

## LOCAL RULES UNDER THE 2003 PUBLIC CONTRACTING CODE

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Most parts of the Public Contracting Code (“Code”) are self-implementing, but many provisions cannot be used unless implementing rules are adopted, and some provisions mandate the adoption of local rules. This paper describes the minimum set of rules needed to exercise all Code authority and to comply with all Code rule requirements.

### MODEL RULES

The Code directs the State’s Attorney General to promulgate public contracting rules (“Model Rules”) that can be used by state agencies and local governments. The Model Rules will control the contracting of a local government unless the local government expressly rejects the Model Rules and adopts its own rules.<sup>1</sup>

The Model Rules were filed on September 1, 2004 and comprise divisions 46, 47, 48 and 49 of OAR Chapter 137 (Department of Justice). The content of the Model Rules is generally as follows:

- Division 46 - Rules applicable to all public contracts (promulgated under ORS Chapter 279A).
- Division 47 - Rules for the procurement of goods and services (promulgated under ORS Chapter 279B).
- Division 48 - Rules for the selection of Architects, Engineer and Land Surveyors (promulgated under ORS 279C.100 - 279C.125).
- Division 49 - Rules for the solicitation and award of public improvement contract and general rules for construction contracts concerning relations with contractors and subcontractors and labor provisions (promulgated under ORS 279C.300 - 279C.870)

*Note Concerning “Procurement.” The Code defines “procurement” as the act of purchasing, leasing, renting or otherwise acquiring goods or services. The word “procurement” is used liberally in ORS 279B but not in ORS 279C. The word*

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<sup>1</sup> “(4) A contracting agency that has not adopted its own rules of procedure in accordance with subsection (5) of this section is subject to the model rules adopted by the Attorney General under this section, including all modifications to the model rules that the Attorney General may adopt. This subsection does not apply to personal services contracts of local contracting agencies except for contracts for architectural, engineering and land surveying services and related services.” ORS 279.A.065

*“procurement” in a sentence indicates that the object of the procurement is goods or services but not public improvements.*

**EVERY LOCAL GOVERNMENT MUST ADOPT SOME RULES.** A local government cannot rely on the Model Rules for all of its contracting needs.

The Model Rules do not create special classes of contracts that are exempt from the general requirements for competitive bids and proposals. Any special exemptions preferred by a local government for the purchase of, for example, library books, police dogs, telecommunications systems or used property, or for procurements under \$5,000<sup>II</sup>, must be created by the local government.

The Model Rules do not provide procedures for personal service contracts of local governments. Each local government must define personal services and establish one or more methods for the award of personal service contracts.

The Model Rules do not address issues of delegation of authority for decision making activities that the statutes assign to “contracting agencies.” Each local government must adopt a rule of delegation.

The Model Rules do not provide procedures for the disposal of surplus property.

#### **CONTRACT REVIEW BOARD/CONTRACTING AGENCY**

The powers and duties that are assigned to local governments by the Code fall into two categories: (1) those that must be exercised or performed by local contract review boards (“CRBs”), and (2) those that must be exercised or performed by “contracting agencies.”

Actions assigned to CRBs should be performed by a local government’s governing body. Actions assigned to contracting agencies can be performed by the governing body or delegated to an executive or administrative official.

**Delegation.** The Code allows the powers of contracting agencies to be delegated and sub-delegated.<sup>III</sup> Therefore, even local governments who use the Model Rules should adopt laws to delegate contracting power to a chief executive or “purchasing agent.” Without appropriate delegation to an executive officer, even routine public contracting actions may require approval of the governing body.

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<sup>II</sup> Both the Code and the Model Rules refer to exemptions from bidding for procurements under \$5,000, but both the Code and the Model Rules state that the exemption must be used under rules adopted by the agency.

<sup>III</sup> ORS 279A.075 provides: “Unless otherwise provided in the Public Contracting Code, the exercise of all authorities in the code may be delegated and subdelegated in whole or in part. Notwithstanding delegations of authority under this section, a person’s ... exercise of the delegated authority is governed by the Code and rules adopted under the Code”

*Suggestion: The rules adopted by the governing body should delegate administrative rulemaking authority to an executive/administrative official. For example:*

Except as otherwise provided in these rules, the powers and duties of the local contract review board under the Public Contracting Code shall be exercised and performed by the [governing body] and all powers and duties given or assigned to contracting agencies by the Public Contracting Code shall be exercised or performed by the Purchasing Agent or the Purchasing Agent's designee.

## **BASIC RULES REQUIREMENT**

Several provisions of the Code require the adoption of implementing rules. In a few instances, described below, the authority to act is limited to local contract review boards. In all other cases, rules may be promulgated by the body, commission or official designated by a governing body as the rule making authority of the contracting agency. The rules that must be adopted by CRBs are described below under the heading "LOCAL CONTRACT REVIEW BOARD." The rules that must be adopted under the authority of contracting agencies are described below under the heading "CONTRACTING AGENCIES." The Model Rules that will apply if local rules are not adopted are referenced in the discussion and reproduced as end notes.

### **LOCAL CONTRACT REVIEW BOARD**

ORS 279A.060 establishes the governing body of every local government as the local contract review board of that entity, but allows a governing body to delegate its CRB authority to another body, board or commission.. Therefore, unless a CRB delegation has been made, all CRB powers and duties should be exercised and performed by the governing body.

#### **Designation of Personal Services Contracts.**

A local contract review board, by ordinance, resolution, administrative rule or other regulation, may designate certain service contracts or classes of service contracts as personal services contracts (*See ORS 279A.055(2)*) and may also designate certain contracts as contracts for architectural, engineering and land surveying services or related services (*ORS 279C.105*). The second designation is not necessary and not useful unless the contracting agency has different rules for the award of contracts for architectural services than for the award of other types of personal services.<sup>1</sup>

*Suggestion: The rule adopted to define and describe the classes, types or categories of personal service contracts should delegate authority to the entity's purchasing agent to determine whether a particular contract is of a type that falls within the definition of personal services, as in the following definition:*

**"Personal services contract" and "Personal Services".** A personal services contract is a contract primarily for the provision of services that require specialized

technical, creative, professional or communication skills or talents, unique and specialized knowledge, or the exercise of discretionary judgment skills, and for which the quality of the service depends on attributes that are unique to the service provider. Such services include, but are not limited to, the services of architects, engineers, attorneys, auditors and other licensed professionals, artists, designers, computer programmers, performers, consultants and property managers. The Purchasing Agent shall have discretion to determine whether a particular type of contract or service falls within the foregoing definitions.

**Sole Source Procurement.** The board must designate the person who shall have authority to declare that goods or services are only available from one source, but that person must use procedural rules adopted by the contracting agency for the declaration that the sole-source exemption applies. (See ORS 279B.075)

**Exemption to Allow Brand Name Specifications for Public Improvements.** ORS 279B.215 provides self-implementing rules under which a contracting agency may use brand-name specifications when purchasing goods or services under ORS Chapter 279B. A different law applies in the case of public improvements, however, and ORS 279C.345 prohibits specifications by brand name, mark or manufacturer except in accordance with rules adopted by a CRB.<sup>2</sup>

**Special Procurements.** Only the contract review board can create or approve exemptions from the procurement methods prescribed by the Code. ORS 279B.085 authorizes exemptions to be created for the procurement of goods and services. ORS 279C.335 authorizes exemptions to be created for the selection and award of contracts for public improvements. Note, however, that a request for proposal process cannot be used to award a public improvement for which an exemption is obtained unless the contracting agency has adopted rules for that purpose. (See ORS 279C.400.)

*Recommendation: The 2003 Oregon Laws created an exemption to allow public improvement contracts for up to \$100,000 to be awarded under an informal quote procedure, but the exemption will sunset on June 30, 2009. By adopting a CRB special class exemption for these contracts, a local government can preserve the exemption past the statutory sunset provision.*

**Electronic Publication of Advertisements for Public Improvements.** The CRB may adopt rules allowing bids for public improvements to be advertised electronically as provided in ORS 279C.360.<sup>3</sup> ORS 279B.055 assigns the authority to promulgate rules for the electronic procurement of goods and services, however, to contracting agencies.

**Appeals of Prequalification Decisions and Debarments.** The decision of a contracting agency to debar a contractor from competing for agency contracts or to deny pre-qualification of a contractor is subject to *de novo* review by the agency's CRB in accordance with rules of the CRB required by ORS 279B.425.

