



MEMORANDUM

EUGENE WATER & ELECTRIC BOARD

Rely on us.

TO: Commissioners Brown, Mital, Helgeson, Manning and Simpson
FROM: Cathy Bloom, Finance Manager; Gail Murray, Purchasing/Risk Manager
DATE: April 29, 2014
SUBJECT: 2013 EWEB Public Contracting Rule Revisions
OBJECTIVE: Board Action – Approval of EWEB Public Contracting Rule Revisions

Issue

One of the Board's responsibilities is to function as the utility's Contract Review Board. In that capacity, the Board has the authority to adopt rules and procedures that interpret Public Purchasing and Contracting Law (ORS279).

Attached for the Board's approval are the required administrative changes to EWEB's contracting rules necessary to assure compliance with the 2013 Legislation, which took effect January 1, 2014.

Background

The 2013 Oregon Legislature's adoption of House and Senate Bills has resulted in changes to the Oregon Public Contracting Code (ORS279A, B, and C). Oregon law requires "a contracting agency that has adopted its own rules... to review those rules each time the Attorney General modifies the model rules... to determine whether the contracting agency's rules should be modified...and to ensure compliance with statutory changes." The Attorney General modifies its administrative rules after every Legislative Session.

In order to remain in legal compliance and to comply with the obligation to review our rules as needed (usually every biennium), the Board adopted the following provision:

EWEB Rule 2-0140: Rules Management

The Purchasing Manager, as approved and/or directed by the General Manager, shall update and revise EWEB Rules without Board approval to facilitate ongoing compliance by EWEB with changing legal requirements. Such revisions and updates do not include changes to dollar thresholds, Board review and approval limits or requirements, granting of any additional authority, reducing the Board's authority, exempting whole classes of contracts, or any other changes which are not clearly defined or needed to assure legal compliance in EWEB's public contracting activities.

Discussion

The revisions were made in cooperation with EWEB's Legal Counsel; so therefore, these changes have passed legal sufficiency review. For the most part, these changes were effective January 1, 2014.

The significant changes from the 2013 Legislative session are as follows:

Division 2 – Authority; General Provisions; Protests and Remedies

New Section 2-0205 Federally Funded Transit Projects – Preference for Exceeding Federal Buy America Requirements.

Division 3 – Public Contracting & Procurement of Goods and Services

Section 3-0265 Small Procurement Threshold change from \$5,000 to \$10,000

Updated to current EWEB structure from Division Director to Leadership Team Manager

Division 5 – Construction Contracts

Section 5-0200 Solicitation documents – adds additional language to be included in solicitation documents regarding requirements for contractors.

Section 5-170 Change from Solar to include Green Energy Technology in Public Buildings

Recommendation/ Requested Board Action

Management is recommending and requesting Board approval of revisions to EWEB Public Contracting Rules, Division 2, 3, and 5 to include recent Legislative changes to Oregon law.

Attachments:

1. Redlined version of EWEB Public Contracting Rule – Division 2
2. Redlined version of EWEB Public Contracting Rule – Division 3
3. Highlighted version of EWEB Public Contracting Rule – Division 5

Statute Authority:

279A.065 Model rules generally; applicability to contracting agencies

EWEB Rule: 2-0140 Rules Management



Public Contracting Rules

GENERAL PROVISIONS

Adopted: 1/4/2005

Effective: 3/1/2005

Revised: ~~4/23/2012~~ ~~2006~~

Revised: ~~5/2/2014~~

Approved: _____

Division 2: Authority; General Provisions; Protests and Remedies

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RULES

2-0100 Authority

The Board is the utility’s Contract Review Board, and has all authority specifically granted it under ORS 279A.050 through 279A.070 and as otherwise provided by law. The Board shall exercise all procurement authority in accordance with the provisions of the Public Contracting Code and EWEB Public Contracting Rules, Divisions 1-6 (“EWEB Rules”). When EWEB has authority to make procurements under a provision of law other than the Public Contracting Code, EWEB is not required to exercise that authority in accordance with the provisions of the Code if, under ORS 279A.025, the Code does not apply to the contract.

Stats. Implemented: Or Laws 2007, Ch. 764, Sec. 3.

2-0105 Effective Date

These EWEB Rules become operative March 1, 2005, and apply only to public contracts first advertised, but if not advertised then entered into, on or after March 1, 2005, except as to Rule 6-0110(4) implementing ORS 279A.180, which statute became operative on September 30, 2003, and which Rule becomes operative on Board approval of these EWEB Rules. See Oregon Laws 2003, ch. 794, §§ 336 and 337.

January 2006 rule revisions (EWEB Rules Division 1-6) from those in effect as of March 1, 2005, apply to public contracts first advertised or solicited on or after January 1, 2006," unless otherwise specified by law.

September 2007 rules revisions to EWEB Rules Divisoins 1 through 6 from those previously in effect, apply to public contracts first advertised or solicited on or after _____ unless otherwise specified by law.

2-0110 Public Contracting Rules

Pursuant to ORS 279A.065(5) and ORS 279A.070, the Board has adopted rules of procedure for all contracts subject to the Code. The Model Public Contracting Rules prepared by the Oregon Attorney General do not apply to EWEB. Reference should be made to EWEB Rules on all matters concerning contracts entered, or to be entered, into by EWEB.

Division 2 applies to contracts entered into by EWEB under EWEB’s Rules. Division 3 applies to contracts for goods or services. Division 4 applies to public consultant contracts. Division 5

applies to contracts for public construction. Where there is a conflict between the rules in Division 2 and those in Divisions 3, 4 or 5, the rules in Divisions 3, 4 or 5 shall be applied. Except as otherwise expressly provided in ORS 279C.800 through ORS 279C.870, and notwithstanding ORS Chapters 279A, 279B, and ORS 279C.005 through 279C.670, applicable federal statutes and regulations govern when federal funds are involved and the federal statutes or regulations conflict with any provision of ORS Chapters 279A, 279B, and ORS 279C.005 through 279C.670 or these rules, or require additional conditions in Public Contracts not authorized by ORS Chapters 279A, 279B, and ORS 279C.005 through 279C.670 or EWEB Rules.

2-0120 Delegation of Authority to General Manager

Pursuant to ORS 279A.075(1), the Board has delegated to the General Manager all its public contracting authority, except as specifically retained by the Board in the EWEB Rules.

2-0130 Purchasing Department

Subject to the control and supervision of the General Manager, the Purchasing Manager may process, negotiate and execute all contracts for EWEB in accordance with EWEB Rules and Oregon law.

2-0140 Rules Management

The Purchasing Manager, as approved and/or directed by the General Manager, shall update and revise EWEB Rules without Board approval to facilitate ongoing compliance by EWEB with changing legal requirements. Such revisions and updates do not include changes to dollar thresholds, Board review and approval limits or requirements, granting of any additional authority, reducing the Board’s authority, exempting whole classes of contracts, or any other changes which are not clearly defined or needed to assure legal compliance in EWEB’s public contracting activities.

The Purchasing Manager shall notify the Board of all updates and revisions made under this rule. The Board has the authority to revise changes made under this rule so long as such revisions do not conflict with law. The Board shall notify the Purchasing Manager and General Manager of such revisions in writing.

2-0150 Board Approval Thresholds

- (1) The Board shall have the sole authority to approve award of all contracts that meet or exceed the following thresholds:
Purchase of all Goods, Services, Personal Services and Equipment: \$150,000 or greater
Construction \$100,000 or greater
- (2) The Board shall have the sole authority to approve all change orders to Board awarded contracts that cause the contract to exceed 25 percent of the last Board approved amount. The Board shall also have the sole authority to approve any change orders where the change order would cause the contract to exceed the Board approval thresholds, as provided in (1) of this rule.
- (3) Procurements that do not apply to this rule are as follows:
 - a. Board Appointed Consultants and Attorneys, which shall be reported to the Board annually;

- b. Required **sole-source** contracts, which includes only the following: governmentally required taxes, fees, permits and payments; software licenses, upgrades, and fees; equipment and software maintenance agreements; and other sole-source contracts required to meet governmental requirements or required to maintain existing software and equipment.
- c. State of Oregon and State of Washington contracts established for use by Oregon Cooperative Public Purchasing (ORCPP) members for the purchase of goods and services; and
- d. Contracts established by the Western States Contracting Alliance (WSCA) as adopted by the State for use by ORCCP members.
- e. This exception from Board approval does not apply to ORCPP contracts for:
 - 1. Services not directly associated to (3)(b) or which cannot be defined as required, routine services or as services for the maintenance of existing equipment; examples include, cell phones, copiers, armored car services, software, etc.
 - 2. Application of this exception (3) is at the sole-judgment and discretion of the Purchasing Manager and shall only be applied to required sole-source contracts and routine ORCPP contracts for goods, equipment, and supplies

2-0160 Affirmative Action; Limited Competition Permitted

Pursuant to ORS 279A.100, EWEB may limit competition on public contracts for goods or services, or on other public contracts with an estimated cost of \$50,000 or less, to carry out affirmative action goals, policies or programs for disadvantaged or minority groups.

When goods, services, or work offered by persons disadvantaged by reason of race, color, religion, sex, national origin, age or physical or mental disability meet or exceed the utility's need, the Board may, at its sole discretion, directly award such person(s) a contract without following a competitive bid process. Documentation verifying the successful contractor's minority or disadvantaged class status, acceptable to the Board shall be filed in the Purchasing office.

If competition for the needed goods, services, or work exists within the minority or disadvantaged community, the Board reserves the right, at its discretion, to limit competition for the contract to only the minority or disadvantaged community or may select the contractor determined to best meet the utility's need through investigation and negotiation with qualified minority or disadvantaged contractors.

2-0170 Subcontracting to and Contracting with Emerging Small Businesses

- (1) As set forth in ORS 279A.105, the Board may require a contractor to subcontract some part of a contract to, or to obtain materials to be used in performing the contract from:
 - (a) A business enterprise that is certified under ORS 200.055 as an emerging small business; or
 - (b) A business enterprise that is:
 - 1. Certified under ORS 200.055 as an emerging small business; and
 - 2. As identified by EWEB, is located in or draws its workforce from economically distressed areas, as designated by the Oregon Economic and Community Development Department.

- (2) A subcontractor certified under ORS 200.055 as an emerging small business is located in or draws its workforce from economically distressed areas if:
 - (a) Its principal place of business is located in an area designated as economically distressed by the Oregon Economic and Community Development Department pursuant to administrative rules adopted by the Oregon Economic and Community Development Department; or
 - (b) The contractor certifies in writing to EWEB that a substantial number of the subcontractor's employees or subcontractors that will manufacture the goods or complete the services under the contract reside in an area designated as economically distressed by the Oregon Economic and Community Development Department. For the purposes of making the foregoing determination, EWEB shall determine in each particular instance what proportion of a contractor's subcontractor's employees or subcontractors constitute a substantial number.
- (3) EWEB should include in each solicitation document a requirement that Offerors certify in their offers in a form prescribed by the utility, that the Offeror has not and will not discriminate against a subcontractor in the awarding of a subcontract because the subcontractor is a disadvantaged minority, women or emerging small business enterprise certified under ORS 200.055.
- (4) Effective January 1, 2008, EWEB may, by appropriate ordinance, resolution or rule, limit competition for a public contract to emerging small business enterprises certified under ORS 200.055 if the contract is estimated to cost \$100,000 or less and is funded by an Emerging Small Business Account established under ORS 200.180.

Stats. Implemented: Or. Laws 2007, Ch. 344, Sec. 2.

2-0180 Preference for Oregon Goods and Services; Nonresident Bidders

- (1) Award When Offers are Equal. When EWEB receives offers which, in its sole judgment, are equal in price, fitness, availability and quality, and chooses to award a Contract, it shall award the contract based on the following order of precedence:
 - (a) To the Offeror among those submitting equal offers that is offering goods or services, or both, or Personal Services that are manufactured, produced or to be performed entirely in Oregon and if the goods, services or Personal Services cost no more than 10 percent more than goods that are not fabricated or processed, or services that are not performed entirely in Oregon.-
 - (b) If two or more Offerors submit equal offers, and both offer goods or services, or both, or Personal Services manufactured, produced or to be performed entirely in Oregon, EWEB may give preference to a qualifying Offeror that resides in or is headquartered in Oregon, or shall otherwise award the contract by drawing lots among the equal offers offering goods or services that have been manufactured or produced in Oregon. The Offerors that submitted the equal offers subject to the drawing of lots shall be given notice and an opportunity to be present when the lots are drawn.
 - (c) If EWEB receives equal offers, and none of the equal offers offer goods or services, or both, or Personal Services manufactured, produced or to be performed entirely in Oregon, then the Board shall award the contract by drawing lots among the equal offers. The Offerors that submitted the equal offers subject to the drawing of lots shall be given notice and an opportunity to be present when the lots are drawn.
- (2) Determining if Offers are Equal. EWEB shall consider offers equal in price, fitness,

availability, and quality as follows:

- (a) Bids received in response to an invitation to bid issued under ORS 279B.055 or ORS 279C.335 are identical in price, fitness, availability and quality if the bids are responsive, and offer the goods or services, or both, or Personal Services described in the Invitation to Bid at the same price.
 - (b) Proposals received in response to a request for proposals issued under ORS 279B.060, or ORS 279C.400 and corresponding EWEB Rules are identical in price, fitness, availability and quality if they are responsive and achieve equal scores when scored in accordance with the evaluation criteria set forth in the Request for Proposals.
 - (c) Proposals received in response to a Special Procurement conducted pursuant to ORS 279B.085 are equal in price, fitness, availability and quality if, after completing the approved contracting procedure, EWEB determines, in writing, that two or more proposals are equally advantageous.
- (3) Determining if Goods or Services are Manufactured or Produced in Oregon. For the purposes of complying with Section 1 of this Rule, EWEB shall determine whether the proposed contract is predominantly for good, services or Personal Services. EWEB may request, either in the Solicitation Document, following closing, or at any other time it determines appropriate, any information EWEB determines is appropriate and necessary to allow it to determine if the goods, services or Personal Services are manufactured, produced or to be performed entirely in Oregon. EWEB may use any reasonable criteria to determine if goods, services or Personal Services are manufactured, produced or to be performed entirely in Oregon, provided that the criteria reasonably relate to that determination, and provided that EWEB applies those criteria equally to each Bidder or Proposer.
- (4) Procedure for Drawing Lots. In any instance when this Rule calls for the drawing of lots, EWEB shall draw lots by a procedure that affords each Offeror subject to the drawing a substantially equal probability of being selected, and that does not allow the person making the selection the opportunity to manipulate the drawing of lots to increase the probability of selecting one Offeror over another. If lots are determined by the tossing of a coin, the coin shall be tossed in the air and allowed to land on the floor without being caught or touched.
- (5) Offers from Local Contractors. When EWEB receives offers equal in price, fitness, availability and quality, and chooses to award a Contract, in addition to the provisions provided by statute and this rule, EWEB may award the contract in favor of a local Contractor, without drawing lots if one or more of the following criteria exist:
- (a) When it is more advantageous for EWEB to secure goods, services, or work from a supplier or contractor in the area.
 - (b) When award of the contract would have an economic impact on the community beyond the benefit to the Contractor.
 - (c) When knowledge of EWEB and the local community is advantageous to EWEB and provides value beyond the basic acquisition.

Nothing herein shall be construed as to guarantee award of any contract to a local bidder. A local bid may have considerations that cause it to outweigh another offer. If those considerations do not exist, the Board shall award the contract to the Offeror who was successful in drawing the winning lot. The reasons for awarding the contract to a local

bidder under this rule shall be documented and filed in the Purchasing Office.

(6) The preferences in this section do not apply to emergency work, minor alterations, ordinary repairs or maintenance work for public improvements or other construction work described in EWEB Rule 5-0140.

(7) For purposes of this section, "services" means services as defined in ORS 279A.010(1)(kk) and personal services designated under ORS 279A.055.

2-0190 Reciprocal Preferences

When evaluating Bids, EWEB will add a percentage increase to the Bid of a Nonresident Bidder equal to the percentage, if any, of the preference that would be given to that bidder in the state in which the bidder resides. EWEB may rely on the list prepared and maintained by the Oregon Department of Administrative Services pursuant to ORS 279A.120(4) to determine both (i) whether the Nonresident Bidder's state gives preference to in-state bidders, and (ii) the amount of such preference.

2-0200 Preference for Recycled Materials

- (1) Notwithstanding provisions of law or EWEB Rules requiring EWEB to award a Contract to the lowest responsible bidder or best proposer or provider of a quotation, and in accordance with subsection (2) of this section, EWEB shall give preference to the procurement of goods manufactured from recycled materials.
- (2) In comparing goods from two or more Bidders or Proposers, if at least one Bidder or Proposer offers goods manufactured from recycled materials, and at least one Bidder or Proposer does not, EWEB shall select the Bidder or Proposer offering goods manufactured from recycled material if each of the following four conditions exists:
 - (a) The recycled product is available;
 - (b) The recycled product meets applicable and acceptable standards;
 - (c) The recycled product can be substituted for a comparable non-recycled product; and
 - (d) The recycled product's costs do not exceed the costs of non-recycled products by more than five percent or a higher percentage if a written determination is set forth in the Solicitation Document. For purposes of making the foregoing determination, EWEB shall consider the costs of the goods following any adjustments EWEB makes to the price of the goods for purposes of evaluation pursuant to Division 3.
- (3) For the purposes of Section 2-0200(3), EWEB shall determine if goods manufactured from recycled materials meet the standards established by or acceptable to EWEB.

2-0205 Federally Funded Transit Projects — Preference for Exceeding Federal Buy America Requirements

(1) EWEB, in its Solicitation Documents to award a contract for a transit project that will be funded in whole or in part with funds from the federal government or a federal government agency, may provide for the application of a preference in favor of an Offeror whose bid or proposal exceeds the applicable federal Buy America requirements.

(a) EWEB has discretion to adjust the amount or character of the preference to account for variations in the nature of the contract or project, and the degree to which each Offeror's bid or proposal exceeds the federal Buy America requirements.

(b) For example, in an invitation to bid procurement EWEB may authorize a range of preference price percentages to account for the various degrees to which the bidders might exceed the federal Buy America requirements. In no event, however, may the percentage preference given to a bidder exceed ten percent of the total bid price.

(c) Similarly, under a request for proposals, EWEB may allocate and award evaluation points to reflect the degrees to which the proposers might exceed the applicable federal Buy America requirements. In no event, however, may those percentage points exceed ten percent of the total number of points available for award under the request for proposals.

Stats. Implemented: 2012 OL, ch 58 (SB 1556)

2-0210 Authority for Cooperative and for Permissive Procurements

- (1) EWEB may participate in, sponsor, conduct or administer Cooperative Procurements as follows:
 - (a) EWEB may participate in, sponsor, conduct or administer a Joint Cooperative Procurements to establish Contracts or Price Agreements for goods or services, that use source selection methods substantially equivalent to those set forth in EWEB Rules, Division 3, or to establish Contracts for Public Improvements that use a competitive bidding process substantially equivalent to that set forth in EWEB Rules, Divisions 4 and 5, and only in accordance with ORS 279A.210.
 - (b) EWEB may participate in, sponsor, conduct or administer Permissive Cooperative Procurements to establish contracts or Price Agreements for the acquisition of goods or services (but not public improvements) that use source selection methods substantially equivalent to those set forth in EWEB Rules, Division 3, and only in accordance with ORS 279A.215.
 - (c) EWEB may participate in, sponsor, conduct or administer interstate Cooperative Procurements to establish contracts or Price Agreements for the acquisition of goods or services that use source selection methods substantially equivalent to those set forth in EWEB Rules, Division 3, and only in accordance with ORS 279A.220.
- (2) A solicitation and award process uses source selection methods substantially equivalent to those identified in Division 3 when it has the characteristics set forth in ORS 279A.200(2). EWEB shall determine for itself, in a means that meets its procurement requirements, whether or not the solicitation and award process for an Original Contract arising out of a Cooperative Procurement is substantially equivalent to these rules or those identified in Division 3 in accordance with ORS 279A.200(2).

2-0220 Responsibilities of Administering and Purchasing

- (1) If EWEB is an Administering Contracting Agency of a Cooperative Procurement, it may establish the conditions under which persons may participate in the Cooperative

Procurements. Such conditions may include, without limitation, whether each person that participates in the Cooperative Procurement must pay administrative fees to EWEB, whether the participants must enter into a written agreement with EWEB, or any other matters related to the administration of the Cooperative Procurement and the resulting Original Contract. EWEB may, but is not required to, include provisions in the Solicitation Document for a Cooperative Procurement or advertise the Solicitation Document in a manner to assist compliance with the Code and EWEB Rules by Purchasing Contracting Agencies.

- (2) If EWEB, acting as a Purchasing Contracting Agency, enters into a Contract or Price Agreement based on a Cooperative Procurement, EWEB shall comply with the Code and EWEB Rules, including without limitation, those sections of the Code and EWEB Rules that govern:
 - (a) The extent to which EWEB may participate in the Cooperative Procurement,
 - (b) The advertisement of the solicitation document related to the Cooperative Procurement, and
 - (c) Public notice of EWEB's intent to establish Contracts or Price Agreements based on a Cooperative Procurement.

2-0230 Advertisements of Intent to Establish Contracts or Price Agreements Through a Permissive Cooperative Procurement

- (1) If EWEB wishes to enter into a Contract or Price Agreement arising out of a Permissive Cooperative Procurement, it must publish notice of its intent to do so if it estimates that it will spend in excess of \$250,000 on goods and services acquired under the Contract or Price Agreement.
- (2) EWEB will spend in excess of \$250,000 for goods and services acquired under a Contract or Price Agreement arising out of a Permissive Cooperative Procurement if:
 - (a) The Contract or Price Agreement arising out of the Permissive Cooperative Procurement expressly provides that EWEB will make payments over the term of the Contract or Price Agreement that will, in aggregate, exceed \$250,000, whether or not the total amount or value of the payments is expressly stated;
 - (b) EWEB's Contract or Price Agreement arising out of the Permissive Cooperative Procurement expressly provides for a guaranteed maximum price, or a maximum not to exceed amount in excess of \$250,000; or
 - (c) At the time EWEB enters into the Contract or Price Agreement, EWEB reasonably contemplates, based on historical or other data available to it, that the total payments it will make for goods or services under the Contract or Price Agreement will, in aggregate, exceed \$250,000 over the anticipated duration of the Contract or Price Agreement.
- (3) The notice of intent required by 2-0230(1) shall contain the information required by ORS 279A.215(2)(b), and EWEB shall advertise the notice in the same manner as provided in ORS 279B.055(4)(b) and (c). EWEB shall give the notice required by this rule no fewer than 7 days before the deadline for submitting comments regarding EWEB's intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement.

- (4) If EWEB intends to establish a Contract or Price Agreement arising out of the Permissive Cooperative Procurement that it administers, it may satisfy the notice requirements set forth in 2-0230(1) and (3) by including the information required by ORS 279A.215(2)(b) in the Solicitation Document related to the Permissive Cooperative Procurement, and including instructions in the Solicitation Document to potential Offerors describing how they may submit comments in response to EWEB's intent to establish a Contract or Price Agreement through the Permissive Cooperative Procurement. The content and timing of such notice shall comply in all respects with ORS 279A.215(2), ORS 279A.215(3) and EWEB Rules.
- (5) EWEB shall respond to any comments on its intent to establish a Contract or Price Agreement through a Permissive Cooperative Procurement as set forth in ORS 279A.215(3)(c), by making a written determination that establishing a Contract or Price Agreement through a Permissive Cooperative Procurement is in the best interest of EWEB and providing a copy of the written determination to any vendor that submitted comments.

2-0240 Advertisements of Interstate Cooperative Procurements

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

- (1) The Solicitation Document for the Interstate Cooperative Procurement lists EWEB or the Cooperative Procurement Group of which EWEB is a member as a party that may enter into Contracts or Price Agreements under the terms and conditions of the Original Contract, and the Solicitation Document is advertised in Oregon in compliance with ORS 279B.055(4) or ORS 279B.060(4) by either:
 - (a) EWEB; or
 - (b) The Cooperative Procurement Group, or a member of the Cooperative Procurement Group, of which EWEB is a member; or
 - (c) Another Purchasing Contracting Agency that is subject to the Code, so long as such advertisement would, if given by EWEB, comply with ORS 279B.055(4) or ORS 279B.060(4) with respect to EWEB; or
- (2) If the Solicitation Document issued by EWEB was not advertised in accordance with 2-0240(1), EWEB gives notice of its intent to enter into a Public Contract or Price Agreement based on the terms of the Interstate Cooperative Procurement. The notice of intent shall contain the information required by ORS 279A.220(2)(b)(B), and EWEB shall advertise the notice in the same manner as provided in ORS 279B.055(4)(b) and (c). EWEB shall give the notice required by this Section no fewer than 7 days before the deadline for submitting comments regarding EWEB's intent to establish a contract or price agreement through an Interstate Cooperative Procurement. EWEB shall respond to any comments on its intent to establish a Contract or Price Agreement through an Interstate Cooperative Procurement as set forth in ORS 279A.220(3)(c), by making a written determination that establishing a contract or price agreement through an Interstate Cooperative Procurement is in EWEB's best interest and providing a copy of the written determination to any vendor that submitted comments.

2-0250 Protests and Disputes In Cooperative Procurement Process

- (1) Bidders or Proposers must make such protests in accordance with the processes and procedures established in Division 3.

- (2) The failure of EWEB to exercise any rights or remedies it has under a Contract or Price Agreement entered into through a Cooperative Procurement shall not affect the rights or remedies of any other Contracting Agency that participates in the Cooperative Procurement, including the Administering Contracting Agency, and shall not prevent EWEB from exercising any rights or seeking any remedies that may be available to it under its own Contract or Price Agreement arising out of the Cooperative Procurement.
- (3) Any other protests related to a Cooperative Procurement, or disputes related to a Contract or Price Agreement arising out of a Cooperative Procurement, shall be made and resolved as set forth in ORS 279A.225.

2-0260 Amendments to Cooperative Procurement Contracts

EWEB may amend a Contract entered into pursuant to a Cooperative Procurement as set forth in Division 3 – Contract Amendments.

2-0270 Rejection of All Offers

If EWEB rejects all Offers, it shall keep all Proposals and Bids in the Procurement file.

Stat. Auth.: ORS 279A.070

Stats. Implemented: ORS 279B.100


2-0280 Protests and Disputes Generally

Unless otherwise required by law, protests related to EWEB contracting shall be in accordance with the protest provisions of these Rules, as found in the various Divisions. The application of such provisions, including this Rule, shall be deemed to constitute EWEB's Administrative Review Process.

- (1) All protests are subject to the laws and EWEB Rules that specifically govern filing and response periods. Any protest must be received within seven business days after issuance of the notice of intent to award the Contract, unless a law or EWEB Rule provides a different protest period.
- (2) All protests must be in writing, signed by the protesting party or an authorized Agent and submitted to EWEB's Purchasing Manager. The protest must state all facts and arguments upon which the protesting party is basing their protest. EWEB will only consider protests identifying an issue of fact concerning a matter of bias, discrimination or conflict of interest, or non-compliance with procedures described in the Solicitation Documents, or non-compliance with state law or the EWEB Rules.
- (3) EWEB's Purchasing Manager will review the protest and will fax (if provided) and mail the protesting party a written response within three (3) business days of receipt of the written protest (unless a law or EWEB Rule provide for a different period) to the fax number and address provided in the bid or proposal. Any written response may be comprised of a determination of the protest, a notice to the protesting party of the need for additional time in which to evaluate the matter, or other notice to the protesting party.
- (4) If the Purchasing Manager's determination [response] is adverse to the protester, any further appeal of the Purchasing Manager's determination by the party must be

submitted in writing to EWEB's General Manager within three (3) business days of issuance of the Purchasing Manager's determination [response].

- (5) EWEB's General Manager will review any appeal of the Purchasing Manager's determination and shall fax (if provided) and mail, in accordance with the fax number and address provided in the bid or proposal, the protesting party a written response within three (3) business days of receipt of written appeal.
- (6) If the determination of the General Manager is adverse to the protesting party's interest, the protesting party may appeal to EWEB's Contract Review Board (Board) only by filing a written notice of appeal with the General Manager within two (2) business days of issuance of the General Manager's written determination.
- (7) The Board, in considering the protest, shall review the documentation presented to the Purchasing Manager and the General Manager on or before the next regularly scheduled Board Meeting, but in no event shall the Board be required to review in less than ten (10) business days. The Contract Review Board will not review evaluation scores. The review by the Contract Review Board shall be based upon the documentation presented to the Purchasing Manager and the General Manager and shall be limited to evaluation of a matter of bias, discrimination or conflict of interest, or non-compliance with procedures described in the Solicitation Document, or non-compliance with state law or the EWEB Public Contracting Rules. The Contract Review Board's determination shall be EWEB's final decision.

 Public Contracting Rules	Adopted: 1/4/2005 Effective: 3/1/2005 Revised: 2/20/2012 Revised: 52/___/2014 Approved: _____
PUBLIC CONTRACTING & PROCUREMENT OF GOODS AND SERVICES	

**Division 3
Public Contracting & Procurement of Goods and Services**

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RULES

3-0100 Policies

- (1) It is the policy of the state of Oregon, in enacting the Public Contracting Code that a sound and responsive public contracting system should:
 - (a) Simplify, clarify and modernize procurement practices so that they reflect the market place and industry standards.
 - (b) Instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government.
 - (c) Promote efficient use of state and local government resources, maximizing the economic investment in public contracting within this state.
 - (d) Clearly identify divisions and policies that implement each of the legislatively mandated socioeconomic programs that overlay public contracting and accompany the expenditure of public funds.
 - (e) Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement. In public

procurement, as set out in ORS chapter 279B, meaningful competition may be obtained by evaluation of performance factors and other aspects of service and product quality, as well as pricing, in arriving at best value.

- (f) Provide a public contracting structure that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competitive bidding as the standard for public improvement contracts unless otherwise exempted;
- (2) And that public contracting activity should:
 - (a) Provide effective outcomes that represent optimal value to EWEB and, to the greatest extent feasible, be consistent with market practices;
 - (b) Seek consistency in procurement practices between contracting agencies covered under the Public Contracting Code while preserving each contracting agency's ability to adopt divisions to maximize EWEB's effectiveness; and
 - (c) Apply innovative practices while maintaining quality and integrity;
 - (3) And that EWEB's development of specifications will encourage reasonable competition consistent with the above policies that will seek to promote optimal value and suitability for the purposes intended and to reasonably encourage competition in satisfying EWEB's needs;
 - (4) And that EWEB's policy will encourage the development of clear, precise and accurate specifications in solicitations for public contracts. To that end, in developing specifications, EWEB may consult, under contract or otherwise, with technical experts, suppliers, prospective contractors and representatives of the industries with which EWEB contracts. However, EWEB shall take reasonable measures to ensure that no person who prepares or assists in the preparation of solicitation documents, specifications, plans or scopes of work, and no business with which the person is associated, realizes a material competitive advantage in a procurement that arises from EWEB's use of the solicitation documents, specifications, plans or scopes of work. The policy against the realization of a material competitive advantage from the character of the specifications developed in conjunction with persons outside EWEB does not proscribe advantages that result incidentally from EWEB's specification of the characteristics of a product or work to meet EWEB's needs.

