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PUBLIC CONTRACTING 101

PRESENTED BY JORDAN RAMIS PC SHAREHOLDERS
STEVE SHROPSHIRE AND DAVID BOWSER
AT THE



Public procurement, whether of goods, services, personal services, design services, or public improvements, is highly regulated. It is hard and technical. You should work with trusted legal counsel to ensure that your procurements and contracts are legally sufficient. Failure to comply can lead to delays, redoing work, big protests, civil penalties, or an order to return funding.¹

1) FIRST STEPS

A. Set up Local Contract Review Board

- i. If the governing body of a local contracting agency takes no action to provide otherwise, the governing body is the local contract review board of that local contracting agency.
- ii. The governing body of a local contracting agency may, by charter, ordinance or other local legislation, authorize a body, board, or commission other than the governing body to serve as the local contract review board of the local contracting agency.
- iii. The governing body of a local contracting agency also may enter into intergovernmental agreements under ORS chapter 190 to

¹ Because it is so highly regulated, the following discussion is generalized. Each procurement must be reviewed to ensure compliance with all applicable legal requirements.

permit the local contract review board of another local contracting agency to exercise authority.

B. Adopt Rules

i. Default – If you do not enact your own local public contracting rules, the DOJ Model Rules apply.

a. 279A.065(5) A contracting agency that has not adopted the contracting agency's own rules of procedure in accordance with subsection (6) of this section is subject to the model rules the Attorney General adopts under this section, including all modifications to the model rules that the Attorney General may adopt.

b. Benefit to Using DOJ – you do not have to pay to have a set drafted or updated. Presumption that DOJ Rules are legally sufficient and comply with the statutory requirements. Update as needed.

ii. Local Set of Rules.

a. 279A.065(6)(a) A contracting agency may adopt the contracting agency's own rules of procedure for public contracts that: (A) Specifically state that the model rules the Attorney General adopts under this section do not apply to the contracting agency; and (B) Prescribe the rules of procedure that the contracting agency will use for public contracts, which may include portions of the model rules the Attorney General adopts.

b. The Public Procurement Statutes control.

c. Must monitor and update as needed.

279A.065 (6)(a) A contracting agency that adopts rules under this subsection shall review the rules each time the Attorney General modifies the model rules under this section to determine whether the contracting agency should modify the contracting agency's rules to ensure compliance with statutory changes.

d. Benefit to Using Own – you can make authorized tweaks, can define personal services, can identify publications, can authorize electronic procurement, can list class exemptions.

iii. Recommendation – Hybrid.

2) SELF-PERFORMED WORK – INITIAL REQUIREMENTS

A. Self-Performed Work – Work performed directly by District’s own labor forces

B. IGA: What if you use an IGA to have another District’s employees build?

i. 190.010 A unit of local government may enter into a written agreement with any other unit or units of local government for the performance of any or all functions and activities that a party to the agreement, its officers or agencies, have authority to perform. The agreement may provide for the performance of a function or activity: By one of the parties for any other party.

ii. Prevailing Wage – Should not apply.

a. Applied to Contractors.

279C.840 Payment of prevailing rate of wage; posting of rates and fringe benefit plan provisions. (1) The hourly rate of wage that a contractor or subcontractor must pay to workers upon all public works may not be less than the prevailing rate of wage.

b. Contractors sell their services.

701.005(5) “Contractor” means: (a) A person that, for compensation or with the intent to sell, arranges, or undertakes or offers to undertake or submits a bid to construct, alter, repair, add to, subtract from, improve, inspect, move, wreck or demolish, for another, a building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, or to do any part thereof.

C. Must have appropriate cost accounting procedures to self-perform project

279C.310 Limitation on contracting agency constructing public improvement. If a contracting agency 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), the contracting agency may not construct a public improvement with the contracting agency’s own equipment or personnel if the cost exceeds \$5,000.

