

TITLE 10

SPECIAL ORDINANCES, REGULATIONS, RULES, POLICIES, AND BARGAINING AGREEMENTS

LCPR 137-049

GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTS FOR CONSTRUCTION SERVICES

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I. GENERAL PROVISIONS RELATED TO PUBLIC CONTRACTS FOR CONSTRUCTION SERVICES

137-049-0100 Application

(1) These Division 49 rules apply to Public Improvement Contracts as well as Public Contracts for ordinary construction services that are not Public Improvements. Model Rules that apply specifically to Public Improvement Contracts are so identified. These Division 49 rules apply to Contracts for Construction Manager/General Contractor Services, whether the initial Contract between the parties includes both pre-construction services and construction services, or only contains pre-construction services, since the underlying Procurement for Construction Manager/General Contractor Services authorizes Contracting Agencies to enter into Contracts for both pre-construction and construction services.

(2) These Division 49 rules address matters covered in ORS Chapter 279C (with the exception of Architectural, Engineering, Land Surveying and Related Services, all of which are addressed in Division 48 of the LCPR).

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
 Stats. Implemented: ORS 279A.065

137-049-0110 Policies

In addition to the general Code policies set forth in ORS 279A.015, the ORS 279C.300 policy on competition and the ORS 279C.305 policy on least-cost for Public Improvements apply to these Division 49 rules.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
 Stats. Implemented: ORS 279C.300 & ORS 279C.305

137-049-0120 Definitions

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

(2) "**Bid Form**" means the documented Offer submitted in response to an ITB. It may include, but is not limited to, the pricing submittal form, the first-tier disclosure form, the certifications and acknowledgment form, and the Offeror signature form.

(3) "**Change Order**" means a Written order, signed by an authorized County representative, directed to the Contractor that requires a change in the Work within the general scope of the original Contract, adjusts the Contract Price, and/or alters the completion date of a Public Improvement Contract.

(4) "**Conduct Disqualification**" means a Disqualification pursuant to ORS 279C.440.

(5) "**Construction**" means the initial construction of County buildings and other structures, or additions thereto, and of County highways and roads.

(6) "**Disqualification**" means the preclusion of a Person from contracting with the County for a period of time in accordance with LCPR 137-049-0370.

(7) "**Findings**" has the meaning as set forth in ORS 279C.330.

(8) "**Foreign Contractor**" means a Contractor that is not domiciled in or registered to do

business in the State of Oregon. (See LCPR 137-049-0480).

(9) "**Major Renovation**" means the remodeling or alteration of County buildings, structures, highways, and roads that is not a minor alteration, ordinary repair, or maintenance of the County building, structure, highway, or road.

(10) "**Notice**" means any of the alternative forms of public announcement of Procurements, as described in LCPR 137-049-0210.

(11) "**Public Improvement**" means a project for construction, reconstruction, or major renovation on real property by or for the County. "Public Improvement" does not include: (a) projects for which no funds of the County are directly or indirectly used, except for participation that is incidental or related primarily to project design or inspection; or (b) emergency work, minor alteration, ordinary repair or maintenance necessary to preserve the real property.

(12) "**Public Works**" has the meaning as set forth in ORS 279C.800(6), and generally includes, but is not limited to, construction, reconstruction, major renovation, or painting projects where the total project cost is \$50,000 or greater, and where the project directly or indirectly uses County funds. In determining the total project cost, the County shall include the collective value of all Work being performed on the project, including Work performed by each and all Contractors, subcontractors, and/or any other Persons being paid by a Contractor or subcontractor to Work on the project.

(13) "**Reconstruction**" means the resurfacing and rebuilding of County highways and roads, the restoration of existing County highways and roads, and the restoration of County buildings and other structures, none of which is considered a minor alteration, ordinary repair, or maintenance of the County highway, road, building, or structure.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279A.065, ORS 279A.010, & ORS 279C.800

137-049-0130 Competitive Bidding Requirement

The County shall solicit Bids for Public Improvement Contracts by Invitation to Bid ("ITB"), except as otherwise allowed or required pursuant to ORS 279C.335 on competitive bidding exceptions and exemptions, 279A.030 on federal law overrides, or 279A.100 on affirmative action. Also see LCPR 137-049-0600 to 137-049-0690 regarding the use of Alternative Contracting Methods, use of Alternative Contracting Methods for Public Improvement projects which are excepted or exempt from the competitive Bidding process, use of Alternative Contracting Methods within the competitive Bidding process, and the process for obtaining an exemption from competitive Bidding requirements.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.335

137-049-0140 Contracts for Construction Other Than Public Improvements

(1) **Procurement Under ORS Chapter 279B.** Pursuant to ORS 279C.320, Public Contracts for construction Services that are not Public Improvement Contracts may be procured and amended as general trade Services under the provisions of ORS Chapter 279B rather than under the provisions of ORS Chapter 279C and these Division 49 rules. Emergency Contracts for construction Services are not Public Improvement Contracts and are regulated under ORS 279B.080 and LCPR 137-048-0280.

(2) **Application of ORS Chapter 279C.** Non-procurement provisions of ORS Chapter 279C and these Division 49 rules may still be applicable to the resulting Contracts. See, for example, particular statutes on Disqualification (ORS 279C.440, 445 and 450); Legal Actions (ORS 279C.460 and 465); Required Contract Conditions (ORS 279C.505, 515, 520 and 530); Hours of Labor (ORS 279C.540 and 545); Retainage (ORS 279C.550, 555, 560, 565 and 570); Subcontracts (ORS 279C.580); Action on Payment Bonds (ORS 279C.600, 605, 610, 615, 620

and 625); Termination (ORS 279C.650, 660 and 670); and all of the Prevailing Wage Rates requirements (ORS 279C.800 through 870) for Public Works Contracts.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.320

137-049-0150 Contracts for Emergency Work; Bidding and Bonding Exemptions

(1) **Emergency Declaration.** The County may declare that Emergency circumstances exist that require prompt execution of a Public Contract for Emergency construction or repair Work. The declaration shall be made by either the Board or the Linn County Administrative Officer by a Written declaration that describes the circumstances creating the Emergency and the anticipated harm from failure to enter into an Emergency Contract. The Emergency declaration shall exempt the Public Contract from the competitive Bidding requirements of ORS 279C.335(1) and shall thereafter be kept on file as a public record.

(2) **Competition for Contracts.** Pursuant to ORS 279C.320(1), Emergency Contracts are regulated under ORS 279B.080, which provides that the County will ensure competition that is reasonable and appropriate under the Emergency circumstances, and may include Written requests for Offers, oral requests for Offers, or direct appointment without competition in cases of extreme necessity, in whatever Solicitation time periods the County considers reasonable in responding to the Emergency.

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

(4) **Emergency Contract Modification.** Emergency Contracts may be modified by Change Order or Amendment to address the conditions described in the original declaration or an amended declaration that further describes additional

work necessary and appropriate for related Emergency circumstances.

(5) **Excusing Bonds.** Pursuant to ORS 279C.380(4) and this rule, the Emergency declaration may also state that the County waives the requirement of furnishing a performance bond and payment bond for the Emergency Contract. After making such an Emergency declaration the bonding requirements are excused for the Procurement, but this Emergency declaration does not affect the separate Public Works bond requirement for the benefit of the Bureau of Labor and Industries (BOLI) in enforcing prevailing wage rate and overtime payment requirements. See LCPR 137-049-0815 and BOLI rules at OAR 839-025-0015.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]
Stats. Implemented: ORS 279B.080, 279C.320 & 279C.380

137-049-0155 Small Public Improvement Contracts Exempted from Competitive Bids

(1) Pursuant to ORS 279C.335(1)(c), the County may Award a Public Improvement Contract with a value of less than \$5,000 (a "Small Public Improvement Contract") in any manner deemed practical or convenient by the County, including by direct selection, appointment, or Award.

(2) A Small Public Improvement Contract may be modified in accordance with LCPR 137-049-0910, but the cumulative modifications shall not increase the total Contract Price to greater than \$5,000. If the Contract Price exceeds \$5,000, the Work must be competitively bid or quoted as otherwise required herein.

(3) A Procurement may not be artificially divided or fragmented so as to establish a Small Public Improvement Contract under this rule.

[Adopted 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.335

137-049-0160 Intermediate Procurements; Competitive Quotes and Amendments

(1) **General.** Public Improvement Contracts estimated by the County not to exceed \$100,000 may be Awarded in accordance with intermediate level Procurement procedures for competitive quotes established by this rule.

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

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

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

(5) **Award.** If Awarded, the County shall Award the Contract to the prospective contractor whose quote will best serve the interests of the County, taking into account the announced selection criteria. If Award is not made to the Offeror offering the lowest price, the County shall make a Written record of the basis for Award.

(6) **Price Increases.** Intermediate level Public Improvement Contracts obtained by competitive quotes may be increased above the original amount of Award by the County's issuance of a

Change Order or Amendment, pursuant to LCPR 137-049-0910, within the following limitations:

(a) Up to an aggregate Contract Price increase of 25% over the original Contract amount when the County's authorized representative determines that a price increase is warranted for additional reasonably related Work, and;

(b) Up to an aggregate Contract Price increase of 50% over the original Contract amount, when the County determines that a price increase is warranted for additional reasonably related Work and the Board approves the increase.

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]

Stats. Implemented: Temporary provisions relating to competitive quotes were not codified but compiled as Legislative Counsel notes following ORS 279C.410.

II. FORMAL PROCUREMENT RULES

137-049-0200 Solicitation Documents; Required Provisions; Assignment or Transfer

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

(a) General Information.

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

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

- (i) The time, date and location of any pre-Offer conference;
- (ii) Whether attendance at the conference will be mandatory or voluntary; and

(iii) That statements made by the County's representatives at the conference are not binding upon the County unless confirmed by Written Addendum.

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

(D) The name and title of the authorized Person designated by the County for receipt of Offers and contact Person (if different);

(E) Instructions and information concerning the form and submission of Offers, including the address of the office to which Offers must be delivered, any Bid or Proposal security requirements, and any other required information or special information, e.g., whether Offers may be submitted by facsimile or electronic means (See LCPR 137-049-0300 regarding facsimile Bids or Proposals and LCPR 137-049-0310 regarding electronic Procurement);

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

(G) The time and date of Closing after which the County will not accept Offers, which time shall be not less than five Days after the date of the last publication of the advertisement. If the County is issuing an ITB that may result in a Public Improvement Contract with a value in excess of \$100,000, the County shall designate a time of Closing consistent with the first-tier subcontractor disclosure requirements of ORS 279C.370(1)(b) and LCPR 137-049-0360. For timing issues relating to Addenda, see LCPR 137-049-0250;

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

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

(J) If the Contract resulting from a Solicitation will be a Contract for a Public Work

subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 3141 to 3148), a statement that no Offer will be received or considered by the County unless the Offer contains a statement by the Offeror as a part of its Offer that "Contractor agrees to be bound by and will comply with the provisions of ORS 279C.840 or 40 U.S.C. 3141 to 3148.";

(K) A statement that the County will not receive or consider an Offer for a Public Improvement Contract unless the Offeror is registered with the Construction Contractors Board, or is licensed by the State Landscape Contractors Board, as specified in LCPR 137-049-0230;

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

(M) Contractor's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See LCPR 137-049-0440(3));

(N) How the County will notify Offerors of Addenda and how the County will make Addenda available (See LCPR 137-049-0250); and

(O) When applicable, instructions and forms regarding First-Tier Subcontractor Disclosure requirements, as set forth in LCPR 137-049-0360.

(b) Evaluation Process:

(A) A statement that the County may reject any Offer not in compliance with all prescribed Public Contracting procedures and requirements, including the requirement to demonstrate the Bidder's responsibility under ORS 279C.375(3)(b), and may reject for good cause all Offers upon the County's finding that doing so is in the public interest;

(B) The anticipated Solicitation schedule, deadlines, protest process and evaluation process, if any;

(C) Evaluation criteria, including the relative value applicable to each criterion, that the

County will use to determine the Responsible Bidder with the lowest Responsive Bid (where Award is based solely on price) or the Responsible Proposer or Proposers with the best Responsive Proposal or Proposals (where use of Competitive Proposals is authorized under ORS 279C.335 and LCPR 137-049-0620), along with the process the County will use to determine acceptability of the Work;

- (i) If the Solicitation Document is an Invitation to Bid, the County shall set forth any special price evaluation factors in the Solicitation Document. Examples of such factors include, but are not limited to, conversion costs, transportation cost, volume weighing, trade-in allowances, cash discounts, depreciation allowances, cartage penalties, ownership or life-cycle cost formulas. Price evaluation factors need not be precise predictors of actual future costs; but, to the extent possible, such evaluation factors shall be objective, reasonable estimates based upon information the County has available concerning future use;
- (ii) If the Solicitation Document is a Request for Proposals, the County will refer to the additional requirements of LCPR 137-049-0650; and

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

(A) Prompt payment to all Persons supplying labor or material; contributions to

Industrial Accident Fund; liens and withholding taxes (ORS 279.505(1));

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

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

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

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

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

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

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

(I) Environmental and natural resources regulations (279C.525);

(J) Payment for medical care and attention to employees (ORS 279C.530(1));

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

(L) Maximum hours, holidays and overtime (ORS 279C.540);

(M) Time limitation on claims for overtime (ORS 279C.545);

(N) Prevailing wage rates (ORS 279C.800 to 279C.870);

(O) BOLI Public Works bond (ORS 279C.830(2));

(P) Retainage (ORS 279C.550 to 279C.570);

(Q) Prompt payment policy, progress payments, rate of interest (ORS 279C.570);

(R) Contractor's relations with subcontractors (ORS 279C.580);

(S) Notice of claim (ORS 279C.605);

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

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

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]

Stats. Implemented: ORS 279A.110, ORS 279A.120, ORS 279C.365, ORS 279C.370, ORS 279C.390, ORS 279C.505 to 580, ORS 279C.605, ORS 305.385, ORS 468A.720, ORS 701.005 & ORS 701.055

137-049-0210 Notice and Advertising Requirements; Posting

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

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

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

(c) Placing Notice on the County's Internet Web site.

