



**Public Contracting Rules**

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Approved: \_\_\_\_\_

**CONSTRUCTION CONTRACTS**

**Division 5  
Construction Contracts**

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**RULES**

**5-0100 Application**

- (1) EWEB Rules, Division 5, apply to Public Improvement Contracts as well as Public Contracts for ordinary construction services that are not Public Improvements (specifically Rule 5-0140 Contracts for Construction Other Than Public Improvements).
- (2) EWEB Rules, Division 5, address matters covered in ORS Chapter 279C (with the exception of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, and Land Surveying or Related Services, all of which are addressed in EWEB Rules, Division 4).

Stat. Auth.: ORS 279A.065; ORS 279A.070

Stats. Implemented: ORS 279A.070; ORS chapter 279C.300, et seq

**5-0105 Policies**

The following statutory policies apply to these EWEB Rules, Division 5:

- (1) It is the policy of the State of Oregon, in enacting the Public Contracting Code, that a sound and responsive public contracting system should:
  - (a) Simplify, clarify and modernize procurement practices so that they reflect the market place and industry standards.
  - (b) Instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government.
  - (c) Promote efficient use of state and local government resources, maximizing the economic investment in public contracting within this state.
  - (d) Clearly identify rules and policies that implement each of the legislatively mandated socioeconomic programs that overlay public contracting and accompany the expenditure of public funds.
  - (e) Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement. In public procurement, as set out in ORS chapter 279B, meaningful competition may be obtained by evaluation of performance factors and other aspects of service and product quality, as well as pricing, in arriving at best value.
  - (f) Provide a public contracting structure that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competitive bidding as the standard for public improvement contracts unless otherwise exempted.
- (2) It is the policy of the State of Oregon that public improvement contracts awarded under this chapter must be based on competitive bidding, except as otherwise specifically provided in ORS 279C.335 for exceptions and formal exemptions from competitive bidding requirements.
- (3) It is the policy of the State of Oregon that contracting agencies shall make every effort to

construct public improvements at the least cost to the contracting agency.

Stat. Auth.: ORS 279A.065; ORS 279A.070

Stats. Implemented: ORS 279A.015, ORS 279C.300 & ORS 279C.305(1)

### **5-0110 Definitions**

Definitions applicable to EWEB Rules, Division 5 are set forth at EWEB Rules, Division 1. For purposes of CM/GC alternative contracting, see additional defined terms adopted by OAR 137-049-0610.

Stat. Auth.: ORS 279A.065; ORS 279A.070

Stats. Implemented: ORS 279C.300 et seq

### **5-0115 Budget Submittal to Oregon Bureau of Labor and Industries**

- (1) Not less than 30 days prior to adoption of EWEB's budget for the subsequent budget period, EWEB shall prepare and file with the Commissioner of the Bureau of Labor and Industries a list of every public improvement subject to the Public Contracting Code and known to EWEB that EWEB plans to fund in the budget period, identifying each improvement by name and estimating the total on-site construction costs. The list shall also contain a statement as to whether EWEB intends to perform the construction through a private contractor. If EWEB intends to perform construction work using EWEB's own equipment and personnel on a project estimated to cost more than \$125,000, EWEB shall also show that EWEB's decision conforms to least cost policy set forth in Rule 5-0105(3). The list is a public record and may be revised periodically by EWEB.
- (2) Subpart 1 does not apply to EWEB when the public improvement is to be used for the distribution or transmission of electric power.

Stat. Auth.: ORS 279A.065; ORS 279A.070

Stats. Implemented: ORS 279C.305(2) & (4).

### **5-0120 Limitation on EWEB Public Improvements with EWEB Personnel**

- (1) **Cost Accounting Limitation.** If EWEB fails to adopt and apply a cost accounting system that substantially complies with the model cost accounting guidelines developed by the Oregon Department of Administrative Services pursuant to section 3, chapter 869, Oregon Laws 1979, as determined by an accountant qualified to perform audits required by ORS 297.210 and 297.405 to 297.555 (Municipal Audit Law), EWEB may not construct a public improvement with EWEB's own equipment or personnel if the cost exceeds \$125,000.
- (2) **Limitation on Exceeding \$125,000 Estimated Cost.** Before EWEB constructs a public improvement with its own equipment or personnel, if the estimated cost exceeds \$125,000, EWEB shall prepare adequate plans and specifications and the estimated unit cost of each classification of work. The estimated cost of the work must include a reasonable allowance for the cost, including investment cost, of any equipment used.
- (3) **Accounting for Public Improvements using EWEB Personnel.** EWEB shall cause to be kept and preserved a full, true and accurate account of the costs of performing the work, including all engineering and administrative expenses and the cost, including investment

costs, of any equipment used. The final account of the costs is a public record.

Stat. Auth.: ORS 279A.065; ORS 279A.070

Stats. Implemented: ORS 279C.305(3); 279C.310

#### **5-0125 Limitation on Waiver of Damages**

- (1) Any clause in a public improvement contract that purports to waive, release or extinguish the rights of a contractor to damages or an equitable adjustment arising out of unreasonable delay in performing the contract, if the delay is caused by acts or omissions of EWEB or persons acting therefore, is against public policy and is void and unenforceable.
- (2) Subsection (1) of this section is not intended to render void any contract provision that:
  - (a) Requires notice of any delay;
  - (b) Provides for arbitration or other procedures for settlement of contract disputes; or
  - (c) Provides for reasonable liquidated damages.

Stat. Auth.: ORS 279A.065; ORS 279A.070

Stats. Implemented: ORS 279C.315

#### **5-0130 Competitive Bidding Requirement**

All public improvement contracts entered into by EWEB and subject to the Public Contracting Code shall be based upon competitive bids, except for the following that are not subject to competitive bids:

- (1) Contracts made with qualified nonprofit agencies providing employment opportunities for disable individuals under ORS 279.835 to 279.855;
- (2) To the extent exempted or otherwise required or allowed by the Code or EWEB Rules, including but not limited to EWEB Rules, Division 6;
- (3) As otherwise allowed or required pursuant to ORS 279C.335 on Competitive Bidding exceptions and exemptions,
- (4) A public improvement contract with a value of less than \$5,000; (see also EWEB Rule 6-0290 Class Exemption of All Construction Contracts Under \$20,000
- (5) Contracts not to exceed \$100,000, made under competitive quotes pursuant to Oregon Laws 2003, chapter 794, sections 132 and 133;
- (6) As exempted by 279A.030 on federal law overrides or by 279A.100 on affirmative action; or
- (7) Pursuant to Rules 5-0600 to 5-0690, including contracts subject to OAR 137-049-0690, which authorize the use of Alternative Contracting Methods under certain circumstances.
- (8) Energy savings performance contracts entered into in accordance with rules of procedure adopted under ORS279A.065.
- (9) Emergency Contracts as provided for in EWEB Rule 5-0150 Emergency Contracts; Bidding and Bonding Exemptions
- (10) Public improvement contracts exempted from competitive bid requirements under subsection (1), (2), (4), (5), (6), and (9) of this rule are not subject to Class Exemption requirements.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.335

#### **5-0140 Contracts for Construction Other than Public Improvements**

- (1) Pursuant to ORS 279C.320, Public Contracts for construction services that are not Public Improvement Contracts, may be procured as general trade services under the provisions of ORS Chapter 279B. Contracts for emergency work are regulated under ORS 279B.080. EWEB shall determine whether such Public Contracts are Public Works Contracts subject to the provisions of ORS 279C.800 to 279C.870 and if they are Public Works Contracts, EWEB shall comply with those provisions. EWEB may also impose requirements EWEB considers to be in the public interest, including bonding and insurance requirements typically imposed on Public Improvement Contracts.
- (2) For an emergency procurement of construction services that are not public improvements, the contracting agency shall ensure competition for a contract for the emergency work that is reasonable and appropriate under the emergency circumstances. In conducting the procurement, the contracting agency shall set a solicitation time period that the contracting agency 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.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.320

#### **5-0150 Emergency Contracts; Bidding and Bonding Exemptions**

- (1) Emergency Declaration. Pursuant to ORS 279C.335(5) and this Rule 5-0150, EWEB may declare that Emergency circumstances exist that require prompt execution of a contract otherwise subject to EWEB Rules, Division 5, including Rules for Emergency construction or repair Work. The declaration shall be made at an administrative level consistent with both of the following procedures:
  - (a) With the General Manager's and/or the affected Division Director's concurrence, EWEB's Purchasing Supervisor may approve award of a Public Contract as an Emergency Procurement pursuant to the requirements of ORS 279C.335(5). When an Emergency Procurement is authorized, the procurement shall be made with competition that is practical under the circumstances. Such circumstances may, but are not limited to, EWEB moving forward as quickly as possible to prevent interruption to vital services, restoration of vital services, prevention of loss to EWEB, protection of the quality of services, or other circumstances necessary to responsibly carry out EWEB's services to its customers; and
  - (b) EWEB shall prepare a written declaration that describes the circumstances creating the Emergency as that term is defined at ORS 279A.010(1)(f) and Division 1, and the anticipated harm from failure to enter into an Emergency contract. The Emergency declaration shall thereafter be kept on file in the Purchasing office.
- (2) Contract Award. Any Contract Awarded under this rule must be awarded within 60 Days after declaration of the Emergency, unless an extension is granted by EWEB.
- (3) 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) **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.
- (3) **Excusing Bonds.** Pursuant to ORS 279C.380(4) and this Rule 5-0150, EWEB, with the General Manager approval, may waive one or both of the requirements of furnishing a performance bond, payment bond and/or public works bond for the Emergency contract. After making such an Emergency declaration waiving the performance bond, payment bond, and/or public works bond, the bonding requirements are excused.
- (4) The purpose of an exemption is to exempt one or more public improvement contracts from competitive bidding requirements. The representations in and the accuracy of the findings, including any general description of the resulting public improvement contract, are the bases for approving the findings and granting the exception. The findings may describe anticipated features of the resulting public improvement contract, but the final parameters of the contract are those characteristics or specifics announced in the solicitation document.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.335(5); 279C.380(4).

#### **5-0160 Intermediate Procurements; Competitive Quotes and Amendments**

- (1) **General.** EWEB may award Public Improvement Contracts, estimated by EWEB not to exceed \$100,000, in accordance with intermediate procurement procedures for competitive quotes established by this rule, except to the extent certain classes of contracts have been exempted by EWEB, pursuant to ORS 279C.335 and EWEB Rules, Divisions 4, 5 or 6. A procurement may not be artificially divided or fragmented so as to constitute an intermediate procurement under this Rule 5-0160 or to circumvent competitive bidding requirements.
- (2) **Selection Criteria.** A written request for quotes shall 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. The 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.** EWEB shall utilize written requests for quotes whenever reasonably practicable for intermediate procurements. When requesting quotations orally, prior to requesting the price quote EWEB shall state any additional selection criteria and, if the criteria are not of equal value, their relative value. Oral quotations may only be utilized when prevailing wage rates are not required to be included within the specifications. An oral quotation may be provided only when expressly authorized in writing by EWEB, in advance of the oral quote.
- (4) **Number of Quotes; Record Required.** EWEB shall seek at least three informally solicited competitive quotes, and keep a written record of the sources and amounts of the quotes

received. If three quotes are not reasonably available, fewer will suffice, but EWEB shall make a written record of the effort made to obtain those quotes.

- (5) Award. If Awarded, EWEB shall award the Contract to the prospective Contractor whose quote will best serve the interests of EWEB, taking into account price as well as any other applicable factors such as, but not limited to, experience, specific expertise, availability, project understanding, contractor capacity and responsibility. If Award is not made to the prospective contractor offering the lowest price, EWEB shall make a written record of the basis for award.
- (6) Price Increases. Intermediate level Public Improvement Contracts obtained by competitive quotes may be increased above the original amount of Award by Change Order or Amendment within the following limitations:
  - (a) Up to an aggregate Contract Price increase of 25% over the original Contract amount as determined to be warranted for additional related work by the affected Division Director and the Purchasing Supervisor, or solely by the General Manager;
  - (b) Up to an aggregate Contract Price increase of 50% over the original Contract amount, when determined to be warranted by the General Manager, or when applicable, the Board for additional related work; or
  - (c) The Board, in its sole judgment and at its sole discretion, shall have authority to review and approve contract amendments for any dollar amount it believes to be in the best interest of EWEB and its customers for additional related work.
- (7) Amendments. Amendments of intermediate level Public Improvement Contracts that exceed the thresholds stated in section 6(a), 6(b), and 6(c) are specifically authorized by ORS279A.065 and 279A.070, and Or Laws 2007, ch. 764, §32. Accordingly, such amendments are not considered new procurements and do not require competitive bidding.

Stat. Auth.: ORS 279A.065; 279A.070.

Stats. Implemented: 279C.335(1)(d); ORS 279C.412.

#### **5-0170 Inclusion of Green Energy Technology in Public Buildings**

- (1) (a) Except as otherwise provided in this section, a public improvement contract with a total contract price of \$5 million or more for the construction of a public building or for the reconstruction or major renovation of a public building, if the cost of the reconstruction or major renovation exceeds 50 percent of the value of the public building, shall contain and reserve an amount equal to at least 1.5 percent of the total contract price for the purpose of including appropriate green energy technology as part of the construction, reconstruction or major renovation of the public building.
- (b) A public improvement contract to construct, reconstruct or renovate a public building may provide for constructing green energy technology, other than battery storage, at a site that is located away from the site of the public building if:
  - (A) Constructing green energy technology away from the site of the public building and using the energy from the green energy technology at the site of the public building is more cost-effective, taking into account additional costs associated with transmitting generated energy to the site of the public building, than is constructing and using green energy technology at the site of the public building;
  - (B) The green energy technology that is located away from the site of the public building is located within this state and in the same county as, or in a county

adjacent to, the site of the public building; and

(C) The public improvement contract provides that all of the moneys for constructing green energy technology away from the site of the public building must fund new energy generating capacity that does not replace or constitute a purchase and use of energy generated from green energy technology that:

(i) Employs solar energy and that existed on the date that the original building permit for the public building was issued; or

(ii) Employs geothermal energy and for which construction was completed before January 1, 2013.

(c) In making the determination required under paragraph (b)(A) of this subsection, EWEB shall:

(A) Compare the costs of constructing green energy technology that employs solar energy at the site of the public building only with the corresponding costs of green energy technology that employs solar energy at a location away from the site of the public building; and

(B) Compare the costs of green energy technology that employs geothermal energy at the site of the public building only with the corresponding costs of green energy technology that employs geothermal energy at a location away from the site of the public building.

(d) Of the amount that EWEB designates for the purpose of green energy technology as required in this subsection EWEB may expend as much as half, or if green energy technology is not appropriate for the public building, the entirety, as follows:

(A) If an analysis under subsection (2) of this section shows that the available total solar resource fraction at the site of the public building is 75 percent or less, EWEB may improve energy use efficiency in the public building by:

(i) Designing, engineering and constructing, reconstructing or renovating the public building to reduce or offset energy use in accordance with guidelines the State Department of Energy adopts by rule; or

(ii) Installing or preparing the public building for an installation of devices, technologies and other measures that reduce or offset energy use in accordance with guidelines the department adopts by rule.

(B) EWEB may include woody biomass energy technology as part of constructing, reconstructing or performing a major renovation on the public building if the woody biomass energy technology creates new energy generation capacity that did not exist on the date on which the original building permit for the public building was issued and the adoption of the technology is allowed under the Department of Environmental Quality's standards and as described in ORS 279C.527.

- (2) Before entering into a public improvement contract described in subsection (1) of this section, EWEB shall prepare a written determination of whether including green energy technology as part of the construction, reconstruction or major renovation of the public building is appropriate.
- a. EWEB shall list in the determination the total contract price and specify the amount it intends to expend on including green energy technology as part of the construction, reconstruction or major renovation; and
  - b. Will show the results of an analysis of the total solar resource fraction available for use at the site on which the contracting agency intends to install green energy technology that uses solar energy for space or water heating or to generate electricity. EWEB may conclude that the green energy technology described in this subsection is appropriate if the total solar resource fraction exceeds 75%.