Stats. Implemented: ORS 279A.015, 279B.010, 279B.205 and 279B.210

3-0110 Application

This EWEB Rule, Division 3, implements ORS chapter 279B, Public Contracting and Public Procurements and applies to the procurement of Goods or Services, except for architectural, engineering, photogrammetric mapping, transportation planning, and land surveying, or related services designated in Division 4 and for personal services designated in Division 6. For contracting and procurement between other public agencies and EWEB for cooperative procurement designated in Division 2, these rules shall only apply between the agencies and EWEB as the purchaser and the contractor as the provider.

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

Stats. Implemented: ORS 279B.015

SOURCE SELECTION

3-0200 Methods of Source Selection

EWEB shall award a public contract for procurement of goods or services by competitive sealed bidding or competitive sealed proposals, including without limitation competitive range, multiple-tiered and multi-step proposals, except for:

- (1) Qualified Products List, Rule 3-0240;
- (2) Specifications and Brand Names, Rule 3-0241;
- (3) Price Agreements, Rule 3-0242;
- (4) Small procurements (not exceeding \$105,000), Rule 3-0265;
- (5) Intermediate procurements (\$105,000 to \$150,000), Rule 3-0270;
- (6) Sole-source procurements, Rule 3-0275;
- (7) Emergency procurements, Rule 3-0280;
- (8) Special procurements, Rule 3-0285;
- (9) Joint Agreements between intergovernmental agencies, Division 2; and
- (10) To obtain information useful in the preparation of an invitation to bid or a request for proposal, EWEB may issue a request for:
 - (a) Information;
 - (b) Interest;
 - (c) Qualifications; or
 - (d) Other preliminary documents to obtain information.

Stats. Implemented: ORS 279B.050

3-0210 Competitive Sealed Bidding

EWEB may procure goods or services by competitive sealed bidding. If competitive sealed bidding is selected, EWEB will issue an Invitation to Bid (ITB), which must include the following information:

- (1) A time and date by which the bids must be received and a place at which the bids must be submitted, and may, in the sole discretion of EWEB, direct or permit the submission and receipt of bids by electronic means pursuant to Rule 3-0330 or by facsimile transmission pursuant to Rule 3-0320;
- (2) The name and title of the person designated to receive bids and the person designated by EWEB as the contact person for the procurement, if different;
- (3) A procurement description which identifies the scope of work included within the procurement, outlines the contractor's anticipated duties and sets expectations for the contractor's performance, including but not limited to the character of the goods or

services, a description of the acquisition, specifications, delivery or performance schedule, and inspection and acceptance requirements. Unless EWEB for good cause specifies otherwise, the scope of work requires the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the appropriate goods or services;

- (4) A time, date and place for prequalification applications, if any, to be filed and the classes of work, if any, for which bidders must be prequalified in accordance with Rule 3-0550;
- (5) A statement that EWEB may cancel the procurement or reject any or all bids pursuant to Rules 3-0640;
- (6) A statement that requires the contractor or subcontractor to possess an asbestos abatement license, if required by ORS 468A.710;
- (7) All contractual terms and conditions applicable to the procurement, including:
 - (a) a provision indicating whether the contractor can assign the contract, delegate its duties, or subcontract the delivery of the goods or services without prior written approval from EWEB;
 - (b) provisions specifying clear consequences for contractor's failure to perform the scope of work identified in the invitation to bid or the contractor's failure to meet established performance standards. The consequences may include, but are not limited to:
 - (A) Reducing or withholding payment;
 - (B) Requiring the contractor to perform, at the contractor's expense, additional work necessary to perform the identified scope of work or meet the established performance standards; or
 - (C) Declaring a default, terminating the public contract and seeking damages and other relief available under the terms of the public contract or other applicable law.
- (8) Notice of any pre-offer conferences as provided in Rule 3-0420 as follows:
 - (a) The time, date and location of any pre-offer conference; and
 - (b) Whether attendance at the conference will be mandatory or voluntary;
- (9) The form and instructions for submission of Bids and any other special information;
- (10) The time, date and place of opening;
- (11) The office where the Solicitation Document may be reviewed;
- (12) A statement that each bidder must identify whether the bidder is a "Resident Bidder";
- (13) Contractor's certification of nondiscrimination in obtaining required subcontractors (emerging small businesses) in accordance with Rule 2-0170(3);
- (14) A statement as to how EWEB will notify bidders of addenda and how EWEB will make addenda available as provided in Rules 3-0300 and 3-0430;
- (15) A statement that EWEB may require bid security.

- (16) Notice of the bidding and evaluation process:
- (a) The anticipated solicitation schedule, deadlines, protest process pursuant to Rule 3-0700, and evaluation criteria and process pursuant to Rule 3-0600;
 - (b) If EWEB intends to award contracts to more than one bidder, it shall identify in the Solicitation Document the manner in which it will determine the number of contracts it will award;

(17) Applicable preferences allowed by Division 2;

Stats. Implemented: ORS 279B.055, 279A.110(4)

3-0211 Multi-Step Sealed Bids

- (1) If EWEB determines that preparing a procurement description to support an award based on price is impractical, EWEB may use a multi-step competitive sealed bid process to procure goods or services.
- (2) Multi-step bidding is a phased process that seeks necessary information or unpriced technical bids in the initial phase of regular competitive sealed bidding, inviting bidders who submitted technically acceptable bids in the initial phase to submit competitive sealed price bids on the technical bids in the final phase. The contract shall be awarded to the lowest responsible bidder. If time is a factor, EWEB may require bidders to submit a separate sealed price bid during the initial phase to be opened after the technical evaluation.
- (3) Whenever multi-step sealed bids are used, public notice for the first phase will be given in accordance with Rule 3-0300. Public notice is not required for the subsequent phases. However, EWEB will give notice of subsequent phases to all bidders and inform any bidders excluded from the subsequent phases of their right, if any, to protest exclusion pursuant to this Rule and Rule 3-0700.
- (4) Procedure for phase one of multi-step sealed bids:
 - (a) Multi-step sealed bidding will be initiated by the issuance of an Invitation to Bid in the form and manner required for competitive sealed bids. In addition to the requirements set forth in Rule 3-0210, the multistep Invitation to Bid shall state:
 - (A) That the solicitation is a Multi-Step Sealed Bid Procurement, and priced bids will be considered only in the second phase and only from those bidders whose unpriced technical bids are found acceptable in the first phase;
 - (B) Whether price bids are to be submitted at the same time as unpriced technical bids; if they are, that such price bids shall be submitted in a separate sealed envelope;
 - (C) That unpriced technical bids are requested;
 - (D) The criteria to be used in the evaluation of unpriced technical bids;
 - (E) That EWEB may conduct oral or written discussions for the purposes of clarification of the unpriced technical bids;
 - (F) That the goods or services being procured shall be furnished generally in accordance with the bidder's technical bid as found to be finally acceptable and shall meet the requirements of the Invitation to Bid;
 - (G) Whether bidders excluded from subsequent phases have a right to protest the exclusion. Such information can be given or changed by addenda.

- (b) After the closing date and time of the solicitation, addenda to the Invitation to Bid shall be distributed only to bidders who submitted unpriced technical bids.
 - (c) Unpriced technical bids need not be opened publicly.
 - (d) Unpriced technical bids shall be evaluated solely in accordance with the criteria set forth in the Invitation to Bid. Unpriced technical bids shall be categorized as:
 - (A) Eligible;
 - (B) Potentially eligible; i.e., in EWEB's sole opinion is reasonably susceptible of being made eligible; or
 - (C) Ineligible, in which case EWEB will record in writing the basis for determining a bid ineligible and make it part of the procurement file.
 - (e) EWEB may initiate phase two of the procedure if, in EWEB's opinion, there are sufficient eligible or potentially eligible unpriced technical bids to assure effective price competition in the second phase without technical discussions.
 - (f) If EWEB finds that there are not sufficient eligible or potentially eligible unpriced technical proposals to assure effective price competition, it shall issue an addendum to the Invitation to Bid or engage in technical discussions as set forth in this rule:
 - (A) Clarification of bidder's technical bid may be conducted with any bidder who submits a qualified, or potentially qualified technical bid.
 - (B) During the course of such discussions, EWEB shall not disclose any information derived from one unpriced technical bid to any other bidder.
 - (C) Once discussions are begun any bidder, who has not been notified that its bid has been finally found ineligible, may submit supplemental information amending its technical bid at any time until the closing of the final step established by EWEB. Such submission may be made at the request of EWEB or upon the bidder's own initiative.
 - (g) When EWEB determines a bidder's unpriced technical bid to be ineligible, such bidder will not be afforded an additional opportunity to supplement its technical bids.
 - (h) Mistakes may be corrected or bids may be withdrawn during phase one:
 - (A) Before unpriced technical bids are considered;
 - (B) After any discussions have commenced under Rule 3-0211(4)(e);
 - (C) When responding to any addenda of the Invitation to Bid;
 - (D) Otherwise mistakes may be corrected or withdrawal permitted in accordance with Rule 3-0470.
- (5) Procedure for Subsequent Phases.
- (a) Upon the completion of phase one, EWEB shall either:
 - (A) Open price bids submitted in phase one (if price bids were required to be submitted) from bidders whose unpriced technical bids were found to be eligible; or
 - (B) If price bids have not been submitted, technical discussions have been held, or addenda to the Invitation to Bid have been issued, invite each eligible bidder to submit a price bid.
 - (b) Phase two shall be conducted as any other competitive sealed bid procurement except:
 - (A) As specifically set forth in this Division;
 - (B) No public notice need be given of this invitation to submit price bids because such notice was previously given.

Stats. Implemented: ORS 279B.055

3-0230 Competitive Sealed Proposals

EWEB may procure goods or services by competitive sealed proposals, including without limitation competitive range, multiple-tiered and multi-step proposals. A Request for Proposal (RFP) is used to initiate a competitive sealed proposal solicitation, which must contain the following information:

- (1) A time and date by which the proposals must be received and a place at which the proposals must be submitted, and may, in the sole discretion of EWEB, direct or permit the submission and receipt of proposals by electronic means pursuant to Rule 3-0330 or by facsimile transmission pursuant to Rule 3-0320 ;
- (2) The name and title of the person designated to receive proposals and the person designated by EWEB as the contact person for the procurement, if different;
- (3) A procurement description which identifies the scope of work included within the procurement, outlines the contractor's anticipated duties and sets expectations for the contractor's performance, including the character of the goods or services EWEB is purchasing or a description of the acquisition, specifications, delivery or performance schedule, inspection and acceptance requirements. Unless the contractor is providing architectural, engineering and land surveying services or related services, or unless EWEB for good cause specifies otherwise, the scope of work requires the contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the appropriate goods or services; ;
- (4) A time, date and place that prequalification applications, if any, must be filed and the classes of work, if any, for which proposers must be prequalified in accordance with Rule 3-0550;
- (5) A statement that EWEB may cancel the procurement or reject any or all proposals pursuant to Rules 3-0640;
- (6) A statement that requires the contractor or subcontractor to possess an asbestos abatement license, if required by ORS 468A.710;
- (7) All contractual terms and conditions applicable to the procurement.
 - (a) The contract terms and conditions shall specify clear consequences for a contractor's failure to perform the scope of work identified in the request for proposals or the contractor's failure to meet established performance standards. The consequences may include but are not limited to:
 - (A) Reducing or withholding payment;
 - (B) Requiring the contractor to perform, at the contractor's expense, additional work necessary to perform the identified scope of work or meet the established performance standards; or
 - (C) Declaring a default, terminating the public contract and seeking damages and other relief available under the terms of the public contract or other applicable law.
 - (b) The request for proposals also may:
 - (A) Identify those contractual terms or conditions EWEB reserves for negotiation with proposers;
 - (B) Request that proposers propose contractual terms and conditions that relate to subject matter reasonably identified in the request for proposals;

(C) Contain or incorporate the form and content of the contract that EWEB will accept, or suggested contract terms and conditions that nevertheless may be the subject of negotiations with proposers, including a provision indicating whether the contractor can assign the contract, delegate its duties, or subcontract the goods or services without prior written approval by EWEB;

- (8) Notice of any pre-offer conference as provided in Rule 3-0420 as follows:
 - (a) The time, date and location of any pre-offer conference; and
 - (b) Whether attendance at the conference will be mandatory or voluntary;
- (9) The form and instructions for submission of proposals and any other special information;
- (10) The time, date and place of opening;
- (11) The office where the Solicitation Document may be reviewed;
- (12) Contractor's certification of nondiscrimination in obtaining required subcontractors (emerging small businesses) in accordance with Rule 2-0210(3);
- (13) How EWEB will notify proposers of addenda and how it will make addenda available as provided in Rules 3-0300 and 3-0430;
- (14) A statement of the proposal and evaluation process:
 - (a) The anticipated solicitation schedule, deadlines, protest process, and evaluation process;
 - (b) The selection criteria;
 - (c) If EWEB intends to award contracts to more than one proposer, it must identify in the Solicitation Document the manner in which it will determine the number of contracts it will award;
 - (d) That EWEB may employ methods of contractor selection that include without limitation:
 - (A) An award or awards based solely on the ranking of proposals;
 - (B) Discussions leading to best and final offers, in which EWEB may not disclose private discussions leading to best and final offers;
 - (C) Discussions leading to best and final offers, in which EWEB may not disclose information derived from proposals submitted by competing proposers;
 - (D) Serial negotiations, beginning with the highest ranked proposer;
 - (E) Competitive simultaneous negotiations;
 - (F) Multiple-tiered competition designed to identify, at each level, a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers;
 - (G) A multi-step request for proposals that require additional information designated in Rule 3-0232; or
 - (H) Any combination of methods described in this section (d);
- (15) A statement that if a contract is awarded, EWEB shall award the contract to the responsible proposer whose proposal EWEB determines in writing to be the most advantageous to EWEB based on:
 - (a) The evaluation process and evaluation factors described in this request for proposal;
 - (b) Any applicable preferences allowed by Division 2; and when applicable,
 - (c) The outcome of any negotiations authorized by this request for proposal;

- (16) A statement that if the request for proposal specifies or authorizes the award of multiple public contracts, EWEB shall award public contracts to the responsible proposers who qualify for the award of a contract under the terms of this request for proposal.
- (17) Applicable preferences allowed by Division 2.
- (18) A statement that if a proposer is eliminated from further competition based on a competitive range evaluation then there is no protest allowed for the proposer's elimination. For all other proposers eliminated from further competition, a statement describing the manner in which those proposers may protest EWEB's decision pursuant to Rule 3-0700.

Stats. Implemented: ORS 279B.060, 279A.110(4)

3-0231 Competitive Range, Multiple-tiered, Discussions and Negotiations

EWEB may use the competitive range process at any stage in the procurement process as follows:

- (1) Determining Competitive Range:
 - (a) EWEB shall establish a competitive range after evaluating all responsive proposals using the evaluation criteria set forth in the Request for Proposals and shall rank the proposers in the competitive range.
 - (b) EWEB may increase the number of proposers in the competitive range if its 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 most advantageous proposer. EWEB may decrease the number of proposers in the initial competitive range only if the excluded proposers have no reasonable chance to be the most advantageous proposer.
- (2) EWEB shall provide written notice to all proposers either:
 - (a) Identifying proposers within the competitive range or
 - (b) Excluding proposers from the competitive range. Excluded proposers may not protest EWEB's evaluation and determination of the competitive range.
- (3) EWEB shall provide written notice to all proposers, collectively "eligible proposers", in the competitive range of its intent to award the contract to the highest-ranked proposer in the competitive range and shall commence discussions with the eligible proposers.
 - (a) EWEB may conduct discussions for the following purposes:
 - (A) Informing eligible proposers of deficiencies in their initial proposals;
 - (B) Notifying eligible proposers of parts of their proposals for which EWEB wants additional information; or
 - (C) Otherwise allowing eligible proposers to develop revised proposals that will allow EWEB to obtain the best proposal based on the requirements and evaluation criteria set forth in the Request for Proposals.
 - (b) In conducting discussions, EWEB:
 - (A) Shall give all eligible proposers fair and equal treatment with respect to any opportunity for discussion and revision of proposals;
 - (B) Shall not disclose private discussions with other eligible proposers;

- (C) Shall not disclose information derived from proposals submitted by competing proposers;
- (c) EWEB may adjust the evaluation of a proposal as a result of a discussion under this section. The conditions, terms, or price of the proposal may be altered or otherwise changed during the course of the discussions provided the changes are within the scope of the Request for Proposals.
- (d) At any time during the time allowed for discussions, EWEB may:
 - (A) Continue discussions with a particular eligible proposer;
 - (B) Terminate discussions with a particular eligible proposer and continue discussions with other eligible proposers; or
 - (C) Conclude discussions with all remaining eligible proposers and provide notice to the eligible proposers requesting best and final offers.
- (4) EWEB may commence serial negotiations with the highest-ranked eligible proposers or commence simultaneous negotiations with all eligible proposers as follows:
 - (a) After initial determination of which proposals are responsive; or
 - (b) After initial determination of the competitive range; or
 - (c) After conclusion of discussions with all eligible proposers and evaluation of revised proposals submitted by eligible proposers.
- (5) EWEB may negotiate:
 - (a) The statement of work;
 - (b) The contract price as it is affected by negotiating the statement of work; and
 - (c) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the Request for Proposal or addenda thereto or terms and conditions that may have been affected because of changes in the statement of work. Unless otherwise acceptable to EWEB, proposers shall not submit for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the Request for Proposal or addenda thereto.
- (6) At any time during discussions or negotiations EWEB may terminate discussions or negotiations with the highest-ranked proposer, or the proposer with whom it is currently discussing or negotiating, if it 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.
- (7) If EWEB is conducting serial negotiations and it terminates negotiations with a proposer, EWEB may then commence negotiations with the next highest scoring proposer in the competitive range, and continue the process until EWEB has either:
 - (a) Determined to award the contract to the proposer with whom it is currently discussing or negotiating; or
 - (b) Completed one round of discussions or negotiations with all eligible proposers in the competitive range unless EWEB provided for more than one round of discussions or negotiations in the Request for Proposal, in which case EWEB has completed all rounds of discussions or negotiations.
- (8) If EWEB chooses to conduct competitive negotiations, it may negotiate simultaneously with competing eligible proposers. EWEB:
 - (a) Shall give all eligible proposers fair and equal treatment with respect to any opportunity for discussion and revision of proposals;

- (b) Shall not disclose private discussions with other eligible proposers;
 - (c) Shall not disclose information derived from proposals submitted by competing proposers;
 - (d) Shall not disclose other proposer's proposals or the substance of negotiations with other proposers until after EWEB has issued an Intent to Award.
- (9) Any oral modification of a proposal resulting from negotiations under this section shall be submitted in writing by the proposer and shall be subject to review and acceptance by EWEB.
- (10) If best and final offers are required, EWEB shall:
- (a) Set the date and time by which proposers must submit best and final offers and give proposers written notice of the date and time and of any additional changes to the evaluation criteria;
 - (b) Best and final offers shall be submitted only once;
 - (c) EWEB may make a written determination that it is in EWEB's best interest to conduct additional discussions, negotiations or change EWEB's requirements and require another submission of best and final offers. Otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award.
 - (d) EWEB shall inform proposers that if they do not submit notice of withdrawal or another best and final offer, then their immediately previous offer will be construed as their best and final offer.
 - (e) EWEB shall evaluate proposer's best and final offer by the criteria in the Request for Proposal or as modified by addenda written before the date and time set for submission of the last best and final offer.

Stats. Implemented: ORS 279B.060

3-0232 Multi-step Sealed Proposals

- (1) Multi-step sealed proposals is a phased procurement process that seeks necessary information or unpriced technical proposals in the initial phase and invites proposers who submitted technically qualified proposals in the initial phase to submit competitive sealed price proposals on the technical proposals in the final phase. The contract shall be awarded to the responsible proposer submitting the most advantageous proposal in accordance with the terms of the Solicitation Document applicable to the final phase. If time is a factor, EWEB may require proposers to submit a separate sealed price proposal during the initial phase to be opened after the technical evaluation.
- (2) Whenever multi-step sealed proposals are used, public notice for the first phase shall be given pursuant to Rule 3-0300. Public notice shall not be required for the subsequent phases. However, EWEB shall give notice of the subsequent phases to all proposers and inform any proposers excluded from the subsequent phases of the right, if any, to protest exclusion pursuant to Rule 3-0700.
- (3) Procedure for phase one of multi-step sealed proposals:
- (a) Multi-step sealed proposals shall be initiated by a Request for Proposal (RFP) in the form and manner required for competitive sealed proposals designated in Rule 3-0230. In addition, the multi-step Request for Proposal shall state:
 - (A) That unpriced technical proposals are requested;
 - (B) Whether price proposals are to be submitted at the same time as unpriced

- technical proposals; that if they are, such price proposals shall be submitted in a separate sealed envelope;
- (C) That it is a multi-step sealed proposal procurement, and that priced proposals will be considered only in the subsequent phases from those proposers whose unpriced technical proposals are found qualified in the first phase;
 - (D) The criteria to be used in the evaluation of unpriced technical proposals;
 - (E) That EWEB may conduct oral or written discussions of the unpriced technical offers;
 - (F) That the goods or services being procured shall be furnished generally in accordance with the proposer's technical proposal as found to be finally qualified and shall meet the requirements of the Request for Proposal;
 - (G) Whether proposers excluded from subsequent phases have a right to protest the exclusion. Such information can be given or changed through addenda.
- (b) After the closing date and time of the solicitation, addenda to the Request for Proposal shall be distributed only to proposers who submitted unpriced technical offers.
 - (c) Unpriced technical proposals need not be opened publicly.
 - (d) Unpriced technical proposals shall be evaluated solely in accordance with the criteria set forth in the Request for Proposal. Unpriced technical proposals shall be categorized as:
 - (A) Qualified;
 - (B) Potentially qualified; i.e. in EWEB's sole opinion is reasonably susceptible of being made qualified; or
 - (C) Unqualified, in which case EWEB will record in writing the basis for determining a proposal unqualified and make it part of the procurement file.
 - (e) EWEB may initiate phase two of the procedure if, in EWEB's opinion, there are sufficient qualified or potentially qualified unpriced technical proposals to assure effective price competition in the second phase without technical discussions.
 - (f) If EWEB finds that there are not sufficient qualified or potentially qualified unpriced technical proposals to assure effective price competition, it shall issue an addendum to the Request for Proposal or engage in technical discussions as set forth in this rule:
 - (A) Clarification of proposer's technical proposal may be conducted with any proposer who submits a qualified, or potentially qualified technical proposal.
 - (B) During the course of such discussions, EWEB shall not disclose any information derived from one unpriced technical proposal to any other proposer.
 - (C) Once discussions are begun any proposer, who has not been notified that its proposal has been finally found unqualified, may submit supplemental information amending its technical proposal at any time until the closing date established by EWEB. Such submission may be made either at the request of EWEB or upon the proposer's own initiative.
 - (g) When EWEB determines a proposer's unpriced technical proposal to be unqualified, such proposer shall not be afforded an additional opportunity to supplement technical proposals.
 - (h) Mistakes may be corrected or proposals may be withdrawn during phase one:
 - (A) Before unpriced technical proposals are considered;
 - (B) After any discussions have commenced under this section;
 - (C) When responding to any addenda to the Request for Proposal;
 - (D) Otherwise mistakes may be corrected or withdrawal permitted pursuant to Rule 3-0470.

- (4) Upon the completion of phase one, EWEB shall either:
 - (a) Open price proposals submitted in phase one (if price proposals were required to be submitted) from proposers whose unpriced technical proposals were found to be qualified; or
 - (b) If price proposals have not been submitted and technical discussions have been held or addenda to the Request for Proposal have been issued, invite each qualified proposer to submit price proposals.
 - (c) Otherwise, phase two shall be conducted as any other competitive sealed proposal solicitation except no public notice need be given of the request to submit price proposals because such notice was previously given.

Stats. Implemented: ORS 279B.060

3-0240 Qualified Products Lists

- (1) EWEB may develop and maintain a qualified products list in instances in which the testing or examination of goods before initiating a procurement is necessary or desirable in order to best satisfy the requirements of EWEB. For purposes of this section, "goods" includes products that have associated or incidental service components, such as supplier warranty obligations or maintenance service programs.
- (2) In the initial development of any qualified products list, EWEB shall give public notice in accordance with Rule 3-0300 of the opportunity for potential contractors, sellers or suppliers to submit goods for testing and examination to determine their acceptability for inclusion on the list and may solicit in writing representative groups of potential contractors, sellers or suppliers to submit goods for the testing and examination. Any potential contractor, seller or supplier, even though not solicited, may offer its goods for consideration.
- (3) EWEB's inclusion of goods on a qualified products list shall be based on the results of tests or examinations. Notwithstanding any provision of ORS 192.410 to 192.505 (trade secrets), EWEB may make the test or examination results public in a manner that protects the identity of the potential contractor, seller or supplier that offered the goods for testing or examination, including by using only numerical designations. Notwithstanding any provision of ORS 192.410 to 192.505 (trade secrets), EWEB may keep confidential trade secrets, test data and similar information provided by a potential contractor, seller or supplier if so requested in writing by the potential contractor, seller or supplier.
- (4) The inclusion of goods on a qualified products list does not constitute and may not be construed as a prequalification of a bidder or proposer under Rule 3-0550 of any prospective contractor, seller or supplier of goods on the qualified products list.
- (5) All protests shall be made pursuant to Rule 3-0720.

Stats. Implemented: ORS 279B.115

3-0241 Specifications and Brand Names

- (1) EWEB shall determine all specifications used in this Division.

- (2) A brand name or equal specification may be used when the use of a brand name or equal specification is advantageous to EWEB because the brand name describes the standard of quality, performance, functionality and other characteristics of the product needed by EWEB.
- (3) EWEB is entitled to determine what constitutes a product that is equal or superior to the product specified, and any such determination is final.
- (4) Nothing in this section may be construed as prohibiting EWEB from specifying one or more comparable products as examples of the quality, performance, functionality or other characteristics of the product needed by EWEB.
- (5) A brand name specification may be prepared and used only if EWEB determines for a solicitation or a class of solicitations that only the identified brand name specification will meet the needs of EWEB based on one or more of the following written determinations:
 - (a) That use of a brand name specification is unlikely to encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts;
 - (b) That use of a brand name specification would result in substantial cost savings to EWEB;
 - (c) That there is only one manufacturer or seller of the product of the quality, performance or functionality required; or
 - (d) That efficient utilization of existing goods requires the acquisition of compatible goods or services.
- (6) All protests shall be made pursuant to Rule 3-0710.

Stats. Implemented: ORS 279B.215, 279B.405

3-0242 Price Agreements

- (1) A price agreement constitutes a firm offer by the contractor regardless of whether any order or purchase has been made or any performance has been tendered under the price agreement. Unless the price agreement otherwise provides, a price agreement is enforceable for the period stated in the price agreement, and notwithstanding ORS 72.2050, obligations thereunder are not revocable by the contractor.
- (2) Under a price agreement, no quantity unreasonably disproportionate to any stated estimate or, in the absence of a stated estimate, to any normal or otherwise comparable prior requirements may be demanded unless otherwise expressly provided in the price agreement. However, EWEB may amend or terminate a price agreement or an order under a price agreement under any of the following circumstances:
 - (a) Any failure of EWEB to receive funding, appropriations, limitations, allotments or other expenditure authority, including the continuation of program operating authority sufficient, as determined in the discretion of EWEB, to sustain purchases at the levels contemplated at the time of contracting; or
 - (b) Any change in law or program termination that makes purchases under the price agreement no longer authorized or appropriate for EWEB's use.
- (3) A price agreement does not constitute an exclusive dealing commitment on the part of EWEB or the contractor unless the price agreement expressly so provides.
- (4) All protests shall be made pursuant to Rule 3-0720.

Stats. Implemented: ORS 279B.140

3-0265 Small Procurements

EWEB may make ~~direct~~ awards for procurements of goods and services not exceeding \$510,000 in any manner deemed practical or convenient, including by direct selection or award.

- (1) EWEB may amend public contracts awarded prior to January 1, 2014, for small procurements but the cumulative amendments may not increase the total contract price to greater than \$6,000. EWEB may amend small procurement contracts awarded on or after January 1, 2014, but the cumulative amendments may not increase the total contract price to greater than \$12,500. Increases beyond the limitations of this Rule must be in compliance with Division 6 (Exemptions).
- (2) The ability to amend small procurement contracts is established as a means to resolve unforeseen cost overages, and shall not be used to circumvent the intermediate procurement process. Unless otherwise waived by the Purchasing Manager, the contract administrator shall provide a written explanation for all overages that cause a small procurement to exceed the \$5,000 applicable monetary limits of subsection (1). The related ~~Division Director~~ Leadership Team Manager shall acknowledge the written explanation with his/her signature and the document shall be filed in the Purchasing Office with the original purchase requisition.
- (3) All protests shall be made pursuant to Rule 3-0720.

Stats. Implemented: ORS 279B.065; HB 2212, Sec.1 (2013).

3-0270 Intermediate Procurements

EWEB may make awards in accordance with intermediate procurement procedures for procurement of goods and services that exceed~~ing~~ \$510,000 but does not exceed~~ing~~ \$150,000.

- (1) A procurement may not be artificially divided or fragmented so as to constitute an intermediate procurement under this section.
- (2) When conducting an intermediate procurement, EWEB shall seek at least three informally solicited competitive price quotes or competitive proposals from prospective contractors. EWEB Purchasing shall keep a written record of the sources of the quotes or proposals received. If three quotes or proposals are not reasonably available, fewer will suffice, but the person obtaining offers shall make a written record of the effort made by EWEB to obtain the quotes or proposals.
- (3) If a contract is awarded, EWEB shall award the contract to the offeror whose quote or proposal will best serve the interests of EWEB, taking into account price as well as considerations including without limitation experience, expertise, product functionality, suitability for a particular purpose, delivery, best value, and contractor responsibility under these Rules.
- (4) EWEB shall prefer written quotations, bids, or proposals for intermediate procurements. Verbal quotations may only be used when the procurement can be clearly defined and communicated, which may include without limitation to product numbers, a specific task, or other considerations that will provide EWEB with the most advantageous, expeditious

results.

