

DIVISION 300 - PUBLIC IMPROVEMENTS**GENERALLY****10.300 Public Improvement Contracts; Exceptions**

- (1) All Contracts for a Public Improvement shall be based on Competitive Bids except as provided in ORS 279C.335(1) which includes the following exceptions:
 - (a) Contracts made with qualified nonprofit agencies providing employment opportunities for disabled individuals under ORS 279.835 to 279.855.
 - (b) A Public Improvement Contract under ORS 279C.335(2), which provides an exemption for Alternative Contracting Methods.
 - (c) A public improvement contract with a value of less than \$5,000.
 - (d) A Contract under \$100,000 made under procedures for Quotes in CR10.310.
 - (e) An energy savings performance contract that the County awards in accordance with Alternative Contracting Methods specified in CR 10.305 below.

10.305 Exemption for Alternative Contracting Methods

- (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, Construction Manager/General Contractor (CM/GC) forms of contracting and Energy Savings Performance Contracts (ESPC), which are specifically addressed in the Attorney General Model Rules in OAR 137-049-0600 to 137-049-0690, as well as other developing techniques such as general "performance contracting" and "cost plus time" contracting, for which procedural requirements are identified under the Attorney General Model Rules.
- (2) The Board may exempt a public improvement project or a class of Public Improvement Contracts if the Board makes the following written findings:
 - (a) It is unlikely that the exemption will encourage favoritism in the awarding of Public Improvement Contracts or substantially diminish competition for public improvement Contracts; and
 - (b) The awarding of the Public Improvement Contracts under the exemption will result in substantial cost savings to the County or the public. The County may consider the type, cost and amount of the Contract, the number of persons available to bid and other such factors deemed appropriate.
- (3) In granting an exemption under (2), the County shall direct the use of Alternative Contracting Methods that take account of market realities and modern practices and are consistent with the public policy of encouraging competition.

- (4) Before the final adoption of the findings under (2) the County shall hold a public hearing, as required in ORS279C.335(5).
- (5) The County adopts the Attorney General's Model Rules for Alternative Contracting Methods for Public Improvement Contracts in OAR 137-049-0600 to 137-049-0690. Those methods include, but are not limited to, Design-Build, ESPC and CM/GC forms of contracting. When the Attorney General's Model Rules in OAR 137-049-0600 to 137-049-0690 refer to an Administrative Rule that the County has not adopted, the County shall apply the statute and/or Rule that most closely applies, if any.

10.310 Intermediate Procurements; Quotes and Amendments

- (1) **General.** Public Improvement Contracts estimated by the County not to exceed \$100,000 may be Awarded in accordance with intermediate level procurement procedures for competitive quotes established by this Rule.
- (2) **Selection Criteria.** The selection criteria may be limited to price or some combination of price, experience, specific expertise, availability, project understanding, contractor capacity, responsibility and similar factors.
- (3) **Request for Quotes.** Prior to the solicitation of a Quote, the County shall determine the specifications of the Good or service and shall maintain written documentation of the specifications. The County shall utilize written requests for quotes whenever reasonably practicable. The County must describe substantially the same specifications to each of the prospective contractors. Written requests 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 Quotes orally, prior to requesting the price quote the County shall state any additional selection criteria and, if the criteria are not of equal value, their relative value.
- (4) **Number of Quotes; Record Required.** The County shall seek at least three (3) Quotes, and keep a written record of the sources and amounts of the Quotes received. If three Quotes are not reasonably available, the County shall make a written record of the effort made to obtain those Quotes.
- (5) **Award.** If Awarded, the County shall Award the Contract to the prospective contractor whose Quote will best serve the interests of the County, taking into account the announced selection criteria. If Award is not made to the Offeror offering the lowest price, the County shall make a written record of the basis for Award.

10.320 Emergency Contracts; Bidding and Bonding Exemptions

- (1) **Emergency Declaration.** The County may declare that Emergency circumstances exist that require prompt execution of a Public Contract for Emergency construction or repair Work. The declaration shall be 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).
- (2) **Competition for Contracts.** The County 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 County considers reasonable in responding to the Emergency.

- (3) **Contract Award.** If an emergency is declared, any Contract Awarded under this Rule must be Awarded within 60 days after declaration of the Emergency, unless an extension is granted by the local contract review board. (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.
- (4) **Contract Modification.** Emergency Contracts may be modified by change order or amendment to address the conditions described in the original declaration or an amended declaration that further describes additional work necessary and appropriate for related Emergency circumstances.