- (3) (a) If EWEB determines that green energy technology is not appropriate for the public building, subsection (1) of this section does not apply to the public improvement contract. EWEB's determination under this paragraph must consider whether constructing green energy technology at the site of the public building is appropriate and whether constructing green energy technology away from the site of the public building and in accordance with subsection (1)(b) and (c) of this section is appropriate.
- (b) If subsection (1) of this section does not apply to the public improvement contract:
- A. EWEB shall spend an amount equal to at least 1.5 percent of the total contract price to include appropriate green energy technology as part of a future public building project; and
- B. The amount EWEB spends on the future public building project in accordance with subparagraph (A) of this paragraph is in addition to any amount required under subsection (1) of this section for including appropriate green energy technology as part of the future public building project.
- (4) Subsection (3)(b) of this section does not apply to a public improvement contract for which state funds are not directly or indirectly used. EWEB may not use an amount described in subsection (3)(b) of this section to comply with the requirements set forth in ORS 276.900 to 276.915 or with a state building code standard that the Department of Consumer and Business Services approves under ORS 455.496.
- (5) As used in this section:
- (a) "Public building" means a building that a public body, as defined in ORS 174.109, owns or controls, and that is:
- (A) Used or occupied by employees of the public body; or
- (B) Used for conducting public business.
- Notwithstanding the provisions of ORS 174.108(3), this section applies to intergovernmental entities described in ORS 174.108(3).
- (b) (A) "Total contract price" means all of the costs EWEB anticipates incurring in all contracts and subcontracts involved in constructing, reconstructing or performing a major renovation of a public building including design or architecture, engineering, transportation or environmental impact assessment and planning, construction management, labor, materials, land surveying and site preparation, demolition, hazardous material removal, required reinforcements or improvements to existing structures or appurtenant infrastructure, insurance, inspections and certifications and, except as provided in subparagraph (B) of this paragraph, other costs EWEB would not incur but for the construction, reconstruction or major renovation of the public building.
- (B) "Total contract price" does not include:
- (i) Costs of advertising, soliciting, evaluating bids or proposals for or awarding a public contract;
- (ii) Costs of moving contracting agency employees, equipment and furnishings from and to a public building;

- (iii) Costs of locating, renting or leasing and preparing to occupy alternative facilities;
  - (iv) Ordinary operating costs for a public building during periods of reconstruction or renovation;
  - (v) Costs of storing equipment or furnishings at a site away from a public building;
  - (vi) Labor costs for employees of a contracting agency;
  - (vii) Direct costs that are solely for the purpose of retrofitting or improving a public building's ability to withstand a seismic event; and
  - (viii) Costs that bear only a tenuous relationship to the construction, reconstruction or major renovation of a public building.
- (c) (A) "Green energy technology" means a system that employs:
- (i) Solar or geothermal energy directly for space or water heating or to generate electricity; or
  - (ii) Building design that uses solar energy passively to reduce energy use from other sources by at least 10 percent from a level required under ORS 276.900 to 276.915 or achieved in buildings constructed according to state building code standards that the Department of Consumer and Business Services approves under ORS 455.496.
  - (iii) Battery storage, if the battery storage is part of a system that generates electricity from solar or geothermal energy on the site of the public building.
- (B) "Green energy technology" does not include a system that:
- (i) Uses water, groundwater or the ground as a heat source at temperatures less than 140 degrees Fahrenheit; or
  - (ii) Incorporates solar energy directly into other methods for generating energy, such as from the action of waves on water, from hydroelectric facilities or from wind-powered turbines.
- (d) (A) "Woody biomass energy technology" means a system that, for space or water heating or as a combined heat and power system, uses a boiler with a lower heating value combustion efficiency of at least 80 percent and that uses as fuel material from trees and woody plants, such as limbs, tops, needles, leaves and other woody parts, that:
- (i) Grows in a forest, a woodland, a farm, a rangeland or a wildland that borders on an urban area; and
  - (ii) Is a by-product of forest management, agriculture, ecosystem restoration or fire prevention or related activities.
- (B) "Woody biomass energy technology" does not include a system that uses for fuel:
- (i) Wood pieces that have been treated with creosote, pentachlorophenol, chromated copper arsenate or other chemical preservatives; or
  - (ii) Municipal solid waste.
- (6) Public improvement contracts subject to this section are also subject to rules the State Department of Energy adopts that include, but are not limited to, requirements and specifications for:
- A. Using particular green energy technologies in public improvements;
  - B. Determining the cost-effectiveness of green energy technologies;
  - C. Reporting the use of green energy technologies in public improvements or submitting documents to the department for review, as appropriate; and
  - D. Determining whether a structure is a public building subject to the requirements of

ORS297C.527.

Stats. Implemented: ORS 279C.527 to 279C.528

## FORMAL PROCUREMENT RULES

### 5-0200 Solicitation Documents; Required Provisions; Assignment or Transfer

(1) Solicitation Documents. Pursuant to ORS 279C.365 and this rule, the Solicitation Documents shall include the following:

- (a) Required General Information:
  - (A) The Public Improvement project, as well as identification of the character of the Work, and applicable plans, Specifications and other Contract documents;
  - (B) Notice of any pre-Offer conference as follows:
    - (i) The time, date and location of any pre-Offer conference;
    - (ii) Whether attendance at the conference will be mandatory or voluntary; and
    - (iii) That statements made by EWEB employees, representatives, and agents at the conference are not binding upon EWEB unless confirmed by Written Addendum, in the form required by EWEB.
  - (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 EWEB's authorized Person designated for receipt of Offers and contact Person (if different);
  - (E) Instructions and information concerning the form and submission of Offers, including the address of the office to which Offers must be delivered, any Bid or Proposal security requirements, and any other required information or special information, e.g., whether Offers may be submitted by facsimile or electronic means (See Rule 5-0300 regarding facsimile Bids or Proposals and Rule 5-0310 regarding electronic Procurement);
  - (F) The time, date and place of Opening;
  - (G) The time and date of Closing after which EWEB will not accept Offers, which time shall be not less than five Days after the date of the last publication of the advertisement, and may, in the sole discretion of EWEB, direct or permit the submission and receipt of bids by electronic means. The date of the last publication for publication of the advertisement on the EWEB Web site is the date of initial posting on the Web site. The date of initial posting on the website is not changed if the website is temporarily down and not available, but is later brought back on line, during the period between the initial posting and the date and time of closing. If EWEB is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, EWEB shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and Rule 5-0360. Timing issues relating to Addenda are governed by Rule 5-0250;
  - (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

project subject to the state prevailing rates of wage under ORS 279C.800 to 279C.870, the federal prevailing rates of wage under the Davis-Bacon Act (40 U.S.C. 276a), or both the state and federal prevailing rates of wage, a statement that no Offer will be received or considered by EWEB 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 or 279C.840 and/or 40 U.S.C. 3141, et seq. and Or Laws 2005, ch. 360, sec 7(1) or (2), whichever are applicable."

- (K) A statement that EWEB 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 required by Rule 5-0230;
  - (L) A statement whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;
  - (M) A statement that the Contractor must provide certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4) and Rule 5-0440(3);
  - (N) How EWEB will notify Offerors of Addenda and how EWEB will make Addenda available, pursuant to Rule 5-0250;
  - (O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in Rule 5-0360;
  - (P) A statement setting forth the requirements of ORS 279C.525 for solicitation documents including (i) reference to specific federal, state and local statutes, ordinances, rules or regulations relating to the prevention of environmental pollution and the preservation of natural resources which must be complied with by the contractor in executing the public improvement contract, (ii) reference to known conditions at the construction site that may require the successful bidder to comply with the referenced federal, state and local statutes, ordinances, rules or regulations relating to the prevention of environmental pollution and the preservation of natural resources, and (iii) providing that the provisions in ORS 279C.525 will be applicable to the Contract;
  - (Q) A statement, at the option of EWEB, pursuant to ORS 279C.525(8), by which EWEB may allocate all or a portion of the known environmental and natural resource risks to a contractor by listing such environmental and natural resource risks with specificity in the solicitation documents; and
  - (R) A statement pursuant to 279C.380(3) that the performance and payment bonds must be payable to EWEB or specified contracting agency or to the public agency or agencies for whose benefit the contract was awarded.
- (b) Required Evaluation Process Information:
- (A) A statement that EWEB may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, and may reject for good cause all Offers upon EWEB's finding that it is in EWEB's or the public's best interest to do so;
  - (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 EWEB 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 Rule 5-0620), along with the process EWEB will use to determine acceptability of the Work. Additional evaluation criteria which may apply are as follows:

- (i) If the Solicitation Document is an Invitation to Bid, EWEB shall set forth any known 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, ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors shall be objective, reasonable estimates based upon information EWEB has available concerning future use;
  - (ii) If the Solicitation Document is a Request for Proposals, EWEB shall refer to the additional requirements of Rule 5-0650; and
- (c) Contract Provisions. EWEB shall include in the Contract all Contract terms and conditions, including, but not limited to, warranties, insurance and bonding requirements, that it considers appropriate for the Public Improvement project, and as required by law. EWEB shall also include in the Contract all of the following Contract provisions:
- (A) A condition, pursuant to ORS 279.505(1), that the contractor shall:
    - (i) Make payment promptly, as due, to all persons supplying to the contractor labor or material for the performance of the work provided for in the contract;
    - (ii) Pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the contract;
    - (iii) Not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation, or subdivision thereof, on account of any labor or material furnished;
    - (iv) Pay to the Department of Revenue all sums withheld from employees under ORS 316.167;
  - (B) A condition requiring that the contractor must demonstrate that an employee drug testing program is in place (ORS 279C.505(2)). EWEB's requirements include the following:

#### **EWEB Drug Testing Requirements**

A Contract award for a Public Improvement shall not be final until the prospective Contractor certifies to EWEB that it has a drug-testing program in place for their employees that includes, at a minimum, the following:

- (a) A written employee drug-testing policy,
- (b) Required drug testing for all new Subject Employees or alternatively, required testing of all Subject Employees every 12 months on a random selection basis, and
- (c) Required testing of a Subject Employee when the Contractor has reasonable cause to believe the Subject Employee is under the influence of drugs.
  - (1) A drug-testing program that meets the above requirements will be deemed a "Qualifying Employee Drug-testing Program." For the purposes of this rule, an employee is a "Subject Employee" only

if that employee will be working on the Public Improvement project job site.

- (2) The Contractor shall represent and warrant to EWEB in the Public Improvement Contract that the Qualifying Employee Drug-testing Program is in place at the time of Contract execution and will continue in full force and effect for the duration of the Contract. Further, EWEB's performance obligation (which includes without limitation, EWEB's obligation to make payment) is contingent on Contractor's compliance with this representation and warranty.
- (d) The Public Improvement Contract shall contain Contractor's covenant that it will require each subcontractor providing labor for the project to:
  - (1) Demonstrate to the Contractor that it has a Qualifying Employee Drug-testing Program for the subcontractor's Subject Employees, and represent and warrant to the Contractor that the Qualifying Employee Drug-testing Program is in place at the time of subcontract execution and will continue in full force and effect for the duration of the subcontract; or
  - (2) Require that the subcontractor's Subject Employees participate in the Contractor's Qualifying Employee Drug-testing Program for the duration of the subcontract;
- (C) If the Contract calls for demolition, a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective, pursuant to ORS 279C.510(1);
- (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, pursuant to ORS 279C.510(2);
- (E) A clause or condition, pursuant to ORS 279C.515(1), requiring that if the contractor fails, neglects or refuses to pay promptly a person's claim for labor or services that the person provides to the contractor or a subcontractor in connection with the public contract as the claim becomes due, the proper officer that represents EWEB may pay the amount of the claim to the person that provides the labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of the contract;
- (F) A clause or condition, pursuant to ORS 279C.515(2), requiring that if the contractor or a first-tier subcontractor fails, neglects or refuses to pay a person that provides labor or materials in connection with the public improvement contract within 30 days after receiving payment from EWEB or a contractor, the contractor or first-tier subcontractor owes the person the amount due plus interest charges that begin at the end of the 10-day period within which payment is due under ORS 279C.580(4) and that end upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279C.580, and requiring that the interest shall be calculated as provided in ORS 279C.515(2) and may not be waived.
- (G) A clause or condition, pursuant to ORS 279C.515(3), requiring that if the contractor or a subcontractor fails, neglects or refuses to pay a person that provides labor or materials in connection with the public improvement contract, the person may file a complaint with the Construction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS 279C.580;
- (H) A condition, pursuant to ORS 279C.520(1) requiring that a person may not be

employed for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency or when the public policy absolutely requires it, and in such cases, except in cases of contracts for personal services designated under ORS 279A.055, the employee shall be paid at least time and a half pay:

- (i)
    - (a) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or
    - (b) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and
  - (ii) For all work performed on Saturday and on any legal holiday specified in ORS 279C.540;
- (I) In the case of contracts for personal services as described in ORS 279A.055, a provision pursuant to ORS 279C.520(3) requiring that the employee shall be paid at least time and a half for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime;
- (J) A provision pursuant to ORS 279C.520(5)(a) requiring that persons employed under the contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in ORS 279C.540(1)(b)(B) to (G) and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater;
- (K) A provision pursuant to ORS 279C.525 referencing specific federal, state and local statutes, ordinances, rules or regulations relating to the prevention of environmental pollution and the preservation of natural resources which must be complied with by the contractor in executing the public improvement contract, and providing that the provisions in ORS 279C.525 are applicable to the Contract;
- (L) A condition, pursuant to ORS 279C.530(1), requiring that the contractor shall promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the contractor, of all sums that the contractor agrees to pay for the services and all moneys and sums that the contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services;
- (M) A clause or condition pursuant to ORS 279C.530(2), 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";
- (N) For public works contracts, a provision stating the existing state prevailing rate of wage and, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act (40 USC 276a) that may be paid to workers in each trade or occupation required for the public works employed in the performance of the contract either by the contractor or subcontractor or other person doing or

- contracting to do the whole or any part of the work contemplated by the contract, pursuant to ORS 279C.830(1), and generally 279C.800 to 279C.870;
- (O) If EWEB is required under section (N) to include the state and federal prevailing rates of wage in the contract, EWEB shall also include information showing which rate of wage is higher for workers in each trade or occupation in each locality as determined by the Bureau of Labor and Industries under ORS 279C.830(1) and 279C.815(2)(b);
  - (P) For public works contracts, a provision that the workers performing work on the public works contract shall be paid not less than the specified prevailing minimum hourly rate of wage, and that every subcontract must include a provision that workers performing work on the public works subcontract shall be paid not less than the specified prevailing minimum hourly rate of wage, pursuant to ORS 279C.830(1), and Or Laws 2005, ch.360, section 7;
  - (Q) A provision requiring that the contractor pay the required fee to Bureau of Labor and Industries (BOLI), and that the fee be paid to the commissioner of BOLI under the commissioner's administrative rule, pursuant to ORS 279C.825(1) and 279C.830(2);
  - (R) A provision requiring the contract (a) to have a public works bond filed with the Construction Contractors Board before starting work on the project, and (b) to include in every subcontract a provision requiring the subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, as required by ORS 279C.830(2)(a), unless exempt under ORS 279C.836;
  - (S) A provision requiring retainage, pursuant to ORS 279C.550 to 279C.570;
  - (T) A clause pursuant to ORS 279C.580(3) requiring the contractor to include in each subcontract for property or services the contractor enters into with a first-tier subcontractor, including a material supplier, for purpose of performing a construction contract:
    - (i) A payment clause that obligates the contractor to pay the first-tier subcontractor for satisfactory performance under the subcontract within 10 days out of amounts EWEB pays to the contractor under the public improvement contract.
    - (ii) A clause that requires the contractor to provide a first-tier subcontractor with a standard form that the first-tier subcontractor may use as an application for payment or as another method by which the subcontractor may claim a payment due from the contractor.
    - (iii) A clause that requires the contractor, except as otherwise provided in this paragraph, to use the same form and regular administrative procedures for processing payments during the entire term of the subcontract. A contractor may change the form or the regular administrative procedures the contractor uses for processing payments if the contractor:
      - (1) Notifies the subcontractor in writing at least 45 days before the date on which the contractor makes the change; and
      - (2) Includes with the written notice a copy of the new or changed form or a description of the new or changed procedure.
    - (iv) An interest penalty clause that obligates the contractor, if the contractor does not pay the first-tier subcontractor within 30 days after receiving payment from EWEB, to pay the first-tier subcontractor an interest penalty on amounts due in each payment the contractor does not make in accordance with the payment clause included in the subcontract under

paragraph (a) of this subsection. A contractor or first-tier subcontractor is not obligated to pay an interest penalty if the only reason that the contractor or first-tier subcontractor did not make payment when payment was due is that the contractor or first-tier subcontractor did not receive payment from EWEB or contractor when payment was due. The interest penalty:

- (1) Applies to the period that begins on the day after the required payment date and that ends on the date on which the amount due is paid; and
  - (2) Is computed at the rate specified in ORS 279C.515(2).
- (U) A clause pursuant to ORS 279C.580(4) obligating the contractor in each of the contractor's subcontracts, to require the first-tier subcontractor to include a payment clause and an interest penalty clause that conforms to the standards of subsection (R) of this section in each of the first-tier subcontractor's subcontracts and to require each of the first-tier subcontractor's subcontractors to include such clauses in the first-tier subcontractors' subcontracts with each lower-tier subcontractor or supplier.
- (V) A provision requiring notice of claim, pursuant to ORS 279C.605;
- (W) A provision requiring the contractor's certification of compliance with the Oregon tax laws; and
- (X) A provision requiring the 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.
- (Y) A provision requiring the contractor to comply with all state and federal laws and regulations, including the Public Contracting Code, and requiring the contractor to comply with the EWEB Public Contracting Rules, including, but not limited to, requiring that the contractor comply with (i) the payment of claims requirements of ORS 279C.515, (ii) the hours of labor requirements of 279C.520, (iv) federal, state and local statutes, ordinances, rules and regulations pertaining to environmental pollution and natural resources preservation, and the environmental pollution and natural resources preservation requirements of ORS 279C.525, (v) the maximum hours, holidays and overtime laws and regulations of ORS 279C.540, (vi) the time limitation claim requirements of ORS 279C.545, (vii) the prevailing wage rate requirements of ORS 279C.800 to 279C.870, (viii) the prompt payment policy, progress payments and rate of interest requirements of ORS 279C.570, (ix) the requirements of ORS 279C.580 pertaining to the contractor's relations with subcontractors, and (x) the payment bond requirements of ORS 279C.600 to 279C.610
- (2) Assignment or Transfer. Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, or transfer rights, nor delegate duties under the Contract, either in whole or in part, without EWEB's prior Written consent. Unless otherwise agreed by EWEB 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 EWEB 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 EWEB for

complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless EWEB otherwise agrees in Writing.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279A.110(4), ORS 279A.120, ORS 279C.365, ORS 279C.370, ORS 279C.390, ORS 279C.505 to 580, ORS 279C.605, ORS 279C.800 to 870, ORS 305.385, ORS 468A.720, ORS 701.005, ORS 701.055

### **5-0210 Notice and Advertising Requirements; Posting**

- (1) Notice; Distribution Fee. EWEB shall furnish “**Notice**” as set forth below in subsections (a) through (c). 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. EWEB may charge a fee or require a deposit for the Solicitation Document. EWEB may furnish Notice using any method it has, in its sole judgment, determined to foster and promote competition, including, but not limited to:
  - (a) Mailing, faxing, emailing or mailing a postcard Notice of the availability of Solicitation Documents to Persons that have expressed an interest in EWEB's Procurements. However, EWEB shall not be liable for any human, mechanical, or electronic failure or error that may cause the Notice to fail to reach the intended recipient;
  - (b) Posting Notice on the EWEB's Electronic Procurement System; or
  - (c) Posting Notice on the EWEB's Internet Web site.