- (5) EWEB may negotiate with an offeror to clarify its quote, bid, proposal, or to effect modifications that will make the quote, bid, or proposal acceptable or make the quote, bid, or proposal more advantageous to EWEB.
- (6) Intermediate procurements may be increased above the original amount of award by change order or amendment within the following limitations:
 - (a) Up to an aggregate contract price increase of 25% over the original contract amount as determined by the affected ~~Division Director~~ **Leadership Team Manager** and the Purchasing Manager, or solely by the General Manager, that a price increase is warranted for additional related work;
 - (b) Up to an aggregate contract price increase of 50% over the original contract amount, when the General Manager, or when applicable, EWEB's Contract Review Board, determines that a price increase is warranted for additional related work;
 - (c) EWEB's Contract Review Board, in its sole judgment and at its sole discretion, shall have authority to review and approve contract amendments for any dollar amount it believes to be in the best interest of EWEB and its customers.
- (7) All protests shall be made pursuant to Rule 3-0700.

Stats. Implemented: ORS 279B.070; [HB 2212, Sec.2 \(2013\)](#).

3-0275 Sole-source Procurements

EWEB may award a contract for goods or services without competition when the General Manager, after reviewing findings of fact, determines that the goods or services or class of goods or services, are available from only one source.

- (1) The determination of a sole-source must be based on written findings that may include:
 - (a) That the efficient utilization of existing goods requires the acquisition of compatible goods or services;
 - (b) That the goods or services required for the exchange of software or data with other public or private agencies are available from only one source;
 - (c) That the goods or services are for use in a pilot or an experimental project; or
 - (d) Other findings that support the conclusion that the goods or services are available from only one source.
- (2) In addition to the findings provided above, EWEB-specific findings may include the following:
 - (a) That EWEB's ability to provide vital services to its customers may be jeopardized should another good or service fail to match exactly the features, characteristics, performance, compatibility, reliability, and functionality of the sole-source good or service.
 - (b) EWEB lacks the time or expertise to responsibly investigate, analyze, or test an unfamiliar product(s) to assure that the product's capability, interface, features, components, durability, functionality, performance, safety, economy, and reliability are compatible with EWEB's infrastructure and will provide EWEB and its customers the most advantageous performance.
 - (c) Subparagraph (b) above shall not be used to avoid the bidding or proposal requirements provided in this Division.

- (3) To the extent reasonably practical, EWEB shall negotiate with the sole-source to obtain contract terms that are advantageous to EWEB.
- (4) If there are multiple sellers for the sole-source manufacturer's good(s) or service(s), EWEB shall follow the appropriate solicitation process to encourage competition between the potential providers.
- (5) The determinations made by EWEB under this Rule are final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law.
- (6) All protests shall be made pursuant to Rule 3-0720.

Stats. Implemented: ORS 279B.075, 279B.145

3-0280 Emergency Procurements

- (1) With the General Manager and/or the affected **Leadership Team Manager** **Division Director's** concurrence, EWEB's Purchasing Manager may approve award of a public contract for goods or services as an emergency procurement. EWEB shall document the:
 - (a) Nature of the emergency; and
 - (b) Describe the method used for the selection of the particular contractor.
- (2) EWEB may amend an emergency contract if the emergency justification for entering in the contract still exists and the amendment is necessary to address the continuing emergency.
- (3) The determinations made by EWEB under this Rule are final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law.
- (4) All protests shall be made pursuant to Rule 3-0720.

Stats. Implemented: ORS 279B.080, 279B.145

3-0285 Special Procurements

EWEB may submit a written request to the Board that describes the proposed contracting procedure, the goods or services or the class of goods or services to be acquired through the special procurement and the circumstances that justify the use of a special procurement or an alternative procedure prescribed by the Board under the following standards:

- (1) Be unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts and
- (2) Either:
 - (a) Reasonably expected to result in substantial cost savings to EWEB or to the public, or
 - (b) Otherwise substantially promotes the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under competitive sealed bids, competitive sealed proposals, small procurements, intermediate procurements or under any rules adopted thereunder.
- (3) If EWEB intends to award a contract through a special procurement that calls for competition among prospective contractors, EWEB shall award the contract to the offeror

EWEB determines to be the most advantageous to EWEB.

- (4) When the Board approves a class special procurement under this section, EWEB may award contracts to acquire goods or services within the class of goods or services in accordance with the terms of the Board's approval without making a subsequent request for a special procurement.
- (5) EWEB shall give public notice of the approval process pursuant to Rule 3-0300 and the notice shall describe the goods or services or class of goods or services to be acquired through the special procurement.
- (6) The determinations made by EWEB under this Rule are final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law.
- (7) All protests shall be made pursuant to Rule 3-0710.

Stats. Implemented: ORS 279B.085, 279B.145; Or Laws 2007, Ch. 764, Sec. 7.

3-0290 Procurement for Services

- (1) Except as provided in subsection ~~(#)~~, (3), before conducting a procurement for services with an estimated contract price that exceeds \$250,000, EWEB shall:
 - (a) Demonstrate, by means of a written cost analysis, that EWEB would incur less cost in conducting the procurement than in performing the services with EWEB's own personnel and resources; or
 - (b) Demonstrate that performing the services with EWEB's own personnel and resources is not feasible.
- (2) In the cost analysis, EWEB shall:
 - (a) Estimate EWEB's cost of performing the services, including:
 - (A) Salary or wage and benefit costs for EWEB employees who are directly involved in performing the services, including employees who inspect, supervise or monitor the performance of the services.
 - (B) Materials costs, including costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies.
 - (C) Costs incurred in planning for, training for, starting up, implementing, transporting and delivering the services and costs related to stopping and dismantling a project or operation because EWEB intends to procure a limited quantity of services or procure the services within a defined or limited period of time.
 - (D) Miscellaneous costs related to performing the services. EWEB may not include, in the cost analysis, EWEB's indirect overhead costs for existing salaries or wages and benefits for administrators or for rent, equipment, utilities and materials except to the extent that the costs are attributable solely to performing the services and would not exist unless EWEB performs the services.
 - (b) Estimate the cost a potential contractor would incur in performing the services, including:
 - (A) Average or actual salary or wage and benefit costs for contractors and employees who:
 - (i) Work in the industry or business most closely involved in performing the services that EWEB intends to procure; and

- (ii) Would be necessary and directly involved in performing the services or who would inspect, supervise or monitor the performance of the services;
 - (B) Material costs, including costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies; and
 - (C) Miscellaneous costs related to performing the services, including but not limited to reasonably foreseeable fluctuations in the costs for the items identified in this subsection over the expected duration of the procurement.
 - (c) After comparing the difference between the costs estimated as provided in subsections (2)(a) and (2)(b), except as provided in subsection (2)(d), EWEB may proceed with the procurement only if EWEB would incur more cost in performing the services with EWEB's own personnel and resources than EWEB would incur in procuring the services from a contractor. EWEB may not proceed with the procurement if the sole reason is because the costs estimated in subsection (2)(b)(A) are lower than the costs estimated in subsection (2)(a)(A).
 - (d) EWEB may proceed with a procurement even if it determines that EWEB would incur less cost in providing the services with EWEB's own personnel and resources if at the time EWEB intends to conduct a procurement, EWEB lacks personnel and resources that are necessary to perform the services with in the time in which the services are required. If EWEB conducts a procurement under the conditions described in this subsection, EWEB shall:
 - (A) Keep a record of the cost analysis and findings that EWEB makes for each procurement conducted under this subsection, along with the basis for EWEB's decision to proceed with the procurement; and
 - (B) Collect and provide copies of the records described in subparagraph (2)(d)(A) each calendar quarter to the local contract review board.
- (3) Notwithstanding the provisions of subsection (2)(c), EWEB may proceed with a procurement if it reasonably determines in writing that using EWEB's own personnel or resources to perform the services that EWEB intends to procure is not feasible. EWEB may make this determination without conducting a cost analysis under subsection (2) if EWEB finds that:
- (a) EWEB lacks the specialized capabilities, experience or technical or other expertise necessary to perform the services. In making its finding, EWEB shall compare EWEB's capability, experience or expertise in the field most closely involved in performing the services with a potential contractor's capability, experience or expertise in the same or a similar field.
 - (b) Special circumstances require EWEB to procure the services by contract. Special circumstances may include, but are not limited to, circumstances in which:
 - (A) The terms under which EWEB receives a grant or other funds for use in a procurement requires EWEB to obtain services through an independent contractor;
 - (B) Other state or federal law requires EWEB to procure services through an independent contractor;
 - (C) The procurement is for services that are incidental to a contract for purchasing or leasing real or personal property, including service and maintenance agreements for equipment that is leased or rented;
 - (D) EWEB cannot accomplish policy, administrative or legal goals, including but not limited to avoiding conflicts of interest or ensuring independent or unbiased findings in cases when using EWEB's existing personnel or

- persons EWEB could hire through a regular or ordinary process would not be suitable;
- (E) The procurement is for services to which the provisions of EWEB Rule 3-0280 apply;
 - (F) The procurement is for services, the need for which is so urgent, temporary or occasional that attempting to perform the services with EWEB's own personnel or resources would cause a delay that would frustrate the purpose for obtaining the services; or
 - (G) The services that EWEB intends to procure will be completed within six months after the date on which the contract for services is executed.
- (4) A cost analysis, record, documentation or determination made under subsection (2) and a finding or a determination and supporting documentation under subsection (3) are public records.

Stat. Auth.: 2009 Or Laws Ch 880, Sec.2-4.

Stat. Implemented: 2009 Or Laws Ch 880, Sec.2-4.

PROCUREMENT PROCESS

3-0300 Public Notice of Solicitations

- (1) EWEB shall give public notice of an invitation to bid or for proposal, which notice is intended to foster competition among prospective bidders or proposers. Public Notice shall be given by:
- (a) Newspaper publication in the area where the contract is to be performed:
 - (A) At least once in
 - (B) At least one newspaper of general circulation and
 - (C) At least seven days before the solicitation closing date; or
 - (b) Electronic publication: if EWEB determines that electronically providing public notice of bids or proposals is likely to be cost-effective;
 - (c) In addition to (a) and (b), EWEB may use any other medium reasonably calculated to reach prospective bidders or proposers, including but not limited to trade magazines and journals, the State of Oregon's Procurement Information Network (ORPIN), and specific trade association web sites.
- (2) Once a means of notification is selected for a specific project, EWEB shall continue to use that method to post all required and informational documents or directions on how to secure documents for that project.
- (3) If the selected method of notification is unavailable because of mechanical difficulties, lack of access, or for other undetermined reasons, EWEB may mail, e-mail, or fax to all known prospective bidders or proposers in the form of an addendum the information regarding the process change. However, EWEB will not be liable for failures to contact potential bidders or proposers, failure to provide documents or any other information in a timely manner, and/or for any breakdowns in communications caused by mechanical or electronic failures, human error, force majeure, or any other interruption that prevented a potential bidder or proposer from receiving information. It is the bidder's or proposer's responsibility to monitor the solicitation process, to monitor EWEB Purchasing's web site, to ask questions, make inquiries, and to stay actively abreast of the solicitation status.
- (4) When the cost of printed Public Notice, in EWEB's opinion and sole judgment, is prohibitive, EWEB may limit printed Public Notice to information directing potential bidders

or proposers to EWEB's web site, EWEB's Purchasing Office, or other less costly means of providing information. EWEB may fax or email Public Notice information if it chooses to do so.

- (5) The Public Notice shall set forth:
 - (a) Where, when, how, and for how long the Solicitation Document may be obtained;
 - (b) A general description of the Goods or Services to be acquired;
 - (c) The interval between the first date of notice of the Solicitation Document given in accordance with (1) above and Closing will not be less than fourteen (14) Days for an Invitation to Bid and thirty (30) Days for a Request for Proposals, unless EWEB determines that a shorter interval is in EWEB's interest and that a shorter interval will not substantially affect competition. EWEB will document the specific reasons for the shorter public notice period in the Procurement file;
 - (d) The date that bidders or proposers must file applications for prequalification if prequalification is a requirement and the class of Goods or Services is one for which Persons must be prequalified;
 - (e) The office where Contract terms, conditions and Specifications may be reviewed;
 - (f) The name, title and address of the individual at EWEB authorized to receive Offers;
 - (g) The scheduled Opening; and
 - (h) Any other information EWEB deems appropriate.
- (6) A proposer may obtain a copy of the Public Notice of solicitations upon request.
- (7) EWEB shall make available to potential bidders or proposers notice of any Addenda to a Solicitation Document in accordance with 3-0430.

Stats. Implemented: ORS 279B.055(4), ORS 279B.060(4)

3-0310 Bids or Proposals are Offers

- (1) Offer and Acceptance: The bid or proposal is the bidder's or proposer's offer to enter into a contract. The offer is a "Firm Offer," i.e., the offer shall be held open by the offeror for EWEB's acceptance for the period specified in Rule 3-0480 (Time for Agency Acceptance). EWEB's award of the contract constitutes acceptance of the offer and binds the offeror to the contract.
- (2) Contingent Offers: Except to the extent the bidder or proposer is authorized to propose certain terms and conditions pursuant to Rule 3-0231 (Competitive Range, Discussions and Negotiations), a proposer shall not make its offer contingent upon EWEB's acceptance of any terms or conditions (including specifications) other than those specifically allowed in the Solicitation Document.
- (3) Offeror's Acknowledgment: 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 proposal permits proposal of alternative terms under Rule 3-0231 (Competitive Range, Discussions and Negotiations), the offeror's offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by EWEB in writing.

Stats. Implemented: ORS 279B.055, ORS 279B.060

3-0320 Facsimile Transmission of Bids and Proposals

- (1) EWEB may authorize offerors to submit offer by facsimile transmission. If EWEB determines that bid or proposal security is or will be required, it will not authorize facsimile offers unless a method for receipt of such security is agreed to in writing prior to the facsimile transmission of the offer. Prior to authorizing the submission of facsimile offers, EWEB shall determine that its equipment and personnel are capable of receiving the size and volume of anticipated offers within a short period of time. In addition, EWEB will establish administrative procedures and controls to:
 - (a) Receive, identify, record, and safeguard facsimile offers;
 - (b) Ensure timely delivery of offers to the location of opening; and
 - (c) Preserve the offers as sealed.

- (2) In addition to all other requirements, if EWEB authorizes a facsimile offer, it will include in the solicitation document the following statements:
 - (a) "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 EWEB via a facsimile machine";
 - (b) "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 statement that requires offerors to sign their facsimile offers;
 - (d) "EWEB reserves the right to award the contract solely on the basis of a facsimile offer. However, upon EWEB's request the apparent successful offeror shall promptly submit its complete original signed offer";
 - (e) The data and compatibility characteristics of EWEB's receiving facsimile machine as follows:
 - (A) Telephone number; and
 - (B) If applicable, the compatibility characteristics, e.g. make and model number, receiving speed, communications protocol; and
 - (f) A provision that EWEB is not responsible for any failure attributable to the transmission or receipt of the facsimile offer including, but not limited to the following:
 - (A) Receipt of garbled or incomplete documents;
 - (B) Availability or condition of the receiving facsimile machine;
 - (C) Incompatibility between the sending and receiving facsimile machines;
 - (D) Delay in transmission or receipt of documents;
 - (E) Failure of the offeror to properly identify the offer documents;
 - (F) Illegibility of offer documents; and
 - (G) Safeguarding security and confidentiality of data.

Stats. Implemented: ORS 279A.065, 279A.070

3-0330 Electronic Procurement

- (1) EWEB may conduct all phases of a procurement, including without limitation the posting of electronic solicitations and the receipt of electronic offers, by electronic methods if and to the extent EWEB specifies in a Solicitation Document, a request for quotes, or any other written instructions on how to participate in the procurement

- (2) EWEB shall open an electronic offer in accordance with its electronic security measures in

effect at the time of its receipt of the electronic offer. The bidder or proposer submitting the electronic offer assumes the risk of premature disclosure due to submission in unsealed form.

- (3) EWEB's use of electronic signatures shall be consistent with applicable statutes and Divisions. EWEB may limit the use of electronic methods of conducting a procurement to those that are most advantageous to EWEB or those that are most advantageous for the specific project.
- (4) If EWEB determines that bid or proposal security is or will be required, EWEB will not authorize electronic offers unless a method for receipt of such security is agreed to in writing prior to the transmission of the electronic offer.
- (5) EWEB shall conduct all portions of an electronic procurement in accordance with this Division 3.
- (6) As a condition of participation in an electronic procurement, EWEB may require potential bidders or proposers to:
 - (a) Register with EWEB before the date and time first set to accept offers,
 - (b) Agree to the terms, conditions, or other requirements of a Solicitation Document, or
 - (c) Agree to terms and conditions governing the procurement, such as procedures that EWEB may use to attribute, authenticate or verify the accuracy of an electronic offer or the actions that constitute an electronic signature.
- (7) EWEB may specify that bidders or proposers must submit an electronic offer by a particular date and time, or that they may submit multiple electronic offers during a period of time established in the electronic solicitation.
 - (a) When EWEB specifies that bidders or proposers may submit multiple electronic offers during a specified period of time, EWEB will designate a time and date on which they may begin to submit their electronic offers, and a time and date after which they may no longer submit electronic offers.
 - (b) The date and time after which bidders or proposers may no longer submit electronic offers need not be specified by a particular date and time but may instead be specified by a description of the conditions that, when they occur, will establish the date and time after which electronic offers may no longer be submitted.
 - (c) If EWEB will accept electronic offers until a designated date and time, it will receive the first responses and then begin to accept real time electronic offers. EWEB will continue to accept electronic offers in until the date and time specified, after which the utility will no longer accept electronic offers.
 - (d) If there are a limited number of offers or if conditions exist whereby delaying the closing is technical and not reasonable under the conditions, EWEB may shorten the closing date by posting an addendum. The shortened closing date and time may not be less than 72 hours from the date and time the addendum was posted.
- (8) Following receipt of the first electronic offer (after the day and time first set to receive electronic offers) EWEB will post on its Electronic Procurement System, and updated on a real time basis, the lowest electronic offer price or the highest ranking electronic offer.
 - (a) At any time before the date and time an electronic offer is closed, a bidder or proposer may revise its electronic offer, except that a bidder or proposer may not lower its price unless that price is below the then lowest electronic offer.
 - (b) A bidder or proposer may not increase the price set forth in its electronic offer after the day and time that EWEB first accepts electronic offers.
 - (c) A bidder or proposer may withdraw an electronic offer only in compliance with this

division 3. If a bidder or proposer withdraws an electronic offer, it may not later submit an electronic offer at a price higher than that set forth in the withdrawn electronic offer.

- (9) In the event of a failure of EWEB's Electronic Procurement System that interferes with the ability of bidders or proposers to submit electronic offers, protest or to otherwise participate in the procurement, EWEB may cancel the procurement in accordance with Rule 3-0660, or may extend the date and time for receipt of electronic offers by providing notice of the extension immediately after the Electronic Procurement System becomes available.

Stats. Implemented: ORS279B.055(5), 279B.060(2)

BID AND PROPOSAL PREPARATION

3-0400 Offer Preparation

- (1) An offeror shall submit and sign its offer in accordance with the instructions set forth in the Solicitation Document. An offeror shall initial and submit any correction or erasure to its offer prior to opening in accordance with the requirements for submitting an offer set forth in the Solicitation Document.
- (2) An offeror shall submit its offer on the form(s) provided in the Solicitation Document, unless an offeror is otherwise instructed in the Solicitation Document.
- (3) An offeror shall provide EWEB with all documents and descriptive literature required by the Solicitation Document.
- (4) An offeror shall clearly mark and/or designate trade secrets and information protected from disclosure by the Oregon Public Records Laws, Chapter 192.
- (5) If the Solicitation Document permits electronic offers pursuant to Rule 3-0330, an offeror may submit its offer electronically. EWEB shall not consider electronic offers unless authorized by the Solicitation Document.

Stats. Implemented: ORS 279A.065, 279A.070

3-0405 Bid Security

- (1) If EWEB determines that bid security is reasonably necessary or prudent to protect the interests of EWEB in an invitation to bid or a request for proposal, EWEB shall:
 - (a) Return the bid security to all bidders or proposers upon the execution of the contract; and
 - (b) Retain the bid security if a bidder or proposer who is awarded a contract fails to promptly and properly execute the contract. For purposes of these rules, prompt and proper execution of the contract includes all action by a bidder or proposer that is necessary to form a contract in accordance with the invitation to bid or request for proposal, including posting performance security, submitting proof of insurance when the invitation to bid or request for proposal requires the submission and agreeing to perform the scope of work and meet the performance standards set forth in the invitation to bid or request for proposal.

- (2) The determinations by EWEB are final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law.

Stats. Implemented: ORS 279B.055(3) and (11), 279B.060(4), 279B.145

3-0410 Offer Submission

- (1) Product Samples and Descriptive Literature. EWEB may require product samples or descriptive literature if it determines either is necessary or desirable to evaluate the quality, features or characteristics of an offer. EWEB will dispose of product samples, or make them available for the offeror to retrieve in accordance with the Solicitation Document.
- (2) Identification of Offers
 - (a) To ensure proper identification and handling, offers shall be submitted in a sealed envelope appropriately marked or in the envelope provided by EWEB, whichever is applicable. If EWEB permits electronic offers or facsimile offers in the Solicitation Document, the offeror may submit and identify facsimile offers or electronic offers in accordance with Rules 3-0320 and 3-0330, and the instructions set forth in the Solicitation Document.
 - (b) EWEB is not responsible for offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.
- (3) Receipt of Offers. The offeror is responsible for ensuring that EWEB receives its offer at the required delivery point prior to the closing, regardless of the method used to submit or transmit the offer.

Stats. Implemented: ORS 279A.065, 279A.070

3-0420 Pre-Offer Conferences

- (1) EWEB may hold pre-offer conferences with prospective offerors prior to closing, to explain the procurement requirements, obtain information, or to conduct site inspections.
- (2) EWEB may require attendance at the pre-offer conference as a condition for making an offer.
- (3) If EWEB holds a pre-offer conference, the conference shall be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the closing to allow offerors to consider information provided at that conference.
- (4) Statements made by EWEB representatives, agents, or contractors at the pre-offer conference do not change the Solicitation Document unless EWEB confirms such statements with a written addendum to the Solicitation Document.
- (5) EWEB shall include notice of any pre-offer conference in the Solicitation Document.

Stats. Implemented: ORS 279A.065, 279A.070

3-0430 Addenda to Solicitation Document

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- (1) EWEB may change a Solicitation Document only by written addenda. An offeror shall provide written acknowledgment of receipt of all issued addenda with its offer, unless otherwise specified in the addenda.
 - (a) EWEB shall make addenda available to all prospective offerors in a manner intended to foster competition and consistent with the bidding document instructions and EWEB's usual practices. The Solicitation Document shall specify how EWEB will provide notice of addenda and how EWEB will make the addenda available before closing.
 - (b) The following is an example of the language to be used: "EWEB will not mail notice of addenda, but will publish notice of any addenda on its web site. Addenda may be downloaded off the web site. Offerors should frequently check the web site until closing, i.e., at least once weekly until the week of closing and at least once daily the week of the closing. Any and all questions with regard to project addenda shall be communicated to the appropriate EWEB Buyer."
- (2) Generally EWEB shall issue addenda within a reasonable time to allow prospective offerors to consider the addenda in preparing their offers. EWEB may extend the closing if it determines prospective offerors need additional time to review and respond to addenda. Unless unusual circumstances exist, EWEB will not issue addenda less than 72 hours before the closing and then the addenda will also extend the closing.
- (3) Addenda that modify the evaluation criteria, selection process or procedure for any tier of competition under a multiple-tiered or multi-step sealed proposal will be issued no fewer than five (5) days before the beginning of that tier or step of competition, unless EWEB determines that a shorter period is sufficient to allow the offerors to prepare for that tier or step of competition. EWEB shall document the reasons for shortening the period.
- (4) An offeror may submit a written protest to the addendum as provided in Rule 3-0700 by the later of:
 - (a) The close of EWEB's next business day after the addendum is issued or
 - (b) The date and time set forth in the addendum or
 - (c) The date and time designated in Rule 3-0700.
- (5) If the deadline established in section (4) is after the deadline for receiving protests to the Solicitation Document pursuant to Rule 3-0700, then EWEB may consider an offeror's protest to the Addendum only, and shall not consider a protest to matters not added or modified by the Addendum.
- (6) EWEB is not required to provide a protest period for addenda issued during a multiple-tier or multi-step procurement process provided for in these Rules.

Stats. Implemented: ORS 279B.060

3-0440 Pre-Closing Modification or Withdrawal of Offers

- (1) An offeror may modify its offer in writing prior to the closing date and time by preparing and submitting its modification to its offer in accordance with Rules 3-0400 and 3-0410 unless otherwise specified in the Solicitation Document. Any modification must include:
 - (a) The offeror's statement that the modification amends and supersedes the prior offer;
 - (b) The bid or proposal modification; and
 - (c) The Solicitation Document number or other identification as specified in the

Solicitation Document.

- (2) An offeror may withdraw its offer by written notice submitted on the offeror's letterhead, signed by an authorized representative of the offeror, delivered to the individual and location specified in the Solicitation Document or the place of closing if no location is specified, and received by EWEB prior to the closing. The offeror or authorized representative of the offeror may also withdraw its offer in person prior to the closing upon presentation of appropriate identification and evidence of authority satisfactory to EWEB.
- (3) EWEB may release an unopened offer withdrawn by the offeror to the offeror or its authorized representative after voiding any date and time stamp mark. The offeror shall mark the written request to withdraw an offer as follows:
 - (a) Bid or proposal withdrawal; and
 - (b) The Solicitation Document number or other identification as specified in the Solicitation Document.
- (4) EWEB shall include all documents relating to the modification or withdrawal of offers in the appropriate procurement file.

Stats. Implemented: ORS 279B.055, 279B.060

3-0450 Receipt, Opening, and Recording of Offers; Confidentiality of Offers

- (1) EWEB shall electronically or mechanically time-stamp or hand-mark each offer and any modification upon its receipt. EWEB shall not open the offer or modification upon receipt but shall maintain it as confidential and secure until opening. If EWEB inadvertently opens an offer or a modification prior to the opening, it shall return the offer or modification to its secure and confidential state until opening. EWEB shall document the resealing for the procurement file by affixing a statement explaining the time, circumstances and/or reasons it inadvertently opened the offer or modification.
- (2) After review and evaluation of the information submitted in the offers regarding exemptions and information clearly marked and identified by the bidder or proposer and submitted to EWEB in confidence, and which are protected by the Public Records Laws ORS Chapter 192, EWEB shall publicly open offers including any modifications made to the offer.
- (3) EWEB shall record the amount of the bid, the name of the bidder and other relevant information not designated by the bidder as exempt or confidential under Oregon law, and shall make such record available to public inspection.
- (4) Notwithstanding ORS 192.410 to 192.505 (trade secrets), proposals may be opened in a manner to avoid disclosing contents to competing proposers during, when applicable, the process of negotiation, but EWEB shall record and make available the identity of all proposers as part of EWEB's public records after the proposals are opened. Notwithstanding ORS 192.410 to 192.505 (trade secrets), proposals are not required to be open for public inspection until after the notice of intent to award a contract is issued. The fact that proposals are opened at a meeting, as defined in ORS 192.610, does not make the contents of the proposals subject to disclosure, regardless of whether EWEB fails to give notice of or provide for an executive session for the purpose of opening proposals.

Stats. Implemented: ORS 279B.055(5), 279B.060(6)

3-0460 Late Offers, Late Withdrawals and Late Modifications

Any offer received after closing is late. An offeror's request for withdrawal or modification of an offer received after closing is late. EWEB shall not consider late offers, withdrawals or modifications except as permitted in Rules 3-0470 or 3-0231.

Stats. Implemented: ORS 279B.055

3-0470 Mistakes

- (1) To protect the integrity of the competitive procurement process and to assure fair treatment of offerors, EWEB will consider whether to permit waiver, correction or withdrawal of offers for certain mistakes.
- (2) EWEB shall not allow an offeror to correct or withdraw an offer for an error in judgment.
- (3) If EWEB discovers certain mistakes in an offer after opening but before award of the contract, it may take the following action:
 - (a) EWEB may waive or permit an offeror to correct a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the offer, or an insignificant mistake that can be waived or corrected without prejudice to other offerors. Examples of minor informalities include an offeror's failure to:
 - (A) Return the correct number of signed offers or the correct number of other documents required by the Solicitation Document;
 - (B) Sign the offer in the designated block, provided a signature appears elsewhere in the offer evidencing an intent to be bound; and
 - (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) EWEB may correct a clerical error if the error is evident on the face of the offer or other documents submitted with the offer, and the offeror confirms EWEB's correction in writing. A clerical error is an offeror's error in transcribing its offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example a missing unit price may be established by dividing the total price for the units by the quantity of units for that item or a missing, or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the offer). In the event of a discrepancy, unit prices shall prevail over extended prices.
 - (c) EWEB may permit an offeror to withdraw an offer based on one or more clerical errors in the offer only if the offeror shows with objective proof and by clear and convincing evidence:
 - (A) The nature of the error;
 - (B) That the error is not a minor informality under this subsection or an error in judgment;
 - (C) That the error cannot be corrected or waived under 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 EWEB does not grant the offeror permission to withdraw the offer;
 - (G) That EWEB's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on EWEB or the public it represents; and
 - (H) That the offeror promptly gave EWEB notice of the claimed error.
- (d) The criteria in subsection (3)(c) of this Rule shall determine whether EWEB will permit an offeror to withdraw its offer after closing. These criteria also shall apply to the question of whether EWEB will permit an offeror to withdraw its offer without forfeiture of its bid bond or other bid security or without liability to EWEB based on the difference between the amount of the offeror's offer and the amount of the contract actually awarded by EWEB, whether by award to the next lowest responsive and responsible bidder or the most advantageous responsive and responsible proposer, or by resorting to a new solicitation.
- (3) EWEB shall reject any offer in which a mistake is evident on the face of the offer and the intended correct offer is not evident or cannot be substantiated from documents submitted with the offer.
 - (4) The procedures and criteria set forth above are offeror's only opportunity to correct mistakes or withdraw offers because of a mistake. Following award, an offeror is bound by its offer, and may withdraw its offer or rescind a contract entered into pursuant to this Division 3 only to the extent permitted by applicable law.
 - (5) Any decision by EWEB to permit the correction or withdrawal of bids based on bid mistakes shall be supported by a written determination by EWEB that states the reasons for the action taken. The determinations by EWEB are final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law.

Stats. Implemented: ORS 279B.055, 279B.145

3-0480 Time for Agency Acceptance

An offeror's offer is a firm offer and is irrevocable, valid and binding on the offeror for not less than 30 days from closing unless otherwise specified in the Solicitation Document.

Stats. Implemented: ORS 279A.065, 279A.070

3-0490 Extension of Time for Acceptance of Offer

EWEB may request orally or in writing that offerors extend in writing the time within which EWEB may consider their offer(s). If an offeror agrees to such extension, the offer shall continue as a firm offer and remain irrevocable, valid and binding on the offeror for the agreed upon extension period.