**Concession Agreements.** It is questionable whether contracts that grant a franchise or concession to operate a business on public property are “public contracts” because they do not fit within the definition of “public contract” under ORS 279A.010<sup>IV</sup> as either a sale or disposal of property or services or as an acquisition of property or services. When adopting contracting rules, a CRB may wish to provide for the selection and award of concession agreements. A definition of “concession agreement” might look something like the following:

**“Concession agreement.”** A concession agreement is a contract that authorizes and requires a private entity or individual to promote or sell, for its own business purposes, specified types of goods or services from a site within a building or upon lands owned by [Contracting Agency] and under which the concessionaire makes payments to the [Contracting Agency] based, at least in part, on the concessionaire’s revenues from sales. The term “concession agreement” does not include an agreement which is merely a flat-fee or per-foot rental, lease, license, permit or other arrangement for the use of public property.

### **CONTRACTING AGENCY**

The Code does not require “contracting agency” actions to be made by the governing body. In fact, ORS 279A.010 defines “Contracting agency” as including “any person authorized by a contracting agency to conduct a procurement on the contracting agency’s behalf.” Therefore, the authority to promulgate contracting agency rules can be delegated.

**Declaration of Intention to Adopt Local Rules and Reject Model Rules.** ORS 279A.065(5) provides:

A contracting agency may adopt its own rules of procedure for public contracts that: (A) Specifically state that the [Model Rules] 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 adopted by the Attorney General.

**Personal Service Contracts.** ORS 279A.070 provides:

Each contracting agency authorized to enter into personal services contracts shall create procedures for the screening and selection of persons to perform personal services.

A contracting agency may adopt a rule providing that personal service contracts be awarded under the statutes and Model Rules governing requests for proposals and intermediate procurements under ORS 279B.050 to 279B.085 and OAR 137-047-0250-

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<sup>IV</sup> Public Contract is defined as “a sale or other disposal or a purchase, lease, rental or other acquisition by a contracting agency of personal property, services, including personal services, public improvements ... .”

0290. The problem with this short-cut is that these Code provisions and Model Rules do not include any rules for award by direct appointment.

**Purchase of Equipment and Supplies from Federal Catalogs.** The United States Administrator of General Services (“GSA”) maintains posted catalogues of certain types of equipment that may be purchased by State and local governments, including law enforcement equipment suitable for counter-drug activities, pursuant to 10 USC 381, and computer equipment, pursuant to the e-government act of 1002. ORS 279A.180 requires contracting agencies to adopt rules for the purchase of goods available from federal agencies under 10 USC 381 or similar federal purchasing programs.

**Transfer, sale or disposal of personal property.** If local rules for the disposal of personal property are not adopted under ORS 279A.185, after March 1, 2005, local governments will have to dispose of surplus personal property using the competitive bidding requirements of the Code.

**Small Procurements.** The adoption of rules is required to exempt small value contracts for goods or services from formal competitive procurement requirements. ORS 279B.065 also provides that a contract awarded as a small procurement may not be amended unless the rules authorize amendment.<sup>4</sup>

*The Model Rules do not describe how a small procurement can be awarded. Some local rule must be adopted to use this provision.*

**Informal Selection of Good and Services.** ORS 279B.070 provides an informal quote procedure for the procurement of goods or services exceeding \$5,000 but not exceeding \$150,000.<sup>5</sup> However, rules must be adopted to authorize a contract awarded under this section to be amended to exceed \$150,000.<sup>6</sup>

**Recommendation:** *The Model Rules have a single section (OAR 137-047-0800) that restricts the manner in which any procurement contract can be amended. Modifications that local governments may want to make include the following:*

*Allow additional goods or services to be purchased even though the original contract did not provide unit prices or allow for additional purchases.*

*Allow a contract to be extended or even renewed for a single term not to exceed one year. It is not uncommon for a department to discover that a maintenance services or real estate broker contract has expired or is about to expire only when it needs a service performed. A short renewal or extension will allow services to continue while the department prepares a new solicitation. A short extension or renewal may also be in the best interest of the agency when pending plans for the relocation or restructuring of a facility or function may eliminate the further need for the contracted goods or services.*

*Specify the circumstances under which the contract price for small and intermediate procurement contracts may be increased beyond the statutory exemption threshold.*

**Informal Selection of Public Improvement Contractors.** Sections 132 and 133 of Chapter 794 of the 2003 Oregon Laws allow public improvement contracts for up to \$100,000 to be awarded using informal quotes, but only if a contracting agency adopts authorizing rules, including rules to govern how such contracts may be amended. Sections 132 and 132 of the act have not been encoded but appear in the Oregon Revised Statutes immediately following ORS 279C.410.

***Suggestion:** These laws are automatically repealed on June 30, 2009. Therefore, it is recommended that rules for informal award of small public improvement contracts be paired with local CRB exemptions from bidding for such contracts, so that the process can survive the 2009 statutory sunset provision.*

***Remember:** Pursuant to ORS 279C.335 and ORS 279.835 to 279.855, public agencies are required to check with DAS to see if a nonprofit public agency providing employment opportunities for the disabled is able to perform the services.*

#### **Competitive Bids for Goods and Services.**

**Requirements for Public Notice of Solicitations.** ORS 279B.055(4) requires contracting agencies to adopt rules for the advertisement of procurement contracts. Unless otherwise specified in these rules, the advertisement must be published at least seven days before the solicitation closing date.<sup>7</sup>

**Electronic Publication of Advertisements and Electronic Submission and Opening of Bids.** The adoption of rules is a prerequisite to the use of electronic procurement procedures. ORS 279B.055(4)(c). The Model Rules contain provisions for electronic procurements of goods and services.<sup>8</sup>

***Suggestion:** An entity that will rely on the Model Rules should consider adopting a rule restricting the use of the electronic advertising and bidding protocols authorized by the Model Rules.*

**Correction and Withdrawal of Bids.** The adoption of rules is a prerequisite to use of the authority to allow correction and withdrawal of bids. ORS 279B.055(7).<sup>9</sup>

***Recommendation:** The Model Rules for correction and withdrawal of bids require certain formalities. For example a pre-closing modification must contain a statement that the modification “amends and supersedes the prior offer” and be marked as a Bid or Proposal Modification with the solicitation number shown. These requirements must be set forth in the instructions to*

*bidders/proposers; otherwise, the bidders/proposers can hardly be expected to comply with them.*

***Recommendation:** The Model Rules provide that in case of discrepancies between unit and extended prices in a bid, the unit prices will prevail. This statement should be set forth in the instructions to bidders to prevent disputes.*

### **Competitive Proposals for Goods and Services.**

ORS 279B.060 authorize contracting agencies to award procurement contracts using the proposal process described in the statute, but subsection (2)(h)(D) and (6)(b)(H) may require rulemaking as a prerequisite to the authority to use evaluation methods other a single ranking of submitted proposals.<sup>10</sup>

ORS 279B.060(6)(d) also requires rules to be adopted for the issuance addenda to add new evaluation criteria after initial proposals are opened.<sup>11</sup>

**Competitive Proposals for Public Improvements.** A public improvement contract awarded under the competitive proposal process described in ORS 279C.400 cannot be amended unless the contracting agency has adopted rules for that purpose. In addition, ORS 279C.405(2) seems to require the adoption of rules authorizing the use of multi-tiered evaluation, competitive negotiations or any combination of the methods described in the statute.<sup>12</sup>

***Suggestion:** The criteria that “may” be evaluated using the Model Rules are listed in great detail, and separate criteria are provided for design/build contracts, CM/GC contracts and energy savings contracts. Contracting Agencies may want to adopt rules that leave discretion concerning criteria to the purchasing agent. Nevertheless, the Model Rules can serve as a reference for ideas about the range of criteria that may be appropriate for different types of contracts.*

***Problem?** ORS 279C.355 requires a detailed evaluation report to be made for any public improvement over \$100,000 which is not constructed pursuant to a bid award. **Question:** Is anybody doing this? There is no apparent sanction.*

**Sole Source Procurements.** Rules are a prerequisite to the authority to declare that goods or services are only available from a sole source. ORS 279B.075<sup>13</sup>

**Notice of intent to award.** Rules must be adopted to allow a contracting agency to post a notice of its intent to award fewer than seven days prior to the award of a contract. The notice and its manner of posting or issuance must conform to the contracting agency’s rules. (See ORS 279B.135 for goods and services (procurement) awards and ORS 279C.410(7) for public improvements awarded by proposals.)

**Protests.** Contracting agencies must provide a reasonable time and manner for affected persons to protest: (A) a request for approval from the contract review board for a special



procurement of goods or services under ORS 279B.085 (*See ORS 279B.400*); (B) the terms and specifications and requirements of a solicitation (*See ORS 279B.405(3) and (6)*); and (C) procurement awards (*See ORS 279B.410*).

