

# LAKE OSWEGO PUBLIC CONTRACT RULES 2005

## Section 103

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### **103-0100 Applications**

(1) These Section 103 rules apply to Public Improvement Contracts as well as Public Contracts for ordinary construction services that are not Public Improvements. Rules that apply specifically to Public Improvement Contracts are so identified. Notwithstanding the foregoing, pursuant to ORS 279C.320(1), this Section 103 does not apply to procurement of Contracts for:

- (a) Minor alteration, ordinary repair or maintenance of Public Improvements; or
- (b) Any other construction contract that is not defined as a public improvement under ORS 279A.010;
- (c) Except for emergency contracts that are regulated under ORS 279C.335.

(2) These Section 103 rules address matters covered in ORS Chapter 279C.

(3) These Section 103 rules become effective on March 1, 2005, and apply to the Contracts described in section (1) above first advertised, but if not advertised then entered into, on or after March 1, 2005.

### **103-0110 Policies**

In addition to the general Code policies set forth in ORS 279A.015, the ORS 279C.300 policy on competition and the ORS 279C.305 policy on least-cost for Public Improvements apply to these Section 103 rules.

### **103-0120 Definitions**

- (1) **“Conduct Disqualification”** means a Disqualification pursuant to ORS 279C.440.
- (2) **“Disqualification”** means the preclusion of a Person from contracting with the PCO for a period of time in accordance with Section 103-0370. Disqualification may be a Conduct Disqualification or DBE Disqualification.
- (3) **“Foreign Contractor”** means a Contractor that is not domiciled in or registered to do business in the State of Oregon. See Section 103-0480.
- (4) **“Notice”** means any of the alternative forms of public announcement of Procurements, as described in OAR 137-049-0210.

### **103-0130 Competitive Bidding Requirement**

The PCO shall solicit Bids for Public Improvement Contracts by Invitation to Bid (“ITB”), except as otherwise exempted, allowed or required pursuant to ORS 279C.335 on Competitive Bidding exceptions

and exemptions, 279A.030 on federal law overrides ORS 279A.100 on affirmative action. Also see Sections 103-0600 to 103-0690 regarding the use of Alternative Contracting Methods and the exemption process.

### **103-0140      Contracts for Construction Other than Public Improvements**

(1) Procurement under ORS Chapter 279B. Pursuant to ORS 279C.320, Public Contracts for construction services that are not Public Improvement Contracts, other than Emergency Contracts regulated under ORS 279C.335(5) and Section 103-0150, may be procured and amended as general trade services under the provisions of ORS Chapter 279B and Section 101 and 102 rules, rather than under the provisions or ORS Chapter 279C and these Section 103 rules.

(2) Application of ORS Chapter 279C. Non-procurement provisions of ORS Chapter 279C and these Section 103 rules may still be applicable to the resulting Contracts. See, for example, particular statutes on Disqualification (ORS 279C.440, 445 and 450); Legal Actions (ORS 279C.460 and 465); Required Contract Conditions (ORS 279C.505, 515, 520 and 530); Hours of Labor (ORS 279C.540 and 545); Retainage (ORS 279C.550, 560 and 565); Subcontracts (ORS 279C.580); Action on Payment Bonds (ORS 279C.600, 605, 610, 615, 620 and 625); Termination (ORS 279C.650, 660 and 670); and all the Prevailing Wage Rates requirements (ORS 279C.800 through 870) for Public Works Contracts.

### **103-0150      Emergency Contracts; Bidding and Bonding Exemptions**

(1) Emergency Declaration. Pursuant to ORS 279C.335(5) and this rule, the PCO may declare that Emergency circumstances exist that require prompt execution of a Public Contract for Emergency construction or repair Work. The declaration shall be made at an administrative level consistent with the City's internal policies, by a written declaration that describes the circumstances creating the Emergency and the anticipated harm from failure to enter into an Emergency Contract. The Emergency declaration shall exempt the Public Contract from the competitive bidding requirements of ORS 279C.335(1) and shall thereafter be kept on file as a public record.

(2) Competitive for Contracts. The PCO shall ensure competition for an Emergency Contract as reasonable and appropriate under the Emergency circumstances, and may include written requests for Offers, oral requests for Offers or direct appointment without competition in cases of extreme necessity, in whatever Solicitation time periods the PCO considers reasonable in responding to the Emergency.

(3) Contract Award. Any Contract Awarded under this rule must be Awarded within sixty (60) days after declaration of the Emergency, unless an extension is granted under ORS 279C.335(5).

(4) Contract Scope. Although no dollar limitation applies to Emergency Contracts, the scope of the Contract must be limited to Work that is necessary and appropriate to remedy the conditions creating the Emergency as described in the declaration.

(5) Contract Modification. Emergency Contracts may be modified by change order or amendment to address the conditions described in the original declaration or an amended declaration that further describes additional work necessary and appropriate for related Emergency circumstances.

(6) Excusing Bonds. Pursuant to ORS 279C.380(4) and this rule, the Emergency declaration may also state that the City waives the requirement of furnishing a performance bond and payment bond for Emergency Contract. After making such an Emergency declaration the bonding requirements are excused for the procurement.

### **103-0160 Intermediate Procurements; Competitive Quotes and Amendments**

(1) General. Public Improvement Contracts estimated by the PCO not to exceed \$100,000, or not to exceed \$50,000 in the case of Contracts for highways, bridges and other transportation projects, may be Awarded in accordance with intermediate level procurement procedures for competitive quotes established by this rule.

(2) Selection Criteria. The selection criteria may be limited to price or some combination of price, experience, specific expertise, availability, project understanding, contractor capacity, responsibility and similar factors.

(3) Request for Quotes. The PCO shall utilize written requests for quotes whenever reasonably practicable. 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. When requesting quotations orally, prior to requesting the price quote the PCO shall state any additional selection criteria and, if the criteria are not of equal value, their relative value. For Public Works Contracts, oral quotations may be utilized only in the event that Written copies of the prevailing wage rates are not required by the Bureau of Labor and Industries.

(4) Number of Quotes; Record Required. The PCO shall seek at least three competitive quotes, and keep a written record of the sources and amounts of the quotes received. If three quotes are not reasonably available the PCO shall make a written record of the effort made to obtain those quotes.

(5) Award. If Awarded, the Awarding Authority shall Award the Contract to the prospective contractor whose quote will best serve the interests of the City, taking into account the announced selection criteria. If Award is not made to the Offeror offering the lowest price, the PCO 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 the Award by PCO issuance of a Change to the Work or Amendment and approval of the Change Order pursuant to Section 103-0910, within the following limitations:

(a) Up to an aggregate Contract Price increase of twenty-five (25) percent over the original Contract amount when the PCO determines that a price increase is warranted for additional reasonably related Work, and;

(b) Up to an aggregate Contract Price increase of fifty (50) percent over the original Contract amount, when the PCO determines that a price increase is warranted for additional reasonably related Work and:

(i) the City Manager of the City or Executive Director for LORA, as appropriate, if the PCO was the Awarding Authority; or

(ii) the City Council, if the City Council was the Awarding Authority, approves the increase.

(7) Amendments. Amendments of intermediate level Public Improvement Contracts that exceed the thresholds stated in section (1) are specifically authorized by the Code, when made in accordance with this rule. Accordingly, such amendments are not considered new procurements and do not require an exemption from competitive bidding.

## **FORMAL PROCUREMENT RULES**

### **103-0200 Solicitation Documents; Required Provisions; Assignment or Transfer**

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

(a) General Information.

(A) Identification of the Public Improvement project, including the character of the Work, and applicable plans, Specifications and other Contract documents;

(B) Notice of any pre-Offer conference as follows:

(i) The time, date and location of any pre-Offer conference;

(ii) Whether attendance at the conference will be mandatory or voluntary;

and

(iii) That statements made by the PCO or the PCO's representatives, including City consultants, e.g., architect, engineer, at the conference are not binding upon the City unless confirmed by Written Addendum.

(C) The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be prequalified if prequalification is a requirement;

(D) The name and title of the 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 Section 103-0300 regarding facsimile Bids or Proposals and Section 103-0310 regarding electronic Procurement);

(F) The time, date and place of Opening;

(G) The time and date of Closing after which the PCO will not accept Offers, which time shall be not less than five (5) Days after the date of the last publication of the advertisement, and may in the discretion of the PCO, if permitted by ORS 279C.365(1)(d), permit the submission and receipt of bids by electronic means. Although a minimum of five (5) Days is prescribed, the PCO is encouraged to use at least a fourteen (14) Day Solicitation period when feasible. If the PCO is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, the PCO shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and Section 103-0360. For timing issues related to Addenda, see Section 103-0250;

(H) The office where the Specifications for the Work may be reviewed;

(I) A statement that each Bidder to an ITB must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120;

(J) If the Contract resulting from a Solicitation will be a Contract for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 276a), a statement that no Offer will be received or considered by the City unless the Offer contains a statement by the Offeror as a part of its Offer that "Contractor agrees to be bound by and will comply with the provisions of ORS 279C.840 or 40 U.S.C. 276a;"

(K) A statement that the City will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as specified in Section 103-0230;

(L) Whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;

(M) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See Section 103-0440(3));

(N) How the PCO will notify Offers of Addenda and how the PCO will make Addenda available (See Section 103-0250); and

(O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in Section 103-0360.

(b) Evaluation Process:

(A) A statement that the PCO may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, and may reject for good cause all Offers upon the PCO's finding that it is in the public 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 the PCO will use to determine the Responsible Bidder with the lowest Responsive Bid (where Award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of Competitive Proposals is authorized under ORS 279C.335 and Section 103-0620), along with the process the PCO will use to determine acceptability of the Work;

(i) If the Solicitation Document is an Invitation to Bid, the PCO shall set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future cost; but, to the extent possible, such evaluation factors shall be objective, reasonable estimates based upon information the PCO has available concerning future use;

(ii) If the Solicitation Document is a Request for Proposals, the PCO shall refer to the additional requirements of Section 103-0650; and

(c) Contract Provisions. The PCO shall include all Contract terms and conditions, including warranties, insurance and bonding requirements, that the PCO considers appropriate for the Public Improvement project. The PCO must also include all applicable Contract provisions required by Oregon law as follows:

(A) Prompt payment to all Persons supplying labor or material; contributions to Industrial Accident Fund; liens and withholding taxes (ORS 279.505(1));

(B) Demonstrate that an employee drug testing program is in place (ORS 279C.505(2));

(C) If the Contract calls for demolition Work described in ORS 279C.510(1), a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective;

(D) If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective (ORS 279C.510(2));

(E) Payment of claims by public officers (ORS 279C.515(1));

(F) Contractor and first-tier subcontractor liability for late payment on Public Improvement Contracts pursuant to ORS 279C.515(2), including the rate of interest;

(G) Person's right to file a complaint with the Construction Contractors Board for all Contracts related to a Public Improvement Contract (ORS 279C.515(3));

(H) Hours of labor in compliance with ORS 279C.520;

- (I) Environmental and natural resource regulations (ORS 279C.525);
- (J) Payment for medical care and attention to employees (ORS 279C.530(1));

(K) A Contract provision substantially as follows: “All employers, including Contractor, that employ subject Workers who Work under this Contract in the State of Oregon shall comply with ORS 656.017 and provide the required Workers’ Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements.” (ORS 279C.530(2));

- (L) Maximum hours, holidays and overtime (ORS 279C.540);
- (M) Time limitation on claims for overtime (ORS 279C.545);
- (N) Prevailing wage rates (ORS 279C.800 to 279C.870);
- (O) Fee paid to BOLI (ORS 279C.830);
- (P) Retainage (ORS 279C.550 to 279C.570);
- (Q) Prompt payment policy, progress payments, rate of interest (ORS 279C.570);
- (R) Contractor’s relations with subcontractors (ORS 279C.580);
- (S) Notice of claim (ORS 279C.605);

(T) Contractor’s certification of compliance with the Oregon tax laws in accordance with ORS 305.385; and

(U) Contractor’s certification that all subcontractors performing Work described in ORS 701.005(2) (i.e., construction Work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence Work under the Contract.