EWEB's notice responsibility extends only to the posting, and it is the responsibility of interested persons to check the electronic site periodically for posted solicitation and other related information.

- (2) Advertising. Pursuant to ORS 279C.360 and this Rule 5-0210, EWEB shall advertise every Solicitation for competitive Bids or competitive Proposals for a Public Improvement Contract, unless EWEB has exempted the Solicitation from the advertisement requirement as part of a competitive Bidding exemption under ORS 279C.335, or unless another exemption, such as intermediate procurement, is applicable.
  - (a) Unless EWEB publishes by Electronic Advertisement as permitted under subsection 2(b), EWEB 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 any additional issues and publications selected by EWEB.
  - (b) EWEB may publish by Electronic Advertisement if:
    - (A) EWEB published a notice that it may publish advertisements for Offers by Electronic Advertisement. EWEB shall publish such notice weekly, for no less than four consecutive weeks, in at least one newspaper of general circulation in the area where the business office of EWEB is located and in as many additional issues and publications as EWEB may determine to be necessary or desirable to provide notice to potential Offerors, prior to the establishment of the electronic site or prior to use of the electronic site for Electronic Advertisement, if the site is already established.

EWEB notice shall include the World Wide Web location (i.e., Uniform Resource Locator or URL) where it will publish future Electronic Advertisements or alternatively, the Web location where EWEB will publish

- information on accessing the Electronic Advertisement via a Telnet application;
- (B) EWEB posts in its business office a notice that EWEB will publish advertisements for Offers by Electronic Advertisement. The notice shall include the World Wide Web location (i.e., Uniform Resource Locator or URL) where EWEB publishes Electronic Advertisements or alternatively, the Web location where it publishes information on accessing the Electronic Advertisement via a Telnet application; and
- (C) EWEB determines Electronic Advertisement is likely to be cost effective.
- (c) In addition to the EWEB's publication required under subsection 2(a) or 2(b), EWEB 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, which may include a general description of the project;
  - (B) The office where Contract terms, conditions and Specifications may be reviewed;
  - (C) If prequalification is a requirement, the date that Persons must file applications for prequalification under ORS 279C.430, 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 required newspaper publication, if the advertisement is published as required in 2(a) or 2(c) of this section, and which shall not be less than five Days after the date of the first posting to the EWEB electronic or internet Web site, if the advertisement is published as required in 2(b) of this section;
  - (E) The name, title and address of EWEB Person authorized to receive Offers;
  - (F) The date, time and place of the scheduled Opening; and
  - (G) If applicable, that the Contract is for Public Works subject to ORS 279C.800 to 279C.870 and/or the Davis-Bacon Act (40 U.S.C. 3141, et seq.).
- (3) Posting Advertisement for Offers. EWEB may post a copy of each advertisement for Offers at EWEB's Purchasing office. An Offeror may obtain a copy of the advertisement for Offers upon request, for which EWEB may charge a reasonable fee.

Stat. Auth.: ORS 279A.065; 279A.070; 279C.360

Stats. Implemented: ORS 279C.360

#### **5-0220 Prequalification of Offerors**

- (1) Prequalification. Pursuant to ORS 279C.430 and this rule, two types of prequalification are authorized:
  - (a) Mandatory Prequalification. EWEB will indicate in the Solicitation Documents if it will require mandatory prequalification. Mandatory prequalification occurs when EWEB conditions a Person's submission of an Offer upon the Person's prequalification. EWEB shall not consider an Offer from a Person that is not prequalified if EWEB required prequalification, unless the Person is known by EWEB, in EWEB's sole judgment, to be qualified for the work. Nevertheless, EWEB shall not be required to consider prequalification of any Offeror after the date and time required for submission of prequalification information, regardless of past working experience or information known about the Offeror. EWEB shall require use of a form prescribed

- by EWEB's purchasing office to be used by the Offeror for mandatory or permitted prequalification.
- (b) **Permissive Prequalification.** EWEB may prequalify a Person for its Solicitation list on forms prescribed by EWEB's Purchasing office, but in permissive prequalification EWEB shall not limit distribution of a Solicitation to that list.
- (2) **Prequalification Presumed.** If an Offeror is currently prequalified by either the Oregon Department of Transportation or the Oregon Department of Administrative Services to perform Contracts, the Offeror shall be rebuttably presumed to be qualified to perform similar Work for EWEB.
- (3) **Standards for Prequalification.** A Person may prequalify by demonstrating to EWEB's satisfaction:
- (a) That the bidder is not on the list created by the Construction Contractors Board under ORS 201.227 for bidders who are not qualified to hold a public improvement contract;
  - (b) 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;
  - (c) The Person's record of performance;
  - (d) The Person's record of integrity;
  - (e) The Person is qualified to contract with EWEB, pursuant to EWEB Rules, including Rule 5-0390(2) regarding standards of responsibility; and
  - (f) That the person has supplied all necessary information as to the inquiry regarding items (a) through (e), and does not fail to supply information requested by EWEB relating to such items.
- (4) **Notice Of Denial.** If a Person fails to prequalify for a mandatory prequalification, EWEB shall notify the Person, specify the reasons under section (3) of this rule and inform the Person of the Person's right to a hearing under ORS 279C.445 and 279C.450.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.430 & ORS 279C.435

#### **5-0230 Eligibility to Bid or Propose; Registration or License**

- (1) **Construction Contracts.** EWEB 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.** EWEB 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 license issued pursuant to ORS 671.560 by the State Landscape Contractors Board at the time the offer is made.
- (3) **Noncomplying Entities.** EWEB shall deem an Offer nonresponsive if it is received from a Person that fails to comply with this rule and shall reject the Offer as stated in ORS 279C.365(1)(k), unless contrary to federal law or subject to different timing requirements set by federal funding agencies.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.365, ORS 671.530 & ORS 701.055

#### **5-0240 Pre-Offer Conferences**

- (1) Purpose. EWEB 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. EWEB 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 an offering Person is present.
- (3) Scheduled time. If EWEB 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, as determined in the sole discretion of EWEB.
- (4) Statements Not Binding. Statements made by EWEB employees, representatives, and agents at the pre-Offer conference do not change the Solicitation Document unless EWEB confirms such statements with a Written Addendum to the Solicitation Document.
- (5) Announcement. EWEB must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with Rule 5-0200(1)(a)(B).

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.365 and 279C.370

#### **5-0250 Addenda to Solicitation Documents**

- (1) Issuance; Receipt. EWEB 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 EWEB otherwise specifies in the Addenda or in the Solicitation Document.
- (2) Notice and Distribution. EWEB shall notify prospective Offerors of Addenda consistent with the standards of Notice set forth in Rule 5-0210(1). The Solicitation Document shall specify how EWEB will provide notice of Addenda and how it will make the Addenda available, in accordance with EWEB Rules, including Rule 5-0200(1)(a)(N). For example, the document could state: "EWEB will not mail notice of Addenda, but will publish notice of any Addenda on EWEB's Web site. Addenda may be downloaded off of the Web site."
- (3) Timelines; Extensions. EWEB shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. EWEB may extend the Closing if it determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by public interest, EWEB shall not issue Addenda less than 72 hours before the Closing unless the Addenda 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 Rule 5-0260, by the close of the next business day after issuance of the

Addendum, or up to the last day allowed to submit a request for change or protest under Rule 5-0260, whichever date is later.

EWEB shall consider only an Offeror's request for change or protest to items within the scope of the Addendum; EWEB shall not consider a request for change or protest to matters not added to, or modified by, the Addendum, unless the Offeror submits the request for change or protest before the deadline for EWEB's receipt of request for change or protests as set forth in Rule 5-0260(2) and (3).

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.395 & ORS 279A.065

### **5-0260 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 EWEB clarify any provision of the Solicitation Document. EWEB's clarification to an Offeror, whether orally or in writing, does not change the Solicitation Document and is not binding on EWEB unless EWEB amends the Solicitation Document by Written 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 EWEB not less than 10 Days prior to Closing;
  - (b) Content of Request for Change.
    - (A) An Offeror's written request for change shall include a statement of the requested change(s) to the Contract terms and conditions, including any Specifications, together with the reason for the requested change.
    - (B) An Offeror shall mark its request for change as follows:
      - (i) "Solicitation Specification Request for Change" or "Contract Provision Request for Change"; and
      - (ii) Solicitation Document number (or other identification as specified in the Solicitation Document).
- (3) Protest.
  - (a) Delivery. An Offeror may protest Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a written protest on those matters to EWEB not less than 10 Days prior to Closing;
  - (b) Content of Protest.
    - (A) An Offeror's written protest shall include:
      - (i) A detailed statement of the legal and factual grounds for the protest;
      - (ii) A description of the resulting prejudice to the Offeror; and
      - (iii) A statement of the desired changes to the Contract terms and conditions, including any Specifications.
    - (B) An Offeror shall mark its protest as follows:
      - (i) "Solicitation Specification Protest" or "Contract Provision Protest"; and
      - (ii) Solicitation Document number (or other identification as specified in the Solicitation Document)

- (4) EWEB's Response. EWEB shall not consider an Offeror's request for change or protest after the deadline established for submitting such request or protest. EWEB shall provide notice to the applicable Person if it entirely rejects a protest. If EWEB agrees with the Person's request or protest, in whole or in part, EWEB shall either issue an Addendum reflecting its determination under Rule 5-0260 or cancel the Solicitation under Rule 5-0270.
- (5) Extension of Closing. If EWEB receives a written request for change or protest from an Offeror in accordance with this rule, EWEB may extend Closing if EWEB determines, in its sole judgment, an extension is necessary to consider the request or protest and issue an Addendum, if any, to the Solicitation Document.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.345 & ORS 279C365

### **5-0270 Cancellation of Solicitation Document**

- (1) Cancellation in the Public Interest. EWEB may cancel a Solicitation for good cause if EWEB finds that cancellation is in EWEB's or the public interest. EWEB's reasons for cancellation shall be made part of the Solicitation file.
- (2) Notice of Cancellation. If EWEB cancels a Solicitation prior to Opening, EWEB shall provide Notice of cancellation in accordance with Rule 5-0210(1). Such notice of cancellation shall:
  - (a) Identify the Solicitation;
  - (b) Briefly explain the reason for cancellation; and
  - (c) If appropriate, explain that an opportunity will be given to compete on any re-solicitation of the project.
- (3) Disposition of Offers.
  - (a) Prior to Offer Opening. If EWEB cancels a Solicitation prior to Offer Opening, it 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, EWEB may open the Offer to determine its source and then return it to the Offeror.
  - (b) After Offer Opening. If EWEB rejects all Offers or cancels a Solicitation after opening, it shall retain all such Offers as part of EWEB's Solicitation file.

Stat. Auth.: ORS 279A.007

Stats. Implemented: ORS 279C.395

### **5-0280 Offer Submissions**

- (1) Offer and Acceptance. The Bid or Proposal is the Bidder's or Proposer's Offer to enter into a Contract.
  - (a) In competitive Bidding, the Offer is always a "Firm Offer," i.e., the Offer shall be held open by the Offeror for EWEB's acceptance for the period specified in Rule 5-0410. EWEB's Award of the Contract to a Bidder constitutes acceptance of the Offer and binds the Offeror to the Contract.
  - (b) In competitive Proposals, the Solicitation Document shall describe whether Offers

are to be made and considered as “Firm Offers” that may be accepted without negotiation, as in the case of competitive Bidding, or whether Offers are subject to discussion, negotiation or otherwise are not to be considered as final offers. See Rule 5-0650 on Requests for Proposals and Rule 5-0290 on Bid or Proposal Security.

- (c) All bids made to EWEB under ORS 279C.335 or 279C.400 must be made in writing, must be filed with the person designated for receipt of bids by EWEB, and must be opened publicly by EWEB immediately after the deadline for submission of bids, unless otherwise provided in the Code or these EWEB Rules, Division 5.
- (2) Responsive Offer. EWEB may Award a Contract only to a Responsible Offeror with a Responsive Offer.
- (3) Contingent Offers. Except to the extent that a Proposer is authorized to propose certain terms and conditions pursuant to Rule 5-0650, a Proposer shall not make an Offer contingent upon EWEB's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.
- (4) Offeror's Acknowledgement. By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits proposal of alternative terms under Rule 5-0650, 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 EWEB in Writing.
- (5) Instructions. An Offeror shall submit and Sign its Offer in accordance with the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document. The Offer must be signed on behalf of the Offeror by someone with authority to bind the Offeror.
- (6) 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.
- (7) Documents. An Offeror shall provide EWEB with all documents and descriptive literature required under the Solicitation Document.
- (8) Facsimile or Electronic Submissions. If EWEB permits facsimile or electronic Offers in the Solicitation Document, the Offeror may submit facsimile or electronic Offers in accordance with the Solicitation Document. EWEB shall not consider facsimile or electronic Offers unless authorized by the Solicitation Document.
- (9) Product Samples and Descriptive Literature. EWEB may require Product Samples or descriptive literature if it is necessary or desirable to evaluate the quality, features or characteristics of the offered items. EWEB 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 or in the envelope provided by EWEB, whichever is applicable.

- (b) EWEB is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.
- (11) Receipt of Offers. The Offeror is responsible for ensuring that EWEB receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.365 & ORS 279C.375

### **5-0290 Bid or Proposal Security**

Unless otherwise required by EWEB, this rule applies only to public improvement contracts with a value, estimated by EWEB, of more than \$100,000.

- (1) Requirement for Bid Security (Optional for Proposals). Unless EWEB has otherwise exempted a Solicitation or class of Solicitations from Bid security pursuant to ORS 279C.390, EWEB shall require bidders to provide Bid security (submitted with or posted for ) every solicitation for Public Improvements . EWEB may require Bid security even if it has exempted a class of Solicitations from Bid security. EWEB may require Proposal security in RFPs when Award of a Public Improvement Contract may be made without negotiation following receipt of a Firm Offer as described in Rule 5-0280(1)(b). See ORS 279C.400(5).
- (2) Security Amount. If Bid or Proposal security is required, it shall be not more than 10% of the Offeror's Bid or Proposal. EWEB shall not use Bid or Proposal security to discourage competition. EWEB shall expressly provide for any Bid or Proposal security 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. See ORS 279C.365(4) and ORS 279C.385.
- (3) Form of Bid or Proposal Security. EWEB 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 for Unsuccessful Offers. EWEB shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been fully executed and all required bonds have been provided, or after all Offers have been rejected. EWEB 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. The bid or proposal security of unsuccessful Offerors shall be returned when the contract has been duly signed.