**Accounting System.** Unless a contracting agency adopts 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. (*See ORS 279C.310*)

**Emergency Conditions.** A public improvement contract may be awarded without bidding, and the requirement for performance and payments bonds may be waived if emergency conditions require prompt execution of the contract and the contracting agency has adopted rules for the declaration of emergency conditions. (*See ORS 279C.335(5) and ORS 279C.380(4)*).<sup>14</sup>

**Negotiations when Bids Exceed Project Budget.** A contracting agency must adopt rules to authorize negotiation with the lowest bidder when all bids exceed the project budget for a public improvement. (*See ORS 279C.340*)<sup>15</sup>

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#### MODEL RULES

The following are excerpts from the Model Rules

<sup>1</sup> **OAR 137-046-0130(3)** provides: Contracts ... for Personal Services ... designated as such by the Local Contracting Agency's Local Contract Review Board ... are not subject to these Model Rules, unless the ... Agency adopts OAR 137-047-0250 through OAR 137-047-0290 as the procedures the Local Contracting Agency will use to screen and select persons to perform Contracts for Personal Services other than Architectural, Engineering and Surveying Services and Related Services.

<sup>2</sup> **OAR 137-049-0870(2)** provides:

(1) **Generally.** The Contracting Agency's Solicitation Document shall not expressly or implicitly require any product by brand name or mark, nor shall it require the product of any particular manufacturer or seller, except pursuant to an exemption granted under ORS 279C.345(2).

(2) **Equivalents.** A Contracting Agency may identify products by brand names so long as the following language: "approved equal"; "or equal"; "approved equivalent" or "equivalent," or similar language is included in the Solicitation Document. The Contracting Agency shall determine, in its sole discretion, whether an Offeror's alternate product is "equal" or "equivalent."

<sup>3</sup> **OAR 137-049-0212(2)(b)** provides: A Contracting Agency may publish by Electronic Advertisement if the Contract Review Authority for the Contracting Agency determines Electronic Advertisement is likely to be cost effective and, by rule or order, authorizes Electronic Advertisement.

<sup>4</sup> **OAR 137-047-0265 Small Procurements**

(1) **Generally.** For Procurements of Goods or Services less than or equal to \$5,000 a Contracting Agency may award a Contract as a Small Procurement pursuant to ORS 279B.065 and in accordance with rules promulgated by the Contracting Agency pursuant to ORS 279A.070.

**AN ORDINANCE REPLACING CHAPTER 2.50 OF  
THE ASHLAND MUNICIPAL CODE RELATING TO  
RULES OF PROCEDURE FOR PUBLIC CONTRACTING**

THE PEOPLE OF THE CITY OF ASHLAND DO ORDAIN AS FOLLOWS:

SECTION 1. Chapter 2.50 of the Ashland Municipal Code is replaced in its entirety with the following chapter:

Chapter 2.50

**LOCAL CONTRACT REVIEW BOARD RULES**

Sections:

- 2.50.005 Introduction.
- 2.50.010 Definitions.
- 2.50.015 Authority.
- 2.50.020 Public Contracting Officer's Authority.
- 2.50.025 Procedure for Review by Legal Counsel.
- 2.50.070 Procedure for Competitive Bids.
- 2.50.075 Sole Source.
- 2.50.080 Emergency Contracts.
- 2.50.085 Special Procurements/Alternative Contracting Methods for Public Improvements.
- 2.50.090 Procedure for Requests for Proposals for Goods and Services and for Public Improvements.
- 2.50.095 Prequalification [ORS 279C.430].
- 2.50.100 Protests of Procurement Process, Solicitation Document and Award [279B.400, 279B.405, 279B.410].
- 2.50.105 Correction and Withdrawal of Bids [ORS 279B.055(7)].
- 2.50.110 Record Keeping.
- 2.50.115 Transfer, Sale, or Disposal of Personal Property [279A.185]
- 2.50.120 Advertising Requirement for Competitive Sealed Bidding or Proposals and Notice of Intent to Award [ORS 279B.055(4), 279B.135, 279C.360, 279C.410].
- 2.50.125 Negotiation When Bids for Public Improvements Exceed Budget [ORS 279C.340].

EXHIBIT A

EXHIBIT B – CITY OF ASHLAND SURPLUS PROPERTY DISPOSAL  
ADMINISTRATIVE RULES & PROCEDURES

**Section 2.50.005 Introduction**

A. Purpose. These Rules are promulgated by the City of Ashland Local Contract Review Board under authority granted by ORS 279A.025 and 279C.335, 279A.060 and 279A.065, and Ordinance No. \_\_\_\_\_ to establish a procedure to assure that

each contract to which the City is a party has met state and city competitive bidding and other purchasing requirements.

B. Authority. Most of the model public contract rules promulgated by the Attorney General apply to the City of Ashland including OAR Chapter 137, Divisions 46, 47, 48 and 49. Pursuant to ORS 279A.065, however, the Council elects to establish some of its own rules of procedure for public contracts as set forth herein.

C. Findings. [ORS 279C.335(2)]. The exemption of certain contracts or classes of contracts from formal competitive bidding as set forth in these Rules are either expressly authorized by state law or will not encourage favoritism in public contracts or substantially diminish competition for public contracts and will result in substantial cost savings to the City because:

- i. The nature of the particular classes of contracts exempted makes competitive bidding pointless or not cost effective in such cases;
- ii. Each exemption requires alternative contracting procedures which will ensure reasonable competition and the best contract price for the public.

D. Scope. These rules set forth herein apply to goods and services and public improvement contracts. Contracts for personal services, including architect and engineering contracts are governed by AMC 2.52, *infra*.

E. Applicability of City Charter. Notwithstanding Article Eleven, section 4, of the Ashland City Charter, bids may be published through electronic means and may be advertised in a newspaper of circulation published statewide. Notwithstanding the same provision, Council may delegate approval of plans and specifications to appropriate staff.

## **Section 2.50.010 Definitions**

The words and phrases set forth in ORS 279A.010 and OAR 137-046-0110 are incorporated herein. Additionally, the following words and phrases mean:

A. Agency: City of Ashland, its Public Contracting Officer or its department seeking procurement.

B. Approved as to form. Legal Counsel's designation that a public contract on its face is legal, valid and binding. The designation is not a guaranty or a warranty the contract is in the City of Ashland's best interests or eliminates exposure to personal liability.

C. Council: The Local Contract Review Board for the City of Ashland, which is comprised of the City Council of the City of Ashland.

D. Legal Counsel: Either City of Ashland legal counsel or another attorney designated by City of Ashland legal counsel.

E. Standard Contract: A contract form that has previously been approved as to form by

Legal Counsel or already approved as a City of Ashland purchasing form.

F. Intermediate Procurement. A procurement of goods or service between \$5,000 and \$75,000.

G. Public Contracting Officer. The City's Finance Director, or his or her designee, including the City Administrator.

### **Section 2.50.015 Authority**

Unless otherwise expressly authorized by these Rules or by ordinance or order of the Council, all contracts must be approved by the Council before they can be executed. The Council gives its approval through its Consent Agenda which authorizes the Public Contracting Officer, his or her designee or the contracting Department to execute the contract. The Council may also execute contracts itself.

### **Section 2.50.020 Public Contracting Officer's Authority**

A. Authority to Execute Contracts Without Prior Council Approval. The Public Contracting Officer may execute without prior Council approval contracts that satisfy all of the following:

- i. The contract has a total value of seventy-five thousand dollars (\$75,000) or less;
- ii. The contract does not exceed a twenty-four month contract period;
- iii. The contract provides that the contract may be terminated by the City for convenience thirty (30) or fewer days following delivery of written notice to the contractor;
- iv. Funds are budgeted for the purpose of the contract;
- v. The contract has been approved as to form by Legal Counsel unless it meets one of the exemptions set forth below; in Section 2.50.025, and,
- vi. All other requirements for public contract code procurement have been satisfied.

B. Delegation of Authority. The Council may, by resolution, delegate authority to the Public Contracting Officer to execute any other contract upon the following conditions:

- i. The original contract has been approved by Legal Counsel, or is otherwise exempt.
- ii. If an amendment or change order, the total aggregate cost change does not exceed 35 percent (35%) of the original contract amount.
- iii. Any applicable performance or payment bonds and insurance coverages are adjusted to account for the change in the contract amount.

C. Delegation of Authority for Short Term Contract. Pursuant to the Public Contracting Officer's authority granted in this section the Public Contracting Officer may delegate authority to execute:

- i. a contract that is for 72 hours or less and meets the requirements in

- Section 2.50.020(A) above.
- ii. change orders or amendments provided the need for the change order or amendment is a result of an unanticipated event and the authorized work is within the scope of work as originally contracted for by the parties.