(2) Assignment or Transfer Restricted. Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, or transfer rights, nor delegate duties under the Contract, either in whole or in part, without the PCO’s prior Written consent. Unless otherwise agreed by the PCO in Writing, such consent shall not relieve the Contractor of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If the PCO consents in Writing to an assignment, sale, disposal or transfer of the Contractor’s rights or delegation of Contractor’s duties, the Contractor and its surety, if any, shall remain liable to the PCO for complete performance of the Contract as if no such assignment, sale, disposal, transfer, or delegation had occurred unless the PCO otherwise agrees in Writing.

## **103-0210 Notice and Advertising Requirements; Posting**

(1) Notice and Distribution Fee. The PCO shall furnish "Notice" as set forth below in subsections (a) through (c), to a number of Persons sufficient for the purpose of fostering and promoting competition. The Notice shall indicate where, when, how and for how long the Solicitation Document may be obtained and generally describe the Public Improvement project or Work. The Notice may contain any other appropriate information. The PCO may charge a fee or require a deposit for the Solicitation Document. The PCO may furnish Notice using any method determined to foster and promote competition, including:

(a) Mailing Notice of the availability of Solicitation Documents to Persons that have expressed an interest in the City's Procurements;

(b) Placing Notice on the City's Electronic Procurement System; or

(c) Placing Notice on the City's Internet Website.

(2) Advertising. Pursuant to ORS 279C.360 and this rule, the PCO shall advertise every Solicitation for competitive Bids or competitive Proposals for a Public Improvement Contract, unless the Board has exempted the Solicitation from the advertisement requirement as part of a competitive Bidding exemption under ORS 279C.335.

(a) Unless the PCO publishes by Electronic Advertisement as permitted under subsection 2(b), the PCO shall publish the advertisement for Offers at least once in at least one newspaper of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as the PCO may determine to be necessary or desirable to foster and promote competition.

(b) The PCO may publish by Electronic Advertisement if the Board determines Electronic Advertisement is likely to be cost effective and, by rule or order, authorizes Electronic Advertisement.

(c) In addition to the publication required under subsection 2(a) or 2(b), the PCO shall also publish an advertisement for Offers in at least one trade newspaper of general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000.

(d) All advertisements for Offers shall set forth:

(A) The Public Improvement project;

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

(C) The date that Persons must file applications for prequalifications under ORS 279C.340, if prequalification is a requirement, and the class or classes of Work for which Persons must be prequalified;

(D) The scheduled Closing, which shall not be less than five (5) Days after the date of the last publication of the advertisement;

(E) The name, title and address of the Person authorized to receive Offers;

(F) The scheduled Opening; and

(G) If applicable, that the Contract is for a Public Work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 276(a)).

### **103-0220 Prequalification of Offerors**

(1) Prequalification. Pursuant to ORS 279C.430 and this rule, two types of prequalifications are authorized:

(a) Mandatory Prequalification. The City may, by rule, resolution, ordinance or other law or regulation, or upon the discretion of the PCO, require mandatory prequalification of Offerors on forms prescribed by the City Manager or Executive Director. The PCO must indicate in the Solicitation Document if mandatory prequalification is required. Mandatory prequalification is when the PCO conditions a Person's submission of an Offer upon the Person's prequalification. The PCO shall not consider an Offer from a Person that is not prequalified if the PCO required prequalification.

(b) Permissive Prequalification. The PCO may prequalify a Person for the PCO's Solicitation list on forms prescribed by the City Manager or Executive Director, but in permissive prequalification the PCO shall not limit distribution of a Solicitation to that list.

(2) Prequalification Presumed. If an Offeror is currently prequalified by either the Oregon Department of Transportation or the Oregon Department of Administrative Services to perform Contracts, the Offeror shall be rebuttably presumed qualified to perform similar Work for the City.

(3) Standards for Prequalifications. A Person may prequalify by demonstrating to the PCO's satisfaction:

(a) That the Person's financial, material, equipment, facility and personnel resources and expertise, or ability to obtain such resources and expertise, indicate that the Person is capable of meeting all contractual responsibilities;

(b) The Person's record of performance;

(c) The Person's record of integrity;

(d) The Person is qualified to contract with the City.

(See Section 103-0390(2) regarding standards of responsibility.)

(4) Notice of Denial. If a Person fails to prequalify for a mandatory prequalification, the PCO 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.

**103-0230 Eligibility to Bid or Propose; Registration or License**

- (1) Construction Contracts. The PCO shall not consider a Person's Offer to do Work as a contractor, as defined in ORS 701.005(2), unless the Person has a current, valid certificate of registration issued by the Construction Contractors Board at the time the Offer is made.
- (2) Landscape Contracts. The PCO shall not consider a Person's Offer to do Work as a landscape contractor as defined in ORS 271.520(2), unless the Person has a current, valid landscape contractors license issued pursuant to ORS 671.560 by the State Landscape Contractors Board at the time the offer is made.
- (3) Noncomplying Entities. The PCO shall deem an Offer received from a Person that fails to comply with this rule nonresponsive and shall reject the Offer as stated in ORS 279C.365(1)(k), unless contrary to federal law or subject to different timing requirements set by federal funding agencies.

**103-0240 Pre-Offer Conferences**

- (1) Purpose. The PCO may hold pre-Offer conferences with prospective Offerors prior to Closing, to explain the Procurement requirements, obtain information or to conduct site inspections.
- (2) Required Attendance. The PCO 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 firm is present.
- (3) Scheduled Time. If the PCO holds a pre-Offer conference, it shall be held within a reasonable time after the Solicitation Document has been issued, but in no event less than seven (7) days prior to the Closing Date.
- (4) Statements Not Binding. Statements made by the PCO, the PCO's representatives, or City consultants, e.g., architect or engineer, at the pre-Offer conference do not change the Solicitation Document unless the PCO confirms such statements with a Written Addendum to the Solicitation Document.
- (5) PCO Announcement. The PCO must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with Section 103-0200(1)(a)(B).

**103-0250 Addenda to Solicitation Documents**

- (1) Issuance; Receipt. The PCO may change a Solicitation Document only by Written Addenda. An Offeror shall provide Written acknowledgement of receipt of all issued Addenda with its Offer, unless the PCO otherwise specifies in the Addenda or in the Solicitation Document.

(2) Notice and Distribution. The PCO shall notify prospective Offerors of Addenda consistent with the standards of Notice set forth in Section 103-0210(1). The Solicitation Document shall specify how the PCO will provide notice of Addenda and how the PCO will make the Addenda available (see Section 103-0200(1)(a)(N)). For example, "PCO will not mail notice of Addenda, but will publish notice of any Addenda on PCO's Website. Addenda may be downloaded off the City's Website. Offerors should frequently check the City's Website until closing, i.e., at least once weekly until the week of Closing and at least once daily the week of the Closing."

(3) Timelines; Extensions. The PCO shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offerors. The PCO may extend the Closing if the PCO determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by public interest, the PCO shall not issue Addenda less than forty-eight (48) hours before the Closing unless the Addendum also extends the Closing.

(4) Request for Change or Protest. Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in Section 103-0260, by the close of the City's next business day after issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under Section 103-0260, whichever day is later. The PCO shall consider only an Offeror's request for change or protest to the Addendum; the PCO shall not consider a request for change or protest to matters not added or modified by the Addendum, unless the Offeror submits the request for change or protest before the deadline for the receipt of request for change or protests as set forth in Section 103-0260(2) and (3).

### **103-0260 Request for Clarification or Change; Solicitation Protests**

(1) Clarification. Prior to the deadline for submitting a Written request for change or protest, an Offeror may request that the PCO clarify and provision of the Solicitation Document. The PCO's clarification to an Offeror, whether orally or in Writing, does not change the Solicitation Document and is not binding on the PCO unless the PCO amends the Solicitation Document by Addendum.

(2) Request for Change.

(a) Delivery. An Offeror may request in Writing a change to the Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver the Written request for change to the PCO not less than ten (10) Days prior to Closing;

(b) Content of Request for Change.

(A) An Offeror's Written request for change shall include a statement of the requested change(s) to the Contract terms and conditions, including any Specifications, together with the reason for the requested change.

(B) An Offeror shall mark its request for change as follows:

(i) "Contract Provision Request for Change;" and

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

(3) Protest.

(a) Delivery. An Offeror may protest Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest on those matters to the City Manager or Executive Director, as appropriate, not less than ten (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

(ii) A statement of the desired changes to the Contract terms and conditions, including any Specifications.

(B) An Offeror shall mark its protest as follows:

(i) "Contract Provision Protest;" and

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

(4) Response. The City Manager or Executive Director, as appropriate is not required to consider an Offeror's request for change or protest after the deadline established for submitting such request or protest. The City Manager or Executive Director, as appropriate shall provide notice to the applicable Person if the City Manager or Executive Director, as appropriate entirely rejects a protest. If the City Manager or Executive Director, as appropriate agrees with the Person's request or protest, in whole or in part, the City Manager or Executive Director, as appropriate shall either issue an Addendum reflecting its determination under Section 103-0260 or cancel the Solicitation under Section 103-0270.

(5) Extension of Closing. If the City Manager or Executive Director, as appropriate receives a Written request for change or protest from an Offeror in accordance with this rule, the PCO may extend Closing if the PCO determines an extension is necessary to consider the request or protest and issue an Addendum, if any to the Solicitation Document.

### **103-0270 Cancellation of Solicitation Document**

(1) Cancellation in the Public Interest. The PCO may cancel a Solicitation for good cause if the PCO finds that cancellation is in the public interest. The PCO's reasons for cancellation shall be made part of the Solicitation file.

(2) Notice of Cancellation. If the PCO cancels a Solicitation prior to Opening, the PCO shall provide Notice of Cancellation in accordance with Section 103-0210(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 resolicitation.

(3) Disposition of Offers.

(a) Prior to Offer Opening. If the PCO cancels a Solicitation prior to Offer Opening, the PCO shall return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, the PCO shall open the Offer to determine the source and then return it to the Offeror.

(b) After Offer Opening. If the PCO rejects all Offers, the PCO shall retain all such Offers as part of the PCO's Solicitation file.

### **103-0280 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 the Awarding Authority's acceptance for the period specified in Section 103-0410. The 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 Section 103-0650 on Requests for Proposals and Section 103-0290 on Bid or Proposal Security.

(2) Responsive Offer. The Awarding Authority may Award a Contract only to a Responsible Offeror with a Responsive Offer.

(3) Contingent Offers. Except to the extent that an Offeror is authorized to propose certain terms and conditions pursuant to Section 103-0650, an Offeror shall not make an Offer contingent upon the Awarding Authority'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 Section 103-0650, the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the PCO in Writing.

(5) Instructions. An Offeror shall submit and Sign its Offer in accordance with the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document.

(6) Forms. An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.

(7) Documents. An Offeror shall provide the PCO with all documents and descriptive literature required under the Solicitation Document.

(8) Facsimile or Electronic Submissions. If the PCO permits facsimile or electronic Offers in the Solicitation Document, the Offeror may submit facsimile or electronic Offers in accordance with the Solicitation Document. The PCO shall not consider facsimile or electronic Offers unless authorized by the Solicitation Document.

(9) Product Samples and Descriptive Literature. The PCO may require Product Samples or descriptive literature if it is necessary or desirable to evaluate the quality, features or characteristics of the offered items. The PCO 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 the PCO, whichever is applicable.

(b) The PCO is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.

