Consultant to provide Related Services, pricing policies and pricing proposals or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates, and overhead.
- (F) A Statement that Proposers responding to the RFP do so solely at their expense, and the City is not responsible for any Proposer expenses associated with the RFP;
- (G) A statement directing Proposers to the protest procedures set forth in these division 48 rules; and
- (H) A sample form of the Contract
- (b) Provide a Request for Proposals to a minimum of five (5) prospective Consultants. If fewer than five (5) prospective Consultants are available, City shall provide the RFP to all available prospective Consultants and shall maintain a written record of the City's efforts to locate available prospective Consultants for the RFP. City shall draw prospective Consultants from:
- (A) The City's list of Consultants that is created and maintained under COH-48-0120 (List of Interested Consultants: Performance Record);
 - (B) Another Contracting Agency's list of Consultants that is created and maintained under a local rule similar to COH-48-0120 (List of Interested Consultants: Performance Record); or
 - (C) All Consultants that the City reasonably can locate that offer the desired Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services, or any combination of the foregoing.

2023 City of Hillsboro Public Contracting Rules – Division 48

- (c) Review and rank all proposals received according to the criteria set forth in the Request for Proposals, and select the three highest-ranked Proposers.
- (3) If the City uses the informal selection procedure for Related Services on the basis of price Proposals and other pricing information alone it shall:
- (a) Create an Informal Request for Proposals that includes at a minimum the following:
 - (A) A description of the Project for which a Consultant’s Related Services are needed and a description of the Related Services that will be required under the resulting Contract;
 - (B) The 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) The date and time proposals are due and other directions for submitting proposals;
 - (E) 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 (2)(a)(E)(i) through section (2)(a)(E)(vii) of this rule that are related to the Related Services described in the Informal Request for Proposals;
 - (F) Pricing criteria upon which the highest ranked Consultant will be selected. Pricing criteria may include, but are not limited to, the total price for the Related Services described in the Informal Request for Proposals, 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 Informal Request for Proposals, expenses, hourly rates and overhead;
 - (G) A statement directing Proposers to the protest procedures set forth in these division 48 rules; and
 - (H) A sample form of the Contract.
 - (b) Provide the Informal Request for Proposals to a minimum of five prospective Consultants. If fewer than five prospective Consultants are available, the City shall provide the RFP to all available prospective Consultants and shall maintain a written record of the City’s efforts to locate available prospective Consultants for the RFP. The City shall draw prospective Consultants from:
 - (A) The City’s list of Consultants that is created and maintained under COH-48-0120 (List of Interested Consultants; Performance Record);
 - (B) Another Contracting Agency’s list of Consultants that is created and maintained under COH-48-0120 (List of Interested Consultants; Performance Record); or

- (C) All Consultants that the City reasonably can locate that offer the desired Related Services; and
 - (c) Review and rank all responsive proposals received, according to the total price for the Related Services described in the Informal Request for Proposals, Consultant pricing policies and other pricing information requested in the Informal Request for Proposals, including but not limited to the number of hours proposed for the Related Services required, expenses, hourly rates and overhead, and select the three highest-ranked Proposers who submitted price proposals that will provide the best value to the City.
- (4) When the Estimated Fee in an informal selection procedure is expected not to exceed \$150,000, the City is only required to provide the RFP under sections (2) and (3) of this rule to three prospective Consultants. If fewer than three prospective Consultants are available, the City shall provide the RFP to all available prospective Consultants and shall maintain a written record of the City's efforts to locate available prospective Consultants for the RFP.
- (5) If the City does not cancel the RFP after it reviews and ranks each Proposer, the City will begin negotiating a Contract with the highest-ranked Proposer. The City shall direct negotiations toward discussing, refining and finalizing the following:
 - (a) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be provided by the Consultant;
 - (b) The Consultant's performance obligations and performance schedule;
 - (c) Payment methodology, Consultant's rates and number of hours, and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the City as determined solely by the City, taking into account the value, scope, complexity, and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and
 - (d) Any other conditions or provisions the City believes to be in the City's best interest to negotiate.
- (6) The City shall, either orally or in writing, formally terminate negotiations with the highest-ranked Proposer if the City and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The City may thereafter negotiate with the second-ranked Proposer, and if necessary, with the third-ranked Proposer, in accordance with section (4) of COH-48-0210, 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 City 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 COH-48-0220.
- (7) As an alternative to either the Informal Selection Procedure outlined above, the City may use the following selection procedure for Architectural, Engineering, Photogrammetric Mapping,

Transportation Planning or Land Surveying Services. In accordance with ORS 279C.110(5) [HB 2769 (Oregon Laws 2019, Chapter 55)], the City may solicit pricing policies, proposals or other pricing information as part of the City's screening and selection of prospective Consultants, in accordance with the following requirements:

- (a) Create an RFP that meets the requirements of ORS 279C.110(5)(a). In providing an estimate of the cost of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, the City may provide a specific estimate of that cost, or a range of estimated costs;
- (b) Provide the RFP to a minimum of five (5) prospective Consultants. If fewer than five (5) prospective Consultants are available, the City shall provide the RFP to all available prospective Consultants and shall maintain a written record of the City's efforts to locate available prospective Consultants for the RFP. The City shall draw prospective Consultants from:
 - (A) The City's list of Consultants that is created and maintained under COH-48-0120 (List of Interested Consultants; Performance Record);
 - (B) Another Contracting Agency's list of Consultants that is created and maintained under COH-48-0120 (List of Interested Consultants; Performance Record); or
 - (C) All Consultants that the City reasonably can locate that offer the desired Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services, or any combination of the foregoing.
- (c) In the initial phase of the RFP, evaluate each prospective Consultant on the basis of each Consultant's qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, with those qualifications including the criteria set forth in subsections (2)(a)(E)(i) through (2)(a)(E)(ix) of COH-48-0210;
- (d) At the end of the initial phase of the RFP, announce the evaluation scores of each Consultant and rank each Consultant according to the evaluation scores. The City shall identify up to three (3) of the highest ranked prospective Consultants as being qualified to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, and as being eligible to participate in the second phase of the RFP process;
- (e) In the second phase of the RFP, request a pricing proposal from the highest ranked prospective Consultants identified in the initial phase of the RFP, with that pricing proposal to meet the requirements of ORS 279C.110(5)(c)(A) and (B);
- (f) Complete the evaluation of the highest ranked prospective Consultants that have decided to provide price proposals. In the City's final evaluation of the prospective Consultants who have provided price proposals, the City cannot assign more than fifteen (15) percent of the overall weight of the evaluation criteria in the second phase of the RFP to each Consultant's price proposal;

- (g) If the City does not cancel the RFP after it reviews the qualifications of all prospective Consultants and the price proposals received from the highest ranked Consultants and ranks the highest ranked Consultants from the second phase of the RFP, begin negotiating a Contract with the highest ranked prospective Consultant. The City shall direct Contract negotiations toward discussing, refining and finalizing the following:
 - (A) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be provided by the Consultant;
 - (B) The Consultant's performance obligations and performance schedule;
 - (C) The Consultant's payment methodology, rates and number of hours, and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services required under the Contract that is fair and reasonable to the City as determined solely by the City, taking into account the value, scope, complexity and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services; and
 - (D) Any other conditions or provisions the City believes to be in the City's best interest to negotiate; and
- (h) The City shall, either orally or in writing, formally terminate negotiations with the highest ranked Consultant, if the City and the Consultant are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The City may thereafter negotiate with the second ranked Consultant, and if necessary, with the third ranked Consultant, in accordance with section (7)(g) of this rule, until negotiations result in a Contract. If negotiations with any of the top three prospective Consultants do not result in a Contract within a reasonable amount of time, the City may end the particular informal solicitation and thereafter may proceed with a new solicitation in accordance with these Rules.
- (8) When the Estimated Fee in an informal selection procedure under this rule is expected not to exceed \$150,000, the City is only required to provide the RFP under sections (2), (3) and (6) of this rule to three (3) prospective Consultants. If fewer than three (3) prospective Consultants are available, the City shall provide the RFP to all available prospective Consultants and shall maintain a written record of the City's efforts to locate available prospective Consultants for the RFP.
- (9) The City shall terminate the informal selection procedure and proceed with the formal selection procedure under COH-48-0220 if the scope of the anticipated Contract is revised during negotiations so that the Estimated Fee will exceed \$250,000.

COH-48-0220 Formal Selection Procedure

- (1) Subject to COH-48-0130, (Applicable Selection Procedures; Pricing Information; Disclosure of Proposals) the City shall use the formal selection procedure described in this rule to select a Consultant if the Consultant cannot be selected under either COH-48-0200 (Direct Appointment

Procedure) or COH-48-0210 (Informal Selection Procedure). The formal selection procedure described in this rule may otherwise be used at the City’s discretion.

- (2) When using the formal selection procedure, the City shall obtain Contracts through public advertisement of Requests for Proposals, or Requests for Qualifications followed by Requests for Proposals.
 - (a) Except as provided in subsection (b) of this section, the City 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 disadvantaged business enterprise (“DBE”), service-disabled veteran business (“SDVB”), minority business enterprise (“MBE”), women business enterprise (“WBE”) and emerging small business enterprise (“ESB”) audiences.
 - (A) The City shall publish the advertisement within a reasonable time before the deadline for the proposal submission or response to the RFQ or RFP, but in any event no fewer than fourteen calendar days before the closing date set forth in the RFQ or RFP.
 - (B) The City shall include a brief description of the following items in the advertisement:
 - (i) The Project;
 - (ii) A description of the Architectural, Engineering, Photogrammetric Mapping,
 - (iii) Transportation Planning or Land Surveying Services or Related Services the City seeks;
 - (iv) How and where Consultants may obtain a copy of the RFQ or RFP; and
 - (v) The deadline for submitting a proposal or response to the RFQ or RFP.
 - (b) In the alternative to advertising in a newspaper as described in section (2)(a) of COH-48-0220, the City shall publish each RFP and RFQ by one or more of the electronic methods identified in COH-46-0110(14). The City shall comply with subsections (2)(a)(A) and (2)(a)(B) of this rule when publishing advertisements by electronic methods.
 - (c) The City may send notice of the RFP or RFQ directly to all consultants on the City's list of Consultants that is created and maintained under COH-48-0120 (List of Interested Consultants; Performance Record).
- (3) **Request for Qualifications Procedure.** The City may use the RFQ procedure to evaluate potential Consultants and establish a short list of qualified Consultants to whom the City may issue an RFP for some or all of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ.

2023 City of Hillsboro Public Contracting Rules – Division 48

- (a) Mandatory RFQ Requirements. The City shall include the following, at a minimum, in each RFQ:
 - (A) A brief description of the Project for which the City is seeking Consultants;
 - (B) A description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services the City seeks 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services the City seeks;
 - (F) The RFQ evaluation criteria, including weights, points, or other classifications applicable to each criterion;
 - (G) A statement whether or not the City will hold a prequalification meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ, and if a prequalification 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 their expense, and that the City is not responsible for any Consultant expenses associated with the RFQ.
- (b) Optional RFQ Requirements. The City may include a request for any or all of the following in each RFQ:
 - (A) A statement describing Consultants' general qualifications and related performance information;
 - (B) A description of Consultants' specific qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ, including Consultants' committed resources and recent, current, and projected workloads;
 - (C) A list of similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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;

2023 City of Hillsboro Public Contracting Rules – Division 48

- (D) A copy of all records, if any, of Consultants' performance under contracts with any other Contracting Agency;
 - (E) The number of Consultants' experienced staff committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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) Consultants' approaches to Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFQ and design philosophy, if applicable;
 - (G) Consultants' geographic proximity to and familiarity with the physical location of the Project;
 - (H) Consultants' Ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;
 - (I) If the City is selecting a Consultant to provide Related Services, Consultants' pricing policies and pricing Proposals, or other pricing information, including the number of hours estimated for the services required, expenses, hourly rates, and overhead;
 - (J) Consultants' ability to assist the City in complying with any art acquisition requirements;
 - (K) Consultants' ability to assist the City in complying with State of Oregon energy efficient design requirements established by the City, pursuant to ORS 276.900 through 276.915;
 - (L) Consultants' ability to assist the City in complying with the energy technology requirements of ORS 279C.527 and 279.528;
 - (M) Whether the Consultant owes a liquidated and delinquent debt to the State of Oregon; and
 - (N) Any other information the City deems reasonably necessary to evaluate Consultants' qualifications.
- (c) If the City will use a Request for Qualifications followed by an RFP to procure Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services under this rule and the City intends to use pricing policies, proposals or other pricing information as part of the City's screening and selection of prospective Consultants, pursuant to ORS 279C.110(5) and COH 48-0205, the City cannot request cost proposals or otherwise use pricing policies, proposals or other pricing information as part of the Request for Qualifications. The City may only request cost proposals or otherwise use pricing policies, proposals or other pricing information during the RFP process, following the establishment of a short list of qualified Consultants through the Request for Qualifications process

- (d) RFQ Evaluation Committee. The City 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 City may appoint to the evaluation committee City employees or employees of other public agencies with experience in Architecture, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying, Related Services, construction services, or Public Contracting. If the City procedure permits, the City may include on the evaluation committee private practitioners of architecture, engineering, photogrammetry, transportation planning or land surveying, or related professions. The City shall designate one member of the evaluation committee as the evaluation committee chairperson.
 - (e) The City may use any reasonable screening or evaluation method to establish a short list of qualified Consultants, including, but not limited to, the following:
 - (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, who practice in a particular subject area, or whose practice is in a particular geographic locale or region, provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFQ.
 - (f) After the evaluation committee reviews, scores, and ranks the responding Consultants, the City shall establish a short list of at least three qualified Consultants, if feasible, provided however, if four or fewer Consultants responded to the RFQ or if fewer than three Consultants fail to meet the City's minimum requirements, then:
 - (A) The City may establish a short list of fewer than three qualified Consultants; or
 - (B) The City may cancel the RFQ and issue an RFP.
 - (g) No Consultant will be eligible for placement on the City's short list established under subsection (3)(d) of COH-48-0220 if the Consultant or any of Consultant's principals, partners, or associates are members of the City's RFQ evaluation committee.
 - (h) Except when the RFQ is cancelled, the City 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 City shall use the procedure described in this section (4) of this rule when issuing an RFP for a Contract described in section (1) of this rule.
- (a) **Mandatory RFP Requirements.** Except as otherwise provided in Sections (4)(b) and (4)(c) of this rule, when using the formal selection procedure, the City 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services sought will be performed.
- (B) The RFP evaluation process and the criteria which will be used to select the most qualified Proposer, including the weights, points, or other classifications applicable to each criterion. If the City does not indicate the applicable number of points, weights, or other classifications, then each criterion is of equal value. Evaluation criteria may include, but are not limited to, the following:
 - (i) Proposers' availability and capability to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;
 - (ii) Experience of Proposers' key staff persons in providing similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services on comparable projects;
 - (iii) The amount and type of resources and number of experienced staff persons Proposers have committed to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Proposers estimate that the staff referenced in section (4)(a)(B)(iii), above, would spend on the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;
 - (vi) Proposers' demonstrated ability to complete successfully similar Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services on time and within budget, including whether or not there is a record of satisfactory performance under COH-48-0120;
 - (vii) References and recommendations from past clients;
 - (viii) Proposers' performance history in meeting deadlines, submitting accurate estimates, producing high quality work, meeting financial obligations, price and cost data from previous projects, cost controls, and contract administration;
 - (ix) Status and quality of any required license or certification;

- (x) Proposers' knowledge and understanding of the Project and Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP as shown in Proposers' approaches to staffing and scheduling needs for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP;
 - (xiii) Whether the Consultant owes a liquidated and delinquent debt to the State of Oregon
 - (xiv) If the City is selecting a Consultant to provide Related Services, pricing policies and pricing Proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates, and overhead; and
 - (xv) Any other criteria that the City deems relevant to the Project and Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 the number of hours proposed for the services required, expenses, hourly rates, and overhead, when the sole purpose or predominant purpose of the RFP is to obtain Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying 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, points, or other classifications 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 City;

- (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 City;
 - (I) A statement that Proposers responding to the RFP do so solely at their expense, and the City is not responsible for any Proposer expenses associated with the RFP;
 - (J) A statement directing Proposers to the protest procedures set forth in these division 48 rules;
 - (K) Compliance with the City's Supplier Diversity Program, including, but not limited to, utilization of DBE, MBE, WBE, ESB and veteran-owned business participation goals or good faith efforts with respect to DBE, MBE, WBE, ESB and veteran-owned business participation, and federal requirements when federal funds are involved;
 - (L) A statement whether or not the City will hold a pre-Proposal meeting for all interested Consultants to discuss the Project and the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 City deems reasonably necessary to permit the City to evaluate, rank, and select the most qualified Proposer to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP; and
 - (N) A sample form of the Contract.
- (b) RFP Contents for Related Services Selections Based on Price Only. If the City uses the formal selection procedure it shall include at least the following in each Request for Proposals, 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 City 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 Request for Proposals, 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 Request for Proposals, 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 Request for Proposals.
- (c) Selection of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services with Pricing Policies, Proposals or Other Pricing Information. If the City will be including pricing policies, proposals or other pricing information in the City's formal selection procedure criteria for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services pursuant to ORS 279C.110(5), the City shall meet the following minimum requirements for each RFP:
- (A) If the City has used the Request for Qualifications procedure in Section (3) of this rule to evaluate potential Consultants and establish a short list of qualified Consultants pursuant to ORS 279C.110(5), the RFP must meet the requirements of ORS 279C.110(5) that address the second phase of the selection process applicable to the short list of no more than three of the highest ranked prospective consultants that were identified in the initial phase of the selection process described in ORS 279C.110(5)(a) and (b).
 - (B) If the City has elected to not use the Request for Qualifications procedure in Section (3) of this rule, and will use only an RFP, the City shall include at least the following in the RFP:
 - (i) The information set forth in ORS 279C.110(5)(a). In providing an estimate of the cost of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, the City may provide a specific estimate of that cost, or a range of estimated costs;
 - (ii) In the initial phase of the RFP, provisions describing the City's evaluation of each prospective Consultant on the basis of each Consultant's qualifications to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, with those qualifications including the criteria set forth in subsections (4)(a)(B)(i) through (4)(a)(B)(xiii) and (4)(a)(B)(xv) of this rule;
 - (iii) At the end of the initial phase of the RFP, provisions describing the City's evaluation scores of each Consultant and rank of each Consultant according to the evaluation scores. The City shall identify up to three (3) of the highest ranked prospective Consultants as being qualified to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services described in the RFP, and as being eligible to participate in the second phase of the RFP process;
 - (iv) In the second phase of the RFP, provisions describing the City's request of a pricing proposal from each of the highest ranked prospective Consultants

identified in the initial phase of the RFP, pursuant to the requirements of ORS 279C.110(5)(c)(A) and (B);

- (v) Provisions describing the City's evaluation of the highest ranked prospective Consultants that have decided to provide price proposals. In the City's final evaluation of the prospective Consultants who have provided price proposals, the City cannot assign more than fifteen percent (15%) of the overall weight of the evaluation criteria in the second phase of the RFP to each Consultant's price proposal;
- (d) RFP Evaluation Committee. The City shall establish a committee of at least three individuals to review, score, and rank Proposals according to the evaluation criteria set forth in the RFP. A City employee shall chair the committee. If the RFP has followed an RFQ, the City may include the same members who served on the RFQ evaluation committee. The City may appoint to the evaluation committee the City employees or employees of other public agencies with experience in Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying, or Related Services, construction services, or Public Contracting. At least one member of the evaluation committee must be a City employee. If the City procedure permits, the City may include on the evaluation committee private practitioners of architecture, engineering, land surveying, or related professions. The City 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 are members of the City'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 City the results of the scoring and ranking for each Proposer.
- (e) If the City does not cancel the RFP after it receives the results of the scoring and ranking for each Proposer, the City will begin negotiating a Contract with the highest-ranked Proposer. The City shall direct negotiations toward discussing, refining and finalizing the following:
 - (A) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be provided by the Consultant;
 - (B) The Consultant's performance obligations and performance schedule;

- (C) Payment methodology, Consultant’s rates and number of hours, and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the City as determined solely by the City, taking into account the value, scope, complexity, and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services; and
- (D) Any other provisions the City believes to be in the City’s best interest to negotiate.
- (f) The City shall, either orally or in Writing, formally terminate negotiations with the highest-ranked Proposer if the City and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. The City may thereafter negotiate with the second-ranked Proposer, and if necessary, with the third-ranked Proposer, and so on, in accordance with section (4)(d) 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 City may end the particular formal solicitation. Nothing in this rule precludes the City from proceeding with a new formal solicitation for the same Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP that failed to result in a Contract.