D. Delegation to Contract in Emergency. Pursuant to ORS 279B.080, the Public Contracting Officer is granted authority to make procurements of goods and services in an emergency pursuant to the procedure set forth in ORS 279B.080 and Section 2.50.080 herein.

E. Delegation to Declare Sole Source Procurements. The appropriate department head is granted authority to determine that the goods or services, or class of goods or services, are available only from one source in accordance with Section 2.50.075 and ORS 279B.075.

F. Delegation to adopt forms and procurement procedures. The Public Contracting Officer or his or her delegatee is granted authority to:

- i. Adopt forms, computer software, procedures and administrative policies for all City purchases consistent with the Ashland Municipal Code.
- ii. Require all contracting by departments to conform to approved City purchasing policies adopted by the Public Contracting Officer or his or her delegate or the Local Contract Review Board.
- iii. Require each department to plan purchase requirements in advance so that orders can be placed in economical quantities.

**Section 2.50.025 Procedure for Review by Legal Counsel.** All public contracts must be reviewed by Legal Counsel unless otherwise exempt or the Council approves of the contract.

A. Procedure. The Public Contracting Officer or his or her designee, or the contracting Department shall submit a completed contract checklist along with a completed contract with all referenced exhibits. Legal Counsel, after reviewing the contract, shall stamp the contract "Approved as to Form" or not stamp it and provide an oral or written explanation of the problems with it if not approved as to form. In approving a contract, Legal Counsel assumes the Public Contracting Officer or his or her designee or the contracting Department has complied with all applicable public contract code requirements. It will not undertake an independent inquiry for compliance. If Legal Counsel does not approve a contract, the Public Contracting Officer or his or her designee or the contracting department may revise the contract to obtain approval or submit it to City Council for its approval.

B. Exemption from Review. Legal counsel review is not required in the following circumstances:

1. The contract is for 72 hours or less,
2. The contract is a federal or state grant;
3. The contract falls within one or more of the categories set forth in OAR 137-045-0050 and OAR 137-045-0055 and any amendments thereto.

4. The total contract amount is less than \$25,000.
5. The contract contains the provisions, as appropriate, as set forth in Exhibit A, attached.

**Section 2.50.070 Procedure for Competitive Bids**

All Public Contracts shall be based upon Competitive Bidding pursuant to ORS 279A - 279C and the Attorney General Model Rules, OAR Chapter 137 Divisions 46 - 49, except for the following:

- A. Contracts listed in ORS 279A.025(2).
- B. Purchases through federal programs as set forth in ORS 279A.180.
- C. Small procurements as set forth in ORS 279B.065.
- D. Intermediate procurements as defined herein and set forth in ORS 279B.070.
- E. Sole source procurements as set forth in ORS 279B.075 and herein.
- F. Emergency procurements as set forth in ORS 279B.080 and herein.
- G. Special procurements as set forth ORS 279B.085 and herein.
- H. Alternative contracting methods as set forth in ORS 279C.335 and herein.
- I. Contracts which are exclusively for personal services. Such contracts may include incidental materials such as written reports or opinions, architectural or engineering renderings and other supplemental materials required for providing the services. [279B.050(4)]
- J. A contract or class of contracts, and amendments to contracts specified below, provided the Public Contracting Officer, his or her designee or the contracting Department identifies the basis for the exemption. In circumstances where the basis for the exemption is not readily apparent, the Public Contracting Officer, his or her designee or the contracting Department shall consult with Legal Counsel. Where appropriate, alternative contracting and purchasing practices that take account of market realities and modern or innovative contracting and purchasing methods, which are consistent with the public policy of encouraging competition, shall be used.

(1) Contracts for the purchase of materials where competitive bids for the same materials have been obtained by other public agencies or the federal government whose processes for bid and award are substantially equivalent to those set forth herein, and the contract is to be awarded to the party to whom the original contract was awarded so long as the price of the materials is the same or lower than that in the original contract.

(2) Contracts for licenses and maintenance of computer hardware, computer

software, and telecommunications products (including cable, video and television products).

(3) Contracts for the purchase of services, equipment or supplies for the maintenance, repair or conversion of existing equipment are exempt if required for the efficient utilization of the equipment. Where practicable in the judgment of the department head, competitive quotes shall be obtained.

(4) Contracts for the purchase of food or food supplies.

(5) Purchase of items or services of an artistic nature.

(6) Contracts for periodicals, including journals, magazines, and similar publications.

(7) Contracts for the purchase or lease of ballots, ballot pages and ballot cards or equipment necessary to conduct elections.

(8) Contracts for removal, cleanup or transport of hazardous materials. As used in this Subsection, "hazardous materials" include any material or substance which may pose a present or future threat to human health or the environment, including Hazardous Waste as that term is used in the Resources Conservation and Recovery Act (42 USC 6901 et seq.).

(9) Contracts for purchase or lease of office photocopiers.

(10) Contracts for purchase of used motor vehicles, including but not limited to used heavy construction equipment

(11) Contracts for the purchase of copyrighted materials.

(12) Contracts for the purchase of advertising, including legal advertising intended for the purpose of giving public notice.

(13) Contracts for the purchase of products, services or supplies that are exempted by the Treasury and Financial Department from documenting competitive quotes for individual contracts, upon consideration of cost savings and other factors.

(14) Contracts for the purchase or sale of all utilities including, but not limited to, electric power, gas, water, sewage, internet, cemetery lots, cable and telecommunication services, including bandwidth, and the sale of telecommunication materials or products or other services, materials or products traditionally provided by the City.

(15) Contracts for the purchase of goods or services where the rate or price for the goods or services being purchased is established by federal, state or local regulating authority.

(16) Contracts for the purchase of cable television programming for the Ashland Fiber Network cable television systems.

(17) Any future or additional contract or class of contracts made exempt by the State, Department of Administrative Services or Council under 279A.025 and 279C.335.

K. Additional Requirements for Exemption. Any contract exempted under this section shall additionally satisfy these criteria:

- (1) The performance bond requirements of ORS 279C.375 and 279C.380, unless an emergency exists as described in Section 2.50.080, below.
- (2) The construction and landscape contractor registration and requirements of ORS Chapter 671.630 *et seq.* and Chapter 701;
- (3) Any other law applicable to such a contract; and,
- (4) If the contract price exceeds \$50,000, or the then current BOLI contract amount, the City and the contractor shall comply with the prevailing wage provisions of ORS 279C.800 - 279C.870, to the extent BOLI applies.

#### **Section 2.50.075 Sole Source**

The appropriate department head shall determine when there is only one seller or price of a product of the quality required available within a reasonable purchase area. To the extent reasonably practical, the appropriate department head shall negotiate with the sole source to obtain contract terms advantageous to the contracting agency. The determination of a sole source must be based on written findings that may include:

- (1) That the efficient utilization of existing goods requires the acquisition of compatible goods or services;
- (2) 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;
- (3) That the goods or services are for use in a pilot or an experimental project; or
- (4) Other findings that support the conclusion that the goods or services are available from only one source.

#### **Section 2.50.080 Emergency Contracts**

A. General Rule. A contract may also be exempted from Competitive Bidding and notice of intent to award requirements if preempted by federal law pertaining to emergencies as set forth in ORS 279A.030. A contract may also be exempted from Competitive Bidding and notice of intent to award requirements set forth in ORS 279B.135 and ORS 279C.410(7), if the Council, by a majority vote of members present, determines that emergency conditions require prompt execution of the contract. A determination of such an emergency shall be entered into the record of the meeting at which the determination is made as well as the method used for the selection of the particular contractor. The determination shall be made before any contract exempted hereunder is executed. If the matter is a Public Improvement, and the Council declares an



emergency exists, any contract awarded under this subsection must be awarded within 60 days following declaration of the emergency, unless Council grants an extension.

- B. Emergency Exemption by Public Contracting Officer or his or her Delegatee. A contract under \$100,000 may also be exempted from Competitive Bidding and notice of intent to award requirements set forth in ORS 279B.135 and ORS 279C.410(7) if the Public Contracting Officer determines that emergency conditions require prompt execution of the contract. A determination of such an emergency shall be entered into the record of the acquisition of the materials or services purchased as well as the method used for the selection of the particular contractor. The determination shall be made before any contract exempted hereunder is executed. Pursuant to ORS 279C.380 and 390, the Public Contracting Officer may exempt the contract awarded in an emergency basis from the bid security and payment and performance bond requirements. Any amendment to an Emergency Contract shall only be approved of by a majority vote of the Council before any work in relation to the amendment commences.
- C. "Emergency" Defined. As defined in ORS 279A.010, and for purposes of this Section, an "emergency" consists of circumstances creating a substantial risk of loss, damage, interruption of services or threat to public health, safety, welfare or property that could not have been reasonably foreseen and requires prompt execution of a contract to remedy the condition.