Stats. Implemented: ORS 279A.065, 279A.070

QUALIFICATIONS AND DUTIES

3-0500 Responsibility of Bidders and Proposers

- (1) EWEB shall prepare a written determination of nonresponsibility of a bidder or proposer if EWEB determines that the bidder or proposer does not meet the standards of responsibility.
- (2) In determining whether a bidder or proposer has met the standards of responsibility, EWEB shall consider whether a bidder or proposer has:
 - (a) Available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to indicate the capability of the bidder or proposer to meet all contractual responsibilities;
 - (b) Completed previous contracts of a similar nature with a satisfactory record of performance. For purposes of this paragraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the bidder's or proposer's control, the bidder or proposer stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. EWEB shall document the record of performance of a bidder or proposer if EWEB finds under this paragraph that the bidder or proposer is not responsible;
 - (c) A satisfactory record of integrity. In evaluating the bidder's or proposer's record of integrity, EWEB may consider, among other things, whether the bidder or proposer has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the bidder's or proposer's performance of a contract or subcontract. EWEB shall document the record of integrity of a bidder or proposer if EWEB finds under this paragraph that the bidder or proposer is not responsible;
 - (d) Qualified legally to contract with EWEB;
 - (e) Supplied all necessary information in connection with the inquiry concerning responsibility. If a bidder or proposer fails to promptly supply information concerning responsibility that EWEB requests, EWEB shall determine the bidder's or proposer's responsibility based on available information or may find that the bidder or proposer is not responsible; and
 - (f) Not been debarred by EWEB under Rule 3-0575.
- (3) EWEB may refuse to disclose outside of EWEB confidential information furnished by a bidder or proposer under this section when the bidder or proposer has clearly identified in writing the information the bidder or proposer seeks to have treated as confidential and EWEB has authority under ORS 192.410 to 192.505 to withhold the identified information from disclosure.
- (4) The determinations made by EWEB under this Rule are final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law.

Stats. Implemented: ORS 279B.110, 279B.145

3-0550 Prequalification of Prospective Offerors

- (1) EWEB may prequalify prospective bidders or proposers to submit bids or proposals for public contracts to provide particular types of goods or services. The method of submitting prequalification applications, the information required in order to be prequalified and the

forms to be used for submitting prequalification information shall be determined by EWEB unless otherwise prescribed by rule adopted by the Board in its capacity as the local contract review board.

- (2) EWEB shall, in response to the receipt of a prequalification application submitted under subsection (1) of this section, notify the prospective bidder or proposer whether the prospective bidder or proposer is qualified based on the standards of responsibility listed in Rule 3-0500(2), the type and nature of contracts that the prospective bidder or proposer is qualified to compete for and the time period for which the prequalification is valid. If EWEB does not prequalify a prospective bidder or proposer as to any contracts covered by the prequalification process, the notice must specify which of the standards of responsibility listed in Rule 3-0500(2) the prospective bidder or proposer failed to meet. Unless the reasons are specified, the prospective bidder or proposer shall be deemed to have been prequalified in accordance with the application.
- (3) If EWEB subsequently discovers that a prospective bidder or proposer that prequalified under subsections (1) and (2) of this section is no longer qualified, EWEB may revoke the prequalification upon reasonable notice to the prospective bidder or proposer, except that a revocation is invalid as to any contract for which an advertisement for bids or proposals has already been issued.

Stats. Implemented: ORS 279B.120

3-0560 Application for Prequalification

- (1) When EWEB permits or requires prequalification of bidders or proposers, a prospective bidder or proposer who wishes to prequalify shall submit a prequalification application to EWEB on a form prescribed under Rule 3-0550(1).
- (2) Upon receipt of a prequalification application, EWEB shall investigate the prospective bidder or proposer as necessary to determine whether the prospective bidder or proposer is qualified.
 - (a) The determination shall be made in less than 30 days, if practicable, if the prospective bidder or proposer requests an early decision to allow the prospective bidder or proposer as much time as possible to prepare a bid or proposal for a contract that has been advertised.
 - (b) In making its determination, EWEB shall consider only the applicable standards of responsibility listed in Rule 3-0500(2).
 - (c) EWEB shall promptly notify the prospective bidder or proposer whether the prospective bidder or proposer is qualified.
- (3) If EWEB finds that a prospective bidder or proposer is qualified, the notice must state the type and nature of contracts that the prospective bidder or proposer is qualified to compete for and the period of time for which the prequalification is valid.
- (4) If EWEB finds that the prospective bidder or proposer is not qualified as to any contracts covered by the rule, resolution, ordinance or other regulation, the notice must specify:
 - (a) The reasons given under Rule 3-0550 for not prequalifying the prospective bidder or proposer;
 - (b) Inform the prospective bidder or proposer of the right to a hearing under Rule 3-0760; and
 - (c) Inform the prospective bidder or proposer to file with EWEB a written demand for

hearing within three business days after receipt of the notice pursuant to Rule 3-0760.

- (5) If EWEB has reasonable cause to believe that there has been a substantial change in the conditions of a prequalified prospective bidder or proposer and that the prospective bidder or proposer is no longer qualified or is less qualified, EWEB may revoke or may revise and reissue the prequalification after reasonable notice to the prequalified prospective bidder or proposer. The notice must specify:
 - (a) The reasons given under this Rule for revocation or revision of the prequalification of the prospective bidder or proposer;
 - (b) Inform the prospective bidder or proposer of the right to a hearing under Rule 3-0760; and
 - (c) Inform the prospective bidder or proposer to file with EWEB a written demand for hearing within three business days after receipt of the notice pursuant to Rule 3-0760.
- (6) A revocation or revision does not apply to any contract for which an advertisement for bids or proposals was issued before the date the notice of revocation or revision was received by the prequalified prospective bidder or proposer.

Stats. Implemented: ORS 279B.125

3-0575 Debarment of Prospective Offerors

- (1) EWEB:
 - (a) May debar a prospective bidder or proposer from consideration for award of EWEB's contracts for the reasons listed in subsection (2) of this section after providing the prospective bidder or proposer with notice and a reasonable opportunity to be heard.
 - (b) May not debar a prospective bidder or proposer under this section for more than three years.
- (2) A prospective bidder or proposer may be debarred from consideration for award of EWEB's contracts if:
 - (a) The prospective bidder or proposer has been convicted of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract or in the performance of a public or private contract or subcontract.
 - (b) The prospective bidder or proposer has been convicted under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the prospective bidder's or proposer's responsibility as a contractor.
 - (c) The prospective bidder or proposer has been convicted under state or federal antitrust statutes.
 - (d) The prospective bidder or proposer has committed a violation of a contract provision that is regarded by EWEB or the Construction Contractors Board to be so serious as to justify disqualification. A violation may include but is not limited to a failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a failure to perform or an unsatisfactory performance caused by acts beyond the control of the contractor may not be considered to be a basis for debarment.
 - (e) The prospective bidder or proposer does not carry workers' compensation or unemployment insurance as required by statute.

- (3) EWEB shall issue a written decision to debar a prospective bidder or proposer under this section. The decision must:
 - (a) State the reasons for the action taken; and
 - (b) Inform the debarred prospective bidder or proposer of the appeal rights of the prospective bidder or proposer under Rule 3-0760.
- (4) A copy of the decision issued under subsection (3) of this section must be mailed or otherwise furnished immediately to the debarred prospective bidder or proposer.
- (5) A prospective bidder or proposer that wishes to appeal debarment shall, within three business days after receipt of notice of debarment, notify EWEB in writing that the prospective bidder or proposer appeals the debarment as provided in Rule 3-0760.

Stats. Implemented: ORS 279B.130; Or. Laws 2007, Ch. 764, Sec. 8.

OFFER EVALUATION AND AWARD

3-0600 Evaluation of Invitation to Bid

- (1) EWEB shall evaluate all bids that are received before the time and date indicated for bid opening in the invitation to bid.
- (2) EWEB shall evaluate the bids based on the requirements set forth in the invitation to bid and which shall include:
 - (a) Any criteria to determine minimum acceptability, such as inspection, testing, quality and suitability for intended use or purpose.
 - (b) Any criteria that will affect the bid price and will be considered in evaluation for award including, but not limited to, discounts, transportation costs and total costs of ownership or operation of a product over the life of the product must be objectively measurable.
 - (c) No criteria may be used in a bid evaluation that is not set forth in the invitation to bid or in a qualified products list maintained under 3-0240.
 - (d) EWEB shall, for the purpose of evaluating bids, apply any applicable preference allowed in Division 2.
- (3) EWEB may not consider for award bids received after the time and date indicated for bid opening in the invitation to bid.
- (4) EWEB may retain bids or copies of bids received after the bid time and date indicated in the invitation to bid.
- (5) After bid opening, EWEB may conduct discussions with apparent responsive bidders for the purpose of clarification to assure full understanding of the bid. All bids, in EWEB's sole discretion, needing clarification shall be accorded such an opportunity. EWEB shall document clarification of any bidder's bid in the procurement file.

Stats. Implemented: ORS 279B.055(6)

3-0605 Award of Contract to Invitation to Bid

- (1) If a contract is awarded, EWEB shall award the contract:

- (a) To the lowest responsible bidder whose bid substantially complies with the requirements and criteria set forth in the invitation to bid and with all prescribed public procurement procedures and requirements; or
 - (b) When the invitation to bid specifies or authorizes the award of multiple contracts, to the responsible bidders:
 - (A) Whose bids substantially comply with the requirements and criteria set forth in the invitation to bid and with all prescribed public procurement procedures and requirements; and
 - (B) Who qualify for the award of a public contract under the terms of the invitation to bid.
 - (c) A multiple award may be made if award to two or more bidders of similar goods or services is necessary for adequate availability, delivery, service or product compatibility.
 - (d) Multiple awards may not be made for the purpose of dividing the procurement into multiple solicitations, or to allow for user preference unrelated to utility or economy.
 - (e) A notice to prospective bidders that multiple contracts may be awarded for any invitation to bid shall not preclude EWEB from awarding a single contract in response to the invitation to bid.
- (2) If, after evaluation of bids, EWEB determines that an acceptable bid has been received for only parts of the requirements of the Solicitation Document:
- (a) EWEB may award a contract for the parts of the Solicitation Document for which acceptable bids have been received; or
 - (b) EWEB may reject all bids pursuant to 3-0640, and may issue a new Solicitation Document on the same or revised terms, conditions and specifications.
- (3) If EWEB initially determines that two or more bids are identical in all respects, EWEB shall re-evaluate the identical bids to verify the initial findings are correct and valid. If the re-evaluation verifies identical bids, EWEB shall award the contract as follows:
- (a) Preference shall be given to the bidder whose supplies and services have been manufactured or produced in Oregon;
 - (b) EWEB may use any reasonable criteria to make this determination, including without limitation requesting information from the bidders or other sources and applying such criteria equally to each bidder;
 - (c) If two or more remain identical after any preferences are allowed, then the contract shall be awarded by drawing lots as follows:
 - (A) EWEB shall give notice of the drawing to the identical bidders;
 - (B) The identical bidders shall be given the opportunity to be present when the lots are drawn;
 - (C) The drawing of lots shall be a drawing where each bidder has a substantially equal probability of being selected and that does not allow the person making the selection the opportunity to manipulate the drawing of lots to increase the probability of selecting one bidder over another bidder.
- (4) After award, EWEB shall make a record showing the basis for determining the successful bidder and shall include:
- (a) The bid or bids if multiple awards are made; and
 - (b) The final ranking score of each evaluated Bid.

Stats. Implemented: ORS 279B.055(10)

3-0610 Evaluation of Request for Proposals

- (1) Evaluation criteria:
 - (a) Need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates of actual future costs based on information available to EWEB; and
 - (b) The relative importance of price and any other evaluation factors used to rate the proposals in the first tier of competition, and if more than one tier of competitive evaluation may be used, a description of the process under which the proposals will be evaluated in the subsequent tiers; and

- (2) For purposes of evaluation and as provided in the request for proposal, EWEB may employ methods of contractor selection that include without limitation to:
 - (a) An award or awards based solely on the ranking of proposals;
 - (b) Discussions leading to best and final offers, in which EWEB may not disclose private discussions leading to best and final offers;
 - (c) Discussions leading to best and final offers, in which EWEB may not disclose information derived from proposals submitted by competing proposers;
 - (d) Serial negotiations, beginning with the highest ranked proposer;
 - (e) Competitive simultaneous negotiations;
 - (f) Multiple-tiered competition designed to identify, at each level, a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers;
 - (g) A multi-step request for proposals requesting the submission of unpriced technical submittals, and then later issuing a request for proposals limited to the proposers whose technical submittals EWEB had determined to be qualified under the criteria set forth in the initial request for proposals; or
 - (h) Any combination of methods described in this paragraph, as authorized or prescribed by rules adopted herein.

- (3) In the request for proposal, EWEB shall describe the methods by which EWEB will make the results of each tier of competitive evaluation available to the proposers who competed in the tier and how any proposers who are eliminated from further competition may protest or otherwise object to EWEB's decision.

- (4) After award, EWEB shall make a record showing the basis for determining the successful bidder and shall include:
 - (a) The bid or bids if multiple awards are made;
 - (b) Completed bid tabulation sheet; and
 - (c) Written justification for any rejection of lower bids.

Stats. Implemented: ORS 279B.060

3-0615 Award of Contract to Request for Proposals

- (1) If a contract is awarded, EWEB shall award the contract to the responsible proposer whose proposal EWEB determines in writing to be the most advantageous to EWEB based on:
 - (a) The evaluation process and evaluation factors described in the request for proposals;

- (b) Any applicable preferences allowed in Division 2; and,
 - (c) When applicable, the outcome of any negotiations authorized by the request for proposals.
 - (d) Other factors may not be used in the evaluation.
- (2) When the request for proposals specifies or authorizes the award of multiple public contracts, EWEB shall award public contracts to the responsible proposers who qualify for the award of a contract under the terms of the request for proposals.
- (3) After award, EWEB shall make a record showing the basis for determining the successful proposer and shall include:
- (a) The proposal or proposals if multiple awards are made;
 - (b) The final ranking score of each evaluated Proposal;
 - (c) Written justification for any rejection of higher scoring proposals; and
 - (d) If EWEB engaged in any of the methods of contractor selection described in Rule 3-0231 (Competitive Range, Multiple-tiered) or 3-0232 (Multi-step Sealed Proposals), written documentation of the content of any discussions, negotiations, best and final offers, or any other procedures EWEB used to select a proposer to which EWEB awarded a contract.
- (4) The determinations by EWEB under this Rule are final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law.

Stats. Implemented: ORS 279B.060(10), 279B.145

3-0620 Notice of Intent to Award Contract

- (1) At least seven days before the award of a public contract, EWEB shall issue, or post electronically or otherwise, to each bidder or proposer, including any proposer who was evaluated in a final competitive tier, notice of EWEB's intent to award a contract.
- (2) This section does not apply to a contract awarded as a small procurement 3-0265, an intermediate procurement 3-0270, a sole-source procurement 3-0275, an emergency procurement 3-0280, or a special procurement under 3-0285.

Stats. Implemented: ORS 279B.055(9), 279B.060(9), 279B.135

3-0630 Availability of Award Decisions

- (1) To the extent required by the Solicitation Document, EWEB shall deliver to the successful offeror a signed purchase order, price agreement, or other contract documents as applicable.
- (2) A person may obtain tabulations of awarded bids or evaluation summaries of proposals for a minimal charge, in person or by submitting to EWEB a written request accompanied by payment. The requesting person shall provide the Solicitation Document number and enclose a self-addressed, stamped envelope. In addition, EWEB may make bid and proposal tabulations available by posting them on EWEB's web site, or if EWEB establishes an Electronic Procurement System, it may make bid and proposal tabulations available through its Electronic Procurement System.
- (3) After notice of Intent to Award a contract, EWEB shall make procurement files available in

accordance with these Rules and Oregon law.

Stats. Implemented: ORS 279B.055 & ORS 279B.060

3-0640 Cancellation, Rejection, Delay of ITB or RFP

- (1) EWEB may cancel, reject in whole or in any part any bids or proposals if EWEB determines it is in the best interest of EWEB. The reasons for cancellation or rejection must be made part of the solicitation file, and may include without limitation:
 - (a) An offer is contingent upon EWEB's acceptance of terms and conditions (including specifications) that differ from the Solicitation Document;
 - (b) An offer that takes exception to terms and conditions (including specifications) set forth in the Solicitation Document;
 - (c) An offer attempts to prevent public disclosure of matters in contravention of the terms and conditions of the Solicitation Document or in contravention of applicable law;
 - (d) An offer proposes goods or services that fail to meet the specifications of the Solicitation Document;
 - (e) An offer that is late;
 - (f) An offer that is not in substantial compliance with the Solicitation Document;
 - (g) An offer is not in substantial compliance with all prescribed public procurement procedures;
 - (h) An offeror has not been prequalified under Rule 3-0550 and EWEB required mandatory prequalification;
 - (i) An offeror has been debarred under Rule 3-0575;
 - (j) An offeror has not met the requirements of subcontracting to an emerging small business as provided in ORS 279A.105, if required by the Solicitation Document;
 - (k) An offeror has not submitted properly executed bid or proposal security as required by the Solicitation Document;
 - (l) An offeror has failed to provide the certification of non-discrimination required under Rule 3-0210 and 3-0230;
 - (m) An offeror has failed to demonstrate its ability to perform satisfactorily under a contract and EWEB finds that it is not a responsible bidder or proposer under Rule 3-0500;
 - (n) An offeror is not qualified legally to contract with EWEB;
 - (o) An offeror has not supplied all necessary information in connection with any inquiry concerning responsibility. If the offeror fails to promptly supply information requested by EWEB concerning responsibility, EWEB shall base the determination of responsibility upon any available information, or may find the offeror non-responsible;
 - (p) The content of or an error in the Solicitation Document, or the procurement process unnecessarily restricted competition for the contract;
 - (q) The price, quality or performance presented by the offerors are too costly or of insufficient quality to justify acceptance of any offer;
 - (r) An offer that is based on a bid mistake that cannot be corrected under Rule 3-0470, which determination by EWEB is final and conclusive unless clearly erroneous, arbitrary, capricious or contrary to law;
 - (s) Causes other than legitimate market forces that threaten the integrity of the competitive process. These causes may include, without limitation, those that tend to limit competition, such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the Solicitation Document;

- (2) For purposes of this Division, EWEB may investigate any person submitting an offer. The investigation may include that person's officers, directors, owners, affiliates, or any other person acquiring ownership of the person to determine application of this Division or to apply the debarment provisions of Rule 3-0575.
- (3) EWEB is not liable to any bidder or proposer for any loss or expense caused by or resulting from the delay or suspension of a solicitation, bid, proposal or award.

Stats. Implemented: ORS279A.060, 279B.100, 279B.110, 279B.145

3-0660 Notice of Cancellation of Procurement or Solicitation

- (1) If EWEB cancels a procurement or solicitation prior to opening, it shall provide written notice of cancellation in the same manner that EWEB initially provided notice of the solicitation. The notice shall:
 - (a) Identify the Solicitation Document;
 - (b) Briefly explain the reason for cancellation; and
 - (c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.
- (2) If EWEB cancels a procurement or solicitation after opening, EWEB shall provide written notice of cancellation to all offerors who submitted offers.

Stats. Implemented: ORS 279B.100

3-0670 Disposition of Offers if Procurement or Solicitation Canceled

- (1) Prior to opening: If EWEB cancels a procurement or solicitation prior to opening, it shall return all offers it received to offerors unopened, provided the offeror submitted its offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, EWEB shall open the offer to determine the source and then return it to the offeror. For electronic offers, EWEB shall delete the offers from its Electronic Procurement System or information technology system.
- (2) After Opening. If EWEB cancels a procurement or solicitation after opening, EWEB:
 - (a) May return proposals but if returned then shall keep a list of returned proposals in the procurement file; and
 - (b) Shall keep bids in the procurement file.
- (3) Rejection of all offers. If EWEB rejects all offers, it shall keep all proposals and bids in the procurement file.

Stats. Implemented: ORS279B.060(5)(c)

LEGAL REMEDIES

3-0700 Protests and Judicial Review of Competitive Bidding and Proposals

- (1) A prospective bidder, proposer or offeror for a public contract solicited under Rules 3-0210 (Competitive Sealed Bidding), 3-0211 (Multi-Step Sealed Bids), 3-0230 (Competitive Sealed Proposals), 3-0231 (Competitive Range, Multiple-tiered, Discussions and

Negotiations), 3-0232 (Multi-step Sealed Proposals) may file a protest with EWEB if the prospective bidder, proposer or offeror believes that:

- (a) The procurement process is contrary to law, or
 - (b) A solicitation document is unnecessarily restrictive in that specifications limit competition arbitrarily, without reasonably promoting the fulfillment of the procurement needs of EWEB, or
 - (c) A solicitation document is legally flawed in that a solicitation document contains terms or conditions that are contrary to law, or
 - (d) A solicitation document improperly specifies a brand name as defined in ORS 279B.200.
- (2) EWEB shall notify prospective protesters of the time and manner in which a protest under this section may be filed and considered, and which shall be no less than five business days before bids, proposals or offers are due.
 - (3) EWEB shall consider the protest if the protest is timely filed and contains the following:
 - (a) Sufficient information to identify the solicitation that is the subject of the protest;
 - (b) The grounds that demonstrate how the procurement process is contrary to law or how the solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name;
 - (c) Evidence or supporting documentation that supports the grounds on which the protest is based; and
 - (d) The relief sought.
 - (4) If the protest meets the requirements of subsection (3) of this section, EWEB shall consider the protest and issue a decision in writing. Otherwise, EWEB shall promptly notify the protester that the protest is untimely or that the protest failed to meet the requirements of subsection (3) of this section and give the reasons for the failure.
 - (5) EWEB shall issue a decision on the protest no fewer than three business days before bids, proposals or offers are due, unless a written determination is made by EWEB that circumstances exist that justify a shorter time limit.
 - (6) The protester must file a protest with EWEB and exhaust all administrative remedies before seeking judicial review.
 - (7) The decision of the Board on a protest is subject to judicial review only if the action or writ of review is filed before the opening of bids, proposals or offers.
 - (8) If a prospective protester fails to timely file its protest, the prospective protester may not challenge the contract on grounds in subsection (1) in any future legal or administrative proceeding.

Stats. Implemented: ORS 279B.405; Or. Laws 2007, Ch. 764, Sec. 11.

3-0710 Protests and Judicial Review of Special Procurements

- (1) An affected person may protest the approval of a special procurement:
 - (a) By filing a written protest with EWEB that contains the following:
 - (A) A detailed statement of the legal and factual grounds for the protest;
 - (B) A description of the resulting harm to the person; and

- (C) The relief requested.
- (b) Prior to the date set for hearing by the Board in the public notice requesting the approval of a proposed special procurement given pursuant to Rule 3-0285(5).
- (2) The Board may uphold the protest, in whole or in part, or it may in its sole discretion implement the sustained protest in the approval of the special procurement.
- (3) Before seeking judicial review of the approval of a special procurement, an affected person must exhaust all available nonjudicial remedies.
- (4) The decision of the Board on a protest is subject to judicial review only if the suit or writ of review is filed before the opening of bids, proposals or offers.

Stats. Implemented: ORS 279B.400, 279B.405(7)

3-0720 Protests and Judicial Review of Other Violations

- (1) If EWEB allegedly violates the EWEB Rules for which no judicial remedy is otherwise provided, except for Rule 3-0800 (Required Contract Provisions), the alleged violation is subject to judicial review only as provided in this Rule.
- (2) A prospective protester must give EWEB written notice:
 - (a) No later than 10 days after the date on which the alleged violation occurred and in no event more than 10 days after the date of execution of the contract;
 - (b) Identifying the public contract about to be awarded or has been awarded;
 - (c) Describing the alleged violation that occurred in the procurement process and that the violation resulted in or will result in the unlawful award of a contract or the unlawful failure to award the contract;
 - (d) A statement whether the protester was deprived of the award of the contract or deprived of the opportunity to compete for the award of the contract;
 - (e) A statement that the protester would have been qualified to receive the award of the contract under Rule 3-0500 (Responsibility of Bidders and Proposers).
- (3) If the protest meets the requirements of subsection (2) of this section, EWEB shall consider the protest and issue a decision in writing. Otherwise, EWEB shall promptly notify the protester that the protest is untimely or that the protest failed to meet the requirements of subsection (2) of this section and give the reasons for the failure.
- (4) EWEB shall issue a decision on the protest no less than three business days after receipt of the protest.
- (5) The protester must file a protest with EWEB and exhaust all administrative remedies before seeking judicial review. Any judicial review of an alleged violation by EWEB shall be conducted by means of writ of review under ORS Chapter 34 filed in the Lane County Circuit Court.
- (6) If a person gives the notice required under subsection (2) and timely seeks judicial review under this section, EWEB shall not execute the contract unless it determines that a compelling governmental interest exists in proceeding or that the goods and services are urgently needed. If such a determination is made, EWEB shall set forth in writing the reasons for the determination and immediately provide the reasons to the person filing the challenge.

Stats. Implemented: ORS 279B.420

3-0740 Protests and Judicial Review of Contract Award

- (1) A bidder or proposer may protest the award of a public contract or a notice of intent to award a public contract, whichever occurs first, if:
 - (a) The bidder or proposer is adversely affected because the bidder or proposer would be eligible to be awarded the public contract in the event that the protest were successful; and
 - (b) The reason for the protest is that:
 - (A) All lower bids or higher ranked proposals are nonresponsive;
 - (B) EWEB has failed to conduct the evaluation of proposals in accordance with the criteria or processes described in the solicitation materials;
 - (C) EWEB has abused its discretion in rejecting the protestor's bid or proposal as nonresponsive; or
 - (D) EWEB's evaluation of bids or proposals or EWEB's subsequent determination of award is otherwise in violation of EWEB Rules.
 - (c) The protest is submitted within seven days.
- (2) The bidder or proposer shall submit the protest to EWEB in writing and shall specify the grounds for the protest to be considered by EWEB.
- (3) EWEB may not consider late protests.
- (4) EWEB shall consider and respond in writing to a protest no less than three business days after receipt of the protest.
- (5) The protester must exhaust all administrative remedies before seeking judicial review. EWEB's decision on a protest of a contract award is reviewable by the Lane County Circuit Court. To obtain review, a complainant must commence an action in accordance with ORS 279B.415(3) before the contract that is the subject of the protest is executed by EWEB.

Stats. Implemented: ORS 279B.410, 279B.415; Or. Laws 2007, Ch. 764, Sec. 12.

3-0760 Review of Prequalification and Debarment Decisions

- (1) Upon receipt of a notice from EWEB of a prequalification decision under Rule 3-0550 or of a decision to debar under Rule 3-0575, a prospective bidder or proposer that wishes to appeal the decision shall, within three business days after receipt of the notice, notify EWEB that the prospective bidder or proposer appeals the decision as provided in this section.
- (2) Immediately upon receipt of the prospective bidder's or proposer's notice of appeal, EWEB shall notify the Board.
- (3) Upon the receipt of notice from EWEB under subsection (2) of this section, the Board shall promptly notify the person appealing and EWEB of the time and place of the hearing. The Board shall conduct the hearing and decide the appeal within 30 days after receiving the notice from EWEB. The Board shall set forth in writing the reasons for the hearing decision.

- (4) At the hearing the Board shall consider de novo:
 - (a) The notice of denial, revocation or revision of a prequalification or the notice of debarment;
 - (b) The standards of responsibility listed in Rule 3-0500(2) on which EWEB based the denial, revocation or revision of the prequalification or the reasons listed in Rule 3-0575(2) on which EWEB based the debarment;
 - (c) Any evidence provided by the parties;
 - (d) Whether there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the decision, and the miscalculation or mistake operated to the substantial prejudice of the petitioner.
 - (e) In all other respects, a hearing before the Board shall be conducted under rules of procedure adopted by the Board.

- (5) The Board may allocate the Board's costs for the hearing between the person appealing and EWEB. The allocation shall be based upon facts found by the Board and stated in the final order that, in the Board's opinion, warrant such allocation of costs. If the final order does not allocate the costs for the hearing, the costs shall be paid as follows:
 - (a) If the decision to deny, revoke or revise a prequalification of a person as a bidder or the decision to debar a person is upheld, the costs shall be paid by the person appealing the decision.
 - (b) If the decision to deny, revoke or revise a prequalification of a person as a bidder or the decision to debar a person is reversed, the costs shall be paid by EWEB.

- (6) A decision of the Board may be reviewed only upon a petition, filed within 15 days after the date of the decision, in the circuit court of the county in which the Board has its principal office.

Stats. Implemented: ORS 279B.425

CONTRACTS

3-0800 Required Contract Provisions

Every public contract shall contain the following provisions:

- (1) Conditions concerning payment, contributions, liens, withholding: Every public contract shall contain a condition that the contractor shall:
 - (a) Make payment promptly, as due, to all persons supplying to the contractor labor or material for the performance of the work provided for in the contract.
 - (b) Pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the contract.
 - (c) Not permit any lien or claim to be filed or prosecuted against EWEB, on account of any labor or material furnished.
 - (d) Pay to the Department of Revenue all sums withheld from employees under ORS 316.167.

- (2) Condition concerning salvaging, recycling, composting or mulching yard waste material: Every public contract for lawn and landscape maintenance shall contain a condition requiring the contractor to salvage, recycle, compost or mulch yard waste material at an approved site, if feasible and cost-effective.

- (3) Condition concerning payment for medical care and providing workers' compensation:
 - (a) Every public contract shall contain a condition that the contractor shall promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the contractor, of all sums that the contractor agrees to pay for the services and all moneys and sums that the contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services.
 - (b) Every public contract shall contain a clause or condition that all subject employers working under the contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126.

- (4) Conditions concerning Hours of Labor (1) when labor is employed by a contracting agency through a contractor, a person may not be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity or emergency or when the public policy absolutely requires it, in which event, the person so employed for excessive hours shall receive at least time and a half pay:
 - (a) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or
For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and
 - (b) For all work performed on Saturday and on the following legal holidays:
 - (A) Each Sunday.
 - (B) New Year's Day on January 1.
 - (C) Memorial Day on the last Monday in May.
 - (D) Independence Day on July 4.
 - (E) Labor Day on the first Monday in September.
 - (F) Thanksgiving Day on the fourth Thursday in November.
 - (G) Christmas Day on December 25.

- (5) An employer shall give notice in writing to employees who perform work under subsection 4 of this section, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that employees may be required to work.

- (6) For the purpose of this section, each time a legal holiday, other than Sunday, listed in subsection (4) of this section falls on Sunday, the succeeding Monday shall be recognized as a legal holiday. Each time a legal holiday listed in subsection (4) of this section falls on Saturday, the preceding Friday shall be recognized as a legal holiday.

- (7) When specifically agreed to under a written labor-management negotiated labor agreement, an employee may be paid at least time and a half pay for work performed on any legal holiday specified in ORS 187.010 and 187.020 that is not listed in subsection (4) of this section.