10.330 Specifications for Contracts; Exemptions

The County may require a product by brand, maker, manufacturer or seller only if the Board makes the finding that the sought product is exempt under ORS 279C.345(2).

10.340 Addenda to Solicitation Documents

- (1) **Issuance; Receipt.** The County 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 County otherwise specifies in the Addenda or in the Solicitation Document.
- (2) **Notice and Distribution.** The County shall notify prospective Offerors of Addenda in a manner intended to foster competition and to make prospective Offerors aware of the Addenda.
- (3) **Timelines; Extensions.** The County shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The County may extend the Closing if the County determines prospective Offerors need additional time to review and respond to Addenda.

10.350 Bid or Proposal Security

- (1) **Security Amount.** If ORS 279C.365 requires Bid or Proposal security, it shall be 10% of the Offeror's Bid or Proposal. The Offeror shall forfeit Bid or Proposal security after Award if the Offeror fails to execute the Contract and promptly return it within 14 days of Award, unless the Board finds otherwise, with any required Performance Bond and Payment Bond and, in the case of Proposal security, with any required proof of insurance.
- (2) **Requirement for Bid Security (Optional for Proposals).** Unless the County has otherwise exempted a Solicitation or class of Solicitations from Bid security pursuant to ORS 279C.390, the County shall require Bid security for its Solicitation of Bids for Public Improvements. The County may require Bid security even if it has exempted a class of Solicitations from Bid security. The County may require Proposal security in

RFPs when Award of a Public Improvement Contract may be made without negotiation following receipt of a Firm Offer. See ORS 279C.400(5).

- (3) **Form of Bid or Proposal Security.** The County 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 County shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been fully executed and all required bonds have been provided, or after all Offers have been rejected. The County 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.

10.355 Performance Bond

Upon award of a contract, the County shall require successful Offeror to submit a Performance Bond equal to 100% of total contract price to ensure faithful performance of the contract. The bond shall be in the form of a cashier's check or certified check made payable to Coos County, or, at the discretion of the County, a surety bond effective for at least (30) thirty days from a company licensed to do business in the State of Oregon, or an irrevocable letter of credit issued by an insured institution as defined in ORS 706.008. If the successful Offeror complies with the terms, conditions and provisions of the proposal documents in all respects, and performs all matters and things required to be undertaken under the proposal documents, and the requirements of all laws of the State of Oregon, then the obligation of the Offeror and the surety of Offeror shall be void, otherwise such obligations shall remain in full force and effect.

10.356 Payment Bond

Upon award of a contract, the County shall require successful Offeror to submit a Payment Bond equal to 100% of total contract price, unless exempted under ORS 279C.380(4). The bond shall be in the form of a cashier's check or certified check made payable to Coos County, or a surety bond effective for at least (30) thirty days from a company licensed to do business in the State of Oregon, or an irrevocable letter of credit issued by an insured institution as defined in ORS 706.008.

10.357 Excusing Bonds.

The County may, when awarding a contract for a public improvement, excuse the requirement of a performance bond and/or a payment bond under ORS 279C.380 in the following circumstances:

- (a) Pursuant to ORS 279C.380(5) Public Improvement projects with a total contract price less than \$100,000, or less than \$50,000 for highways, bridges and transportation projects.
- (b) Pursuant to ORS 279C.380(4) and this Rule, an Emergency declaration, under Rule 10.320(1) may also state that the County waives the requirement of furnishing a performance bond and payment bond for the Emergency Contract. After making such an Emergency declaration, the bonding requirements are excused for the procurement.
- (c) Pursuant to ORS 279C.380(4)(a) and this Rule, the County may, in the sole discretion of the Board of Commissioners waive the requirement of a performance bond in its entirety.
- (d) Pursuant to ORS 279C.380(4)(a) and this Rule, the County may, in the sole discretion of the Board of Commissioners permit a successful, responsible Offeror to submit a cashier's check or certified check in lieu of all or a portion of a performance bond otherwise required by this Rule or by statute.

10.358 Public Works Bond

For public improvement projects over \$100,000, Contractors and Subcontractors shall file a \$30,000 Public Works Bond with the Construction Contractors Board prior to commencement of the project. The Bond shall be filed with a corporate surety authorized to do business in the State of Oregon and shall be a continuing obligation until depleted by claims paid, or until the surety cancels the Bond. Contractors shall verify Subcontractor(s) have filed their Bonds, or qualify as exempt. Notwithstanding the above, the Board may allow exemptions pursuant to ORS 279C.836.