COH-48-0230 Ties Among Proposers

- (1) If the City 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 City may select a candidate through any process that the City believes will result in the best value for the City, taking into account the scope, complexity, and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services. Provided, however, that the tie-breaking process established by the City under this section (1) cannot be based on pricing policies and pricing Proposals, or other pricing information, including the number of hours proposed for the services required, expenses, hourly rates, and overhead. The process must be designed to instill public confidence through ethical and fair dealing, honesty, and good faith on the part of the City and Proposers and shall protect the integrity of the Public Contracting process. Once a tie is broken, the City and the selected Proposer shall proceed with negotiations under COH-48-0210(3) or COH-48-0220(4)(c), as applicable.
- (2) If the City 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 City shall follow the procedure set forth in COH-46-0300 (Preferences for Oregon Goods and Services) to select the Consultant.

COH-48-0240 Protest Procedures

- (1) **RFP Protest and Request for Change.** 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 calendar 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 City may not consider any protest or request for change that is submitted after the submission deadline. In addition, a Consultant may not request a change to or otherwise challenge or protest any provision, Specification or Contract term after the RFP protest deadline has passed.

- (2) **Protest of Consultant Selection.** Pursuant to ORS 279C.110(8), Consultants may submit a written protest of the Contracting Agency’s selection of a Consultant for award of a Contract as follows:
- (a) **Single Award.** In the event of an award to a single Proposer, the City shall provide to all Proposers a copy of the selection notice that the City 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 City no later than seven 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP.
 - (b) **Multiple Award.** In the event of an award to more than one Proposer, the City shall provide to all Proposers copies of the selection notices that the City 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 City no later than seven 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, or because a sufficient number of Proposals of 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 otherwise are not qualified to perform the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the RFP.
 - (c) **Effect of Protest Submission Deadline.** The City may not consider any protest that is submitted after the submission deadline.
- (3) **Resolution of Protests.** A duly authorized representative of the City shall resolve all timely submitted protests within a reasonable time following the City’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 City shall revise the RFP accordingly and shall re-advertise the RFP in accordance with these Rules.

**COH-48-0250 Solicitation Cancellation, Delay, or Suspension;
Rejection of All Proposals or Responses; Consultant Responsibility For Costs**

The City may cancel, delay, or suspend a solicitation, RFQ, or other preliminary Procurement document, whether related to a Direct Appointment Procedure (COH-48-0200), Informal Selection Procedure (COH-48-0210), or a Formal Selection Procedure (COH-48-0200), or reject all Proposals, responses to RFQs, responses to other preliminary Procurement documents, or any combination of the foregoing, if the City believes it is in the public interest to do so. In the event of any such cancellation, delay, suspension, or rejection, the City 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 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.

COH-48-0270 Price Agreements

- (1) The City may establish Price Agreements for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services when the City cannot determine the precise quantities of those Services that the City will require over a specified time period.
- (2) When establishing Price Agreements under this rule, the City shall select no fewer than three Consultants, when feasible. The selection procedures for establishing Price Agreements shall be in accordance with COH-48-0130(1) or (2), as applicable. The City 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 division 48 rules, solicitation materials and the terms and conditions for a Price Agreement for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 Proposal;
 - (b) Specify whether the City intends to award a Price Agreement to one Consultant or to multiple Consultants. If the City will award a Price Agreement to more than one Consultant, the solicitation document and Price Agreement shall describe the criteria and procedures the City will use to select a Consultant for each individual work order or task order. The criteria and procedures to assign work orders or task orders that only involve or predominantly involve Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying services are at the City's sole discretion and may include 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 COH-48-0130(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; and

- (c) Specify the maximum term for assigning Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under the Price Agreement.
- (4) All Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services assigned under a Price Agreement require a written work order or task order issued by the City. Any work orders or task orders assigned under a Price Agreement must include, at a minimum, the following:
- (a) The specific scope of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services to be provided by the Consultant;
 - (b) The Consultant’s performance obligations and performance schedule;
 - (c) The payment methodology, Consultant’s rates and number of hours, and a maximum amount payable to the Consultant for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the work order or task order that is fair and reasonable to the City, as determined solely by the City, taking into account the value, scope, complexity, and nature of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services;
 - (d) Language that incorporates all applicable terms and conditions of the Price Agreement into the work order or task order; and
 - (e) Any other conditions or provisions the City believes to be in the City’s best interest.

POST-SELECTION CONSIDERATIONS

COH-48-0300 Prohibited Payment Methodology; Purchase Restrictions

- (1) Except as otherwise allowed by law, the City shall not enter into any Contract which includes compensation provisions that expressly provide for payment of
 - (a) Consultant’s costs under the contract plus a percentage of these costs; or
 - (b) A percentage of the Project construction costs or total Project cost.
- (2) Except as otherwise allowed by law, the City 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 Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services required under the Contract.
- (3) Except in cases of Emergency or in the particular instances noted in the subsections below, the City shall not purchase any building materials, supplies, or equipment for any building, structure, or facility constructed by or for the City from any Consultant under a Contract with the City to perform Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services for the building, structure, or facility. This prohibition does not apply if either of the following circumstances exists:
- (a) Consultant is providing Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services under a Contract with the City to perform Design-Build services or Energy Savings Performance Contract services (see COH-49-0670 and COH-49-0680); or
 - (b) That portion of the Contract relating to the acquisition of building materials, supplies, or equipment was awarded to Consultant pursuant to applicable law governing the award of such a Contract.

COH-48-0310 Expired or Terminated Contracts; Reinstatement

- (1) If the City enters into a Contract for Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services and that Contract subsequently expires or is terminated, the City may proceed as follows, subject to the requirements of subsection (2) of this Rule:
- (a) Expired Contracts. If the Contract has expired as the result of Project delay caused by the City or caused by any other occurrence outside the reasonable control of the City or the Consultant, and if no more than one year has passed since the Contract expiration date, the City may amend the Contract to extend the Contract expiration date, revise the description of the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related 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 City and the Consultant shall continue performance under the Contract as amended; or
 - (b) Terminated Contracts. If the City 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, then the City may enter into a new Contract with the same Consultant to perform the remaining Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services not completed under the Original Contract, or to perform any remaining Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services not completed under the Contract as adjusted to reflect a material alteration of the Project.

- (2) The City may proceed under either subsections (1)(a) or (1)(b) of this rule only after making written findings that Amending the existing Contract or entering into a new Contract with the Consultant will:
 - (a) Promote efficient use of public funds and resources and result in substantial cost savings to the City;
 - (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.

COH-48-0320 Contract Amendments

- (1) The City may amend any Contract if the City, in its sole discretion, determines that the amendment is within the scope of the Solicitation Document and that the amendment would not materially impact the field of competition for the Architectural, Engineering, Photogrammetric Mapping, Transportation Planning or Land Surveying Services or Related Services described in the final form of the original Procurement document. In making this determination, the City 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 Solicitation Document if the City reasonably believes that the number of Proposers would not significantly increase if the Procurement document were re-issued to include the additional services.
- (2) The City 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 which 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 City, and must receive all required approvals before the amendments will be binding on the City.
- (4) Contract Amendment Authority.
 - (a) Contract amendments shall be approved as per the City's Schedule of Contract Signature Authority.

END OF DIVISION 48

DIVISION 49

CONSTRUCTION AND PUBLIC IMPROVEMENT

COH-49-0100 Application

- (1) These division 49 rules apply to Public Improvement Contracts as well as Public Contracts for ordinary construction services that are not Public Improvements. Rules that apply specifically to Public Improvement Contracts are so identified. These division 49 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 Contracting Agencies to enter into Contracts for both pre-construction and construction services.
- (2) These division 49 rules address matters covered in ORS Chapter 279C (with the exception of Architectural, Engineering, Land Surveying and Related Services, all of which are addressed in division 48 of the City of Hillsboro Public Contracting Rules).

COH-49-0110 Policies

In addition to the general code policies set forth in ORS 279A.015, the ORS 279C.300 policy on competition and the ORS 279C.305 policy on least-cost for Public Improvements apply to these division 49 rules.

COH-49-0120 Definitions

- (1) **"Conduct Disqualification"** means a disqualification pursuant to ORS 279C.440 in accordance with COH-49-0370.
- (2) **"Disqualification"** (under ORS 279C.440) means the preclusion of a Person from contracting with the City for a period of time. Disqualification may be a Conduct Disqualification or Disqualification. The City is authorized to disqualify a Person in accordance with COH-49-0370.
- (3) **"Foreign Contractor"** means a Contractor that is not domiciled in or registered to do business in the State of Oregon. See COH-49-0490.
- (4) **"Notice"** means any of the alternative forms of public announcement of Procurements, as described in COH-49-0210.
- (5) **"Work"** means 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.

COH-49-0130 Competitive Bidding Requirement

The City must solicit Bids for Public Improvement Contracts by Invitation to Bid ("ITB"), except as otherwise allowed or required pursuant to ORS 279C.335 on competitive bidding exceptions and exemptions, ORS 279A.030 on federal law overrides, or ORS 279A.100 on affirmative action. Also see COH-49-0600 through COH-49-0690 regarding the use of Alternative Contracting Methods, use of Alternative Contracting Methods for projects which are excepted or 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.

COH-49-0140 Contracts for Construction Other Than Public Improvements; Emergency Construction Contracts

- (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 COH division 47 rules rather than under the provisions of ORS 279C and these division 49 rules.
- (2) **Emergency Construction Contracts.** Emergency Contracts for construction services are not Public Improvement Contracts and are regulated under ORS 279B.080. See COH-49-0150.
- (3) **Application of ORS Chapter 279C.** Non-procurement provisions of ORS 279C and these division 49 rules may still be applicable to the resulting Contracts. See, for example, particular statutes on Disqualification (ORS 279C.440, 445, and 450); Legal Actions (ORS 279C.460 and 465); Required Contract Conditions (ORS 279C.505, 515, 520, and 530); Hours of Labor (ORS 279C.540 and 545); Retainage (ORS 279C.550, 560, and 565); Subcontracts (ORS 279C.580); Action on Payment Bonds (ORS 279C.600, 605, 610, 615, 620, and 625); Termination (ORS 279C.650, 655, 660, and 670); and all of the Prevailing Rate of Wage requirements (ORS 279C.800 through 870) for Public Works Contracts.

COH-49-0145 Exemptions From Competitive Bidding

- (1) **Specific Exemptions for Individual Contracts.** The following Contracts are exempt pursuant to ORS 279C.335(2):
 - (a) Public Improvement Contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 through 279.855.
 - (b) A Public Improvement Contract exempt under Section (2) of this Rule.
 - (c) A Public Improvement Contract with a value of less than \$25,000.
 - (d) A Public Improvement Contract not to exceed \$100,000 made under procedures for Competitive Quotes in COH-49-0160.
 - (e) Energy savings performance Contracts entered into in accordance with rules of procedure adopted under ORS 279A.065.
 - (f) A Public Improvement contract for which no Bids were received after soliciting for Bids pursuant to COH-49-0130, provided the City follows the same procedures for an Exemption as outlined in sections (2) and (3) of this rule.
- (2) **Contracts Approved Pursuant to a Request for Exemption for an Individual Contract or Class of Contracts.**
 - (a) The City Manager may request a resolution from the Contract Review Board exempting a particular Public Improvement Contract or class of Public Improvement

Contracts from Competitive Bidding if the Contract or Contracts are not otherwise exempted under these Rules.

- (b) When requesting a class exemption, the City Manager must clearly identify the class based on the class's defining characteristics, including some combination of Project descriptions or locations, time periods, Contracting values, methods of Procurement, or other factors that distinguish the limited and related class of Public Improvements from the City's overall construction program. The City Manager or Contract Review Board may not define a class exemption solely by funding source (e.g., a bond fund) or by method of Procurement (e.g., RFP or CM/GC).
- (3) **Contents of Contract Exemption Request.** Public Improvement Contract exemption requests must contain the following:
- (a) The nature of the Project;
 - (b) Estimated cost of the Project;
 - (c) Findings supporting why it is unlikely that an exemption from Competitive Bidding would encourage favoritism or diminish competition for the Public Contract as required by ORS 279C.335(2)(a);
 - (d) Findings supporting that the exemption will likely result in substantial cost savings to the City as required by ORS 279C.335(2)(b) or is a pilot Project for which the City intends to determine whether the use of an Alternative Contracting Method actually results in substantial cost savings;
 - (e) Information regarding fourteen factors required pursuant to ORS 279C.335(2)(b)(A)-(N):
 - (f) Proposed Alternative Contracting and Purchasing practices to be employed;
 - (g) The estimated date by which it would be necessary to award the Contract; and
 - (h) If the City will seek to deliver the Public Improvement utilizing the Construction Manager/General Contractor method, it must demonstrate compliance with ORS 279C.337 and with the Attorney General Model Rules governing CM/GC contracting (OAR 137-049-0690).
- (4) **Hearing Permitted.**
- (a) The Contract Review Board may hold a public hearing prior to adoption of an exemption resolution.
 - (b) Notification of the public hearing must be published in at least one trade newspaper of general statewide circulation (e.g. the Daily Journal of Commerce) at least 14 Days before the hearing.

- (c) The Notice must state that the public hearing is for the purpose of taking comments on the City's draft Findings for an exemption from the Competitive Bidding requirement. At the time of the Notice, copies of the draft Findings must be made available to the public.
- (d) At the public hearing, the City must offer an opportunity for any interested party to appear and present comment.
- (e) If the City is required to act promptly due to circumstances beyond its control that do not constitute an Emergency, notification of the public hearing can be published simultaneously with the City's solicitation of Contractors for the Alternative Public Contracting method, as long as responses to the solicitation are due at least five Days after the hearing and approval of the resolution adopting the Findings.

COH-49-0150 Emergency Contracts; Bidding and Bonding Exemptions

- (1) **Emergency Declaration.** The City Manager 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 City's internal policies, by a written declaration that describes the circumstances creating the Emergency and the anticipated harm from failure to enter into an Emergency Contract. The Emergency declaration shall 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 City 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 City Manager considers reasonable in responding to the Emergency.
- (3) **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.
- (4) **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.
- (5) **Excusing Bonds.** Pursuant to ORS 279C.380(4) and this rule, the Emergency declaration may also state that the City waives the requirement of furnishing a performance bond and payment bond for the Emergency Contract. After making such an Emergency declaration, those 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. See COH-49-0815 and BOLI rules at OAR 839-025-0015.

COH-49-0160 Intermediate Procurements; Competitive Quotes and Amendments

- (1) **General.** Public Improvement Contracts estimated by the City 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.** The City must utilize Written requests for quotes whenever reasonably practicable and unless stated to the contrary elsewhere in these rules, for all intermediate-level procurements over \$50,000, when the procurement is for construction or will result in a Public Improvement Contract. Written requests for quotes must include the selection criteria to be utilized in selecting a Contractor and, if the criteria are not of equal value, their relative value or ranking. When requesting quotations orally, prior to requesting the price quote the City shall state any additional selection criteria and, if the criteria are not of equal value, their relative value.
- (4) **Number of Quotes; Record Required.** The City must seek at least three (3) competitive quotes and keep a Written record of the sources and amounts of the quotes received. If three (3) quotes are not reasonably available, the City must explain why in writing.
- (5) **Award.** If Awarded, the City shall Award the Contract to the prospective contractor whose quote will best serve the interests of the City, taking into account the announced selection criteria. If Award is not made to the Offeror offering the lowest price, the City shall make a Written record of the basis for Award.
- (6) **Change Orders and Contract Amendments.** See COH-49-0910.