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

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

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

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

(d) All advertisements for Offers will set forth:

- (A) The Public Improvement project;
- (B) The office where Contract terms, conditions, and Specifications may be reviewed;
- (C) The date that Persons must file applications for prequalification under ORS 279C.340, if prequalification is a requirement, and the class or classes of Work for which Persons must be prequalified;
- (D) The scheduled Closing, which shall not be less than five days after the date of the last publication of the advertisement;
- (E) The name, title, and address of the Person authorized to receive Offers;
- (F) The scheduled Opening; and
- (G) If applicable, that the Contract is for a Public Works subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act (40 U.S.C. 276(a)).

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.360 & ORS 200.035

137-049-0220 Prequalification of Offerors

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

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

(b) **Permissive Prequalification.** The County may prequalify a Person for the County's solicitation list on forms prescribed by the Board, but in permissive prequalification the County shall not limit distribution of a solicitation to that list.

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

(3) **Standards for Prequalification.** A Person may prequalify by demonstrating to the County's satisfaction:

- (a) That the Person's financial, material, equipment, facility and personnel resources and expertise, or ability to obtain such resources and expertise, indicate that the Person is capable of meeting all contractual responsibilities;
- (b) The Person's record of performance;
- (c) The Person's record of integrity;
- (d) The Person is qualified to contract with the County. (See, LCPR 137-049-0390(2) regarding standards of responsibility.)

(4) **Notice Of Denial.** If a Person fails to prequalify for a mandatory prequalification, the County shall notify the Person, specify the reasons under Section (3) of this rule and inform the Person of the Person's right to a hearing under ORS 279C.445 and 279C.450.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]
Stats. Implemented: ORS 279C.430 & ORS 279C.435

137-049-0230 Eligibility to Bid or Propose; Registration or License

(1) **Construction Contracts.** The County shall not consider a Person's Offer to do Work as a contractor, as defined in ORS 701.005(2), unless the Person has a current, valid certificate of registration issued by the Construction Contractors Board at the time the Offer is made.

(2) **Landscape Contracts.** The County shall not consider a Person's Offer to do Work as a landscape contractor as defined in ORS 671.520(2), unless the Person has a current, valid

landscape contractors license issued pursuant to ORS 671.560 by the State Landscape Contractors Board at the time the offer is made.

(3) **Noncomplying Entities.** The County shall deem an Offer received from a Person that fails to comply with this rule nonresponsive and shall reject the Offer as stated in ORS 279C.365(1)(k), unless contrary to federal law or subject to different timing requirements set by federal funding agencies.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.365, ORS 671.530 & ORS 701.055

137-049-0240 Pre-Offer Conferences

(1) **Purpose.** The County may hold pre-Offer conferences with prospective Offerors prior to Closing, to explain the Procurement requirements, obtain information or to conduct site inspections.

(2) **Required attendance.** The County may require attendance at the pre-Offer conference as a condition for making an Offer. Unless otherwise specified in the Solicitation Document, a mandatory attendance requirement is considered to have been met if, at any time during the mandatory meeting, a representative of an offering firm is present.

(3) **Scheduled time.** If the County holds a pre-Offer conference, it shall be held within a reasonable time after the Solicitation Document has been issued, but sufficiently before the Closing to allow Offerors to consider information provided at that conference.

(4) **Statements Not Binding.** Statements made by the County's representative at the pre-Offer conference do not change the Solicitation Document unless the County confirms such statements with a Written Addendum to the Solicitation Document.

(5) **County Announcement.** The County shall set forth notice of any pre-Offer conference in the Solicitation Document in accordance with LCPR 137-049-0200(1)(a)(B).

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.365 and 279C.370

137-049-0250 Addenda to Solicitation Documents

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

(2) **Notice and Distribution.** The County shall notify prospective Offerors of Addenda consistent with the standards of Notice set forth in LCPR 137-049-0210(1). The Solicitation Document shall specify how the County will provide notice of Addenda and how the County will make the Addenda available (see, LCPR 137-049-0200(1)(a)(N).) For example, "The County will not mail notice of Addenda, but will publish notice of any Addenda on the County's Web site. Addenda may be downloaded off the County's Web site. Offerors should frequently check the County's Web site until closing, i.e., at least once weekly until the week of Closing and at least once daily the week of the Closing."

(3) **Time lines; Extensions.** The County shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. The County may extend the Closing if the County determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent required by public interest, the County will not issue Addenda less than 72 hours before the Closing unless the Addendum also extends the Closing.

(4) **Request for Change or Protest.** Unless a different deadline is set forth in the Addendum, an Offeror may submit a Written request for change or protest to the Addendum, as provided in LCPR 137-049-0260, by the close of the County's next business day after issuance of the Addendum, or up to the last day allowed to submit a request for change or protest under LCPR 137-049-0260, whichever date is later. The County shall consider only an Offeror's request for change or protest to the Addendum; the County shall not consider a

request for change or protest to matters not added or modified by the Addendum, unless the Offeror submits the request for change or protest before the deadline for the County's receipt of request for change or protests as set forth in LCPR 137-049-0260(2) and (3).

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.395 & ORS 279A.065

137-049-0260 Request for Clarification or Change; Solicitation Protests

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

(2) Request for Change.

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

(b) Content of Request for Change.

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

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

- (i) "Contract Provision Request for Change"; and
- (ii) Solicitation Document number (or other identification as specified in the Solicitation Document).

(3) Protest.

(a) Delivery. An Offeror may protest Specifications or Contract terms and conditions. Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written

protest on those matters to the County not less than 10 Days prior to Closing;

(b) Content of Protest.

(A) An Offeror's Written protest shall include:

- (i) A detailed statement of the legal and factual grounds for the protest;
- (ii) A description of the resulting prejudice to the Offeror; and
- (iii) A statement of the desired changes to the Contract terms and conditions, including any Specifications.

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

- (i) "Contract Provision Protest"; and
- (ii) Solicitation Document number (or other identification as specified in the Solicitation Document)

(4) **County Response.** The County is not required to consider an Offeror's request for change or protest after the deadline established for submitting such request or protest. The County shall provide notice to the applicable Person if it entirely rejects a protest. If the County agrees with the Person's request or protest, in whole or in part, the County shall either issue an Addendum reflecting its determination under LCPR 137-049-0260 or cancel the Solicitation under LCPR 137-049-0270.

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.345 & ORS 279C365

137-049-0270 Cancellation of Solicitation Document

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

(2) **Notice of Cancellation.** If the County cancels a solicitation prior to Opening, the County shall provide Notice of cancellation in accordance with LCPR 137-049-0210(1). Such Notice of cancellation shall:

- (a) Identify the solicitation;
- (b) Briefly explain the reason for cancellation; and
- (c) If appropriate, explain that an opportunity will be given to compete on any resolicitation.

(3) **Disposition of Offers.**

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

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.395

137-049-0280 Offer Submissions

(1) **Offer and Acceptance.** The Bid or Proposal is the Bidder's or Proposer's offer to enter into a Contract.

(a) In competitive Bidding and competitive Proposals, the Offer is always a "Firm Offer," i.e., the Offer shall be held open by the Offeror for the County's review for the period specified in LCPR 137-049-0410.

(b) Notwithstanding the fact that a competitive Proposal is a "Firm Offer" for the period specified in LCPR 137-049-0410, the County may

elect to discuss or negotiate certain contractual provisions, as identified in these rules or in the Solicitation Document, with the Proposer. See LCPR 137-049-0650 on Requests for Proposals and LCPR 137-049-0290 on Bid or Proposal Security. Where negotiation is permitted by the rules or the Solicitation Document, Proposers are bound to an obligation to negotiate in good faith and only on those terms that the rules or the Solicitation Document has reserved for negotiation.

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

(3) **Contingent Offers.** Except to the extent that an Offeror is authorized to propose certain terms and conditions pursuant to LCPR 137-049-0650, an Offeror shall not make an Offer contingent upon the County's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

(4) **Offeror's Acknowledgment.** By signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits proposal of alternative terms under LCPR 137-049-0650, the Offeror's Offer includes the nonnegotiable terms and conditions and any proposed terms and conditions offered for negotiation upon and to the extent accepted by the County in Writing.

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

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

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

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

(9) **Product Samples and Descriptive Literature.** The County may require Product Samples or descriptive literature if it is necessary or desirable to evaluate the quality, features or characteristics of the offered items. The County shall dispose of Product Samples or make available for return Product Samples to the Offeror in accordance with the Solicitation Document.

(10) **Identification of Offers**

(a) To ensure proper identification and handling, Offers shall be submitted in a sealed envelope appropriately marked or in the envelope provided by the County, whichever is applicable.

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

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.365 & ORS 279C.375

137-049-0290 Bid or Proposal Security

(1) **Security Amount.** If the County requires Bid or Proposal security, it shall be not more than 10% or less than 5% of the Offeror's Bid or Proposal, consisting of the base Bid or Proposal together with all additive alternates. The County will not use Bid or Proposal security to discourage competition. The County shall clearly state any Bid or Proposal security requirements in its Solicitation Document. The Offeror shall forfeit Bid or

Proposal security after Award if the Offeror fails to execute the Contract and promptly return it with any required Performance Bond and Payment Bond and, in the case of Proposal security, with any required proof of insurance. See ORS 279C.365(4) and ORS 279C.385.

(2) **Requirement for Bid Security (Optional for Proposals).** Unless the County has otherwise exempted a Solicitation or class of Solicitations from Bid security pursuant to ORS 279C.390, the County will require Bid security for its Solicitation of Bids for Public Improvements. This requirement applies only to Public Improvement Contracts with a value, estimated by the County, of more than \$100,000 or, in the case of Contracts for highways, bridges, and other transportation projects, more than \$50,000. See ORS 279C.365(6). The County may require Bid security even if it has exempted a class of Solicitations from Bid security. The County may also require Proposal security in RFPs. See ORS 279C.400(5).

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

(a) A surety bond from a surety company authorized to do business in the State of Oregon;

(b) An irrevocable letter of credit issued by an insured institution as defined in ORS 706.008; or

(c) A cashier's check or Offeror's certified check.

(4) **Return of Security.** The County shall return or release the Bid or Proposal security of all unsuccessful Offerors after a Contract has been fully executed and all required bonds and insurance have been provided, or after all Offers have been rejected. The County may return the Bid or Proposal security of unsuccessful Offerors prior to Award if the return does not prejudice Contract Award and the security of at least the Bidders with the three lowest Bids, or the Proposers with the three highest scoring Proposals, is retained pending execution of a Contract.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.365, ORS 279C.385 & ORS 279C.390

137-049-0300 Facsimile Bids and Proposals

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

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

(2) **Provisions To Be Included in Solicitation Document.** In addition to all other requirements, if the County authorizes a facsimile Offer for Bids or Proposals, the County will include in the Solicitation Document (other than in a Request for Quotes) the following:

(a) A provision substantially in the form of the following: "A 'facsimile Offer', as used in this Solicitation Document, means an Offer, modification of an Offer, or withdrawal of an Offer that is transmitted to and received by the County via a facsimile machine.";

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

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

(d) A provision substantially in the form of the following: "The County reserves the right to Award the Contract solely on the basis of the facsimile Offer. However, upon the County's request the apparent successful Offeror shall

promptly submit its complete original Signed Offer";

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

(A) Telephone number; and

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

(f) A provision that the County is not responsible for any failure attributable to the transmission or receipt of the facsimile Offer including, but not limited to the following:

(A) Receipt of garbled or incomplete documents;

(B) Availability or condition of the receiving facsimile machine;

(C) Incompatibility between the sending and receiving facsimile machine;

(D) Delay in transmission or receipt of documents;

(E) Failure of the Offeror to properly identify the Offer documents;

(F) Illegibility of Offer documents; and

(G) Security and confidentiality of data.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.365

137-049-0310 Electronic Procurement

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

(2) **Alternative Procedures.** In the event that the County desires to allow Electronic Offers for a Public Improvement Contract, it will first promulgate supporting procedures substantially in conformance with LCPR 137-047-0330 (Electronic Procurement under ORS Chapter 279B),

taking into account ORS Chapter 279C requirements for Written bids, opening bids publicly, bid security, first-tier subcontractor disclosure and inclusion of prevailing wage rates.

(3) **Interpretation.** Nothing in this rule shall be construed as prohibiting the County from making Procurement documents for Public Improvement Contracts available in electronic format as well as in hard copy when Bids are to be submitted only in hard copy. See ORS 279C.365(2).