**Section 2.50.085 Special Procurements/Alternative Contracting Methods for Public Improvements.** The Council may approve of special procurement or alternative contracting for public improvement methods pursuant to this Section.

- A. Special Procurements for Goods and Services:
- (1) To seek approval of a special procurement, the Public Contracting Officer, his or her designee, or the contracting Department shall submit a written request to the Council 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 under the standards set forth in this subsection.
  - (2) The Council may approve a special procurement if it finds that a written request submitted under this subsection demonstrates that the use of a special procurement as described in the request, or an alternative procedure prescribed by the Public Contracting Officer, his or her designee, contracting Department or Council, will:
    - (a) Be unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competition for public contracts; and
    - (b) Result in substantial cost savings to the City or to the public; or
    - (c) Otherwise substantially promote the public interest in a manner that could not practicably be realized by complying

with requirements that are applicable under ORS 279B.055, 279B.060, 279B.065 or 279B.070 or under any rules adopted thereunder.

- (3) Public notice of the approval process for a proposed special procurement must be given in the same manner as provided in ORS 279B.055 (4)(b).
- (4) If a contract is awarded through a special procurement, the City shall award the contract to the offeror whose offer the department determines in writing to be the most advantageous to the contracting agency.
- (5) When the Council approves a class special procurement, as defined in ORS 279B.085, under this section, the City may award contracts to acquire goods or services within the class of goods or services in accordance with the terms of the Council's approval without making a subsequent request for a special procurement.

**B. Alternative Contracts For Public Improvements.** The Public Contracting Officer, his or her designee or the contracting Department shall submit a written request to the Council that describes the proposed contracting procedure, the services to be acquired through the alternative contract for public improvements and the circumstances that justify the use of it under the standards set forth in the subsections, below. The Council shall make the following findings to approve of an Alternative Contract:

- (1) It is unlikely that the exemption will encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts; and
- (2) The awarding of public improvement contracts under the exemption will result in substantial cost savings to the contracting department or, if the contracts are for public improvements described in ORS 279A.050(3)(b), to the City or the public. In making the finding, the Council may consider the type, cost and amount of the contract, the number of persons available to bid and such other factors as may be deemed appropriate.
- (3) In granting exemptions under this subsection, the Council 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.
  - (b) Require and approve or disapprove written findings by the contracting department that support the awarding of a particular public improvement contract or a class of public improvement contracts, without the competitive bidding requirement of subsection (1) of this section. The findings must show that the exemption of a contract or class of contracts complies with the requirements of subsection (2) of this section.
  - (c) Before final adoption of the findings required by this section exempting a public improvement contract or a class of public

- improvement contracts from the requirement of competitive bidding, the Council shall hold a public hearing.
- (d) 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.
  - (e) The notice shall state that the public hearing is for the purpose of taking comments on the Council'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 the Council the notice may describe the process by which the findings are finally adopted and may indicate the opportunity for any further public comment.
  - (f) At the public hearing, the Council shall offer an opportunity for any interested party to appear and present comment.
  - (g) If the Council is required to act promptly due to circumstances beyond the Council's control that do not constitute an emergency, notification of the public hearing may be published simultaneously with the Council's solicitation of contractors for the alternative public contracting method, as long as responses to the solicitation are due at least five days after the meeting and approval of the findings.

**Section 2.50.090. Procedure for Requests for Proposals for Goods and Services and for Public Improvements**

**A. General Rules for RFPs for procurement of Goods and Services and for Public Improvements**

- (1) Procedures for Utilizing RFPs. The following procedures are to be employed when using an RFP, whether for Procurement or Public Improvement Contracts:
  - (a) A cover page identifying the City of Ashland as the contracting agency. The cover page will also have the date the proposal was distributed and the due date.
  - (b) The proposal is advertised and a written solicitation document is issued that invites the submission of sealed offers in accordance with ORS 279B.060 and 279B.055(4) (good and services) or ORS 279C.400 and 279C.405 (improvements).
  - (c) Contractual requirements are clearly stated in the solicitation documents.
  - (d) Evaluation criteria to be applied in awarding the contract and the role of an evaluation committee are stated clearly in the solicitation document. Criteria used to identify the proposal that best meets the City's needs may include but are not limited to cost, quality, service, compatibility, product reliability, operating efficiency and expansion potential;
  - (e) The solicitation document clearly states all complaint processes

- and remedies available;
- (f) The solicitation document states the provision for proposers to comment on any specification they feel limits competition.
  - (g) The Department shall prepare a proposal setting forth the minimum eligibility requirements and known criteria of selection such as experience, accreditation and cost.
  - (h) The Department shall supply and require signature of a non-discrimination certificate pursuant to ORS 279A.110.
  - (i) The Department shall forward the completed RFP to Legal Counsel for review when the contract amount is \$75,000 or more before the Department releases it. Legal Counsel will supply the appropriate contract form.
  - (j) The Department shall, depending upon the availability of qualified contractors, submit the proposal to at least three contractors.
  - (k) The Department shall review all proposals submitted for consistency with the request, relative costs, and other relevant criteria of selection set forth on the proposal. The Department shall maintain in writing its evaluation of the proposals, which evaluations shall be considered public record.
  - (l) Recommendation of contract awards will be prepared by the Department and forwarded to the Public Contracting Officer's Office for approval.
  - (m) Selection of a contractor shall be made in accordance with the evaluation criteria and process set forth in the RFP and pursuant to ORS 279B.060 for goods and services and ORS 279C.400 - 410 for improvements.
  - (n) Except for trade secrets and information submitted to the City in confidence under ORS 192.504(4), which the proposer has designated in its proposal, all information submitted shall be deemed public record, including prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment per OAR 137-049-0330 (2006).

**B. Goods and Services Procurements: The RFP shall be conducted in accordance with ORS 279B.060.**

- (1) Additional required information:
  - (a) A procurement description;
  - (b) 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 ORS 279B.120;
  - (c) A statement that the department may cancel the procurement or reject any or all proposals in accordance with ORS 279B.100;
  - (d) A statement that "Contractors shall use recyclable products to the maximum extent economically feasible in the performance of the contract work set forth in this document";
  - (e) A statement that requires the contractor or subcontractor to possess an asbestos abatement license, if required under ORS 468A.710; and

- (f) All contractual terms and conditions applicable to the procurement, including the length of the contract period, termination provisions and applicable forms, including a proposed contract.
- (2) Notice and Selection Procedures:
  - (a) Public notice of the request for proposal shall be given in the same manner as provided for public notice of invitations to bid in ORS 279B.055 (4).
  - (b) Notwithstanding ORS 192.410 to 192.505, proposals may be opened in a manner to avoid disclosure of contents to competing proposers during, when applicable, the process of negotiation, but the Department shall record and make available the identity of all proposers as part of the Department's public records from and after the opening of the proposals. Notwithstanding ORS 192.410 to 192.505, 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 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.
  - (c) Notwithstanding any requirement to make proposals open to public inspection after the Department's issuance of notice of intent to award a contract, a Department may withhold from disclosure to the public materials included in a proposal that are exempt or conditionally exempt from disclosure under ORS 192.501 or 192.502.

C. Public Improvements: The Request for Proposal shall be conducted in accordance with ORS 279C.365 and ORS 279C.405.

- (1) Required information:
  - (a) The public improvement project;
  - (b) The office where the specifications for the project may be reviewed;
  - (c) The date that prequalification applications must be filed under ORS 279C.430 and the class or classes of work for which bidders must be prequalified if prequalification is a requirement;
  - (d) The date and time after which bids will not be received, which must be at least five days after the date of the last publication of the advertisement;
  - (e) The name and title of the person designated for receipt of bids;
  - (f) The date, time and place that the Department will publicly open the bids;
  - (g) A statement that, if the contract is for a public works subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 276a), no bid will be received or considered by the Department unless the bid contains a statement by the bidder that ORS 279C.840 or 40 U.S.C. 276a will be complied with;

- (h) A statement that each bid must identify whether the bidder is a resident bidder, as defined in ORS 279A.120;
  - (i) A statement that the Department may reject any bid not in compliance with all prescribed public contracting procedures and requirements and may reject for good cause all bids upon a finding of the Council that it is in the public interest to do so;
  - (j) Information addressing whether a contractor or subcontractor must be licensed under ORS 468A.720;
  - (k) A statement that a bid for a public improvement contract may not be received or considered by the Department unless the bidder is licensed by the Construction Contractors Council or the State Landscape Contractors Council.
  - (l) All required contractual terms and conditions including the length of the contract period, termination provisions and applicable forms, including a proposed contract.
  - (m) 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, as authorized or prescribed by rules adopted under ORS 279A.065.
  - (n) All evaluation factors that will be considered by the Department when evaluating the proposals, including the relative importance of price and any other evaluation factors.
- (2) Format. [279C.365(2)]. All proposals made to the Department under ORS 279C.335 or .400 must be:
- (a) In writing;
  - (b) Filed with the person designated for receipt of bids by the Department; and
  - (c) Opened publicly by the Department immediately after the deadline for submission of bids.
  - (d) After having been opened, the bids must be made available for public inspection.
  - (e) A surety bond, irrevocable letter of credit issued by an insured institution as defined in ORS 706.008, cashier's check or certified check of each bidder shall be attached to all bids as bid security unless the contract for which a bid is submitted has been exempted from this requirement under ORS 279C.390. The security may not exceed 10 percent of the amount bid for the contract.