FORMAL PROCUREMENT RULES

COH-49-0200 Solicitation Documents; Required Provisions; Assignment or Transfer

- (1) **Solicitation Document.** Pursuant to ORS 279C.365 and this rule, the Solicitation Document must include the following:
 - (a) **General Information.**
 - (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; and
 - (ii) Whether attendance at the conference will be mandatory or voluntary; and

2023 City of Hillsboro Public Contracting Rules – Division 49

- (iii) That statements made by the City's representatives at the conference are not binding upon the City 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 City Representative designated for receipt of Offers and the 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 COH-49-0300 regarding facsimile Bids or Proposals and COH-49-0310 regarding electronic Procurement);
- (F) The time, date, and place of Opening;
- (G) The time and date of Closing after which the City will not accept Offers, which time shall be not less than five Days after the date of the last publication of the advertisement. Although a minimum of five Days is prescribed, the City is encouraged to use at least a 14-Day solicitation period when feasible. If the City is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, the City shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and COH-49-0360. For timing issues relating to Addenda, see COH-49-0250;
- (H) The office where the Specifications for the Work may be reviewed;
- (I) A statement that each Bidder to an ITB must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120;
- (J) If the Contract resulting from a solicitation will be a Contract for a Public Work subject to ORS 279C.800 through 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 City 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 City 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 COH-49-0230;
- (L) Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;

- (M) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See COH-49-0440(3));
 - (N) How the City will notify Offerors of Addenda and how the City will make Addenda available (See COH-49-0250); and
 - (O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in COH-49-0360.
- (b) **Evaluation Process.**
- (A) A statement that the City 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 ORS 279C.375(3)(b), and may reject for good cause all Offers 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 City 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 COH-49-0620), along with the process the City will use to determine acceptability of the Work;
 - (i) If the Solicitation Document is an Invitation to Bid, the City shall set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, and ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but to the extent possible, such evaluation factors must be objective, reasonable estimates based upon information the City has available concerning future use;
 - (ii) If the Solicitation Document is a Request for Proposals, the City must refer to the additional requirements of COH-49-0650; and
- (c) **Contract Provisions.** The City shall include all Contract terms and conditions, including warranties, insurance, and bonding requirements, that the City considers appropriate for the Public Improvement Project. All Public Improvement Contracts must also include all applicable provisions required by Oregon law including:
- (A) Prompt payment to all Persons supplying labor or material, contributions to Industrial Accident Fund, liens and withholding taxes (ORS 279C.505(1));
 - (B) Demonstrate that an employee drug testing program is in place (ORS 279C.505(2));

2023 City of Hillsboro Public Contracting Rules – Division 49

- (C) If the Contract calls for demolition Work described in ORS 279C.510(1), a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;
- (D) If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost-effective (ORS 279C.510(2));
- (E) Payment of claims by public officers (ORS 279C.515(1));
- (F) Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515(2), including the rate of interest;
- (G) Person's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279C.515(3));
- (H) Hours of labor in compliance with ORS 279C.520;
- (I) Environmental and natural resources regulations (ORS 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(2));
- (P) Retainage (ORS 279C.550 to 279C.570);
- (Q) Prompt payment policy, progress payments, rate of interest (ORS 279C.570);
- (R) Contractor's relations with subcontractors (ORS 279C.580);
- (S) Notice of claim (ORS 279C.605);
- (T) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385; and
- (U) Contractor's certification that all subcontractors performing Work described in ORS 701.005(2) (i.e., construction Work) will be registered with the Construction.

Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence Work under the Contract.

- (2) **Assignment or Transfer Restricted.** Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of or transfer rights, or delegate duties under the Contract, either in whole or in part, without the City's prior Written consent. Unless otherwise agreed by the City in Writing, such consent shall not relieve the Contractor of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If the City 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 City for complete performance of the Contract as if no such assignment, sale, disposal, transfer, or delegation had occurred unless the City otherwise agrees in Writing.

COH-49-0210 Notice and Advertising Requirements; Posting

- (1) **Notice and Distribution Fee.** The City shall furnish Notice as set forth below in subsections (1)(a) through (1)(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 City may charge a fee or require a deposit for the Solicitation Document. The City may furnish Notice using any method determined to foster and promote competition, including:
- (a) Mailing Notice of the availability of Solicitation Documents to Persons that have expressed an interest in the City's Procurements;
 - (b) Placing Notice on the City's Electronic Procurement System; or
 - (c) Placing Notice on the City's Internet Web site.
- (2) **Advertising.** Pursuant to ORS 279C.360 and this Rule, the City shall advertise every solicitation for competitive Bids or competitive Proposals for a Public Improvement Contract, unless the Contract Review Board has exempted the solicitation from the advertisement requirement as part of a Competitive Bidding exemption under ORS 279C.335.
- (a) Unless the City publishes by Electronic Advertisement as permitted under subsection (2)(b) of this Rule, the City 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 City may determine to be necessary or desirable to foster and promote competition.
 - (b) The City may publish by Electronic Advertisement if the Contract Review Board determines that Electronic Advertisement is likely to be cost-effective and, by Rule or order, authorizes Electronic Advertisement.
 - (c) In addition to the City's publication required under subsection (2)(a) or (2)(b), the City shall also publish an advertisement for Offers in at least one trade newspaper of

general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000.

- (d) All advertisements for Offers shall set forth:
 - (A) The Public Improvement project;
 - (B) The office where Contract terms, conditions, and Specifications may be reviewed;
 - (C) The date that Persons must file applications for prequalification under ORS 279C.340, if prequalification is a requirement, and the class or classes of Work for which Persons must be prequalified;
 - (D) The scheduled Closing, which shall not be less than five Days after the date of the last publication of the advertisement;
 - (E) The name, title, and address of the City Person authorized to receive Offers;
 - (F) The scheduled Opening; and 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. 3141 to 3148).

COH-49-0220 Prequalification of Offerors

- (1) **Prequalification.** Pursuant to ORS 279C.430 and this Rule, two types of prequalification are authorized:
 - (a) **Mandatory Prequalification.** The City may require mandatory prequalification of Offerors on forms prescribed by the City Manager. The City must indicate in the Solicitation Document if it will require mandatory prequalification. Mandatory prequalification is when the City conditions a Person's submission of an Offer upon the Person's prequalification. The City shall not consider an Offer from a Person that is not prequalified if the City required prequalification.
 - (b) **Permissive Prequalification.** The City may prequalify a Person for the City's solicitation list, but in permissive prequalification the City shall not limit distribution of a solicitation to that list.
 - (c) **Prequalification Procedure.** When prequalification is required or allowed, a Person shall submit a prequalification application to the City on the form prescribed by the City. The City shall determine if the applicant is qualified within 30 Days of the date of application, or sooner if practicable and so requested by the applicant to enable the applicant to participate in Bidding on an advertised Contract. If the City finds that the applicant is qualified, the City will provide Notice to the applicant of the nature and type of Contracts the applicant is qualified to Bid on and the period of time for which the qualification is valid.
 - (d) If prequalification is used in conjunction with a solicitation for a contract to be funded in whole or in part with federal funds: prequalification process shall allow sufficient

time so that potential bidders will not be precluded from qualifying during the solicitation period.

- (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 the City.
- (3) **Standards for Prequalification.** A Person may prequalify by demonstrating to the City'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 City. (See COH-49-0390(2) regarding standards of responsibility.)
- (4) **Notice of Denial.** If a Person fails to prequalify for a mandatory prequalification, the City shall notify the Person and specify the reasons under Section (3) of this rule and inform the Person of the Person's right to a hearing under ORS 279C.445 and 279C.450 as provided in Section (6) of this Rule.
- (5) **Revocation of Prequalification.** If the City has reasonable cause to believe that there has been a substantial change in the conditions of a prequalified Person and that the Person is no longer qualified or is less qualified, the City may revoke or revise and reissue the prequalification after reasonable Notice to the prequalified Person. The Notice shall 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 as provided in Section (6) of this Rule.
- (6) **Appeal of Denial or Revocation of, or Revision to Prequalification.**
 - (a) Any Person who wishes to appeal the City decision under Sections (4) or (5) of this Rule shall, within three business Days after receipt of the Notice of disqualification, file Written Notice with the City that Person appeals the decision. The City shall notify the Contract Review Board and schedule the appeal hearing before the Contract Review Board.
 - (b) Immediately upon receipt of the prospective Bidder's or Proposer's Notice of appeal, the City shall notify the local Contract Review Board.
 - (c) Upon the receipt of Notice from the City under Section (2) of this Rule, the City Manager on behalf of the Contract Review Board shall promptly notify the Person of the time and place of the hearing. The Contract Review Board shall conduct the hearing and decide the appeal within 30 Days after receiving the Notice from the City.

The Contract Review Board shall set forth in Writing the reasons for the hearing decision.

- (d) At the hearing the Contract Review Board shall consider de novo the Notice of denial, revocation or revision of a prequalification, the standards listed in Section (3) of this Rule on which the City based the decision, and any evidence provided by the parties. Hearings before a Contract Review Board shall be conducted under rules of procedure adopted by the Contract Review Board.

COH-49-0230 Eligibility to Bid or Propose; Registration or License

- (1) **Construction Contracts.** The City 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 City 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) **Non-complying Entities.** The City 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 or the City.

COH-49-0240 Pre-Offer Conferences

- (1) **Purpose.** The City 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 City may require attendance at the pre-Offer conference as a condition for making an Offer. Unless otherwise specified in the Solicitation Document, a mandatory attendance requirement is considered to have been met if, at any time during the mandatory meeting, a representative of offering firm is present.
- (3) **Scheduled time.** If the City 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 City's representative at the pre-Offer conference do not change the Solicitation Document unless the City confirms such statements with a Written Addendum to the Solicitation Document.
- (5) **City Announcement.** The City must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with COH-49-0200(1)(a)(B).

COH-49-0250 Addenda to Solicitation Documents

- (1) **Issuance; Receipt.** The City 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 City otherwise specifies in the Addenda or in the Solicitation Document.
- (2) **Notice and Distribution.** The City shall notify prospective Offerors of Addenda consistent with the standards of Notice set forth in COH-49-0210(1). The Solicitation Document must specify how the City will provide notice of Addenda and how the City will make the Addenda available (see COH-49-0200(1)(a)(N)). For example, "The City will not mail notice of Addenda, but will publish Notice of any Addenda on the City's Web site. Addenda may be downloaded off the City's Web site. Offerors should frequently check the City's Web site until closing, i.e., at least once weekly until the week of closing, and at least once daily during the week of the Closing."
- (3) **Timelines; Extensions.** The City shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The City may extend the Closing if the City determines that prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by public interest, the City shall not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.
- (4) **Request for Change or Protest.** Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in COH-49-0260, by the close of the City'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 COH-49-0260, whichever date is later. The City shall consider only an Offeror's request for change or protest to the Addendum; the City must not consider a request for change or protest to matters not added or modified by the Addendum, unless the Offeror submits the request for change or protest before the deadline for the City's receipt of request for change or protests as set forth in COH-49-0260(2) and (3).

COH-49-0260 Request for Clarification or Change; Solicitation Protests

- (1) **Clarification.** Prior to the deadline for submitting a Written request for change or protest, an Offeror may request that the City clarify any provision of the Solicitation Document. The City's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on the City unless the City 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 City not less than seven 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 shall deliver a Written protest on those matters to the City not less than seven 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) 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) **The Response.** The City is not required to consider an Offeror's request for change or protest after the deadline established for submitting such request or protest. The City must provide Notice to the applicable Person if it entirely rejects a protest. If the City agrees with the Person's request or protest, in whole or in part, the City shall either issue an Addendum reflecting its determination under COH-49-0260 or cancel the solicitation under COH-49-0270.
- (5) **Extension of Closing.** If the City receives a Written request for change or protest from an Offeror in accordance with this Rule, the City may extend Closing if the City determines that an extension is necessary to consider the request or protest and issue an Addendum, if any, to the Solicitation Document.
- (6) **Failure to Protest or Request a Change Precludes Protest of Award on Such Issue.** An Offeror cannot protest an Award based on any issue that could have, but was not, raised as a Request for Change or Protest of solicitation.

COH-49-0270 Cancellation of Solicitation Document

- (1) **Cancellation in the Public Interest.** The City may cancel a solicitation for good cause if the City finds that cancellation is in the public interest. The City's reasons for cancellation shall be made part of the Procurement File.
- (2) **Notice of Cancellation.** If the City cancels a solicitation prior to Opening, the City must provide Notice of cancellation in accordance with COH-49-0210(1). Such Notice of cancellation must:
 - (a) Identify the solicitation;
 - (b) Briefly explain the reason for cancellation; and
 - (c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.
- (3) **Disposition of Offers.**
 - (a) Prior to Offer Opening. If the City cancels a solicitation prior to Offer Opening, the City 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 City shall open the Offer to determine the source and then return it to the Offeror.
 - (b) After Offer Opening. If the City rejects all Offers, the City shall retain all such Offers as part of the City's Procurement File.

COH-49-0280 Offer Submissions

- (1) **Offer and Acceptance.** The Bid or Proposal is the Bidder's or Proposer's Offer to enter into a Contract.
 - (a) In Competitive Bidding and Competitive Proposals, the Offer is always a "Firm Offer," i.e., the Offer shall be held open by the Offeror for the City's acceptance for the period specified in COH-49-0410. The City may elect to accept the Offer at any time during the specified period, and the City'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 COH-49-0410, the City may elect to discuss or negotiate certain Contractual provisions, as identified in these Rules or in the Solicitation Document, with the Proposer. See COH-49-0650 on Requests for Proposals and COH-49-0290 on 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 City 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 COH-49-0650, an Offeror shall not make an Offer contingent upon the City'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 that it has read and understand the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits Proposal of alternative terms under COH-49-0650, the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the City in Writing.
- (5) **Instructions.** An Offeror shall submit and Sign the Offer in accordance with the Solicitation Document. An Offeror shall initial and submit any corrections or erasures 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 Offeror is otherwise instructed in the Solicitation Document.
- (7) **Documents.** An Offeror shall provide the City with all documents and Descriptive Literature required under the Solicitation Document.
- (8) **Facsimile or Electronic Submissions.** If the City permits Facsimile or Electronic Offers in the Solicitation Document, the Offeror may submit Facsimile or Electronic Offers in accordance with the Solicitation Document. The City will not consider facsimile or Electronic Offers unless authorized by the Solicitation Document.
- (9) **Product Samples and Descriptive Literature.** The City 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 City 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, in the envelope provided by the City, or through the City's electronic means identified in the solicitation, whichever is applicable.
- (11) **Receipt of Offers.**
 - (a) The City is not responsible for Offers submitted in any manner or format, or to any delivery point, other than as required in the Solicitation Document,
 - (b) The Offeror is responsible for ensuring that the City receives the Offers at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

COH-49-0290 Bid or Proposal Security

- (1) **Security Amount.** If the City 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 City shall not use Bid or Proposal security to discourage competition. The City 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, any required proof of insurance. See ORS 279C.365(5) and 279C.385.
- (2) **Requirement for Bid Security (Optional for Proposals).** Unless the City has otherwise exempted a solicitation or class of solicitations from Bid security pursuant to ORS 279C.390, the City must require Bid security for its solicitation of Bids for Public Improvements. This requirement applies only to Public Improvement Contracts with a value estimated by City, of more than \$100,000 or in the case of Contracts for highways, bridges and other transportation projects, more than \$50,000. See ORS 279C.365(6). The City may require Bid security even if it has exempted a class of solicitations from Bid security. The City may also require Proposal security in RFPs. See ORS 279C.400(5).
- (3) **Form of Bid or Proposal Security.** The City 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 City shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been fully executed and all required bonds and insurance have been provided, or after all Offers have been rejected. The City 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.

COH-49-0300 Electronic Bids and Proposals

- (1) **City Authorization.** The City may authorize Offerors to submit Electronic Offers. If the City determines that Bid or Proposal security is or will be required, the City shall not authorize Electronic Offers unless the City has established a method for receipt of such security. Prior to authorizing the submission of Electronic Offers, the City shall determine that the City's equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time. In addition, the City shall establish administrative procedures and controls:
 - (a) To receive, identify, record, and safeguard Electronic 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 City authorizes an Electronic Offer for Bids or Proposals, the City 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: "An 'Electronic 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 City via a facsimile machine";
 - (b) A provision substantially in the form of the following: "Offerors may submit Electronic Offers in response to this Solicitation Document. The entire response must arrive at the place and by the time specified in this Solicitation Document.";
 - (c) A provision that requires Offerors to Sign their Electronic Offers;
 - (d) A provision substantially in the form of the following: "The City reserves the right to Award the Contract solely on the basis of the Electronic Offer." However, upon the City's request, the apparent successful Offeror shall promptly submit its complete original Signed Offer; and
 - (e) The data and compatibility characteristics of the City'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 City is not responsible for any failure attributable to the transmission or receipt of the Electronic Offer including, but not limited to, the following:
 - (A) Receipt of garbled or incomplete documents;
 - (B) Availability or condition of the receiving machine;
 - (C) Incompatibility between the sending and receiving machines;
 - (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 Security and confidentiality of data.

COH-49-0310 Electronic Procurement

- (1) **General.** The City may utilize Electronic Advertisement of Public Improvement Contracts in accordance with ORS 279C.360(1), provided that advertisement of such Contracts with an estimated Contract Price in excess of \$125,000 must also be published in a trade newspaper of general statewide circulation, and may post Notices of intent to Award electronically as provided by ORS 279C.410(7).
- (2) **Alternative Procedures.** In the event that the City desires to direct or permit the submission and receipt of Offers for a Public Improvement Contract by electronic means, as allowed under ORS 279C.365(1)(d), it shall first promulgate supporting procedures substantially in conformance with COH-47-0330 (Electronic Procurement under ORS 279B), taking into account ORS 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 City 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. See ORS 279C.365(2).

COH-49-0320 Pre-Closing Modification or Withdrawal of Offers

- (1) **Modifications.** An Offeror may modify its Offer in Writing prior to the Closing. An Offeror shall prepare and submit any modification to its Offer to the City in accordance with COH-49-0280, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:
 - (a) Bid (or Proposal) modification; and
 - (b) Solicitation number (or other identification as specified in the Solicitation Document).
- (2) **Withdrawals.**
 - (a) An Offeror may withdraw its Offer by Written Notice submitted on the Offeror's letterhead, Signed by an authorized representative of the Offeror, delivered to the location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by the City 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 City may release an unopened Offer withdrawn under Section (2)(a) of this Rule to the Offeror or its authorized representative after voiding any date and time-stamp mark;
 - (c) The Offeror shall mark the Written request to withdraw an Offer as follows:
 - (A) Bid (or Proposal) withdrawal; and

(B) Solicitation number (or other identification as specified in the Solicitation Document).