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.365

137-049-0320 Pre-Closing Modification or Withdrawal of Offers

(1) **Modifications.** An Offeror may modify its Offer in Writing prior to the Closing. An Offeror shall prepare and submit any modification to its Offer to the County in accordance with LCPR 137-049-0280, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror shall mark the submitted modification as follows:

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

(2) **Withdrawals:**

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

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

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

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

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.360(2), ORS 279C.365, ORS 279C.375 & ORS 279C.395

137-049-0330 Receipt, Opening and Recording of Offers; Confidentiality of Offers

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

(2) **Opening and Recording.** The County shall publicly open Offers including any modifications made to the Offer pursuant to LCPR 137-049-0320.

(a) In the case of Invitations to Bid, to the extent practicable, the County shall read aloud the name of each Bidder, the Bid price(s), and such other information as the County considers appropriate. When Bids are opened at a Board meeting, the Bid Form is the only document required to be placed in the Commissioner's Journal.

(b) In the case of Requests for Proposals, unless the Solicitation Document states otherwise, the County will not read Offers aloud.

(3) **Availability.** After Opening, the County shall make Bids available for public inspection, but, pursuant to ORS 279C.410, Proposals are not

subject to disclosure until after Notice of Intent to Award is issued. In any event, the County may withhold from disclosure those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.345(2); ORS 646.461 to 646.475. To the extent the County determines such designation is not in accordance with applicable law, the County shall make those portions available for public inspection. The Offeror shall separate information designated as confidential from other nonconfidential information at the time of submitting its Offer. Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential and shall be publicly available regardless of an Offeror's designation to the contrary.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.365, ORS 279C.375, 192.345, & ORS 279C.395

137-049-0340 Late Bids, Late Withdrawals and Late Modifications

Any Offer received after Closing is late. An Offeror's request for withdrawal or modification of an Offer received after Closing is late. The County shall not consider late Offers, withdrawals or modifications except as permitted in LCPR 137-049-0350 or 137-049-0390.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.365, ORS 279C.375 & ORS 279C.395

137-049-0350 Mistakes

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

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

(a) The County may waive, or permit an Offeror to correct, a minor informality. A minor

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

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

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

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

(b) The County may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms the County's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct unit or amount is evident by simple arithmetic calculations (for example a missing unit price may be established by dividing the total price for the units by the quantity of units for that item or a missing, or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). In the event of a discrepancy, unit prices shall prevail over extended prices.

(c) The County may permit an Offeror to withdraw an Offer based on one or more clerical errors in the Offer only if the Offeror shows with objective proof and by clear and convincing evidence:

(A) The nature of the error;

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

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

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

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

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

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

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

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

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

(4) **Identification of Mistakes after Award.** The procedures and criteria set forth above are Offeror's only opportunity to correct mistakes or withdraw Offers because of a mistake. Following Award, an Offeror is bound by its Offer, and may withdraw its Offer or rescind a Contract entered into pursuant to these Division 49 rules only to the extent permitted by applicable law.

137-049-0360 First-Tier Subcontractors; Disclosure and Substitution

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

(a) Five percent of the total Contract Price, but at least \$15,000; or

(b) \$350,000, regardless of the percentage of the total Contract Price.

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

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

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

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

(3) **Bidder Instructions and Disclosure Form.** For the purposes of this rule, the County's Solicitation will:

(a) Prescribe the disclosure form that must be substantially in the form set forth in ORS 279C.370(2); and

(b) Provide instructions in a notice substantially similar to the following:

"Instructions for First-Tier Subcontractor Disclosure

Bidders are required to disclose information about certain first-tier subcontractors when the contract value for a Public Improvement is greater than \$100,000 (see ORS 279C.370). Specifically, when the contract amount of a first-tier subcontractor furnishing labor or labor and materials would be greater than or equal to: (i) 5% of the project Bid, but at least \$15,000; or (ii) \$350,000 regardless of the percentage, the Bidder must disclose the following information about that subcontract either in its Bid submission, or within two hours after Bid Closing:

- (A) The subcontractor's name,
- (B) The category of Work that the subcontractor would be performing, and
- (C) The dollar value of the subcontract. If the Bidder will not be using any subcontractors that are subject to the above disclosure requirements, the Bidder is required to indicate 'NONE' on the accompanying form.

THE COUNTY MUST REJECT A BID IF THE BIDDER FAILS TO SUBMIT THE DISCLOSURE FORM WITH THIS INFORMATION BY THE STATED DEADLINE (see LCPR 137-049-0360)."

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

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

sive and shall not be considered for Contract Award.

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

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.370, ORS 279C.585, ORS 279C.590 & ORS 279C.835

137-049-0370 Disqualification of Persons

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

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

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

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

(C) Conviction under state or federal antitrust statutes.

(D) Violation of a contract provision that is regarded by the County to be so serious as to justify Conduct Disqualification. A violation under this subsection 1(a)(D) may include, but is not limited to, material failure to perform the terms of a contract or an unsatisfactory performance in accordance with the terms of the contract. However, a Person's failure to perform or unsatisfactory performance caused by acts beyond the Person's control is not a basis for Disqualification.

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

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

- (i) The Person fraudulently obtained or retained or attempted to obtain or retain or aided another Person to fraudulently obtain or retain or attempt to obtain or retain certification as a disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business enterprise, or a business that a service-disabled veteran owns; or
- (ii) The Person knowingly made a false claim that any Person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a Contract or subcontract or other benefit; or
- (iii) The Person has been disqualified by another contracting agency pursuant to ORS 200.065.

(B) For a DBE Disqualification under ORS 200.075, the County may disqualify a Person upon finding that:

- (i) The Person has entered into an agreement representing that a disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business enterprise, or a business that a service-disabled veteran owns, certified pursuant to ORS 200.055 ("Certified Enterprise"), will perform or supply materials under a Public Improvement Contract without the knowledge and consent of the Certified Enterprise; or
- (ii) The Person exercises management and decision-making control over the internal operations, as defined by ORS 200.075(1)(b), of any Certified Enterprise; or
- (iii) The Person uses a Certified Enterprise to perform Work under a Public Improvement Contract to meet an established Certified Enterprise goal, and such enterprise does not perform a commercially useful function, as defined by ORS 200.075(3), in performing its obligations under the contract.
- (iv) If a Person is Disqualified for a DBE Disqualification under ORS 200.075, the County shall not permit such Person to participate in County Contracts.

(C) For a Disqualification under ORS 279A.110, the County may disqualify a Person if the County finds that the Person discriminated

against a disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business enterprise, or a business that a service-disabled veteran owns in awarding a subcontract under a Contract with the County.

(2) **Notice of Intent to Disqualify.** The County shall provide Written notice to the Person of a proposed Disqualification personally or by registered or certified mail, return receipt requested. This notice shall:

- (a) State that the County intends to disqualify the Person;
- (b) Set forth the reasons for the Disqualification;
- (c) Include a statement of the Person's right to a hearing if requested in Writing within the time stated in the notice and that if the County does not receive the Person's Written request for a hearing within the time stated, the Person shall have waived its right to a hearing;
- (d) Include a statement of the authority and jurisdiction under which the hearing will be held;
- (e) Include a reference to the particular sections of the statutes and rules involved;
- (f) State the proposed Disqualification period; and
- (g) State that the Person may be represented by legal counsel.

(3) **Hearing.** The County shall schedule a hearing upon the receipt of the Person's timely hearing request. Within a reasonable time prior to the hearing, the County shall notify the Person of the time and place of the hearing and provide information on the procedures, right of representation and other rights related to the conduct of the hearing prior to hearing.

(4) **Notice of Disqualification.** The County shall provide Written notice to the Person of its Disqualification, personally or by registered or certified mail, return receipt requested. The notice shall contain:

- (a) The effective date and period of Disqualification;

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]

Stats. Implemented: ORS 200.065, ORS 200.075, ORS 279C.440, ORS 279C.445, ORS 279C.450, ORS 279A.110, & OL 2015 & ch 565 (HB 3303)

137-049-0380 Bid or Proposal Evaluation Criteria

(1) **General.** A Public Improvement Contract, if Awarded, shall be Awarded to the Responsible Bidder submitting the lowest Responsive Bid, or to the Responsible Proposer submitting the best Responsive Proposal. See LCPR 137-049-0390 and Rules for Alternative Contracting Methods at LCPR 137-049-0600 to 137-049-0690.

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

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

(b) **Unit Price.** If the Bid includes unit pricing for estimated quantities, the total Bid price shall be calculated by multiplying the estimated quantities by the unit prices submitted by the Bidder, and adjusting for any additive or deductive alternates selected by the County, for the purpose of comparing Bids. The County shall specify within the Solicitation Document the estimated quantity of the Procurement to be used for determination of the low Bidder. In the event

of mathematical discrepancies between unit price and any extended price calculations submitted by the Bidder, the unit price shall govern. See LCPR 137-049-0350(2)(b).

(3) **Proposal Evaluation Criteria.** If the Board has exempted the Procurement of a Public Improvement from the competitive Bidding requirements of ORS 279C.335(1), and has directed the County to use an Alternative Contracting Method under ORS 279C.335(4), the County shall set forth the evaluation criteria in the Solicitation Documents. See LCPR 137-049-0640, LCPR 137-049-0650, LCPR 137-049-0670, LCPR 137-049-0690, ORS 279C.335, and 279C.405.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.335 & OL 2011 & ch 458

137-049-0390 Offer Evaluation and Award; Determination of Responsibility

(1) **General.** If Awarded, the County shall Award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer or Proposers submitting the best, Responsive Proposal or Proposals, provided that such Person is not listed by the Construction Contractors Board as disqualified to hold a Public Improvement Contract. See ORS 279C.375(2)(a). The County may Award by item, groups of items or the entire Offer provided such Award is consistent with the Solicitation Document and in the public interest. Where Award is based on competitive Bids, ORS 279C.375(5) permits multiple Contract awards when specified in the ITB.

(2) **Determination of Responsibility.** Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before Awarding a Contract, the County must have information that indicates that the Offeror meets the standards of responsibility set forth in ORS 279.375(3)(b). To be a Responsible Offeror, the County must determine that the Offeror:

(a) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to demonstrate

the capability of the Offeror to meet all contractual responsibilities;

(b) Has completed previous contracts of a similar nature with a satisfactory record of contract performance. A satisfactory record of performance means that, to the extent the costs associated with and time available to perform a previous contract were within the Offeror's control, the Offeror stayed within the time and budget allotted for the procurement and otherwise performed the contract in a satisfactory manner. The County shall review an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in contract performance. In reviewing the Offeror's performance, the County shall determine whether the Offeror's deficient performance was expressly excused under the terms of contract or whether the Offeror took appropriate corrective action. The County may review the Offeror's performance on both private and public Contracts in determining the Offeror's record of contract performance. The County shall make its basis for determining an Offeror not Responsible under this paragraph part of the Solicitation file;

(c) Has a satisfactory record of integrity. An Offeror may lack integrity if the County determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to the County or any other contracting agency. The County may find an Offeror not Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for Conduct Disqualification under LCPR 137-049-0370 may be used to determine an Offeror's integrity. The County shall make its basis for determining that an Offeror is not Responsible under this paragraph part of the Solicitation file;

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

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

(3) In addition to making the Responsibility determination under ORS 279C.375(3)(b) and Section (2) of this rule, the County may consider, as authorized by House Bill 2094 (2019 Oregon Laws, chapter 124), as part of the County's evaluation of an Offer, whether the Offeror owes a liquidated and delinquent debt to the State of Oregon.

(4) **Documenting Determinations.** The County shall document their compliance with ORS 279C.375(3) and the above Sections of this rule on a Responsibility Determination Form substantially as set forth in 279.375(3)(c), and file that form with the Construction Contractors Board within 30 days after Contract Award.

(5) **Evaluation.** The County will evaluate an Offer only as set forth in the Solicitation Document and in accordance with applicable law. The County will not evaluate an Offer using any other requirement or criterion.

(6) **Offeror Submissions:**

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

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

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

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

(b) The County shall evaluate product acceptability only in accordance with the criteria

disclosed in the Solicitation Document to determine that a product is acceptable. The County shall reject an Offer providing any product that does not meet the Solicitation Document requirements. The County's rejection of an Offer because it offers non-conforming Work or materials is not Disqualification and is not appealable under ORS 279C.445.

(7) **Evaluation of Bids.** The County shall use only objective criteria to evaluate Bids as set forth in the ITB. The County shall evaluate Bids to determine which Responsible Offeror offers the lowest Responsive Bid.

(a) **Nonresident Bidders.** In determining the lowest Responsive Bid, the County will, in accordance with LCPR 137-046-0310, add a percentage increase to the Bid of a nonresident Bidder equal to the percentage, if any, of the preference given to that Bidder in the state in which the Bidder resides.

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

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

(8) **Evaluation of Proposals.** See LCPR 137-049-0650 regarding rules applicable to Requests for Proposals.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]
Stats. Implemented: ORS 279C.335, ORS 279C.365, ORS 279C.375 & ORS 279C.395 & OL 2015 & ch 454 (SB 491)

137-049-0395 Notice of Intent to Award

(1) **Notice.** At least seven days before the Award of a Public Improvement Contract, the County shall issue to each Bidder (pursuant to ORS 279C.375(2)) and each Proposer (pursuant to 279C.410(7)), or post electronically or otherwise, a notice of the County's intent to Award the Contract (the "Notice of Intent to Award".) This

requirement does not apply to Award of a small (under \$5,000) or intermediate (informal competitive quotes) Public Improvement Contract awarded under LCPR 137-049-0155 and LCPR 137-049-0160 respectively.