- (5) Return of Security for Successful Offers. Upon the execution of a public improvement contract and delivery of a good and sufficient performance bond, a good and sufficient payment bond, and any required proof of insurance by the successful bidder, the bid security of the successful bidder shall be returned to the bidder. A bidder who is awarded a contract and who fails promptly and properly to execute the contract and to deliver the performance bond and the payment bond shall forfeit the bid security that accompanied the successful bid. The bid security shall be taken and considered as liquidated damages and not as a penalty for failure of the bidder to execute the contract and bonds. The bid security of unsuccessful bidders may be returned to them when the bids have been opened and the contract has been awarded, and may not be retained by EWEB after the contract has been duly signed.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.365, ORS 279C.385 & ORS 279C.390

### **5-0300 Facsimile Bids and Proposals**

- (1) Authorization. EWEB may authorize Offerors to submit facsimile Offers. If EWEB determines that Bid or Proposal security is or will be required, EWEB shall not authorize facsimile Offers unless it has established a method for receipt of such security. Prior to authorization EWEB must determine whether its equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time and establish administrative procedures and controls:
- (a) For receiving, identifying, recording and safeguarding facsimile Offers, and
  - (b) To ensure timely delivery of Offers to the location of Opening and to preserve the "sealed" requirement of competitive Procurement.
- (2) Provisions to Be Included in Solicitation Document. In addition to all other requirements, if EWEB authorizes a facsimile Offer, it shall include in the Solicitation Document provisions substantially similar to the following:
- (a) A facsimile Offer, as used in this Solicitation, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by EWEB via a facsimile machine.
  - (b) Offerors may submit facsimile Offers in response to this Solicitation. The entire response must arrive at the place and by the time specified in this Solicitation Document, with the response printed out by the facsimile machine and not just residing in the memory of the facsimile machine.
  - (c) Facsimile Offers must be Signed by the Offeror.
  - (d) EWEB reserves the right to Award the Contract solely on the facsimile Offer. However, upon EWEB's request the apparently successful Offeror shall promptly submit its complete original Signed Offer.
  - (e) The data and compatibility characteristics of EWEB's receiving facsimile machine are as follows:
    - (A) Telephone number;
    - (B) Compatibility characteristics, e.g., make and model number, receiving speed, and communications protocol.
  - (f) EWEB 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.
- (G) Security and confidentiality of data.

Stat. Auth.: ORS 279A.065; 279A.070  
Stats. Implemented: ORS 279C.365

### **5-0310 Electronic Procurement**

- (1) General. EWEB may advertise Public Improvement Contracts electronically in accordance with ORS 279C.360(1), and post notices of intent to Award electronically as provided by ORS 279C.410(7).
- (2) Alternative Procedures. In the event that EWEB desires to utilize electronic procurement, including submission and receipt of electronic offers, for a Public Improvement Contract, it shall first promulgate supporting procedures substantially in conformance with Rule 3-0330 (electronic procurement for goods and services), taking into account statutory 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 EWEB 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.

Stat. Auth.: ORS 279A.065; 279A.070  
Stats. Implemented: ORS 279C.365

### **5-0320 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 EWEB in accordance with Rule 5-0280, 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 EWEB 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) EWEB may release an unopened Offer withdrawn under subsection 2(a) to the Offeror or its authorized representative, after voiding any date and time stamp mark .

- (c) The Offeror shall mark the written request to withdraw an Offer as follows:
  - (A) Bid (or Proposal) Withdrawal; and
  - (B) Solicitation Number (or Other Identification as specified in the Solicitation Document).

- (3) Documentation. EWEB shall include all documents relating to the modification or withdrawal of Offers in the appropriate Solicitation file.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.360(2), ORS 279C.365, ORS 279C.375 & ORS 279C.395

### **5-0330 Receipt, Opening and Recording of Offers**

- (1) Receipt. EWEB shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. EWEB shall not open the Offer or modification upon receipt, but shall store it in a secure place until Opening. If EWEB inadvertently opens an Offer or a modification prior to the Opening, EWEB shall reseal and store the opened Offer or modification for Opening. EWEB shall document the resealing for the Procurement file (e.g. "Inadvertently opened the Offer due to improper identification of the Offer").
- (2) Opening and recording. EWEB shall publicly open Offers including any modifications made to the Offer pursuant to Rule 5-0320. In the case of Invitations to Bid, to the extent practicable, EWEB shall read aloud the name of each Bidder, the Bid price(s), and such other information as it considers appropriate. In the case of Requests for Proposals or voluminous s Bids, if the Solicitation Document so provides, EWEB will not read Offers aloud.
- (3) Availability.
  - (a) After Opening and EWEB review for potential Public Record Exempt Material, EWEB shall make the Offers available for public inspection except for those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.345(2) and ORS 646.461 to 646.475. To the extent EWEB determines such designation is not in accordance with applicable law, it shall make those portions available for public inspection. The Offeror shall separate information designated as confidential from other non-confidential information at the time of submitting its Offer. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and shall be publicly available regardless of an Offeror's designation to the contrary.
  - (b) In those cases where EWEB is allowed to and may need to negotiate changes to offers, EWEB may hold the Offerors confidential until it has satisfied that process.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.365, ORS 279C.375 & ORS 279C.395

### **5-0340 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. EWEB shall not consider late Offers, withdrawals or modifications except as permitted in Rule 5-0350 or 5-0390.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.365, ORS 279C.375 & ORS 279C.395

### **5-0350 Mistakes**

- (1) Generally. To protect the integrity of the competitive Solicitation process and to assure fair treatment of Offerors, EWEB should carefully consider whether to permit waiver, correction or withdrawal for certain mistakes.
- (2) Treatment of Mistakes. EWEB shall not allow an Offeror to correct or withdraw an Offer for an error in judgment. If EWEB discovers certain mistakes in an Offer after Opening, but before Award of the Contract, it may take the following action:
  - (a) EWEB 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/or
    - (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, quantity or delivery.
  - (b) EWEB 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 EWEB'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). In the event of a discrepancy, unit prices shall prevail over extended prices.
  - (c) EWEB 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 subparagraph (b) of this subsection;
    - (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 EWEB does not grant it permission to withdraw the Offer;
    - (G) That EWEB's or the public's status has not changed so significantly that relief

from the forfeiture will Work a substantial hardship on EWEB or the public it represents; and

- (H) That the Offeror promptly gave notice of the claimed error to EWEB.
  - (d) The criteria in subsection (2)(c) of this rule shall determine whether EWEB will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether EWEB will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid security), or without liability to EWEB based on the difference between the amount of the Offeror's Offer and the amount of the contract actually Awarded by EWEB, 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. EWEB 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.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.375 & ORS 279C.395

#### **5-0360 First-Tier Subcontractors; Disclosure and Substitution**

- (1) Required Disclosure. Within two working hours after the Bid Closing on an ITB for a Public Improvement having a Contract Price with a value estimated by EWEB to exceed \$100,000, all Bidders shall submit to EWEB a disclosure form as described by ORS 279C.370(2), using forms provided or made available by EWEB, identifying any first-tier subcontractors (those Entities that would be contracting directly with the prime contractor) that will be furnishing labor or labor and materials on the Contract, if Awarded, whose subcontract value would be equal to or greater than:
- (a) Five percent of the total project bid, but at least \$15,000; or
  - (b) \$350,000, regardless of the percentage of the total project bid.

The disclosure of first-tier subcontractors must include the name of each subcontractor, the category of work that each subcontractor will perform and the dollar value of each subcontract.

- (2) Bid Closing, Disclosure Deadline and Bid Opening. For each ITB to which this rule applies, EWEB shall:
- (a) Set the Bid Closing on a Tuesday, Wednesday or Thursday, and at a time between 2 p.m. and 5 p.m., so that the resulting two-hour disclosure deadline does not fall on a legal holiday recognized by EWEB, except that these Bid Closing restrictions do not apply to an ITB for maintenance or construction of highways, bridges or other transportation facilities;
  - (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 EWEB.
- (3) Bidder Instructions and Disclosure Form. For the purposes of this rule, EWEB 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 when the contract value for a Public Improvement is estimated by EWEB to be greater than \$100,000 (see ORS 279C.370). Specifically, when the contract amount of a first-tier subcontractor furnishing labor or labor and materials would be greater than or equal to: (i) 5% of the project Bid, but at least \$15,000, or (ii) \$350,000 regardless of the percentage, the Bidder must disclose the following information about that subcontract either in its Bid submission, or within two working hours after Bid Closing:

- 1) The subcontractor's name,
- 2) The category of Work that the subcontractor would be performing, and
- 3) 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.

**EWEB MUST REJECT A BID IF THE BIDDER FAILS TO SUBMIT THE DISCLOSURE FORM WITH THIS INFORMATION BY THE STATED DEADLINE (see Rule 5-0360)."**

- (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) EWEB Role. EWEB shall obtain, and make available for public inspection, the disclosure forms required by ORS 279C.370 and this rule. EWEB shall also provide copies of disclosure forms to the Bureau of Labor and Industries as required by ORS 279C.835. EWEB is not required to determine the accuracy or completeness of the information provided on disclosure forms.
- (7) Substitution. Substitution of affected first-tier subcontractors shall be made only in accordance with ORS 279C.585. EWEB shall accept written submissions filed under that statute as public records. Aside from issues involving inadvertent clerical error under ORS 279C.585, EWEB does not have a statutory role or duty to review, approve or resolve disputes concerning such substitutions. ORS 279C.590 provides a procedure for an initially disclosed subcontractor to file a complaint with the Construction Contractors Board to claim that the contractor improperly substituted a different subcontractor for the initially disclosed subcontractor.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.370, ORS 279C.585, ORS 279C.590 & ORS 279C.835

### **5-0370 Disqualification of Persons**

- (1) Authority. EWEB may disqualify a Person from consideration of Award of Contracts with EWEB after providing the Person with notice and a reasonable opportunity to be heard in

accordance with this Rule 5-0370.

- (a) Standards for Conduct Disqualification. As provided in ORS 279C.440, EWEB may disqualify a Person for a period up to three years based upon:
  - (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 criminal antitrust statutes.
  - (D) Violation of a contract provision that is regarded by EWEB 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. However, a Person's failure to perform or unsatisfactory performance caused by acts beyond the Person's control is not a basis for Disqualification.
  - (E) The person does not carry workers' compensation or unemployment insurance as required by statute.
- (b) Standards for Business Enterprise Certification ("BEC") Disqualification. As provided in ORS 200.065 or 200.075, EWEB may disqualify a Person from bidding or participating in any EWEB Contract (e.g. subcontractors) as follows:
  - (A) For a BEC Disqualification under ORS 200.065, EWEB may disqualify a Person upon making a finding or obtaining an admission that:
    - (i) The Person fraudulently obtained or retained or attempted to obtain or retain or aided another Person to fraudulently obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise; or
    - (ii) The Person knowingly made a false claim that any Person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit; or
    - (iii) The Person has been found to have made a fraudulent certification or has been disqualified by another Contracting Agency or by the Department of Consumer and Business Services, pursuant to ORS 200.065.
  - (B) For a BEC Disqualification under ORS 200.075, EWEB may disqualify a Person upon finding that:
    - (i) The Person has entered into an agreement representing that a disadvantaged, minority, women, or emerging small business enterprise, certified pursuant to ORS 200.055 ("Certified Enterprise"), will perform or supply materials under a Public Improvement Contract, without the knowledge and consent of the Certified Enterprise; or
    - (ii) The Person exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any Certified Enterprise; or
    - (iii) The Person uses a Certified Enterprise to perform services under a contract or to provide supplies under a Public Improvement Contract to meet an established Certified Enterprise goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the contract.

- (iv) A Person's right to bid or participate in any public contract is suspended by any public contracting agency or by the Department of Consumer and Business Services, under ORS 200.075 (whereupon EWEB shall not permit such Person to participate in EWEB Contracts, for the period of the suspension).
  - (C) Standards for Discrimination Disqualification. EWEB may disqualify a Person, pursuant to ORS 279A.110, if it finds that the Person discriminated against minority, women or emerging small business enterprises in awarding a subcontract in connection with a contract advertised by EWEB or a contract between EWEB and the Person.
- (2) Notice of Intent to Disqualify. EWEB 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 EWEB 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, pursuant to ORS 279C.445 and 279C.450, if requested in Writing within the time stated in the notice and that if EWEB does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived its right to a hearing;
  - (d) Include a statement of the authority and jurisdiction under which the hearing will be held;
  - (e) Include a reference to the particular sections of the statutes and rules involved, as to the reason(s) for the disqualification and the rights to appeal;
  - (f) State the proposed Disqualification period; and
  - (g) State that the Person may be represented by legal counsel, if expressly authorized under the applicable statutes or by Rule.
- (3) Hearing. EWEB shall schedule a hearing upon the receipt of the Person's timely request. EWEB shall notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.
- (4) Notice of Disqualification. EWEB shall immediately 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 any disqualification, including, but not limited to, Conduct Disqualification, BEC Disqualification under ORS 200.065 or ORS 200.075, or Discrimination Disqualification under ORS 279A.110, the disqualified person must notify EWEB in Writing within three business Days after receipt of notice of Disqualification if the Person intends to appeal EWEB's decision, unless some other appeal period is set forth by statute or rule.

Stat. Auth.: ORS 279A.0070

Stats. Implemented: ORS 200.065, ORS 200.075, ORS 279C.440, ORS 279C.445, ORS 279C.450 & ORS 279A.110

### **5-0380 Bid or Proposal Evaluation Criteria**

- (1) General. Unless excluded or exempt from the competitive bidding requirements, a Public Improvement Contract, if awarded, shall be Awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. See for reference Rule 5-0390, and Rules for Alternative Contracting Methods at Rule 5-0600 to 5-0690.
- (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 EWEB elects not to award additive or deductive alternates, Bids shall be compared on the basis of lump-sum prices, or lump-sum base Bid prices, as applicable. If the ITB calls for a lump-sum base Bid, plus additive or deductive alternates, the total Bid price shall be calculated by adding to or deducting from the base Bid those alternates selected by EWEB, for the purpose of comparing Bids.
  - (b) Unit Price. If the Bid includes unit pricing for estimated quantities, the total Bid price shall be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by EWEB, for the purpose of comparing Bids. EWEB shall specify within the Solicitation Document the estimated quantity of the procurement to be used for determination of the low Bidder. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price shall govern. See for reference Rule 5-0350(2)(b).
- (3) Proposal Evaluation Criteria. If the Contract Review Board has exempted the Procurement of a Public Improvement from the competitive Bidding requirements of ORS 279C.335(1), and has directed EWEB to use an Alternative Contracting Method under ORS 279C.335(3), EWEB shall set forth the evaluation criteria in the Solicitation Documents. See for reference Rule 5-0650, ORS 279C.335 and 279C.405.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.335; 279C.375

### **5-0390 Offer Evaluation and Award; Determination of Responsibility**

- 1) General. If Awarded, EWEB 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, pursuant to ORS 279C.375(3)(a) and ORS 701.227. A commercial contractor holding a Level 1 or Level 2 license from the Construction Contractors Board is not excluded from competing for a public contract on the basis of their level of license.
  - (a) EWEB may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in EWEB's interest.
  - (b) Based on competitive bids, EWEB may award a public improvement contract or may award multiple public improvement contracts when specified in the invitation to bid.
- (2) Determination of Responsibility. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, EWEB 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, EWEB must determine that the Offeror:

- (a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to demonstrate the capability of the Offeror to meet all contractual responsibilities;
  - (b) Completed previous contracts of a similar nature with a satisfactory record of contract performance. For purposes of this paragraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the bidder's or proposer's control, the bidder or proposer stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. EWEB 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, EWEB should determine whether the Offeror's deficient performance was expressly excused under the terms of contract, or whether the Offeror took appropriate corrective action. EWEB may review the Offeror's performance on both private and Public Contracts in determining the Offeror's record of contract performance. EWEB shall document the Offeror's record of performance in the Solicitation file if EWEB finds under this subparagraph that the bidder is not responsible;
  - (c) Has a satisfactory record of integrity. In evaluating the bidder's or proposer's record of integrity, EWEB may consider, among other things, whether the bidder or proposer has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the bidder's or proposer's performance of a contract or subcontract. An Offeror may lack integrity if EWEB determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to EWEB or another Contracting Agency. EWEB 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 Rule 5-0370 may be used to determine an Offeror's integrity. EWEB shall document the Offeror's record of integrity in the Solicitation file if EWEB finds under this subparagraph that the bidder is not responsible;
  - (d) Is qualified legally to contract with EWEB (including that the contractor has not been disqualified or debarred by EWEB); and
  - (e) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information concerning responsibility that EWEB requests, EWEB shall determine the Offeror's responsibility based on available information, or may find that the Offeror is not Responsible.
- (3) Evaluation. EWEB shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable laws and regulations. EWEB shall not evaluate an Offer using any other requirement or criterion.
- (4) Offeror Submissions.
- (a) EWEB 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) EWEB shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. EWEB shall reject an Offer providing any product that does not meet the Solicitation Document requirements. EWEB's rejection of an Offer because it offers nonconforming Work or materials is not Disqualification and is not appealable under ORS 279C.445.
- (5) Evaluation of Bids. EWEB shall use only objective criteria to evaluate Bids as set forth in the ITB. EWEB shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid.
- (a) Nonresident Bidders. In determining the lowest Responsive Bid, EWEB shall, in accordance with these Rules, 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, EWEB 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. EWEB shall not, unless permitted elsewhere by law or rule, negotiate scope of Work or other terms or conditions under an Invitation to Bid process prior to Award.
- (6) Evaluation of Proposals. Rule 5-0650 governs evaluation of RFPs.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.335, ORS 279C.365, ORS 279C.375, ORS 279C.395.