- (3) **Documentation.** The City shall include all documents relating to the modification or withdrawal of Offers in the appropriate Procurement File.

COH-49-0330 Receipt, Opening, and Recording of Offers; Confidentiality of Offers

- (1) **Receipt.** The City shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The City must not open the Offer or modification upon receipt, but must maintain it as confidential and secure until Opening. If the City inadvertently opens an Offer or a modification prior to the Opening, the City shall return the Offer or modification to its secure and confidential state until Opening. The City shall document the resealing for the Procurement File (e.g., "The City inadvertently opened the Offer due to improper identification of the Offer").
- (2) **Opening and Recording.** The City shall publicly open Offers, including any modifications made to the Offer, pursuant to COH-49-0320. In the case of Invitations to Bid, to the extent practicable, the City shall read aloud the name of each Bidder, the Bid price(s), and such other information as the City considers appropriate. In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, the City will not read Offers aloud.
- (3) **Availability.** After Opening, the City 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 the Notice of Intent to Award is issued. In any event, the City may withhold from disclosure those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.501(2); ORS 646.461 to 646.475. To the extent the City determines such designation is not in accordance with applicable law, the City 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, models, 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.

COH-49-0340 Late Bids, Late Withdrawals, and Late Modifications

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. The City will not consider late Offers, withdrawals, or modifications except as permitted in COH-49-0350 or COH-49-0390.

COH-49-0350 Mistakes

- (1) **Generally.** To protect the integrity of the Competitive Procurement process and to ensure fair treatment of Offerors, the City should carefully consider whether to permit waiver, correction, or withdrawal of Offers for certain mistakes.
- (2) **City Treatment of Mistakes.** The City shall not allow an Offeror to correct or withdraw an Offer for an error in judgment. If the City discovers certain mistakes in an Offer after Opening but before Award of the Contract, the City may take the following action:

2023 City of Hillsboro Public Contracting Rules – Division 49

- (a) The City 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 City 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 City'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 City 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 (2)(b) of this Rule;
 - (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 City does not grant the Offeror permission to withdraw the Offer;
 - (G) That the City's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on the City or the public it represents; and
 - (H) That the Offeror promptly gave Notice of the claimed error to the City.

- (d) The criteria in Section (2)(c) of this Rule shall determine whether the City will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether the City 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 City based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually Awarded by the City, 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 City 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 division 49 only to the extent permitted by applicable law.

COH-49-0360 First-Tier Subcontractors; Disclosure and Substitution; ITB

- (1) **Required Disclosure.** Within two working hours after the Bid Closing on an ITB for a Public Improvement having a Contract Price anticipated by the City to exceed \$100,000, all Bidders shall submit to the City 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 (5%) 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 City shall:
 - (a) Set the Bid Closing on a Tuesday, Wednesday, or Thursday, and at a time between 2:00 p.m. and 5:00 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 City.
- (3) **Bidder Instructions and Disclosure Form.** For the purposes of this Rule, the City 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 (see ORS 279C.370). Specifically, when the Contract amount of a first-tier subcontractor furnishing labor or labor and materials would be greater than or equal to: (i) 5% of the Project Bid, but at least \$15,000, or (ii) \$350,000 regardless of the percentage, the Bidder must disclose the following information about that subcontract either in its Bid submission, or within two hours after Bid Closing:
 - (A) The subcontractor's name,
 - (B) The category of Work that the subcontractor would be performing, and
 - (C) The dollar value of the subcontract. 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 CITY MUST REJECT A BID IF THE BIDDER FAILS TO SUBMIT THE DISCLOSURE FORM WITH THIS INFORMATION BY THE STATED DEADLINE (see COH-49-0360).

- (4) **Submission.** A Bidder shall submit the disclosure form required by this Rule either in its Bid submission or within two working hours after Bid Closing in the manner specified by the ITB.
- (5) **Responsiveness.** Compliance with the disclosure and submittal requirements of ORS 279C.370 and this Rule is a matter of Responsiveness. Bids that are submitted by Bid Closing, but for which the disclosure submittal has not been made by the specified deadline, are not Responsive and shall not be considered for Contract Award.
- (6) **City Role.** The City shall obtain, and make available for public inspection, the disclosure forms required by ORS 279C.370 and this Rule. The City shall also provide copies of disclosure forms to the Bureau of Labor and Industries (BOLI) as required by ORS 279C.835. The City is not required to determine the accuracy or completeness of the information provided on disclosure forms.
- (7) **Substitution.** Pursuant to ORS 278C.585, a Contractor whose Bid is accepted may substitute a first tier subcontractor that was not disclosed under ORS 279C.370 and this Rule by submitting the name of the new subcontractor and the reason for the substitution in Writing to the City. A Contractor may substitute a first-tier subcontractor under this Section in the following circumstances:
 - (a) When the subcontractor disclosed under ORS 279C.370 fails or refuses to execute a Written Contract after having had a reasonable opportunity to do so after the Written Contract, which must be reasonably based on the general terms, conditions, plans, and Specifications for the Public Improvement Project or the terms of the subcontractor's Written Bid, is presented to the subcontractor by the Contractor;
 - (b) When the disclosed subcontractor becomes bankrupt or insolvent;

- (c) When the disclosed subcontractor fails or refuses to perform the subcontract;
- (d) When the disclosed subcontractor fails or refuses to meet the bond requirements of the Contractor that had been identified prior to the Bid submittal;
- (e) When the Contractor demonstrates to the City that the subcontractor was disclosed as the result of an inadvertent clerical error;
- (f) When the disclosed subcontractor does not hold a license from, or has a license that is not properly endorsed by, the Construction Contractors Board and is required to be licensed by the Construction Contractors Board;
- (g) When the Contractor determines that the Work performed by the disclosed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and Specifications or that the subcontractor is substantially delaying or disrupting the progress of the Work;
- (h) When the disclosed subcontractor is ineligible to work on a Public Improvement Contract under applicable statutory provisions;
- (i) When the substitution is for good cause; The Construction Contractors Board shall define "good cause" by rule. "good cause" includes, but is not limited to, the financial instability of a subcontractor. The definition of "good cause" must reflect the least-cost policy for Public Improvement Contracts established in ORS 279C.305;
- (j) When the substitution is reasonably based on the Contract alternates chosen by the City. The City must accept written submissions filed under this Section (7) as public records. Aside from issues involving inadvertent clerical error under ORS 279C.585, the City 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.

COH-49-0370 Disqualification of Persons

- (1) **Authority.** The City may disqualify a Person from consideration of Award of the City'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 City may disqualify a Person for:
 - (A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract or in the performance of such contract or subcontract.
 - (B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty that currently, seriously, and directly affects the Person's responsibility as a contractor.

- (C) Conviction under state or federal antitrust statutes.
 - (D) Violation of a contract provision that is regarded by the City 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, including a violation of the City's policy on Standards of Conduct for Independent Contractors. However, a Person's failure to perform or unsatisfactory performance caused by acts beyond the Person's control is not a basis for Disqualification.
- (b) Standards for Disqualification. As provided in ORS 200.065, 200.075, or 279A.110, the City may disqualify a Person's right to submit an Offer or to participate in a Contract (e.g., subcontractors) as follows:
- (A) For Disqualification under ORS 200.065, the City 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 business enterprise, minority-owned business, women-owned business, emerging small business, or a business that a service-disabled veteran owns; 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 City pursuant to ORS 200.065.
 - (B) For a Disqualification under ORS 200.075, the City may disqualify a Person upon finding that:
 - (i) The Person has entered into an agreement representing that disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business, or a business that a service-disabled veteran owns, certified under 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 Work under a Public Improvement Contract to meet an established Certified Enterprise goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the Contract.

- (iv) If a Person is Disqualified for a DBE Disqualification under ORS 200.075, the affected City shall not permit that Person to participate in that City's Contracts.
 - (C) For a Disqualification under ORS 279A.110, the City may disqualify a Person if the City finds that the Person discriminated against a disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business, or a business that a service-disabled veteran owns in Awarding a subcontract under a Contract with that City.
- (2) **Notice of Intent to Disqualify.** The City 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 City 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 a time stated in the notice and that if the City 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 under which the hearing will be held;
 - (e) Include a reference to the particular sections of the statutes and rules involved;
 - (f) State the proposed Disqualification period; and
 - (g) State that the Person may be represented by legal counsel.
- (3) **Hearing.** The City shall schedule a hearing upon the City's receipt of the Person's timely hearing request. Within a reasonable time prior to the hearing, the City 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.
- (4) **Notice of Disqualification.** The City 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 City in Writing within three business Days after receipt of the City's notice of Disqualification if the Person intends to appeal the City's decision.

COH-49-0380 Bid or Proposal Evaluation Criteria

- (1) **General.** A Public Improvement Contract, if Awarded, must be Awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. See COH-49-0390 and Rules for Alternative Contracting Methods at COH-49-0600 to COH-49-0690.
- (2) **Bid Evaluation Criteria.** Invitations to Bid may solicit lump-sum Offers, unit-price Offers, or a combination of the two.
 - (a) **Lump Sum.** If the ITB requires a lump-sum Bid without additive or deductive alternates, or if the City elects not to award additive or deductive alternates, Bids must be compared on the basis of lump-sum prices, or lump-sum base-Bid prices, as applicable. If the ITB calls for a lump-sum base Bid, plus additive or deductive alternates, the total Bid price must be calculated by adding to or deducting from the base Bid those alternates selected by the City for the purpose of comparing Bids.
 - (b) **Unit Price.** If the Bid includes unit pricing for estimated quantities, the total Bid price must be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by the City for the purpose of comparing Bids. The City must specify within the Solicitation Document the estimated quantity of the procurement to be used for determination of the low Bidder. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price governs. See COH-49-0350(2)(b).
- (3) **Proposal Evaluation Criteria.** If the City has exempted the Procurement of a Public Improvement from the Competitive Bidding requirements of ORS 279C.335(1) and has directed staff to use an Alternative Contracting Method under ORS 279C.335(4), the City shall set forth the evaluation criteria in the Solicitation Documents. See COH-49-0640, COH-49-0650, ORS 279C.335, and ORS 279C.405.

COH-49-0390 Offer Evaluation and Award; Determination of Responsibility

- (1) **General.** If Awarded, the City 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 such Person is not listed by the Construction Contractors Board as disqualified to hold a Public Improvement Contract (See ORS 279C.375(3)(a)) or is ineligible for Award as a nonresident education service district (ORS 279C.325). The City 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. Where 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 City must have information that indicates that the Offeror meets the standards of responsibility set forth in ORS 279C.375(3)(b). To be a Responsible Offeror, the City must determine that the Offeror:

2023 City of Hillsboro Public Contracting Rules – Division 49

- (a) Has available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or ability to obtain the resources and expertise, necessary 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 that 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 City shall 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 City 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 City may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. The City 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 lack integrity if the City determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to the City. The City 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 COH-49-0370 may be used to determine an Offeror's integrity. The City 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 City 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 City.
 - (e) Has supplied all necessary information in connection with the inquiry concerning responsibility. If an Offeror fails to promptly supply information concerning responsibility that the City requests, the City shall base the determination of responsibility on any available information, or may find the Offeror is not Responsible.
- (3) In addition to making the responsibility determination under ORS 279C.375(3)(b) and section (2) of this rule, the Contracting Agency may consider, as authorized by House Bill 2094 (2019 Oregon Laws, chapter 124), as part of the Contracting Agency's evaluation of an Offer, whether the Offeror owes a liquidated and delinquent debt to the State of Oregon.
- (4) **Documenting Agency Determinations.** The City must 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 279.375(3)(c), and file that form with the Construction Contractors Board within 30 days after Contract Award.

- (5) **City Evaluation.** The City shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. The City shall not evaluate an Offer using any other requirement or criterion.
- (6) **Offeror Submissions.**
- (a) The City 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 City shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. The City shall reject an Offer providing any product that does not meet the Solicitation Document requirements. The City's rejection of an Offer because it offers nonconforming Work or materials is not Disqualification and is not appealable under ORS 279C.445.
- (7) **Evaluation of Bids.** The City shall use only objective criteria to evaluate Bids as set forth in the ITB. The City shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid.
- (a) Nonresident Bidders. In determining the lowest Responsive Bid, the City must, in accordance with COH-46-0310, add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.
 - (b) Clarifications. In evaluating Bids, the City may seek information from a Bidder only to clarify the Bidder's Bid. Such clarification shall not vary, contradict, or supplement the Bid. A Bidder must submit Written and Signed clarifications and such clarifications shall become part of the Bidder's Bid.
 - (c) Negotiation Prohibited. The City must not negotiate scope of Work or other terms or conditions under an Invitation to Bid process prior to Award.
- (8) **Evaluation of Proposals.** See COH-49-0650 regarding rules applicable to Requests for Proposals.

COH-49-0395 Notice of Intent to Award

- (1) **Notice.** At least seven Days before the Award of a Public Improvement Contract, the City shall issue to each Bidder (pursuant to ORS 279C.375(2)) and each Proposer (pursuant to 279C.410(7)), or post electronically or otherwise, a Notice of the City's Intent to Award the Contract. This requirement does not apply to Award of a Small (under \$5,000) or Intermediate

(informal Competitive Quotes) Public Improvement Contract Awarded under ORS 279C.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 City's Procurement system, and may be made electronically.
- (3) **Finalizing Award.** The City's Award shall not be final until the later of the following:
 - (a) Seven Days after the date of the Notice, unless the Solicitation Document provided a different period for protest; or
 - (b) The City provides a Written response to all timely filed protests that denies each protest and affirms the Award.
- (4) **Prior Notice Impractical.** Posting of Notice of Intent to Award shall not be required when the City determines that it is impractical due to unusual time constraints in making prompt Award for its immediate Procurement needs, documents the Procurement File as to the reasons for that determination, and posts Notice of that action as soon as reasonably practical.

COH-49-0400 Documentation of Award; Availability of Award Decisions

- (1) **Basis of Award.** After Award, the City must make a record showing the basis for determining the successful Offeror part of the City's Procurement File.
- (2) **Contents of Award Record for Bids.** The City's record shall include:
 - (a) All submitted Bids;
 - (b) Completed Bid tabulation sheet; and
 - (c) Written justification for any rejection of lower Bids.
- (3) **Contents of Award Record for Proposals.** Where the use of Requests for Proposals is authorized as set forth in COH-49-0650, the City's record shall include:
 - (a) All submitted Proposals;
 - (b) The completed evaluation of the Proposals;
 - (c) Written justification for any rejection of higher-scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and
 - (d) If the City permitted negotiations in accordance with COH-49-0650, the City's completed evaluation of the initial Proposals and the City's completed evaluation of final Proposals.
- (4) **Contract Document.** The City 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 City 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 City may also provide tabulations of Bids and Proposals Awarded on designated Web sites.
- (6) **Availability of Procurement Files.** The City must make completed Procurement Files available for public review at the City.
- (7) **Copies from Procurement Files.** Any Person may obtain copies of material from Procurement Files upon payment of a reasonable copying charge.

COH-49-0410 Time for City Acceptance; Extension

- (1) **Time for Offer Acceptance.** An Offeror's Bid, or Proposal submitted as a Firm Offer (see COH-49-0280), is irrevocable, valid, and binding on the Offeror for not less than 30 Days from Closing unless otherwise specified in the Solicitation Document.
- (2) **Extension of Acceptance Time.** The City may request, orally or in Writing, that Offerors extend, in Writing, the time during which the City may consider and accept their Offer(s). If an Offeror agrees to such extension, the Offer shall continue as a Firm Offer, irrevocable, valid, and binding on the Offeror for the agreed-upon extension period.

COH-49-0420 Negotiation With Bidders Prohibited

- (1) **Bids.** Except as permitted by ORS 279C.340 and COH-49-0430 when all Bids exceed the Cost Estimate, the City must not negotiate with any Bidder prior to Contract Award. After Award of the Contract, the City and the Contractor may only modify the Contract by Change Order or Amendment to the Contract in accordance with COH-49-0860.
- (2) **Requests for Proposals.** The City may conduct discussions or negotiations with Proposers only in accordance with the requirements of COH-49-0650.

COH-49-0430 Negotiation When Bids Exceed Cost Estimate

- (1) **Generally.** In accordance with ORS 279C.340, if all Responsive Bids from Responsible Bidders on a competitively Bid Project exceed the City's Cost Estimate, prior to Contract Award the City 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 City's Cost Estimate. The subcontractor disclosure and substitution requirements of COH-49-0360 do not apply to negotiations under this Rule.
- (2) **Definitions.** The following definitions apply to this Rule:
 - (a) **"Cost Estimate"** means the City's most recent pre-Bid, good-faith assessment of anticipated Contract costs, consisting either of an estimate of an Architect, Engineer, or other qualified professional, or confidential cost calculation worksheets, where available, and otherwise consisting of formal planning or budgetary documents.

- (b) **"Other Options"** means those items generally considered appropriate for negotiation in the RFP process, relating to the details of Contract performance as specified in COH-49-0650, but excluding any material requirements previously announced in the solicitation process that would likely affect the field of competition.
 - (c) **"Project"** means a Public Improvement.
 - (d) **"Value Engineering"** means the identification of alternative methods, materials, or systems which provide for comparable function at reduced initial or life-time cost. It includes proposed changes to the plans, Specifications, or other Contract requirements 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 either increase or decrease absolute costs over varying time periods.
- (3) **Rejection of Bids.** In determining whether all Responsive Bids from Responsible Bidders exceed the Cost Estimate, only those Bids that have been formally rejected, or Bids from Bidders who have been formally disqualified by the City, shall be excluded from consideration.
 - (4) **Scope of Negotiations.** The City 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 City 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 resolicitation of trade subcontracts.
 - (5) **Discontinuing Negotiations.** The City may discontinue negotiations at any time, and shall do so if it appears to the City 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.

COH-49-0440 Rejection of Offers

(1) Rejection of an Offer.