- D. Must provide list of projects to BOLI each year

279C.305(2)(a) Not less than 30 days before adopting a budget for the subsequent budget period or before starting to construct a public improvement, each contracting agency shall prepare and file with the Commissioner of the Bureau of Labor and Industries a list of every public improvement that the contracting agency plans to fund in the budget period, identifying each improvement by name and estimating the total on-site construction costs. The list must also state whether the contracting agency intends to perform the construction through a private contractor.

See Exhibit 1 – Planned Public Improvement Summary (WH 118)

- E. Must perform a cost analysis to show it will cost less

279C.305(2)(b) If the contracting agency intends to use the contracting agency's own equipment or personnel to perform construction work on a public improvement (or that of another agency through an IGA) and the estimated value of the construction work that the contracting agency intends to perform with the contracting agency's own equipment or personnel exceeds \$200,000, the contracting agency shall file with the commissioner not later than 180 days before construction begins on the public improvement an analysis that shows that the contracting agency's decision conforms to the policy stated in subsection (1) of this section. The list and the analysis are public records, and the contracting agency may periodically revise the list or analysis.

279C.305(3) – List of items to include in estimates

See Exhibit 2 – Public Improvement Project Cost Analysis (WH 119)

- F. 279C.306(5) – Civil penalties – \$5,000-\$20,000

3) USING THE PROPER PROCEDURE FOR THE PROCUREMENT

A. GOODS/SERVICES

- i. Default (for procurements in excess of \$150,000) – Competitive sealed bidding under ORS 279B.055 or competitive sealed proposals under ORS 279B.060. Full process – Invitation for Bids/Request For Proposals – Advertisement – Award.

- a. Length – Construction – 5 days minimum, 14 days recommended. Goods – minimum 14 days but can go to minimum 7 days if documented, at least 30 days recommended.
 - b. Advertisement – Must be published at least once in at least one newspaper of general circulation in the area where the contract is to be performed and in as many additional issues and publications as the contracting agency may determine.
 - c. Pre-Bid Conference – After publication and with enough time to consider before bid. Mandatory or permissive.
 - d. Request for Change/Protest of Solicitation – 10 days before closing or as otherwise set forth in solicitation.
 - e. Addenda – At least 72 hours before closing, with protest by close of business next day or last day to protest solicitation if later.
 - f. Opening – (1) Construction – Tuesday/Wednesday/Thursday between 2-5 PM with First Tier Subcontractor Disclosure within 2 hours of closing; (2) Goods – Whenever.
 - g. Acceptance Period – Bids good for 30 days, can get extension from bidders.
 - h. Notice of Award – 7 days before entering contract. Triggers 7-day protest period.
- ii. Small Procurement – \$10,000 or less – Cannot artificially divide – Any manner the contracting agency deems practical or convenient, including by direct selection or award.
 - iii. Intermediate Procurement – \$10,000.01 to \$150,000 – Cannot artificially divide – Three informally solicited competitive price quotes or competitive proposals – keep a written record of the sources of the quotes or proposals received. Fewer will suffice, but make a written record of the effort to obtain the quotes or proposals. Award the contract to the offeror whose quote or proposal will best serve the interests of the contracting agency, taking into account price as well as considerations, including, but not limited to, experience, expertise, product functionality, suitability for a particular purpose, and contractor responsibility.

- iv. Sole Source – Determine in writing, in accordance with rules adopted under ORS 279A.065, that the goods or services, or class of goods or services, are available from only one source – written findings – public notice is required if procurement would otherwise require full competition (>\$150,000) and 7-day protest period – very limited.
- v. Emergency – May make or authorize others to make emergency procurements of goods or services in an emergency – document the nature of the emergency and describe the method used for the selection of the particular contractor.

“Emergency” means circumstances that: (A) Could not have been reasonably foreseen; (B) Create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and (C) Require prompt execution of a contract to remedy the condition.

Do not create your own emergency.