AWARD OF CONTRACT

10.360 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 County's Cost Estimate, prior to Contract Award the County 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 County's Cost Estimate. The subcontractor disclosure and substitution requirements do not apply to negotiations under this Rule.
- (2) **Definitions.** The following definitions apply to this Rule:
 - (a) "**Cost Estimate**" means the County's most recent pre-Bid, good faith assessment of anticipated Contract costs, consisting either of an estimate of an architect, engineer, other qualified professionals including County employees serving as project manager, or Department Heads, 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, 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.

10.370 Rejection of Offers

(1) Rejection of an Offer.

- (a) The County 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 County shall reject an Offer upon the County's finding that the Offer:
 - (A) Is contingent upon the County'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; or
 - (G) Is not in substantial compliance with all prescribed public Solicitation procedures.
- (c) The County shall reject an Offer upon the County's finding that the Offeror:
 - (A) Has not been prequalified under ORS 279C.430 and the County required mandatory prequalification;
 - (B) Has been Disqualified under ORS 279C.440;

- (C) Has been declared ineligible under ORS 279C.860 by the Commissioner of Bureau of Labor and Industries and the Contract is for a Public Work;
 - (D) Is listed as not qualified by the Construction Contractors Board, if the Contract is for a Public Improvement;
 - (E) Has not met the requirements of ORS 279A.105 to emerging small businesses if required by the Solicitation Document;
 - (F) Is not Responsible under 279C.375(1).
- (2) **Form of Business.** For purposes of this Rule, the County 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.
- (3) **Rejection of all Offers.** The County may reject all Offers for good cause upon the County's finding it is in the public interest to do so.

10.380 Notice of Intent to Award.

- (1) Unless otherwise provided in the Solicitation Document, the County shall provide Written notice to all Offerors of the County's intent to Award the Contract at least seven (7) days before the Award of a Contract.
- (2) The County's Award shall not be final until the later of the following:
- (a) Five days after the date of the notice, unless the Solicitation Document provided a different period for protest; or
 - (b) The County provides a Written response to all timely-filed protests that denies the protest and affirms the Award.
- (3) Notice shall be effective upon mailing of the intent to Award.

PROTESTS

10.390 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 County's Contractor selection or Contract Award decision.
- (2) **Notice of Competitive Range.** Unless otherwise provided in the RFP, when the competitive proposal process is authorized under the Alternative Contracting Method, the County shall provide Written notice to all Proposers of the County's determination of the Proposers included in the Competitive Range. The County's notice of the Proposers included in the Competitive Range shall not be final until the later of the following:
- (a) Five (5) Business days after the date of the notice, unless otherwise provided therein; or

- (b) Until the County 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) **Right to Protest Award.**

- (a) An adversely affected or aggrieved Offeror may submit to the County a Written protest of the County's intent to Award within five (5) business days after issuance of the notice of intent to Award the Contract for Bids or Proposals and five (5) business days after Award of the Contract for Quotes, unless a different protest period is provided under the Solicitation Document.
- (b) The Offeror's protest must be in Writing and must specify the grounds upon which the protest is based.
- (c) An Offeror is adversely affected or aggrieved only if the Offeror is eligible for Award of the Contract as the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer submitting the best Responsive Proposal and is next in line for Award, i.e., the protesting Offeror must claim that all lower Bidders or higher-scored Proposers are ineligible for Award:
 - (A) Because their Offers were nonresponsive; or
 - (B) The County committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been the Responsible Bidder offering the lowest Bid or the Responsible Proposer offering the highest-ranked Proposal.
- (d) The County 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 County's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.

(4) **Right to Protest Competitive Range.**

- (a) An adversely affected or aggrieved Proposer may submit to the County a Written protest of the County's decision to exclude the Proposer from the Competitive Range within five (5) Business Days after issuance of the notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document.
- (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 County 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 County 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 County's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.
- (5) **Authority to Resolve Protests.** The Board, or such Board's designee, may settle or resolve a Written protest submitted in accordance with the requirements of this Rule.
- (6) **Decision.** If a protest is not settled, the Board, or such Board's designee, shall promptly issue a Written decision on the protest. Judicial review of this decision will be available if provided by statute.
- (7) **Award.** The successful Offeror shall promptly execute the Contract after the Award is final. The County shall execute the Contract only after it has obtained all applicable required documents and approvals.