- (a) The City may reject any Offer upon finding that to accept the Offer may impair the integrity of the Procurement process or that rejecting the Offer is in the public interest.
- (b) The City shall reject an Offer upon the City's finding that the Offer:
 - (A) Is contingent upon the City's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document,
 - (B) Takes exception to terms and conditions (including Specifications),
 - (C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of the Solicitation Document or in contravention of applicable law;
 - (D) Offers Work that fails to meet the Specifications of the Solicitation Document;
 - (E) Is late;
 - (F) Is not in substantial compliance with the Solicitation Document; or
 - (G) Is not in substantial compliance with all prescribed public solicitation procedures.
- (c) The City shall reject an Offer upon the City's finding that the Offeror:
 - (A) Has not been prequalified under ORS 279C.430 and the City required mandatory prequalification;
 - (B) Has been Disqualified;
 - (C) Has been declared ineligible under ORS 279C.860 by the Commissioner of the Bureau of Labor and Industries (BOLI) 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 (pertaining to subcontracting to emerging small businesses or businesses owned by service-disabled veterans) if required by the Solicitation Document;
 - (F) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;
 - (G) Has failed to provide the certification required under Section (3) of this Rule; or
 - (H) Is not Responsible. See COH-49-0390(2) regarding City determination that the Offeror has met statutory standards of responsibility.

- (2) **Form of Business.** For purposes of this Rule, the City 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 through 279C.450 and COH-49-0370.
- (3) **Certification of Non-Discrimination.** The Offeror shall certify and deliver to the City Written certification, as part of the Offer, that the Offeror has not discriminated and will not discriminate against any disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business, or business that a service-disabled veteran owns, in obtaining any required subcontracts. Failure to do so shall be grounds for disqualification.
- (4) **Contract and Subcontract Conditions.** If the City awards a Contract to an Offeror that has been determined to be responsible under ORS 200.005(8) and ORS 200.045(3), or awards a Contract under ORS 279A.100:
 - (a) The City must provide, as a material condition of the Contract:
 - (A) That the Contractor must maintain its certification under ORS 200.055 throughout the term of the Contract and any extensions (if the City used the certification as a factor in or as a basis for the award of the Contract);
 - (B) That the Contractor must promptly pay each subcontractor that is certified under ORS 200.055 in accordance with ORS 279B.220, or 279C.570 and ORS 279C.580, whichever apply to the Contract;
 - (C) That the Contractor must include, in any subcontract the Contractor establishes in connection with the Contract, a provision that requires the subcontractor to maintain the subcontractor's certification under ORS 200.055 throughout the term of the subcontract and any extensions (if the Contractor used the certification as a factor in or as a basis for the award of the subcontract);
 - (D) That the City may require the Contractor to terminate a subcontract with a subcontractor that fails to maintain its certification under ORS 200.055 throughout the term of the subcontract and any extensions.
 - (b) In the administration of Contracts that are subject to section (4) of this rule, the City must verify the Contractor's and any subcontractor's compliance with subsection (4)(a) of this rule.
 - (c) Subparagraph (4)(a)(A) of this section does not apply to an emerging small business that ceases to qualify as a tier one firm or a tier two firm (as ORS 200.005 defines those terms) due to the growth in the business's number of full-time equivalent employees or in average annual gross receipts during the term of the Contract. This section (4) does not apply to an emerging small business for which a certification under ORS 200.055 expires during the term of the Contract or any extensions.
- (5) **Rejection of all Offers.** The City may reject all Offers for good cause upon the City's Written Finding that it is in the public interest to do so. The City must notify all Offerors of the rejection of all Offers, along with the good-cause justification and Finding.

- (6) **Criteria for Rejection of All Offers.** The City 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 City cancels the solicitation in accordance with COH-49-0270; or
 - (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

COH-49-0450 Protest of Contractor Selection, Contract Award

- (1) **Purpose.** An adversely affected or aggrieved Offeror must exhaust all avenues of administrative review and relief before seeking judicial review of the City'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 COH-49-0650, the City shall provide Written Notice to all Proposers of the City's determination of the Proposers included in the Competitive Range. The City's Notice of the Proposers included in the Competitive Range must not be final until the later of the following:
 - (a) Ten (10) Days after the date of the Notice, unless the notice states an earlier or later time frame; or
 - (b) Until the City 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 City must provide Written Notice to all Offerors of the City's Intent to Award the Contract as provided in COH-49-0395.
- (4) **Right to Protest Award.**
 - (a) An adversely affected or aggrieved Offeror may submit to the City a Written protest of the City's Intent to Award within seven Days after issuance of the Notice of Intent to

Award the Contract, unless a different protest period is provided under the Solicitation Document.

- (b) The Offeror's protest must be in Writing and must specify the grounds upon which the protest is based.
- (c) An Offeror is adversely affected or aggrieved only if the Offeror is eligible for Award of the Contract as the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer submitting the best Responsive Proposal and is next in line for Award, i.e., the protesting Offeror must claim that all lower Bidders or higher-scored Proposers are ineligible for Award:
 - (A) Because their Offers were Non-Responsive; or
 - (B) The City committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been the Responsible Bidder offering the lowest Bid or the Responsible Proposer offering the highest-ranked Proposal.
- (d) The City will not consider a protest submitted after the time period established in this Rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest the City'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 City a Written protest of the City's decision to exclude the Proposer from the Competitive Range within seven Days after issuance of the Notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document. (See procedural requirements for the use of RFPs at COH-49-0650.)
- (b) The Proposer's protest shall be in Writing and must specify the grounds on which the protest is based.
- (c) A Proposer is adversely affected only if the Proposer is responsible and submitted a Responsive Proposal and is eligible for inclusion in the Competitive Range, i.e., the protesting Proposer must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Proposers are removed from consideration, and that those ineligible Proposers are ineligible for inclusion in the Competitive Range because:
 - (A) Their Proposals were not Responsive; or
 - (B) The City committed a substantial violation of a provision in the RFP or of an applicable Procurement statute or administrative rule, and the protesting Proposer was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.

- (d) The City 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 City'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 City Manager 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 City Manager, or such Person's designee, shall promptly issue a Written decision on the protest. Judicial review of this decision will be available if provided by statute.
- (8) **Award.** The successful Offeror shall promptly execute the Contract after the Award is final. The City shall execute the Contract only after it has obtained all applicable required documents and approvals.

COH-49-0460 Performance and Payment Security; Maintenance Bond; Waiver

- (1) **Public Improvement Contracts.** Unless the required performance bond is waived under ORS 279C.380(1)(a) or this Rule, excused in cases of emergency under ORS 279C.380(4), or unless the City Manager exempts a Contract within their contract approval authority, or unless City Council 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 City 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 with a value, estimated by the City, of more than \$100,000 or, in the case of Contracts for highways, bridges and other transportation projects, more than \$50,000.
- (2) **Other Construction Contracts.** The City may require performance security for other construction Contracts that are not Public Improvement Contracts. Such requirements must be expressly set forth in the Solicitation Document.
- (3) **Requirement for Surety Bond.** The City 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 City may accept a cashier's check or certified check in lieu of all or a portion of the required performance bond if specified in the Solicitation Document). The payment bond must be furnished by a surety company authorized to do business in Oregon, and in an amount equal to the full Contract Price.
- (4) **Time for Submission.** The apparent successful Offeror must promptly furnish the required performance security at the City's request. If the Offeror fails to furnish the security as requested, the City 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 City's discretion, the Offeror must forfeit its Bid or Proposal security.

- (5) **Public Improvement Contracts Under \$100,000.** The City Manager may, in his or her discretion, waive the Bid security requirements and performance and payment bond requirements of ORS 279C.380 if the amount of the Contract for the Public Improvement is \$100,000 or less.
- (6) **Requirement for Maintenance Bond.** The City may, at its sole option, require a maintenance bond for any public improvement contract. When a maintenance bond is required, such bond must be:
 - (a) In an amount, and effective period, specified by the City; and
 - (b) Solely for the protection of the City and any public agency providing funding for the project for which the contract was awarded;

COH-49-0470 Substitute Contractor

If the Contractor provided a performance bond, the City may afford the Contractor's surety the opportunity to provide a substitute Contractor to complete performance of the Contract. A substitute Contractor shall perform all remaining Contract Work and comply with all terms and conditions of the Contract, including the provisions of the performance bond and the payment bond. Such substitute performance does not involve the Award of a new Contract and shall not be subject to the Competitive Procurement provisions of ORS 279C.

COH-49-0490 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 must be forwarded to the City. The City Awarding the Contract shall satisfy itself that the above requirements have been complied with before it issues final payment on the Contract.

ALTERNATIVE CONTRACTING METHODS

COH-49-0600 Alternative Contracting Methods; Purpose

These COH-49-0600 to COH-49-0690 Rules are intended to provide guidance to the City regarding the use of Alternative Contracting Methods for Public Improvement Contracts. These Alternative Contracting Methods include, but are not limited to, the following forms of contracting: Design-Build, Energy-Savings, Performance Contract ("ESPC"), and Construction Manager/General Contractor ("CM/GC") Method. As to ESPC contracting, these COH-49-0600 through COH-49-0690 Rules implement the requirements of ORS 279C.335 pertaining to the adoption of Rules appropriate for use by the entire City to govern the procedures for entering into ESPCs. As to contracting for CM/GC Services requiring an exemption from competitive bidding under 279C.335(2), the City may only procure CM/GC services in accordance with the Model Rules, pursuant to the requirements of ORS 279C.337.

COH-49-0610 Definitions for Alternative Contracting Methods

The following definitions shall apply to Rules COH-49-0600 to COH-49-0690, unless the context requires otherwise:

- (1) **“Affiliate”** means a person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with another person, as set forth in ORS 279C.332(1).
- (2) **"Alternative Contracting Methods"** means innovative techniques for procuring or performing Public Improvement Contracts, utilizing processes other than the traditional methods involved in the design-bid-build construction method (with Award of a Public Improvement Contract based solely on price, in which a final design is issued with formal Bid Documents, construction Work is 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 COH-49-0600 to COH-49-0690 rules, as well as other developing techniques which include, but are not limited to, general "performance" and "cost-plus-time " contracting, for which procedural requirements are identified under these COH-49-0600 to COH-49-0690 Rules.
- (3) **"Construction Manager/General Contractor"** means a person that provides construction manager/general contractor services to a contracting agency under a public improvement contract, as set forth in ORS 279C.332(2).
- (4) **“Construction Manager/General Contractor Method” (or “CM/GC Method”)** means the Alternative Contracting Method which involves the City’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"** means a form of Procurement that results in a Public Improvement Contract in which the construction Contractor also provides or obtains specified design services, participates on the Project team with the City, and manages both design and construction. In this form of Contract, a single Person provides the City with all of the services necessary to both design and construct the Project.
- (7) **“Early Work”** means 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" ("ECMs")** (also known as "Energy Efficiency Measures") means, as used in ESPC Procurement, any equipment, fixture, or furnishing to be added to or used in an existing building or structure, and any repair, alteration, or improvement to an

existing building or structure that is designed to reduce energy consumption and related costs, including those costs related to electrical energy, thermal energy, water consumption, waste disposal, and future Contract-labor costs and materials costs associated with maintenance of the building or structure. For purposes of these COH-49-0600 to COH-49-0690 Rules, use of either or both of the terms "building" or "structure" must be deemed to include existing energy, water and waste disposal systems connected or related to or otherwise used for the building or structure when such system(s) are included in the Project, either as part of the Project together with the building or structure, or when such system(s) are the focus of the Project. Maintenance services are not Energy Conservation Measures for purposes of these COH-49-0600 to COH-49-0690 Rules.

- (9) **"Energy Savings Guarantee"** means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the City 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 City 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 City 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")** means a Public Improvement Contract between the City 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 separately invoiced or subcontracted by the Contractor or 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 procurements for CM/GC Services. For Alternative Contracting Methods other than the CM/GC Method, "Guaranteed Maximum Price" or "GMP" means the total maximum price provided to the City by the Contractor, and accepted by the City, 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")** means, as used in ESPC Procurement, the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy using systems pre-installation and post-installation.
- (14) **"Project Development Plan"** means a secondary phase of Personal Services and Work 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 Work 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")** means, as used in ESPC Procurement, a company, firm, or other legal Person with the following characteristics: demonstrated technical, operational, financial, and managerial capabilities to design, install, construct, commission, manage, measure and verify, and otherwise implement Energy Conservation Measures and other Work on building systems or building components that are directly related to the ECMs in existing buildings and structures; a prior record of successfully performing ESPCs on projects involving existing buildings and structures that are comparable to the Project under consideration by the City; 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" means 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 City under the terms of the Contract, including costs for which the City reimburses a Contractor and fees, profits or other payments the Contractor earns.
- (17) **"Technical Energy Audit"** as used in ESPC Procurement means the initial phase of Personal 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 City 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.

COH-49-0620 Use of Alternative Contracting Methods

- (1) **Competitive Bidding Exemptions.** ORS Chapter 279C requires a Competitive Bidding process for Public Improvement Contracts unless a statutory exception applies, a class of Contracts has been exempted 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 City Rules. Use of Alternative Contracting Methods may be directed by the City if that use is within the competitive bidding process, if feasible, or through available statutory exception to the competitive bidding process. Use of Alternative Contracting Methods must be directed through the City's Contract Review Authority, however, when use of the Alternative Contracting Method requires an exemption to the prescribed competitive bidding requirement of 279C.335. In any of these circumstances, use of Alternative Contracting Methods must be justified in accordance with any applicable Code and City requirements and if required these COH-49-0600 through COH-49-0690 Rules. See COH-49-0630 regarding required Findings and restrictions on exemptions from the competitive bidding requirement under ORS 279C.335.
- (2) **Energy Savings Performance Contracts.** ESPCs are exempted from the competitive bidding requirements for Public Improvement Contracts pursuant to ORS 279C.335(1)(f) if the City

complies with the procedures set forth in these COH-49-0600 through COH-49-0690 Rules related to the solicitation, negotiation, and contracting for ESPC Work. If these procedures are not followed, an ESPC Procurement may still be exempted from competitive Bidding requirements by following the general exemption procedures within ORS 279C.335.

- (3) **Post-Project Evaluation.** ORS 279C.355 requires that the City prepare a formal post-Project evaluation of Public Improvement Projects in excess of \$100,000 when the Competitive Bidding process required by ORS 279C.355 was not used. The purpose of this evaluation is to determine whether it was actually in the City's best interest to use an Alternative Contracting Method outside the competitive bidding process. The evaluation must be delivered to the City Council within 30 Days of the date the City "accepts" the Public Improvement Project, which event is typically defined in the Contract. In the absence of such definition, acceptance of the Project occurs on the later of the date of final payment or the date of final completion of the Work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:
- (a) Financial information, consisting of Cost Estimates, any Guaranteed Maximum Price (GMP) 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.

COH-49-0630 Findings, Notice, and Hearing

- (1) **Cost Savings Factors.** When Findings are required under ORS 279C.335 to exempt a Contract or class of Contracts from Competitive Bidding requirements, the "substantial cost savings and other substantial benefits" criteria at ORS 279C.335(2)(b) require consideration of the type, cost, amount of the Contract, and, to the extent applicable, the other factors set forth in the statute. If a particular factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts, the City Council, acting as the local contract review board, does not need to consider that factor, and the City 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 279C.330 which applies to exemptions from competitive bidding means the justification for the City's conclusion that addresses the factors listed in both ORS 279C.335(2)(a) and 279C.335(2)(b).
- (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;

- (b) Additional Findings that address industry practices, surveys, trends, past experiences, evaluations of completed projects required by ORS 279C.355, and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable, such Findings shall relate back to the specific characteristics of the Project or Projects at issue in the exemption request; and
 - (c) As an alternative to the "substantial cost savings and other substantial benefits" requirement if an Alternative Contracting Method has not been previously used, the City may make a Finding that identifies the Project as a "pilot Project" under ORS 279C.335(2)(c). Nevertheless, the City 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 will be made based upon identified selection criteria, and an opportunity will be given 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 Proposals), 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 City. 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 City must 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 an Agency directly or indirectly creates a class whereby the Agency uses, for example, the CM/GC Method for all Agency construction projects or all Agency construction projects over a particular dollar amount, unidentified future Agency construction projects of a particular work category, or all Agency 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 Agency 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 Agency'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 City operations;
 - (C) Share common characteristics, such as historic building considerations, the presence of asbestos or other hazardous substances, or the presence of agency staff during construction;
 - (D) Otherwise possess characteristics that meet the requirements of ORS 279C.335(2); and
 - (E) Otherwise meet the requirements of these Rules, as applicable.
- (7) **Public Hearing.** Before final adoption of Findings exempting a Public Improvement Contract from the requirement of Competitive Bidding, the City must give Notice and offer to hold a public hearing pursuant to ORS 279C.335(4). If an interested person requests a hearing, it will be for the purpose of receiving public comment on the City's draft Findings.

COH-49-0640 Competitive Proposals; Procedure

The City may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS 279C.400 to 279C.410 and COH-49-0600 to COH-49-0690, unless other applicable statutes control the City's use of Competitive Proposals for Public Improvement Contracts. Also see the Section of Rules in this division entitled Formal Procurement Rules, COH-49-0200 to COH-49-0450, and RFP-related Rules under the Alternative Contracting Methods Section at COH-49-0640 to COH-49-0660. For ESPCs, the following RFP process as further specified in COH-49-0645, COH-49-0650, COH-49-0660 and COH-49-0680 shall be utilized if the City 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 COH-49-0600 to COH-49-0690 includes the following steps:

- (1) **Proposal Evaluation.** Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. Proposal evaluation must be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors must:
- (a) Be reasonable estimates based on information available to the City;
 - (b) Treat all Proposals equitably; and
 - (c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the City. See ORS 279C.305.

For ESPC Proposal evaluations, the City may provide in the RFP that qualifications-based evaluation factors will outweigh the City'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 City shall comply with ORS 279C.337 and the Model Rules.

(2) Evaluation Factors.

- (a) In basic negotiated construction contracting where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that affect cost or quality.
- (b) In CM/GC contracting, in addition to Section (2)(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, coordination of multiple disciplines, the time available to commence and complete the improvement, and related matters that could affect the cost or quality of the Work.
- (c) In Design-Build contracting, in addition to Sections (2)(a) and (2)(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 could affect the cost or quality of the Work.
- (d) In Energy Savings Performance Contracting (ESPC) contracting, in addition to the factors set forth in Sections (2)(a)-(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 ventures comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting energy guarantee contract levels, the specific Person that will provide the Energy Savings Guarantee to be offered by the ESCO, the ESCO's management plan for the Project, information on the specific methods, techniques, and equipment that the ESCO will use in the performance of the Work under the ESPC, the ESCO's team members and consultants to be assigned to the Project, the ESCO's experience in the energy savings performance contracting field, the ESCO's experience acting as the prime contractor on previous ESPC projects (as opposed to a subcontractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC

projects and the assignment of risk in the particular Project between the City 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 Project.