(11) Receipt of Offers. The Offeror is responsible for ensuring that the PCO receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

### **103-0290 Bid and Proposal Security**

(1) Security Amount. If the PCO requires Bid or Proposal security, it shall be ten (10) percent of the Offeror's Bid or Proposal, consisting of the base Bid or Proposal together with all additive alternatives. The PCO shall not use Bid or Proposal security to discourage competition. The PCO shall clearly state any Bid or Proposal security requirements in its Solicitation Document. The Offeror shall forfeit Bid or Proposal security after Award if the Offeror fails to execute the Contract and promptly return it with any required Performance Bond and Payment Bond and, in the case of Proposal security, with any required proof of insurance. See ORS 279C.365(4) and ORS 279C.385.

(2) Requirements for Bid Security (Optional for Proposals). Unless the Board has otherwise exempted a Solicitation or class of Solicitations from Bid security pursuant to ORS 279C.390 (See Section 103-0461), the PCO shall require Bid security for its Solicitation of Bids for Public Improvements. The PCO may require Bid security even if it has exempted a class of Solicitations from Bid security. Proposal security may be required in RFPs when Award of a Public Improvement Contract may be made without negotiation following receipt of a Firm Offer as described in Section 103-0280(1)(b). See ORS 279C.400(5).

(3) Form of Bid or Proposal Security. The PCO may accept only the following forms of Bid or Proposal security:

- (a) A surety bond from a surety company authorized to do business in the State of Oregon;
  - (b) An irrevocable letter of credit issued by an insured institution as defined in ORS 706.008;
- or
- (c) A cashier's check or Offeror's certified check.

(4) Return of Security. The PCO shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been fully executed and all required proofs of insurance and bonds have been provided, or after all Offers have been rejected. The PCO 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.

### **103-0300 Facsimile Bids and Proposals**

(1) PCO Authorization. The PCO may authorize Offerors to submit facsimile Offers. If the PCO determines that Bid or Proposal security is or will be required, the PCO shall not authorize facsimile Offers unless the PCO has established a method for receipt of such security. Prior to authorizing the submission of facsimile Offers, the PCO shall determine that the equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time. In addition, the PCO shall establish administrative procedures and controls:

- (a) To receive, identify, record and safeguard facsimile Offers;
- (b) To ensure timely delivery of Offers to the location of Opening; and
- (c) To preserve the Offers as sealed.

(2) Provisions to be Included in Solicitation Document. In addition to all other requirements, if the PCO authorizes a facsimile Offer for Bids or Proposals, the PCO shall include in the Solicitation Document (other than in a request for quotes) the following:

(a) A provision substantially in the form of the following: “A ‘facsimile Offer,’ as used in this Solicitation Document, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by the PCO via a facsimile machine;”

(b) A provision substantially in the form of the following: “Offerors may submit facsimile Offers in response to this Solicitation Document. The entire response must arrive at the place and by the time specified in this Solicitation Document;”

(c) A provision that requires Offerors to Sign their facsimile Offers;

(d) A provision substantially in the form of the following: “The [Awarding Authority] reserves the right to Award the Contract solely on the basis of the facsimile Offer. However, upon the PCO’s request the apparent successful Offeror shall promptly submit its complete original Signed Offer;”

(e) The data and compatibility characteristics of the City’s receiving facsimile machine as follows:

(A) Telephone number; and

(B) Compatibility characteristics, e.g., make and number, receiving speed, communications protocol; and

(f) A provision that the City is not responsible for any failure attributable to the transmission or receipt of the 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 Offer to properly identify the Offer documents;

(F) Illegibility of Offer documents; and

(G) Security and confidentiality of data.

### **103-0310 Electronic Procurement**

(1) General. The PCO may utilize Electronic Advertisement of Public Improvement Contracts in accordance with ORS 279C.360(1), provided that advertisement of such Contracts with an estimated Contract Price in excess of \$125,000 must also be published in a trade newspaper of general statewide circulation, and my post notices of intent to Award electronically as provided by ORS 279C.410(7).

(2) Alternative Procedures. In the event the City desires to allow Electronic Offers for a Public Improvement Contract, it shall first promulgate supporting procedures substantially in conformance

with Section 102-0330 (Electronic Procurement under ORS Chapter 279B), taking into account ORS Chapter 279C requirements for written bids, opening bids publicly, bid security, first-tier subcontractor disclosure and inclusion of prevailing wage rates.

(3) Interpretation. Nothing in this rule shall be construed as prohibiting Contracting Agencies 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.

### **103-0320 Pre-Closing Modification or Withdrawal of Offers**

(1) Modifications. An Offeror may modify its Offer in Writing prior to the Closing. An Offeror shall prepare and submit any modification to its Offer to the PCO in accordance with Section 103-0280, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:

- (a) Bid (or Proposal) Modification; and
- (b) Solicitation Number (or Other Identification as specified in the Solicitation Document).

(2) Withdrawals.

(a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, Signed by an authorized representative of the Offeror, delivered to the location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by the PCO prior to Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in Person prior to the Closing, upon presentation of appropriate identification and satisfactory evidence of authority.

(b) The PCO may release an unopened Offer withdrawn under subsection 2(a) to the Offeror or its authorized representative, after voiding any date and time stamp mark.

(c) The Offeror shall mark the Written request to withdraw an Offer as follows:

- (A) Bid (or proposal) Withdrawal; and
- (B) Solicitation Number (or Other Identification as specified in the Solicitation Document).

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

### **103-0330 Receipt, Opening and Recording of Offers; Confidentiality of Offers**

(1) Receipt. The PCO shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. The PCO shall not open the Offer or modification upon receipt, but shall maintain it as confidential and secure until Opening. If the PCO inadvertently opens an Offer or a modification prior to the Opening, the PCO shall return the Offer or modification to its secure and confidential state until Opening. The PCO shall document the resealing for the Procurement file (e.g., “PCO inadvertently opened the Offer due to improper identification of the Offer”).

(2) Opening and Recording. The PCO shall publicly open Offers including any modifications made to the Offer pursuant to Section 103-0320. In the case of Invitations to Bid, to the extent practicable, the PCO shall read aloud the name of each Bidder, the Bid price(s), and such other information as the PCO considers appropriate. In the case of Requests for Proposals or voluminous Bids, if the Solicitation Document so provides, or if all Bidders at the Opening consent, the PCO need not read Offers aloud.

(3) Availability. After Opening, the PCO shall make Bids available for public inspection, but pursuant to ORS 279C.410 Proposals are not subject to disclosure until after notice of intent to award is issued. In any event Contracting Agencies may withhold from disclosure those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.501(2); ORS 646.461 to 646.475. To the extent the PCO determines such designation is not in accordance with applicable law, the PCO shall make those portions available for public inspection. The Offeror shall separate information designated as confidential from other nonconfidential information at the time of submitting its Offer. Prices, makes, 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.

### **103-0340 Late Bids, Late Withdrawals and Late Modifications**

Any Offer received after closing is late. An Offer’s request for withdrawal or modification of an Offer received after Closing is late. The Awarding Authority shall not consider late Offers, withdrawals or modifications except as permitted in Section 103-0350 or 103-0390.

### **103-0350 Mistakes**

(1) Generally. To protect the integrity of the competitive Procurement process and to assure fair treatment of Offerors, the PCO should carefully consider whether to permit waiver, correction or withdrawal of Offers for certain mistakes.

(2) PCO Treatment of Mistakes. The PCO shall not allow an Offeror to correct or withdraw an Offer for an error in judgment. If the PCO discovers certain mistakes in an Offer after Opening, but before Award of the Contract, the PCO may take the following action:

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

(A) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;

(B) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and

(C) Acknowledge receipt of an Addendum to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addendum and intended to be bound by its terms; or the Addendum involved did not affect price, quality or delivery.

(b) The PCO may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms the PCO'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) The PCO may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:

(A) The nature of the error:

(B) That the error is not a minor informality under this subsection or an error in judgment;

(C) That the error cannot be corrected or waived under subsection (b) of this section;

(D) That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;

(E) That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;

(F) That the Offeror will suffer substantial detriment if the PCO does not grant the Offeror permission to withdraw the Offer;

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

(H) That the Offeror promptly gave notice of the claimed error to the PCO.

(d) The criteria in subsection (2)(c) of this rule shall determine whether the PCO will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether the PCO will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid or Proposal security), or without liability to the PCO based on the difference between the amount of the Offeror's Offer and the amount of the Contract actually awarded by the Awarding Authority, whether by Award to the next lowest Responsive and Responsible Bidder or the best Responsive and Responsible Proposer, or by resort to a new solicitation.

(3) Rejection for Mistakes. The PCO shall reject any Offer in which a mistake is evident on the face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents submitted with the Offer.

(4) Identification of Mistakes after Award. The procedures and criteria set forth above are Offeror's only opportunity to correct mistakes or withdraw Offers because of a mistake. Following Award, an Offeror is bound by its Offer, and may withdraw its Offer or rescind a Contract entered into pursuant to this Section 103 only to the extent permitted by applicable law.

#### **103-0360 First-Tier Subcontractors; Disclosure and Substitution**

(1) Required Disclosure. Within two (2) working hours after the Bid Closing on an ITB for a Public Improvement having a Contract Price estimated by the PCO to exceed \$100,000, all Bidders shall submit to the PCO a disclosure form as described by ORS 279C.370(2), identifying any first-tier subcontractors (those Entities that would be contracting directly with the prime contractor) that will be furnishing labor or labor and materials on the Contract, if Awarded, whose subcontract value would be equal to or greater than:

- (a) Five (5) percent of the total Contract Price, but at least \$15,000; or
- (b) \$350,000, regardless of the percentage of the total Contract Price.

(2) Bid Closing, Disclosure Deadline and Bid Opening. For each ITB to which this rule applies, the PCO shall:

(a) Set the Bid Closing on a Tuesday, Wednesday or Thursday, and at a time between 2 p.m. and 5 p.m., except that these Bid Closing restrictions do not apply to an ITB for maintenance or construction of highways, bridges or other transportation facilities, and provided that the two (2) hour disclosure deadline described by this rule would not then fall on a legal holiday;

(b) Open Bids publicly immediately after the Bid Closing; and

(c) Consider for Contract Award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed by the PCO.

(3) Bidder Instructions and Disclosure Form. For the purposes of this rule, the PCO in the 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 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) Five (5) percent 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 subcontractor either in its Bid submission, or within two (2) 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. THE PCO MUST REJECT A BID IF THE BIDDER FAILS TO SUBMIT THE DISCLOSURE FORM WITH THIS INFORMATION BY THE STATED DEADLINE (see Section 103-0360).

(4) Submission. A Bidder shall submit the disclosure form required by this rule either in its Bid submission, or within two (2) Working hours after Bid Closing in the manner specified by the ITB.

(5) Responsiveness. Compliance with the disclosure and submittal requirements of ORS 279C.370 and this rule is a matter of Responsiveness. Bids that are submitted by Bid Closing, but for which the disclosure submittal has not been made by the specified deadline, are not Responsive and shall not be considered for Contract Award.

(6) City Role. The PCO shall obtain, and make available for public inspection, the disclosure forms required by ORS 279C.370 and this rule. The PCO shall also provide copies of disclosure forms to the Bureau of Labor and Industries as required by ORS 279C.835. The PCO is not required to determine the accuracy or completeness of the information provided on disclosure forms.

(7) Substitution. Substitution of affected first-tier subcontractors shall be made only in accordance with ORS 279C.585. The PCO shall accept Written submissions filed under that statute as public records. Aside from issues involving inadvertent clerical error under ORS 279C.585, the City does not have a statutory role or duty to review, approve or resolve disputes concerning such substitutions. See ORS 279C.590 regarding complaints to the Construction Contractors Board on improper substitution.



**103-0370 Disqualification of Persons**

(1) Authority. The PCO may disqualify a Person from consideration of Award of the City's Contracts after providing the Person with notice and a reasonable opportunity to be heard in accordance with sections (2) and (4) of this rule.