**5-0400 Documentation of Award; Availability of Award Decisions**

- (1) Basis of Award. After Award, EWEB shall make a record showing the basis for determining the successful Offeror part of EWEB's Solicitation file.
- (2) Contents of Award Record for Bids. EWEB'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 Rule 5-0650, EWEB'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 EWEB permitted negotiations in accordance with Rule 5-0650, its completed evaluation of the initial Proposals and EWEB's completed evaluation of final Proposals.

- (4) Contract Document. EWEB 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 EWEB 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. EWEB may also provide tabulations of Bids and Proposals Awarded on designated Web sites or on EWEB's Electronic Procurement System.
- (6) Availability of Solicitation Files. Except for material exempt from public disclosure under Oregon Public Records Law, EWEB shall make completed Solicitation files available for public review at EWEB.
- (7) Copies from Solicitation Files. Any Person may obtain copies of discloseable material from Solicitation files upon payment of a reasonable copying charge.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.365 & ORS 279C.375

#### **5-0410 Time for Acceptance; Extension**

- (1) Time for Offer Acceptance. An Offeror's Bid, or Proposal submitted as a Firm Offer (see Rule 5-0280), 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. EWEB may request, orally or in writing that Offerors extend the time during which EWEB may consider and accept their Offer. Offerors shall acknowledge their agreement to extend or not extend their offer in writing to EWEB. If an Offeror agrees to extend the Offer, the offer shall continue as a Firm Offer, irrevocable, valid and binding on the Offeror for the agreed-upon extension period.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.375

#### **5-0420 Negotiation with Bidders and Proposers Limited**

- (1) Bids. When all bids exceed EWEB's cost estimate, EWEB may negotiate with a Bidder prior to Contract Award, only as permitted by ORS 279C.340 and Rule 5-0430. After Award of the Contract, EWEB and Contractor may modify the Contract only by change order or amendment to the Contract in accordance with Rule 5-0860.
- (2) Requests for Proposals. EWEB may conduct discussions or negotiations with Proposers only in accordance with the requirements of Rule 5-0650, or as otherwise by statute or in EWEB Rules, Division 5.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.340 & ORS 279C.375

#### **5-0430 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 EWEB's Cost Estimate, prior to Contract Award, EWEB may negotiate Value Engineering and Other Options with the Responsible Bidder submitting the lowest Responsive Bid in an attempt to bring the Project within EWEB's Cost Estimate. Notwithstanding any other provision of law, the records of a bidder used in contract negotiation under ORS 279C.340 and Rules 5-0420 and 5-0430, are not subject to public inspection until after the negotiated contract has been awarded or the negotiation process has been terminated. The subcontractor disclosure and substitution requirements of Rule 5-0360 do not apply to negotiations under this rule.

- (2) Definitions. Definitions applicable to EWEB Public Contracting Rules, Division 5 are set forth at EWEB Public Contracting Rules, Division 1.
- (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 EWEB, shall be excluded from consideration.
- (4) Scope of Negotiations. EWEB 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 EWEB 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. EWEB may discontinue negotiations at any time, and shall do so if it appears to EWEB 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. ORS 279C.340 shall not be construed as creating any additional public records where that result is not otherwise contemplated by the Public Records law, ORS Chapter 192. Records of a Bidder used in Contract negotiations may not become public records unless they are also submitted to EWEB, and unless they are otherwise exempted from being considered public records.

Stat. Auth.: ORS 279C.340 & ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.340

#### **5-0440 Rejection of Offers**

- (1) Rejection of an Offer.
  - (a) EWEB 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) EWEB shall reject an Offer upon EWEB's finding that the Offer:

- (A) Is contingent upon EWEB's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;
  - (B) Takes exception to terms and conditions (including Specifications);
  - (C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of Solicitation Document or in contravention of applicable law;
  - (D) Offers Work or goods that fail to meet the Specifications of the Solicitation Document;
  - (E) Is late;
  - (F) Is not in substantial compliance with the Solicitation Documents;
  - (G) Is not in compliance with all prescribed public bidding procedures and requirements.
- (c) EWEB shall reject an Offer upon EWEB's finding that the Offeror:
- (A) Has not been prequalified under ORS 279C.430 and EWEB required mandatory prequalification;
  - (B) Has been Disqualified;
  - (C) Has been declared ineligible under ORS 279C.860 by the Commissioner of Bureau of Labor and Industries and the Contract is for a Public Work;
  - (D) Is listed as not qualified by the Construction Contractors Board, if the Contract is for a Public Improvement;
  - (E) Has not met the requirements of ORS 279A.105, pertaining to subcontracting to emerging small businesses, 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;
  - (H) Is not Responsible. See Rule 5-0390(2) regarding EWEB determination that the Offeror has met statutory standards of responsibility.
- (2) Form of Business. For purposes of this rule, EWEB may investigate any Person submitting an Offer. The investigation may include that Person's officers, Directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this rule or to apply the Disqualification provisions of ORS 279C.440 to 279C.450 and Rule 5-0370.
- (3) Certification of Non-Discrimination. The Offeror shall certify and deliver to EWEB Written certification, as part of the Offer, pursuant to ORS 279.110(4), that the Offeror has not discriminated and will not discriminate against minority, women or emerging small business enterprises in obtaining any required subcontracts. Failure to do so shall be grounds for disqualification.
- (4) Rejection of all Offers. EWEB may reject all Offers for good cause upon EWEB's Written finding it is in EWEB's interest to do so. EWEB shall notify all Offerors of the rejection of all Offers, along with the good cause justification and finding.
- (5) Criteria for Rejection of All Offers. EWEB 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 that 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) EWEB cancels the Solicitation in accordance with Rule 5-0270; or
  - (f) Any other circumstance indicating that Awarding the Contract would not be in EWEB's interest.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.375, ORS 279C.380, ORS 279C.395, ORS 279A.105 & ORS 279A.110

#### **5-0450 Protest of Contractor Selection, Contract Award**

- (1) Purpose. An adversely affected or aggrieved Offeror must exhaust all avenues of administrative review procedures and relief before seeking judicial review of EWEB's Contractor selection or Contract Award decision.
- (2) Notice of Competitive Range. If protest of competitive range is provided for in the RFP, when the competitive proposal process is authorized under Rule 5-0650, EWEB shall provide Written notice to all Proposers of EWEB's determination of the Proposers included in the Competitive Range. EWEB's notice of the Proposers included in the Competitive Range shall not be final until the later of the following:
  - (a) 10 Days after the date of the notice, unless otherwise provided therein; or
  - (b) Until EWEB 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, EWEB shall provide Written notice to all Offerors of EWEB's intent to Award the Contract. EWEB'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) EWEB provides a written response to all timely-filed protests that denies the protest and affirms the Award.
- (4) Right to Protest Award.
  - (a) An adversely affected or aggrieved Offeror may submit a written protest of EWEB's intent to Award within seven Days after the date 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 nonresponsive; or
    - (B) EWEB 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) EWEB 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 EWEB'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) If the RFP document provides for protest of the competitive range, an adversely affected or aggrieved Proposer may submit a written protest of the EWEB's decision to exclude the Proposer from the Competitive Range within seven Days after the date 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 Rule 5-0650.)
  - (b) The Proposer's protest shall be in writing and must specify the grounds upon which the protest is based.
  - (c) A Proposer is adversely affected only if the Proposer is responsible and submitted a Responsive Proposal and is eligible for inclusion in the Competitive Range, i.e., the protesting Proposer must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Proposers are removed from consideration, and that those ineligible Proposers are ineligible for inclusion in the Competitive Range because:
    - (A) Their Proposals were not responsive; or
    - (B) EWEB 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) EWEB 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 EWEB'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. A written protest may be resolved at any step in the EWEB Administrative Review process by the person(s) authorized to respond to the protest.
- (7) Decision. If a protest is not settled at any step of the administrative review process provided by statute or rule, EWEB or its designee shall issue a Written decision on the protest. Judicial review of this decision will be available if the administrative process has been exhausted and if such review is provided by statute.
- (8) Award. The successful Offeror shall promptly execute the Contract after the Award is final. EWEB shall execute the Contract only after it has obtained all applicable required documents and approvals.

Stat. Auth.: ORS 279A.0070

Stats. Implemented: ORS 279C.375, ORS 279C.380, ORS 279C.385 & ORS 279C.460

#### **5-0460 Performance and Payment Security; Waiver**

- (1) Public Improvement Contract Security Requirements. The successful bidder for a public improvement contract shall promptly execute and deliver to EWEB a performance bond and a payment bond each in a sum equal to the full Contract Price for all Public

Improvement Contracts, subject to the requirements of ORS 279C.380 and these EWEB Rules, Division 5, unless:

- (a) The required performance bond is waived under ORS 279C.380(1)(a);
  - (b) The performance and/or payment bonds are excused in cases of emergency under ORS 279C.380(4); or
  - (c) EWEB exempts a Contract or classes of contracts from the required performance bond and payment bond pursuant to the Code and EWEB Rules, including ORS 279C.390.
- (2) Performance Bond. The performance bond is for the faithful performance of the contract in accordance with the plans, specifications and conditions of the Contract. The performance bond must be solely for the protection of EWEB and any other public agency or agencies for whose benefit the Contract was awarded. If the public improvement contract is with a single person to provide both design and construction of a public improvement, the obligation of the performance bond for the faithful performance of the contract required by this paragraph must also be for the preparation and completion of the design and related services covered under the contract. EWEB may waive the requirement of a performance bond and may permit the successful bidder to submit a cashier's check or certified check in lieu of all or a portion of the required performance bond.
- (3) Construction Manager/General Contractor Services. OAR 137-049-0690(5)(o) directs the procedure for CM/CG performance and payment bonds.

*Referring to:*

*OAR 137-049-0690(5)(o) Performance and Payment Bonds. Provided no construction Work is included with the pre-construction services to be performed under the initial form of the CM/GC Contract, no performance bond or payment bond is required to be provided by the CM/GC at the time of Contract signing, consistent with ORS 279C.380. Once construction Work is included in the Contract and authorized by the Contracting Agency to be performed by the CM/GC, however, the CM/GC must provide a performance bond and payment bond each in the full amount of any Early Work to be performed by the CM/GC, or the full amount of the GMP, fixed Contract Price or other maximum Contract Price, as applicable. Furthermore, in the event additional Early Work is added to the CM/GC Contract after the initial Early Work or in the event an amendment to the CM/GC Contract is made so that the GMP, fixed Contract Price or other maximum Contract Price must be increased, the performance bond and the payment bond must each be increased in an amount equal to the additional Early Work or the increased GMP, fixed Contract Price or other maximum Contract Price. (DOJ 2-2015, f. & cert. ef. 2-3-15)*

- (4) Payment Bond. The payment bond shall be in an amount equal to the full Contract Price, solely for the protection of claimants under ORS 279C.600.
- (5) Other Construction Contracts. EWEB may require performance security for other construction Contracts that are not Public Improvement Contracts. Such requirements shall be expressly set forth in the Solicitation Document.
- (6) Requirement for Security Bonds. EWEB shall accept only a performance bond executed solely by a surety company or companies authorized to transact surety business in Oregon unless otherwise specified in the Solicitation Document (i.e., EWEB may accept a

cashier's check or certified check in lieu or all or a portion of the required performance bond if specified in the Solicitation Document). EWEB shall accept only a payment bond executed solely by a surety company or companies authorized to transact surety business in Oregon, in an amount equal to the full Contract Price.

- (7) Time for Submission. The apparent successful Offeror must promptly furnish the required performance/payment security upon EWEB's request. If the Offeror fails to furnish the performance/payment security as requested, EWEB 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 EWEB's discretion, the Offeror shall forfeit its Bid or Proposal security.
- (8) Exemption of Contracts or Classes of Contracts from Bid Requirements. Subject to the provisions of subsection (9) of this Rule, EWEB may exempt certain contracts or classes of contracts from all or a portion of the requirement for bid security and from all or a portion of the requirement that good and sufficient bonds be furnished to ensure performance of the contract and payment of obligations incurred in the performance.
- (9) Authority to Require Security When Contracts Exempted. EWEB may require bid security and a good and sufficient performance bond, a good and sufficient payment bond, or any combination of such bonds, even though the public improvement contract is of a class exempted by the Director of the Oregon Department of Administrative Services or EWEB.
- (10) Public Works Bond. The contractor and each subcontractor shall each promptly execute and file public works bonds in the amount of \$30,000 with the Construction Contractors Board and shall submit a copy of the bond to EWEB before starting work on a contract or subcontract for a public works project, unless the bond requirement is excused based upon: (a) an emergency declaration, or (b) the contractor or subcontractor holds a Business Enterprise Certification, has properly elected not to file a public works bond in accordance with ORS 279C.836 and gives notice of such election to the contractor (if the enterprise is a subcontractor) or to EWEB (if the enterprise is the contractor) before starting work on a public works project, or (c) effective January 1, 2008, the contractor or subcontractor electing not to file a public works bond in accordance with these rules and ORS 276C.836 for a public works project for which the contract price does not exceed \$100,000.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.375, ORS 279C.380, ORS 279C.390 and ORS 279C.836.

#### **5-0470 Substitute Contractor**

If the Contractor provided a performance bond, EWEB 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 Chapter 279C.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.365, ORS 279C.370, ORS 279C.375, ORS 279C.380 & 279C.390

### **5-0480 Foreign Contractor**

If the Contract Price exceeds \$10,000 and the Contractor is a Foreign Contractor, the Contractor shall promptly report to the Oregon Department of Revenue on forms provided by the Department of Revenue, the Contract Price, terms of payment, Contract duration and such other information as the Department of Revenue may require before final payment can be made on the Contract. A copy of the report shall be forwarded to EWEB. EWEB shall satisfy for itself that the above requirements have been complied with before it issues final payment on the Contract.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279A.120

## **ALTERNATIVE CONTRACTING METHODS**

### **5-0600 Purpose**

Rules 5-0600 to 5-0690 are intended to provide guidance regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as may be directed by a EWEB's Contract Review Authority under ORS 279C.335. Those methods include, but are not limited to, Design-Build form of contracting. Construction Manager/General Contractor (CM/GC) forms of contracting are governed by mandatory provisions of OAR 137-049-0600 to OAR 137-049-0690.

Stat. Auth.: ORS 279C.335 & 279A.065

Stats. Implemented: ORS 279C.335 & 279A.065

### **5-0610 Definitions for Alternative Contracting Methods**

Definitions applicable to EWEB Rules, Division 5 are set forth at EWEB Rules, Division 1. For purposes of CM/GC alternative contracting, OAR 137-049-0610 provides additional defined terms.