- (3) **Contract Negotiations.** Contract terms may be negotiated to the extent allowed by the RFP and COH-49-0600 through COH-49-0690, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See COH-49-0650. Terms that may be negotiated consist of details of Contract performance; methods of construction, timing, and assignment of risk in specified areas; fee; and other matters that affect cost or quality 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 Contracting Agency has identified as being subject to negotiation, consistent with the requirements of COH-49-0690. 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 COH-49-0680 below.

COH-49-0645 Requests for Qualifications ("RFQ")

As provided by ORS 279C.405(1), the City may utilize RFQs to obtain information useful in the preparation or distribution of an RFP. When using 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 City 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 firms selected in the RFQ process. In such cases, the City shall also provide within the RFQ a protest provision substantially in the form of COH-49-0450(5) regarding protests of the Competitive Range. Thereafter, the City may distribute RFPs to the selected firms without further advertisement of the solicitation.

COH-49-0650 Requests for Proposals ("RFP")

- (1) **Generally.** The use of Competitive Proposals must be specially authorized for a Public Improvement Contract under the competitive bidding exception and exemption requirements of ORS 279C.335(1), COH-49-0130, and COH-49-0600 through COH-49-0690. Also see ORS 279C.337 and 279C.400 through 279C.410 for statutory requirements regarding Competitive Proposals, and COH-49-0640 regarding Competitive Proposal procedures.
- (2) **Solicitation Documents.** In addition to the Solicitation Document requirements of COH-49-0200, this Rule applies to the requirements for RFPs. RFP Solicitation Documents shall conform to the following standards:

- (a) The City must set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references, and warranty provisions. See COH-49-0640 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 must be reasonable estimates based on information available to the City. 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 establishing any Competitive Range;
- (b) When the City is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, the City shall 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 City has identified as authorized for negotiation. The City shall describe the evaluation, discussion, and negotiation processes, including how the City will establish the Competitive Range, if any;
- (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 COH-49-0650(4)(a).
- (d) When the City intends to Award Contracts to more than one Proposer, the City shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. The City shall also include the criteria it will use to determine how the City will endeavor 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 City shall evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. The City shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.
- (A) Clarifications. In evaluating Proposals, the City may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer shall submit Written and Signed clarifications and such clarifications shall become part of the Proposer's Proposal.
- (B) Limited Negotiation. If the City did not permit negotiation in its Request for Proposals, the City 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. The process for discussions or negotiations that is outlined and explained in Sections (5)(b) and (6) of this Rule does not apply to this limited negotiation.
- (b) Discussions; Negotiations. If the City permitted discussions or negotiations in the Request for Proposals, the City 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 City's discretion, the City may forego discussions and negotiations and evaluate all Proposals in accordance with this Rule.
 - (B) If the City proceeds with discussions or negotiations, the City shall establish a negotiation team tailored for the acquisition. The City's team may include legal, technical, auditing, and negotiating personnel.
- (c) Cancellation. Nothing in this Rule must restrict or prohibit the City from canceling the solicitation at any time.
- (4) **Competitive Range; Protest; Award.**
- (a) Determining Competitive Range.
 - (A) If the City does not cancel the solicitation, after the Opening the City will evaluate all Proposals in accordance with the evaluation criteria set forth in the RFP. After evaluation of all Proposals in accordance with the criteria set forth in the RFP, the City will rank the Proposers based on the City's scoring and determine the Competitive Range.
 - (B) The City may increase the number of Proposers in the Competitive Range if the City'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 City's evaluation of revised Proposals submitted in accordance with the process described in this Rule.
 - (b) Protesting Competitive Range. The City 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 City's evaluation and determination of the Competitive Range in accordance with COH-49-0450.
 - (c) Intent to Award; Discuss or Negotiate. After the protest period provided in accordance with these Rules expires, or after the City has provided a final response to any protest, whichever date is later, the City 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 City's Intent to Award in accordance with COH-49-0450.
 - (ii) After the protest period provided in accordance with COH-49-0450 expires, or after the City has provided a final response to any protest, whichever date is later, the City 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 from them, and, following such discussions and receipt and evaluation of revised Proposals, conduct negotiations with the Proposers in the Competitive Range.
- (5) **Discussions; Revised Proposals.** If the City chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, the City shall proceed as follows:
- (a) Initiating Discussions. The City shall initiate oral or Written discussions with all of the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP that the City identified in the RFP as the subject of discussions. The City may conduct discussions for the following purposes:
 - (A) Informing Proposers of deficiencies in their initial Proposals;
 - (B) Notifying Proposers of parts of their Proposals for which the City would like additional information; and
 - (C) Otherwise allowing Proposers to develop revised Proposals that will allow the City to obtain the best Proposal based on the requirements and evaluation criteria set forth in the RFP.
 - (b) Conducting Discussions. The City 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 City may terminate discussions with any Proposer in the Competitive Range at any time. However, the City shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with the City before the City notifies Proposers of the date and time pursuant to this Section that revised Proposals will be due.
 - (A) In conducting discussions, the City:
 - (i) Shall treat all Proposers fairly and must 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 City 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 City does not cancel the solicitation at the conclusion of the City's discussions with all remaining Proposers in the Competitive Range, the City shall give all remaining Proposers in the Competitive Range Notice of the date and time by which they shall submit revised Proposals. This Notice constitutes the City's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in the City's Notice.

(A) Upon receipt of the revised Proposals, the City shall evaluate the revised Proposals based upon the evaluation criteria set forth in the RFP and rank the revised Proposals based on the City's scoring.

(B) The City may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the RFP.

(d) Intent to Award; Protest. The City shall provide Written Notice to all Proposers in the Competitive Range of the City's Intent to Award the Contract. An unsuccessful Proposer may protest the City's Intent to Award in accordance with COH-49-0450. After the protest period provided in accordance with that Rule expires, or after the City has provided a final response to any protest, whichever date is later, the City shall commence final Contract negotiations.

(6) Negotiation.

(a) Initiating Negotiations. The City 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 City 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 City 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 City terminates negotiations with a Proposer, the City may then commence negotiations with the next highest-scoring Proposer in the Competitive Range, and continue the process described in this Rule until the City has:
- (A) Determined to Award the Contract to the Proposer with whom it is currently negotiating; or
 - (B) Completed one round of negotiations with all Proposers in the Competitive Range, unless the City provided for more than one round of discussions or negotiations in the Request for Proposals, in which case the City may proceed with any authorized further rounds of discussions or negotiations.
- (7) **Terminating Discussions or Negotiations.** At any time during discussions or negotiations conducted in accordance with this Rule, the City may terminate discussions or negotiations with the Proposer with whom it is currently conducting discussions or negotiations if the City 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.

COH-49-0660 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 Proposal may result in a Cost Reimbursement Contract with a GMP or some other maximum price specified in the Contract as state law and these Rules may permit.
- (2) Economic incentives or disincentives may be included to reflect stated City 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 (GMP) is used as the pricing mechanism for CM/GC where a total Contract Price is provided in the design phase in order to assist the City in determining whether the Project scope is within the City's budget and allowing for design changes during preliminary design rather than after final design services have been completed.

- (a) If this collaborative process is successful, the Contractor shall propose a final GMP, which may be accepted by the City 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 City shall terminate the Contract. The City 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 City shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable, and properly allocated.

COH-49-0670 Design-Build Contracts

- (1) **General.** The Design-Build form of contracting, as defined at COH-49-0610(3), has technical complexities that are not readily apparent. The City 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 City shall be able to reasonably anticipate the following types of benefits:
- (a) Obtaining, through a Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control, and required documentation as a fully integrated function with a single point of responsibility;
 - (b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the Project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;
 - (c) Reducing the risk of design flaws, misunderstandings, and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims;
 - (d) Shortening Project time as construction activity (early submittals, mobilization, subcontracting, and advance Work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased Projects);
or
 - (e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.
- (2) **Authority.** The City shall utilize the Design-Build form of contracting only in accordance with the requirements of these COH-49-0600 through COH-49-0690 Rules. See particularly COH-49-0620 pertaining to Alternative Contracting Methods and COH-49-0680 pertaining to ESPCs.
- (3) **Selection.** Design-Build selection criteria may include those factors set forth above in COH-49-0640(2)(a), (b), and (c).

- (4) **QBS Inapplicable.** Because the value of construction Work predominates the Design-Build form of Contracting, the qualifications-based selection ("QBS") process mandated by ORS 279C.110 for the City in certain circumstances in obtaining certain Consultant services is not applicable.
- (5) **Licensing.** If a Design-Build Contractor is not an Oregon-licensed design professional, the City 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(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and ORS 672.060(11) regarding the offer of engineering services that are appurtenant to construction services.
- (6) **Performance Security.** ORS 279C.380(1)(a) provides that for Design-Build Contracts, the surety's obligation on performance bonds, or the Bidder's obligation on cashier's or certified checks accepted in lieu thereof, includes the preparation and completion of design and related professional services specified in the Contract. This additional obligation, beyond performance of construction services, extends only to the provision of professional services and related design revisions, corrective Work, and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage.
- (7) **Contract Requirements.** The City shall conform its Design-Build contracting practices to the following requirements:
 - (a) Design services. The level or type of design Services required shall 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 shall be identified.
 - (b) Professional liability. The Contract shall clearly identify the liability of design professionals with respect to the Design-Build Contractor and the City, as well as requirements for professional liability insurance.
 - (c) Risk allocation. The Contract shall clearly identify the extent to which the City 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 City regarding characteristics or capabilities of the completed Project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated Project performance and budget guidelines.
 - (e) Incentives. The Contract shall clearly identify any economic incentives and disincentives, the specific criteria that apply, and their relationship to other financial elements of the Contract.

- (f) Honoraria. If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the solicitation process on the basis that the City is benefited from such deliverables.

COH-49-0680 Energy Savings Performance Contracts

- (1) **Generally.** These COH-49-0600 through COH-49-0690 Rules include a limited, efficient method for the City 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 City chooses not to utilize the ESPC Procurement method provided for by these COH-49-0600 through COH-49-0690 Rules, the City 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 City not subject to all the requirements of ORS 279C.335.
- (2) **ESPC Contracting Method.** The ESPC form of contracting, as defined at COH-49-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the City, as well as the additional technical complexities associated with a Design-Build Contract. The City shall only utilize the ESPC contracting method with the assistance of knowledgeable staff or Consultants who are experienced in its use. In order to utilize the ESPC contracting process, the City shall 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 and Work: facility profiling, energy baseline studies, ECMs, Technical Energy Audits, project development planning, engineering design, plan preparation, cost estimating, Life-Cycle Costing, construction administration, project management, construction, quality control, operations and maintenance staff training, commissioning services, M & V services, and required documentation as a fully integrated function with a single point of responsibility;
 - (b) Obtaining, through an ESCO, an Energy Savings Guarantee;
 - (c) Integrating the Technical Energy Audit phase and the Project Development Plan phase into the design and construction phase of Work on the Project;
 - (d) Reducing the risk of design flaws, misunderstandings, and conflicts inherent in the construction process, through the integration of ESPC services;
 - (e) Obtaining innovative design solutions through the collaboration of the members of the ESCO integrated ESPC services team;
 - (f) Integrating cost-effective ECMs into an existing building or structure so that the ECMs pay for themselves through savings realized over the useful life of the ECMs;
 - (g) Preliminary design, development, implementation, and an Energy Savings Guarantee of ECMs into an existing building or structure through an ESPC as a distinct part of a major remodel of that building or structure that is being performed under a separate remodeling Contract; and

- (h) Satisfying local energy efficiency design criteria or requirements.
- (3) **Authority.** The City desiring to pursue an exemption from the Competitive Bidding requirements of ORS 279C.335 (and, if applicable, ORS 351.086) shall utilize the ESPC form of contracting only in accordance with the requirements of these COH-49-0600 to COH-49-0690 Rules.
- (4) **No Findings Required.** The City is only required to comply with the ESPC contracting procedures set forth in COH-49-0600 through COH-49-0690 of these 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 City is subject to the requirements of ORS 279C.335 and chooses not to comply with the ESPC contracting procedures set forth in these COH-49-0600 through COH-49-0690 Rules.
- (5) **Selection.** ESPC selection criteria may include those factors set forth above in COH-49-0640(2)(a), (b), (c), and (d). Since the Energy Savings Guarantee is such a fundamental component in the ESPC contracting process, Proposers shall disclose in their Proposals the identity of any Person providing (directly or indirectly) any Energy Savings Guarantee that may be offered by the successful ESCO during the course of the performance of the ESPC, along with any financial statements and related information pertaining to any such Person.
- (6) **Qualifications Based Selection (QBS) Inapplicable.** Because the value of construction Work predominates in the ESPC method of contracting, the QBS process mandated by ORS 279C.110 for the City in obtaining certain consultant services is not applicable.
- (7) **Licensing.** If the ESCO is not an Oregon-licensed design professional, the City 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 Work.
- (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 shall provide a performance bond and a payment bond, each for 100% of the full Contract Price, including the construction Work 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 City'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 City 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 City so provides in the RFP.
- (9) **Contracting Requirements.** The City shall conform its ESPC contracting practices to the following requirements:
- (a) General ESPC Contracting Practices. An ESPC involves a multi-phase Project, which includes the following contractual elements:

- (A) A contractual structure which includes general Contract terms describing the relationship of the parties, the various phases of the Work, the contractual terms governing the Technical Energy Audit for the Project, the contractual terms governing the Project Development Plan for the Project, the contractual terms governing the final design and construction of the Project, the contractual terms governing the performance of the M & V services for the Project, and the detailed provisions of the ESCO's Energy Savings Guarantee for the Project.
- (B) The various phases of the ESCO's Work will include the following:
 - (i) The Technical Energy Audit phase of the Work;
 - (ii) The Project Development Plan phase of the Work;
 - (iii) A third phase of the Work that constitutes a Design-Build Contract, during which the ESCO completes any plans and Specifications required to implement the ECMs that have been agreed to by the parties to the ESPC, and the ESCO performs all construction, commissioning, construction administration, and related services to actually construct the Project; and
 - (iv) A final phase of the Work whereby the ESCO, independently or in cooperation with an independent Consultant hired by the City, 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 City shall conform its Design-Build contracting practices to the Design-Build contracting requirements set forth in COH-49-0670(7).
- (c) Pricing Alternatives. The City 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 City, the ESCO's M & V services may be terminated prior to the completion of

the M & V/Energy Savings Guarantee period and the City'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 COH-49-0600 through COH-49-0690 Rules does not include maintenance services for the Project facility.

COH-49-0690 Construction Manager/General Contractor ("CM/GC")

- (1) Pursuant to ORS 279A.065(3)(a), if the City intends to utilize the CM/GC construction method, it must do so under Oregon Administrative Rule 137-049-0690.

CONTRACT PROVISIONS

COH-49-0800 Required Contract Clauses

Except as provided by COH-49-0150 and COH-49-0160, the City 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 COH-49-0200(1)(c) regarding Solicitation Documents. The following series of Rules provides further guidance regarding particular Public Contract provisions.

COH-49-0810 Waiver of Delay Damages against Public Policy

The City 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 City's unreasonable delay in performing the Contract. However, Contract provisions requiring Notice of delay, providing for alternative dispute resolution such as arbitration (where allowable) or mediation, providing other procedures for settling Contract disputes, or providing for reasonable liquidated damages are permissible.

COH-49-0815 BOLI Public Works Bond

Pursuant to ORS 279C.830(2), the Specifications for every Public Works Contract shall contain a provision stating that the Contractor and every subcontractor shall 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.

COH-49-0820 Retainage

- (1) **Withholding of Retainage.** Except as required by law, the City will not retain an amount in excess of five percent (5%) of the Contract Price for Work completed. If the Contractor has performed at least fifty percent (50%) of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written

approval, the City may, in its sole discretion, reduce or eliminate Retainage on any remaining progress payments. The City shall respond in Writing to all such applications within a reasonable time. When the Contract Work is ninety-seven and one-half (97½%) completed, the City may, at its discretion and without application by the Contractor, reduce the retained amount to one-hundred percent (100%) of the value of the remaining unperformed Contract Work. The City may at any time reinstate Retainage. Retainage shall be included in the final payment of the Contract Price.

- (2) **Cash Retainage – Contract Price \$500,000 or Less.** When the Contract Price for a Public Improvement Contract is \$500,000 or less, the City may reserve as retainage from any progress payment an amount not to exceed five percent, pursuant to ORS 279C.570(7). The City shall hold all retained moneys in a Contracting Agency fund or account, and interest is not required to accrue on the retained moneys.
- (3) **Cash Retainage – Contract Price in Excess of \$500,000.** When the Contract Price for a Public Improvement Contract exceeds \$500,000, the City shall, in the ordinary course, deposit cash retainage in an amount not to exceed five percent from any progress payment due under the Public Improvement Contract into an interest-bearing escrow account, pursuant to ORS 279C.570(2). The Contractor under the Public Improvement Contract is entitled to receive interest on the retained moneys from the date the Contractor's related payment request is fully approved by the City until the date the retained moneys are paid by the City to the Contractor. For purposes of this section, a payment of retainage is deemed to be "paid" by the City when the payment is transmitted to the Contractor, or otherwise applied against an obligation of the Contractor under the Public Improvement Contract.
- (4) **Alternatives In Lieu of Cash Retainage.** Unless the City reserves an amount as retainage and finds in Writing that accepting a bond or instrument described in part (a) of this Section or a surety bond described in part (b) of this Section poses an extraordinary risk that is not typically associated with the bonds, securities, other instrument, or surety bond, as applicable, the City, 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 Section (6)(a) of this Rule; or
 - (b) A surety bond deposited as provided in Section (6)(b) of this Rule.
- (5) **Deposit in Interest-Bearing Accounts.** Upon election of the Contractor, and when the Contract Price in the Public Improvement Contract is \$500,000 or less, the City shall deposit cash Retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the City. Earnings on such an account shall accrue on the cash retainage from the date the Contractor's related payment request is fully approved by the City until the date the retained moneys are paid by the City to the Contractor. For purposes of this section, a payment of retainage is deemed to be "paid" by a Contracting Agency when the payment is transmitted to the Contractor, or otherwise applied against an obligation of the Contractor under the Public Improvement Contract. When the contractor makes an election for deposit of retainage into an interest-bearing account and the Contract Price in the Public Improvement Contract exceeds \$500,000, the Contractor's election shall be satisfied by the

Contracting Agency's establishment of an interest-bearing escrow account, pursuant to ORS 279C.570(2).