**2.50.095 Prequalification [ORS 279C.430].** The type and nature of contracts to which a prequalification application can be made includes only Public Improvement Contracts and Public Works Contracts, as defined in ORS 279A - 279C.

A. **Process.** Persons desiring to bid for contracts to perform public improvements where prequalification is determined "mandatory" by the Public Contracting

Officer shall submit a completed State of Oregon, Department of Administrative Services, Contractor's Prequalification Application to the Public Contracting Officer. The prequalification application shall be submitted, when required, at least ten days prior to the opening of bids of any contract for which the person desires to be considered.

- B. Applications. Applications for prequalification must be submitted on a standard form prescribed per ORS 279A.050.
- C. Determination; Validity. The Public Contracting Officer shall, within thirty days, if practical, of the receipt of the prequalification application submitted pursuant to this Section, notify the prospective bidder as to whether bidder is qualified, the nature and types of contracts that s/he is qualified to bid on, and the time period for which the prequalification is valid. Prequalifications under this Section shall be valid only until the end of the calendar year within which they are issued. The Public Contracting Officer will consider only the applicable standards of responsibility listed in ORS 279C.375(2)(b).
- D. Qualification Statement. Upon establishment of the applicant's prequalification, the Public Contracting Officer shall issue a qualification statement. The statement shall inform the applicant of any conditions which may be imposed on the qualification and advise the applicant to notify the City promptly if there has been any substantial change of conditions or circumstances which would make any statement contained in the prequalification application (a) no longer applicable, or (b) untrue. If the applicant desires to appeal the conditions of the prequalification, written notice must be give to the Public Contracting Officer within three business days after receipt of the notice.
- E. Adverse Determination. If the Public Contracting Officer does not qualify an applicant, written notice will be given to the applicant stating the reasons that prequalification has been denied. If the applicant desires to appeal the denial, written notice must be given to the Public Contracting Officer in accordance with section (d) above. [ORS 279C.445].
- F. Revocation of Prequalification. If a Public Contracting Officer has reasonable cause to believe there is a substantial change in the conditions of a prequalified person, the Public Contracting Officer may revoke, revise or reissue the prequalification upon notice to the prospective bidder; provided, however, that such action shall be invalid as to any contract for which an advertisement for bids has already been made under ORS 279C.430. The notice shall state the reasons found under ORS 279C.375(2)(b) for revocation or revision of the prequalification of the person and inform the person of the right to a hearing as set forth in ORS 279C.445 and ORS 279C.450.

**2.50.100 Protests of Procurement Process, Solicitation Document and Award**  
**[279B.400, 279B.405, 279B.410]**

- A. Time for Submission of Protest. Protests of the procurement process, bid specifications or awards shall be presented to the Public Contracting Officer in

the following time and manner:

- (1) Protests as to the process or specification shall be received at the Public Contracting Officer's office no later than seven calendar days prior to bid closing.
- (2) Protests as to the process or specification shall be in writing and contain:
  - (a) Sufficient information to identify the nature of the protest and bid to which the protest relates.
  - (b) Grounds demonstrating how the procurement process is contrary to law or how the bid 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;
  - (d) The relief sought [ORS 279B.405(4)(d)].
- (3) Protests as to the bid award shall contain and follow the requirements set forth in ORS 279B.410 and be received at the Public Contracting Officer's office within three (3) business days from the date of the award of the public contract or the date of the notice of intent to award a public contract, whichever occurs first.

B. Untimely submission: Protests which are not in writing, do not contain the necessary information listed above or are filed after the deadline shall not be considered.

C. Extension of Bid Closing. If a procurement process or bid specification protest is timely presented, the bid opening date may be extended if necessary to allow consideration of the protest and issuance of any addendum.

**2.50.105 Correction and Withdrawal of Bids [ORS 279B.055(7)]** Rules adopted under ORS 279A.065 shall provide for and regulate the correction and withdrawal of bids before and after bid opening and the cancellation of awards or contracts based on bid mistakes. After bid opening, changes in bids prejudicial to the interests of the public or fair competition are not permitted. All decisions to permit the correction or withdrawal of bids, or to cancel an award or a contract based on bid mistakes, shall be supported by a written determination by the Department that states the reasons for the action taken.

**2.50.110. Record Keeping** To facilitate contract file record keeping and reduce accounting and auditing difficulties in having dispersed contract files, each Department will maintain a complete file on all contracts executed on behalf of that Department. Information to be included in the file shall include, at a minimum,

- i. any and all invitation for bids or RFP, bid or proposal advertisements,
- ii. recordings of minutes of contract selection meetings and other meetings,
- iii. Council consent authorizing contract execution,
- iv. original signed contract,
- v. any approved Local Contract Review Board waivers, and
- vi. list of who the bid was sent out to or the list of planholders.



The Recorder's Office shall retain the original executed contract as well as original copies of any required insurance certificates, performance bonds, and payment bonds or other bid security. The department which is responsible for the procurement shall continually monitor insurance certificates to ensure the City remains an additional insured and has sufficient coverage.

**2.50.115 Transfer, Sale or Disposal of Personal Property [279A.185]** Any personal property that becomes surplus shall be disposed of in the manner set forth in Exhibit B, attached hereto.

**2.50.120 Advertising Requirements for Competitive Sealed Bidding or Proposals and Notice of Intent to Award [ORS 279B.055(4), 279B.135, 279C.360, 279C.410]**

- A. The contracting Department shall give public notice of a RFP, or an invitation to bid issued under this section. Public notice is intended to foster competition among prospective proposers or bidders. The contracting Department shall make invitations to bid and RFPs available to prospective proposers or bidders.
- B. A public notice 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 department may determine. If the contract is for a public improvement estimated to cost in excess of \$125,000, the advertisement must be published in at least one trade newspaper of general statewide circulation.
- C. The Council may, by resolution, authorize public notice of bids or proposals to be published electronically instead of in a newspaper of general circulation if the contracting Department determines that electronically providing public notice of bids or proposals is likely to be cost-effective. In the event the proposal or bid is electronically published, as set forth and in accordance with OAR 137-047-0330 and OAR 137-049-0310, it shall be the bidder's or proposer's responsibility to monitor the electronic publication for additional instructions, addenda and similar material.
- D. In addition to the modes of publication authorized by paragraphs (B) and (C) of this subsection, the Contracting department may use any other medium reasonably calculated to reach prospective bidders or proposers.
- E. The contracting Department shall issue, or post electronically, a written notice of intent to award a contract to all bidders or proposers.

**2.50.125 Negotiation When Bids for Public Improvements Exceed Budget [ ORS 279C.340]** The Public Contracting Officer, his or her designee, or the contracting Department, may negotiate with the lowest responsive, responsible bidder when all responsive bids from responsible bidders exceed the City's cost estimate in accordance with ORS 279C.340. The Public Contracting Officer, his or her designee or the contracting Department shall negotiate to obtain the best possible value for the City. In the event the Public Contracting Officer, his or her designee or the contracting

Department cannot, in his or her discretion, obtain the best possible value, the Public Improvement Project shall be competitively re-bid or abandoned.

**EXHIBIT A**

Except ORS 244, 670 and 279C.510, these statutes must be recited verbatim in "any public contract."