- (8) This section does not apply to contracts for personal services designated under ORS 279A.055, provided that persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in subsection (4)(b)(B) to (G) of this section and for all overtime worked in excess of 40 hours in any one

week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

- (9) Subsections (4) and (5) of this section do not apply to contracts for services at a county fair or for other events authorized by a county fair board if persons employed under the contract receive at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week.
- (10) Subsections (4) to (6) of this section do not apply to a contract for services if the contractor is a party to a collective bargaining agreement in effect with any labor organization.
- (11) (a) Subsections (4) and (5) of this section do not apply to contracts for services. However, persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in subsection (14)(b)(B) to (G) of this section and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.
(b) An employer shall give notice in writing to employees who work on a contract for services, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.
- (12) Any contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of this section is liable to the affected employees in the amount of their unpaid overtime wages and in an additional amount equal to the unpaid overtime wages as liquidated damages. If the violation resulted from willful falsification of payroll records, the contractor or subcontractor or contractor's or subcontractor's surety is liable to the affected employees in the amount of their unpaid overtime wages and in an additional amount equal to twice the unpaid overtime wages as liquidated damages.
- (13) An action to enforce liability to employees under subsection 9 of this section may be brought as an action on the contractor's payment bond as provided for in ORS 279C.610.
- (14) This section **DOES NOT** apply to:
 - (a) Financial institutions as defined in ORS 706.008.
 - (b) Labor performed in the prevention or suppression of fire under contracts and agreements made pursuant to the authority of the State Forester or the State Board of Forestry under ORS 477.406.
 - (c) Public contracts for goods or personal property.
- (15) In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries may adopt rules to carry out the provisions of this section.

Stats. Implemented: ORS279B.020, 279B.220, 279B.225, 279B.230, 279B.235, 279B.405

3-0850 Contract Amendments

- (1) EWEB may amend a contract without additional competition to add additional goods or services within the scope of the Solicitation Document (if used), the contract or the approval of special procurement, subject to the following conditions:
 - (a) The original contract was awarded pursuant to Rules 3-0210 (competitive sealed EWEB Public Contracting Rules, Division 3 - Page 46 of 47

- bidding), 3-0211 (multi-step sealed bids), 3-0230 (competitive sealed proposals), 3-0231 (competitive range, multiple-tiered, discussions and negotiations), 3-0232 (multi-step sealed proposals), 3-0275 (sole-source procurements), 3-0285 (special procurements), or cooperative procurements in Division 2; and
- (b) One of the following two conditions are satisfied:
 - (A) The additional goods or services are required by reason of existing or new laws, divisions, regulations or ordinances of federal, state or local agencies, that affect performance of the original contract; or
 - (B) The prices for the goods or services are modified only as follows:
 - (i) When prices for the goods or services are based on unit prices, unit prices that establish the cost basis for the additional goods or services were provided in the offer or original contract and those prices do not increase except as permitted by an escalation clause in the contract; or,
 - (ii) When prices for the goods or services are not based on unit prices, options that establish the cost basis for the additional goods or services were provided in the Solicitation Document, offer, or original contract.
 - (c) If the amendment is not anticipated in the Solicitation Document, the contract or the approval of special procurement, the contract shall not be amended for more than twenty-five percent of the total not-to-exceed amount of the original contract without approval by the Purchasing Manager or the related [Leadership Team Manager](#)~~Division Director~~.
- (2) EWEB may renegotiate the terms and conditions, including the contract price, of a contract without additional competition and amend a contract if it is advantageous to EWEB, subject to the following conditions:
- (a) EWEB must determine that, with all things considered, the renegotiated contract is at least as favorable to EWEB as the original contract; and
 - (b) The renegotiated contract will not have a total term greater than allowed in the original Solicitation Document, contract or approval of a special procurement after combining the initial and extended terms. For example, a one-year contract, renewable each year for up to four additional years, may be renegotiated as a two to five-year Contract, but not beyond a total of five years. Also, if contracts with a single contractor are restated as a single contract, the term of the single contract may not have a total term greater than any one of the prior contracts.
 - (c) If a contractor offers a lower price in exchange for a change in term or condition that was expressly rejected in the original solicitation, the amended contract may be structured with this changed term as an optional, but not as a mandatory, contract term.
 - (d) If the contract is the result of a cooperative procurement, the amended contract must be within the scope of the original contract and may not materially change the terms, conditions, and prices of the original contract.

Stats. Implemented: ORS 279A.065



Public Contracting Rules

CONSTRUCTION CONTRACTS

Adopted: 1/4/2005

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Approved: _____

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Construction Contracts**

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RULES

5-0100 Application

- (1) EWEB Rules, Division 5, apply to Public Improvement Contracts as well as Public Contracts for ordinary construction services that are not Public Improvements (specifically Rule 5-0140 Contracts for Construction Other Than Public Improvements).
- (2) EWEB Rules, Division 5, address matters covered in ORS Chapter 279C (with the exception of Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, and Land Surveying or Related Services, all of which are addressed in EWEB Rules, Division 4).
- (3) EWEB Rules, Division 5, apply to the Contracts described in section (1) above which are first advertised, but if not advertised then entered into, on or after March 1, 2005.
- (4) Revisions to these rules from those in effect as of March 1, 2005 apply to public works contracts first advertised or solicited on or after January 1, 2006, unless otherwise specified by law or which maybe to EWEB's advantage. In no case shall changes apply to parts of the construction contracting process that has already occurred at the time the revisions were implemented.

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

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

5-0105 Policies

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

- (1) It is the policy of the State of Oregon, in enacting the Public Contracting Code, that a sound and responsive public contracting system should:
 - (a) Simplify, clarify and modernize procurement practices so that they reflect the market place and industry standards.
 - (b) Instill public confidence through ethical and fair dealing, honesty and good faith on the part of government officials and those who do business with the government.
 - (c) Promote efficient use of state and local government resources, maximizing the economic investment in public contracting within this state.
 - (d) Clearly identify rules and policies that implement each of the legislatively mandated socioeconomic programs that overlay public contracting and accompany the expenditure of public funds.
 - (e) Allow impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement. In public procurement, as set out in ORS chapter 279B, meaningful competition may be obtained by evaluation of performance factors and other aspects of service and product quality, as well as pricing, in arriving at best value.

- (f) Provide a public contracting structure that can take full advantage of evolving procurement methods as they emerge within various industries, while preserving competitive bidding as the standard for public improvement contracts unless otherwise exempted.
- (2) It is the policy of the State of Oregon that public improvement contracts awarded under this chapter must be based on competitive bidding, except as otherwise specifically provided in ORS 279C.335 for exceptions and formal exemptions from competitive bidding requirements.
- (3) It is the policy of the State of Oregon that contracting agencies shall make every effort to construct public improvements at the least cost to the contracting agency.

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

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

5-0110 Definitions

Definitions applicable to EWEB Rules, Division 5 are set forth at EWEB Rules, Division 1.

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

Stats. Implemented: ORS 279C.300 etseq

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

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

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

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

5-0120 Limitation on EWEB Public Improvements with EWEB Personnel

- (1) **Cost Accounting Limitation.** If EWEB fails to adopt and apply a cost accounting system that substantially complies with the model cost accounting guidelines developed by the Oregon Department of Administrative Services pursuant to section 3, chapter 869, Oregon Laws 1979, as determined by an accountant qualified to perform audits required by ORS 297.210 and 297.405 to 297.555 (Municipal Audit Law), EWEB may not construct a public improvement with EWEB's own equipment or personnel if the cost exceeds \$125,000.
- (2) **Limitation on Exceeding \$125,000 Estimated Cost.** Before EWEB constructs a public

improvement with its own equipment or personnel, if the estimated cost exceeds \$125,000, EWEB shall prepare adequate plans and specifications and the estimated unit cost of each classification of work. The estimated cost of the work must include a reasonable allowance for the cost, including investment cost, of any equipment used.

- (3) Accounting for Public Improvements using EWEB Personnel. EWEB shall cause to be kept and preserved a full, true and accurate account of the costs of performing the work, including all engineering and administrative expenses and the cost, including investment costs, of any equipment used. The final account of the costs is a public record.

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

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

5-0125 Limitation on Waiver of Damages

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

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

Stats. Implemented: ORS 279C.315

5-0130 Competitive Bidding Requirement

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

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

adopted under ORS279A.065.

- (9) Emergency Contracts as provided for in EWEB Rule 5-0150 Emergency Contracts; Bidding and Bonding Exemptions
- (10) Public improvement contracts exempted from competitive bid requirements under subsection (1), (2), (4), (5), (6), and (9) of this rule are not subject to Class Exemption requirements.

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

Stats. Implemented: ORS 279C.335

5-0140 Contracts for Construction Other than Public Improvements

- (1) Pursuant to ORS 279C.320, Public Contracts for construction services that are not Public Improvement Contracts, , may be procured as general trade services under the provisions of ORS Chapter 279B. Contracts for emergency work are regulated under ORS 279B.080. EWEB shall determine whether such Public Contracts are Public Works Contracts subject to the provisions of ORS 279C.800 to 279C.870 and if they are Public Works Contracts, EWEB shall comply with those provisions. EWEB may also impose requirements EWEB considers to be in the public interest, including bonding and insurance requirements typically imposed on Public Improvement Contracts.
- (2) For an emergency procurement of construction services that are not public improvements, the contracting agency shall ensure competition for a contract for the emergency work that is reasonable and appropriate under the emergency circumstances. In conducting the procurement, the contracting agency shall set a solicitation time period that the contracting agency determines to be reasonable under the emergency circumstances and may issue written or oral requests for offers or make direct appointments without competition in cases of extreme necessity.

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

Stats.Implemented: ORS 279C.320, Or Laws 2007, Ch. 764, Sec. 62(2) and 13.

5-0150 Emergency Contracts; Bidding and Bonding Exemptions

- (1) EmergencyDeclaration. Pursuant to ORS 279C.335(5) and this Rule 5-0150, EWEB may declare that Emergency circumstances exist that require prompt execution of a contract otherwise subject to EWEB Rules, Division 5, including Rules for Emergency construction or repair Work. The declaration shall be made at an administrative level consistent with both of the following procedures:
 - (a) With the General Manager's and/or the affected Division Director's concurrence, EWEB's Purchasing Manager may approve award of a Public Contract as an Emergency Procurement pursuant to the requirements of ORS 279C.335(5). When an Emergency Procurement is authorized, the procurement shall be made with competition that is practical under the circumstances. Such circumstances may, but are not limited to, EWEB moving forward as quickly as possible to prevent interruption to vital services, restoration of vital services, prevention of loss to EWEB, protection of the quality of services, or other circumstances necessary to responsibly carry out EWEB's services to its customers; and
 - (b) EWEB shall prepare a written declaration that describes the circumstances creating the Emergency as that term is defined at ORS 279A.010(1)(f) and Division 1, and the

anticipated harm from failure to enter into an Emergency contract. The Emergency declaration shall thereafter be kept on file in the Purchasing office.

- (2) Contract Award. Any Contract Awarded under this rule must be awarded within 60 Days after declaration of the Emergency, unless an extension is granted by EWEB.
- (3) Contract Scope. Although no dollar limitation applies to Emergency Contracts, the scope of the Contract must be limited to Work that is necessary and appropriate to remedy the conditions creating the Emergency as described in the declaration.
- (4) Contract Modification. Emergency Contracts may be modified by Change Order or Amendment to address the conditions described in the original declaration or an amended declaration that further describes additional work necessary and appropriate for related Emergency circumstances.
- (5) Excusing Bonds. Pursuant to ORS 279C.380(4) and this Rule 5-0150, EWEB, with the General Manager approval, may waive one or both of the requirements of furnishing a performance bond, payment bond and/or public works bond for the Emergency contract. After making such an Emergency declaration waiving the performance bond, payment bond, and/or public works bond, the bonding requirements are excused.
- (6) The purpose of an exemption is to exempt one or more public improvement contracts from competitive bidding requirements. The representations in and the accuracy of the findings, including any general description of the resulting public improvement contract, are the bases for approving the findings and granting the exception. The findings may describe anticipated features of the resulting public improvement contract, but the final parameters of the contract are those characteristics or specifics announced in the solicitation document.

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

Stats. Implemented: ORS 279C.335(5); 279C.380(4); OR Laws 2005, ch. 360, sec 2(8), Or Laws 2007, Ch. 764, Sec. 14.

5-0160 Intermediate Procurements; Competitive Quotes and Amendments

- (1) General. Pursuant to Oregon Laws, 2003, ch. 794, ' 132, and ORS 279C.335(1)(d), EWEB may award Public Improvement Contracts, estimated by EWEB not to exceed \$100,000, in accordance with intermediate procurement procedures for competitive quotes established by this rule, except to the extent certain classes of contracts have been exempted by EWEB, pursuant to ORS 279C.335 and EWEB Rules, Divisions 4, 5 or 6. A procurement may not be artificially divided or fragmented so as to constitute an intermediate procurement under this Rule 5-0160 or to circumvent competitive bidding requirements.
- (2) Selection Criteria. A written request for quotes shall include the selection criteria to be utilized in selecting a Contractor and, if the criteria are not of equal value, their relative value or ranking. The criteria may be limited to price or some combination of price, experience, specific expertise, availability, project understanding, contractor capacity, responsibility and similar factors.

- (3) Request for Quotes. EWEB shall utilize written requests for quotes whenever reasonably practicable for intermediate procurements. When requesting quotations orally, prior to requesting the price quote EWEB shall state any additional selection criteria and, if the criteria are not of equal value, their relative value. Oral quotations may only be utilized when prevailing wage rates are not required to be included within the specifications. An oral quotation may be provided only when expressly authorized in writing by EWEB, in advance of the oral quote.
- (4) Number of Quotes; Record Required. EWEB shall seek at least three informally solicited competitive quotes, and keep a written record of the sources and amounts of the quotes received. If three quotes are not reasonably available, fewer will suffice, but EWEB shall make a written record of the effort made to obtain those quotes.
- (5) Award. If Awarded, EWEB shall award the Contract to the prospective Contractor whose quote will best serve the interests of EWEB, taking into account price as well as any other applicable factors such as , but not limited to, experience, specific expertise, availability, project understanding, contractor capacity and responsibility. If Award is not made to the prospective contractor offering the lowest price, EWEB shall make a written record of the basis for award.
- (6) Price Increases. Intermediate level Public Improvement Contracts obtained by competitive quotes may be increased above the original amount of Award by Change Order or Amendment within the following limitations:
 - (a) Up to an aggregate Contract Price increase of 25% over the original Contract amount as determined to be warranted for additional related work by the affected Division Director and the Purchasing Manager, or solely by the General Manager;
 - (b) Up to an aggregate Contract Price increase of 50% over the original Contract amount, when determined to be warranted by the General Manager, or when applicable, the Board for additional related work; or
 - (c) The Board, in its sole judgment and at its sole discretion, shall have authority to review and approve contract amendments for any dollar amount it believes to be in the best interest of EWEB and its customers for additional related work.
- (7) Amendments. Amendments of intermediate level Public Improvement Contracts that exceed the thresholds stated in section 6(a), 6(b), and 6(c) are specifically authorized by ORS279A.065 and 279A.070, and Or Laws 2003, ch. 794, 132. Accordingly, such amendments are not considered new procurements and do not require competitive bidding.

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

Stats. Implemented: Oregon Laws 2003, ch. 794, ' ' 132 and 133 (sections in chapter 794 repealed effective June 30, 2009 pursuant to ' 332a of ORS chapter 794); 279C.335(1)(d).

5-0170 Inclusion of Solar Green Energy Technology in Public Buildings

- (1) (a) Except as otherwise provided in this section, a public improvement contract for the construction of a public building or for the reconstruction or major renovation of a public building, if the cost of the reconstruction or major renovation exceeds 50 percent of the value of the public building, shall contain and reserve an amount equal to at least 1.5 percent of the total contract price for the purpose of including appropriate green energy

technology as part of the construction, reconstruction or major renovation of the public building.

(b) A public improvement contract to construct, reconstruct or renovate a public building may provide for constructing green energy technology at a site that is located away from the site of the public building if:

(A) Constructing green energy technology away from the site of the public building and using the energy from the green energy technology at the site of the public building is more cost-effective, taking into account additional costs associated with transmitting generated energy to the site of the public building, than is constructing and using green energy technology at the site of the public building;

(B) The green energy technology that is located away from the site of the public building is located within this state and in the same county as, or in a county adjacent to, the site of the public building; and

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

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

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

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

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

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

(2) Before entering into a public improvement contract described in subsection (1) of this section, EWEB shall prepare a written determination of whether including green energy technology as part of the construction, reconstruction or major renovation of the public building is appropriate. EWEB shall list in the determination the total contract price and specify the amount it intends to expend on including green energy technology as part of the construction, reconstruction or major renovation.

(3) (a) If EWEB determines that green energy technology is not appropriate for the public building, subsection (1) of this section does not apply to the public improvement contract. EWEB's determination under this paragraph must consider whether constructing green energy technology at the site of the public building is appropriate and whether constructing green energy technology away from the site of the public building and in accordance with subsection (1)(b) and (c) of this section is appropriate.

(b) If subsection (1) of this section does not apply to the public improvement contract:

A. EWEB shall spend an amount equal to at least 1.5 percent of the total contract price

- to include appropriate green energy technology as part of a future public building project; and
- B. The amount EWEB spends on the future public building project in accordance with subparagraph (A) of this paragraph is in addition to any amount required under subsection (1) of this section for including appropriate green energy technology as part of the future public building project.
- (4) Subsection (3)(b) of this section does not apply to a public improvement contract for which state funds are not directly or indirectly used. EWEB may not use an amount described in subsection (3)(b) of this section to comply with the requirements set forth in ORS 276.900 to 276.915 or with a state building code standard that the Department of Consumer and Business Services approves under ORS 455.496.
- (5) As used in this section:
- (a) "Public building" means a building that a public body, as defined in ORS 174.109, owns or controls, and that is:
- (A) Used or occupied by employees of the public body; or
 - (B) Used for conducting public business.
- Notwithstanding the provisions of ORS 174.108(3), this section applies to intergovernmental entities described in ORS 174.108(3).
- (b) "Green energy technology" means a system that employs:
- (A) Solar or geothermal energy directly for space or water heating or to generate electricity; or
 - (B) Building design that uses solar energy passively to reduce energy use from other sources by at least 20 percent from a level required under ORS 276.900 to 276.915 or achieved in buildings constructed according to state building code standards that the Department of Consumer and Business Services approves under ORS 455.496.
- (c) "Green energy technology" does not include a system that:
- (A) Uses water, groundwater or the ground as a heat source at temperatures less than 140 degrees Fahrenheit; or
 - (B) Incorporates solar energy directly into other methods for generating energy, such as from the action of waves on water, from hydroelectric facilities or from wind-powered turbines.
- (6) Public improvement contracts subject to this section are also subject to rules the State Department of Energy adopts that include, but are not limited to, requirements and specifications for:
- A. Using particular green energy technologies in public improvements;
 - B. Determining the cost-effectiveness of green energy technologies;
 - C. Reporting the use of green energy technologies in public improvements or submitting documents to the department for review, as appropriate; and
 - D. Determining whether a structure is a public building subject to the requirements of ORS 297C.527.

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

FORMAL PROCUREMENT RULES

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

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

- (a) Required General Information:
 - (A) The Public Improvement project, as well as identification of the character of the Work, and applicable plans, Specifications and other Contract documents;
 - (B) Notice of any pre-Offer conference as follows:
 - (i) The time, date and location of any pre-Offer conference;
 - (ii) Whether attendance at the conference will be mandatory or voluntary; and
 - (iii) That statements made by EWEB employees, representatives, and agents at the conference are not binding upon EWEB unless confirmed by Written Addendum, in the form required by EWEB.
 - (C) The deadline for submitting mandatory prequalification applications and the class or classes of Work for which Offerors must be prequalified if prequalification is a requirement;
 - (D) The name and title of EWEB's authorized Person designated for receipt of Offers and contact Person (if different);
 - (E) Instructions and information concerning the form and submission of Offers, including the address of the office to which Offers must be delivered, any Bid or Proposal security requirements, and any other required information or special information, e.g., whether Offers may be submitted by facsimile or electronic means (See Rule 5-0300 regarding facsimile Bids or Proposals and Rule 5-0310 regarding electronic Procurement);
 - (F) The time, date and place of Opening;
 - (G) The time and date of Closing after which EWEB will not accept Offers, which time shall be not less than five Days after the date of the last publication of the advertisement, and may, in the sole discretion of EWEB, direct or permit the submission and receipt of bids by electronic means. The date of the last publication for publication of the advertisement on the EWEB Web site is the date of initial posting on the Web site. The date of initial posting on the website is not changed if the website is temporarily down and not available, but is later brought back on line, during the period between the initial posting and the date and time of closing. If EWEB is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, EWEB shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and Rule 5-0360. Timing issues relating to Addenda are governed by Rule 5-0250;
 - (H) The office where the Specifications for the Work may be reviewed;
 - (I) A statement that each Bidder to an ITB must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120;
 - (J) If the Contract resulting from a Solicitation will be a Contract for a Public Work project subject to the state prevailing rates of wage under ORS 279C.800 to 279C.870, the federal prevailing rates of wage under the Davis-Bacon Act (40 U.S.C. 276a), or both the state and federal prevailing rates of wage, a statement that no Offer will be received or considered by EWEB unless the Offer contains a statement by the Offeror as a part of its Offer that "Contractor

agrees to be bound by and will comply with the provisions of ORS 279C.838 or 279C.840 and/or 40 U.S.C. 3141, et seq. and Or Laws 2005, ch. 360, sec 7(1) or (2), whichever are applicable.”

- (K) A statement that EWEB will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as required by Rule 5-0230;
 - (L) A statement whether a Contractor or a subcontractor under the Contract must be licensed under ORS 468A.720 regarding asbestos abatement projects;
 - (M) A statement that the Contractor must provide certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4) and Rule 5-0440(3);
 - (N) How EWEB will notify Offerors of Addenda and how EWEB will make Addenda available, pursuant to Rule 5-0250;
 - (O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in Rule 5-0360;
 - (P) A statement setting forth the requirements of ORS 279C.525 for solicitation documents including (i) reference to specific federal, state and local statutes, ordinances, rules or regulations relating to the prevention of environmental pollution and the preservation of natural resources which must be complied with by the contractor in executing the public improvement contract, (ii) reference to known conditions at the construction site that may require the successful bidder to comply with the referenced federal, state and local statutes, ordinances, rules or regulations relating to the prevention of environmental pollution and the preservation of natural resources, and (iii) providing that the provisions in ORS 279C.525 will be applicable to the Contract;
 - (Q) A statement, at the option of EWEB, pursuant to ORS 279C.525(8), by which EWEB may allocate all or a portion of the known environmental and natural resource risks to a contractor by listing such environmental and natural resource risks with specificity in the solicitation documents; and
 - (R) A statement pursuant to 279C.380(3) that the performance and payment bonds must be payable to EWEB or specified contracting agency or to the public agency or agencies for whose benefit the contract was awarded.
- (b) Required Evaluation Process Information:
- (A) A statement that EWEB may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, and may reject for good cause all Offers upon EWEB's finding that it is in EWEB's or the public's best interest to do so;
 - (B) The anticipated Solicitation schedule, deadlines, protest process, and evaluation process, if any;
 - (C) Evaluation criteria, including the relative value applicable to each criterion, that EWEB will use to determine the Responsible Bidder with the lowest Responsive Bid (where Award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of Competitive Proposals is authorized under ORS 279C.335 and Rule 5-0620), along with the process EWEB will use to determine acceptability of the Work. Additional evaluation criteria which may apply are as follows:
 - (i) If the Solicitation Document is an Invitation to Bid, EWEB shall set forth any known special price evaluation factors in the Solicitation Document.

Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors shall be objective, reasonable estimates based upon information EWEB has available concerning future use;

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

EWEB Drug Testing Requirements

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

- (a) A written employee drug-testing policy,
- (b) Required drug testing for all new Subject Employees or alternatively, required testing of all Subject Employees every 12 months on a random selection basis, and
- (c) Required testing of a Subject Employee when the Contractor has reasonable cause to believe the Subject Employee is under the influence of drugs.
 - (1) A drug-testing program that meets the above requirements will be deemed a "Qualifying Employee Drug-testing Program." For the purposes of this rule, an employee is a "Subject Employee" only if that employee will be working on the Public Improvement project job site.
 - (2) The Contractor shall represent and warrant to EWEB in the Public Improvement Contract that the Qualifying Employee Drug-testing Program is in place at the time of Contract execution and

will continue in full force and effect for the duration of the Contract. Further, EWEB's performance obligation (which includes without limitation, EWEB's obligation to make payment) is contingent on Contractor's compliance with this representation and warranty.

- (d) The Public Improvement Contract shall contain Contractor's covenant that it will require each subcontractor providing labor for the project to:
 - (1) Demonstrate to the Contractor that it has a Qualifying Employee Drug-testing Program for the subcontractor's Subject Employees, and represent and warrant to the Contractor that the Qualifying Employee Drug-testing Program is in place at the time of subcontract execution and will continue in full force and effect for the duration of the subcontract; or
 - (2) Require that the subcontractor's Subject Employees participate in the Contractor's Qualifying Employee Drug-testing Program for the duration of the subcontract;
- (C) If the Contract calls for demolition, a condition requiring the Contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective, pursuant to ORS 279C.510(1);
- (D) If the Contract calls for lawn or landscape maintenance, a condition requiring the Contractor to compost or mulch yard waste material at an approved site, if feasible and cost effective, pursuant to ORS 279C.510(2);
- (E) A clause or condition, pursuant to ORS 279C.515(1), requiring that if the contractor fails, neglects or refuses to pay promptly a person's claim for labor or services that the person provides to the contractor or a subcontractor in connection with the public contract as the claim becomes due, the proper officer that represents EWEB may pay the amount of the claim to the person that provides the labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of the contract;
- (F) A clause or condition, pursuant to ORS 279C.515(2), requiring that if the contractor or a first-tier subcontractor fails, neglects or refuses to pay a person that provides labor or materials in connection with the public improvement contract within 30 days after receiving payment from EWEB or a contractor, the contractor or first-tier subcontractor owes the person the amount due plus interest charges that begin at the end of the 10-day period within which payment is due under ORS 279C.580 (4) and that end upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279C.580, and requiring that the interest shall be calculated as provided in ORS 279C.515(2) and may not be waived.
- (G) A clause or condition, pursuant to ORS 279C.515(3), requiring that if the contractor or a subcontractor fails, neglects or refuses to pay a person that provides labor or materials in connection with the public improvement contract, the person may file a complaint with the Construction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS 279C.580;
- (H) A condition, pursuant to ORS 279C.520(1) requiring that a person may not be employed for more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency or when the public policy absolutely requires it, and in such cases, except in cases of contracts for personal services designated under ORS 279A.055, the employee shall be paid at least time and a half pay:

- (i) (a) For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or
 - (b) For all overtime in excess of 10 hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and
- (ii) For all work performed on Saturday and on any legal holiday specified in ORS 279C.540;
- (I) In the case of contracts for personal services as described in ORS 279A.055, a provision pursuant to ORS 279C.520(3) requiring that the employee shall be paid at least time and a half for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime;
- (J) A provision pursuant to ORS 279C.520(5)(a) requiring that persons employed under the contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in ORS 279C.540 (1)(b)(B) to (G) and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater;
- (K) A provision pursuant to ORS 279C.525 referencing specific federal, state and local statutes, ordinances, rules or regulations relating to the prevention of environmental pollution and the preservation of natural resources which must be complied with by the contractor in executing the public improvement contract, and providing that the provisions in ORS 279C.525 are applicable to the Contract;
- (L) A condition, pursuant to ORS 279C.530(1), requiring that the contractor shall promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the contractor, of all sums that the contractor agrees to pay for the services and all moneys and sums that the contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services;
- (M) A clause or condition pursuant to ORS 279C.530(2), substantially as follows: "All employers, including Contractor, that employ subject Workers who Work under this Contract in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless such employers are exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements";
- (N) For public works contracts, a provision stating the existing state prevailing rate of wage and, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act (40 USC 276a) that may be paid to workers in each trade or occupation required for the public works employed in the performance of the contract either by the contractor or subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract, pursuant to ORS 279C.830(1), and generally 279C.800 to 279C.870;
- (O) If EWEB is required under section (N) to include the state and federal prevailing rates of wage in the contract, EWEB shall also include information showing which rate of wage is higher for workers in each trade or occupation in

each locality as determined by the Bureau of Labor and Industries under ORS 279C.830(1) and 279C.815(2)(b);

- (P) For public works contracts, a provision that the workers performing work on the public works contract shall be paid not less than the specified prevailing minimum hourly rate of wage, and that every subcontract must include a provision that workers performing work on the public works subcontract shall be paid not less than the specified prevailing minimum hourly rate of wage, pursuant to ORS 279C.830(1), and Or Laws 2005, ch.360, section 7;
- (Q) A provision requiring that the contractor pay the required fee to Bureau of Labor and Industries (BOLI), and that the fee be paid to the commissioner of BOLI under the commissioner's administrative rule, pursuant to ORS 279C.825(1) and 279C.830(2);
- (R) A provision requiring the contract a) to have a public works bond filed with the Construction Contractors Board before starting work on the project, and b) to include in every subcontract a provision requiring the subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, as required by ORS 279C.830(3), unless exempt under Or Laws 2005, ch. 360, sec. 2(7) or (8) or Or Laws 2007, Ch 415, sec. 1(8);
- (S) A provision requiring retainage, pursuant to ORS 279C.550 to 279C.570;
- (T) A clause pursuant to ORS 279C.580(3) requiring the contractor to include in each subcontract for property or services the contractor enters into with a first-tier subcontractor, including a material supplier, for purpose of performing a construction contract:
 - (i) A payment clause that obligates the contractor to pay the first-tier subcontractor for satisfactory performance under the subcontract within 10 days out of amounts EWEB pays to the contractor under the public improvement contract.
 - (ii) A clause that requires the contractor to provide a first-tier subcontractor with a standard form that the first-tier subcontractor may use as an application for payment or as another method by which the subcontractor may claim a payment due from the contractor.
 - (iii) A clause that requires the contractor, except as otherwise provided in this paragraph, to use the same form and regular administrative procedures for processing payments during the entire term of the subcontract. A contractor may change the form or the regular administrative procedures the contractor uses for processing payments if the contractor:
 - (1) Notifies the subcontractor in writing at least 45 days before the date on which the contractor makes the change; and
 - (2) Includes with the written notice a copy of the new or changed form or a description of the new or changed procedure.
 - (iv) An interest penalty clause that obligates the contractor, if the contractor does not pay the first-tier subcontractor within 30 days after receiving payment from EWEB, to pay the first-tier subcontractor an interest penalty on amounts due in each payment the contractor does not make in accordance with the payment clause included in the subcontract under paragraph (a) of this subsection. A contractor or first-tier subcontractor is not obligated to pay an interest penalty if the only reason that the contractor or first-tier subcontractor did not make payment when payment was due is that the contractor or first-tier subcontractor did not receive payment from EWEB or contractor when payment was due. The interest

penalty:

- (1) Applies to the period that begins on the day after the required payment date and that ends on the date on which the amount due is paid; and
 - (2) Is computed at the rate specified in ORS 279C.515 (2).
- (U) A clause pursuant to ORS 279C.580(4) obligating the contractor in each of the contractor's subcontracts, to require the first-tier subcontractor to include a payment clause and an interest penalty clause that conforms to the standards of subsection (R) of this section in each of the first-tier subcontractor's subcontracts and to require each of the first-tier subcontractor's subcontractors to include such clauses in the first-tier subcontractors' subcontracts with each lower-tier subcontractor or supplier.
- (V) A provision requiring notice of claim, pursuant to ORS 279C.605;
- (W) A provision requiring the contractor's certification of compliance with the Oregon tax laws; and
- (X) A provision requiring the contractor's certification that all subcontractors performing Work described in ORS 701.005(2) (i.e., construction Work) will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 to 701.055 before the subcontractors commence Work under the Contract.
- (Y) A provision requiring the contractor to comply with all state and federal laws and regulations, including the Public Contracting Code, and requiring the contractor to comply with the EWEB Public Contracting Rules, including, but not limited to, requiring that the contractor comply with (i) the payment of claims requirements of ORS 279C.515, (ii) the hours of labor requirements of 279C.520, (iv) federal, state and local statutes, ordinances, rules and regulations pertaining to environmental pollution and natural resources preservation, and the environmental pollution and natural resources preservation requirements of ORS 279C.525, (v) the maximum hours, holidays and overtime laws and regulations of ORS 279C.540, (vi) the time limitation claim requirements of ORS 279C.545, (vii) the prevailing wage rate requirements of ORS 279C.800 to 279C.870, (viii) the prompt payment policy, progress payments and rate of interest requirements of ORS 279C.570, (ix) the requirements of ORS 279C.580 pertaining to the contractor's relations with subcontractors, and (x) the payment bond requirements of ORS 279C.600 to 279C.610
- (2) Assignment or Transfer. Unless otherwise provided in the Contract, the Contractor shall not assign, sell, dispose of, or transfer rights, nor delegate duties under the Contract, either in whole or in part, without EWEB's prior Written consent. Unless otherwise agreed by EWEB in Writing, such consent shall not relieve the Contractor of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the Contractor and be bound to abide by all provisions of the Contract. If EWEB consents in Writing to an assignment, sale, disposal or transfer of the Contractor's rights or delegation of Contractor's duties, the Contractor and its surety, if any, shall remain liable to EWEB for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless EWEB otherwise agrees in Writing.