See Exhibit 3 – Example of Emergency Findings

B. PERSONAL SERVICES

- i. “Personal services” means the services of a person or persons that are designated by the body with procurement authority as personal services.
- ii. 279B.050(4) – May elect, by rule, charter, ordinance, or other appropriate legislative action, to award contracts for personal services under the procedures of ORS 279B.050 to 279B.085.
- iii. This allows for competitive sealed bidding or competitive sealed proposals (>\$150k), small procurements (<\$10K) (any reasonable manner), intermediate procurements (\$10K-\$150k) (3 proposers), sole source (only one source) or emergency (need emergency findings).

C. DESIGN AND RELATED SERVICES

- i. Designers (Architects/Engineers).
 - a. Shall adopt procedures to screen and select persons to perform.
 - b. Based on qualifications.

- c. No consideration of cost until after selection – except may use cost after selecting top proposers if make certain statements in RFP.
 - d. Rank.
 - e. Negotiate contract or move to next.
- ii. Direct Appointment – May directly appoint a consultant if the estimated cost of the architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services for the project does not exceed \$100,000 – or emergency.
- iii. Continuation – A contracting agency may enter into a contract for architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related services directly with a consultant if the project described in the contract consists of work that has been substantially described, planned, or otherwise previously studied or rendered in an earlier contract with the consultant that was awarded under rules adopted under ORS 279A.065, and the new contract is a continuation of the project.
- iv. Related Services.
 - a. “Related services” means personal services, other than architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, that are related to planning, designing, engineering, or overseeing public improvement projects or components of public improvement projects, including but not limited to, landscape architectural services, facilities planning services, energy planning services, space planning services, hazardous substances or hazardous waste or toxic substances testing services, cost estimating services, appraising services, material testing services, mechanical system balancing services, commissioning services, project management services, construction management services and owner’s representation services, or land-use planning services. ORS 279C.100 (8).
 - b. Shall adopt procedures to screen and select persons to perform.
 - c. A contracting agency may select consultants to perform related services:

- (1) In accordance with screening and selection procedures adopted under ORS 279C.105 (your adopted procedures);
- (2) On the basis of the qualifications of the consultants for the types of related services needed, under the requirements of ORS 279C.110 (designer process);
or
- (3) On the basis of price competition, price and performance evaluations, an evaluation of the capabilities of bidders to perform the needed related services or an evaluation of the capabilities of the bidders to perform the needed related services followed by negotiations between the parties on the price for those related services.

D. CONSTRUCTION

- i. Competitive Bidding – Default – Invitation For Bids/Advertisement/Opening/Award.
- ii. Small – Less than \$10,000. No procedure specified so assume direct.
- iii. Intermediate – Less than \$100,000 – use competitive quotes.
- iv. Exemptions – You can exempt a class of contract or a specific contract.
 - a. Class Exemption – Clearly identify the class using the class’s defining characteristics. The characteristics must include a 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 the agency’s overall construction program. The agency 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.
 - b. Written findings.
 - c. Specify process will use to procure.

- d. Publish notice 14 days prior to hearing – have findings available.
- e. Hold hearing.
- f. Written evaluation to DAS at conclusion if more than \$100,000.

See Exhibit 4 – Example of Exemption Findings

- v. CM/GC – Follow DOJ Rules.
- vi. Can negotiate if all bids are higher than estimate.

E. COOPERATIVE PROCUREMENTS

- i. “Permissive cooperative procurement” means a cooperative procurement in which the purchasing contracting agencies are not identified.
- ii. “Joint cooperative procurement” means a cooperative procurement in which the participating governmental bodies or the cooperative procurement group and the bodies’ or group’s contract requirements or estimated contract requirements for price agreements are identified.
- iii. May establish a contract or price agreement through a permissive cooperative procurement only if:
 - a. The administering contracting agency’s solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055 or 279B.060;
 - b. The administering contracting agency’s solicitation and the original contract allow other contracting agencies to establish contracts or price agreements under the terms, conditions, and prices of the original contract;
 - c. The contractor agrees to extend the terms, conditions, and prices of the original contract to the purchasing contracting agency;
 - d. No material change is made in the terms, conditions, or prices of the contract or price agreement between the contractor and the purchasing contracting agency from the

terms, conditions, and prices of the original contract between the contractor and the administering contracting agency; and