*Referring to OAR 137-049-0610*

#### *Definitions for Alternative Contracting Methods*

*The following definitions shall apply to these OAR 137-049-0600 to 137-049-0690 rules, unless the context requires otherwise:*

*(1) Affiliate has the meaning 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 contracting method (with Award of a Public Improvement Contract based solely on price, in which a final design is issued with formal Bid documents, construction 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 OAR 137-049-0600 to 137-049-0690 rules. These methods also include other developing techniques, which include but are not limited to general "performance contracting," "cost plus time" contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(I)) and "qualifications plus project approach" contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(II)). Procedural requirements for these methods are identified in these OAR 137-049-0600 to 137-049-0690 rules, when a Contracting Agency uses an Alternative Contracting Method in a procurement that requires an exemption from competitive bidding under ORS 279C.335(2) or in an ESPC procurement that is excepted from competitive bidding under ORS 279.335(1).*

*(3) Construction Manager/General Contractor (or "CM/GC") has the meaning set forth in ORS 279C.332(2).*

*(4) Construction Manager/General Contractor Method (or "CM/GC Method") means the Alternative Contracting Method which involves a Contracting Agency'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 Contracting Agency, and manages both design and construction. In this form of Contract, a single Person provides the Contracting Agency with all of the Personal Services and construction Work 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 (or "ECMs") (also known as "energy efficiency measures") means, as used in ESPC Procurement, any equipment, fixture or furnishing to be added to or used in an existing building or structure, and any repair, alteration or improvement to an existing building or structure that is designed to reduce energy consumption and related costs, including those costs related to electrical energy, thermal energy, water consumption, waste disposal, and future contract-labor costs and materials costs associated with maintenance of the building or structure. For purposes of these OAR 137-049-0600 to 137-049-0690 rules, use of either or both of the terms "building" or "structure" shall be deemed to include existing energy, water and waste disposal systems connected or related to or otherwise used for the building or structure when such system(s) are included in the project, either as part of the project together with the building or structure, or when such system(s) are the focus of the project. Maintenance services are not Energy Conservation Measures, for purposes of these 137-049-0600 to 137-049-0690 rules.*

*(9) Energy Savings Guarantee means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the Contracting Agency 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 Contracting Agency 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 Contracting Agency after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.*

*(10) Energy Savings Performance Contract (or "ESPC") means a Public Improvement Contract between a Contracting Agency and a Qualified Energy Service Company for the identification, evaluation, recommendation, design and construction of Energy Conservation Measures, including a Design-Build Contract, that guarantee energy savings or performance.*

*(11) General Conditions Work (or "GC Work") means a general grouping of project Work required to support construction operations on the project that is not included within the Contractor's overhead or fee.*

*(12) Guaranteed Maximum Price (or "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 Contracting Agency by the Contractor and accepted by the Contracting Agency that includes all reimbursable costs 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 (or "M & V") means, as used in ESPC Procurement, the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy-using systems pre-installation and post-installation.*

*(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 (or "ESCO") means, as used in ESPC Procurement, a company, firm or other legal Person with the following characteristics: demonstrated technical, operational, financial and managerial capabilities to design, install, construct, commission, manage, 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 Contracting Agency; 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 Contracting Agency under the terms of the Contract, including costs for which a Contracting Agency reimburses a Contractor and fees, profits or other payments the Contractor earns.*

*(17) Technical Energy Audit means, as used in ESPC Procurement, 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 Contracting Agency 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. (DOJ 2-2015, f. & cert. ef. 2-3-15)*

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.335 & ORS 279A.065

### **5-0620 Use of Alternative Contracting Methods**

- (1) Competitive Bidding Exemptions. ORS Chapter 279C requires a competitive Bidding process for Public Improvement Contracts covered by the Public Contracting Code unless a statutory exception applies, a class of Contracts has been exempted or an individual Contract has been exempted in accordance with ORS 279C.335 and any applicable Contracting Agency rules. Use of Alternative Contracting Methods may be directed by EWEB as an exception to the prescribed Public Contracting practices in Oregon, and their use must be justified in accordance with the Code and these Rules 5-0600 to 5-0690.
- (2) Post-Project Evaluation. ORS 279C.355 requires that the EWEB prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 for which the competitive Bidding process was not used. The purpose of this evaluation is to determine whether it was actually in EWEB's best interest to use an Alternative Contracting Method. The evaluation must be made available for public inspection, and must be completed to the Board within 30 Days of the date EWEB "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 the actual project cost as compared with original project estimates, the amount of any Guaranteed Maximum Price, and the number of project change orders issued by EWEB;
  - (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.

Stat. Auth.: ORS 279A.065; 279A.070; 279C.335

Stats. Implemented: ORS 279C.335; 279C.355

### **5-0630 Findings, Notice and Hearing**

- (1) **General Standard for Exemptions.** The Board may exempt a public improvement contract or class of public improvement contracts from the competitive bidding requirements of ORS 279C.335(1) upon approval of the following findings submitted by EWEB:
  - (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 awarding of public improvement contracts under the exemption will likely result in substantial cost savings to EWEB.
  - (c) As an alternative to the finding described in paragraph (b) of this subsection, if EWEB seeks an exemption that would allow the use of an alternate contracting method not previously used, EWEB may make a finding that identifies the project as a pilot project to determine whether the use of the alternate contracting method actually results in substantial cost savings to EWEB or, if the contract is for a public improvement described in ORS 279A.050(3)(b), to EWEB or the public. EWEB shall include an analysis and conclusion regarding actual cost savings, if any, in the evaluation required under ORS 279C.355.
- (2) **Cost Savings Factors.** Under the "substantial cost savings" criterion for findings to support an exemption under ORS 279C.335, EWEB may, pursuant to ORS 279C.335(2)(b), consider the type, cost, and amount of the Contract, number of Persons available to Bid, and "such other factors as may be deemed appropriate."
- (3) **Information Required for Findings.** "Findings" means the justification for EWEB's conclusion that includes, "but is not limited to," information regarding eight identified areas, as defined in Division 1, pursuant to ORS 279C.330.
- (4) **Addressing Cost Savings.** When the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the "substantial cost savings" requirement may be addressed by a combination of:
  - (a) Specified Findings that address the factors and other information specifically identified by statute; and
  - (b) Additional Findings that address industry practices, surveys, trends, past experiences, evaluations of completed projects required by ORS 279C.355 and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable, such Findings should relate back to the specific characteristics of the project or projects at issue in the exemption request.
- (5) **Favoritism and Competition.** The criteria at ORS 279C.335(2)(a) that it is "unlikely" that the exemption will "encourage favoritism" or "substantially diminish competition" may be addressed in contemplating the use of Alternative Contracting Methods by specifying the

manner in which an RFP process will be utilized, that the Procurement will be formally advertised, competition will be encouraged, and Award made based upon identified selection criteria.

- (6) Class Exemptions. In accordance to ORS 279C.335(3), In making findings to support an exemption for a class of public improvement contracts, EWEB shall clearly identify the class using the class's defining characteristics. Those characteristics shall include some combination of project descriptions or locations, time periods, contract values, methods of procurement or other factors that distinguish the limited and related class of public improvement contracts from EWEB's overall construction program. EWEB may not identify a class solely by funding source, such as a particular bond fund, or by the method of procurement, but shall identify the class using characteristics that reasonably relate to the exemption criteria set forth in ORS279C.335(2).
- (7) Requirements for Public Hearing.
  - (a) Before final adoption of Findings exempting a Public Improvement Contract from the requirement of competitive bidding, EWEB shall give notice and hold a public hearing as required by ORS 279C.335(4). The hearing shall be for the purpose of receiving public comment on EWEB's draft Findings.
  - (b) Notification of the public hearing shall be published in at least one trade newspaper of general statewide circulation a minimum of 14 days before the hearing.
  - (c) The notice shall state that the public hearing is for the purpose of taking comments on EWEB's draft findings for an exemption from the competitive bidding requirement. At the time of the notice, copies of the draft findings shall be made available to the public. At the option of EWEB, the notice may describe the process by which the findings are finally adopted and may indicate the opportunity for any further public comment.
  - (d) At the public hearing, EWEB shall offer an opportunity for any interested party to appear and present comment.
  - (e) If EWEB is required to act promptly due to circumstances beyond its control that do not constitute an emergency, notification of the public hearing may be published simultaneously with EWEB's solicitation of contractors for the Alternate Contracting Method, as long as the responses to the solicitation are due at least five (5) days after the meeting and approval of the findings.
- (8) Requirements for Exemptions. In granting exemptions, the Board shall:
  - (a) When appropriate, direct the use of Alternate Contracting Methods that take account of market realities and modern practices and are consistent with the public policy of encouraging competition; and
  - (b) Require and approve or disapprove written findings by EWEB that support the awarding of a particular public improvement contract or a class of public improvement contracts, without the competitive bidding requirement of ORS 279C.335(1). The findings must show that the exemption of a contract or class of contracts complies with the requirements in this Rule 5-0630, and ORS 279C.335.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.335

## **5-0640 Competitive Proposals; Procedure**

EWEB 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 Rules 5-0600 to 5-690, and EWEB Rules, Division 6, unless other applicable statutes control EWEB's use of competitive Proposals for Public Improvement Contracts. In accordance with ORS 279C.400, EWEB may solicit and award a public improvement contract, or may award multiple public improvement contracts when specified in the request for proposals, by requesting and evaluating competitive proposals. The RFP process for the Alternative Contracting Methods identified in Rules 5-0600 to 5-0690 includes the following steps:

- (1) Proposal Evaluation. Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. Proposal evaluation shall be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall:
  - (a) Be reasonable estimates based on information available to EWEB;
  - (b) Treat all Proposals equitably; and
  - (c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to EWEB, pursuant to ORS 279C.305(1) and Rule 5B0105(3).
- (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, OAR 137-049-0640(2)(b) directs the procedures for CM/CG evaluation factors.

*Referring to OAR 137-049-0640(2)(b):*

*In CM/GC contracting, in addition to (a) above, those factors may also include the ability to respond to the technical complexity or unique character of the project, analyze and propose solutions or approaches to complex project problems, analyze and propose value engineering options, analyze and propose energy efficiency measures or alternative energy options, coordinate multiple disciplines on the project, effectively utilize the time available to commence and complete the improvement, and related matters that could affect the cost or quality of the Work. (DOJ 2-2015, f. & cert. ef. 2-3-15)*

- (c) In Design-Build contracting, in addition to (a) and (b) above, those factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience and related matters that affect cost or quality.
- (3) Contract Negotiations. Contract terms may be negotiated to the extent allowed by the RFP and Rules 5-0600 to 5-0690, 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 Rule 5-0650. Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that affect cost or quality.

Stat. Auth.: ORS 279C.335 & ORS 279A.065  
Stats. Implemented: ORS 279C.335 & ORS 279A.065

### **5-0650 Requests for Proposals (RFP)**

- (1) Generally. The use of competitive proposals must be specially authorized for a Public Improvement Contract under the competitive bidding requirements of ORS 279C.335(1), Rules 5-0130, 5-0600 to 5-0690, and Division 6, and/or findings adopted pursuant thereto. Also see ORS 279C.400 to 279C.410 for statutory requirements regarding competitive Proposals, and Rule 5-0640 regarding competitive Proposal procedures.
- (2) EWEB 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 or distribution of a request for proposals.
- (3) Solicitation Documents. The Solicitation Document requirements of Rule 5-0200(1) apply to Requests for Proposals, except as to first-tier subcontractor disclosure under ORS 279C.370 and reciprocal preference under ORS 279A.120, and except as otherwise provided by statute. For purposes of applying the requirements of Rule 5-0200(1), bids includes proposals and bid documents, and invitation to bid include Requests for Proposals. RFP Solicitation Documents shall also conform to the following standards:
  - (a) EWEB shall set forth evaluation and selection criteria in the Solicitation Document. Examples of evaluation criteria include price or cost and its relative importance, 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 Rule 5-0640. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates based on information available to EWEB;
  - (b) When EWEB is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, EWEB must identify the specific terms and conditions in or provisions of the Solicitation Document that are subject to negotiation or discussion and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions EWEB has identified as authorized for negotiation. EWEB must describe the evaluation and discussion or negotiation process, including how it will establish the Competitive Range;
  - (c) When EWEB intends to Award Contracts to more than one Proposer, EWEB must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. EWEB shall also include the criteria it will use to determine how it will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular Contractor to provide goods or services from those Contractors awarded Contracts;
  - (d) EWEB shall include in the Solicitation Document the method of contractor selection, which may include, but is not limited to, award without negotiation, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed either to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or any combination of methods.

**(4) Receipt and Evaluation of Proposals.**

- (a) List of Proposals. For each request for proposals, EWEB shall prepare a list of proposals. (b) Public Inspection Issues. Notwithstanding the public records law, ORS 192.311 to 192.478:
  - (A) Proposals may be opened so as to avoid disclosure of contents to competing proposers during, when applicable, the process of negotiation.
  - (B) Proposals are not required to be open for public inspection until after issuance of the notice of intent to award a contract.
  - (C) EWEB may withhold from disclosure to the public trade secrets, as defined in ORS 192.345, and information submitted to a public body in confidence, as described in ORS 192.355, that are contained in a proposal. The fact that proposals are opened at a public meeting as defined in ORS 192.610 does not make their contents subject to disclosure, regardless of whether the public body opening the proposals fails to give notice of or provide for an executive session for the purpose of opening proposals. If a request for proposals is canceled after proposals are received, EWEB may return a proposal to the proposer that made the proposal. EWEB shall keep a list of returned proposals in the file for the solicitation.
- (b) Evaluation. EWEB shall evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. EWEB shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.
  - (A) Clarifications. In evaluating Proposals, EWEB may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer must submit Written and Signed clarifications and such clarifications shall become part of the Proposer's Proposal.
  - (B) Limited Negotiation. If EWEB did not permit negotiation in its Request for Proposals, it may, nonetheless, negotiate with the highest-ranked Proposer, but may then only negotiate the:
    - (i) Statement of Work; and
    - (ii) Contract Price as it is affected by negotiating the statement of Work.
    - (iii) The process for discussions or negotiations that is outlined and explained in subsections (5)(b) and (6) of this rule does not apply to this limited negotiation.
- (c) Discussions; Negotiations. If EWEB permitted discussions or negotiations in the Request for Proposals, it 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 EWEB's discretion, EWEB may forego discussions and negotiations and evaluate all Proposals in accordance with this rule.
  - (B) If EWEB proceeds with discussions or negotiations, it shall establish a negotiation team, of one or more individuals, tailored for the acquisition. EWEB's team may include legal, technical and negotiating personnel.
- (d) Cancellation. Nothing in this rule shall restrict or prohibit EWEB from canceling the Solicitation at any time.

**(5) Competitive Range; Protest; Award.**

- (a) Determining Competitive Range.
  - (A) If EWEB does not cancel the Solicitation, after the Opening it will evaluate all Proposals in accordance with the evaluation criteria set forth in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria set forth in the Request for Proposals, EWEB will determine and rank the Proposers in the Competitive Range.
  - (B) EWEB may increase the number of Proposers in the Competitive Range if EWEB'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 EWEB's evaluation of revised Proposals submitted in accordance with the process described in this rule.
- (b) Protesting Competitive Range. EWEB shall provide written notice to all Proposers identifying Proposers in the Competitive Range, if the RFP provides that notice is to be given. A Proposer that is not within the Competitive Range may protest EWEB's evaluation and determination of the Competitive Range in accordance with Rule 5-0450, if the RFP provides for protest of the competitive range.
- (c) Intent to Award; Discuss or Negotiate. After the protest period provided in accordance with these rules expires, or after EWEB has provided a final response to any protest, whichever date is later, it 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 EWEB's intent to Award in accordance with Rule 5-0450.
    - (ii) After the protest period provided in accordance with Rule 5-0450 expires, or after EWEB has provided a final response to any protest, whichever date is later, it 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.
- (6) Discussions; Revised Proposals. If EWEB chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, it shall proceed as follows:
  - (a) Initiating Discussions. EWEB 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 it identified in the RFP as the subject of discussions. EWEB 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 EWEB would like additional information; and
    - (C) Otherwise allowing Proposers to develop revised Proposals that will allow EWEB to obtain the best Proposal based on the requirements and evaluation criteria set forth in the Request for Proposals.
  - (b) Conducting Discussions. EWEB 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. EWEB may terminate discussions with any Proposer in the Competitive Range at any time. However, EWEB shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with EWEB before EWEB notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.

- (A) In conducting discussions, EWEB:
  - (i) Shall treat all Proposers fairly and shall not favor any Proposer over another;
  - (ii) Shall not discuss other Proposers' Proposals;
  - (iii) May suggest specific revisions that a Proposer could make to its Proposal, but shall not otherwise direct the Proposer to make any specific revisions to its Proposal; and
  - (iv) Shall accord proposers fair and equal treatment with respect to any opportunity for discussion and revision of proposals
- (B) At any time during the time allowed for discussions, EWEB 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 EWEB does not cancel the Solicitation at the conclusion of EWEB's discussions with all remaining Proposers in the Competitive Range, EWEB shall give all remaining Proposers in the Competitive Range notice of the date and time by which they must submit revised Proposals. This notice constitutes EWEB's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in its notice.

- (A) Upon receipt of the revised Proposals, EWEB shall score the revised Proposals based upon the evaluation criteria set forth in the Request for Proposals, and rank the revised Proposals based on the EWEB's scoring.

- (B) EWEB may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the Request for Proposals.

- (d) Intent to Award; Protest. EWEB shall provide written notice to all Proposers in the Competitive Range of its intent to Award the Contract. An unsuccessful Proposer may protest EWEB's intent to Award in accordance with Rule 5-0450. After the protest period provided in accordance with that rule expires, or after EWEB has provided a final response to any protest, whichever date is later, it shall commence final Contract negotiations.

(7) Negotiations.