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

Stats. Implemented: ORS 279A.110(4), ORS 279A.120, ORS 279C.365, ORS 279C.370, ORS

5-0210 Notice and Advertising Requirements; Posting

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

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

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

EWEB notice shall include the World Wide Web location (i.e., Uniform Resource Locator or URL) where it will publish future Electronic Advertisements or alternatively, the Web location where EWEB will publish information on accessing the Electronic Advertisement via a Telnet application;

- (B) EWEB posts in its business office a notice that EWEB will publish advertisements for Offers by Electronic Advertisement. The notice shall include the World Wide Web location (i.e., Uniform Resource Locator or URL) where EWEB publishes Electronic Advertisements or alternatively, the Web location

where it publishes information on accessing the Electronic Advertisement via a Telnet application; and

- (C) EWEB determines Electronic Advertisement is likely to be cost effective.
 - (c) In addition to the EWEB's publication required under subsection 2(a) or 2(b), EWEB shall also publish an advertisement for Offers in at least one trade newspaper of general statewide circulation if the Contract is for a Public Improvement with an estimated cost in excess of \$125,000.
 - (d) All advertisements for Offers shall set forth:
 - (A) The Public Improvement project, which may include a general description of the project;
 - (B) The office where Contract terms, conditions and Specifications may be reviewed;
 - (C) If prequalification is a requirement, the date that Persons must file applications for prequalification under ORS 279C.430, and the class or classes of Work for which Persons must be prequalified;
 - (D) The scheduled Closing, which shall not be less than five Days after the date of the last required newspaper publication, if the advertisement is published as required in 2(a) or 2(c) of this section, and which shall not be less than five Days after the date of the first posting to the EWEB electronic or internet Web site, if the advertisement is published as required in 2(b) of this section;
 - (E) The name, title and address of EWEB Person authorized to receive Offers;
 - (F) The date, time and place of the scheduled Opening; and
 - (G) If applicable, that the Contract is for Public Works subject to ORS 279C.800 to 279C.870 and/or the Davis-Bacon Act (40 U.S.C. 3141, et seq.).
- (3) Posting Advertisement for Offers. EWEB may post a copy of each advertisement for Offers at EWEB's Purchasing office. An Offeror may obtain a copy of the advertisement for Offers upon request, for which EWEB may charge a reasonable fee.

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

Stats. Implemented: ORS 279C.360

5-0220 Prequalification of Offerors

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

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

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

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

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

- (1) Construction Contracts. EWEB shall not consider a Person's Offer to do Work as a contractor, as defined in ORS 701.005(2), unless the Person has a current, valid certificate of registration issued by the Construction Contractors Board at the time the Offer is made.
- (2) Landscape Contracts. EWEB shall not consider a Person's Offer to do Work as a landscape contractor as defined in ORS 671.520(2), unless the Person has a current, valid landscape license issued pursuant to ORS 671.560 by the State Landscape Contractors Board at the time the offer is made.
- (3) Noncomplying Entities. EWEB shall deem an Offer nonresponsive if it is received from a Person that fails to comply with this rule and shall reject the Offer as stated in ORS 279C.365(1)(k), unless contrary to federal law or subject to different timing requirements set by federal funding agencies.

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

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

5-0240 Pre-Offer Conferences

- (1) Purpose. EWEB may hold pre-Offer conferences with prospective Offerors prior to

Closing, to explain the Procurement requirements, obtain information or to conduct site inspections.

- (2) Required attendance. EWEB may require attendance at the pre-Offer conference as a condition for making an Offer. Unless otherwise specified in the Solicitation Document, a mandatory attendance requirement is considered to have been met if, at any time during the mandatory meeting, a representative of an offering Person is present.
- (3) Scheduled time. If EWEB holds a pre-Offer conference, it shall be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference, as determined in the sole discretion of EWEB.
- (4) Statements Not Binding. Statements made by EWEB employees, representatives, and agents at the pre-Offer conference do not change the Solicitation Document unless EWEB confirms such statements with a Written Addendum to the Solicitation Document.
- (5) Announcement. EWEB must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with Rule 5-0200(1)(a)(B).

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

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

5-0250 Addenda to Solicitation Documents

- (1) Issuance; Receipt. EWEB may change a Solicitation Document only by Written Addenda. An Offeror shall provide Written acknowledgement of receipt of all issued Addenda with its Offer, unless EWEB otherwise specifies in the Addenda or in the Solicitation Document.
- (2) Notice and Distribution. EWEB shall notify prospective Offerors of Addenda consistent with the standards of Notice set forth in Rule 5-0210(1). The Solicitation Document shall specify how EWEB will provide notice of Addenda and how it will make the Addenda available, in accordance with EWEB Rules, including Rule 5-0200(1)(a)(N). For example, the document could state: "EWEB will not mail notice of Addenda, but will publish notice of any Addenda on EWEB's Web site. Addenda may be downloaded off of the Web site."
- (3) Timelines; Extensions. EWEB shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. EWEB may extend the Closing if it determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by public interest, EWEB shall not issue Addenda less than 72 hours before the Closing unless the Addenda also extends the Closing.
- (4) Request for Change or Protest. Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in Rule 5-0260, by the close of the next business day after issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under Rule 5-0260, whichever date is later.

EWEB shall consider only an Offeror's request for change or protest to items within the scope of the Addendum; EWEB shall not consider a request for change or protest to matters not added to, or modified by, the Addendum, unless the Offeror submits the

request for change or protest before the deadline for EWEB's receipt of request for change or protests as set forth in Rule 5-0260(2) and (3).

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

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

5-0260 Request for Clarification or Change; Solicitation Protests

- (1) Clarification. Prior to the deadline for submitting a written request for change or protest, an Offeror may request that EWEB clarify any provision of the Solicitation Document. EWEB's clarification to an Offeror, whether orally or in writing, does not change the Solicitation Document and is not binding on EWEB unless EWEB amends the Solicitation Document by Written Addendum.
- (2) Request for Change.
 - (a) Delivery. An Offeror may request in writing a change to the Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver the written request for change to EWEB not less than 10 Days prior to Closing;
 - (b) Content of Request for Change.
 - (A) An Offeror's written request for change shall include a statement of the requested change(s) to the Contract terms and conditions, including any Specifications, together with the reason for the requested change.
 - (B) An Offeror shall mark its request for change as follows:
 - (i) "Solicitation Specification Request for Change" or "Contract Provision Request for Change"; and
 - (ii) Solicitation Document number (or other identification as specified in the Solicitation Document).
- (3) Protest.
 - (a) Delivery. An Offeror may protest Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a written protest on those matters to EWEB not less than 10 Days prior to Closing;
 - (b) Content of Protest.
 - (A) An Offeror's written protest shall include:
 - (i) A detailed statement of the legal and factual grounds for the protest;
 - (ii) A description of the resulting prejudice to the Offeror; and
 - (iii) A statement of the desired changes to the Contract terms and conditions, including any Specifications.
 - (B) An Offeror shall mark its protest as follows:
 - (i) "Solicitation Specification Protest" or "Contract Provision Protest"; and
 - (ii) Solicitation Document number (or other identification as specified in the Solicitation Document)
- (4) EWEB's Response. EWEB shall not consider an Offeror's request for change or protest after the deadline established for submitting such request or protest. EWEB shall provide notice to the applicable Person if it entirely rejects a protest. If EWEB agrees with the Person's request or protest, in whole or in part, EWEB shall either issue an Addendum reflecting its determination under Rule 5-0260 or cancel the Solicitation under Rule 5-270.

- (5) Extension of Closing. If EWEB receives a written request for change or protest from an Offeror in accordance with this rule, EWEB may extend Closing if EWEB determines, in its sole judgment, an extension is necessary to consider the request or protest and issue an Addendum, if any, to the Solicitation Document.

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

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

5-0270 Cancellation of Solicitation Document

- (1) Cancellation in the Public Interest. EWEB may cancel a Solicitation for good cause if EWEB finds that cancellation is in EWEB's or the public interest. EWEB's reasons for cancellation shall be made part of the Solicitation file.
- (2) Notice of Cancellation. If EWEB cancels a Solicitation prior to Opening, EWEB shall provide Notice of cancellation in accordance with Rule 5-0210(1). Such notice of cancellation shall:
 - (a) Identify the Solicitation;
 - (b) Briefly explain the reason for cancellation; and
 - (c) If appropriate, explain that an opportunity will be given to compete on any re-solicitation of the project.
- (3) Disposition of Offers.
 - (a) Prior to Offer Opening. If EWEB cancels a Solicitation prior to Offer Opening, it shall return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, EWEB may open the Offer to determine its source and then return it to the Offeror.
 - (b) After Offer Opening. If EWEB rejects all Offers or cancels a Solicitation after opening, it shall retain all such Offers as part of EWEB's Solicitation file.

Stat. Auth.: ORS 279A.007

Stats. Implemented: ORS 279C.395

5-0280 Offer Submissions

- (1) Offer and Acceptance. The Bid or Proposal is the Bidder's or Proposer's Offer to enter into a Contract.
 - (a) In competitive Bidding, the Offer is always a "Firm Offer," i.e., the Offer shall be held open by the Offeror for EWEB's acceptance for the period specified in Rule 5-0410. EWEB's Award of the Contract to a Bidder constitutes acceptance of the Offer and binds the Offeror to the Contract.
 - (b) In competitive Proposals, the Solicitation Document shall describe whether Offers are to be made and considered as "Firm Offers" that may be accepted without negotiation, as in the case of competitive Bidding, or whether Offers are subject to discussion, negotiation or otherwise are not to be considered as final offers. See Rule 5-0650 on Requests for Proposals and Rule 5-0290 on Bid or Proposal Security.
 - (c) All bids made to EWEB under ORS 279C.335 or 279C.400 must be made in writing, must be filed with the person designated for receipt of bids by EWEB, and must be opened publicly by EWEB immediately after the deadline for submission of bids,

unless otherwise provided in the Code or these EWEB Rules, Division 5.

- (2) Responsive Offer. EWEB may Award a Contract only to a Responsible Offeror with a Responsive Offer.
- (3) Contingent Offers. Except to the extent that a Proposer is authorized to propose certain terms and conditions pursuant to Rule 5-0650, a Proposer shall not make an Offer contingent upon EWEB's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.
- (4) Offeror's Acknowledgement. By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits proposal of alternative terms under Rule 5-0650, the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by EWEB in Writing.
- (5) Instructions. An Offeror shall submit and Sign its Offer in accordance with the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to the Opening in accordance with the requirements for submitting an Offer under the Solicitation Document. The Offer must be signed on behalf of the Offeror by someone with authority to bind the Offeror.
- (6) Forms. An Offeror shall submit its Offer on the form(s) provided in the Solicitation Document, unless an Offeror is otherwise instructed in the Solicitation Document.
- (7) Documents. An Offeror shall provide EWEB with all documents and descriptive literature required under the Solicitation Document.
- (8) Facsimile or Electronic Submissions. If EWEB permits facsimile or electronic Offers in the Solicitation Document, the Offeror may submit facsimile or electronic Offers in accordance with the Solicitation Document. EWEB shall not consider facsimile or electronic Offers unless authorized by the Solicitation Document.
- (9) Product Samples and Descriptive Literature. EWEB may require Product Samples or descriptive literature if it is necessary or desirable to evaluate the quality, features or characteristics of the offered items. EWEB will dispose of Product Samples, or return or make available for return Product Samples to the Offeror in accordance with the Solicitation Document.
- (10) Identification of Offers.
 - (a) To ensure proper identification and handling, Offers shall be submitted in a sealed envelope appropriately marked or in the envelope provided by EWEB, whichever is applicable.
 - (b) EWEB is not responsible for Offers submitted in any manner, format or to any delivery point other than as required in the Solicitation Document.
- (11) Receipt of Offers. The Offeror is responsible for ensuring that EWEB receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer.

Stat. Auth.: ORS 279A.065; 279A.070
Stats. Implemented: ORS 279C.365 & ORS 279C.375

5-0290 Bid or Proposal Security

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

- (1) Requirement for Bid Security (Optional for Proposals). Unless EWEB has otherwise exempted a Solicitation or class of Solicitations from Bid security pursuant to ORS 279C.390, EWEB shall require bidders to provide Bid security (submitted with or posted for) every solicitation for Public Improvements . EWEB may require Bid security even if it has exempted a class of Solicitations from Bid security. EWEB may require Proposal security in RFPs when Award of a Public Improvement Contract may be made without negotiation following receipt of a Firm Offer as described in Rule 5-0280(1)(b). See ORS 279C.400(5).
- (2) Security Amount. If Bid or Proposal security is required, it shall be not more than 10% of the Offeror's Bid or Proposal. EWEB shall not use Bid or Proposal security to discourage competition. EWEB shall expressly provide for any Bid or Proposal security in its Solicitation Document. The Offeror shall forfeit Bid or Proposal security after Award if the Offeror fails to execute the Contract and promptly return it with any required Performance Bond and Payment Bond. See ORS 279C.365(4) and ORS 279C.385.
- (3) Form of Bid or Proposal Security. EWEB may accept only the following forms of Bid or Proposal security:
 - (a) A surety bond from a surety company authorized to do business in the state of Oregon;
 - (b) An irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or
 - (c) A cashier's check or Offeror's certified check.
- (4) Return of Security for Unsuccessful Offers. EWEB shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been fully executed and all required bonds have been provided, or after all Offers have been rejected. EWEB may return the Bid or Proposal security of unsuccessful Offerors prior to Award if the return does not prejudice Contract Award and the security of at least the Bidders with the three lowest Bids, or the Proposers with the three highest scoring Proposals, is retained pending execution of a Contract. The bid or proposal security of unsuccessful Offerors shall be returned when the contract has been duly signed.
- (5) Return of Security for Successful Offers. Upon the execution of a public improvement contract and delivery of a good and sufficient performance bond, a good and sufficient payment bond, and any required proof of insurance by the successful bidder, the bid security of the successful bidder shall be returned to the bidder. A bidder who is awarded a contract and who fails promptly and properly to execute the contract and to deliver the performance bond and the payment bond shall forfeit the bid security that accompanied the successful bid. The bid security shall be taken and considered as liquidated damages and not as a penalty for failure of the bidder to execute the contract and bonds. The bid security of unsuccessful bidders may be returned to them when the bids have been

opened and the contract has been awarded, and may not be retained by EWEB after the contract has been duly signed.

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

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

5-0300 Facsimile Bids and Proposals

- (1) Authorization. EWEB may authorize Offerors to submit facsimile Offers. If EWEB determines that Bid or Proposal security is or will be required, EWEB shall not authorize facsimile Offers unless it has established a method for receipt of such security. Prior to authorization EWEB must determine whether its equipment and personnel are capable of receiving the size and volume of anticipated Offers within a short period of time and establish administrative procedures and controls:
 - (a) For receiving, identifying, recording and safeguarding facsimile Offers, and
 - (b) To ensure timely delivery of Offers to the location of Opening and to preserve the "sealed" requirement of competitive Procurement.

- (2) Provisions to Be Included in Solicitation Document. In addition to all other requirements, if EWEB authorizes a facsimile Offer, it shall include in the Solicitation Document provisions substantially similar to the following:
 - (a) A facsimile Offer, as used in this Solicitation, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by EWEB via a facsimile machine.
 - (b) Offerors may submit facsimile Offers in response to this Solicitation. The entire response must arrive at the place and by the time specified in this Solicitation Document, with the response printed out by the facsimile machine and not just residing in the memory of the facsimile machine.
 - (c) Facsimile Offers must be Signed by the Offeror.
 - (d) EWEB reserves the right to Award the Contract solely on the facsimile Offer. However, upon EWEB's request the apparently successful Offeror shall promptly submit its complete original Signed Offer.
 - (e) The data and compatibility characteristics of EWEB's receiving facsimile machine are as follows:
 - (A) Telephone number;
 - (B) Compatibility characteristics, e.g., make and model number, receiving speed, and communications protocol.
 - (f) EWEB is not responsible for any failure attributable to the transmission or receipt of the facsimile Offer including, but not limited to the following:
 - (A) Receipt of garbled or incomplete documents.
 - (B) Availability or condition of the receiving facsimile machine.
 - (C) Incompatibility between the sending and receiving facsimile machine.
 - (D) Delay in transmission or receipt of documents.
 - (E) Failure of the Offeror to properly identify the Offer documents.
 - (F) Illegibility of Offer documents.
 - (G) Security and confidentiality of data.

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

Stats. Implemented: ORS 279C.365

5-0310 Electronic Procurement

- (1) General. EWEB may advertise Public Improvement Contracts electronically in accordance with ORS 279C.360(1), and post notices of intent to Award electronically as provided by ORS 279C.410(7).
- (2) Alternative Procedures. In the event that EWEB desires to utilize electronic procurement, including submission and receipt of electronic offers, for a Public Improvement Contract, it shall first promulgate supporting procedures substantially in conformance with Rule 3-0330 (electronic procurement for goods and services), taking into account statutory requirements for written bids, opening bids publicly, bid security, first-tier subcontractor disclosure and inclusion of prevailing wage rates.
- (3) Interpretation. Nothing in this rule shall be construed as prohibiting EWEB from making procurement documents for Public Improvement Contracts available in electronic format as well as in hard copy when Bids are to be submitted only in hard copy.

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

Stats. Implemented: ORS 279C.365

5-0320 Pre-Closing Modification or Withdrawal of Offers

- (1) Modifications. An Offeror may modify its Offer in writing prior to the Closing. An Offeror shall prepare and submit any modification to its Offer to EWEB in accordance with Rule 5-0280, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:
 - (a) Bid (or Proposal) Modification; and
 - (b) Solicitation Number (or Other Identification as specified in the Solicitation Document).
- (2) Withdrawals
 - (a) An Offeror may withdraw its Offer by Written notice submitted on the Offeror's letterhead, Signed by an authorized representative of the Offeror, delivered to the location specified in the Solicitation Document (or the place of Closing if no location is specified), and received by EWEB prior to the Closing. The Offeror or authorized representative of the Offeror may also withdraw its Offer in Person prior to the Closing, upon presentation of appropriate identification and satisfactory evidence of authority.
 - (b) EWEB may release an unopened Offer withdrawn under subsection 2(a) to the Offeror or its authorized representative, after voiding any date and time stamp mark .
 - (c) The Offeror shall mark the written request to withdraw an Offer as follows:
 - (A) Bid (or Proposal) Withdrawal; and
 - (B) Solicitation Number (or Other Identification as specified in the Solicitation Document).
- (3) Documentation. EWEB shall include all documents relating to the modification or withdrawal of Offers in the appropriate Solicitation file.

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

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

5-0330 Receipt, Opening and Recording of Offers

- (1) Receipt. EWEB shall electronically or mechanically time-stamp or hand-mark each Offer and any modification upon receipt. EWEB shall not open the Offer or modification upon receipt, but shall store it in a secure place until Opening. If EWEB inadvertently opens an Offer or a modification prior to the Opening, EWEB shall reseal and store the opened Offer or modification for Opening. EWEB shall document the resealing for the Procurement file (e.g. "Inadvertently opened the Offer due to improper identification of the Offer").
- (2) Opening and recording. EWEB shall publicly open Offers including any modifications made to the Offer pursuant to Rule 5-0320. In the case of Invitations to Bid, to the extent practicable, EWEB shall read aloud the name of each Bidder, the Bid price(s), and such other information as it considers appropriate. In the case of Requests for Proposals or voluminous s Bids, if the Solicitation Document so provides, EWEB will not read Offers aloud.
- (3) Availability.
 - (a) After Opening and EWEB review for potential Public Record Exempt Material, EWEB shall make the Offers available for public inspection except for those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.501(2); ORS 646.461 to 646.475. To the extent EWEB determines such designation is not in accordance with applicable law, it shall make those portions available for public inspection. The Offeror shall separate information designated as confidential from other non-confidential information at the time of submitting its Offer. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and shall be publicly available regardless of an Offeror's designation to the contrary.
 - (b) In those cases where EWEB is allowed to and may need to negotiate changes to offers, EWEB may hold the Offerors confidential until it has satisfied that process.

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

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

5-0340 Late Bids, Late Withdrawals and Late Modifications

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. EWEB shall not consider late Offers, withdrawals or modifications except as permitted in Rule 5-0350 or 5-0390.

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

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

5-0350 Mistakes

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

- (a) EWEB may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:
 - (A) Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;
 - (B) Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and/or
 - (C) Acknowledge receipt of an Addendum to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addendum and intended to be bound by its terms; or the Addendum involved did not affect price, quantity or delivery.
 - (b) EWEB may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms EWEB's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example a missing unit price may be established by dividing the total price for the units by the quantity of units for that item or a missing, or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). In the event of a discrepancy, unit prices shall prevail over extended prices.
 - (c) EWEB may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:
 - (A) The nature of the error;
 - (B) That the error is not a minor informality under this subsection or an error in judgment;
 - (C) That the error cannot be corrected or waived under subparagraph (b) of this subsection;
 - (D) That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;
 - (E) That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;
 - (F) That the Offeror will suffer substantial detriment if EWEB does not grant it permission to withdraw the Offer;
 - (G) That EWEB's or the public's status has not changed so significantly that relief from the forfeiture will Work a substantial hardship on EWEB or the public it represents; and
 - (H) That the Offeror promptly gave notice of the claimed error to EWEB.
 - (d) The criteria in subsection (2)(c) of this rule shall determine whether EWEB will permit an Offeror to withdraw its Offer after Closing. These criteria also shall apply to the question of whether EWEB will permit an Offeror to withdraw its Offer without forfeiture of its Bid bond (or other Bid security), or without liability to EWEB based on the difference between the amount of the Offeror's Offer and the amount of the contract actually Awarded by EWEB, whether by Award to the next lowest Responsive and Responsible Bidder or the best Responsive and Responsible Proposer, or by resort to a new Solicitation.
- (3) Rejection for Mistakes. EWEB shall reject any Offer in which a mistake is evident on the

face of the Offer and the intended correct Offer is not evident or cannot be substantiated from documents submitted with the Offer.

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

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

5-0360 First-Tier Subcontractors; Disclosure and Substitution

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

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

- (2) Bid Closing, Disclosure Deadline and Bid Opening. For each ITB to which this rule applies, EWEB shall:
- (a) Set the Bid Closing on a Tuesday, Wednesday or Thursday, and at a time between 2 p.m. and 5 p.m., so that the resulting two-hour disclosure deadline does not fall on a legal holiday recognized by EWEB, except that these Bid Closing restrictions do not apply to an ITB for maintenance or construction of highways, bridges or other transportation facilities;
 - (b) Open Bids publicly immediately after the Bid Closing; and
 - (c) Consider for Contract Award only those Bids for which the required disclosure has been submitted by the announced deadline on forms prescribed by EWEB.
- (3) Bidder Instructions and Disclosure Form. For the purposes of this rule, EWEB in its Solicitation shall:
- (a) Prescribe the disclosure form that must be utilized, substantially in the form set forth in ORS 279C.370(2); and
 - (b) Provide instructions in a notice substantially similar to the following:
"Instructions for First-Tier Subcontractor Disclosure
Bidders are required to disclose information about certain first-tier subcontractors when the contract value for a Public Improvement is estimated by EWEB to be greater than \$100,000 (see ORS 279C.370). Specifically, when the contract amount of a first-tier subcontractor furnishing labor or labor and materials would be greater than or equal to: (i) 5% of the project Bid, but at least \$15,000, or (ii) \$350,000 regardless of the percentage, the Bidder must disclose the following information about that subcontract either in its Bid submission, or within two working hours after Bid Closing:
 - 1) The subcontractor's name,
 - 2) The category of Work that the subcontractor would be performing, and
 - 3) The dollar value of the subcontract.

If the Bidder will not be using any subcontractors that are subject to the above disclosure requirements, the Bidder is required to indicate "NONE" on the accompanying form.

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

- (4) **Submission.** A Bidder shall submit the disclosure form required by this rule either in its Bid submission, or within two Working hours after Bid Closing in the manner specified by the ITB.
- (5) **Responsiveness.** Compliance with the disclosure and submittal requirements of ORS 279C.370 and this rule is a matter of Responsiveness. Bids that are submitted by Bid Closing, but for which the disclosure submittal has not been made by the specified deadline, are not Responsive and shall not be considered for Contract Award.
- (6) **EWEB Role.** EWEB shall obtain, and make available for public inspection, the disclosure forms required by ORS 279C.370 and this rule. EWEB shall also provide copies of disclosure forms to the Bureau of Labor and Industries as required by ORS 279C.835. EWEB is not required to determine the accuracy or completeness of the information provided on disclosure forms.
- (7) **Substitution.** Substitution of affected first-tier subcontractors shall be made only in accordance with ORS 279C.585. EWEB shall accept written submissions filed under that statute as public records. Aside from issues involving inadvertent clerical error under ORS 279C.585, EWEB does not have a statutory role or duty to review, approve or resolve disputes concerning such substitutions. ORS 279C.590 provides a procedure for an initially disclosed subcontractor to file a complaint with the Construction Contractors Board to claim that the contractor improperly substituted a different subcontractor for the initially disclosed subcontractor.

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

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

5-0370 Disqualification of Persons

- (1) **Authority.** EWEB may disqualify a Person from consideration of Award of Contracts with EWEB after providing the Person with notice and a reasonable opportunity to be heard in accordance with this Rule 5-0370.
 - (a) **Standards for Conduct Disqualification.** As provided in ORS 279C.440, EWEB may disqualify a Person for a period up to three years based upon:
 - (A) Conviction for the commission of a criminal offense as an incident in obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.
 - (B) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty that currently, seriously and directly affects the Person's responsibility as a contractor.
 - (C) Conviction under state or federal criminal antitrust statutes.

- (D) Violation of a contract provision that is regarded by EWEB to be so serious as to justify Conduct Disqualification. A violation under this subsection 1(a)(D) may include but is not limited to material failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a Person's failure to perform or unsatisfactory performance caused by acts beyond the Person's control is not a basis for Disqualification.
 - (E) The person does not carry workers' compensation or unemployment insurance as required by statute.
- (b) Standards for Business Enterprise Certification ("BEC") Disqualification. As provided in ORS 200.065 or 200.075, EWEB may disqualify a Person from bidding or participating in any EWEB Contract (e.g. subcontractors) as follows:
- (A) For a BEC Disqualification under ORS 200.065, EWEB may disqualify a Person upon making a finding or obtaining an admission that:
 - (i) The Person fraudulently obtained or retained or attempted to obtain or retain or aided another Person to fraudulently obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise; or
 - (ii) The Person knowingly made a false claim that any Person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit; or
 - (iii) The Person has been found to have made a fraudulent certification or has been disqualified by another Contracting Agency or by the Department of Consumer and Business Services, pursuant to ORS 200.065.
 - (B) For a BEC Disqualification under ORS 200.075, EWEB may disqualify a Person upon finding that:
 - (i) The Person has entered into an agreement representing that a disadvantaged, minority, women, or emerging small business enterprise, certified pursuant to ORS 200.055 ("Certified Enterprise"), will perform or supply materials under a Public Improvement Contract, without the knowledge and consent of the Certified Enterprise; or
 - (ii) The Person exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any Certified Enterprise; or
 - (iii) The Person uses a Certified Enterprise to perform services under a contract or to provide supplies under a Public Improvement Contract to meet an established Certified Enterprise goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the contract.
 - (iv) A Person's right to bid or participate in any public contract is suspended by any public contracting agency or by the Department of Consumer and Business Services, under ORS 200.075 (whereupon EWEB shall not permit such Person to participate in EWEB Contracts, for the period of the suspension).
 - (C) Standards for Discrimination Disqualification. EWEB may disqualify a Person, pursuant to ORS 279A.110, if it finds that the Person discriminated against minority, women or emerging small business enterprises in awarding a subcontract in connection with a contract advertised by EWEB or a contract between EWEB and the Person.
- (2) Notice of Intent to Disqualify. EWEB shall notify the Person in Writing of a proposed

Disqualification personally or by registered or certified mail, return receipt requested. This notice shall:

- (a) State that EWEB intends to disqualify the Person;
 - (b) Set forth the reasons for the Disqualification;
 - (c) Include a statement of the Person's right to a hearing, pursuant to ORS 279C.445 and 279C.450, if requested in Writing within the time stated in the notice and that if EWEB does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived its right to a hearing;
 - (d) Include a statement of the authority and jurisdiction under which the hearing will be held;
 - (e) Include a reference to the particular sections of the statutes and rules involved, as to the reason(s) for the disqualification and the rights to appeal;
 - (f) State the proposed Disqualification period; and
 - (g) State that the Person may be represented by legal counsel, if expressly authorized under the applicable statutes or by Rule.
- (3) Hearing. EWEB shall schedule a hearing upon the receipt of the Person's timely request. EWEB shall notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.
- (4) Notice of Disqualification. EWEB shall immediately notify the Person in Writing of its Disqualification, personally or by registered or certified mail, return receipt requested. The notice shall contain:
- (a) The effective date and period of Disqualification;
 - (b) The grounds for Disqualification; and
 - (c) A statement of the Person's appeal rights and applicable appeal deadlines. For any disqualification, including, but not limited to, Conduct Disqualification, BEC Disqualification under ORS 200.065 or ORS 200.075, or Discrimination Disqualification under ORS 279A.110, the disqualified person must notify EWEB in Writing within three business Days after receipt of notice of Disqualification if the Person intends to appeal EWEB's decision, unless some other appeal period is set forth by statute or rule.