- (6) **Alternatives to Cash Retainage.** In lieu of cash Retainage to be held by the City, 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 City or in any bank or trust company to be held for the benefit of the City. If the City accepts the deposit, the City shall reduce the cash Retainage by an amount equal to the value of the bonds and securities, and reimburse the excess to the Contractor.
 - (B) Bonds, securities, or other instruments deposited or acquired in lieu of cash Retainage shall be of a character approved by the City, including, but not limited to:
 - (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 City's determination that all requirements for the protection of the City's interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu of Retainage.
 - (b) Deposit of Surety Bond. The City, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the City in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond shall accept surety bonds from its subcontractors and suppliers in lieu of Retainage. In such cases, Retainage shall be reduced by an amount equal to the value of the bond, and the excess shall be reimbursed.
- (7) **Recovery of Additional Costs.** Pursuant to ORS 279A.560(3), the City may recover from the Contractor all additional costs incurred in the proper handling of Retainage alternatives requested by the Contractor, whether a request for the deposit of bonds, securities or other instruments in lieu of cash retainage, a request for a surety bond in lieu of cash retainage or an election for an interest-bearing account. If the City incurs costs associated with establishing a fund or account under section (2) of this rule or establishing an interest-bearing escrow account under section (3) of this rule, the City is not permitted to recover such costs from the Contractor.

- (8) **Additional Retainage When Certified Payroll Statements Not Filed.** Pursuant to ORS 279C.845(7), if a Contractor is required to file certified payroll statements and fails to do so, the City shall retain twenty-five percent (25%) of any amount earned by the Contractor on a Public Works Contract until the Contractor has filed such statements with the City. The City shall pay the Contractor the amount retained under this provision within 14 Days after the Contractor files the certified statements, regardless of whether a subcontractor has filed such statements (but see 279C.845(1) regarding the requirement for both Contractors and subcontractors to file certified statements with the City). See BOLI rule at OAR 839-025-0010.

COH-49-0830 Contractor Progress Payments

- (1) **Request for Progress Payments.** Each month the Contractor shall submit to the City their Written request for a progress payment based on an estimated percentage of Contract completion. At the City's discretion, this request may also include the value of material to be incorporated in the completed Work, which has been delivered to the premises and appropriately stored. The sum of these estimates is referred to as the "value of completed Work." With these estimates as a base, the City will make a progress payment to the Contractor, which shall be equal to:
- (a) The value of completed Work;
 - (b) Less those amounts that have been previously paid;
 - (c) Less other amounts that may be deductible or owing and due to the City for any cause; and
 - (d) 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.

COH-49-0840 Interest

- (3) **Prompt Payment Policy.** The City shall pay promptly all payments due and owing to the Contractor on Contracts for Public Improvements.
- (4) **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 City 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 City that includes Oregon, up to a maximum rate of thirty percent (30%).
- (5) **Interest on Final Payment.** Final payment on the Contract Price, including Retainage, shall be due and owing no later than 30 Days after Contract completion and acceptance of the Work. Late-payment interest on such final payment shall thereafter accrue at the rate of one and one-half percent (1½%) per month until paid.

- (6) **Settlement or Judgment Interest.** In the event of a dispute as to compensation due a Contractor for Work performed, upon settlement or judgment in favor of the Contractor, interest on the amount of the settlement or judgment shall be added to, and not made part of, the settlement or judgment. Such interest, at the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve City that includes Oregon, shall accrue from the later of the Progress Payment Due Date, or 30 Days after the Contractor submitted a claim for payment to the City in Writing or otherwise in accordance with the Contract requirements.

COH-49-0850 Final Inspection

- (1) **Notification of Completion; Inspection.** The Contractor shall notify the City in Writing when the Contractor considers the Contract Work completed. Within 15 Days of receiving the Contractor's Notice, the City 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 City finds that all Work required under the Contract has been completed satisfactorily, the City shall acknowledge acceptance of the Work in Writing.

COH-49-0860 Public Works Contracts

- (1) **Generally.** ORS 279C.800 to 279C.870 regulates Public Works Contracts, as defined in ORS 279C.800(6), and requirements for payment of prevailing wage rates. Also see Bureau of Labor and Industries (BOLI) rules at OAR Chapter 839.
- (2) **Required Contract Conditions.** As detailed in the above statutes and Rules, every Public Works Contract shall contain the following provisions:
 - (a) City 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). If both state and federal prevailing rates of wage apply, the contract and every subcontract shall provide that all workers shall be paid the higher of the applicable state or federal Prevailing Rate of Wage.
 - (f) A requirement for filing a public works bond by the Contractor and every subcontractor, as set forth in ORS 279C.830(2).

- (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), shall 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):
 - (A) Physically contained within or attached to hard copies of Procurement Specifications;
 - (B) Included by a statement incorporating the applicable wage rate publication into the Specifications by reference in compliance with OAR 839-025-0020; or
 - (C) 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 839-025-0020 and 839-025-0035.
 - (c) A requirement for filing a public works bond by the Contractor and every subcontractor, as set forth in ORS 279C.830(2).

COH-49-0870 Specifications; Brand Name Products

- (1) **Generally.** The City's Solicitation Document shall not expressly or implicitly require any product by Brand Name or mark, nor shall it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279C.345(2).
- (2) **Equivalents.** The City 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 City shall determine, in its sole discretion, whether an Offeror's alternate product is "equal" or "equivalent."
- (3) **Product Exemption.** The City Manager is delegated the authority to exempt products from the prohibition in Section (1) of this Rule, pursuant to ORS 279C.345(2), upon any of the following Written Findings and with consideration to the eight factors listed in ORS 279C.330(1)(a), as applicable:
 - (a) It is unlikely that the exemption will encourage favoritism in the Awarding of Public Improvement Contracts or substantially diminish competition for Public Improvement Contracts;
 - (b) The Specification of a product by Brand Name or mark, or the product of a particular manufacturer or seller, would result in substantial cost savings to the City;
 - (c) There is only one manufacturer or seller of the product of the quality required; or

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

COH-49-0880 Records Maintenance; Right to Audit Records

- (1) **Records Maintenance; Access.** Contractors and subcontractors shall maintain all fiscal records relating to Contracts in accordance with generally accepted accounting principles ("GAAP"). In addition, Contractors and subcontractors shall maintain all other records necessary to clearly document (i) their performance, and (ii) any claims arising from or relating to their performance under a Public Contract. Contractors and subcontractors shall make all records pertaining to their performance and any claims under a Contract (the books, fiscal records, and all other records, hereafter referred to as "Records") accessible to the City at reasonable times and places, whether or not litigation has been filed as to such claims.
- (2) **Inspection and Audit.** The City 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 shall provide cost or pricing data under a Contract, the Person shall maintain such Records that relate to the cost or pricing data for three (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 City and its authorized representatives shall be entitled to inspect, examine, copy, and audit any Contractor's or subcontractor's Records, as provided in Section (1) of this Rule. The Contractor and subcontractor shall maintain the Records and keep the Records accessible and available at reasonable times and places for a minimum period of three 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.

COH-49-0890 City Payment for Unpaid Labor or Supplies

- (1) **Contract Incomplete.** If the Contract is still in force, the City 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 City 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 City shall not make payments to subcontractors or suppliers for Work already paid for by the City.

COH-49-0900 Contract Suspension; Termination Procedures

- (1) **Suspension of Work.** In the event the City suspends performance of Work for any reason considered by the City 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 City suspends Work under the Contract for any reason considered to be in the public interest (other than a labor dispute, or any judicial proceeding relating to the Work filed to resolve a labor dispute); and
 - (B) Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the Work.
 - (b) Payment. When a Contract, or any divisible portion thereof, is terminated pursuant to this Section (2), the City shall pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. The City 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 the City.** The City 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 City unilaterally terminates the Contract for any reason considered by the City 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 City 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.

CONTRACT AMENDMENTS AND CHANGE ORDERS

COH-49-0910 Public Improvement Contract Amendments and Changes to the Work

- (1) **Definitions for Rule.** As used in this Rule with regard to Public Improvement Contracts:
- (a) **"Amendment"** means a Written modification to the terms and conditions of a Public Improvement Contract, other than by Changes to the Work, within the general scope of the original Procurement that requires mutual agreement between the City and the Contractor.
 - (b) **"Changes to the Work"** means a mutually agreed-upon Change Order, or a Construction Change Directive or other Written order issued by the City 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 Orders.** Changes to the Work are anticipated in construction and, accordingly, the City shall include Change provisions in all Public Improvement Contracts that detail the scope of the Changes clause, provide pricing mechanisms, authorize the City or its authorized representative(s) to issue Changes to the Work, and provide a procedure for addressing Contractor claims for additional time or compensation. When Changes to the Work are agreed to or issued consistent with the Contract's Changes provisions, they are not considered to be new Procurements, and an exemption from Competitive Bidding is not required for their issuance by the City.
- (3) **Contract Amendments.** Public Improvement 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 this Rule and other applicable legal requirements.
- (4) **Intermediate-level Price Increases.** Intermediate-level Public Improvement Contracts obtained by competitive quotes may be increased above the original amount of Award by the City's issuance of a Change to the Work or Amendment, pursuant to this Rule within the following limitations:
 - (a) Up to an aggregate Contract Price increase of up to 50% over the Original Contract amount when the City Manager or designee determines that a price increase is warranted for additional reasonably related Work.
 - (b) Amendments of intermediate-level Public Improvement Contracts that exceed the thresholds stated in this Rule are specifically authorized by the Code when the total amended contract value will not exceed \$100,000, quotes were obtained as per COH-49-0160 and all other requirements of COH-49-0160 are met. Accordingly, such amendments are not considered new Procurements and do not require an exemption from competitive bidding.

(5) **Contract Amendment Authority.**

- (a) Contract amendments shall be approved as per the City's Schedule of Contract Signature Authority.

END OF DIVISION 49



1. BACKGROUND

The City of Hillsboro (City) is working to advance racial equity in the delivery of City services. This Supplier Diversity Policy (this “policy”) is one of the tools the City will use to advance racial equity. The policy provides an opportunity for the City to operationalize equity practices by addressing barriers faced by minority-owned businesses, women-owned businesses, veteran-owned, and other disadvantaged business enterprises seeking to do business with the City.

2. PURPOSE

The purpose of this policy is to afford greater and more meaningful opportunities for minority-owned, women-owned, veteran-owned businesses, and emerging small businesses wishing to do business with the City as a direct supplier, contractor, or subcontractor.

The City recognizes systemic barriers and discrimination have occurred throughout the United States based on race and gender. The City seeks to address systemic inequities by employing race and gender-neutral (non-mandated) strategies in its procurement and contracting practices.

3. DEFINITIONS

“**COBID**” means the State of Oregon Certification Office for Business Inclusion and Diversity.

“**COBID Certified Businesses**” means all businesses which hold certification with the State of Oregon Certification Office for Business Inclusion and Diversity (COBID).

“**City Contract**” means a Public Contract as defined in the City's Public Contracting Rules (COH-45-0100) (1).

“**Department**” or “**Departments**” means any individual City department or all City departments.

“**Finance Department**” means the City’s Finance Department.

“**Finance Director**” means the Director of the Finance Department.

“**Self-Identified Local Minority-owned Business**” means a for-profit business, which is not currently COBID certified, which has identified with the City as at least 51 percent owned by minority group members (including, but not limited to, African American, Native American, Asian, or Hispanic), and in which the minority owners control management and daily business operations. Such businesses must be headquartered in Washington County, or the business owners or owner must reside in Washington County.

"Self-Identified Local Women-owned Business" means a for-profit business, which is not currently COBID certified, which has identified with the City as at least 51 percent owned by women and in which the women owners control management and daily business operations. Such businesses must be headquartered in Washington County, or the business owners or owner must reside in Washington County.

4. POWERS AND DUTIES OF THE CITY MANAGER

The City Manager (or their designee) shall have the power and duty to:

- Work collaboratively with Departments in implementing this policy, establishing procedures, and planning for future policy and procedure enhancements;
- Assist and advise City departments in their efforts to increase minority-owned business and women-owned business participation on City Contracts;
- Work in collaboration with the State of Oregon, other public agencies, and contractors with the aim of increasing the number of COBID certified firms in our region;
- Establish standard solicitation methods, tools and, where applicable, specifications, to advance the work of this policy;
- Work with Information Services and other departments to put software systems in place to support the work of this policy; and,
- Adopt procedures in accordance with the City of Hillsboro Municipal Code and consistent with this policy.

5. DEPARTMENT RESPONSIBILITIES

Each Department shall adopt a supplier diversity plan, developed in consultation with and approved by the Finance Director, to afford women and minority businesses the maximum practicable opportunity to participate on City Contracts directly and meaningfully. Plans will be updated on an annual basis and Departments will provide the Finance Director an annual report regarding their supplier diversity results for that year.

6. FINANCE RESPONSIBILITIES

The Finance Department shall provide trainings, support, examples, and templates to assist Departments in the development of their supplier diversity plans. The Finance Department shall review the supplier diversity plans and assure that they are in alignment with this policy. The Finance Department will include the plans and their results in its annual supplier diversity report to City Council.

7. BUSINESS ASSISTANCE

The Supplier Diversity program will provide:

- Educational resources and outreach programs to assist women and minority businesses to compete effectively for City Contracts;

- The services of the City or other technical resources to assist contractors desiring to bid on a City Contract; and
- Information or other support regarding organizations and agencies available to assist such contractors with technical assistance in bidding, contracting, recruiting, tutoring, training, or assisting potential subcontractors.

8. BUSINESS CERTIFICATION AND REGISTRATION

The City shall recognize State of Oregon COBID Certified Businesses as well Self-Identified Local Minority-owned Businesses and Self-Identified Local Women-owned Businesses for purposes of tracking and reporting minority-owned, women-owned, veteran-owned, and emerging small businesses contracting and subcontracting and how that compares to the City's contracting as a whole.

9. APPLICATION TO CONTRACTS WITH FEDERAL FUNDING

In applying the provisions of this policy to City Contracts funded in whole or in part with federal funds, references to COBID Certified Businesses shall also include federally recognized "Disadvantaged Business Enterprises" (DBE). In the event of a conflict between the provisions of this section or the procedures implementing this policy, and the requirements of 2 CFR 200 or any other superseding applicable federal statute or regulation, the provisions of the federal statute or regulation shall control.



City of Hillsboro Policy

- Title:** Standards of Conduct for Independent Contractors
- Effective Date:** November 22, 2023
- Policy Statement:** In accordance with the City’s core value of advancing Equity, the City is committed to fostering and maintaining a work environment in which all individuals are treated with respect, courtesy, and dignity.
- Definitions:**
- “City Contract”:** Any form of written agreement between the City of Hillsboro and a Contractor that is subject to the City’s *Public Contracting Rules*. These include, but are not limited to, contracts for public improvements, trade services, professional services, software systems, and assorted good and services.
- “Contractor”:** All independent contractors, subcontractors, consultants, suppliers and their officers, agents, and employees that are working under a City Contract.
- “Discrimination”:** The prejudicial treatment of individuals or groups based on their race, religion, color, sex, sexual orientation, gender identity, gender expression, pregnancy, national origin, age, mental or physical disability, uniformed/military service or veteran’s status, use of the worker’s compensation system, expunged juvenile records, or any other protected status or activity in accordance with applicable law.
- “Equity”:** The act of removing barriers and eliminating social and economic disparities by centering those who have been historically excluded from the decision-making process.
- “Harassment”:** Any unwanted or unwelcome behavior or conduct that is offensive or hostile towards a person or a group and that creates an intimidating, humiliating, or threatening environment.
- “Sexual Harassment”:** Any harassment of a sexual nature. This can take many forms, including physical touching, sexual advances, inappropriate comments or jokes, requests for sexual favors, and other forms of verbal or physical conduct that is of a sexual nature and unwelcome.
- Applicability:** This policy applies to all Contractors working under a City Contract.

Policy:

When performing work under a City Contract:

1. Contractor agrees to conduct themselves in a professional manner and treat others – including members of the public and City staff – with respect, courtesy, and dignity.
2. Contractor agrees to not engage in any Discrimination or Harassment toward any person or group in any form which includes, but is not limited to, behavior, comments, jokes, slurs, electronic communications, pictures, and other conduct or materials that a reasonable person would consider offensive, hostile, threatening, or otherwise contributing to an intimidating or offensive environment.
3. Contractor agrees to not engage in any Sexual Harassment which may take the form of unwelcome physical contact, questions, jokes, or comments about another person’s dating, relationships, appearance, or sexual activities. This also includes, but is not limited to, any unwelcome whistling, staring, leering or unwelcome gifts, comments, notes, electronic communications, sexual advances or flirtatious behavior.

Remedies:

Contractors’ adherence to this policy is a material term of all City Contracts. The City reserves the right to terminate any contractual relationship for cause if Contractor violates this policy. Repeated or severe violations of this policy may result in debarment from City contracting for a certain number of years and/or other legal remedies available to the City.

Contractor Responsibilities

Contractors are responsible for ensuring:

1. All individuals, subcontractors, and assignees tasked to perform work under a City Contract are made aware of this policy and adhere to its requirements.
2. All work performed under a City Contract is in full compliance with this policy and all applicable laws and regulations.

Raising Concerns

If Contractor or City staff observe any conduct that is in violation of this policy, they are encouraged to send their concerns to the City’s Procurement Services Manager or file a report to the City’s [EthicsPoint](#) portal or by calling (866) 593-5986.



Surplus Personal Property Policy

Through the conduct of its ordinary course of business, the City of Hillsboro (City) acquires ownership of a variety of personal property. The purpose of this policy is to ensure the protection of the City's assets and to inform all staff of the appropriate protocols for disposing of surplus personal property.