Non improvement (goods/services)	Improvement (construction)
ORS 279B.220	ORS 279C.505
ORS 279B.225	ORS 279C.515
ORS 279B.230	ORS 279C.520
ORS 279B.235	ORS 279C.530
ORS Chapter 244	ORS Chapter 244
ORS 670.600	ORS 670.600
////////////////////////////////////	ORS 279C.510 (if demo)

The following contract clauses should be incorporated into the vast majority of City contracts. To the extent they conflict with clauses from an outside vendor's original contract, they shall control:

**INDEMNITY; INSURANCE:**

Contractor shall defend, save, hold harmless, and indemnify the City of Ashland, Oregon, and its officers, employees, agents, and members, from all claims, suits, or actions of whatever nature resulting from or arising out of the activities of Contractor or its officers, employees, subcontractors, or agents under this contract.

**EVENTS OF DEFAULT:** Contractor shall be in default under the Contract if:

- Contractor commits any material breach or default of any covenant, warranty, certification, or obligation it owes under the Contract;
- Contractor loses its QRF status pursuant to the QRF Rules or loses any license, certificate or certification that is required to perform the Services or to qualify as a QRF;
- Contractor institutes an action for relief in bankruptcy or has instituted against it an action for insolvency; makes a general assignment for the benefit of creditors; or ceases doing business on a regular basis of the type identified in its obligations under the Contract; or
- Contractor attempts to assign rights in, or delegate duties under, the Contract.

**Insurance provisions: worker's compensation, general liability, professional liability (errors and omissions), automobile liability**

Insurance. Contractor shall at its own expense provide the following insurance:

- i **Worker's Compensation** insurance in compliance with ORS 656.017, which requires subject employers to provide Oregon workers' compensation coverage for all their subject workers.

- ii **Professional Liability** insurance with a combined single limit, or the equivalent, of not less than Enter one: \$200,000, \$500,000, \$1,000,000, \$2,000,000 or Not Applicable for each claim, incident or occurrence. This is to cover damages caused by error, omission or negligent acts related to the professional services to be provided under this contract.
- iii **General Liability** insurance with a combined single limit, or the equivalent, of not less than Enter one: \$200,000, \$500,000, \$1,000,000, \$2,000,000 or Not Applicable for each occurrence for Bodily Injury and Property Damage. It shall include contractual liability coverage for the indemnity provided under this contract.
- iv **Automobile Liability** insurance with a combined single limit, or the equivalent, of not less than Enter one: \$200,000, \$500,000, \$1,000,000, or Not Applicable for each accident for Bodily Injury and Property Damage, including coverage for owned, hired or non-owned vehicles, as applicable.

Notice of cancellation or change. There shall be no cancellation, material change, reduction of limits or intent not to renew the insurance coverage(s) without 30 days' written notice from the Contractor or its insurer(s) to the City.

Additional Insured/Certificates of Insurance. Contractor shall name The City of Ashland, Oregon, and its elected officials, officers and employees as Additional Insureds on any insurance policies required herein but only with respect to Contractor's services to be provided under this Contract. As evidence of the insurance coverages| required by this Contract, the Contractor shall furnish acceptable insurance certificates prior to commencing work under this contract. The certificate will specify all of the parties who are Additional Insureds. Insuring companies or entities are subject to the City's acceptance. If requested, complete copies of insurance policies, trust agreements, etc. shall be provided to the City. The Contractor shall be financially responsible for all pertinent deductibles, self-insured retentions and/or self-insurance.

## **JURISDICTION – LITIGATION IN OREGON AND ACCORDING TO OREGON LAWS**

**Governing Law; Jurisdiction; Venue:** This contract shall be governed and construed in accordance with the laws of the State of Oregon without resort to any jurisdiction's conflict of laws, rules or doctrines. Any claim, action, suit or proceeding (collectively, "the claim") between the City (and/or any other or department of the State of Oregon) and the Contractor that arises from or relates to this contract shall be brought and conducted solely and exclusively within the Circuit Court of Jackson County for the State of Oregon. If, however, the claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon filed in Jackson County, Oregon. Contractor, by the signature herein of its authorized representative, hereby consents to the *in personam* jurisdiction of said courts. In no event shall this section be construed as a waiver by City of any form of defense or immunity, based on the Eleventh Amendment to the United States Constitution, or otherwise, from any claim or from the jurisdiction.

**MERGER CLAUSE:** THIS CONTRACT AND ATTACHED EXHIBITS CONSTITUTE THE ENTIRE AGREEMENT BETWEEN THE PARTIES. NO WAIVER, CONSENT, MODIFICATION OR CHANGE OF TERMS OF THIS CONTRACT SHALL BIND

EITHER PARTY UNLESS IN WRITING AND SIGNED BY BOTH PARTIES. SUCH WAIVER, CONSENT, MODIFICATION OR CHANGE, IF MADE, SHALL BE EFFECTIVE ONLY IN THE SPECIFIC INSTANCE AND FOR THE SPECIFIC PURPOSE GIVEN. THERE ARE NO UNDERSTANDINGS, AGREEMENTS, OR REPRESENTATIONS, ORAL OR WRITTEN, NOT SPECIFIED HEREIN REGARDING THIS CONTRACT. CONTRACTOR, BY SIGNATURE OF ITS AUTHORIZED REPRESENTATIVE, HEREBY ACKNOWLEDGES THAT HE/SHE HAS READ THIS CONTRACT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

**NONAPPROPRIATIONS CLAUSE.** Funds Available and Authorized: City has sufficient funds currently available and authorized for expenditure to finance the costs of this contract within the City's fiscal year budget. Contractor understands and agrees that City's payment of amounts under this contract attributable to work performed after the last day of the current fiscal year is contingent on City appropriations, or other expenditure authority sufficient to allow City in the exercise of its reasonable administrative discretion, to continue to make payments under this contract. In the event City has insufficient appropriations, limitations or other expenditure authority, City may terminate this contract without penalty or liability to City, effective upon the delivery of written notice to Contractor, with no further liability to Contractor.

**PRIOR APPROVAL REQUIRED PROVISION.** Prior Approval Required: Approval by the City of Ashland Council or the Public Contracting Officer is required before any work may begin under this contract.

**TERMINATION:**

- a. Mutual Consent. This contract may be terminated at any time by mutual consent of both parties.
- b. City's Convenience. This contract may be terminated at any time by City upon 30 days' notice in writing and delivered by certified mail or in person.
- c. For Cause. City may terminate or modify this contract, in whole or in part, effective upon delivery of written notice to Contractor, or at such later date as may be established by City under any of the following conditions:
  - i. If City funding from federal, state, county or other sources is not obtained and continued at levels sufficient to allow for the purchase of the indicated quantity of services;
  - ii. If federal or state regulations or guidelines are modified, changed, or interpreted in such a way that the services are no longer allowable or appropriate for purchase under this contract or are no longer eligible for the funding proposed for payments authorized by this contract; or
  - iii. If any license or certificate required by law or regulation to be held by Contractor to provide the services required by this contract is for any reason denied, revoked, suspended, or not renewed.
- d. For Default or Breach.
  - i. Either City or Contractor may terminate this contract in the event of a breach of the contract by the other. Prior to such termination the party seeking termination shall give to the other party written notice of the breach and intent to terminate. If the party committing the breach has not entirely cured the breach within 15 days of the date of the notice, or within such other period as

the party giving the notice may authorize or require, then the contract may be terminated at any time thereafter by a written notice of termination by the party giving notice.

- ii. Time is of the essence for Contractor's performance of each and every obligation and duty under this contract. City by written notice to Contractor of default or breach, may at any time terminate the whole or any part of this contract if Contractor fails to provide services called for by this contract within the time specified herein or in any extension thereof.
  - iii. The rights and remedies of City provided in this subsection (d) are not exclusive and are in addition to any other rights and remedies provided by law or under this contract.
- e. Obligation/Liability of Parties. Termination or modification of this contract pursuant to subsections a, b, or c above shall be without prejudice to any obligations or liabilities of either party already accrued prior to such termination or modification. However, upon receiving a notice of termination (regardless whether such notice is given pursuant to subsections a, b, c or d of this section, Contractor shall immediately cease all activities under this contract, unless expressly directed otherwise by City in the notice of termination. Further, upon termination, Contractor shall deliver to City all contract documents, information, works-in-progress and other property that are or would be deliverables had the contract been completed. City shall pay Contractor for work performed prior to the termination date if such work was performed in accordance with the Contract.