(2) **Form and Manner of Posting.** The form and manner of posting notice shall conform to customary practices within the County's procurement system, and may be made electronically.

(3) **Finalizing Award.** The County's Award shall not be final until the later of the following:

(a) Seven Days after the date of the notice, unless the Solicitation Document provided a different period for protest; or

(b) The County provides a Written response to all timely-filed protests that denies the protest and affirms the Award.

(4) **Prior Notice Impractical.** Posting of Notice of Intent to Award shall not be required when the County determines that it is impractical due to unusual time constraints in making prompt Award for its immediate procurement needs, documents the Contract file as to the reasons for that determination, and posts notice of that action as soon as reasonably practical.

[Adopted 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.375

137-049-0400 Documentation of Award; Availability of Award Decisions

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

(2) **Contents of Award Record for Bids.** The County's record shall include:

- (a) All submitted Bids;
- (b) Completed Bid tabulation sheet; and
- (c) Written justification for any rejection of lower Bids.

(3) **Contents of Award Record for Proposals.** Where the use of Requests for Proposals is authorized as set forth in LCPR 137-049-0650, the County's record shall include:

- (a) All submitted Proposals.

(b) The completed evaluation of the Proposals;

(c) Written justification for any rejection of higher scoring Proposals or for failing to meet mandatory requirements of the Request for Proposal; and

(d) If the County permitted negotiations in accordance with LCPR 137-049-0650, the County's completed evaluation of the initial Proposals and the County's completed evaluation of final Proposals.

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

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

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

(7) **Copies from Solicitation Files.** Any Person may obtain copies of material from Solicitation files upon payment of a reasonable copying charge.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.365 & ORS 279C.375

137-049-0410 Time for Offer Acceptance; Extension

(1) **Time for Offer Acceptance.** An Offeror's Bid, or Proposal submitted as a Firm Offer (see LCPR 137-049-0280), is irrevocable, valid and binding on the Offeror for not less than 30 Days from Closing unless otherwise specified in the Solicitation Document.

(2) **Extension of Acceptance Time.** The County may request, orally or in Writing, that Offerors extend, in Writing, the time during which

the County may consider their Offer(s). If an Offeror agrees to such extension, the Offer shall continue as a Firm Offer, irrevocable, valid and binding on the Offeror for the agreed-upon extension period.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.375

137-049-0420 Negotiation With Bidders Prohibited

(1) **Bids.** Except as permitted by ORS 279C.340 and LCPR 137-049-0430, when all bids exceed the cost estimate, the County shall not negotiate with any Bidder prior to Contract Award. After Award of the Contract, the County and Contractor may modify the Contract only by Change Order or Amendment to the Contract in accordance with LCPR 137-049-0860.

(2) **Requests for Proposals.** The County may conduct discussions or negotiations with Proposers only in accordance with the requirements of LCPR 137-049-0650.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.340 & ORS 279C.375

137-049-0430 Negotiation When Bids Exceed Cost Estimate

(1) **Generally.** In accordance with ORS 279C.340, if all Responsive Bids from Responsible Bidders on a competitively Bid Public Improvement project exceed the County's Cost Estimate, prior to Contract Award the County may negotiate Value Engineering and Other Options with the Responsible Bidder submitting the lowest, Responsive Bid in an attempt to bring the project within the County's Cost Estimate. The subcontractor disclosure and substitution requirements of LCPR 137-049-0360 do not apply to negotiations under this rule.

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

(a) **"Cost Estimate"** means the County's most recent pre-Bid, good faith assessment of anticipated Contract costs, consisting either of an estimate of an architect, engineer or other qualified professional, or confidential cost calculation

worksheets, where available, and otherwise consisting of formal planning or budgetary documents.

(b) **"Other Options"** means those items generally considered appropriate for negotiation in the RFP process, relating to the details of Contract performance as specified in LCPR 137-049-0650, but excluding any material requirements previously announced in the Solicitation process that would likely affect the field of competition.

(c) **"Project"** means a Public Improvement.

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

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

(4) **Scope of Negotiations.** The County will not proceed with Contract Award if the scope of the Public Improvement project is significantly changed from the original Bid. The scope is considered to have been significantly changed if the pool of competition would likely have been affected by the change; that is, if other Bidders would have been expected by the County to participate in the Bidding process had the change been made during the Solicitation process rather than during negotiation. This rule shall not be construed to prohibit resolicitation of trade subcontracts.

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

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

(7) **Public Records.** To the extent that a Bidder's records used in Contract negotiations under ORS 279C.340 are public records, they are exempt from disclosure until after the negotiated Contract has been awarded or the negotiation process has been terminated, at which time they are subject to disclosure pursuant to ORS 192.311 through 192.478.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.340

137-049-0440 Rejection of Offers

(1) Rejection of an Offer:

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

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

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

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

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

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

(E) Is late;

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

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

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

(A) Has not been prequalified under ORS 279C.430 and the County required mandatory prequalification;

(B) Has been Disqualified;

(C) Has been declared ineligible under ORS 279C.860 by the Commissioner of Bureau of Labor and Industries and the Contract is for a Public Work;

(D) Is listed as not qualified by the Construction Contractors Board, if the Contract is for a Public Improvement;

(E) Has not met the requirements of ORS 279A.105 if required by the Solicitation Document;

(F) Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;

(G) Has failed to provide the certification required under Section 3 of this rule;

(H) Is not Responsible. See LCPR 137-049-0390(2) regarding the County's determination that the Offeror has met statutory standards of Responsibility.

(2) **Form of Business.** For purposes of this rule, the County may investigate any Person submitting an Offer. The investigation may include that Person's officers, directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this rule or to apply the Disqualification provisions of ORS 279C.440 to 279C.450 and LCPR 137-049-0370.

(3) **Certification of Non-Discrimination.** The Offeror shall certify and deliver to the County Written certification, as part of the Offer that the Offeror has not discriminated and will not dis-

criminate against any disadvantaged business enterprise, minority-owned business, women-owned business, emerging small business enterprise, or business that a service-disabled veteran owns, in obtaining any required subcontracts. Failure to do so will be grounds for Disqualification.

(4) Contract and Subcontract Conditions. If the County Awards a Contract to an Offeror that has been determined to be Responsible under ORS 200.005(8) and ORS 200.045(3), or Awards a Contract under ORS 279A.100:

(a) The County must provide, as a material condition of the Contract:

(A) That the Contractor must maintain its certification under ORS 200.055 throughout the term of the Contract and any extensions (if the County used the certification as a factor in or as a basis for the award of the Contract);

(B) That the Contractor must promptly pay each subcontractor that is certified under ORS 200.055 in accordance with ORS 279B.220, or 279C.570 and ORS 279C.580, whichever apply to the Contract;

(C) That the Contractor must include, in any subcontract the Contractor establishes in connection with the Contract, a provision that requires the subcontractor to maintain the subcontractor's certification under ORS 200.055 throughout the term of the subcontract and any extensions (if the Contractor used the certification as a factor in or as a basis for the award of the subcontract); and

(D) That the County may require the Contractor to terminate a subcontract with a subcontractor that fails to maintain its certification under ORS 200.055 throughout the term of the subcontract and any extensions.

(b) In the administration of Contracts that are subject to Section (4) of this rule, the County must verify the Contractor's and any subcontractor's compliance with subsection (4)(a) of this rule.

(c) Subparagraph (4)(a)(A) of this Section does not apply to an emerging small business that

ceases to qualify as a tier one firm or a tier two firm (as ORS 200.005 defines those terms) due to the growth in the business's number of full-time equivalent employees or in average annual gross receipts during the term of the Contract. This Section (4) does not apply to an emerging small business for which a certification under ORS 200.055 expires during the term of the Contract or any extensions.

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

(6) Criteria for Rejection of All Offers. The County may reject all Offers upon a Written finding that:

(a) The content of or an error in the Solicitation Document, or the Solicitation process itself, unnecessarily restricted competition for the Contract;

(b) The price, quality or performance presented by the Offerors is too costly or of insufficient quality to justify acceptance of the Offer;

(c) Misconduct, error, or ambiguous or misleading provisions in the Solicitation Document threaten the fairness and integrity of the competitive process;

(d) Causes other than legitimate market forces threaten the integrity of the competitive Procurement process. These causes include, but are not limited to, those that tend to limit competition such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct and inadvertent or intentional errors in the Solicitation Document;

(e) The County cancels the Solicitation in accordance with LCPR 137-049-0270; or

(f) Any other circumstance indicating that Awarding the Contract would not be in the public interest.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]

Stats. Implemented: ORS 279C.375, ORS 279C.380, ORS 279C.395, OL 2015 ch 325 (HB 2716), OL 2015 ch 565 (HB 3303), ORS 279A.105 & ORS 279A.110

137-049-0450 Protest of Contractor Selection, Contract Award

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

(2) **Notice of Competitive Range.** Unless otherwise provided in the RFP, when the competitive Proposal process is authorized under LCPR 137-049-0650, the County shall provide Written notice to all Proposers of the County's determination of the Proposers included in the Competitive Range. The County's notice of the Proposers included in the Competitive Range shall not be final until the later of the following:

(a) Ten (10) days after the date of the notice, unless otherwise provided therein; or

(b) Until the County provides a Written response to all timely-filed protests that denies the protest and affirms the notice of the Proposers included in the Competitive Range.

(3) **Notice of Intent to Award.** Unless otherwise provided in the Solicitation Document, the County shall provide Written notice to all Offerors of the County's intent to Award the Contract, as provided by LCPR 137-049-0395.

(4) **Right to Protest Award:**

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

(b) The Offeror's protest must be in Writing and must specify the grounds upon which the protest is based.

(c) An Offeror is adversely affected or aggrieved only if the Offeror is eligible for Award of the Contract as the Responsible Bidder submitting the lowest Responsive Bid or the Responsible Proposer submitting the best Responsive Proposal and is next in line for Award, i.e., the protesting

Offeror must claim that all lower Bidders or higher-scored Proposers are ineligible for Award:

(A) Because their Offers were non-responsive; or

(B) The County committed a substantial violation of a provision in the Solicitation Document or of an applicable Procurement statute or LCPR, and the protesting Offeror was unfairly evaluated and would have, but for such substantial violation, been the Responsible Bidder offering the lowest Bid or the Responsible Proposer offering the highest-ranked Proposal.

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

(5) **Right to Protest Competitive Range:**

(a) An adversely affected or aggrieved Proposer may submit to the County a Written protest of the County's decision to exclude the Proposer from the Competitive Range within seven Days after issuance of the notice of the Competitive Range, unless a different protest period is provided under the Solicitation Document. (See procedural requirements for the use of RFPs at LCPR 137-049-0650.)

(b) The Proposer's protest shall be in Writing and must specify the grounds upon which the protest is based.

(c) A Proposer is adversely affected only if the Proposer is Responsible and submitted a Responsive Proposal and is eligible for inclusion in the Competitive Range, i.e., the protesting Proposer must claim it is eligible for inclusion in the Competitive Range if all ineligible higher-scoring Proposers are removed from consideration, and that those ineligible Proposers are ineligible for inclusion in the Competitive Range because:

(A) Their Proposals were not responsive; or

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

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

(6) **Authority to Resolve Protests.** The Board, or its designee, may settle or resolve a Written protest submitted in accordance with the requirements of this rule.

(7) **Decision.** If a protest is not settled, the Board, or its designee, shall promptly issue a Written decision on the protest. Judicial review of this decision will be available if provided by statute.

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.375, ORS 279C.380, ORS 279C.385 & ORS 279C.460

137-049-0460 Performance and Payment Security; Waiver

(1) **Public Improvement Contracts.** Unless the required performance bond is waived under ORS 279C.380(1)(a), excused in cases of emergency under ORS 279C.380(4), or unless the County exempts a Contract or classes of contracts from the required performance bond and payment bond pursuant to ORS 279C.390, the Contractor shall execute and deliver to the County a performance bond and a payment bond each in a sum equal to the Contract Price for all Public Improvement Contracts. This requirement applies only to Public Improvement Contracts with a value, estimated by the County, of more than \$100,000

or, in the case of Contracts for highways, bridges and other transportation projects, more than \$50,000. See 279C.380(5). Also see LCPR 137-049-0815 and BOLI rules at OAR 839-025-0015 regarding the separate requirement for a Public Works bond.

(2) **Other Construction Contracts.** The County may require performance security for other construction Contracts that are not Public Improvement Contracts. Such requirements will be set forth in the Solicitation Document.

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

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.375, ORS 279C.380 & ORS 279C.390

137-049-0470 Substitute Contractor

If the Contractor provided a performance bond, the County may afford the Contractor's surety the opportunity to provide a substitute contractor to complete performance of the Contract. A substitute contractor shall perform all remaining Contract Work and comply with all terms and conditions of the Contract, including the provisions of the performance bond and the payment bond. Such substitute performance does

not involve the Award of a new Contract and shall not be subject to the competitive Procurement provisions of ORS Chapter 279C.