- e. Shall provide public notice of intent to establish a contract or price agreement through a permissive cooperative procurement if the estimated amount of the procurement exceeds \$250,000.
- iv. A joint cooperative procurement is valid only if:
 - a. The administering contracting agency's solicitation and award process for the original contract is an open and impartial competitive process and uses source selection methods substantially equivalent to those specified in ORS 279B.055, 279B.060 or 279B.085, or uses a competitive bidding process substantially equivalent to the competitive bidding process in ORS chapter 279C;
 - b. The administering contracting agency's solicitation and the original contract or price agreement identifies the cooperative procurement group or each participating purchasing contracting agency and specifies the estimated contract requirements; and
 - c. No material change is made in the terms, conditions, or prices of the contract between the contractor and the purchasing contracting agency from the terms, conditions, and prices of the original contract between the contractor and the administering contracting agency.

F. RESPONSIBILITY

- i. Check to make sure the contractor is not disqualified (CCB List).
- ii. Document compliance by completing the required checklist.
See Exhibit 5 – Responsibility Checklist
- iii. Send to CCB within 30 days of award.

4) PROCUREMENT FORMS

A. TEMPLATES

- i. Find prior similar procurement.
- ii. Modify as needed.

- ii. Check to ensure that all required language is present.

B. CONTRACT FORMS

- i. Attach form of contract to procurement.
- ii. Manuscript – An original template drafted just for you.
- iii. Industry forms – AIA, AGC – license fee.
- iv. DAS Forms.

5) CONTRACT – REQUIRED STATE TERMS

A. 279B Many required terms for goods and services

279A.107 Certification as disadvantaged business enterprise, minority-owned business, woman-owned business, business that service-disabled veteran owns, or emerging small business during term of public contract; exceptions

279A.110 Discrimination in subcontracting prohibited; remedies

279A.112 Requirement to certify that contractor has policy and practice of preventing sexual harassment, sexual assault, and discrimination against employees who are members of protected class; required elements of certification; exceptions

279B.220 Conditions concerning payment, contributions, liens, withholding

279B.225 Condition concerning salvaging, recycling, composting, or mulching yard waste material

279B.230 Condition concerning payment for medical care and providing workers' compensation

279B.235 Condition concerning hours of labor, compliance with pay equity provisions, employee discussions of rate of pay or benefits

279B.240 Exclusion of recycled oils prohibited

B. 279C Even more required terms

See Exhibit 6 – Required Terms

6) CONTRACT – REQUIRED FEDERAL TERMS

A. Check your source of governmental funding

B. Federal requirements control

279A.030 Federal law prevails in case of conflict. Except as otherwise expressly provided in ORS 279C.800 to 279C.870, and notwithstanding ORS 279C.005 to 279C.670 and this chapter and ORS chapter 279B, applicable federal statutes and regulations govern when federal funds are involved and the federal statutes or regulations conflict with any provision of ORS 279C.005 to 279C.670 or this chapter or ORS chapter 279B, or require additional conditions in public contracts not authorized by ORS 279C.005 to 279C.670 or this chapter or ORS chapter 279B.

C. FTA – See Exhibit 7 – Required FTA Terms

D. FEMA – See Exhibit 8 – Required FEMA Terms

7) REQUIRED GRANT TERMS

A. Almost all grants (whether private, state, or federal) impose terms that must be passed to the contractor

B. See Exhibit 9 – Required Grant Terms

8) FEDERAL PROCUREMENT REQUIREMENTS

A. Federal money may also impose additional or contradictory procurement requirements

B. FTA – See Exhibit 10 – FTA Third Party Contracting TOC

C. FEMA – See Exhibit 10 – FEMA Field Manual TOC

JORDAN RAMIS PC CONTACT INFORMATION:

Steve Shropshire, Shareholder

steve.shropshire@jordanramis.com

541-647-2979 Direct

David Bowser, Shareholder

david.bowser@jordanramis.com

503-724-9229 Cell