(a) Standards for Conduct Disqualification. As provided in ORS 279C.440, the PCO may disqualify a Person for:

(A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.

(B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the Person's responsibility as a contractor.

(C) Conviction under state or federal antitrust statutes.

(D) Violation of a contract provision that is regarded by the PCO 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.

(b) Standards for DBE Disqualification. As provided in ORS 200.065, 200.075 or 279A.110, the PCO may disqualify a Person's right to submit an Offer or to participate in a Contract (e.g., subcontractors) as follows:

(A) For a DBE Disqualification under ORS 200.065, the PCO may disqualify a Person upon finding that:

(i) The Person fraudulently obtained or retained or attempted to obtain or retain or aided another Person to fraudulently obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise; or

(ii) The Person knowingly made a false claim that any Person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit; or

(iii) The Person has been disqualified by another Contracting Agency (as defined in ORS 279A.010(1)(b)), pursuant to ORS 200.065.

(B) For a DBE Disqualification under ORS 200.075, the PCO 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 Certification Enterprise to perform services under a contract or to provide supplies under a Public Improvement Contract to meet an established Certified Enterprise goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the contract.

(iv) If a Person is Disqualified for a DBE Disqualification under ORS 200.075 for a City Contract, the PCO shall not permit such Person to participate in the City’s Contract or submit an Offer.

(C) For a DBE Disqualification under ORS 279A.110, the PCO may disqualify a Person if the PCO finds that the Person discriminated against minority, women or emerging small business enterprises in awarding a subcontract under a contract with the City.

(2) Notice of Intent to Disqualify. The PCO shall notify the Person in Writing of a proposed Disqualification personally or by registered or certified mail, return receipt requested. This notice shall:

(a) State that the PCO intends to disqualify the Person;

(b) Set forth the reasons for the Disqualification;

(c) Include a statement of the Person’s right to a hearing if requested in Writing within the time stated in the notice and that if the PCO 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 authority and jurisdiction under which the hearing will be held;

(e) Include a reference to the particular sections of the statutes and rules involved;

(f) State the proposed Disqualification period; and

(g) State that the Person may be represented by legal counsel.

(3) Hearing. The City Manger of the City or Executive Director of LORA shall schedule a hearing upon the PCO receipt of the Person’s timely request. The PCO shall notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.

(4) Notice of Disqualification. The City Manager of the City or Executive Director of LORA will notify the Person in Writing of its Disqualification, personally or by registered or certified mail, return receipt requested. The notice shall contain:

- (a) The effective date and period of Disqualification;
- (b) The grounds for Disqualification; and
- (c) A statement of the Person's appeal rights and applicable appeal deadlines. For a Conduct Disqualification or a DBE Disqualification under ORS 279A.110, the disqualified person must notify the PCO in Writing within three (3) business Days after receipt of the notice of Disqualification if the Person intends to appeal the decision.

**103-0380 Bid or Proposal Evaluation Criteria**

(1) General. A Public Improvement Contract, if Awarded, shall be Awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. See Section 103-0390, and Rules for Alternative Contracting Methods at Section 103-0600 to 103-0690.

(2) Bid Evaluation Criteria. Invitations to Bid may solicit lump-sum Offers, unit-price Offers or a combination of the two.

(a) Lump Sum. If the ITB requires a lump-sum Bid, without additive or deductive alternates, or if the Awarding Authority elects not to award additive or deductive alternates, Bids shall be compared on the basis of lump-sum prices, or lump-sum base Bid prices, as applicable. If the ITB calls for a lump-sum base Bid, plus additive or deductive alternates, the total Bid price shall be calculated by adding to or deducting from the base Bid those alternates selected by the Awarding Authority, for the purpose of comparing Bids.

(b) Unit Price. If the Bid includes unit pricing for estimated quantities, the total Bid price shall be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by the Awarding Authority, for the purpose of comparing Bids. The PCO 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 Section 103-0350(2)(b).

(3) Proposal Evaluation Criteria. If the Board has exempted the Procurement of a Public Improvement from the competitive Bidding requirements of ORS 279C.335(1), and has directed the PCO to use an Alternate Contracting Method under ORS 279C.335(3), the PCO shall set forth the evaluation criteria in the Solicitation Documents. See Section 103-0650, ORS 279C.335 and 279C.405.

**103-0390 Offer Evaluation and Award; Determination of Responsibility**

(1) General. If Awarded, the Awarding Authority shall Award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals, provided that such Person is not listed by the Construction

Contractors Board as disqualified to hold a Public Improvement Contract. See ORS 279C.375(2)(a). The Awarding Authority may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in the public interest.

(2) Determination of Responsibility. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before the Contract is Awarded, the PCO must have information that indicates that the Offeror meets the standards of responsibility set forth in ORS 279.375(2)(b). To be a Responsible Offeror, the PCO 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) Has a satisfactory record of contract performance. The PCO should carefully scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in contract performance. In reviewing the Offeror's performance, the PCO should determine whether the Offeror's deficient performance was expressly excused under the terms of contract, or whether the Offeror took appropriate corrective action. The PCO may review the Offeror's performance on both private and Public Contracts in determining the Offeror's record of contract performance. The PCO shall make its basis for determining an Offeror not Responsible under this paragraph part of the Solicitation file;

(c) Has a satisfactory record of integrity. An Offeror may lack integrity if the PCO determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to the PCO. The PCO may find an Offeror not responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Conduct Disqualification under Section 103-0370 may be used to determine an Offeror's integrity. The PCO shall make its basis for determining that an Offeror is not Responsible under this paragraph part of the Solicitation file;

(d) Is qualified legally to contract with the City; and

(e) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information requested by the PCO concerning responsibility, the PCO shall base the determination of responsibility upon any available information, or may find the Offeror not Responsible.

(3) Scope of Evaluation. The PCO shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. The PCO shall not evaluate an Offer using any other requirement or criterion.

(4) Offeror Submissions.

(a) The PCO may require an Offeror to submit Product Samples, descriptive literature, technical data, or other material and may also require any of the following prior to Award:

(A) Demonstration, inspection or testing of a product prior to Award for characteristics such as compatibility, quality or workmanship;

(B) Examination of such elements as appearance or finish; or

(C) Other examinations to determine whether the product conforms to Specifications.

(b) The PCO shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. The PCO shall reject an Offer providing any product that does not meet the Solicitation Document requirements. The PCO'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. The PCO shall use only objective criteria to evaluate Bids as set forth in the ITB. The PCO shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsible Bid.

(a) Nonresident Bidders. In determining the lowest Responsive Bid, the PCO shall, in accordance with Section 101-0310, add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.

(b) Clarifications. In evaluating Bids, the PCO may seek information from a Bidder only to clarify the Bidder's Bid. Such clarifications shall not vary, contradict or supplement the Bid. A Bidder must submit Written and Signed clarifications and such clarifications shall become part of the Bidder's Bid.

(c) Negotiation Prohibited. The PCO shall not negotiate scope of Work or other terms or conditions under an Invitation to Bid process prior to Award.

(6) Evaluation of Proposals. See Section 103-0650 regarding rules applicable to Requests for Proposals.

#### **103-0400 Documentation of Award; Availability of Award Decisions**

(1) Basis of Award. After Award, the PCO shall make a record showing the basis for determining the successful Offeror part of the PCO's Solicitation file.

(2) Contents of Award Record for Bids. The PCO'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 Section 103-0650, the PCO's record shall include:

- (a) All submitted Proposals;
- (b) The completed evaluation of the Proposals;
- (c) Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and
- (d) If the PCO permitted negotiations in accordance with Section 103-0650, the PCO's completed evaluation of the initial Proposals and the PCO's completed evaluation of final Proposals.

(4) Contract Document. The PCO shall deliver a fully executed copy of the final Contract to the successful Offeror.

(5) Bid Tabulations and Award Summaries. Upon request of any Person the PCO shall provide tabulations of Awarded Bids or evaluation summaries of Proposals upon payment in the amount charged for production of public records by the City, as specified in the then applicable City Master Fee Schedule. Requests must contain the Solicitation Document number and, if requested, be accompanied by a self-addressed, stamped envelope, the PCO may also provide tabulations of Bids and Proposals Awarded on designated Websites or on the City's Electronic Procurement System.

(6) Availability of Solicitation Files. The PCO shall make completed Solicitation files available for public review at the office of the PCO.

(7) Copies from Solicitation Files. Any Person may obtain copies of material from Solicitation files upon payment of the amount charged for production of public records by the City, as specified in the then applicable City Master Fee Schedule.

#### **103-0410 Time for PCO Acceptance; Extension**

(1) Time for Offer Acceptance. An Offeror's Bid, or Proposal submitted as a Firm Offer (see Section 103-0280), is irrevocable, valid and binding on the Offeror for not less than thirty (30) Days from Closing unless otherwise specified in the Solicitation Document.

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

#### **103-0420 Negotiation with Bidders Prohibited**

(1) Bids. Except as permitted by ORS 279C.340 and Section 103-0430 when all bids exceed the cost estimate, the PCO shall not negotiate with any Bidder prior to Contract Award. After Award of the

Contract, the PCO and Contractor may modify the Contract only by change order or amendment to the Contract in accordance with Section 103-0860.

(2) Requests for Proposals. The PCO may conduct discussions or negotiations with Proposers only in accordance with the requirements of Section 103-0650.

### **103-0430 Negotiation When Bids Exceed Cost Estimate**

(1) Generally. In accordance with ORS 279C.340, if all Responsive Bids from Responsible Bidders on a competitively Bid Project exceed the PCO's Cost Estimate, prior to Contract Award the PCO may negotiate Value Engineering and Other Options with the Responsible Bidder submitting the lowest, Responsive Bid in an attempt to bring the Project within the Project's Cost Estimate. The subcontractor disclosure and substitution requirements of Section 103-0360 do not apply to negotiations under this rule.

(2) Definitions. The following definitions apply to this administrative rule:

(a) "Cost Estimate" means the City's most recent pre-Bid, good faith assessment of anticipated Contract costs, consisting either of an estimate of an architect, engineer or other qualified professional, or confidential cost calculation Worksheets, where available, and otherwise consisting of formal planning or budgetary documents.

(b) "Other Options" means those items generally considered appropriate for negotiation in the RFP process, relating to the details of Contract performance as specified in Section 103-0650, but excluding any material requirements previously announced in the Solicitation process that would likely affect the field of competition.

(c) "Project" means a Public Improvement.

(d) "Value Engineering" means the identification of alternative methods, materials or systems which provide for comparable function at reduced initial or life-time cost. It includes proposed changes to the plans, Specifications, or other Contract requirements which may be made, consistent with industry practice, under the original Contract by mutual agreement in order to take advantage of potential cost savings without impairing the essential functions or characteristics of the Public Improvement. Cost savings include those resulting from life cycle costing, which may either increase or decrease absolute costs over varying time periods.

(3) Rejection of Bids. In determining whether all Responsive Bids from Responsible Bidders exceed the Cost Estimate, only those Bids that have been formally rejected, or Bids from Bidders who have been formally disqualified by the PCO, shall be excluded from consideration.

(4) Scope of Negotiations. The PCO shall not proceed with Contract Award if the scope of the Project is significantly changed from the original Bid. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other Bidders would have been expected by the PCO to participate in the Bidding process had the change

been made during the Solicitation process rather than during negotiation. This rule shall not be construed to prohibit resolicitation of trade subcontracts.

(5) **Discontinuing Negotiations.** The PCO may discontinue negotiations at any time, and shall do so if it appears to the PCO that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to rebid any portion of the project, or to obtain subcontractor pricing information upon request, shall be considered a lack of good faith.

(6) **Limitation.** Negotiations may be undertaken only with the lowest Responsive, Responsible Bidder pursuant to ORS 279C.340. That statute does not provide any additional authority to further negotiate with Bidders next in line for Contract Award.