Stat. Auth.: ORS 279A.0070

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

5-0380 Bid or Proposal Evaluation Criteria

- (1) General. Unless excluded or exempt from the competitive bidding requirements, a Public Improvement Contract, if awarded, shall be Awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. See for reference Rule 5-0390, and Rules for Alternative Contracting Methods at Rule 5-0600 to 5-0690.
- (2) Bid Evaluation Criteria. Invitations to Bid may solicit lump-sum Offers, unit-price Offers or a combination of the two.
 - (a) Lump Sum. If the ITB requires a lump-sum Bid, without additive or deductive alternates, or if EWEB elects not to award additive or deductive alternates, Bids shall be compared on the basis of lump-sum prices, or lump-sum base Bid prices, as

- applicable. If the ITB calls for a lump-sum base Bid, plus additive or deductive alternates, the total Bid price shall be calculated by adding to or deducting from the base Bid those alternates selected by EWEB, for the purpose of comparing Bids.
- (b) Unit Price. If the Bid includes unit pricing for estimated quantities, the total Bid price shall be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by EWEB, for the purpose of comparing Bids. EWEB shall specify within the Solicitation Document the estimated quantity of the procurement to be used for determination of the low Bidder. In the event of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price shall govern. See for reference Rule 5-350(2)(b).
- (3) Proposal Evaluation Criteria. If the Contract Review Board has exempted the Procurement of a Public Improvement from the competitive Bidding requirements of ORS 279C.335(1), and has directed EWEB to use an Alternative Contracting Method under ORS 279C.335(3), EWEB shall set forth the evaluation criteria in the Solicitation Documents. See for reference Rule 5-0650, ORS 279C.335 and 279C.405.

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

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

5-0390 Offer Evaluation and Award; Determination of Responsibility

- 1) General. If Awarded, EWEB shall Award the Contract to the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer or Proposers submitting the best Responsive Proposal or Proposals, provided that such Person is not listed by the Construction Contractors Board as disqualified to hold a Public Improvement Contract, pursuant to ORS 279C.375(3)(a) and ORS 701.227. Effective July 1, 2008, a commercial contractor holding a Level 1 or Level 2 license from the Construction Contractors Board is not excluded from competing for a public contract on the basis of their level of license.
- (a) EWEB may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in EWEB's interest.
- (b) Based on competitive bids, EWEB may award a public improvement contract or may award multiple public improvement contracts when specified in the invitation to bid.
- (2) Determination of Responsibility. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, EWEB must have information that indicates that the Offeror meets the standards of responsibility set forth in ORS 279C.375(3)(b). To be a Responsible Offeror, EWEB must determine that the Offeror:
- (a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to demonstrate the capability of the Offeror to meet all contractual responsibilities;
- (b) Completed previous contracts of a similar nature with a satisfactory record of contract performance. For purposes of this paragraph, a satisfactory record of performance means that to the extent that the costs associated with and time available to perform a previous contract remained within the bidder's or proposer's control, the bidder or proposer stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. EWEB should carefully

- scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in contract performance. In reviewing the Offeror's performance, EWEB should determine whether the Offeror's deficient performance was expressly excused under the terms of contract, or whether the Offeror took appropriate corrective action. EWEB may review the Offeror's performance on both private and Public Contracts in determining the Offeror's record of contract performance. EWEB shall document the Offeror's record of performance in the Solicitation file if EWEB finds under this subparagraph that the bidder is not responsible.;
- (c) Has a satisfactory record of integrity. In evaluating the bidder's or proposer's record of integrity, EWEB may consider, among other things, whether the bidder or proposer has previous criminal convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the bidder's or proposer's performance of a contract or subcontract. An Offeror may lack integrity if EWEB determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to EWEB or another Contracting Agency. EWEB may find an Offeror not Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Conduct Disqualification under Rule 5-0370 may be used to determine an Offeror's integrity. EWEB shall document the Offeror's record of integrity in the Solicitation file if EWEB finds under this subparagraph that the bidder is not responsible.;
 - (d) Is qualified legally to contract with EWEB (including that the contractor has not been disqualified or debarred by EWEB); and
 - (e) Has supplied all necessary information in connection with the inquiry concerning responsibility. If the Offeror fails to promptly supply information concerning responsibility that EWEB requests, EWEB shall determine the Offeror's responsibility based on available information, or may find that the Offeror is not Responsible.
- (3) Evaluation. EWEB shall evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable laws and regulations. EWEB shall not evaluate an Offer using any other requirement or criterion.
- (4) Offeror Submissions.
- (a) EWEB may require an Offeror to submit Product Samples, descriptive literature, technical data, or other material and may also require any of the following prior to Award:
 - (A) Demonstration, inspection or testing of a product prior to Award for characteristics such as compatibility, quality or workmanship;
 - (B) Examination of such elements as appearance or finish; or
 - (C) Other examinations to determine whether the product conforms to Specifications.
 - (b) EWEB shall evaluate product acceptability only in accordance with the criteria disclosed in the Solicitation Document to determine that a product is acceptable. EWEB shall reject an Offer providing any product that does not meet the Solicitation Document requirements. EWEB's rejection of an Offer because it offers nonconforming Work or materials is not Disqualification and is not appealable under ORS 279C.445.

- (5) Evaluation of Bids. EWEB shall use only objective criteria to evaluate Bids as set forth in the ITB. EWEB shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid.
 - (a) Nonresident Bidders. In determining the lowest Responsive Bid, EWEB shall, in accordance with these Rules, add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.
 - (b) Clarifications. In evaluating Bids, EWEB may seek information from a Bidder only to clarify the Bidder's Bid. Such clarification shall not vary, contradict or supplement the Bid. A Bidder must submit Written and Signed clarifications and such clarifications shall become part of the Bidder's Bid.
 - (c) Negotiation Prohibited. EWEB shall not, unless permitted elsewhere by law or rule, negotiate scope of Work or other terms or conditions under an Invitation to Bid process prior to Award.

- (6) Evaluation of Proposals. Rule 5-0650 governs evaluation of RFPs.

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

Stats. Implemented: ORS 279C.335, ORS 279C.365, ORS 279C.375, ORS 279C.395 & Or Laws 2007, Ch. 836, sec. 42.

5-0400 Documentation of Award; Availability of Award Decisions

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

- (2) Contents of Award Record for Bids. EWEB's record shall include:
 - (a) All submitted Bids;
 - (b) Completed Bid tabulation sheet; and
 - (c) Written justification for any rejection of lower Bids.

- (3) Contents of Award Record for Proposals. Where the use of Requests for Proposals is authorized as set forth in Rule 5-0650, EWEB's record shall include:
 - (a) All submitted Proposals.
 - (b) The completed evaluation of the Proposals;
 - (c) Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and
 - (d) If EWEB permitted negotiations in accordance with Rule 5-0650, its completed evaluation of the initial Proposals and EWEB's completed evaluation of final Proposals.

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

- (5) Bid Tabulations and Award Summaries. Upon request of any Person EWEB shall provide tabulations of Awarded Bids or evaluation summaries of Proposals for a nominal charge which may be payable in advance. Requests must contain the Solicitation Document number and, if requested, be accompanied by a self-addressed, stamped envelope. EWEB may also provide tabulations of Bids and Proposals Awarded on designated Web sites or on EWEB's Electronic Procurement System.

- (6) Availability of Solicitation Files. Except for material exempt from public disclosure under Oregon Public Records Law, EWEB shall make completed Solicitation files available for public review at EWEB.
- (7) Copies from Solicitation Files. Any Person may obtain copies of discloseable material from Solicitation files upon payment of a reasonable copying charge.

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

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

5-0410 Time for Acceptance; Extension

- (1) Time for Offer Acceptance. An Offeror's Bid, or Proposal submitted as a Firm Offer (see Rule 5-0280), is irrevocable, valid and binding on the Offeror for not less than 30 Days from Closing unless otherwise specified in the Solicitation Document.
- (2) Extension of Acceptance Time. EWEB may request, orally or in writing that Offerors extend the time during which EWEB may consider and accept their Offer. Offerors shall acknowledge their agreement to extend or not extend their offer in writing to EWEB. If an Offeror agrees to extend the Offer, the offer shall continue as a Firm Offer, irrevocable, valid and binding on the Offeror for the agreed-upon extension period.

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

Stats. Implemented: ORS 279C.375

5-0420 Negotiation with Bidders and Proposers Limited

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

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

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

5-0430 Negotiation When Bids Exceed Cost Estimate

- (1) Generally. In accordance with ORS 279C.340, if all Responsive Bids from Responsible Bidders on a competitively Bid Project exceed EWEB's Cost Estimate, prior to Contract Award, EWEB may negotiate Value Engineering and Other Options with the Responsible Bidder submitting the lowest Responsive Bid in an attempt to bring the Project within EWEB's Cost Estimate. Notwithstanding any other provision of law, the records of a bidder used in contract negotiation under ORS 279C.340 and Rules 5-0420 and 5-0430, are not subject to public inspection until after the negotiated contract has been awarded or the negotiation process has been terminated. The subcontractor disclosure and substitution requirements of Rule 5-0360 do not apply to negotiations under this rule.
- (2) Definitions. Definitions applicable to EWEB Public Contracting Rules, Division 5 are set

forth at EWEB Public Contracting Rules, Division 1.

- (3) Rejection of Bids. In determining whether all Responsive Bids from Responsible Bidders exceed the Cost Estimate, only those Bids that have been formally rejected, or Bids from Bidders who have been formally disqualified by EWEB, shall be excluded from consideration.
- (4) Scope of Negotiations. EWEB shall not proceed with Contract Award if the scope of the Project is significantly changed from the original Bid. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other Bidders would have been expected by EWEB to participate in the Bidding process had the change been made during the Solicitation process rather than during negotiation. This rule shall not be construed to prohibit resolicitation of trade subcontracts.
- (5) Discontinuing Negotiations. EWEB may discontinue negotiations at any time, and shall do so if it appears to EWEB that the apparent low Bidder is not negotiating in good faith or fails to share cost and pricing information upon request. Failure to rebid any portion of the project, or to obtain subcontractor pricing information upon request, shall be considered a lack of good faith.
- (6) Limitation. Negotiations may be undertaken only with the lowest Responsive, Responsible Bidder pursuant to ORS 279C.340. That statute does not provide any additional authority to further negotiate with Bidders next in line for Contract Award.
- (7) Public Records. ORS 279C.340 shall not be construed as creating any additional public records where that result is not otherwise contemplated by the Public Records law, ORS Chapter 192. Records of a Bidder used in Contract negotiations may not become public records unless they are also submitted to EWEB, and unless they are otherwise exempted from being considered public records.

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

Stats. Implemented: ORS 279C.340

5-0440 Rejection of Offers

- (1) Rejection of an Offer.
 - (a) EWEB may reject any Offer upon finding that to accept the Offer may impair the integrity of the Procurement process or that rejecting the Offer is in the public interest.
 - (b) EWEB shall reject an Offer upon EWEB's finding that the Offer:
 - (A) Is contingent upon EWEB's acceptance of terms and conditions (including Specifications) that differ from the Solicitation Document;
 - (B) Takes exception to terms and conditions (including Specifications);
 - (C) Attempts to prevent public disclosure of matters in contravention of the terms and conditions of Solicitation Document or in contravention of applicable law;
 - (D) Offers Work or goods that fail to meet the Specifications of the Solicitation Document;
 - (E) Is late;
 - (F) Is not in substantial compliance with the Solicitation Documents;
 - (G) Is not in compliance with all prescribed public bidding procedures and

requirements.

- (c) EWEB shall reject an Offer upon EWEB's finding that the Offeror:
 - (A) Has not been prequalified under ORS 279C.430 and EWEB required mandatory prequalification;
 - (B) Has been Disqualified;
 - (C) Has been declared ineligible under ORS 279C.860 by the Commissioner of Bureau of Labor and Industries and the Contract is for a Public Work;
 - (D) Is listed as not qualified by the Construction Contractors Board, if the Contract is for a Public Improvement;
 - (E) Has not met the requirements of ORS 279A.105, pertaining to subcontracting to emerging small businesses, if required by the Solicitation Document;
 - (F) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;
 - (G) Has failed to provide the certification required under section 3 of this rule;
 - (H) Is not Responsible. See Rule 5-0390(2) regarding EWEB determination that the Offeror has met statutory standards of responsibility.

- (2) Form of Business. For purposes of this rule, EWEB may investigate any Person submitting an Offer. The investigation may include that Person's officers, Directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this rule or to apply the Disqualification provisions of ORS 279C.440 to 279C.450 and Rule 5-0370.

- (3) Certification of Non-Discrimination. The Offeror shall certify and deliver to EWEB Written certification, as part of the Offer, pursuant to ORS 279.110(4), that the Offeror has not discriminated and will not discriminate against minority, women or emerging small business enterprises in obtaining any required subcontracts. Failure to do so shall be grounds for disqualification.

- (4) Rejection of all Offers. EWEB may reject all Offers for good cause upon EWEB's Written finding it is in EWEB's interest to do so. EWEB shall notify all Offerors of the rejection of all Offers, along with the good cause justification and finding.

- (5) Criteria for Rejection of All Offers. EWEB may reject all Offers upon a Written finding that:
 - (a) The content of or an error in the Solicitation Document, or the Solicitation process unnecessarily restricted competition for the Contract;
 - (b) The price, quality or performance presented by the Offerors is too costly or of insufficient quality to justify acceptance of the Offer;

 - (c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;
 - (d) Causes that threaten the integrity of the competitive Procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct and inadvertent or intentional errors in the Solicitation Document;
 - (e) EWEB cancels the Solicitation in accordance with Rule 5-0270; or
 - (f) Any other circumstance indicating that Awarding the Contract would not be in EWEB's interest.

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

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

5-0450 Protest of Contractor Selection, Contract Award

- (1) Purpose. An adversely affected or aggrieved Offeror must exhaust all avenues of administrative review procedures and relief before seeking judicial review of EWEB's Contractor selection or Contract Award decision.
- (2) Notice of Competitive Range. If protest of competitive range is provided for in the RFP, when the competitive proposal process is authorized under Rule 5-0650, EWEB shall provide Written notice to all Proposers of EWEB's determination of the Proposers included in the Competitive Range. EWEB's notice of the Proposers included in the Competitive Range shall not be final until the later of the following:
 - (a) 10 Days after the date of the notice, unless otherwise provided therein; or
 - (b) Until EWEB provides a written response to all timely-filed protests that denies the protest and affirms the notice of the Proposers included in the Competitive Range.
- (3) Notice of Intent to Award. Unless otherwise provided in the Solicitation Document, EWEB shall provide Written notice to all Offerors of EWEB's intent to Award the Contract. EWEB's Award shall not be final until the later of the following:
 - (a) Seven Days after the date of the notice, unless the Solicitation Document provided a different period for protest; or
 - (b) EWEB provides a written response to all timely-filed protests that denies the protest and affirms the Award.
- (4) Right to Protest Award.
 - (a) An adversely affected or aggrieved Offeror may submit a written protest of EWEB's intent to Award within seven Days after the date of the notice of intent to Award the Contract, unless a different protest period is provided under the Solicitation Document.
 - (b) The Offeror's protest must be in Writing and must specify the grounds upon which the protest is based.
 - (c) An Offeror is adversely affected or aggrieved only if the Offeror is eligible for Award of the Contract as the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer submitting the best Responsive Proposal and is next in line for Award, i.e., the protesting Offeror must claim that all lower Bidders or higher-scored Proposers are ineligible for Award:
 - (A) Because their Offers were nonresponsive; or
 - (B) EWEB committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or administrative rule, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been the Responsible Bidder offering the lowest Bid or the Responsible Proposer offering the highest-ranked Proposal.
 - (d) EWEB shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest EWEB's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.
- (5) Right to Protest Competitive Range.
 - (a) If the RFP document provides for protest of the competitive range, an adversely affected or aggrieved Proposer may submit a written protest of the EWEB's decision

to exclude the Proposer from the Competitive Range within seven Days after the date of the notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document. (See procedural requirements for the use of RFPs at Rule 5-0650.)

- (b) The Proposer's protest shall be in writing and must specify the grounds upon which the protest is based.
 - (c) A Proposer is adversely affected only if the Proposer is responsible and submitted a Responsive Proposal and is eligible for inclusion in the Competitive Range, i.e., the protesting Proposer must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Proposers are removed from consideration, and that those ineligible Proposers are ineligible for inclusion in the Competitive Range because:
 - (A) Their Proposals were not responsive; or
 - (B) EWEB committed a substantial violation of a provision in the RFP or of an applicable Procurement statute or administrative rule, and the protesting Proposer was unfairly evaluated and would have, but for such substantial violation, been included in the Competitive Range.
 - (d) EWEB shall not consider a protest submitted after the time period established in this rule or such different period as may be provided in the Solicitation Document. A Proposer may not protest EWEB's decision not to increase the size of the Competitive Range above the size of the Competitive Range set forth in the RFP.
- (6) Authority to Resolve Protests. A written protest may be resolved at any step in the EWEB Administrative Review process by the person(s) authorized to respond to the protest.
- (7) Decision. If a protest is not settled at any step of the administrative review process provided by statute or rule, EWEB or its designee shall issue a Written decision on the protest. Judicial review of this decision will be available if the administrative process has been exhausted and if such review is provided by statute.
- (8) Award. The successful Offeror shall promptly execute the Contract after the Award is final. EWEB shall execute the Contract only after it has obtained all applicable required documents and approvals.

Stat. Auth.: ORS 279A.0070

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

5-0460 Performance and Payment Security; Waiver

- (1) Public Improvement Contract Security Requirements. The successful bidder for a public improvement contract shall promptly execute and deliver to EWEB a performance bond and a payment bond each in a sum equal to the full Contract Price for all Public Improvement Contracts, subject to the requirements of ORS 279C.380 and these EWEB Rules, Division 5, unless:
 - (a) The required performance bond is waived under ORS 279C.380(1)(a);
 - (b) The performance and/or payment bonds are excused in cases of emergency under ORS 279C.380(4); or
 - (c) EWEB exempts a Contract or classes of contracts from the required performance bond and payment bond pursuant to the Code and EWEB Rules, including ORS 279C.390.

- (2) **Performance Bond.** The performance bond is for the faithful performance of the contract in accordance with the plans, specifications and conditions of the Contract. The performance bond must be solely for the protection of EWEB and any other public agency or agencies for whose benefit the Contract was awarded. If the public improvement contract is with a single person to provide both design and construction of a public improvement, the obligation of the performance bond for the faithful performance of the contract required by this paragraph must also be for the preparation and completion of the design and related services covered under the contract. EWEB may waive the requirement of a performance bond and may permit the successful bidder to submit a cashier's check or certified check in lieu of all or a portion of the required performance bond.
- (3) **Construction Manager/General Contractor Services.** If the public improvement contract is with a single person to provide construction manager and general contractor services, in which a guaranteed maximum price may be established by an amendment authorizing construction period services following preconstruction period services, the contractor shall provide the bonds required by subsection (1) of this section upon execution of an amendment establishing the guaranteed maximum price. EWEB shall also require the contractor to provide bonds equal to the value of construction services authorized by any early work amendment in advance of the guaranteed maximum price amendment. Such bonds must be provided before construction starts.
- (4) **Payment Bond.** The payment bond shall be in an amount equal to the full Contract Price, solely for the protection of claimants under ORS 279C.600.
- (5) **Other Construction Contracts.** EWEB may require performance security for other construction Contracts that are not Public Improvement Contracts. Such requirements shall be expressly set forth in the Solicitation Document.
- (6) **Requirement for Security Bonds.** EWEB shall accept only a performance bond executed solely by a surety company or companies authorized to transact surety business in Oregon unless otherwise specified in the Solicitation Document (i.e., EWEB may accept a cashier's check or certified check in lieu or all or a portion of the required performance bond if specified in the Solicitation Document). EWEB shall accept only a payment bond executed solely by a surety company or companies authorized to transact surety business in Oregon, in an amount equal to the full Contract Price.
- (7) **Time for Submission.** The apparent successful Offeror must promptly furnish the required performance/payment security upon EWEB's request. If the Offeror fails to furnish the performance/payment security as requested, EWEB may reject the Offer and Award the Contract to the Responsible Bidder with the next lowest Responsive Bid or the Responsible Proposer with the next highest-scoring Responsive Proposal, and, at EWEB's discretion, the Offeror shall forfeit its Bid or Proposal security.
- (8) **Exemption of Contracts or Classes of Contracts from Bid Requirements.** Subject to the provisions of subsection (9) of this Rule, EWEB may exempt certain contracts or classes of contracts from all or a portion of the requirement for bid security and from all or a portion of the requirement that good and sufficient bonds be furnished to ensure performance of the contract and payment of obligations incurred in the performance.
- (9) **Authority to Require Security When Contracts Exempted.** EWEB may require bid security

and a good and sufficient performance bond, a good and sufficient payment bond, or any combination of such bonds, even though the public improvement contract is of a class exempted by the Director of the Oregon Department of Administrative Services or EWEB.

- (10) **Public Works Bond.** The contractor and each subcontractor shall each promptly execute and file public works bonds in the amount of \$30,000 with the Construction Contractors Board and shall submit a copy of the bond to EWEB before starting work on a contract or subcontract for a public works project, unless the bond requirement is excused based upon: (a) an emergency declaration, or (b) the contractor or subcontractor holds a Business Enterprise Certification, has properly elected not to file a public works bond in accordance with ORS 279C.836 and gives notice of such election to the contractor (if the enterprise is a subcontractor) or to EWEB (if the enterprise is the contractor) before starting work on a public works project, or (c) effective January 1, 2008, the contractor or subcontractor electing not to file a public works bond in accordance with these rules and ORS 276C.836 for a public works project for which the contract price does not exceed \$100,000.

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

Stats. Implemented: ORS 279C.375, ORS 279C.380, ORS 279C.390 and Or Laws 2005, ch.360, sec. 2; Or Laws 2007, Ch. 415, Sec. 1.

5-0470 Substitute Contractor

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

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

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

5-0480 Foreign Contractor

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

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

Stats. Implemented: ORS 279A.120

ALTERNATIVE CONTRACTING METHODS

5-0600 Purpose

Rules 5-0600 to 5-0690 are intended to provide guidance regarding the use of Alternative

Contracting Methods for Public Improvement Contracts, as may be directed by a EWEB's Contract Review Authority under ORS 279C.335. Those methods include, but are not limited to, Design-Build, and Construction Manager/General Contractor (CM/GC) forms of contracting.

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

5-0610 Definitions for Alternative Contracting Methods

Definitions applicable to EWEB Rules, Division 5 are set forth at EWEB Rules, Division 1.
Stat. Auth.: ORS 279A.065; 279A.070
Stats. Implemented: ORS 279C.335 & ORS 279A.065

5-0620 Use of Alternative Contracting Methods

- (1) Competitive Bidding Exemptions. ORS Chapter 279C requires a competitive Bidding process for Public Improvement Contracts covered by the Public Contracting Code unless a statutory exception applies, a class of Contracts has been exempted or an individual Contract has been exempted in accordance with ORS 279C.335 and any applicable Contracting Agency rules. Use of Alternative Contracting Methods may be directed by EWEB as an exception to the prescribed Public Contracting practices in Oregon, and their use must be justified in accordance with the Code and these Rules 5-0600 to 5-0690.
- (2) Post-Project Evaluation. ORS 279C.355 requires that the EWEB prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 for which the competitive Bidding process was not used. The purpose of this evaluation is to determine whether it was actually in EWEB's best interest to use an Alternative Contracting Method. The evaluation must be made available for public inspection, and must be completed to the Board within 30 Days of the date EWEB "accepts" the Public Improvement project , which event is typically defined in the Contract. In the absence of such definition, acceptance of the Project occurs on the later of the date of final payment or the date of final completion of the Work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:
 - (a) Financial information, consisting of the actual project cost as compared with original project estimates, the amount of any Guaranteed Maximum Price, and the number of project change orders issued by EWEB;
 - (b) A narrative description of successes and failures during design, engineering and construction; and
 - (c) An objective assessment of the use of the Alternative Contracting Method as compared to the exemption Findings.

Stat. Auth.: ORS 279A.065; 279A.070; 279C.335
Stats. Implemented: ORS 279C.335; 279C.355

5-0630 Findings, Notice and Hearing

- (1) General Standard for Exemptions. The Board may exempt a public improvement contract or class of public improvement contracts from the competitive bidding requirements of ORS 279C.335(1) upon approval of the following findings submitted by EWEB:

- (a) It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts;
 - (b) The awarding of public improvement contracts under the exemption will likely result in substantial cost savings to EWEB.
 - (c) As an alternative to the finding described in paragraph (b) of this subsection, if EWEB seeks an exemption that would allow the use of an alternate contracting method not previously used, EWEB may make a finding that identifies the project as a pilot project to determine whether the use of the alternate contracting method actually results in substantial cost savings to EWEB or, if the contract is for a public improvement described in ORS 279A.050(3)(b), to EWEB or the public. EWEB shall include an analysis and conclusion regarding actual cost savings, if any, in the evaluation required under ORS 279C.355.
- (2) Cost Savings Factors. Under the "substantial cost savings" criterion for findings to support an exemption under ORS 279C.335, EWEB may, pursuant to ORS 279C.335(2)(b), consider the type, cost, and amount of the Contract, number of Persons available to Bid, and "such other factors as may be deemed appropriate."
- (3) Information Required for Findings. "Findings" means the justification for EWEB's conclusion that includes, "but is not limited to," information regarding eight identified areas, as defined in Division 1, pursuant to ORS 279C.330.
- (4) Addressing Cost Savings. When the Contract or class of Contracts under consideration for an exemption contemplates the use of Alternative Contracting Methods, the "substantial cost savings" requirement may be addressed by a combination of:
- (a) Specified Findings that address the factors and other information specifically identified by statute; and
 - (b) Additional Findings that address industry practices, surveys, trends, past experiences, evaluations of completed projects required by ORS 279C.355 and related information regarding the expected benefits and drawbacks of particular Alternative Contracting Methods. To the extent practicable, such Findings should relate back to the specific characteristics of the project or projects at issue in the exemption request.
- (5) Favoritism and Competition. The criteria at ORS 279C.335(2)(a) that it is "unlikely" that the exemption will "encourage favoritism" or "substantially diminish competition" may be addressed in contemplating the use of Alternative Contracting Methods by specifying the manner in which an RFP process will be utilized, that the Procurement will be formally advertised, competition will be encouraged, and Award made based upon identified selection criteria.
- (6) Class Exemptions. In accordance to ORS 279C.335(3), In making findings to support an exemption for a class of public improvement contracts, EWEB shall clearly identify the class using the class's defining characteristics. Those characteristics shall include some combination of project descriptions or locations, time periods, contract values, methods of procurement or other factors that distinguish the limited and related class of public improvement contracts from EWEB's overall construction program. EWEB may not identify a class solely by funding source, such as a particular bond fund, or by the method of

procurement, but shall identify the class using characteristics that reasonably relate to the exemption criteria set forth in ORS279C.335(2).

- (7) Requirements for Public Hearing.
 - (a) Before final adoption of Findings exempting a Public Improvement Contract from the requirement of competitive bidding, EWEB shall give notice and hold a public hearing as required by ORS 279C.335(4). The hearing shall be for the purpose of receiving public comment on EWEB's draft Findings.
 - (b) Notification of the public hearing shall be published in at least one trade newspaper of general statewide circulation a minimum of 14 days before the hearing.
 - (c) The notice shall state that the public hearing is for the purpose of taking comments on EWEB's draft findings for an exemption from the competitive bidding requirement. At the time of the notice, copies of the draft findings shall be made available to the public. At the option of EWEB, the notice may describe the process by which the findings are finally adopted and may indicate the opportunity for any further public comment.
 - (d) At the public hearing, EWEB shall offer an opportunity for any interested party to appear and present comment.
 - (e) If EWEB is required to act promptly due to circumstances beyond its control that do not constitute an emergency, notification of the public hearing may be published simultaneously with EWEB's solicitation of contractors for the Alternate Contracting Method, as long as the responses to the solicitation are due at least five (5) days after the meeting and approval of the findings.

- (8) Requirements for Exemptions. In granting exemptions, the Board shall:
 - (a) When appropriate, direct the use of Alternate Contracting Methods that take account of market realities and modern practices and are consistent with the public policy of encouraging competition; and
 - (b) Require and approve or disapprove written findings by EWEB that support the awarding of a particular public improvement contract or a class of public improvement contracts, without the competitive bidding requirement of ORS 279C.335(1). The findings must show that the exemption of a contract or class of contracts complies with the requirements in this Rule 5-0630, and ORS 279C.335.

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

Stats. Implemented: ORS 279C.335

5-0640 Competitive Proposals; Procedure

EWEB may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS 279C.400 to 279C.410 and Rules 5-0600 to 5-690, and EWEB Rules, Division 6, unless other applicable statutes control EWEB's use of competitive Proposals for Public Improvement Contracts. In accordance with ORS 279C.400, EWEB may solicit and award a public improvement contract, or may award multiple public improvement contracts when specified in the request for proposals, by requesting and evaluating competitive proposals. The RFP process for the Alternative Contracting Methods identified in Rules 5-0600 to 5-0690 includes the following steps:

- (1) Proposal Evaluation. Factors in addition to price may be considered in the selection process, but only as set forth in the RFP. Proposal evaluation shall be as objective as possible. Evaluation factors need not be precise predictors of future costs and

performance, but to the extent possible such evaluation factors shall:

- (a) Be reasonable estimates based on information available to EWEB;
- (b) Treat all Proposals equitably; and
- (c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to EWEB, pursuant to ORS 279C.305(1) and Rule 5B0105(3).

(2) Evaluation Factors.

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

(3) Contract Negotiations. Contract terms may be negotiated to the extent allowed by the RFP and Rules 5-0600 to 5-0690, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See Rule 5-0650. Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that affect cost or quality.