[Adopted 2005-052 eff 3/1/05]

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

137-049-0490 Foreign Contractor

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]

Stats. Implemented: ORS 279A.120

III. ALTERNATIVE CONTRACTING METHODS

137-049-0600 Purpose

LCPR 137-049-0600 to 137-049-0690 are intended to provide guidance regarding the use of Alternative Contracting Methods for Public Improvement Contracts, as may be directed by a Board under ORS 279C.335. These methods include, but are not limited to, Design-Build, Energy Savings Performance Contract (ESPC) and Construction Manager/General Contractor (CM/GC) forms of contracting.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]

Stats. Implemented: ORS 279C.335, 279A.065 & 351.086

137-049-0610 Definitions for Alternative Contracting Methods

The following definitions shall apply to LCPR 137-049-0600 to 137-049-0690, unless the context requires otherwise:

(1) "**Affiliate**" has the meaning as set forth in ORS 279C.332(1).

(2) "**Alternative Contracting Methods**" means innovative Procurement techniques for

obtaining Public Improvement Contracts, utilizing processes other than the traditional method of Design- Bid-Build (with Award based solely on price, in which a final design is issued with formal Bid documents, construction services are obtained by sealed Bid Awarded to the lowest Responsive, Responsible Bidder, and the Public Improvement project is built in accordance with those documents). In industry practice, such methods commonly include variations of Design-Build contracting, CM/GC forms of contracting and ESPCs, which are specifically addressed in LCPR 137-049-0600 to 137-049-0690. These methods also include other developing techniques, which include, but are not limited to, general "performance contracting," "cost plus time" contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(I)) and "qualifications plus project approach" contracting (as more particularly described in ORS 279C.332(3)(b)(D)(iii)(II)). Procedural requirements for these methods are identified in LCPR 137-049-0600 to 137-049-0690, when the County uses an Alternative Contracting Method in a Procurement that requires an exemption from competitive bidding under ORS 279C.335(2), or in an ESPC procurement that is excepted from competitive bidding under ORS 279.335(1).

(3) "**Construction Manager/General Contractor**" or "**CM/GC**" has the meaning as set forth in ORS 279C.332(2).

(4) "**Construction Manager/General Contractor Method**" or "**CM/GC Method**" means the Alternative Contracting Method which involves the County's selection of a CM/GC to perform CM/GC Services for a Public Improvement project or projects.

(5) "**Construction Manager/General Contractor Services**" or "**CM/GC Services**" has the meaning as set forth in ORS 279C.332(3).

(6) "**Design-Build**" means a form of Procurement that results in a Public Improvement Contract in which the construction Contractor also provides or obtains specified design services, participates on the project team with the County,

and manages both design and construction. In this form of Contract, a single Person provides the County with all of the services necessary to both design and construct the Public Improvement project.

(7) "**Early Work**" means construction services, construction materials and other Work authorized by the County to be performed under the CM/GC Contract in advance of the establishment of the GMP, fixed price or other maximum, not-to-exceed Contract Price for the Public Improvement project. Permissible Early Work shall be limited to early procurement of materials and supplies, early release of Bid or Proposal packages for site development and related activities, and any other advance Work related to important components of the Public Improvement project for which performance prior to establishment of the GMP will materially and positively affect the development or completion of the project.

(8) "**Energy Conservation Measures**" or "**ECMs**" or "**Energy Efficiency Measures**" means, as used in ESPC Procurement, any equipment, fixture or furnishing to be added to or used in an existing building or structure, and any repair, alteration or improvement to an existing building or structure that is designed to reduce energy consumption and related costs, including those costs related to electrical energy, thermal energy, water consumption, waste disposal, and future contract-labor costs and materials costs associated with maintenance of the building or structure. For purposes of LCPR 137-049-0600 to 137-049-0690, use of either or both of the terms "building" or "structure" shall be deemed to include existing energy, water and waste disposal systems connected or related to or otherwise used for the building or structure when such system(s) are included in the Public Improvement project, either as part of the project together with the building or structure, or when such system(s) are the focus of the project. Maintenance services are not Energy Conservation Measures, for purposes of LCPR 137-049-0600 to 137-049-0690.

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

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

(11) "**General Conditions Work**" or "**GC Work**" means a general grouping of project Work required to support construction operations on the project that is not included within the Contractor's overhead or fee.

(12) "**Guaranteed Maximum Price**" or "**GMP**" has the meaning set forth in ORS 279C.332(4), pertaining to procurements for CM/GC Services. For Alternative Contracting Methods other than the CM/GC Method, the total maximum price provided to the County by the Contractor, and accepted by the County, that includes all reimbursable costs of and fees for completion of the Contract Work and any particularly identified contingency amounts, as defined by the Public Improvement Contract.

(13) "**Measurement and Verification**" or "**M & V**" means, as used in ESPC Procurement, the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy-using systems pre-installation and post-installation.

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

(15) "**Qualified Energy Service Company**" or "**ESCO**" means, as used in ESPC Procurement, a company, firm or other legal Person with the following characteristics: demonstrated technical, operational, financial and managerial capabilities to design, install, construct, commission, manage, measure and verify, and otherwise implement Energy Conservation Measures and other Work on building systems or building components that are directly related to the ECMs in existing buildings and structures; a prior record of successfully performing ESPCs on projects involving existing buildings and structures that are comparable to the Public Improvement project under consideration by the County; and the financial strength to effectively guarantee energy savings and performance under the ESPC for the Public Improvement project in question, or the ability to secure necessary financial measures to effectively guarantee

energy savings under an ESPC for that Public Improvement project.

(16) "**Savings**" has the meaning set forth in ORS 279C.337(4), pertaining to CM/GC Services Procurements. For other Alternative Contracting Methods, "Savings" means a positive difference between a Guaranteed Maximum Price or other maximum not-to-exceed Contract Price set forth in a Public Improvement Contract, and the actual cost of the Contractor's performance of the Contract Work payable by the County under the terms of the Contract, including costs for which the County reimburses a Contractor and fees, profits or other payments the Contractor earns.

(17) "**Technical Energy Audit**" means, as used in ESPC Procurement, the initial phase of Personal Services to be performed by an ESCO that includes a detailed evaluation of an existing building or structure, an evaluation of the potential ECMs that could be effectively utilized at the facility, and preparation of a report to the County of the ESCO's Findings during this initial phase of the Work; the term "Technical Energy Audit" can also refer to the report provided by the ESCO at the conclusion of this phase of the Work.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.332, ORS 279C.335 & ORS 279A.065

137-049-0620 Use of Alternative Contracting Methods

(1) **Competitive Bidding Exemptions.** ORS Chapter 279C requires a competitive Bidding process for Public Improvement Contracts unless a statutory exception applies, a class of Contracts has been exempted, or an individual Contract has been exempted, in accordance with ORS 279C.335 and the LCPR. Use of Alternative Contracting Methods may be directed by the Board, however, when use of the Alternative Contracting Method requires an exemption to the prescribed competitive bidding requirement of 279C.335. In any of these circumstances, use of Alternative Contracting Methods must be justified in accordance with the Code and LCPR 137-049-0600 to 137-049-0690. See LCPR 137-049-0630 regarding required Findings and

restrictions on exemptions from the competitive Bidding requirement under ORS 279C.335.

(2) **Energy Savings Performance Contracts.** ESPCs may be exempted from the competitive Bidding process for Public Improvement Contracts pursuant to ORS 279C.335(1)(f), if the County complies with LCPR 137-049-0600 to 137-049-0690 related to the Solicitation, negotiation and contracting for ESPC Work. If those procedures are not followed, an ESPC Procurement may still be exempted from competitive Bidding requirements by following the general exemption procedures within 279C.335.

(3) **Post-Project Evaluation.** ORS 279C.355 requires that the County prepare a formal post-project evaluation of Public Improvement projects in excess of \$100,000 for which the competitive Bidding process was not used. The purpose of this evaluation is to determine whether it was actually in the County's best interest to use an Alternative Contracting Method outside the competitive bidding process. The evaluation must be delivered to the Board within 30 Days of the date the County "accepts" the Public Improvement project, which event is typically defined in the Contract. In the absence of such definition, acceptance of the Public Improvement project occurs on the later of the date of final payment or the date of final completion of the Work. In the absence of such definition, acceptance of the Public Improvement project occurs on the later of the date of final payment or the date of final completion of the Contract Work. ORS 279C.355 describes the timing and content of this evaluation, with three required elements:

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

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

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]

Stats. Implemented: ORS 279C.335, ORS 279A.065, ORS 279C.355 & ORS 351.086

137-049-0630 Findings, Notice and Hearing

(1) **Cost Savings Factors and Other Substantial Benefits Factors.** When Findings are required under ORS 279C.335 to exempt a Contract or class of Contracts from competitive Bidding requirements, the "substantial cost savings" criterion at ORS 279C.335(2)(b) requires consideration of the type, cost, and amount of the Contract, and to the extent applicable, the other factors set forth in 279C.335(2)(b). If a particular factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts, the Board does not need to consider that factor, and the County is not required to address the factor, other than to explain why the factor has no application whatsoever to the particular Public Improvement Contract or class of Public Improvement Contracts.

(2) **Required Information.** The statutory definition of "Findings" at ORS 279C.330(2), which applies to exemptions from competitive Bidding under ORS 279C.335, means the justification for a County conclusion regarding the factors listed in both ORS 279C.335(2)(a) and 279C.335(2)(b) or, in the alternative, both 279C.335(2)(a) and 279C.335(2)(c).

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

(a) Specified Findings that address the factors and other information specifically identified by statute, including, but not limited to, an analysis or reasonable forecast of future cost savings as well as present cost savings and other substantial benefits; and

(b) Additional Findings that address industry practices, surveys, trends, past experiences, evaluations of completed projects required by ORS 279C.355 and related information regarding the expected benefits and drawbacks of partic-

ular Alternative Contracting Methods. To the extent practicable, such Findings shall relate back to the specific characteristics of the Public Improvement project or projects at issue in the exemption request.

(4) **Favoritism and Competition.** The criteria at ORS 279C.335(2)(a) that the exemption is "unlikely to encourage favoritism" or "substantially diminish competition" may be addressed in contemplating the use of Alternative Contracting Methods by specifying the manner in which an RFP process will be utilized, that the Procurement will be formally advertised with public notice and disclosure of the planned Alternative Contracting Method, that competition will be encouraged, that Award will be made based upon identified selection criteria, and that there will be an opportunity to protest that Award.

(5) **Class Exemptions.** In making the Findings supporting a class exemption, the County shall clearly identify the class with respect to its defining characteristics. The class must meet the following requirements:

(a) The class cannot be based on a single characteristic or factor, so that the County directly or indirectly creates a class whereby the County uses, for example, the CM/GC Method for all County Public Improvement projects or all County Public Improvement projects over a particular dollar amount, unidentified future County Public Improvement projects of a particular Work category, or all County Public Improvement projects from a particular funding source such as the sale of bonds; and

(b) The class must include a combination of factors, must be defined by the County through characteristics that reasonably relate to the exemption criteria set forth in ORS 279C.335(2), and must reflect a detailed evaluation of those characteristics so that the class is defined in a limited way that effectively meets the County's objectives while allowing for impartial and open competition, and protecting the integrity of the exemption process. An example of a class that might be permitted under the statute is a series of Public

Improvement projects, such as a specific group of building renovation projects, that:

(A) Involve renovations for a common purpose;

(B) Require completion on a related schedule in order to avoid unnecessary disruption of County operations;

(C) Share common characteristics, such as historic building considerations, the presence of asbestos or other hazardous substances, or the presence of County staff during construction;

(D) Otherwise possess characteristics that meet the requirements of ORS 279C.335(2); and

(E) Otherwise meet the requirements of the Board, as applicable.

(6) **Public Hearing.** Before final adoption of Findings exempting a Public Improvement Contract from the requirement of competitive Bidding, the County shall give notice and hold a public hearing as required by ORS 279C.335(4). The hearing shall be for the purpose of receiving public comment on the County's draft Findings.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]

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

137-049-0640 Competitive Proposals; Procedure

The County may utilize the following RFP process for Public Improvement Contracts, allowing flexibility in both Proposal evaluation and Contract negotiation, only in accordance with ORS 279C.400 to 279C.410 and LCPR 137-049-0600 to 137-049-690, unless other applicable statutes control the County's use of competitive Proposals for Public Improvement Contracts. Also see the subdivision of rules in this division entitled Formal Procurement Rules, LCPR 137-049-0200 to 137-049-0480, and RFP related rules under the Alternative Contracting Methods subdivision at LCPR 137-049-0640 to 137-049-0660. For ESPCs, the following RFP process as further specified in LCPR 137-049-0645, 137-049-0650, 137-049-0660 and 137-049-0680 shall be utilized if the County

desires the Procurement process to be exempt from the competitive Bidding requirements of ORS 279C.335. The RFP process for the Alternative Contracting Methods identified in LCPR 137-049-0600 to 137-049-0690 includes the following steps:

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

(a) Be reasonable estimates based on information available to the County;

(b) Treat all Proposals equitably; and

(c) Recognize that public policy requires that Public Improvements be constructed at the least overall cost to the County. See ORS 279C.305. For ESPC Proposal evaluations, the County may provide in the RFP that qualifications-based evaluation factors will outweigh the County's consideration of price-related factors, due to the fact that prices for the major components of the Work to be performed during the ESPC process contemplated by the RFP will likely not be determinable at the time of Proposal evaluation. For CM/GC Services Proposal evaluations, the County shall comply with ORS 279C.337.