- (a) Initiating Negotiations. EWEB 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. EWEB may negotiate:

- (i) The statement of Work;
  - (ii) The Contract Price as it is affected by negotiating the statement of Work; and
  - (iii) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the Request for Proposals. Accordingly, Proposers shall not submit, and EWEB shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the Request for Proposals.
- (c) Terminating Negotiations. At any time during discussions or negotiations that EWEB conducts in accordance with this rule, EWEB may terminate discussions or negotiations with the highest-ranked Proposer, or the Proposer with whom it is currently discussing or negotiating, if EWEB reasonably believes that:
- (A) The Proposer is not discussing or negotiating in good faith; or
  - (B) Further discussions or negotiations with the Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.
- (d) Continuing Negotiations. If EWEB terminates discussions or negotiations with a Proposer, it may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this rule until EWEB has either:
- (A) Determined to Award the Contract to the Proposer with whom it is currently discussing or negotiating; or
  - (B) Completed one round of discussions or negotiations with all Proposers in the Competitive Range, unless EWEB provided for more than one round of discussions or negotiations in the Request for Proposals.
- (8) Cancellation/Rejection of Proposals. EWEB may reject any proposal not in compliance with all prescribed public bidding procedures and requirements, and may, for good cause, reject all proposals upon EWEB's finding that it is in the public interest to do so. In any case where competitive bids are required and all proposals are rejected, and the proposed project is not abandoned, new proposals may be called for as in the first instance.
- (9) Award of Contract Pursuant to Proposals.
- (a) Intent to Award. At least seven days before the award of a public contract, unless EWEB determines that seven days is impractical under the circumstances, EWEB shall issue to each proposer or post, electronically or otherwise, a notice of intent to award.
  - (b) Award of Contract. If a public contract is awarded, EWEB shall award a public contract to the responsible proposer whose proposal is determined in writing to be the most advantageous to EWEB based on the evaluation factors set forth in the request for proposals and, when applicable, the outcome of any negotiations authorized by the request for proposals. Other factors may not be used in the evaluation.

Stat. Auth.: ORS 279A.065; 279A.070  
 Stats. Implemented: ORS 279C.400 to 279C.410

### **5-0660 RFP Pricing Mechanisms**

- (1) A Request for Proposals may result in a lump sum Contract Price, as in the case of

competitive Bidding. Alternatively, a cost reimbursement Contract may be negotiated.

- (2) Economic incentives or disincentives may be included to reflect stated EWEB purposes related to time of completion, safety or other Public Contracting objectives, including total least cost mechanisms such as life cycle costing.
- (3) A Guaranteed Maximum Price (GMP) may be used as the pricing mechanism for CM/GC in accordance with OAR 137-049-0660(3).

*Referring to OAR 137-049-0660(3):*

*A Guaranteed Maximum Price may be used as the pricing mechanism for CM/GC Services Contracts where a total Contract Price is provided in the design phase in order to assist the Contracting Agency in determining whether the project scope is within the Contracting Agency's budget, and allowing for design changes during preliminary design rather than after final design services have been completed.*

- (a) *If the collaborative process described above in this section (3) is successful, the Contractor shall propose a final GMP, which may be accepted by the Contracting Agency 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 Contracting Agency shall terminate the Contract. The public Contracting Agency 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. (DOJ 2-2015, f. & cert. ef. 2-3-15)*

- (4) When cost reimbursement Contracts are utilized, regardless of whether a GMP is included, EWEB shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.335

### **5-0670 Design-Build Contracts**

- (1) General. The Design-Build form of contracting, as defined at Rule 5-0610(3), has technical complexities that are not readily apparent. EWEB 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, EWEB must be able to reasonably anticipate the following types of benefits:
  - (a) Obtaining, through a Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;
  - (b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;
  - (c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity

- for input, with the potential of reducing Contract claims;
- (d) Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance Work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased projects); and
  - (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. EWEB shall utilize the Design-Build form of contracting only in accordance with the requirements of these Rules 5-0600 et seq. See particularly Rule 5-0620 on "Use of Alternative Contracting Methods."
  - (3) Selection. Design-Build selection criteria may include those factors set forth above in Rule 5-0640(2)(a), (b) and (c).
  - (4) Licensing. If a Design-Build Contractor is not an Oregon licensed design professional, EWEB 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.
  - (5) 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, which EWEB may also require.
  - (6) Contract Requirements. EWEB shall conform their Design-Build contracting practices to the following requirements:
    - (a) Design Services. The level or type of design services required must be clearly defined within the Procurement documents and Contract, along with a description of the level or type of design services previously performed for the project. The services to be performed shall be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.
    - (b) Professional Liability. The Contract shall clearly identify the liability of design professionals with respect to the Design-Build Contractor and EWEB, as well as requirements for professional liability insurance.
    - (c) Risk Allocation. The Contract shall clearly identify the extent to which EWEB 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 EWEB 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 EWEB is benefited from such deliverables.

Stat. Auth.: ORS 279C.335 & ORS 279A.065; 279A.070  
Stats. Implemented: ORS 279C.335, ORS 279A.065 & ORS 279C.110

### **5-0680 Construction Manager/General Contractor (CM/GC)**

Construction Manager/General Contractor services will be procured in accordance with OAR 137-049-0690.

*Referred to OAR 137-049-0690:*

- (1) *General. The CM/GC Method is a technically complex project delivery system. Contracting Agencies shall use this contracting method only with the assistance of legal counsel with substantial experience and necessary expertise in using the CM/GC Method, as well as knowledgeable staff, consultants or both staff and consultants who have a demonstrated capability of managing the CM/GC process in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, Public Contracting and project management. Unlike the Design-Build form of contracting, the CM/GC Method does not contemplate a "single point of responsibility" under which the CM/GC is responsible for successful completion of all Work related to a performance Specification. The CM/GC has defined contract obligations, including responsibilities as part of the project team along with the Contracting Agency and design professional, although with the CM/GC Method there is a separate contract between the Contracting Agency and design professional. In order to utilize the CM/GC Method, the Contracting Agency must be able to reasonably anticipate the following types of benefits:*
  - (a) *Time Savings. With the CM/GC Method, the Public Improvement has significant schedule ramifications, such that concurrent design and construction are necessary in order to meet critical deadlines and shorten the overall duration of construction. The Contracting Agency may consider operational and financial data that show significant savings or increased opportunities for generating revenue as a result of early completion, as well as less disruption to public facilities as a result of shortened construction periods;*
  - (b) *Cost Savings. With the CM/GC Method, early CM/GC input during the design process is expected to contribute to significant cost savings. The Contracting Agency may consider value engineering, building systems analysis, life cycle costing analysis and construction planning that lead to cost savings. The Contracting Agency shall specify any special factors influencing this analysis, including high rates of inflation, market uncertainty due to material and labor fluctuations or scarcities, and the need for specialized construction expertise due to technical challenges; or*
  - (c) *Technical Complexity. With the CM/GC Method, the Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between the Contracting Agency, design professionals, any Contracting*

*Agency project management or technical consultants and the CM/GC, in which the CM/GC will assist in addressing specific project challenges through pre-construction Personal Services. The Contracting Agency may consider the need for CM/GC input on issues such as operations of the facility during construction, tenant occupancy, public safety, delivery of an early budget or GMP, financing, historic preservation, difficult remodeling projects and projects requiring complex phasing or highly coordinated scheduling.*

- (2) *Authority. Contracting Agencies shall use the CM/GC form of contracting only in accordance with the requirements of these division 49 Model Rules and ORS 279C.337, when a competitive bidding exemption is approved. See particularly OAR 137-049-0600 on "Purpose" and 137-049-0620 on "Use of Alternative Contracting Methods".*
- (3) *Selection. CM/GC selection criteria may include those factors set forth above in OAR 137-049-0640(2)(b).*
- (4) *Basis for Payment. The CM/GC process adds specified construction manager Personal Services to traditional design-bid-build general contractor Work, requiring full Contract performance within a negotiated GMP, fixed Contract Price or other maximum Contract Price. For a GMP pricing method, the basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for construction Work and Personal Services rendered, which together shall not exceed the GMP. See GMP definition at OAR 137-049-0610 and Pricing Mechanisms at 137-049-0660.*
- (5) *Contract Requirements. Contracting Agencies shall conform their CM/GC contracting practices to the following requirements:*
  - (a) *Nature of the Initial CM/GC Services Contract Document. A solicitation for CM/GC Services is a Procurement for a Public Improvement, since the scope of the Procurement includes not only pre-construction Personal Services to be performed by the CM/GC, but also construction Work that is expected to result in a completed Public Improvement. In the traditional CM/GC Services contracting approach, the text of the resulting CM/GC Services Contract will include comprehensive contract provisions that will not only fully govern the relationship between the Contracting Agency and the CM/GC for the pre-construction Personal Services, but will also include the general contract provisions that will control the CM/GC's providing of the construction Work necessary to complete the project (with any remaining necessary construction-related contract provisions being added through Early Work amendments to the Contract, the GMP amendment to the Contract or, if necessary, a conventional amendment to the Contract). The traditional CM/GC Services contracting approach, however, also contemplates that the Contracting Agency will only authorize the CM/GC to perform the pre-construction Personal Services when the Contract is first executed unless construction Work is specifically included in the initial CM/GC Contract. Under this approach, the construction phase or phases of the CM/GC Services project are not yet authorized and the Contract only becomes a Public Improvement Contract once the parties amend the Contract, through an Early Work or a GMP amendment, to authorize the construction of a portion of the project or the entire project. See also OAR 839-025-0020, regarding the Bureau of Labor and Industries' determination of when a Contract for CM/GC Services becomes a "public works" Contract for purposes of paying prevailing wage rates for construction Work under the CM/GC Contract.*

- (b) *Setting the GMP, Fixed Contract Price or Other Maximum Contract Price. The GMP, fixed Contract Price or other maximum Contract Price shall be set at an identified time consistent with industry practice and project conditions and after supporting information reasonably considered necessary to its use has been developed, which will normally take place by the end of the design development phase of the project. The supporting information for the GMP must define with particularity both what Personal Services and construction Work are included and excluded from the GMP, fixed Contract Price or other maximum Contract Price. A set of project drawings and Specifications shall be produced establishing the scope of construction Work contemplated by the GMP, fixed Contract Price or other maximum Contract Price.*
- (c) *Adjustments to the GMP, Fixed Contract Price or Other Maximum Contract Price. The Contract shall clearly identify the standards or factors under which changes or additional construction Work will be considered outside of the Work scope that warrants an increase in the GMP, fixed Contract Price or other maximum Contract Price, as well as criteria for decreasing the GMP, fixed Contract Price or other maximum Contract Price. The GMP, fixed Contract Price or other maximum Contract Price shall not be increased without a concomitant increase to the scope of the Work defined at the establishment of the GMP, fixed Contract Price or other maximum Contract Price or most recent amendment to the GMP, fixed Contract Price or other maximum Contract Price. An increase to the scope of the Work may take the form of conventional additions to the project scope, as well as corrections to the Contract terms and conditions, additions to insurance coverage required by the Contracting Agency and other changes to the Work.*
- (d) *Cost Savings. The Contract shall clearly identify the disposition of any Cost Savings resulting from completion of the Work below the GMP, fixed Contract Price or other maximum Contract Price; that is, under what circumstances, if any, the CM/GC might share in those Cost Savings, or whether the Cost Savings accrue only to the Contracting Agency's benefit. Unless there is a clearly articulated reason for sharing the Cost Savings set forth in the Contract, the Cost Savings must accrue to the Contracting Agency.*
- (e) *Cost Reimbursement. The Contract shall clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, fixed Contract Price or other maximum Contract Price, including any category of GC Work costs, and may also incorporate a mutually-agreeable cost-reimbursement standard.*
- (f) *Audit. Cost reimbursements shall be made subject to final audit adjustment, and the Contract shall establish an audit process to ensure that Contract costs are allowable, properly allocated and reasonable.*
- (g) *Fee. Compensation for the CM/GC's Personal Services and construction Work, where the Contract uses a GMP, shall include a fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee shall be expressly defined in the Contract terms and conditions at the time the Contracting Agency selects the CM/GC. The fee, which may be expressed as either a fixed dollar amount or as a proposed percentage of all reimbursable costs, shall be identified during and become an element of the selection process. It shall subsequently be expressed as a fixed amount for particular construction Work authorized to be performed, when Early Work is added to the Contract through an amendment and when the GMP is established. The CM/GC fee does not include any fee paid to the CM/GC for performing pre-construction services during a separate pre-construction phase.*

- (h) *Incentives. The Contract shall clearly identify any economic incentives, the specific criteria that apply and their relationship to other financial elements of the Contract (including the GMP, fixed Contract Price or other maximum Contract Price).*
- (i) *Controlled Insurance Programs. For projects where an owner-controlled or contractor-controlled insurance program is permitted under ORS 737.602, the Contract shall clearly identify whether an owner-controlled or contractor-controlled insurance program is anticipated or allowable. If so, the Contract shall clearly identify (1) anticipated cost savings from reduced premiums, claims reductions and other factors, (2) the allocation of cost savings, and (3) safety responsibilities, incentives or both safety responsibilities and incentives.*
- (j) *Early Work. The RFP shall clearly identify, whenever feasible, the circumstances under which any Early Work may be authorized and undertaken for compensation prior to establishing the GMP, fixed Contract Price or other maximum Contract Price.*
- (k) *Subcontractor Selection. Subcontracts under the Contract are not Public Contracts within the meaning of the Code. However, the Contract must include provisions that clearly meet the requirements of ORS 279C.337(3) and other Contracting Agency requirements. Within the scope of 279C.337(3), the CM/GC's subcontractor selection process must meet the following parameters:*
  - (A) *Absent a written justification prepared by the CM/GC and approved by the Contracting Agency as more particularly provided for in this section, the CM/GC's Subcontractor selection process must be "competitive", meaning that the process should include publicly-advertised subcontractor solicitations and be based on a low-bid competitive method, a low-quote competitive method for contracts in a specified dollar range agreeable to the Contracting Agency, or a method whereby both price and qualifications of the subcontractors are evaluated in a competitive environment, consistent with the RFP and Contract requirements;*
  - (B) *When the Subcontractor selection process for a particular Work package will not be "competitive" as provided for in this section, the process must meet the following requirements:*
    - (i) *The CM/GC must prepare and submit a written justification to the Contracting Agency, explaining the project circumstances that support a non-competitive Subcontractor selection process for a particular Work package, including, but not limited to, Emergency circumstances, the CM/GC's need to utilize a key Subcontractor member of the CM/GC's project team consistent with the CM/GC's project Proposal, the need to meet other specified Contract requirements, the continuation or expansion of an existing Subcontractor agreement that was awarded through a "competitive process" along with facts supporting the continuation or expansion of the Subcontractor agreement, or a "sole source" justification;*
    - (ii) *For a "sole source" selection of a subcontractor to proceed, the Contracting Agency must evaluate the written justification provided by the CM/GC and must find that critical project efficiencies require utilization of labor, services or materials from one subcontractor; that technical compatibility issues on the project require labor, services or materials from one subcontractor; that particular labor, services or materials are needed as part of an experimental or pilot project or as part of an experimental or pilot aspect of the project; or that other project circumstances exist to support the conclusion that the labor, services or materials are available from only one subcontractor;*

- (iii) *The CM/GC must provide an independent cost estimate for the Work package that will be subject to the non-competitive process, if required by the Contracting Agency;*
  - (iv) *The CM/GC must fully respond to any questions or comments submitted to the CM/GC by the Contracting Agency; and*
  - (v) *The Contracting Agency must approve the CM/GC's use of the non-competitive Subcontractor selection process prior to the CM/GC's pursuit of the non-competitive process.*
- (C) *A competitive selection process may be preceded by a publicly advertised subcontractor pre-qualification process, with only those subcontractors meeting the pre-qualification requirements being invited to participate in the later competitive process through which the CM/GC will select the subcontractor to perform the construction Work described in the selection process;*
- (D) *If the CM/GC or an Affiliate or subsidiary of the CM/GC will be included in the subcontractor selection process to perform particular construction Work on the project, the CM/GC must disclose that fact in the selection process documents and announcements. The Contract must also identify the conditions, processes and procedures the CM/GC will utilize in that competitive process in order to make the process impartial, competitive and fair, including but not limited to objective, independent review and opening of bids or proposals for the elements of Work involved, by a representative of the Contracting Agency or another independent third party.*
- (l) *Subcontractor Approvals and Protests. The Contract shall clearly establish whether the Contracting Agency must approve subcontract awards, and to what extent, if any, the Contracting Agency will resolve or be involved in the resolution of protests of the CM/GC's selection of subcontractors and suppliers. The procedures and reporting mechanisms related to the resolution of sub-contractor and supplier protests shall be established in the Contract with certainty, including the CM/GC's roles and responsibilities in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the Contracting Agency must retain the right to monitor the subcontracting process in order to protect the Contracting Agency's interests and to confirm the CM/GC's compliance with the Contract and with applicable statutes, administrative rules and other legal requirements.*
- (m) *CM/GC Self-Performance or Performance by CM/GC Affiliates or Subsidiaries Without Competition. Consistent with the requirements of ORS 279C.337(3)(c), the Contract must establish the conditions under which the CM/GC or an Affiliate or subsidiary of the CM/GC may perform elements of the construction Work without competition from subcontractors, including, for example, job-site GC Work. Other than for GC Work, in order for the CM/GC or an Affiliate or subsidiary of the CM/GC to perform elements of the construction Work without competition from subcontractors, the CM/GC must provide, or must have included in the CM/GC's RFP Proposal to perform CM/GC Services for the project, a detailed proposal for performance of the Work by the CM/GC or an Affiliate or subsidiary of the CM/GC. If required by the Contracting Agency, the CM/GC's proposal to perform the construction Work must be supported by at least one independent cost estimate prior to the Work being included in the Contract.*
- (n) *Unsuccessful Subcontractor Briefing. ORS 279C.337(3)(e) is designed to allow a subcontractor who was not selected by the CM/GC to perform a particular element of the construction Work to obtain specific information from the CM/GC, and meet with the CM/GC to discuss the subcontractor qualification and selection process involved and the CM/GC's subcontractor selection decisions, in order to better understand*