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

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

5-0650 Requests for Proposals (RFP)

- (1) Generally. The use of competitive proposals must be specially authorized for a Public Improvement Contract under the competitive bidding requirements of ORS 279C.335 (1), Rules 5-0130, 5-0600 to 5-0690, and Division 6, and/or findings adopted pursuant thereto. Also see ORS 279C.400 to 279C.410 for statutory requirements regarding competitive Proposals, and Rule 5-0640 regarding competitive Proposal procedures.
- (2) EWEB may issue a request for information, a request for interest, a request for qualifications or other preliminary documents to obtain information useful in the preparation or distribution of a request for proposals.
- (3) Solicitation Documents. The Solicitation Document requirements of Rule 5-0200(1) apply to Requests for Proposals, except as to first-tier subcontractor disclosure under ORS 279C.370 and reciprocal preference under ORS 279A.120, and except as otherwise provided by statute. For purposes of applying the requirements of Rule 5-0200(1), bids includes proposals and bid documents, and invitation to bid include Requests for Proposals. RFP Solicitation Documents shall also conform to the following standards:
 - (a) EWEB shall set forth evaluation and selection criteria in the Solicitation Document.

Examples of evaluation criteria include price or cost and its relative importance, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references and warranty provisions. See Rule 5-0640. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates based on information available to EWEB;

- (b) When EWEB is willing to negotiate terms and conditions of the Contract or allow submission of revised Proposals following discussions, EWEB must identify the specific terms and conditions in or provisions of the Solicitation Document that are subject to negotiation or discussion and authorize Offerors to propose certain alternative terms and conditions in lieu of the terms and conditions EWEB has identified as authorized for negotiation. EWEB must describe the evaluation and discussion or negotiation process, including how it will establish the Competitive Range;
- (c) When EWEB intends to Award Contracts to more than one Proposer, EWEB must identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. EWEB shall also include the criteria it will use to determine how it will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular Contractor to provide goods or services from those Contractors awarded Contracts;
- (d) EWEB shall include in the Solicitation Document the method of contractor selection, which may include, but is not limited to, award without negotiation, negotiation with the highest ranked proposer, competitive negotiations, multiple-tiered competition designed either to identify a class of proposers that fall within a competitive range or to otherwise eliminate from consideration a class of lower ranked proposers, or any combination of methods.

(4) Receipt and Evaluation of Proposals.

- (a) List of Proposals. For each request for proposals, EWEB shall prepare a list of proposals. (b) Public Inspection Issues. Notwithstanding the public records law, ORS 192.410 to 192.505:
 - (A) Proposals may be opened so as to avoid disclosure of contents to competing proposers during, when applicable, the process of negotiation.
 - (B) Proposals are not required to be open for public inspection until after issuance of the notice of intent to award a contract.
 - (C) EWEB may withhold from disclosure to the public trade secrets, as defined in ORS 192.501, and information submitted to a public body in confidence, as described in ORS 192.502, that are contained in a proposal. The fact that proposals are opened at a public meeting as defined in ORS 192.610 does not make their contents subject to disclosure, regardless of whether the public body opening the proposals fails to give notice of or provide for an executive session for the purpose of opening proposals. If a request for proposals is canceled after proposals are received, EWEB may return a proposal to the proposer that made the proposal. EWEB shall keep a list of returned proposals in the file for the solicitation.
- (b) Evaluation. EWEB shall evaluate Proposals only in accordance with criteria set forth in the RFP and applicable law. EWEB shall evaluate Proposals to determine the Responsible Proposer or Proposers submitting the best Responsive Proposal or

Proposals.

- (A) Clarifications. In evaluating Proposals, EWEB may seek information from a Proposer to clarify the Proposer's Proposal. A Proposer must submit Written and Signed clarifications and such clarifications shall become part of the Proposer's Proposal.
 - (B) Limited Negotiation. If EWEB did not permit negotiation in its Request for Proposals, it may, nonetheless, negotiate with the highest-ranked Proposer, but may then only negotiate the:
 - (i) Statement of Work; and
 - (ii) Contract Price as it is affected by negotiating the statement of Work.
 - (iii) The process for discussions or negotiations that is outlined and explained in subsections (5)(b) and (6) of this rule does not apply to this limited negotiation.
 - (c) Discussions; Negotiations. If EWEB permitted discussions or negotiations in the Request for Proposals, it shall evaluate Proposals and establish the Competitive Range, and may then conduct discussions and negotiations in accordance with this rule.
 - (A) If the Solicitation Document provided that discussions or negotiations may occur at EWEB's discretion, EWEB may forego discussions and negotiations and evaluate all Proposals in accordance with this rule.
 - (B) If EWEB proceeds with discussions or negotiations, it shall establish a negotiation team, of one or more individuals, tailored for the acquisition. EWEB's team may include legal, technical and negotiating personnel.
 - (d) Cancellation. Nothing in this rule shall restrict or prohibit EWEB from canceling the Solicitation at any time.
- (5) Competitive Range; Protest; Award.
- (a) Determining Competitive Range.
 - (A) If EWEB does not cancel the Solicitation, after the Opening it will evaluate all Proposals in accordance with the evaluation criteria set forth in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria set forth in the Request for Proposals, EWEB will determine and rank the Proposers in the Competitive Range.
 - (B) EWEB may increase the number of Proposers in the Competitive Range if EWEB's evaluation of Proposals establishes a natural break in the scores of Proposers indicating a number of Proposers greater than the initial Competitive Range are closely competitive, or have a reasonable chance of being determined the best Proposer after EWEB's evaluation of revised Proposals submitted in accordance with the process described in this rule.
 - (b) Protesting Competitive Range. EWEB shall provide written notice to all Proposers identifying Proposers in the Competitive Range, if the RFP provides that notice is to be given. A Proposer that is not within the Competitive Range may protest EWEB's evaluation and determination of the Competitive Range in accordance with Rule 5-0450, if the RFP provides for protest of the competitive range.
 - (c) Intent to Award; Discuss or Negotiate. After the protest period provided in accordance with these rules expires, or after EWEB has provided a final response to any protest, whichever date is later, it may either:
 - (A) Provide written notice to all Proposers in the Competitive Range of its intent to Award the Contract to the highest-ranked Proposer in the Competitive Range.

- (i) An unsuccessful Proposer may protest EWEB's intent to Award in accordance with Rule 5-0450.
 - (ii) After the protest period provided in accordance with Rule 5-0450 expires, or after EWEB has provided a final response to any protest, whichever date is later, it shall commence final Contract negotiations with the highest-ranked Proposer in the Competitive Range; or
 - (B) Engage in discussions with Proposers in the Competitive Range and accept revised Proposals from them, and, following such discussions and receipt and evaluation of revised Proposals, conduct negotiations with the Proposers in the Competitive Range.
- (6) Discussions; Revised Proposals. If EWEB chooses to enter into discussions with and receive revised Proposals from the Proposers in the Competitive Range, it shall proceed as follows:
- (a) Initiating Discussions. EWEB shall initiate oral or Written discussions with all of the Proposers in the Competitive Range regarding their Proposals with respect to the provisions of the RFP that it identified in the RFP as the subject of discussions. EWEB may conduct discussions for the following purposes:
 - (A) Informing Proposers of deficiencies in their initial Proposals;
 - (B) Notifying Proposers of parts of their Proposals for which EWEB would like additional information; and
 - (C) Otherwise allowing Proposers to develop revised Proposals that will allow EWEB to obtain the best Proposal based on the requirements and evaluation criteria set forth in the Request for Proposals.
 - (b) Conducting Discussions. EWEB may conduct discussions with each Proposer in the Competitive Range necessary to fulfill the purposes of this section, but need not conduct the same amount of discussions with each Proposer. EWEB may terminate discussions with any Proposer in the Competitive Range at any time. However, EWEB shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with EWEB before EWEB notifies Proposers of the date and time pursuant to this section that revised Proposals will be due.
 - (A) In conducting discussions, EWEB:
 - (i) Shall treat all Proposers fairly and shall not favor any Proposer over another;
 - (ii) Shall not discuss other Proposers' Proposals;
 - (iii) May suggest specific revisions that a Proposer could make to its Proposal, but shall not otherwise direct the Proposer to make any specific revisions to its Proposal; and
 - (iv) Shall accord proposers fair and equal treatment with respect to any opportunity for discussion and revision of proposals
 - (B) At any time during the time allowed for discussions, EWEB may:
 - (i) Continue discussions with a particular Proposer;
 - (ii) Terminate discussions with a particular Proposer and continue discussions with other Proposers in the Competitive Range; or
 - (iii) Conclude discussions with all remaining Proposers in the Competitive Range and provide notice to the Proposers in the Competitive Range to submit revised Proposals.
 - (c) Revised Proposals. If EWEB does not cancel the Solicitation at the conclusion of

EWEB's discussions with all remaining Proposers in the Competitive Range, EWEB shall give all remaining Proposers in the Competitive Range notice of the date and time by which they must submit revised Proposals. This notice constitutes EWEB's termination of discussions, and Proposers must submit revised Proposals by the date and time set forth in its notice.

- (A) Upon receipt of the revised Proposals, EWEB shall score the revised Proposals based upon the evaluation criteria set forth in the Request for Proposals, and rank the revised Proposals based on the EWEB's scoring.
 - (B) EWEB may conduct discussions with and accept only one revised Proposal from each Proposer in the Competitive Range unless otherwise set forth in the Request for Proposals.
 - (d) Intent to Award; Protest. EWEB shall provide written notice to all Proposers in the Competitive Range of its intent to Award the Contract. An unsuccessful Proposer may protest EWEB's intent to Award in accordance with Rule 5-0450. After the protest period provided in accordance with that rule expires, or after EWEB has provided a final response to any protest, whichever date is later, it shall commence final Contract negotiations.
- (7) Negotiations.
- (a) Initiating Negotiations. EWEB may determine to commence negotiations with the highest-ranked Proposer in the Competitive Range following the:
 - (A) Initial determination of the Competitive Range; or
 - (B) Conclusion of discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.
 - (b) Conducting Negotiations.
 - (A) Scope. EWEB may negotiate:
 - (i) The statement of Work;
 - (ii) The Contract Price as it is affected by negotiating the statement of Work; and
 - (iii) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the Request for Proposals. Accordingly, Proposers shall not submit, and EWEB shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the Request for Proposals.
 - (c) Terminating Negotiations. At any time during discussions or negotiations that EWEB conducts in accordance with this rule, EWEB may terminate discussions or negotiations with the highest-ranked Proposer, or the Proposer with whom it is currently discussing or negotiating, if EWEB reasonably believes that:
 - (A) The Proposer is not discussing or negotiating in good faith; or
 - (B) Further discussions or negotiations with the Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.
 - (d) Continuing Negotiations. If EWEB terminates discussions or negotiations with a Proposer, it may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this rule until EWEB has either:
 - (A) Determined to Award the Contract to the Proposer with whom it is currently discussing or negotiating; or

- (B) Completed one round of discussions or negotiations with all Proposers in the Competitive Range, unless EWEB provided for more than one round of discussions or negotiations in the Request for Proposals.
- (8) Cancellation/Rejection of Proposals. EWEB may reject any proposal not in compliance with all prescribed public bidding procedures and requirements, and may, for good cause, reject all proposals upon EWEB's finding that it is in the public interest to do so. In any case where competitive bids are required and all proposals are rejected, and the proposed project is not abandoned, new proposals may be called for as in the first instance.
- (9) Award of Contract Pursuant to Proposals.
 - (a) Intent to Award. At least seven days before the award of a public contract, unless EWEB determines that seven days is impractical under the circumstances, EWEB shall issue to each proposer or post, electronically or otherwise, a notice of intent to award.
 - (b) Award of Contract. If a public contract is awarded, EWEB shall award a public contract to the responsible proposer whose proposal is determined in writing to be the most advantageous to EWEB based on the evaluation factors set forth in the request for proposals and, when applicable, the outcome of any negotiations authorized by the request for proposals. Other factors may not be used in the evaluation.

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

5-0660 RFP Pricing Mechanisms

- (1) A Request for Proposals may result in a lump sum Contract Price, as in the case of competitive Bidding. Alternatively, a cost reimbursement Contract may be negotiated.
- (2) Economic incentives or disincentives may be included to reflect stated EWEB purposes related to time of completion, safety or other Public Contracting objectives, including total least cost mechanisms such as life cycle costing.
- (3) A Guaranteed Maximum Price (GMP) is used as the pricing mechanism for CM/GC where a total Contract Price is provided in the design phase in order to assist EWEB in determining whether the project scope is within EWEB'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 EWEB 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 EWEB shall terminate the Contract. EWEB 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, EWEB shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

5-0670 Design-Build Contracts

- (1) General. The Design-Build form of contracting, as defined at Rule 5-0610(3), has technical complexities that are not readily apparent. EWEB shall use this contracting method only with the assistance of knowledgeable staff or consultants who are experienced in its use. In order to use the Design-Build process, EWEB must be able to reasonably anticipate the following types of benefits:
 - (a) Obtaining, through a Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;
 - (b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;
 - (c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims;
 - (d) Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance Work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased projects); and
 - (e) Obtaining innovative design solutions through the collaboration of the Contractor and design team, which would not otherwise be possible if the Contractor had not yet been selected.
- (2) Authority. EWEB shall utilize the Design-Build form of contracting only in accordance with the requirements of these Rules 5-0600 et seq. See particularly Rule 5-0620 on "Use of Alternative Contracting Methods."
- (3) Selection. Design-Build selection criteria may include those factors set forth above in Rule 5-0640(2)(a), (b) and (c).
- (4) Licensing. If a Design-Build Contractor is not an Oregon licensed design professional, EWEB shall require that the Design-Build Contractor disclose in its Written Offer that it is not an Oregon licensed design professional, and identify the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the offer of architectural services, and ORS 672.060(11) regarding the offer of engineering services that are appurtenant to construction services.
- (5) Performance Security. ORS 279C.380(1)(a) provides that for Design-Build Contracts the surety's obligation on performance bonds, or the Bidder's obligation on cashier's or certified checks accepted in lieu thereof, includes the preparation and completion of design and related professional services specified in the Contract. This additional obligation, beyond performance of construction services, extends only to the provision of professional services and related design revisions, corrective Work and associated costs prior to final completion of the Contract (or for such longer time as may be defined in the Contract). The obligation is not intended to be a substitute for professional liability insurance, and does not include errors and omissions or latent defects coverage, which EWEB may also require.

- (6) Contract Requirements. EWEB shall conform their Design-Build contracting practices to the following requirements:
- (a) Design Services. The level or type of design services required must be clearly defined within the Procurement documents and Contract, along with a description of the level or type of design services previously performed for the project. The services to be performed shall be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.
 - (b) Professional Liability. The Contract shall clearly identify the liability of design professionals with respect to the Design-Build Contractor and EWEB, as well as requirements for professional liability insurance.
 - (c) Risk Allocation. The Contract shall clearly identify the extent to which EWEB requires an express indemnification from the Design-Build Contractor for any failure to perform, including professional errors and omissions, design warranties, construction operations and faulty Work claims.
 - (d) Warranties. The Contract shall clearly identify any express warranties made to EWEB regarding characteristics or capabilities of the completed project (regardless of whether errors occur as the result of improper design, construction, or both), including any warranty that a design will be produced that meets the stated project performance and budget guidelines.
 - (e) Incentives. The Contract shall clearly identify any economic incentives and disincentives, the specific criteria that apply and their relationship to other financial elements of the Contract.
 - (f) Honoraria. If allowed by the RFP, honoraria or stipends may be provided for early design submittals from qualified finalists during the Solicitation process on the basis that EWEB is benefited from such deliverables.

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

Stats. Implemented: ORS 279C.335, ORS 279A.065 & ORS 279C.110

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

- (1) General. The CM/GC form of contracting, as defined at Rule 5-0610(2), is a technically complex project delivery system. EWEB shall 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 EWEB and design professional, although in CM/GC there is a separate contract between EWEB and design professional. In order to utilize the CM/GC method, EWEB 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. EWEB 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. EWEB may consider value engineering, building systems analysis, life cycle costing analysis and construction planning that lead to cost savings. EWEB 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; and
- (c) Technical Complexity. The Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between EWEB, design professionals and Contractor, in which the Contractor will assist in addressing specific project challenges through pre-construction services. EWEB 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. EWEB shall use the CM/GC form of contracting only in accordance with the requirements of these rules. See particularly Rule 5-0620 on "Use of Alternative Contracting Methods".
 - (3) Selection. CM/GC selection criteria may include those factors set forth above in Rule 5-0640(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 and Pricing Mechanisms at Rule 5-0660.
 - (5) Contract Requirements. EWEB's 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 EWEB's benefit. (Note that unless there is a clearly articulated reason for sharing such cost savings, they should accrue to EWEB.)
 - (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.
- (f) Fee. Compensation for the CM/GC's services shall be paid on the basis of a fee that is inclusive of profit, overhead and all other indirect or non-reimbursable costs. Costs determined to be included within the fee should be expressly defined wherever possible. The fee, first expressed as a proposed percentage of all reimbursable costs, shall be identified during and become an element of the selection process. It shall subsequently be expressed as a fixed amount when the GMP is established.
- (g) Incentives. The Contract shall clearly identify any economic incentives, the specific criteria that apply and their relationship to other financial elements of the Contract (including the GMP).
- (h) Controlled Insurance Programs. For projects anticipated to exceed \$75 Million, the Contract shall clearly identify whether an Owner Controlled or Contractor Controlled Insurance Program is anticipated or allowable. If so, the Contract shall clearly identify (1) anticipated cost savings from reduced premiums, claims reductions and other factors, (2) the allocation of cost savings, and (3) safety responsibilities and/or incentives.
- (i) Early Work. The RFP shall clearly identify, whenever feasible, the circumstances under which any of the following activities may be authorized and undertaken for compensation prior to establishing the GMP:
 - (A) Early Procurement of materials and supplies;
 - (B) Early release of Bid packages for such things as site development; and
 - (C) Other advance Work related to critical components of the Contract.
- (j) Subcontractor Selection. The Contract shall clearly describe the methods by which the CM/GC shall publicly receive, open and record Bids or price quotations, and competitively select subcontractors to perform the Contract Work based upon price, as well as the mechanisms by which EWEB may waive those requirements. The documents shall also describe completely the methods by which the CM/GC and its affiliated or subsidiary entities may compete to perform the Work, including, at a minimum, advance notice to the public of the CM/GC's intent to compete and a public Opening of Bids or quotations by an independent party.
- (k) Subcontractor Approvals and Protests. The Contract shall clearly establish whether EWEB must approve subcontract awards, and to what extent, if any, EWEB will resolve Procurement protests of subcontractors and suppliers. The related procedures and reporting mechanisms shall be established with certainty, including whether the CM/GC acts as EWEB's representative in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, EWEB shall retain the right to monitor the subcontracting process in order to protect EWEB's interests.
- (l) CM/GC Self-Performance. Whenever feasible, the Contract shall establish the elements of Work the CM/GC may self-perform without competition, including, for example, the Work of the job-site general conditions. In the alternative, the Contract shall include a process for EWEB approval of CM/GC self-performance.
- (m) Socio-Economic Programs. The Contract shall clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and EWEB.

Stat. Auth.: ORS 279A.065; 279A.070
Stats. Implemented: ORS 297C.335 & ORS 279C.380(2)

CONTRACT PROVISIONS

5-0800 Required Contract Clauses

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

Stat. Auth.: ORS 279A.065; 279A.070
Stats. Implemented: ORS 297C.505 to ORS 279C.545 & ORS 279C.800 to 279C.870

5-0810 Waiver of Delay Damages against Public Policy

Any clause in a Public Improvement Contract purporting to waive, release, or extinguish the rights of a Contractor to damages resulting from EWEB's unreasonable delay in performing the Contract is void and unenforceable, as against public policy. However, Contract provisions requiring notice of delay, providing for alternative dispute resolution such as arbitration (where allowable) or mediation, providing other procedures for settling contract disputes, or providing for reasonable liquidated damages, are permissible.

Stat. Auth.: ORS 279A.065; 279A.070
Stats. Implemented: ORS 279C.315

5-0815 BOLI Public Works Bond

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

Stat. Auth.: ORS 279A.065; 279A.070
Stats. Implemented: ORS 297C.830 and generally ORS 279C.800 to 279C.870

5-0820 Retainage

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

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

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

Stat. Auth.: ORS 279A.065

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

5-0830 Contractor Progress Payments

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

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

Stats. Implemented: ORS 279C.570

5-0840 Interest

- (1) Prompt payment policy. EWEB shall pay promptly all payments due and owing to the Contractor on Contracts for Public Improvements.
- (2) Interest on progress payments. Late payment interest shall begin to accrue on payments due and owing on the earlier of 30 Days after receipt of invoice or 15 Days after EWEB approval of payment (the "Progress Payment Due Date"). The interest rate shall equal three times the discount rate on 90-day commercial paper in effect on the Progress Payment Due Date at the Federal Reserve Bank in the Federal Reserve district that includes Oregon, up to a maximum rate of 30 percent.
- (3) Interest on final payment. Final payment on the Contract Price, including retainage, shall be due and owing no later than 30 Days after Contract completion and acceptance of the Work. Late-payment interest on such final payment shall thereafter accrue at the rate of one and one-half percent per month until paid.
- (4) Settlement or judgment interest. In the event of a dispute as to compensation due a Contractor for Work performed, upon settlement or judgment in favor of the Contractor, interest on the amount of the settlement or judgment shall be added to, and not made part of, the settlement or judgment. Such interest, at the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District that includes Oregon, shall accrue from the later of the Progress Payment Due Date, or thirty Days after the Contractor submitted a claim for payment to EWEB in writing or otherwise in

accordance with the Contract requirements.

Stat. Auth.: ORS 279A.065; 279A.070
Stats. Implemented: ORS 279C.570

5-0850 Final Inspection

- (1) Notification of Completion; inspection. The Contractor shall notify EWEB in writing when the Contractor considers the Contract Work completed. Within 15 Days of receiving Contractor's notice, EWEB will inspect the project and project records, and will either accept the Work or notify the Contractor of remaining Work to be performed.
- (2) Acknowledgment of acceptance. When EWEB finds that all Work required under the Contract has been completed satisfactorily, it shall acknowledge acceptance of the Work in writing.

Stat. Auth.: ORS 279A.065; 279A.070
Stats. Implemented: ORS 279C.570(8)

5-0860 Public Works Contracts

- (1) Generally. ORS 279C.800 to 279C.870 regulates Public Works Contracts and requirements for payment of prevailing wage rates. Also see administrative rules of the Bureau of Labor and Industries at OAR Chapter 839, division 16. A public agency may not divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279C.870 to 279C.870.
- (2) Required Contract Conditions. As detailed in ORS 279C.800 to 279C.870 and these EWEB Rules, every Public Works contract must contain, among other requirements set forth in ORS chapter 279C and these EWEB Rules, Division 5, the following provisions:
 - (a) EWEB authority to pay certain unpaid claims and charge such amounts to contractors, as set forth in ORS 279C.515(1).
 - (b) Maximum hours of labor and overtime, as set forth in ORS 279C.520(1).
 - (c) Employer notice to employees of hours and days that employees may be required to work, as set forth in ORS 279C.520(2).
 - (d) Contractor required payments for certain services related to sickness or injury, as set forth in ORS 279C.530.
 - (e) Requirement for payment of prevailing rate of wage, as set forth in ORS 279C.800 to 279C.870, including 279C.830(1).
 - (f) Requirement for payment of fee to BOLI at the time EWEB enters the public works contract, as set forth in ORS 279C.825(1) and administrative rule of the BOLI commissioner. Effective January 1, 2008, the fee shall be paid by EWEB.
- (3) Requirements for Specifications. The Specifications for every Public Works Contract, consisting of the procurement package (such as the Project Manual, Bid or Proposal Booklets, Request for Quotes or similar procurement Specifications), must contain the following provisions:
 - (a) The prevailing rate of wage, as required by ORS 279C.830(1), physically contained within or attached to hard copies of procurement Specifications, or by a downloadable direct link to the specific wage rates that apply to the project (either on the EWEB web site or the BOLI web site) when procurement Specifications are also made available in electronic format.

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

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

Stats. Implemented: ORS 279C.800 to ORS 279C.870 & Or Laws 2007, Ch. 844, sec. 7(3).

5-0870 Specifications; Brand Name Products

- (1) Generally. EWEB's Solicitation Documents shall not expressly or implicitly require any product by any brand name or mark, nor shall it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279C.345(2). See exemptions in Division 6.
- (2) Equivalent. EWEB may identify products by brand names so long as the following language: "approved equal"; "or equal"; "approved equivalent" or "equivalent," or similar language is included in the Solicitation Document. EWEB shall determine, in its sole discretion, whether an Offeror's alternate product is "equal" or "equivalent."

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

Stats. Implemented: ORS 279C.345

5-0880 Records Maintenance; Right to Audit Records

- (1) Records Maintenance; Access. Contractors and subcontractors shall maintain all fiscal records relating to Contracts in accordance with generally accepted accounting principles ("GAAP"). In addition, Contractors and subcontractors shall maintain all other records necessary to clearly document (i) their performance; and (ii) any claims arising from or relating to their performance under a Public Contract. Contractors and subcontractors shall make all records pertaining to their performance and any claims under a Contract (the books, fiscal records and all other records, hereafter referred to as "Records") accessible to EWEB at reasonable times and places, whether or not litigation has been filed as to such claims.
- (2) Inspection and Audit. EWEB may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the Records of any Person that has submitted cost or pricing data according to the terms of a Contract to the extent that the

Records relate to such cost or pricing data. If the Person must provide cost or pricing data under a Contract, the Person shall maintain such Records that relate to the cost or pricing data for 3 years from the date of final payment under the Contract, unless a shorter period is otherwise authorized in Writing.

- (3) Records Inspection; Contract Audit. EWEB, and its authorized representatives, shall be entitled to inspect, examine, copy, and audit any Contractor's or subcontractor's Records, as provided in section 1 of this rule. The Contractor and subcontractor shall maintain the Records and keep the Records accessible and available at reasonable times and places for a minimum period of 3 years from the date of final payment under the Contract or subcontract, as applicable, or until the conclusion of any audit, controversy or litigation arising out of or related to the Contract, whichever date is later, unless a shorter period is otherwise authorized in Writing.

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

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

5-0890 EWEB Payment for Unpaid Labor or Supplies

- (1) Contract incomplete. If the Contract is still in force, EWEB may, in accordance with ORS 279C.515(1), pay a valid claim to the Person that provided the labor or services, and charge the amount against payments due or to become due to the Contractor under the Contract. If EWEB chooses to make such a payment as provided in ORS 279C.515(1), the Contractor and the Contractor's surety shall not be relieved from obligation with respect to any unpaid claim.
- (2) Contract completed. If the Contract has been completed and all funds disbursed to the prime Contractor, all claims shall be referred to the Contractor's surety for resolution. EWEB shall not make payments to subcontractors or suppliers for Work for which it has already paid.

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

Stats. Implemented: ORS 279C.515

5-0900 Contract Suspension; Termination Procedures

- (1) Suspension of Work. In the event an EWEB contract is not terminated, but EWEB suspends performance of Work for any reason considered by EWEB to be in the public interest other than a labor dispute or any third-party judicial proceeding relating to the work filed in regards to a labor dispute, the Contractor shall be entitled to a reasonable extension of Contract time, and to reasonable compensation for all costs, including a reasonable allowance for related overhead, incurred by the Contractor as a result of the suspension.
- (2) Contractor Violations of Laws, Regulations or the Contract The contractor is not entitled to an extension or compensation under this Rule where the suspension of the work or termination of the contract occurs as a result of the contractor's violation of federal, state or local statutes, ordinances, rules or regulations in existence at the time the contract was executed or as a result of violations of the terms of the contract.
- (3) Termination of Contract by mutual agreement for reasons other than default.

- (a) Reasons for termination. The parties may agree to terminate the Contract or a divisible portion thereof if:
 - (A) EWEB suspends Work under the Contract for any reason considered to be in the public interest (other than a labor dispute, or any judicial proceeding relating to the Work filed to resolve a labor dispute); and
 - (B) Circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the Work.
 - (b) Payment. When a Contract, or any divisible portion thereof, is terminated pursuant to this section (2), EWEB shall pay the Contractor a reasonable amount of compensation for preparatory Work completed, and for costs and expenses arising out of termination. EWEB shall also pay for all Work completed, based on the Contract Price. Unless the Work completed is subject to unit or itemized pricing under the Contract, payment shall be calculated based on percent of Contract completed. No claim for loss of anticipated profits will be allowed.
- (4) Termination for Public interest. EWEB may include in its Contracts terms detailing the circumstances under which the Contractor shall be entitled to compensation as a matter of right in the event EWEB unilaterally terminates the Contract for any reason considered by EWEB to be in the public interest.
 - (5) Responsibility for completed Work. Termination of the Contract or a divisible portion thereof pursuant to this rule shall not relieve either the Contractor or its surety of liability for claims arising out of the Work performed.
 - (6) Remedies cumulative. EWEB may, at its discretion, avail itself of any or all rights or remedies set forth in these rules, in the Contract, or available at law or in equity.

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

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

5-0910 Change Orders and Contract Amendments

- (1) Definitions applicable to EWEB Public Contracting Rules Division 5 are set forth at EWEB Public Contracting Rules, Division 1.
- (2) Changes Provisions. Change Orders are anticipated in construction and, accordingly, EWEB shall include changes provisions in all Public Improvement Contracts that detail the scope of the changes clause, provide pricing mechanisms, authorize it to issue Change Orders and provide a procedure for addressing contractor claims for additional time or compensation. When Change Orders are issued consistent with the Contract's changes provisions they are not considered to be new procurements and an exemption from competitive bidding is not required for their issuance by EWEB.
- (3) Change Order Authority. EWEB may establish internal limitations and delegations for Change Order authority, including dollar limitations. Dollar limitations on Change Orders are not set by these Rules, but Change Orders are limited by the above definition to changes in the work, within the general scope of the Contract, ordered by EWEB under the changes provisions of the Public Improvement Contract.
- (4) Contract Amendments. Amendments to a Public Improvement Contract may be made only

within the general scope of the original Procurement, when the field of competition and contractor selection would not likely have been affected by the contract modification, and the Amendment is made consistent with current legal requirements. Factors to be considered in making that determination include similarities in work, project site, relative dollar values, differences in risk allocation and whether the original Procurement was accomplished through Competitive Bidding, Competitive Proposals, Competitive Quotes, sole source or Emergency contract. Contracting Agencies shall determine whether an Amendment:

- (a) Affects only the legal or commercial terms and conditions of the Public Contract, in which case the Amendment is not considered to be a new procurement and does not require an exemption from competitive bidding, or
- (b) Adds work beyond the general scope of the current Public Contract and its changes provisions (such as a cardinal change in the work), in which case the Amendment is considered to be a new procurement and may not be entered into unless an exemption from competitive bidding is first obtained.

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

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