(2) **Evaluation Factors:**

(a) For basic negotiated Public Improvement Contracts where the main justification for utilizing an RFP process is to consider factors other than price, evaluation factors may consist of firm and personnel experience on similar projects, adequacy of equipment and physical plant, sources of supply, availability of key personnel, financial capacity, past performance, safety records, project understanding, proposed methods of construction, proposed milestone dates, references, service, and related matters that affect the cost or quality of the Work.

(b) For CM/GC Contracting, in addition to the factors set forth in subsection (a), evalua-

tion factors may also include the ability to respond to the technical complexity or unique character of the Public Improvement project, the capacity to analyze and propose solutions or approaches to complex project problems, the coordination of multiple disciplines, the time required to commence and complete the Public Improvement, and related matters that affect the cost or quality of the Work.

(c) For Design-Build Contracting, in addition to the factors set forth in subsections (a) and (b), evaluation factors may also include design professional qualifications, specialized experience, preliminary design submittals, technical merit, design-builder team experience and related matters that affect the cost or quality of the Work.

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

the ESCO's project history related to removal from an ESPC project or the inability or unwillingness of the ESCO to complete an ESPC project, the ESCO's M & V capabilities and experience (independently or in cooperation with an independent third-party M & V consultant), the ESCO's ability to explain the unique risks associated with ESPC projects and the assignment of risk in the particular Public Improvement project between the County and the ESCO, the ESCO's equipment performance guarantee policies and procedures, the ESCO's energy savings and cost savings guarantee policies and procedures, the ESCO's project cost guarantee policies and procedures, the ESCO's pricing methodologies, the price that the ESCO will charge for the Technical Energy Audit phase of the Work and the ESCO's fee structure for all phases of the ESPC.

(3) **Contract Negotiations.** Contract terms may be negotiated to the extent allowed by the RFP and LCPR 137-049-0600 to 137-049-0690, provided that the general Work scope remains the same and that the field of competition does not change as a result of material changes to the requirements stated in the Solicitation Document. See LCPR 137-049-0650. Terms that may be negotiated consist of details of Contract performance, methods of construction, timing, assignment of risk in specified areas, fee, and other matters that affect the cost or quality of the Work. For the CM/GC Method, terms that may be negotiated also include the specific scope of pre-construction services, the GC Work, any early Work and other construction Work to be performed by the CM/GC, and any other terms that the County has identified as being subject to negotiation, consistent with the requirements of LCPR 137-049-0690. For ESPC Contracting, terms that may be negotiated also include the scope of preliminary design of ECMs to be evaluated by the parties during the Technical Energy Audit phase of the Work, the scope of services to be performed by the ESCO during the Project Development Plan phase of the Work, the detailed provisions of the Energy Savings Guarantee to be

provided by the ESCO and scope of Work, methodologies and compensation terms and conditions during the design and construction phase and M & V phase of the Work, consistent with the requirements of LCPR 137-049-0680.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.335, ORS 279A.065 & ORS 351.086

137-049-0645 Requests for Qualifications (RFQ)

As provided by ORS 279C.405(1), the County may utilize Requests for Qualifications (RFQs) to obtain information useful in the preparation or distribution of a RFPs. When using RFQs as the first step in a two-step Procurement, in which distribution of the RFPs will be limited to the firms identified as most qualified through their submitted statements of qualification, the County shall first advertise and provide notice of the RFQ in the same manner in which RFPs are advertised, specifically stating that RFPs will be distributed only to the firms selected in the RFQ process. In such cases the County shall also provide within the RFQ a protest provision substantially in the form of LCPR 137-049-0450(5) regarding protests of the Competitive Range. Thereafter, the County may distribute RFPs to the selected firms without further advertisement of the solicitation.

[Adopted 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.405

137-049-0650 Requests for Proposals (RFP)

(1) **Generally.** The use of competitive Proposals must be specially authorized for a Public Improvement Contract under the competitive Bidding requirement of ORS 279C.335, LCPR 137-049-0130, and LCPR 137-049-0600 to 137-049-0690. Also see ORS 279C.337 and ORS 279C.400 to 279C.410 for statutory requirements regarding competitive Proposals, and LCPR 137-049-0640 regarding competitive Proposal procedures.

(2) **Solicitation Documents.** In addition to the Solicitation Document requirements of LCPR 137-049-0200, this rule applies to the requirements for Requests for Proposals. RFP Solicita-

tion Documents shall conform to the following standards:

(a) The County shall set forth selection criteria in the Solicitation Document. Examples of evaluation criteria include price or cost, quality of a product or service, past performance, management, capability, personnel qualification, prior experience, compatibility, reliability, operating efficiency, expansion potential, experience of key personnel, adequacy of equipment or physical plant, financial wherewithal, sources of supply, references and warranty provisions. See LCPR 137-049-0640 regarding Proposal evaluation and evaluation factors. Evaluation factors need not be precise predictors of actual future costs and performance, but to the extent possible, such factors shall be reasonable estimates based on information available to the County. Subject to ORS 279C.410(4), the Solicitation Document may provide for discussions with Proposers to be conducted for the purpose of Proposal evaluation prior to award or prior to establishing any Competitive Range;

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

(c) When the County intends to Award Contracts to more than one Proposer, the County shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will Award. The County shall also include the criteria it will use to determine how the County will endeavor to achieve optimal value, utility and substantial fairness when selecting a particular Contractor to provide goods or

services from those Contractors Awarded Contracts.

(3) Evaluation of Proposals:

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

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

(B) *Limited Negotiation*. If the County did not permit negotiation in its Request for Proposals, the County may, nonetheless, negotiate with the highest-ranked Proposer, but may then only negotiate the:

- (i) Statement of Work; and
- (ii) Contract Price as it is affected by negotiating the statement of Work. The process for discussions or negotiations that is outlined and explained in subsections (5)(b) and (6) of this rule does not apply to this limited negotiation.

(b) Discussions; Negotiations. If the County permitted discussions or negotiations in the Request for Proposals, the County shall evaluate Proposals and establish the Competitive Range, and may then conduct discussions and negotiations in accordance with this rule.

(A) If the Solicitation Document provided that discussions or negotiations may occur at County's discretion, the County may forego discussions and negotiations and evaluate all Proposals in accordance with this rule.

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

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

(4) Competitive Range; Protest; Award.

(a) Determining Competitive Range.

(A) If the County does not cancel the Solicitation after the Opening, the County shall evaluate all Proposals in accordance with the evaluation criteria set forth in the RFP. After evaluation of all Proposals in accordance with the criteria set forth in the RFP, the County shall determine and rank the Proposers based on the County's scoring and determine in Competitive Range.

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

(b) Protesting Competitive Range. The County shall provide notice to all Proposers identifying Proposers in the Competitive Range. A Proposer that is not within the Competitive Range may protest the County's evaluation and determination of the Competitive Range in accordance with LCPR 137-049-0450.

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

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

(i) An unsuccessful Proposer may protest the County's intent to Award in accordance with LCPR 137-049-0450.

(ii) After the protest period provided in accordance with LCPR 137-049-0450 expires, or after the County has provided a final response to any protest, whichever date is later, the County shall commence final Contract negotiations with the highest-ranked Proposer in the Competitive Range; or

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

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

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

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

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

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

(b) Conducting Discussions. The County may conduct discussions with each Proposer in the Competitive Range as necessary to meet the intent of this Section (5), but it need not conduct the same amount of discussions with each Proposer. The County may terminate discussions with

any Proposer in the Competitive Range at any time. However, the County shall offer all Proposers in the Competitive Range the opportunity to discuss their Proposals with the County before the County notifies Proposers, pursuant to subsection (C) below, of the date and time that revised Proposals will be due.

(A) In conducting discussions, the County:

- (i) Shall treat all Proposers fairly and shall not favor any Proposer over another;
- (ii) Shall not discuss other Proposers' Proposals;
- (iii) Shall not suggest specific revisions that a Proposer should make to its Proposal, and shall not otherwise direct the Proposer to make any specific revisions to its Proposal.

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

- (i) Continue discussions with a particular Proposer;
- (ii) Terminate discussions with a particular Proposer and continue discussions with other Proposers in the Competitive Range; or
- (iii) Conclude discussions with all remaining Proposers in the Competitive Range and provide notice to the Proposers in the Competitive Range to submit revised Proposals.

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

Proposers must submit revised Proposals by the date and time set forth in the County's notice.

(A) Upon receipt of the revised Proposals, the County shall score the revised Proposals based upon the evaluation criteria set forth in the Request for Proposals and rank the revised Proposals based on the County's scoring.

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

(d) Intent to Award; Protest. The County shall provide notice to all Proposers in the Competitive Range of the County's intent to Award the Contract. An unsuccessful Proposer may protest the County's intent to Award in accordance with LCPR 137-049-0450. After the protest period provided in accordance with that rule expires, or after the County has provided a final response to any protest, whichever date is later, the County shall commence final Contract negotiations.

(6) Negotiations:

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

- (A) Initial determination of the Competitive Range; or
- (B) Conclusion of discussions with all Proposers in the Competitive Range and evaluation of revised Proposals.

(b) Conducting Negotiations; Scope. The County may negotiate:

- (A) The statement of Work;
- (B) The Contract Price as it is affected by negotiating the statement of Work; and
- (C) Any other terms and conditions reasonably related to those expressly authorized for negotiation in the RFP. Accordingly, Proposers shall not submit, and County shall not accept, for negotiation any alternative terms and conditions that are not reasonably related to those expressly authorized for negotiation in the RFP.

(c) Continuing Negotiations. If the County terminates negotiations with a Proposer, the County may then commence negotiations with the next highest scoring Proposer in the Competitive Range, and continue the process described in this rule until the County has:

(A) Determined to Award the Contract to the Proposer with whom it is currently negotiating; or

(B) Completed one round of negotiations with all Proposers in the Competitive Range, unless the County provided for more than one round of discussions or negotiations in the RFP, in which case the County may proceed with any authorized further rounds of discussions or negotiations.

(d) Terminating Discussions or Negotiations. At any time during discussions or negotiations that the County conducts in accordance with this rule, the County may terminate discussions or negotiations with the highest-ranked Proposer, or the Proposer with whom it is currently discussing or negotiating if the County reasonably believes that:

(A) The Proposer is not discussing or negotiating in good faith; or

(B) Further discussions or negotiations with the Proposer will not result in the parties agreeing to the terms and conditions of a final Contract in a timely manner.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]

Stats. Implemented: ORS 279C.400 to 279C.410

137-049-0660 RFP Pricing Mechanisms

(1) An RFP may result in a lump-sum Contract Price, as in the case of competitive Bidding. Alternatively, a cost reimbursement Contract with a GMP, or some other maximum price specified in the Contract, may be negotiated.

(2) Economic incentives or disincentives may be included to reflect the stated County purposes related to time of completion, safety or other Public Contracting objectives, including, but not limited to, total least cost mechanisms such as life cycle costing.

(3) A Guaranteed Maximum Price may be used as the pricing mechanism for CM/GC where a total Contract Price is provided in the design phase in order to assist the County in determining whether the project scope is within the County's budget, and allowing for design changes during preliminary design rather than after final design Work has been completed.

(a) If the collaborative process described in this Section (3) is successful, the Contractor shall propose a final GMP, which may be accepted by the County and included within the Contract.

(b) If the collaborative process described in this Section (3) is not successful, and no mutually agreeable resolution on the GMP for the Public Improvement project can be achieved with the Contractor, then the County shall terminate the Contract. The County may then proceed to negotiate a new Contract (and GMP) with the firm that was next ranked in the original selection process, or employ other means for continuing the Public Improvement project under ORS Chapter 279C.

(4) When cost reimbursement Contracts are utilized, regardless of whether a GMP is included, the County shall provide for audit controls that will effectively verify rates and ensure that costs are reasonable, allowable and properly allocated.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]

Stats. Implemented: ORS 279C.335

137-049-0670 Design-Build Contracts

(1) **General**. The Design-Build Procurement process, as defined at LCPR 137-049-0610(3), has technical complexities that are not readily apparent. The County may seek the assistance of knowledgeable staff or consultants who are experienced in its use. In order to use the Design-Build process, the County must be able to reasonably anticipate the following types of benefits:

(a) Obtaining, through a Design-Build team, engineering design, plan preparation, value engineering, construction engineering, construction, quality control and required documentation as a fully integrated function with a single point of responsibility;

(b) Integrating value engineering suggestions into the design phase, as the construction Contractor joins the project team early with design responsibilities under a team approach, with the potential of reducing Contract changes;

(c) Reducing the risk of design flaws, misunderstandings and conflicts inherent in construction Contractors building from designs in which they have had no opportunity for input, with the potential of reducing Contract claims;

(d) Shortening project time as construction activity (early submittals, mobilization, subcontracting and advance Work) commences prior to completion of a "Biddable" design, or where a design solution is still required (as in complex or phased projects); or

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

(2) **Authority.** The County shall utilize the Design-Build Procurement process in accordance with the requirements of LCPR 137-049-0600 to 137-049-0690. See particularly LCPR 137-049-0620 on "Use of Alternative Contracting Methods" and LCPR 137-049-0680 pertaining to ESPCs.