(7) **Public Records.** To the extent that a Bidder's records used in Contract negotiations under ORS 279C.340 are public records, they are exempt from disclosure until after the negotiated Contract has been awarded or the negotiation process has been terminated, at which time they are subject to disclosure pursuant to the provisions of the Oregon Public Records Law, ORS 192.410 to 192.505.

#### **103-0440 Rejection of Offers**

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

(a) The PCO may reject any Offer upon finding that to accept the Offer may impair the integrity of the Procurement process or that rejecting the Offer is in the public interest.

(b) The PCO shall reject an Offer upon the PCO's finding that the Offer:

(A) Is contingent upon the City's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;

(B) Takes exception to terms and conditions (including Specifications);

(C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of Solicitation Document or in contravention of applicable law;

(D) Offers Work or goods that fail to meet the Specifications of the Solicitation Document;

(E) Is late;

(F) Is not in substantial compliance with the Solicitation Documents;

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

(c) The PCO shall reject an Offer upon the PCO's finding that the Offeror:



- (A) Has not been prequalified under ORS 279C.430 and the PCO 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 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 requirement of ORS 279A.105 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 Section 103-0390(2) regarding PCO determination that the Offeror has met statutory standards of responsibility.

(2) Form of Business. For purposes of this rule, the PCO may investigate any Person submitting an Offer. The investigation may include that Person's officers, Directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this rule or to apply the Disqualification provisions of ORS 279C.440 to 279C.450 and Section 103-0370.

(3) Certification of Non-Discrimination. The Offeror shall certify and deliver to the PCO Written certification, as part of the Offer 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. The PCO may reject all Offers for good cause upon the PCO's Written finding it is in the public interest to do so. The PCO 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. The PCO may reject all Offers upon a Written finding that:

- (a) The content of or an error in the Solicitation Document, or the Solicitation process unnecessarily restricted competition for the Contract;
- (b) The price, quality or performance presented by the Offerors is too costly or of insufficient quality to justify acceptance of the Offer;
- (c) Misconduct, error or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;
- (d) Causes other than legitimate market forces threaten the integrity of the competitive Procurement process. These causes include, but are not limited to, those that tend to limit competition

such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct and inadvertent or intentional errors in the Solicitation Document;

- (e) The PCO cancels the Solicitation in accordance with Section 103-0270; or
- (f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

### **103-0450 Protest of Contractor Selection, Contract Award**

(1) Purpose. An adversely affected or aggrieved Offeror must exhaust all avenues of administrative review and relief before seeking judicial review of the Contractor selection or Contract Award decision.

(2) Notice of Competitive Range. Unless otherwise provided in the RFP, when the competitive proposal process is authorized under Section 103-0650, the PCO shall provide Written notice to all Proposers of the PCO's determination of the Proposers included in the Competitive Range. The PCO's notice of the Proposers included in the Competitive Range shall not be final until the later of the following:

- (a) Ten (10) Days after the date of the notice, unless otherwise provided therein; or
- (b) Until the PCO 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 or Award. Unless otherwise provided in the Solicitation Document, the PCO shall provide Written or electronic notice to all Offerors of the intent to Award the Contract. The PCO's Award shall not be final until the later of the following:

- (a) Seven (7) Days after the date of the notice, unless the Solicitation Document provided a different period for protest; or
- (b) The PCO provides a Written response to all timely-filed protests that denies the protest.

(4) Right to Protest Award.

(a) An adversely affected or aggrieved Offeror may submit to the PCO a Written protest of the intent to Award within seven (7) Days after issuance of the notice of intent to Award the Contract, unless a different protest period is provided under the Solicitation Document.

(b) The Offeror's protest must be in Writing and must specify the grounds 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) The PCO 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-ranking Proposal.

(d) The PCO shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest the PCO's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.

(5) Right to Protest Competitive Range.

(a) An adversely affected or aggrieved Proposer may submit to the PCO a Written protest of the PCO's decision to exclude the Proposer from the Competitive Range within seven (7) Days after issuance of the notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document. (See procedural requirements for the use of RFPs at Section 103-0650.)

(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) The PCO committed a substantial violation of a provision in the RFP or of an applicable Procurement statute or administrative rule, and the protesting Proposer was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.

(d) The PCO shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest the PCO's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.

(6) Authority to Resolve Protests. The City Manager of the City or the Executive Director of LORA, or such Person's designee, may settle or resolve a Written protest submitted in accordance with the requirements of this rule.

(7) Decision. If a protest is not settled, the City Manager of the City or the Executive Director of LORA, or such Person's designee, shall promptly issue a Written decision on the protest. Judicial review of this decision will be available if provided by statute.

(8) Award. The successful Offeror shall promptly execute the Contract after the Award is final. The designated official of the City shall execute the Contract only after it has obtained all applicable required documents and approvals.

**103-0460 Performance and Payment Security; Waiver**

(1) Public Improvement Contracts. Unless the required performance bond and payment bond is waived under ORS 279C.380(1)(a), excused pursuant to either ORS 279C.380 or in cases of emergency under ORS 279C.380(4), or unless the Board exempts a Contract or classes of contracts from the required performance bond and payment bond pursuant to ORS 279C.390 (See Section 103-0461), the Contractor shall execute and deliver to the PCO a performance bond and a payment bond each in a sum equal to the Contract Price for all Public Improvement Contracts.

(2) Other Construction Contracts. The PCO 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.

(3) Requirement for Surety Bond. The PCO shall accept only a performance bond furnished by a surety company authorized to do business in Oregon unless otherwise specified in the Solicitation Document (i.e., the PCO may accept a cashier's check or certified check in lieu or all or a portion of the required performance bond if specified in the Solicitation Document). The payment bond must be furnished by a surety company authorized to do business in Oregon, and in an amount equal to the full contract price.

(4) Time for Submission. The apparent successful Offeror must promptly furnish the required performance security upon the PCO's request. If the Offeror fails to furnish the performance security as requested, the PCO may reject the Offer and Award the Contract to the Responsible Bidder with the next lowest Responsive Bid or the Responsible Proposer with the next highest-scoring Responsive Proposal, and, at the PCO's discretion, the Offeror shall forfeit its Bid or Proposal security.

**103-0461 Waiver of Requirement for Bid Security, Performance and Payment Bonds**

Pursuant to ORS 279C.390 and Section 130-0460(1), the requirements for bid security, performance and payment bonds for following classes of Public Improvement Contracts are waived, unless the PCO elects to require such bonds, but in such event the PCO shall not exercise such discretion to discourage competition:

(1) Public Improvement Contracts with a Contract Price equal to or less than \$50,000, except as otherwise required by these rules.

### **103-0470      Substitute Contractor**

If the Contractor provided a performance bond, the PCO may afford the Contractor's surety the opportunity to provide a substitute contractor to complete the 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.

### **103-0490      Foreign Contractor**

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

## **ALTERNATIVE CONTRACTING METHODS**

### **103-0600      Purpose**

Sections 103-0600 to 103-0690 in regards to the use of Alternative Contracting Methods for Public Improvement Contracts, including but are not limited to, Design-Build, Energy Savings Performance Contract (ESPC) and Construction Manger/General Contractor (CM/GC) forms of contracting. As to ESPC contracting, these Section 103-0600 to 103-0690 rules implement the requirements of ORS 279C.335 pertaining to the adoption of rules appropriate to govern the procedures for entering into ESPCs.

### **103-0610      Definitions for Alternative Contracting Methods**

The following definitions shall apply to these Section 103-0600 to 103-0690 rules, unless the context requires otherwise:

(1)      **"Alternative Contracting Methods"** means innovative Procurement techniques for obtaining Public Improvement Contracts, utilizing processes other than the traditional method of Design-Bid-Build (with Award based solely on price, in which a final design is issued with formal Bid documents, construction services are obtained by sealed Bid Awarded to the lowest Responsive, Responsible Bidder, 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 Section 103-0600 to 103-0690 rules, as well as other developing techniques such as general "performance contracting" and "cost plus time" contracting, for which procedural requirements are identified under these Section 103-0600 to 103-0690 rules.

(2) **“Construction Manager/General Contractor”** (or **“CM/GC”**) means a form of Procurement that results in a Public Improvement Contract for a Construction Manager/General Contractor to undertake project team involvement with design development; constructability reviews; value engineering, scheduling, estimating and subcontracting services; establish a Guaranteed Maximum Price to complete the Contract Work; act as General Contractor; hold all subcontracts, self-perform portions of the Work as may be allowed by the under the CM/GC Contract; coordinate and manage the building process; provide general Contractor expertise; and act as a member of the project team along with the PCO, other City employees, architect/engineers and other consultants. CM/GC also refers to a Contractor under this form of Contract, sometimes known as the **“Construction Manager at Risk.”**

(3) **“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 PCO, and manages both design and construction. In this form of Contract, a single Person provides the City with all of the services necessary to both design and construct the project.

(4) **“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 material costs associated with the maintenance of the building or structure. For purposes of these Section 103-0600 to 103-0690 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 Section 103-0600 to 103-0690 rules.

(5) **“Energy Savings Guarantee”** means the energy savings and performance guarantee provided by the ESCO under an ESPC Procurement, which guarantees to the City that certain energy savings and performance will be achieved for the project covered by the RFP, through the installation and implementation of the agreed-upon ECMs for the project. The Energy Savings Guarantee shall include, but shall not be limited to, the specific energy savings and performance levels and amounts that will be guaranteed, provisions related to the financial remedies available to the City in the event the guaranteed savings and performance are not achieved, the specific conditions under which the ESCO will guarantee energy savings and performance (including the specific responsibilities of the City after final completion of the design and construction phase), and the term of the energy savings and performance guarantee.

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

(7) **“Guaranteed Maximum Price”** (or **“GMP”**) means the total maximum price provided to the City by the Contractor, and accepted by the City, that includes all reimbursable costs of and fees for completion of the Contract Work, as defined by the Public Improvement Contract, except for material changes in the scope of Work. It may also include particularly identified contingency amounts.

(8) **“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 pre-installation and post-installation.

(9) **“Project Development Plan”** means a secondary phase of services performed by an ESCO in an ESPC Procurement when the ESCO performs more extensive design of the agreed-upon ECMs for the project, provides the detailed provisions of the ESCO’s Energy Savings Guarantee that the fully installed and commissioned ECMs will achieve a particular energy savings level for the building or structure, and prepares an overall report or plan summarizing the ESCO’s services during this secondary phase of the Work and otherwise explaining how the agreed-upon ECMs will be implemented during the design and construction phase of the Work; the term “Project Development Plan” can also refer to the report or plan provided by the ESCO at the conclusion of this phase of the Work.

(10) **“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 PCO; 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.

(11) **“Technical Energy Audit”** means, as used in ESPC Procurement, the initial phase of services to be performed by an ESCO that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the PCO 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.

### **103-0620 Use of Alternative Contracting Methods**

(1) **Competitive Bidding Exemptions.** ORS Chapter 279C requires a competitive Bidding process for Public Improvement Contracts unless a statutory exception applies, a class of Contracts has been exempted or an individual Contract has been exempted in accordance with ORS 279C.335 and any applicable Rules. Use of Alternative Contracting Methods may be directed by Board as an exception to the prescribed Public Contracting practices in Oregon, and their use must be justified in accordance with

the Code and these Section 103-0600 to 103-0690 rules. See Section 103-0630 regarding Findings and restrictions on class exemptions.

(2) Energy Savings Performance Contracts. Unlike other Alternative Contracting Methods covered by Section 103-0600 to 103-0690, ESPCs may be exempted from the competitive Bidding process for Public Improvement Contracts pursuant to ORS 279C.335, if the PCO complies with the procedures set forth in Section 103-0600 to 103-0690 related to the Solicitation, negotiation and contracting for ESPC services.