**CERTIFICATIONS/REPRESENTATIONS:** Contractor, under penalty of perjury, certifies that (a) the number shown on this form is its correct taxpayer ID (or is waiting for the number to be issued to it and (b) Contractor is not subject to backup withholding because (i) it is exempt from backup withholding or (ii) it has not been notified by the Internal Revenue Service (IRS) that it is subject to backup withholding as a result of a failure to report all interest or dividends, or (iii) the IRS has notified it that it is no longer subject to backup withholding. Contractor further represents and warrants to City that (a) it has the power and authority to enter into and perform the work, (b) the Contract, when executed and delivered, shall be a valid and binding obligation of Contractor enforceable in accordance with its terms, (c) the work under the Contract shall be performed in accordance with the highest professional standards, and (d) Contractor is qualified, professionally competent and duly licensed to perform the work. Contractor also certifies under penalty of perjury that its business is not in violation of any Oregon tax laws, and it is a corporation authorized to act on behalf of the entity designated above and authorized to do business in Oregon or is an independent contractor as defined in the contract documents, and has checked four or more of the following criteria:

- \_\_\_\_\_ (1) I carry out the labor or services at a location separate from my residence or is in a specific portion of my residence, set aside as the location of the business.
- \_\_\_\_\_ (2) Commercial advertising or business cards or a trade association membership are purchased for the business.
- \_\_\_\_\_ (3) Telephone listing is used for the business separate from the personal residence listing.
- \_\_\_\_\_ (4) Labor or services are performed only pursuant to written contracts.

- \_\_\_\_\_ (5) Labor or services are performed for two or more different persons within a period of one year.
- \_\_\_\_\_ (6) I assume financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of performance bonds, warranties, errors and omission insurance or liability insurance relating to the labor or services to be provided.

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Contractor

(Date)

## EXHIBIT B

### City of Ashland SURPLUS PROPERTY DISPOSAL ADMINISTRATIVE RULES & PROCEDURES

**March 9, 2006**

Under the **Ashland Municipal Code, Chapter 2.50 Public Contracts, Section 2.50.090, Disposal of Surplus and Abandoned Property**, the City of Ashland Finance transfer to other departments, direct transfer or sale to political subdivisions, state agencies, or non-profit organizations, sale, trade, auction, or destruction; provided however, that disposal of surplus property having residual value of more than \$10,000 shall be subject to authorization by the City of Ashland, Local Contract Review Board.

#### **Definitions**

The following definitions apply to these administrative rules:

- (1) **"Bid"** means a competitive Offer to purchase advertised Surplus Property at a price specified by the bidder.
- (2) **"Cash"** includes U.S. currency, cashier's checks, and money orders made payable to the City of Ashland.
- (3) **"Employee's Household"** means all persons residing with employee.
- (4) **"Employee's Immediate Family"** means the children, step-children, parents, stepparents, grandparents and spouse of employee, separately or in any combination thereof.
- (5) **"Invitation to Bid"** means a competitive Offer to bid on Surplus Property available for public sale and is also known as a bid advertisement.
- (6) **"Not-for-profit organization"** is defined in ORS 279A.250(2) and means a nonprofit corporation as defined in ORS 307.130.
- (7) **"Political Subdivision"** includes divisions or units of Oregon local government having separate autonomy such as Oregon counties, cities, municipalities or other public corporate entities having local governing authority.
- (8) **"State agency"** is defined in ORS 279A.250(4) and means every state officer, board, commission, department, institution, branch or agency of state government whose costs are paid wholly or in part from funds held in the State Treasury, and includes the Legislative Assembly and the courts, including the officers and committees of both, and the Secretary of State and the State Treasurer in the performance of the duties of their constitutional offices.
- (9) **"Surplus Property"** means all personal property, vehicles and titled equipment property designated as surplus for sale to state agencies, political subdivisions of the State, and private not-for-profit organizations or the general public or any combination thereof.

#### **Prior to offering Surplus Property for Public Sale**

- (1) Prior to offering surplus property for public sale, the Surplus Property may be made available by direct transfer or direct sale to the following:
  - (a) Other City departments
  - (b) Political Subdivisions



(c) **State Agencies**

(d) Any non-profit organization determined to be eligible by the Purchasing Agent.

(2) Surplus Property acquired by political subdivisions, state agencies, or qualified not-for-profit organizations through direct sales or transfers must be used only in the conduct of their official public programs.

(3) Surplus Property must not be acquired through warehouse floor sales or direct transfer for any use or purpose other than conduct of their official public programs, and not for resale or distribution unless otherwise pre-approved by the Purchasing Agent.

(4) Non-qualifying private entities and private citizens, separately or combined, must not be eligible to acquire surplus property except at public sales.

**(1) Conduct**

(a) The Purchasing Agent or his/her designee must conduct public sales for the disposal of Surplus Property.

(b) Methods of disposal may include, but not be limited to: oral auctions, sealed bid sales and fixed price retail sales, separately or in any combination thereof.

**(2) Conduct of Auctions and Sealed Bid Sales**

(a) The Purchasing Agent or his/her designee must advertise the date, time and location of public auction or sealed bid sales.

(b) A public Invitation to Bid must be available at the auction site of an auction or sealed bid sale.

(c) The public may inspect property offered for sale at the time and place specified in the public Invitation to Bid;

(d) The Purchasing Agent reserves the right to reject any and all bids regarded as not in the best interests of the City of Ashland;

(e) All items must be sold to the highest Bidder. All Surplus Property must be offered "As-Is, Where-Is" with no warranty or other guarantee as to its condition or fitness for use. A purchaser or disappointed Bidder does not have recourse against the City of Ashland or any of their respective officers, employees or agents.

(f) All sales must be final.

**(3) Eligibility**

(a) Members of the general public may participate as buyers at public sales.

(b) No employee whether full-time, part-time, temporary or unpaid volunteer, of the Department and/or Purchasing, member of the employee's household, the employee's immediate family, or any person acting on the employee's behalf may participate in public sales if the employee has had any role in declaring the item surplus, processing the item or related paperwork, or offering it for sale.

**(4) Payment**

Full payment must be made within five (5) business days, unless otherwise specified in the public Invitation to Bid. Payment must be made by cash, cashier's check or money order. The methods of payment, time limit for making full payment, and the place where payment must be made will be specified in public Invitation to Bid.

**(5) Failure to Comply**

The Purchasing Agent or his/her designee may establish criteria to disqualify participants from surplus sales pursuant to this Rule. Such criteria may be based on:

- (a) Conviction of fraud;
- (b) Inappropriate conduct
- (c) Failure to claim purchases; or
- (d) Other documented activities determined by the Purchasing Agent or his/her designee to warrant disqualification. Based upon these criteria, the Purchasing Agent or his/her designee may disqualify participants from participation in other surplus sales.

**(6) Claiming Items Purchased**

- (a) Items not paid in full and claimed by the time specified in the Invitation to Bid will be offered to the next highest bidder.
- (b) Property paid for, but not claimed within the time specified in the Invitation to Bid must be considered abandoned and ownership must default back to the City of Ashland, unless prior approval is obtained from the City of Ashland Purchasing Agent.
- (c) Title to Property sold will be transferred to the purchaser when full and final payment
- (d) Motor Vehicles Division trip permits must be required to drive unlicensed motor vehicles. The purchaser will be responsible for obtaining a trip permit and to certify that the driver of the vehicle has a valid driver's license and is insured as required by Oregon law before a trip permit can be issued.

**(7) Disposal of Surplus Property, without requiring competitive bidding**

- (1) With the prior approval of the Purchasing Agent, the authorized designee may sell or transfer surplus property to political subdivisions, state agencies, or non-profit organizations.
  - (a) Political subdivisions, state agencies, and or non-profit organizations may be given preference to acquire surplus property.
  - (b) Property acquired shall be used for public purpose or benefit and not for resale to a private purchaser.
- (2) With the prior approval of the Purchasing Agent, the authorized designee may transfer computers and related hardware that are surplus, obsolete or unused to a common or union high school district or education service district.
  - (a) The authorized designee may not charge the school district a fee for the transfer.
- (3) The Purchasing Agent or his/her designee may recycle or otherwise dispose of property when the Purchasing Agent determines the value and condition of the property does not warrant the cost of a sale.

**(8) Proceeds from the disposal of Surplus Property**

- (1) The Purchasing Agent shall determine what fund and/or funds will be credited with the proceeds received from the disposal of surplus property.

Authorized by:  
Lee Tuneberg  
Finance Director  
Purchasing Agent

Authority: ORS 279A.065 (5)(a), ORS 279.070, AMC 2.50.090  
Drafted from: ORS 279A.250, OAR 125-246-0700

The foregoing ordinance was first read by title only in accordance with Article X,  
Section 2(C) of the City Charter on the \_\_\_\_ day of \_\_\_\_\_, 2006, and duly  
PASSED and ADOPTED this \_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
Barbara Christensen, City Recorder

SIGNED and APPROVED this \_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
John W. Morrison, Mayor

Approved as to form:

  
\_\_\_\_\_  
Beth A. Lori, Assistant City Attorney