(3) **Selection.** Design-Build selection criteria may include those factors set forth in LCPR 137-049-0640(2)(a), (b) and (c).

(4) **Qualifications-Based Selection Process Inapplicable.** Because the value of construction services predominates the Design-Build Procurement process, the qualifications-based selection process mandated by ORS 279C.110, and further defined in LCPR 137-048, in obtaining Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, Land Surveying, or Related Services is not applicable.

(5) **Licensing.** If a Design-Build Contractor is not an Oregon licensed design professional, the County shall require that the Design-Build Contractor disclose in its Written Offer: 1) that it is not an Oregon licensed design professional, and 2) the identity of the Oregon licensed design profes-

sional(s) who will provide design services. See ORS 671.030(5) regarding the practice of architectural services, and ORS 672.060(11) regarding the practice of engineering services, that are appurtenant to construction services.

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

(7) **Contract Requirements.** The County shall conform their Design-Build Procurement practices to the following requirements:

(a) Design Services. The level or type of design services required will be clearly defined within the Procurement documents and Contract, along with a description of the level or type of design services previously performed for the Public Improvement project. The services to be performed will be clearly delineated as either design Specifications or performance standards, and performance measurements must be identified.

(b) Professional Liability. The Contract shall clearly identify the liability of design professionals with respect to the Design-Build Contractor and the County, as well as requirements for professional liability insurance.

(c) Risk Allocation. The Contract shall clearly identify the extent to which the County requires an express indemnification from the Design-Build Contractor for any failure to perform, including professional errors and omissions,

design warranties, construction operations and faulty Work claims.

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

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

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.335, ORS 279A.065, ORS 279C.110 & ORS 351.086

137-049-0680 Energy Savings Performance Contracts (ESPC)

(1) **Generally.** LCPR 137-049-0600 to 137-049-0690 provides for a limited, efficient method for the County to enter into ESPCs outside the competitive Bidding requirements of ORS 279C.335 for existing buildings or structures, but not for new construction. If the County chooses not to utilize the ESPC Procurement method in LCPR 137-049-0600 to 137-049-0690, the County may still enter into an ESPC by complying with the competitive Bidding exemption process set forth in ORS 279C.335, or by otherwise complying with the Procurement requirements applicable to a contracting agency not subject to all the requirements of ORS 279C.335.

(2) **ESPC Contracting Method.** The ESPC Procurement process, as defined at LCPR 137-049-0610(6), has unique technical complexities associated with the determination of what ECMs are feasible for the County, as well as the additional technical complexities associated with a Design-Build Contract. The County may seek

the assistance of knowledgeable staff or consultants who are experienced in its use. In order to utilize the ESPC contracting process, the County must be able to reasonably anticipate one or more of the following types of benefits:

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

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

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

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

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

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

(g) Preliminary design development and implementation and an Energy Savings Guarantee of ECMs for an existing County building or structure as a distinct part of a major remodel that is being performed under a separate Contract; and

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

(3) **Authority.** The County shall utilize the ESPC Procurement process only in accordance with the requirements of LCPR 137-049-0600 to 137-049-0690.

(4) **No Findings Required.** The County is required only to comply with the ESPC Procurement procedures set forth in LCPR 137-049-0600 to 137-049-0690 for the ESPC to be exempt from the competitive Bidding processes of ORS 279C.335. No Findings are required for an ESPC to be exempt from the competitive Bidding process for Public Improvement Contracts pursuant to ORS 279C.335, unless the County is subject to the requirements of ORS 279C.335 and chooses not to comply with the ESPC Procurement procedures set forth in LCPR 137-049-0600 to 137-049-0690.

(5) **Selection.** ESPC selection criteria may include those factors set forth in LCPR 137-049-0640(2)(a), (b), (c) and (d). Because the Energy Savings Guarantee is a fundamental component in the ESPC Procurement process, Proposers must disclose in their Proposals the identity of any Person providing (directly or indirectly) any Energy Savings Guarantee that may be offered by the successful ESCO during the course of the performance of the ESPC Work, along with any financial statements and related information pertaining to any such Person.

(6) **Qualifications-Based Selection Process Inapplicable.** Because the value of construction services predominates in the ESPC Procurement process, the qualifications-based selection process mandated by ORS 279C.110, and further defined in LCPR 137-048, in obtaining Architectural, Engineering, Photogrammetric Mapping, Transportation Planning, Land Surveying, or Related Services is not applicable.

(7) **Licensing.** If the ESCO is not an Oregon licensed design professional, the County shall require that the ESCO disclose in the ESPC: 1) that it is not an Oregon licensed design professional, and 2) the identity of the Oregon licensed design professional(s) who will provide design services. See ORS 671.030(5) regarding the practice of architectural services, and ORS 672.060(11) regarding the practice of engineering services that are appurtenant to construction services.

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

(9) **Contracting Requirements.** The County shall conform their ESPC Procurement practices to the following requirements:

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

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

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

- (i) The Technical Energy Audit phase of the Work;
- (ii) The Project Development Plan phase of the Work;
- (iii) A third phase of the Work that constitutes a Design-Build Contract, during which the ESCO completes any plans and Specifications required to implement the ECMs that have been agreed to by the parties to the ESPC, and the ESCO performs all construction, commissioning, construction administration and related Personal Services or Work to construct the Public Improvement project; and
- (iv) A final phase of the Work, whereby the ESCO, independently or in cooperation with an independent consultant hired by the County, performs M & V services to ensure that the Energy Savings Guarantee identified by the ESCO in the earlier phases of the Work, and agreed to by the parties, has been fully achieved.

(b) Design-Build Contracting Requirements in ESPCs. At the point in the ESPC when the parties enter into a binding Contract that constitutes a Design-Build Contract, the County shall conform its Design-Build contracting practices to the Design-Build contracting requirements set forth in LCPR 137-049-0560(7).

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

(A) A fixed price for each phase of the Personal Services and Work to be provided by the ESCO;

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

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

(d) Permitted ESPC Scope of Work. The scope of Work under the ESPC is restricted to implementation and installation of ECMs, as well as other Work on building systems or building components that are directly related to the ECMs, and that, as an integrated unit, will pay for themselves over the useful life of the ECMs installed. The permitted scope of Work for ESPCs resulting from a Solicitation under LCPR 137-049-0600 to 137-049-0690 does not include maintenance services for the project facility.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.335, ORS 279A.065, ORS 279C.110 & ORS 351.086

137-049-0690 Construction Manager/General Contractor (CM/GC)

(1) **General.** The CM/GC Method is a technically complex project delivery system. The County shall use this Procurement method only with the assistance of legal counsel with substantial experience and necessary expertise in using the CM/GC Method, as well as knowledgeable staff, consultants, or both who have a demonstrated capability of managing the CM/GC process in the necessary disciplines of engineering, construction scheduling and cost control, accounting, legal, Public Contracting and project management. Unlike the Design-Build Procurement process, the CM/GC Method does not contemplate a "single point of responsibility" under which the CM/GC is responsible for successful completion of all Work related to a performance Specification. The CM/GC has defined contract obligations, including responsibilities as part of the project team along with the County and its design professional(s). In order to utilize the CM/GC Method, the County must be able to reasonably anticipate the following types of benefits:

(a) **Time Savings.** With the CM/GC Method, the Public Improvement has significant schedule ramifications, such that concurrent design and construction are necessary in order to meet critical deadlines and shorten the overall duration of construction. The County may consider operational and financial data that show significant savings or increased opportunities for generating revenue as a result of early completion, as well as less disruption to public facilities as a result of shortened construction periods;

(b) **Cost Savings.** With the CM/GC Method, early CM/GC input during the design process is expected to contribute to significant cost savings. The County may consider value engineering, building systems analysis, life cycle costing analysis, and construction planning that lead to cost savings. The County shall specify any special factors influencing this analysis, including high rates of inflation, market uncertainty due to material and labor fluctuations or scarcities, and

the need for specialized construction expertise due to technical challenges; or

(c) **Technical Complexity.** With the CM/GC Method, the Public Improvement presents significant technical complexities that are best addressed by a collaborative or team effort between the County, its design professionals, any County project management or technical consultants, and the CM/GC, in which the CM/GC will assist in addressing specific project challenges through pre-construction Personal Services. The County may consider the need for CM/GC input on issues such as operations of the facility during construction, tenant occupancy, public safety, delivery of an early budget or GMP, financing, historic preservation, difficult remodeling projects, and projects requiring complex phasing or highly coordinated scheduling.

(2) **Authority.** The County shall use the CM/GC Method only in accordance with the requirements of these Division 49 rules and ORS 279C.337, when a competitive Bidding exemption is approved. See particularly LCPR 137-049-0600 on "Purpose" and LCPR 137-049-0620 on "Use of Alternative Contracting Methods".

(3) **Selection.** CM/GC selection criteria may include those factors set forth above in LCPR 137-049-0640(2)(b).

(4) **Basis for Payment.** The CM/GC Method adds specified construction manager Personal Services to traditional general contractor Work, requiring full Contract performance within a negotiated GMP, fixed Contract Price, or other maximum Contract Price. For a GMP pricing method, the basis for payment is reimbursable direct costs as defined under the Contract, plus a fee constituting full payment for Work and Personal Services rendered, which together shall not exceed the GMP. See GMP definition at LCPR 137-049-0610 and Pricing Mechanisms at LCPR 137-049-0660.

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

(a) Nature of the Initial CM/GC Services Contract Document. A solicitation for CM/GC Services is a Procurement for a Public Improvement, since the scope of the Procurement includes not only pre-construction Personal Services to be performed by the CM/GC, but also construction Work that is expected to result in a completed Public Improvement. In the traditional CM/GC Services contracting approach, the text of the resulting CM/GC Services Contract will include comprehensive contract provisions that will not only fully govern the relationship between the County and the CM/GC for the pre-construction Personal Services, but will also include the general contract provisions that will control the CM/GC's providing of the construction Work necessary to complete the project (with any remaining necessary construction-related contractual provisions being added through Early Work amendments to the Contract, a GMP amendment to the Contract, or, if necessary, a conventional amendment to the Contract). The traditional CM/GC Services contracting approach, however, also contemplates that the County will only authorize the CM/GC to perform the pre-construction Personal Services when the Contract is first executed unless construction Work is specifically included in the initial CM/GC Contract. Under this approach, the construction phase or phases of the CM/GC project are not yet authorized and the Contract only becomes a Public Improvement Contract once the parties amend the Contract, through an Early Work or a GMP amendment, to authorize the construction of a portion of the project or the entire project. See also OAR 839-025-0020, regarding the Bureau of Labor and Industries' determination of when a Contract for CM/GC Services becomes a Public Works Contract for purposes of paying prevailing wage rates for construction Work under the CM/GC Contract.

(b) Setting the GMP. The GMP, fixed Contract Price or other maximum Contract Price shall be set at an identified time consistent with industry practice, after supporting information

reasonably considered necessary to its use has been developed, which will normally take place by the end of the design development phase of the project. The supporting information for the GMP shall define with particularity both what Personal Services and construction Work are included and excluded from the GMP, fixed Contract Price, or other maximum Contract Price. A set of project drawings and Specifications shall be produced establishing the scope of construction Work contemplated by the GMP, fixed Contract Price, or other maximum Contract Price.

(c) Adjustments to the GMP, Fixed Contract Price or Other Maximum Contract Price. The Contract shall clearly identify the standards or factors under which changes or additional construction Work will be considered outside of the Work scope that warrants an increase in the GMP, fixed Contract Price, or other maximum Contract Price, as well as criteria for decreasing the GMP, fixed Contract Price, or other maximum Contract Price. The GMP, fixed Contract Price, or other maximum Contract Price shall not be increased without a concomitant increase to the scope of the Work defined at the establishment of the GMP, fixed Contract Price, or other maximum Contract Price, or most recent amendment to the GMP, fixed Contract Price, or other maximum Contract Price. An increase to the scope of the Work may take the form of conventional additions to the project scope, as well as corrections to the Contract terms and conditions, additions to insurance coverage required by the County and other changes to the Work.

(d) Cost Savings. The Contract shall clearly identify the disposition of any cost savings resulting from completion of the Work below the GMP, fixed Contract Price or other maximum Contract Price; that is, under what circumstances, if any, the CM/GC might share in those cost savings, or whether they accrue only to the County's benefit. Unless there is a clearly articulated reason for sharing the cost savings set forth in the Contract, the Cost Savings must accrue to the County.

(e) Cost Reimbursement. The Contract shall clearly identify what items or categories of items are eligible for cost reimbursement within the GMP, fixed Contract Price or other maximum Contract Price, including any category of GC Work costs, and may also incorporate a mutually-agreeable cost-reimbursement standard.

(f) Audit. Cost reimbursements shall be made subject to final audit adjustment, and the Contract shall establish an audit process to ensure that Contract costs are allowable, properly allocated, and reasonable.

(g) Fee. Compensation for the CM/GC's Personal Services and construction Work, where the Contract uses a GMP, shall include a fee that is inclusive of profit, overhead, and all other indirect or non-reimbursable costs. Costs determined to be included within the fee should be expressly defined in the Contract terms and conditions at the time the County selects the CM/GC. The fee, which may be expressed as either a fixed dollar amount or as a proposed percentage of all reimbursable costs, shall be identified during and become an element of the selection process. It shall subsequently be expressed as a fixed amount for particular construction Work authorized to be performed, when Early Work is added to the Contract through an amendment and when the GMP is established. The CM/GC fee does not include any fee paid to the CM/GC for performing pre-construction services during a separate pre-construction phase.