(3) Post-Project Evaluation. ORS 279C.355 requires the PCO 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 the City's best interest to use an Alternative Contracting Method. The evaluation must be delivered to the Board within thirty (30) Days of the date the PCO "accepts" the Public Improvement project, which event is typically defined in the Contract. In the absence of such definition, acceptance of the Project occurs on the later of the date of final payment or the date of final completion of the Work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:

(a) Financial information, consisting of cost estimates, any Guaranteed Maximum Price, changes and actual costs;

(b) A narrative description of successes and failures during design, engineering and construction; and

(c) An objective assessment of the use of the Alternative Contracting Method as compared to the exemption Findings.

### **103-0630 Findings, Notice and Hearing**

(1) Cost Savings Factors. When Findings are required under ORS 279C.335 to exempt a Contract or class of Contracts from competitive Bidding requirements, the "substantial cost savings" criterion at ORS 279C.335(2)(b) allows consideration of the type, cost, amount of the Contract, number of Entities available to Bid, and "such other factors as may be deemed appropriate."

(2) Required Information. Likewise, the statutory definition of "Findings" at ORS 279.330 means the justification for the conclusion that includes, "but is not limited to," information regarding eight identified areas.

(3) Addressing Cost Savings. Accordingly, when the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the "substantial cost savings" requirement may be addressed by a combination of:

(a) Specific Findings that address the factors and other information specifically identified by statute, including an analysis or reasonable forecast of future cost savings as well as present cost savings; and



(b) Additional Findings that address industry practices, surveys, trends, past experiences, evaluations or completed projects required by ORS 279C.355 and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable, such Findings shall relate back to the specific characteristics of the project or projects at issue in the exemption request.

(4) Favoritism and Competition. The criteria at ORS 279C.335(2)(a) that 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 with public notice and disclosure of the planned Alternative Contracting Method, competition will be encouraged, Award made based upon identified selection criteria and an opportunity to protest that Award.

(5) Class Exemptions. In making the findings supporting a class exemption the PCO shall clearly identify the class with respect to its defining characteristics. Those characteristics shall include some combination of Project descriptions or locations, time periods, contract values or method of procurement or other factors that distinguish the limited and related class of Projects from the City’s overall construction program. Classes shall not be defined solely by funding sources, such as a particular bond fund, or by method of procurement, but must be defined by characteristics that reasonably relate to the exemption set forth in ORS 279C.335(2).

(6) Public Hearing. Before final adoption of Findings exempting a Public Improvement Contract from the requirement of competitive bidding, the Awarding Authority 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 the Awarding Authority’s draft Findings.

### **103-0640 Competitive Proposals; Procedure**

The PCO 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 Section 103-0600 to 103-0690, unless other applicable statutes control the PCO’s use of competitive Proposals for Public Improvement Contracts. Also see the subdivision of rules in this division entitled Formal Procurement Rules, Section 103-0200 to 103-0480, and RFP related rules under the Alternative Contracting Methods subdivision at Section 103-0640 to 103-0660. For ESPCs, the following RFP process shall be utilized if the PCO desires the Procurement process to be exempt from the competitive Bidding requirements of ORS 279C.335. The RFP process for the Alternative Contracting Methods identified in Section 103-0600 to 103-0690 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. For ESPC Proposal evaluations, the PCO may provide in the RFP that qualifications-based evaluation factors will outweigh the City’s consideration of price-related factors, due to the fact that prices for the major components of the Work to be performed during the ESPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation.

Proposal evaluation shall be as objective as possible. Evaluation factors need not be precise predictors of future costs and performance, but to the extent possible such evaluation factors shall:

- (a) Be reasonable estimates based on information available to the PCO;
  - (b) Treat all Proposals equitably; and
  - (c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the City. See ORS 279C.305.
- (2) Evaluation Factors.

(a) In basic negotiated construction contracting, where the only reason for an RFP is to consider factors other than price, those factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that affect cost or quality.

(b) In CM/GC contracting, in addition to (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, coordination of multiple disciplines, the time required to commence and complete the improvement, and related matters that affect cost or quality.

(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.

(d) In ESPC contracting, in addition to the factors set forth in subsections (a), (b) and (c) above, those factors may also include sample Technical Energy Audits from similar projects, sample M & V reports, financial statements and related information of the ESCO for a time period established in the RFP, financial statements and related information of joint venturers comprising the ESCO, the ESCO's capabilities and experience in performing energy baseline studies for facilities (independently or in cooperation with an independent third-party energy baseline consultant), past performance of the ESCO in meeting energy guarantee Contract levels, the specific Person that will provide the Energy Savings Guarantee to be offered by the ESCO, the ESCO's management plan for the project, information on the specific methods, techniques and equipment that the ESCO will use in the performance of the Work under the ESPC, the ESCO's team members and consultants to be assigned to the project, the ESCO's experience in the Energy Savings Performance Contracting field, the ESCO's experience acting as the prime contractor on previous ESPC projects (as opposed to a subcontractor or consultant to a prime ESCO), the ESCO's vendor and product neutrality related to the development of ECMs, the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular project between the PCO and the ESCO, the ESCO's equipment performance guarantee policies and procedures, the ESCO's

energy savings and costs savings guarantee policies and procedures, the ESCO's project cost guarantee policies and procedures, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the Work and the ESCO's fee structure for all phases of the ESPC.

(3) Contract Negotiations. Contract terms may be negotiated to the extent allowed by the RFP and Section 103-0600 to 103-0690, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See Section 103-0650. 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. In ESPC contracting, terms that may be negotiated also include the scope of preliminary design of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the scope of services to be performed by the ESCO during the Project Development Plan phase of the Work, the detailed provisions of the Energy Savings Guarantee to be provided by the ESCO and scope of Work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the Work, consistent with the requirements of Section 103-0680 below.

#### **103-0650 Requests for Proposals (RFP)**

(1) Generally. The use of competitive proposals must be specially authorized for a Public Improvement Contract under the competitive bidding requirement of ORS 279C.335(1), Section 103-0130 and Section 103-0600 to 103-0690. Also see ORS 279C.400 to 279C.410 for statutory requirements regarding competitive Proposals, and Section 103-0640 regarding competitive Proposal procedures.

(2) Solicitation Documents. In addition to the Solicitation Document requirements of Section 103-0200, this rule applies to the requirements for Requests for Proposals. RFP Solicitation Documents shall conform to the following standards:

(a) The PCO shall set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualifications, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references and warranty provisions. See Section 103-0640. 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 the PCO;

(b) When the PCO is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, the PCO must identify the specific terms and conditions in or provisions of the Solicitation Document that are subject to negotiation or discussion and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions the PCO has identified as authorized for negotiation. The PCO must describe the evaluation and discussion or negotiation process, including how the PCO will establish the Competitive Range;

(c) When the PCO intends to Award, or recommend Award of Contracts to more than one Proposer, the PCO must identify in the Solicitation Document the manner in which the PCO will determine the number of Contracts to be Awarded. The PCO shall also include the criteria used to determine how the City 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.

(3) Evaluation of Proposals.

(a) Evaluation. The PCO shall evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. The PCO shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals.

(A) Clarifications. In evaluating Proposals, the PCO may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer must submit Written and Signed clarifications and such clarifications shall become part of the Proposer's Proposal.

(B) Limited Negotiation. If the PCO did not permit negotiation in its Request for Proposals, the PCO 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.

(b) Discussions; Negotiations. If the PCO permitted discussions or negotiations in the Request for Proposals, the PCO 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 PCO's discretion, the PCO may forego discussions and negotiations and evaluate all Proposals in accordance with this rule.

(B) If the PCO proceeds with discussions or negotiations, the PCO shall establish a negotiation team tailored for the acquisition. The City's team may include legal, technical and negotiating personnel.

(c) Cancellation. Nothing in this rule shall restrict or prohibit the PCO from canceling the Solicitation at any time.

(4) Competitive Range; Protest; Award.

(a) Determining Competitive Range.

(A) If the PCO does not cancel the Solicitation, after the Opening the PCO 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, the PCO will determine and rank the Proposers in the Competitive Range.

(B) The PCO may increase the number of Proposers in the Competitive Range if the PCO's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the best Proposer after the PCO's evaluation of revised Proposals submitted in accordance with the process described in this rule.

(b) **Protesting Competitive Range.** The PCO shall provide Written notice to all Proposers identifying Proposers in Competitive Range. A Proposer that is not within the Competitive Range may protest the PCO's evaluation and determination of the Competitive Range in accordance with Section 103-0450.

(c) **Intent to Award; Discuss or Negotiate.** After the protest period provided in accordance with these rules expires, or after the PCO has provided a final response to any protest, whichever date is later, the PCO may either:

(A) Provide Written notice to all Proposers in the Competitive Range of the intent to Award the Contract to the highest-ranked Proposer in the Competitive Range.

(i) An unsuccessful Proposer may protest the intent to Award in accordance with Section 103-0450;

(ii) After the protest period provided in accordance with Section 103-0450 expires, or after the PCO has provided a final response to any protest, whichever date is later, the PCO shall commence final Contract negotiations with the highest-ranked Proposer in the Competitive Range; or

(B) Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them, and, following such discussions and receipt and evaluation of revised Proposals, conduct negotiations with the Proposers in the Competitive Range.

(5) **Discussions; Revised Proposals.** If the PCO chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, the PCO shall proceed as follows:

(a) **Initiating Discussions.** The PCO shall initiate oral or Written discussions with all the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP that the PCO identified in the RFP as the subject of discussions. The PCO may conduct discussion for the following purposes:

(A) Informing Proposers of deficiencies in their initial Proposals;

(B) Notifying Proposers of parts of their Proposals for which the PCO would like additional information; and

(C) Otherwise allowing Proposers to develop revised Proposals that will allow the City to obtain the best Proposal based on the requirement and evaluation criteria set forth in the Request for Proposals.

(b) Conducting Discussions. The PCO may conduct discussions with each Proposer in the Competitive Range necessary to fulfill the purposes of this section, but need not conduct the same amount of discussions with each Proposer. The PCO may terminate discussions with any Proposer in the Competitive Range at any time. However, the PCO shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with PCO before the PCO notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.

(A) In conducting discussions, the PCO:

(i) Shall treat all Proposers fairly and shall not favor any Proposer over another;

(ii) Shall not discuss other Proposers' Proposals;

(iii) Shall not suggest specific revisions that a Proposer should make to its Proposal, and shall not otherwise direct the Proposer to make any specific revisions to its Proposal.

(B) At any time during the time allowed for discussions, the PCO may:

(i) Continue discussions with a particular Proposer;

(ii) Terminate discussion with a particular Proposer and continue discussions with other Proposers in the Competitive Range; or

(iii) Conclude discussions with all remaining Proposers in the Competitive Range and provide notice to the Proposers in the Competitive Range to submit revised Proposals.

(c) Revised Proposals. If the PCO does not cancel the Solicitation at the conclusion of the PCO's discussions with all remaining Proposers in the Competitive Range, the PCO shall give all remaining Proposers in the Competitive Range notice of the date and time by which they must submit revised Proposals. This notice constitutes the PCO's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in the PCO's notice.

(A) Upon receipt of the revised Proposals, the PCO 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 PCO's scoring.

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

(d) Intent to Award; Protest. The PCO shall provide Written notice to all Proposers in the Competitive Range of the intent to Award, or to recommend Award of the Contract. An unsuccessful Proposer may protest the intent to Award in accordance with Section 103-0450. After the protest

period provided in accordance with that rule expires, or after the PCO has provided a final response to any protest, whichever date is later, the PCO shall commence final Contract negotiations.

(6) Negotiations.

(a) Initiating Negotiations. The PCO may determine to commence negotiations with the highest-ranked Proposer in the Competitive Range following the:

(A) Initial determination of the Competitive Range; or

(B) Conclusion of discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.

(b) Conducting Negotiations.