*why the subcontractor was not successful in being selected to perform the particular element of the Work and to improve the subcontractor's substantive qualifications or the subcontractor's methods in competing for elements of the Work for the particular project involved, or for future projects. The briefing meetings may be held with individual subcontractors or, if the subcontractors agree, in groups of subcontractors, with those groups established by bid package or other designation agreed to by the contracting agency and the CM/GC. Nevertheless, the CM/GC is not obligated to provide this briefing opportunity unless the CM/GC receives a written request from a subcontractor to discuss the subcontractor qualification and selection process involved. Unless the Contracting Agency and the CM/GC agree on a different schedule, the CM/GC Contract should include provisions:*

- (A) Allowing a subcontractor 60 days from the CM/GC's notice of award of a subcontract for a particular Work package to request, in writing, a post-selection meeting with the CM/GC under this section; and*
  - (B) Requiring the CM/GC to set a meeting with the subcontractor under this section within 45 days of the subcontractor's written request.*
- (o) Performance and Payment Bonds. Provided no construction Work is included with the pre-construction services to be performed under the initial form of the CM/GC Contract, no performance bond or payment bond is required to be provided by the CM/GC at the time of Contract signing, consistent with ORS 279C.380. Once construction Work is included in the Contract and authorized by the Contracting Agency to be performed by the CM/GC, however, the CM/GC must provide a performance bond and payment bond each in the full amount of any Early Work to be performed by the CM/GC, or the full amount of the GMP, fixed Contract Price or other maximum Contract Price, as applicable. Furthermore, in the event additional Early Work is added to the CM/GC Contract after the initial Early Work or in the event an amendment to the CM/GC Contract is made so that the GMP, fixed Contract Price or other maximum Contract Price must be increased, the performance bond and the payment bond must each be increased in an amount equal to the additional Early Work or the increased GMP, fixed Contract Price or other maximum Contract Price.*
- (p) Independent Review of CM/GC Performance; Conflicts of Interest. If a Contracting Agency requires independent review, monitoring, inspection or other oversight of a CM/GC's performance of pre-construction Personal Services, construction Work or both pre-construction Personal Services and construction Work, the Contracting Agency must obtain those independent review services from a Contractor independent of the CM/GC, the CM/GC's Affiliates and the CM/GC's Subcontractors, pursuant to the requirements of ORS 279C.307. However, ORS 279C.307 does not prohibit the following:*
- (A) The CM/GC's performance of both pre-construction Personal Services and construction Work that are included within the definition of CM/GC Services, consistent with ORS 279C.307(2); or*
  - (B) The CM/GC's performance of internal quality control services, quality assurance services or other internal peer review of CM/GC work product that is intended to confirm the CM/GC's performance of the CM/GC Contract according to its terms.*
- (q) Socio-Economic Programs. The Contract shall clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the*

*respective responsibilities of the CM/GC and Contracting Agency. (DOJ 2-2015, f. & cert. ef. 2-3-15)*

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.335, ORS 279C.337 & ORS 279C.380(2)

## **CONTRACT PROVISIONS**

### **5-0800 Required Contract Clauses**

EWEB shall include in all formal Solicitations for Public Improvement Contracts all of the ORS Chapter 279C required Contract clauses, as set forth in the checklist contained in Rule 5-0200(1)(c) regarding Solicitation Documents. The following series of rules provide further guidance regarding particular Public Contract provisions.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.505 to ORS 279C.545 & ORS 279C.800 to 279C.870

### **5-0810 Waiver of Delay Damages against Public Policy**

Any clause in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from EWEB's unreasonable delay in performing the Contract is void and unenforceable, as against public policy. 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.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.315

### **5-0815 BOLI Public Works Bond**

Pursuant to ORS 279C.830(3), the specifications for every Public Works Contract shall contain a provision stating that the Contractor and every subcontractor must have a Public Works bond filed with the Construction Contractors Board before starting Work on the project, unless otherwise exempt. This bond is in addition to the performance bond and payment bond requirements. See BOLI rule, OAR 839-025-0015.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.830 and generally ORS 279C.800 to 279C.870

### **5-0820 Retainage**

- (1) Withholding of Retainage. Except to the extent EWEB's enabling laws require otherwise, EWEB shall not retain an amount in excess of five percent of the Contract Price for Work completed. If the Contractor has performed at least 50 percent of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of written application containing the surety's written approval, EWEB may, in its discretion, reduce or eliminate retainage on any remaining progress payments. EWEB shall respond in writing to all such applications within a reasonable time. When the Contract Work is 97-1/2 percent completed, EWEB may, at its discretion and without application by the Contractor, reduce the retained amount to 100 percent of the value of the remaining unperformed Contract

Work. EWEB may at any time reinstate retainage. Retainage shall be included in the final payment of the Contract Price.

- (2) Deposit in interest-bearing accounts. Upon request of the Contractor, EWEB shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of EWEB. Earnings on such account shall accrue to the Contractor.
- (3) Alternatives to cash retainage. In lieu of cash retainage to be held by EWEB, the Contractor may substitute one of the following:
  - (a) Deposit of securities:
    - (A) The Contractor may deposit bonds or securities with EWEB or in any bank or trust company to be held for the benefit of EWEB. In such event, EWEB shall reduce the retainage by an amount equal to the value of the bonds and securities, and reimburse the excess to the Contractor.
    - (B) Bonds and securities deposited or acquired in lieu of retainage shall be of a character approved by the Oregon Department of Administrative Services, which may include, without limitation:
      - (i) Bills, certificates, notes or bonds of the United States.
      - (ii) Other obligations of the United States or its Contracting Agencies.
      - (iii) Obligations of any corporation wholly owned by the Federal Government.
      - (iv) Indebtedness of the Federal National Mortgage Association.
    - (C) Upon EWEB's determination that all requirements for the protection of EWEB'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. EWEB, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to EWEB 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.
- (4) Recovery of costs. EWEB may recover from the Contractor all costs incurred in the proper handling of cash retainage and securities, by reduction of the final payment.
- (5) Additional Retainage When Certified Payroll Statements Not Filed.
  - (a) Pursuant to ORS 279C.845(7), if a contractor is required to file certified statements under this section, EWEB shall retain 25 percent of any amount earned by the contractor on the public works until the contractor has filed with EWEB certified statements as required by ORS 279C.845. EWEB shall pay the contractor the amount retained under this subsection within 14 days after the contractor files the certified statements as required by ORS 279C.845, regardless of whether a subcontractor has failed to file certified statements as required by ORS 279C.845. EWEB is not required to verify the truth of the contents of certified statements filed by the contractor under this section.
  - (b) Pursuant to ORS 279C.845(8), the contractor shall retain 25 percent of any amount earned by a first-tier subcontractor on a public works until the subcontractor has filed

with EWEB certified statements as required by ORS 279C.845. The contractor shall verify that the first-tier subcontractor has filed the certified statements before the contractor may pay the subcontractor any amount retained under this subsection. The contractor shall pay the first-tier subcontractor the amount retained under this subsection within 14 days after the subcontractor files the certified statements as required by ORS 279C.845. Neither EWEB nor the contractor is required to verify the truth of the contents of certified statements filed by a first-tier subcontractor under ORS 279C.845.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.560, ORS 279C.570, 279C.845, ORS 701.420

### **5-0830 Contractor Progress Payments**

- (1) Request for progress payments. Each month the Contractor shall submit to EWEB its written request for a progress payment based upon an estimated percentage of Contract completion. At EWEB's discretion, this request may also include the value of material to be incorporated in the completed Work that has been delivered to the premises and appropriately stored. The sum of these estimates is referred to as the "value of completed Work." With these estimates as a base, EWEB will make a progress payment to the Contractor, which shall be equal to: (i) the value of completed Work; (ii) less those amounts that have been previously paid; (iii) less other amounts that may be deductible or owing and due to EWEB for any cause; and (iv) less the appropriate amount of retainage.
- (2) Progress payments do not mean acceptance of Work. Progress payments shall not be construed as an acceptance or approval of any part of the Work, and shall not relieve the Contractor of responsibility for defective workmanship or material.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.570

### **5-0840 Interest**

- (1) Prompt payment policy. EWEB shall pay promptly all payments due and owing to the Contractor on Contracts for Public Improvements.
- (2) Interest on progress payments. Late payment interest shall begin to accrue on payments due and owing on the earlier of 30 Days after receipt of invoice or 15 Days after EWEB approval of payment (the "Progress Payment Due Date"). The interest rate shall equal three times the discount rate on 90-day commercial paper in effect on the Progress Payment Due Date at the Federal Reserve Bank in the Federal Reserve district that includes Oregon, up to a maximum rate of 30 percent. If the contract price exceeds \$500,000, the contracting agency shall place amounts deducted as retainage into an interest-bearing escrow account. Interest on the retainage amount accrues from the date the payment request is approved until the date the retainage is paid to the contractor to which it is due.
- (3) Interest on final payment. Final payment on the Contract Price, including retainage, shall be due and owing no later than 30 Days after Contract completion and acceptance of the Work. Late-payment interest on such final payment shall thereafter accrue at the rate of one and one-half percent per month until paid.

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

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.570

### **5-0850 Final Inspection**

- (1) Notification of Completion; inspection. The Contractor shall notify EWEB in writing when the Contractor considers the Contract Work completed. Within 15 Days of receiving Contractor's notice, EWEB 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 EWEB finds that all Work required under the Contract has been completed satisfactorily, it shall acknowledge acceptance of the Work in writing.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.570(8)

### **5-0860 Public Works Contracts**

- (1) Generally. ORS 279C.800 to 279C.870 regulates Public Works Contracts and requirements for payment of prevailing wage rates. Also see administrative rules of the Bureau of Labor and Industries at OAR Chapter 839, division 16. A public agency may not divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.870 to 279C.870.
- (2) Required Contract Conditions. As detailed in ORS 279C.800 to 279C.870 and these EWEB Rules, every Public Works contract must contain, among other requirements set forth in ORS chapter 279C and these EWEB Rules, Division 5, the following provisions:
  - (a) EWEB 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.800 to 279C.870, including 279C.830(1).
  - (f) Requirement for payment of fee to BOLI at the time EWEB enters the public works contract, as set forth in ORS 279C.825(1) and administrative rule of the BOLI commissioner. Effective January 1, 2008, the fee shall be paid by EWEB.
- (3) Requirements for Specifications. The Specifications for every Public Works Contract,

consisting of the procurement package (such as the Project Manual, Bid or Proposal Booklets, Request for Quotes or similar procurement Specifications), must contain the following provisions:

- (a) The prevailing rate of wage, as required by ORS 279C.830(1), physically contained within or attached to hard copies of procurement Specifications, or by a downloadable direct link to the specific wage rates that apply to the project (either on the EWEB web site or the BOLI web site) when procurement Specifications are also made available in electronic format.
  - (b) If applicable, the federal prevailing rate of wage and information concerning whether the state or federal rate is higher in each trade or occupation in each locality, as determined by BOLI in a separate publication. See BOLI rules, OAR 839-025-0020 and 0035.
  - (c) Reference to payment of fee to BOLI, as required by ORS 279C.830(2).
- (4) EWEB or another interested person may request that the Commissioner of the BOLI to:
- (a) make a determination about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840.
  - (b) The requester shall provide the commissioner with information necessary to enable the commissioner to make the determination.
  - (c) The commissioner shall make the determination within 60 days after receiving the request or 60 days after the requester has provided the commissioner with the information necessary to enable the commissioner to make the determination, whichever is later. The commissioner may take additional time to make the determination if the commissioner and the requester mutually agree that the commissioner may do so.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.800 to ORS 279C.870.

#### **5-0870 Specifications; Brand Name Products**

- (1) Generally. EWEB's Solicitation Documents shall not expressly or implicitly require any product by any 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). See exemptions in Division 6.
- (2) Equivalent. EWEB may identify products by brand names so long as the following language: "approved equal"; "or equal"; "approved equivalent" or "equivalent," or similar language is included in the Solicitation Document. EWEB shall determine, in its sole discretion, whether an Offeror's alternate product is "equal" or "equivalent."

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.345

#### **5-0880 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 EWEB at reasonable times and places, whether or not litigation has been filed as to such claims.

- (2) Inspection and Audit. EWEB may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the Records of any Person that has submitted cost or pricing data according to the terms of a Contract to the extent that the Records relate to such cost or pricing data. If the Person must provide cost or pricing data under a Contract, the Person shall maintain such Records that relate to the cost or pricing data for 3 years from the date of final payment under the Contract, unless a shorter period is otherwise authorized in Writing.
- (3) Records Inspection; Contract Audit. EWEB, 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 3 years from the date of final payment under the Contract or subcontract, as applicable, or until the conclusion of any audit, controversy or litigation arising out of or related to the Contract, whichever date is later, unless a shorter period is otherwise authorized in Writing.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279A.030, ORS 279C.375, ORS 279C.380 & ORS 279C.440

#### **5-0890 EWEB Payment for Unpaid Labor or Supplies**

- (1) Contract incomplete. If the Contract is still in force, EWEB may, in accordance with ORS 279C.515(1), pay a valid claim to the Person that provided the labor or services, and charge the amount against payments due or to become due to the Contractor under the Contract. If EWEB 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 obligation with respect to any unpaid claim.
- (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. EWEB shall not make payments to subcontractors or suppliers for Work for which it has already paid.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.515

#### **5-0900 Contract Suspension; Termination Procedures**

- (1) Suspension of Work. In the event an EWEB contract is not terminated, but EWEB suspends performance of Work for any reason considered by EWEB to be in the public interest other than a labor dispute or any third-party judicial proceeding relating to the work filed in regards to 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) Contractor Violations of Laws, Regulations or the Contract The contractor is not entitled to an extension or compensation under this Rule where the suspension of the work or termination of the contract occurs as a result of the contractor's violation of federal, state or local statutes, ordinances, rules or regulations in existence at the time the contract was executed or as a result of violations of the terms of the contract.
- (3) 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) EWEB 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), EWEB shall pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. EWEB 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.
- (4) Termination for Public interest. EWEB 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 EWEB unilaterally terminates the Contract for any reason considered by EWEB to be in the public interest.
- (5) 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.
- (6) Remedies cumulative. EWEB 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.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279C.650, ORS 279C.326, ORS 279C.655, ORS 279C.660, ORS 279C.665 & ORS 279C.670

### **5-0910 Change Orders and Contract Amendments**

- (1) Definitions applicable to EWEB Public Contracting Rules Division 5 are set forth at EWEB Public Contracting Rules, Division 1.
- (2) Changes Provisions. Change Orders are anticipated in construction and, accordingly, EWEB shall include changes provisions in all Public Improvement Contracts that detail the scope of the changes clause, provide pricing mechanisms, authorize it to issue Change Orders and provide a procedure for addressing contractor claims for additional time or compensation. When Change Orders are 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 EWEB.

- (3) Change Order Authority. EWEB may establish internal limitations and delegations for Change Order authority, including dollar limitations. Dollar limitations on Change Orders are not set by these Rules, but Change Orders are limited by the above definition to changes in the work, within the general scope of the Contract, ordered by EWEB under the changes provisions of the Public Improvement Contract.
- (4) Contract Amendments. Amendments to a Public Improvement Contract may be made only within the general scope of the original Procurement, when the field of competition and contractor selection would not likely have been affected by the contract modification, and the Amendment is made consistent with current legal requirements. 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. Contracting Agencies shall determine whether an Amendment:
  - (a) Affects only the legal or commercial terms and conditions of the Public Contract, in which case the Amendment is not considered to be a new procurement and does not require an exemption from competitive bidding, or
  - (b) Adds work beyond the general scope of the current Public Contract and its changes provisions (such as a cardinal change in the work), in which case the Amendment is considered to be a new procurement and may not be entered into unless an exemption from competitive bidding is first obtained.

Stat. Auth.: ORS 279A.065; 279A.070

Stats. Implemented: ORS 279A.065 & ORS 279C.400(1)