1.0 Definitions

- 1.1 **Personal Property.** Any physical thing that can be moved. Personal Property includes, but is not limited to, movable office equipment, furniture, computers and other electronic devices, vehicles, office supplies, abandoned property, and other moveable objects. Personal Property does not include real property (e.g., land and buildings) or any personal property affixed to real property in such a way as to become part of the real property.
- 1.2 **Surplus Personal Property.** Any Personal Property which no longer meets the City's current needs or needs in the foreseeable future, is unfit for its intended purpose, has Minimal Value, or has exceeded its useful life.
- 1.3 **Minimal Value.** A collection of Surplus Personal Property that, taken together, has a fair market value not exceeding \$25.
- 1.4 **Lost Property.** Personal Property left on the City's premises, the ownership of which cannot be easily deduced.
- 1.5 **Stolen and Abandoned Property.** See Hillsboro Municipal Code, Subchapter 3.12.

2.0 Related Policies; Effect of this Policy

- 2.1 **Department-Specific Policies.** The City Manager or City Council has approved certain department surplus declaration and disposition policies. The list of department-specific policies is included in Exhibit A.
- 2.2 **Approval Process for Department-Specific Policy.** All such department-specific disposition policies for Personal Property not governed by Oregon Law or Hillsboro's Municipal Code must be approved by the City Manager, Deputy City Manager, or the Assistant City Manager who oversees that department.
- 2.3 **Effect of this Policy.** All disposition of Surplus Personal Property that is not subject to a properly approved Department-Specific Policy is governed by this Policy.

3.0 General. Except as noted in Section 2 of this Policy:

- 3.1 **Surplus Declaration.** Except for items of Minimal Value, the Finance Director or their designee(s) has the authority to declare Personal Property as Surplus Personal Property.

- 3.2 **Administration of Surplus Program.** The City's Procurement & Contracting Services Team (Procurement), in coordination with Facilities & Fleet or other departments as needed, coordinates the disposition of Surplus Personal Property.
- 3.3 **Surplus Property Form.** Staff must complete a *Surplus Property Disposition Form* and submit the form to Procurement prior to the disposition of Surplus Personal Property.
- 3.4 **Disposition of Surplus Personal Property that has Minimal Value.** Provided that Section 8 of this Policy is applied, departments may dispose of Surplus Personal Property that has Minimal Value in any way they see fit. A *Surplus Property Disposition Form* is not required for the disposition of surplus personal property that has Minimal Value.
- 4.0 **Disposition Methods.** Depending on the nature and condition of Surplus Personal Property, the City may dispose of its Surplus Personal Property in any of the following ways:
 - 4.1 **Public Sale.** The City may directly sell its Surplus Personal Property at posted prices when prices are based on fair market value and notice of the sale has been advertised to the public. The advertisement should contain, at a minimum: sale date and time, location, contact information, and a general description of the items to be sold. In lieu of sale at the initial purchase price, the City reserves the right to accept best offers.
 - 4.2 **Auction.** The City may approve a written agreement with an experienced auctioneer or auction company to sell its Surplus Personal Property. If the auctioneer's commission or compensation is anticipated to exceed \$25,000, then the City's procurement rules apply to the award of the auction contract.
 - 4.3 **Donation.** The City's Surplus Personal Property may be donated without compensation or competition to (a) a non-profit organization that receives federal, state, or other public funding; or (b) another public agency. Priority should be given to organizations that support the City's mission, vision, and values. Staff wishing to donate Surplus Personal Property must receive written approval from their department director (or designee) and the Finance Department that identifies the name of the organization, the organization's mission, item(s) proposed for donation, and justification for the donation.
 - 4.4 **Trade-in.** When purchasing replacement Personal Property, a trade-in of existing Personal Property may be negotiated with a vendor with the trade-in value credited toward to the purchase price.
 - 4.5 **Recycling or Salvaging.** To minimize waste, the City should recycle or salvage Surplus Personal Property that includes metals, parts, or electronic components with an experienced recycler or salvager.
 - 4.6 **Disposal as Waste.** Items that cannot be efficiently sold, donated, traded, recycled, or salvaged may be disposed as waste through the City's hauler.
 - 4.7 **Alternative methods.** Alternative methods of Surplus Personal Property disposition may be used to promote innovation or when the methods described above are neither practical nor feasible. Alternative disposal methods must be approved by a department director and the Finance Department.

- 5.0 **Sustainability Practices.** Following the City’s sustainability goals, measures should be taken by City staff to reduce the need for Surplus Property by scaling purchases for anticipated needs and not over-buying. Once procured, City staff should use their best efforts to divert Surplus Personal Property from the solid waste stream. Therefore, disposition by trade-in, auction, sale, and donation is preferred over other methods. If those options are not feasible, disposition by recycling and salvage is preferred over the disposal of Surplus Personal Property in a landfill.
- 6.0 **Lost and Found.** City staff will attempt to return Lost Property that is left in City facilities to their lawful owners if the identity of the individual can be determined. The City will securely store Lost Property for a period of thirty (30) days. After thirty (30) days, Lost Property may be disposed using a method described in Section 4 of this Policy, except those items with personally identifiable information. Those items shall be securely destroyed.
- 7.0 **Revenue Generation**
- 7.1 **Generally.** Except as noted below, all revenues of \$1,000 or less generated from the sale of Surplus Personal Property will be credited to the General Fund. With the prior approval of Finance, revenue from the sale of Surplus Personal Property of more than \$1,000 may be credited toward the fund that initially purchased the Personal Property.
- 7.2 **Exceptions.** Exceptions to the rule above:
- 7.2.1 Any department or facility-specific rules arising from Section 2 of this Policy.
- 7.2.2 Exceptions made by the Finance Director or their designee.
- 7.2.3 Assets purchased with grant funds that include stipulations for the asset’s disposition.
- 7.2.4 Proceeds from the sale of assets ordered by a court that are for a specific purpose.
- 7.3 **Accounting.** The City’s Finance Department will ensure a proper accounting of all funds received from the sale of Surplus Personal Property.
- 8.0 **Rules Concerning City Employees**
- 8.1 No City employee may use Surplus Personal Property for their personal use. If Surplus Personal Property is determined to have no value, it is to be properly disposed through a method described in Section 4 of this Policy.
- 8.2 City employees may attend a public sale and/or auction while not on paid worktime to purchase Surplus Personal Property; however: (a) employees may not submit bids or purchase items in which they participated in a decision to surplus the Personal Property, and (b) no preference or advantage shall be given to the City employees over the general public.

EXHIBIT A
List of Department-Specific Disposition Policies

1. **Hillsboro Police Department** – Police Evidence and Abandoned Property
2. **Hillsboro Public Library** – Declaration of surplus books/similar materials (*approved by Hillsboro City Council in January 2021*)



POLICY GOVERNING INTERGOVERNMENTAL AGREEMENTS

- (1) **Purpose.** This policy is intended to clarify the authority of the City Council and the City Manager to enter into intergovernmental agreements. Intergovernmental agreements are not subject to Oregon’s Public Contracting Code or the City’s Public Contracting Rules. In accordance with this Policy, the City Manager (or designee) has the authority to approve certain intergovernmental agreements without City Council approval. City Council must approve all other intergovernmental agreements. An intergovernmental agreement includes those agreements:
 - (a) With another unit of local government as that term is defined in ORS Chapter 190.003;
 - (b) With the State of Oregon or an agency of the State of Oregon;
 - (c) With a public university listed in ORS Chapter 352.002;
 - (d) With another state or an agency of another state;
 - (e) With a Native American tribe or an agency of a tribe; or,
 - (f) With the United States or an agency of the United States.

- (2) **City Manager Authority.** The City Manager or designee may approve the intergovernmental agreements identified in this subsection. As used in this section, a “Public Body” means any of the governmental entities identified in Section (1)(a)-(f) of this Policy.
 - (a) **Commercial Intergovernmental Agreements (“Commercial IGA”).** A Commercial IGA is an agreement between the City and another Public Body in which:
 - (i) the Public Body is engaging the City’s business no differently than any private business or person would engage the City’s business; and
 - (ii) such engagement has been offered to a private business or person prior to the City’s engagement with the Public Body.
 - (iii) Approval of Commercial IGAs are limited by the dollar amounts delegated by City Council to the City Manager and the City Manager to their sub-delegates.

 - (b) **Grants.** Grants are defined at COH-46-0110(42). Approval Grants are limited by the dollar amounts delegated by City Council to the City Manager and the City Manager to their sub-delegates.

- (c) **Renewals of Annually Recurring Agreements.** For the purposes of this Policy, an “Annually Recurring Intergovernmental Agreement” means an agreement between the City and another Public Body in which:
- (i) The terms of the Annually Recurring Intergovernmental Agreement identify a specific start and end date; and
 - (ii) The Annually Recurring Intergovernmental Agreement automatically renews pursuant to its terms or the terms of that IGA allow the parties to elect to renew that IGA.
 - (iii) The City Manager or designee may renew an Annually Recurring Intergovernmental Agreement if:
 - (A) City Council approved the initial term of the Annually Recurring Intergovernmental Agreement;
 - (B) Except for changes to the effective dates of the Annually Recurring Intergovernmental Agreement, all other terms and conditions in that IGA remain the same; and
 - (C) The effective dates of the Annually Recurring Intergovernmental Agreement renewal are definite.
 - (iv) Approval and renewal of Annually Recurring Intergovernmental Agreements are limited by the dollar amounts delegated by City Council to the City Manager and the City Manager to their sub-delegates.
- (3) **City Council Approval.** The city council must approve all other intergovernmental agreements that are not identified in Section (2) of this policy.



REAL PROPERTY ACQUISITION AND DISPOSITION POLICY

This policy guides the City of Hillsboro's ("City") acquisition of real property and interests therein and the sale or lease of City-owned real property. The City will follow this policy when it wants to acquire fee (full ownership) or a lesser interest (e.g., an easement or dedication) in real property or sell or lease City-owned real property. This policy does not apply to the acquisition or disposition of interests in other than real property (e.g., personal or intellectual property).

The City Manager may adopt rules to further implement this policy. The City Manager may not delegate the authority to adopt such rules. Otherwise, unless expressly stated to the contrary in this policy, all references to the City Manager include a designee of the City Manager.

Notwithstanding any language in this policy to the contrary:

- (1) The Utilities Commission ("UC") has full authority to purchase land under the Hillsboro City Charter. Only those land items required for water infrastructure resulting in condemnation must be approved by City Council as outlined in I.(B)(5) of this policy. The UC does not have authority to incur debt on behalf of the City or expend City funds on the acquisition of real property that was not properly appropriated for that purpose.
- (2) The Hillsboro Economic Development Council, Joint Water Commission, and Barney Joint Ownership Commission are not subject to this policy and may adopt their own acquisition and disposition policies.
- (3) When acquiring real property as part of a project involving the City and another public agency, the City, with the approval of the City Attorney, may opt to follow the acquisition policy of the other public agency, in lieu of this policy, provided such policy is compliant with state law and the Uniform Relocation Assistance and Real Property Acquisition Policies of 1970 (42 U.S.C. Ch. 61).

I. ACQUISITION OF REAL PROPERTY

(A) Acquisition Categories

The City's acquisition of an interest in real property falls into one of four categories.

- (1) **Standard purchases.** These purchases involve real property for which the City has documented need and is presently seeking to purchase land to meet that need. For example, a standard purchase would involve the city actively seeking park land, the need for which is documented. The real property does not need to be currently for sale. "Standard purchases" do not include donated land and do not include opportunity purchases.
- (2) **Opportunity purchases.** These purchases generally involve real property either: (a) currently for sale by its owner; or (b) the owner or a third-party has indicated the owner is interested in selling. Most often, the City is not actively seeking to acquire such properties,

but is rather presented with an opportunity to acquire them. They may concern property for which the City has an immediate need or for which the City does not have an immediate need but City ownership may nonetheless be beneficial in the future.

- (3) **Option purchases.** These purchases generally involve real property for which the City has a documented need and may also involve property for which City ownership could be beneficial in the future. These transactions result in the City having the option, but not the obligation, to purchase the property.
- (4) **Donations.** Donations of real property occur in various ways including charitable donations and dedications due to land use approvals. Donations of real property may include developed property, undeveloped property, or gifts subject to life interests.
- (5) **Leases of property owned by third parties.** There may be instances when the City chooses to lease property from a third party instead of purchasing property. Subject to Section (B) of this policy, there are no specific procedures the City must follow before it may lease property from a third party. However, the City Manager may enact rules to establish such procedures.

(B) Acquisitions Requirements

The following apply to all City acquisitions of real property.

- (1) **Due Diligence.** City will perform due diligence when purchasing real property.
- (2) **City Manager Authority.** City Manager may acquire real property in an amount not to exceed the City Manager's contracting authority ("Contracting Authority"), as specified in HMC 2.56, the City Public Contracting Rules. City Manager may further delegate such authority.
- (3) **Approval.** For acquisitions of real property which may exceed their Contracting Authority, City Manager will obtain approval from the appropriate governing body (either City Council or the UC) to acquire the real property prior to making an initial offer for the property.
- (4) The City Manager may sign a purchase and sale agreement if: a) Any such purchase and sale agreement is within the City Manager's Contracting authority; b) Any such purchase and sale agreement does not exceed the amount already approved by City Council; c) any such purchase does not exceed the amount plus contingency already approved by City Council; or d) the purchase and sale agreement contains a condition that the City Council must approve the agreement prior to closing.
- (5) **Condemnation.**
 - a) The City's condemnation actions are subject to ORS Chapter 35, the Uniform Act, and such other laws and regulations as may apply to the particular condemnation.
 - b) When City Council approves a Resolution of Necessity, and the City initiates a condemnation action based on the Resolution of Necessity, additional City Council approval is not required to make the purchase, providing that the purchase amount or amounts are within the Manager's spending authority.

- (6) **Waiver of contingencies.** The City Manager shall be responsible for waiving any City contingencies.
- (7) **Opportunity Purchases.** When considering an opportunity purchase, City Manager must approve pursuit of the City's interest in the property prior to City taking any steps toward acquisition of the property.
- (8) **Donated Property.**
 - a) The City Manager may accept donations of real property with a value not to exceed the City Manager's Contracting Authority.
 - b) The City is not obligated to accept donations of real property. The City shall not accept a donation of real property unless the person or body accepting the donation is authorized by law to do so (e.g. City Manager, City Council or Planning Commission) and the person or body concludes that accepting the donation would be in the best interests of the City.

II. **DISPOSITION: SALE/DISPOSAL OF CITY PROPERTY**

The City may sell or otherwise dispose of City property in different ways. Typically, the City will sell property that is surplus, but the City may sell, convey, dispose of, exchange or lease other property as necessary and in the public interest. Such examples include the City exchanging property with another property owner or the city vacating right-of-way or other public places.

Unless governing body approval is required by law, the City Manager, or the Manager's designee, may act on behalf of the governing body in any steps required by this Policy for the sale, disposal, exchange, conveyance or leasing of City-owned property if the value of the transaction is within the City Manager's authority under the Schedule of Contract Signature Authority. This includes temporary and non-exclusive interests in property, such as construction or art easements, permits and rights of entry and licenses, if the interest granted does not exceed 10 years.

With respect to City-owned property that the City may lease, the City Manager or designee may create a database or similar list identifying the properties and identifying the department that will exercise responsibility over such leases.

(A) Sales or leases of "surplus" City-owned property

When the City decides that City-owned property is no longer needed for public use, it will generally seek to sell the property. Occasionally, instead of selling the property, the City may choose to lease property it previously used but no longer needs. These types of sales or leases are known as "surplus" sales or leases of real property. They are subject to the steps described below.

Occasionally, the City will create space in a new building or in the redevelopment of an existing building that is created specifically for lease to a third-party. These "enterprise" uses are often commercial spaces in buildings intended to generate income or complement other City uses. Leases related to these spaces are not subject to the steps described below, but rather may be leased in any manner the City Manager deems appropriate.

For the sale or lease of "surplus" real property, the City will perform the following steps:

- (1) Governing body will declare the property to be surplus property and not needed for public use. While there are no specific criteria the governing body must follow to declare property surplus, a rational basis must support the declaration.
- (2) If the property is within 100 feet of railroad ROW, or within 500 feet of an at-grade crossing, the City must give notice to the railway division of the Oregon Department of Transportation at least 30 days before listing or placing the property for sale or lease.
- (3) City may obtain an appraisal as necessary, market the property and negotiate a purchase and sale agreement (“PSA”) with buyer or a lease agreement with lessee. If the contemplated transaction is a sale, and the City negotiates and signs a PSA prior to the hearing described in Section (4), the PSA must contain a condition requiring the governing body to approve the agreement prior to closing the sale.
- (4) For sales of surplus property, the governing body must hold at least one hearing on the sale prior to closing the transaction. This step must be performed by the governing body.
 - (a) At least five days before the hearing, the City must publish a notice of the proposed sale and the hearing in a newspaper of general circulation.
 - (i) The notice must state the time and place of the hearing, a general description of the property, the proposed uses for the property (if known) and the reasons why the city considers it necessary to sell it.
 - (b) At the hearing, the nature of the proposed sale and its terms must be “disclosed” (i.e. available for anyone interested) and an appraisal or other evidence of market value must exist.
- (5) If the contemplated transaction is a sale and the City did not sign a PSA prior to the hearing, after the hearing the City will sign the PSA with the buyer; permit the buyer to complete due diligence as set forth in the PSA; and close the sale and transfer property to buyer.
- (6) If the contemplated transaction is a lease, the City shall negotiate the terms of the lease, and may lease the property for a period not to exceed 99 years.

(B) Vacation of rights-of-way or other public places

- (1) The City’s process for vacation of rights of way and other public places are subject to the procedures set forth in state law.

III. PROPERTY EXCHANGES

- (1) The governing body may exchange City-owned property for other property, even if it does not declare the city-owned property to be surplus.
- (2) Pursuant to state law any property the city receives in an exchange must be of equal or superior value to the property the city gives up. This includes any cash the city may receive.

- (3) The City must establish a value for its property and the property to be exchanged through reasonable means, including comparing the sale values of similar properties. Pursuant to state law, the governing body determines the value of both properties in any proposed exchange, however the valuation must be mutually acceptable to the exchanging parties.
- (4) The governing body may, pursuant to the City's home rule authority, modify the requirements in steps II(C)(2) and II(C)(3) as necessary and in the public interest.

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