(A) Scope. The PCO 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 PCO 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 the PCO conducts in accordance with this rule, the PCO may terminate discussions or negotiations with the highest-ranked Proposer, or the Proposer with whom it is currently discussing or negotiating, if the PCO 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 the PCO terminates discussions or negotiations with a Proposer, the PCO may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this rule until the PCO has either:

(A) Determined to Award, or if not the Awarding Authority, determined to recommend Award to the Awarding Authority of the Contract to the Proposer with whom it is currently discussing or negotiating; or

(B) Completed one round of discussions or negotiations with all Proposers in the Competitive Range, unless the PCO provided for more than one round of discussions or negotiations in the Request for Proposals.

### **103-0660 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 City 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) is used as the pricing mechanism for CM/GC where a total Contract Price is provided in the design phase in order to assist the PCO in determining whether the project scope is within the City's budget, and allowing for design changes during preliminary design rather than after final design Work has been completed.
  - (a) If this collaborative process is successful, the Contractor shall propose a final GMP, which may be accepted by the Awarding Authority and included within the Contract.
  - (b) If this collaborative process is not successful, and no mutually agreeable resolution on GMP can be achieved with the Contractor, then the PCO shall terminate the Contract. The PCO may then proceed to negotiate a new Contract (and GMP) with the firm that was next ranked in the original selection process, or employ other means for continuing the project under ORS Chapter 279C.
- (4) When cost reimbursement Contracts are utilized, regardless of whether a GMP is included, the PCO shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

### **103-0670 Design-Build Contracts**

- (1) General. The Design-Build form of contracting, as defined at Section 130-0610(3), has technical complexities that are not readily apparent. The PCO should use this contracting method only with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to use the Design-Build process, the PCO 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); or

(e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.

(2) Authority. The PCO should utilize the Design-Build form of contracting only in accordance with the requirements of these Section 103-0600 to 103-0690 rules. See particularly Section 103-0620 on “Use of Alternative Contracting Methods” and Section 103-0680 pertaining to ESPCs.

(3) Selection. Design-Build selection criteria may include those factors set forth above in Section 103-0640(2)(a), (b) and (c).

(4) *Reserved.*

(5) Licensing. If a Design-Build Contractor is not an Oregon licensed design professional, the PCO shall require that the Design-Build Contractor disclose in its Written Offer that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional (s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and ORS 672.060(11) regarding the offer of engineering services that are appurtenant to construction services.

(6) Performance Security. ORS 279C.380(1)(a) provides that for Design-Build Contracts the surety’s obligation on performance bonds, or the Bidder’s obligation on cashier’s or certified checks accepted in lieu thereof, includes the preparation and completion of design and related professional services specified in the Contract. This additional obligation, beyond performance of construction services, extends only to the provision of professional services and related design revisions, corrective Work and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage.

(7) Contract Requirements. The Design-Build contracting practices shall conform 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 the City, as well as requirements for professional liability insurance.

(c) Risk Allocation. The Contract shall clearly identify the extent to which the City requires an express indemnification from the Design-Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.

(d) Warranties. The Contract shall clearly identify any express warranties made to the City regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.

(e) Incentives. The Contract shall clearly identify any economic incentives and disincentives, the specific criteria that apply and their relationship to other financial elements of the Contract.

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

### **103-0680 Energy Savings Performance Contracts (ESPC)**

(1) Generally. These Section 103-0600 to 103-0690 rules include a limited, efficient method to enter into ESPCs outside the competitive Bidding requirements of ORS 279C.335 for existing buildings or structures, but not for new construction. If the PCO chooses not to utilize the ESPC Procurement method provided for by these Section 103-0600 to 103-0690 rules, the Awarding Authority may still enter into an ESPC by complying with the competitive Bidding exemption process set forth in ORS 279C.335.

(2) ESPC Contracting Method. The ESPC form of contracting, as defined at Section 103-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the City, as well as the additional technical complexities associated with a Design-Build Contract. Contracting Agencies shall only utilize the ESPC contracting method with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the ESPC contracting process, the PCO must be able to reasonably anticipate one or more of the following types of benefits:

(a) Obtaining, through an ESCO, the following types of integrated services: facility profiling, energy baseline studies, ECMs, Technical Energy Audits, project development planning, engineering design, plan preparation, cost estimating, life cycle costing, construction administration, project management, construction, quality control, operations and maintenance staff training, commissioning services, M & V services and required documentation as a fully integrated function with a single point of responsibility;

(b) Obtaining, through an ESCO, an Energy Savings Guarantee;

(c) Integrating the Technical Energy Audit phase and the Project Development Plan phase into the design and construction phase of Work on the project;

(d) Reducing the risk of design flaws, misunderstandings and conflicts inherent in the construction process, through the integration of ESPC services;

(e) Obtaining innovative design solutions through the collaboration of the members of the ESCO integrated ESPC services team;

(f) Integrating cost-effective ECMs into an existing building or structure, so that the ECMs pay for themselves through savings realized over the useful life of the ECMs;

(g) Preliminary design, development, implementation and an Energy Savings Guarantee of ECMs into an existing building or structure through an ESPC, as a distinct part of a major re of that building or structure that is being performed under a separate reing Contract; and

(h) Satisfying local energy efficiency design criteria or requirements.

(3) Authority. The ESPC form of contracting shall be used only in accordance with the requirements of these Section 103-0600 to 103-0690 rules, in order to pursue an exemption from the competitive Bidding requirements of ORS 279C.335 and, if applicable, ORS 351.086.

(4) No Findings Required. The PCO is only required to comply with the ESPC contracting procedures set forth in these Section 103-0600 to 103-0690 rules in order for the ESPC to be exempt from the competitive Bidding processes of ORS 279C.335. No findings are required for an ESPC to be exempt from the competitive Bidding process for Public Improvement Contracts pursuant to ORS 279C.335, unless the City is subject to the requirements of ORS 279C.335 and the PCO chooses not to comply with the ESPC contracting procedures set forth in these Section 103-0600 to 103-0690 rules.

(5) Selection. ESPC selection criteria may include those factors set forth above in Section 103-0640(2)(a), (b), (c) and (d). Since the Energy Savings Guarantee is such a fundamental component in the ESPC contracting process, Proposers must disclose in their Proposals the identity of any Person providing (directly or indirectly) any Energy Savings Guarantee that may be offered by the successful ESCO during the course of the performance of the ESPC, along with any financial statements and related information pertaining to any such Person.

(6) *Reserved.*

(7) Licensing. If the ESCO is not an Oregon licensed design professional, the PCO shall require that the ESCO disclose in the ESPC that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and ORS 672.060(11) regarding the offer of engineering services that are appurtenant to construction services.

(8) Performance Security. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the ESCO must provide a performance bond and a payment bond, each for one hundred (100) percent of the full Contract Price, including the construction and design and related professional services specified in the ESPC Design-Build Contract, pursuant to ORS 279C.380(1)(a). For ESPC Design-Build Contracts, these "design and related professional services" include conventional design services, commissioning services, training services for the City's operations and maintenance staff, and any similar professional services provided by the ESCO under the ESPC Design-Build Contractor prior to final completion of construction. M & V services, and any services associated with the ESCO's Energy Savings Guarantee are not included in these ORS 279C.380(1)(a)

“design and related professional services.” Nevertheless, the PCO may require that the ESCO provide performance security for M & V services and any services associated with the ESCO’s Energy Savings Guarantee, if the PCO so provides in the RFP.

(9) Contracting Requirements. The ESPC contracting practices shall conform to the following requirements:

(a) General ESPC Contracting Practices. An ESPC involves a multi-phase project, which includes the following contractual elements:

(A) A contractual structure which includes general Contract terms describing the relationship of the parties, the various phases of the Work, the contractual terms governing the Technical Energy Audit for the project, the contractual terms governing the Project Development Plan for the project, the contractual terms governing the final design and construction of the project, the contractual terms governing the performance of the M & V services for the project, and the detailed provisions of the ESCO’s Energy Savings Guarantee for the project.

(B) The various phases of the ESCO’s Work will include the following:

(i) The Technical Energy Audit phase of the Work;

(ii) The Project Development Plan phase of the Work;

(iii) A third phase of the Work that constitutes a Design-Build Contract, during which the ESCO completes any plans and Specifications required to implement the ECMs that have been agreed to by the parties to the ESPC, and the ESCO performs all construction, commissioning, construction administration and related services to actually construct the project; and

(iv) A final phase of the Work, whereby the ESCO, independently or in cooperation with an independent consultant hired by the City, performs M & V services to ensure that the Energy Savings Guarantee identified by the ESCO in the earlier phases of the Work and agreed to by the parties has actually been achieved.

(b) Design-Build Contracting Requirements in ESPCs. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the Design-Build contracting practices shall be conformed to the Design-Build contracting requirements set forth in Section 103-0670(7) above.

(c) Pricing Alternatives. The PCO may utilize one of the following pricing alternatives in the ESPC:

(A) A fixed price for each phase of the services to be provided by the ESCO;

(B) A cost reimbursement pricing mechanism, with a maximum not-to-exceed price or a GMP; or

(C) A combination of a fixed fee for certain components of the services to be performed, a cost reimbursement pricing mechanism for the construction services to be performed with

a GMP, a single or annual fixed fee for M & V services to be performed for an identified time period after final completion of the construction Work, and a single or annual Energy Savings Guarantee fixed fee payable for an identified time period after final completion of the construction Work that is conditioned on certain energy savings being achieved at the facility by the ECMs that have been implemented by the ESCO during the project (in the event an annual M & V services fee and annual Energy Savings Guarantee fee is utilized by the parties, the parties may provide in the Design-Build Contract that, at the sole option of the PCO, the ESCO's M & V services may be terminated prior to the completion of the M & V/Energy Savings Guarantee period and the City's future obligation to pay the M & V services fee and Energy Savings Guarantee fee will likewise be terminated, under terms agreed to by the parties.

(d) Permitted ESPC Scope of Work. The scope of Work under the ESPC is restricted to implementation and installation of ECMs, as well as other Work on building systems or building components that are directly related to the ECMs, and that, as an integrated unit, will pay for themselves over the useful life of the ECMs installed. The permitted scope of Work for ESPCs resulting from a Solicitation under these Section 103-0600 to 103-0690 rules does not include maintenance services for the project facility.

#### **103-0690 Construction Manager/General Contractor (CM/GC)**

(1) General. The CM/GC form of contracting, as defined at Section 103-0610(2), is a technically complex project delivery system. The PCO should use this contracting method only with the assistance of knowledgeable staff or 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 form of contracting does not contemplate a "single point of responsibility" under which the Contractor 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 PCO and design professional, although in CM/GC there is a separate contract between the City and design professional. In order to utilize the CM/GC method, the PCO must be able to reasonably anticipate the following types of benefits:

(a) Time Savings. 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 PCO 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. Early Contractor input during the design process is expected to contribute to significant cost savings. The PCO may consider value engineering, building systems analysis, life cycle costing analysis and construction planning that lead to cost savings. The PCO 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. The Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between the PCO, design professionals and Contractor, in which the Contractor will assist in addressing specific project challenges through pre-construction services. The PCO may consider the need for Contractor 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 rules. See particularly Section 103-0620 on "Use of Alternative Contracting Methods."

(3) Selection. CM/GC selection criteria may include those factors set forth above in Section 103-0640(2)(b).

(4) Basis for Payment. The CM/GC process adds specified Construction Manager services to traditional General Contractor services, requiring full Contract performance within a negotiated Guaranteed Maximum Price (GMP). The basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for Work and services rendered, which together shall not exceed the GMP. See GMP definition at Section 103-0610(7) and Pricing Mechanisms at Section 103-0660.

(5) Contract Requirements. The CM/GC contracting practices shall conform to the following requirements:

(a) Setting the GMP. The GMP shall be set at an identified time consistent with industry practice, after supporting information reasonably considered necessary to its use has been developed, and the supporting information shall define with particularity both what is included and excluded from the GMP. A set of drawings and Specifications shall be produced establishing the GMP scope.

(b) Adjustments to the GMP. The Contract shall clearly identify the standards or factors under which changes or additional Work will be considered outside of the Work scope that warrants an increase in the GMP, as well as criteria for decreasing the GMP. The GMP shall not be increased without a concomitant increase to the scope defined at the establishment of the GMP or most recent GMP amendment.

(c) Cost Savings. The Contract shall clearly identify the disposition of any cost savings resulting from completion of the Work below the GMP; that is, under what circumstances, if any, the CM/GC might share in those cost savings, or whether they accrue only to the City's benefit. (Note that unless there is a clearly articulated reason for sharing such cost savings, they should accrue to the City.)

(d) Cost Reimbursement. The Contract shall clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, including any category of "General Conditions" (a general grouping of direct costs that are not separately invoiced, subcontracted or included within either overhead or fee), and may also incorporate a mutually-agreeable cost-reimbursement standard.

(e) 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.

## **CONTRACT PROVISIONS**

### **103-0800 Required Contract Clauses**

The PCO 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 Section 103-0200(1)(c) regarding Solicitation Documents. The following series of rules provide further guidance regarding particular Public Contract provisions.

### **103-0810 Waiver of Delay Damages Against Public Policy**

The PCO shall not place any provision in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from the City's unreasonable delay in performing the Contract. However, Contract provisions requiring notice of delay, providing for alternative dispute resolution such as arbitration (where allowable) or mediation, providing other procedures for settling contract disputes, or providing for reasonable liquidated damages, are permissible.

### **103-0820 Retainage**

(1) Withholding of Retainage. The City shall not retain an amount in excess of five (5) percent of the Contract Price for Work completed. If the Contract has performed at least fifty (50) percent of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written approval, the PCO may, in the PCO's discretion, reduce or eliminate retainage on any remaining progress payments. The PCO shall respond in Writing to all such applications within a reasonable time. When the Contract Work is ninety seven and one-half (97.5) percent completed, the PCO may, at its discretion and without application by the Contractor, reduce the retained amount to one hundred (100) percent of the value of the remaining unperformed Contract Work. The PCO 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, the PCO shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the City. Earnings on such account shall accrue to the Contractor.

(3) Alternatives to Cash Retainage. In lieu of cash retainage to be held by the City, the Contractor may substitute one of the following:

(a) Deposit of securities:

(A) The Contractor may deposit bonds or securities with the City or in any bank or trust company to be held for the benefit of the City. In such event, the PCO 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 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 the PCO's determination that all requirements for the protection of the City's interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu of retainage.

(b) Deposit of Surety Bond. The PCO, at PCO's discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the PCO 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. The City may recover from the Contractor all costs incurred in the proper handling of cash retainage and securities, by reduction of the final payment.

**103-0830 Contractor Progress Payments**

(1) Request for Progress Payments. Each month the Contractor shall submit to the PCO its Written request for a progress payment based upon an estimated percentage of Contract completion. At the PCO's discretion, this request may also include the value of material to be incorporated in the completed Work that has been delivered to the premises and appropriately stored. The sum of these estimates is referred to as the "value of completed Work." With these estimates as a base, the PCO will make a progress payment to the Contractor, which shall be equal to: (i) the value of completed Work; (ii) less those amounts that have been previously paid; (iii) less other amounts that may be deductible or owing and due to the PCO 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 of responsibility for defective workmanship or material.

**103-0840 Interest**

(1) Prompt Payment Policy. The City 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 thirty (30) Days after receipt of invoice or fifteen (15) Days after PCO approval of payment (the "Progress Payment Due Date"). The interest rate shall equal three (3) 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 thirty (30) percent.

(3) Interest on Final Payment. Final payment on the Contract Price, including retainage, shall be due and owing no later than thirty (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 (1.5) 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 ninety (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 (30) Days after the Contractor submitted a claim for payment to the PCO in Writing or otherwise in accordance with the Contract requirements.

**103-0850 Final Inspection**

(1) Notification of Completion; Inspection. The Contractor shall notify the PCO in Writing when the Contractor considers the Contract Work completed. Within fifteen (15) Days of receiving Contractor's notice, the PCO will inspect the project and project records, and will either accept the Work or notify the Contractor of remaining Work to be performed.

(2) Acknowledgement of Acceptance. When the PCO finds that all Work required under the Contract has been completed satisfactorily, the PCO shall acknowledge acceptance of the Work in writing.

### **103-0860 Public Works Contracts**

- (1) Generally. ORS 279C.800 to 279C.870 regulates Public Works Contracts, as defined in ORS 279C.800(5), and requirements for payment of prevailing wage rates. Also see administrative rules of the Bureau of Labor and Industries (BOLI) at OAR Chapter 839.
- (2) Required Contract Conditions. As detailed in the above statutes and rules, every Public Works Contract must contain the following provisions:
  - (a) City authority to pay certain unpaid claims and charge such amounts to Contractors, as set forth in ORS 279C.515(1).
  - (b) Maximum hours of labor and overtime, as set forth in ORS 279C.520(1).
  - (c) Employer notice to employees of hours and days that employees may be required to work, as set forth in ORS 279C.520(2).
  - (d) Contractor required payments for certain services related to sickness or injury, as set forth in ORS 279C.530.
  - (e) Requirement for payment or prevailing rate of wage, as set forth in ORS 279C.830(1).
  - (f) Requirement for payment of fee to BOLI, as set forth in ORS 279C.830(2) and administrative rule of the BOLI commissioner.

- (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, and by a downloadable direct link to the specific wage rates that apply to the project (either on the City website or the BOLI website) when procurement Specifications are also made available in electronic format.
- (b) Reference to payment of fee to BOLI, as required by ORS 279C.830(2).

### **103-0870 Specifications; Brand Name Products**

- (1) Generally. The Solicitation Document shall not expressly or implicitly require any product by brand name or mark, nor shall it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279C.345(2).
- (2) Equivalents. The PCO 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. The PCO shall determine, in its sole discretion, whether an Offeror’s alternate product is “equal” or “equivalent.”

### **103-0880      Records Maintenance; Right to Audit Records**

(1)      Records Maintenance; Access. Contractors and subcontractors shall maintain all fiscal records relating to Contracts in accordance with generally accepted accounting principles (“GAAP”). In addition, Contractors and subcontractors shall maintain all other records necessary to clearly document (i) their performance; and (ii) any claims arising from or relating to their performance under a Public Contract. Contractors and subcontractors shall make all records pertaining to their performance and any claims under a Contract (the books, fiscal records and all other records, hereafter referred to as “Records”) accessible to the PCO at reasonable times and places, whether or not litigation has been filed as to such claims.

(2)      Inspection and Audit. The PCO 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 three (3) years from the date of final payment under the Contract, unless a shorter period is otherwise authorized in Writing.

(3)      Records Inspection; Contract Audit. The PCO or the PCO’s designees shall be entitled to inspect, examine, copy, and audit any Contractor’s or subcontractor’s Records, as provided in section 1 of this rule. The Contractor and subcontractor shall maintain the Records and keep the Records accessible and available at reasonable times and places for a minimum period of three (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.

### **103-0890      Payment for Unpaid Labor or Supplies**

(1)      Contract Incomplete. If the Contract is still in force, the PCO may, after consultation with the City Attorney or LORA Board Counsel, as appropriate, in accordance with ORS 279C.515(1), pay a valid claim to the Person furnishing the labor or services, and charge the amount against payments due or to become due to the Contractor under the Contract. If the PCO chooses to make such payment as provided in ORS 279C.515(1), the Contractor and the Contractor’s surety shall not be relieved from liability for unpaid claims.

(2)      Contract Completed. If the Contract has been completed and all funds disbursed to the prime Contractor, all claims shall be referred to the Contractor’s surety for resolution. The PCO shall not make payments to subcontractors or suppliers for Work already paid for by the City.

### **103-0900      Contract Suspension; Termination Procedures**

(1)      Suspension of Work. In the event the PCO suspends performances of Work for any reason considered by the PCO to be in the public interest other than a labor dispute, the Contractor shall be

entitled to a reasonable extension of Contract time, and to reasonable compensation for all costs, including a reasonable allowance for related overhead, incurred by the Contractor as a result of the suspension.

(2) Termination of Contract by Mutual Agreement for Reasons Other Than Default.

(a) Reasons for Termination. The parties may agree to terminate the Contract or a divisible portion thereof if:

(A) The PCO suspends Work under the Contract for any reason considered to be in the public interest (other than a labor dispute, or any judicial proceeding relating to the Work filed to resolve a labor dispute); and

(B) Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the Work.

(b) Payment. When a Contract, or any divisible portion thereof, is terminated pursuant to this section (2), the City shall pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. The City shall also pay for all Work completed, based on the Contract Price. Unless the Work completed is subject to unit or itemized pricing under the Contract, payment shall be calculated based on percent of Contract completed. No claim for loss of anticipated profits will be allowed.

(3) Public Interest Termination. The PCO may include in the Contract's terms detailing the circumstances under which the Contractor shall be entitled to compensation as a matter of right in the event the City unilaterally terminates the Contract for any reason considered by the PCO to be in the public interest.

(4) Responsibility for Completed Work. Termination of the Contract or a divisible portion thereof pursuant to this rule shall not relieve either the Contractor or its surety of liability for claims arising out of the Work performed.

(5) Remedies Cumulative. The City may, at its discretion, avail itself of any or all rights or remedies set forth in these rules, in the Contract, or available at law or in equity.

**103-0910 Changes to the Work and Contract Amendments**

(1) Definitions for Rule. As used in this rule:

(a) **"Amendment"** means a Written modification to the terms and conditions of a Public Improvement Contract, other than by Changes to the Work, within the general scope of the original Procurement that requires mutual agreement between the City and the Contractor.

(b) **"Changes to the Work"** means a mutually agreed upon change order, or a construction change directive or other Written order issued by the Change Order Authority to the Contractor requiring a change in the Work within the general scope of a Public Improvement Contract and issued

under its changes provisions in administering the Contract and, if applicable, adjusting the Contract Price or contract time for the changed work.

(2) Changes Provisions. Changes to the Work are anticipated in construction and, accordingly, the PCO shall include changes provisions in all Public Improvement Contracts that detail the scope of the changes clause, provide pricing mechanism, authorize the Change Order Authority to issue Changes to the Work and provide a procedure for addressing Contractor claims for additional time or compensation. When Changes to the Work are agreed to or issued consistent with the Contractor's changes provisions they are not considered to be new Procurements and an exemption from competitive bidding is not required for their issuance by Contracting Agencies.

(3) Change Order Authority. The Change Order Authority is designated in Section 101-0140.

(4) Contract Amendments. In addition to the exemption from competitive bidding requirements provided for Emergency Contracts (Section 103-0150), intermediate level Public Improvement Contracts (Section 103-0160), and for substitute Contractors provided in subsection (5) below, Contract Amendments within the general scope of the original Procurement are not considered to be new Procurements and an exemption from competitive bidding is not required in order to add components or phases of Work specified in or reasonably implied from the Solicitation Document. Amendments to a Public Improvement Contract may be made when:

(a) They are within the general scope of the original Procurement;

(b) The field of competition and Contractor selection would not likely have been affected by the Contract modification. Factors to be considered in making that determination include similarities in Work, project site, relative dollar values, differences in risk allocation and whether the original Procurement was accomplished through Competitive Bidding, Competitive Proposals, competitive quotes, sole source or Emergency contract;

(c) In the case of a Contract obtained under an Alternative Contracting Method, any additional Work was specified or reasonably implied within the findings supporting the competitive bidding exemption; and

(d) The Amendment is made consistent with applicable legal requirements.