(h) Incentives. The Contract shall clearly identify any economic incentives, the specific criteria that apply, and their relationship to other financial elements of the Contract (including the GMP, fixed Contract Price or other maximum Contract Price).

(i) Controlled Insurance Programs. For Public Improvement projects where an owner-controlled or contractor-controlled insurance program is permitted under ORS 737.602, the Contract will clearly identify whether an owner-controlled or contractor-controlled insurance program is anticipated or allowable. If so, the

Contract shall clearly identify (1) anticipated cost savings from reduced premiums, claims reductions, and other factors, (2) the allocation of cost savings, and (3) safety responsibilities and/or incentives.

(j) Early Work. The RFP shall clearly identify, whenever feasible, the circumstances under which any Early Work may be authorized and undertaken for compensation prior to establishing the GMP, fixed Contract Price or other maximum Contract Price.

(k) Subcontractor Selection. Subcontracts under the Contract are not Public Contracts within the meaning of the Code. However, the Contract must include provisions that clearly meet the requirements of ORS 279C.337(3) and other County requirements. Within the scope of ORS 279C.337(3), the CM/GC's subcontractor selection process must meet the following parameters:

(A) Absent a Written justification prepared by the CM/GC and approved by the County as more particularly provided for in this Section, the CM/GC's subcontractor selection process must be "competitive", meaning that the process should include publicly-advertised subcontractor solicitations and be based on a low-bid competitive method, a low-quote competitive method for contracts in a specified dollar range agreeable to the County, or a method whereby both price and qualifications of the subcontractors are evaluated in a competitive environment, consistent with the RFP and Contract requirements;

(B) When the subcontractor selection process for a particular Work package will not be "competitive" as provided for in this Section, the process must meet the following requirements:

(i) The CM/GC must prepare and submit a Written justification to the County, explaining the project circumstances that support a non-competitive subcontractor selection process for a particular Work package, including, but not

limited to, Emergency circumstances, the CM/GC's need to utilize a key subcontractor member of the CM/GC's project team consistent with the CM/GC's project Proposal, the need to meet other specified Contract requirements, the continuation or expansion of an existing subcontractor agreement that was awarded through a "competitive process" along with facts supporting the continuation or expansion of the subcontractor agreement, or a "sole source" justification;

- (ii) For a "sole source" selection of a subcontractor to proceed, the County must evaluate the Written justification provided by the CM/GC and must find that critical project efficiencies require utilization of labor, services or materials from one subcontractor; that technical compatibility issues on the project require labor, services or materials from one subcontractor; that particular labor, services or materials are needed as part of an experimental or pilot project or as part of an experimental or pilot aspect of the project; or that other project circumstances exist to support the conclusion that the labor, services or materials are available from only one subcontractor;
- (iii) The CM/GC must provide an independent cost estimate for the Work package that will be subject to the

non-competitive process, if required by the County;

- (iv) The CM/GC must fully respond to any questions or comments submitted to the CM/GC by the County; and
- (v) The County must approve the CM/GC's use of the non-competitive subcontractor selection process prior to the CM/GC's pursuit of the non-competitive process.

(C) A competitive selection process may be preceded by a publicly advertised subcontractor pre-qualification process, with only those subcontractors meeting the pre-qualification requirements being invited to participate in the later competitive process through which the CM/GC will select the subcontractor to perform the construction Work described in the selection process;

(D) If the CM/GC, or an affiliate or subsidiary of the CM/GC, will be included in the subcontractor selection process to perform particular construction Work on the project, the CM/GC must disclose that fact in the selection process documents and announcements. The Contract must also identify the conditions, processes and procedures the CM/GC will utilize in that competitive process in order to make the process impartial, competitive and fair, including but not limited to objective, independent review and opening of bids or proposals for the elements of Work involved, by a representative of the County or another independent third party.

(1) Subcontractor Approvals and Protests. The Contract shall clearly establish whether the County must approve subcontract awards, and to what extent, if any, the County will resolve or be involved in resolution of protests of the CM/GC's selection of subcontractors and suppliers. The procedures and reporting mechanisms related to the resolution of subcontractor and supplier protests shall be established in the Contract with

certainty, including the CM/GC's roles and responsibilities in this process and whether the CM/GC's subcontracting records are considered to be public records. In any event, the County shall retain the right to monitor the subcontracting process in order to protect the County's interests and to confirm the CM/GC's compliance with the Contract and with applicable statutes, administrative rules and other legal requirements.

(m) CM/GC Self-Performance or Performance by CM/GC Affiliates or Subsidiaries Without Competition. Consistent with the requirements of ORS 279C.337(3)(c), the Contract must establish the conditions under which the CM/GC or an Affiliate or subsidiary of the CM/GC may perform elements of the construction Work without competition from subcontractors, including, for example, job-site GC Work. Other than for GC Work, in order for the CM/GC or an Affiliate or subsidiary of the CM/GC to perform elements of the construction Work without competition from subcontractors, the CM/GC must provide, or must have included in the CM/GC's RFP Proposal to perform CM/GC Services for the project, a detailed proposal for performance of the Work by the CM/GC or an affiliate or subsidiary of the CM/GC. If required by the County, the CM/GC's Proposal to perform the construction Work be supported by at least one independent cost estimate prior to the Work being included in the Contract.

(n) Unsuccessful Subcontractor Briefing. ORS 279C.337(3)(e) is designed to allow a subcontractor who was not selected by the CM/GC to perform a particular element of the construction Work to obtain specific information from the CM/GC, and meet with the CM/GC to discuss the subcontractor qualification and selection process involved and the CM/GC's subcontractor selection decisions, in order to better understand why the subcontractor was not successful in being selected to perform the particular element of the Work and to improve the subcontractor's substantive qualifications or the subcontractor's methods in competing for elements of the Work for the

particular project involved, or for future projects. The briefing meetings may be held with individual subcontractors or, if the subcontractors agree, in groups of subcontractors, with those groups established by bid package or other designation agreed to by the County and the CM/GC. Nevertheless, the CM/GC is not obligated to provide this briefing opportunity unless the CM/GC receives a Written request from a subcontractor to discuss the subcontractor qualification and selection process involved. Unless the County and the CM/GC agree on a different schedule, the CM/GC Contract should include provisions:

(A) Allowing a subcontractor 60 days from the CM/GC's notice of award of a subcontract for a particular Work package to request, in Writing, a post-selection meeting with the CM/GC under this Section; and

(B) Requiring the CM/GC to set a meeting with the subcontractor under this Section within 45 days of the subcontractor's Written request.

(o) Performance and Payment Bonds. Provided no construction Work is included with the pre-construction services to be performed under the initial form of the CM/GC Contract, no performance bond or payment bond is required to be provided by the CM/GC at the time of Contract signing, consistent with ORS 279C.380. Once construction Work is included in the Contract and authorized by the County to be performed by the CM/GC, however, the CM/GC must provide a performance bond and payment bond each in the full amount of any Early Work to be performed by the CM/GC, or the full amount of the GMP, fixed Contract Price, or other maximum Contract Price, as applicable. Furthermore, in the event additional Early Work is added to the CM/GC Contract after the initial Early Work or in the event an amendment to the CM/GC Contract is made so that the GMP, fixed Contract Price, or other maximum Contract Price must be increased, the performance bond and the payment bond must each be increased in an amount equal to the additional Early

Work or the increased GMP, fixed Contract Price, or other maximum Contract Price.

(p) Independent Review of CM/GC Performance; Conflicts of Interest. If the County requires independent review, monitoring, inspection or other oversight of a CM/GC's performance of pre-construction Personal Services, construction Work, or both pre-construction Personal Services and construction Work, the County must obtain those independent review services from a Contractor independent of the CM/GC, the CM/GC's affiliates, and the CM/GC's subcontractors, pursuant to the requirements of ORS 279C.307. However, ORS 279C.307 does not prohibit the following:

(A) The CM/GC's performance of both pre-construction Personal Services and construction Work that are included within the definition of CM/GC Services, consistent with ORS 279C.307(2); or

(B) The CM/GC's performance of internal quality control services, quality assurance services, or other internal peer review of CM/GC work product that is intended to confirm the CM/GC's performance of the CM/GC Contract according to its terms.

(q) Socio-Economic Programs. The Contract shall clearly identify conditions relating to any required socio-economic programs (such as Affirmative Action or Prison Inmate Labor Programs), including the manner in which such programs affect the CM/GC's subcontracting requirements, the enforcement mechanisms available, and the respective responsibilities of the CM/GC and the County.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]
Stats. Implemented: ORS 297C.335, ORS 279C.337, & ORS 279C.380(2)

IV. CONTRACT PROVISIONS

137-049-0800 Required Contract Clauses

Except as provided by LCPR 137-049-0150 and 137-049-0160, the County shall include in all Solicitation Documents for Public Improvement Contracts all of the ORS Chapter 279C required

Contract clauses, as set forth in the checklist contained in LCPR 137-049-0200(1)(c) regarding Solicitation Documents. The following series of rules provide further guidance regarding particular Public Contract provisions.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 297C.505 to ORS 279C.545 & ORS 279C.800 to 279C.870

137-049-0810 Waiver of Delay Damages Against Public Policy

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.315

137-049-0815 BOLI Public Works Bond

Pursuant to ORS 279C.830(2), the Specifications for every Public Works Contract shall contain a provision stating that the Contractor and every subcontractor must have a Public Works bond filed with the Construction Contractors Board before starting Work on the Public Improvement project, unless otherwise exempt. This bond is in addition to performance bond and payment bond requirements. See BOLI rule at OAR 839-025-0015.

[Adopted 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.830

137-049-0820 Retainage

(1) **Withholding of Retainage.** The County shall not retain an amount in excess of five percent of the Contract Price for Work completed. If the Contractor has performed at least 50 percent of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written approval, the County may, in its discretion, reduce

or eliminate retainage on any remaining progress payments. The County shall respond to all such applications within a reasonable time. When the Contract Work is 97-1/2 percent completed, the County may, at its discretion and without application by the Contractor, reduce the retained amount to 100 percent of the value of the remaining unperformed Contract Work. The County may at any time reinstate retainage. Retainage shall be included in the final payment of the Contract Price.

(2) **Cash Retainage - Contract Price \$500,000 or Less.** When the Contract Price for a Public Improvement Contract is \$500,000 or less, the County may reserve as retainage from any progress payment an amount not to exceed five percent, pursuant to ORS 279C.570(7). If the County chooses to reserve retainage, the County shall hold all retained moneys in a County fund or account, and interest is not required to accrue on the retained moneys.

(3) **Cash Retainage - Contract Price in Excess of \$500,000.** When the Contract Price for a Public Improvement Contract exceeds \$500,000, the County shall, in the ordinary course, deposit cash retainage in an amount not to exceed five percent from any progress payment due under the Public Improvement Contract into an interest-bearing escrow account, pursuant to ORS 279C.570(2) [House Bill 2415 (2019 Oregon Laws, Chapter 486)]. The Contractor under the Public Improvement Contract is entitled to receive interest on the retained moneys from the date the Contractor's related payment request is fully approved by the County until the date the retained moneys are paid by the County to the Contractor. For purposes of this Section, a payment of retainage is deemed to be "paid" by the County when the payment is transmitted to the Contractor, or otherwise applied against an obligation of the Contractor under the Public Improvement Contract.

(4) **Alternatives In Lieu of Cash Retainage.** Unless the County reserves an amount as retainage finds in Writing that accepting bonds,

securities, or other instruments described in part (a) of this Section or a surety bond described in part (b) of this Section poses an extraordinary risk that is not typically associated with the bonds, securities, other instruments or surety bond, as applicable, the County shall, in lieu of withholding moneys from payment, accept from the Contractor:

(a) Bonds, securities or other instruments that are deposited and accepted as provided in subsection (6)(a) of this rule; or

(b) A surety bond deposited as provided in subsection (6)(b) of this rule.

(5) **Deposit in Interest-bearing Accounts.** Upon election of the Contractor and when the Contract Price in the Public Improvement Contract is \$500,000 or less, the County shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the County. Earnings on such an account shall accrue on the cash retainage from the date the Contractor's related payment request is fully approved by the County until the date the retained moneys are paid by the County to the Contractor. For purposes of this Section, a payment of retainage is deemed to be "paid" by the County when the payment is transmitted to the Contractor, or otherwise applied against an obligation of the Contractor under the Public Improvement Contract. When the Contractor makes an election for deposit of retainage into an interest-bearing account and the Contract Price in the Public Improvement Contract exceeds \$500,000, the Contractor's election shall be satisfied by the County's establishment of an interest-bearing escrow account, pursuant to ORS 279C.570(2) [House Bill 2415 (2019 Oregon Laws, Chapter 486)].

(6) **Alternatives In Lieu of Cash Retainage - Requirements.** In lieu of cash retainage to be held by the County, the Contractor may substitute one of the following:

(a) Deposit of bonds, securities or other instruments.

(A) The Contractor may deposit bonds, securities or other instruments with the County or in any bank or trust company to be held for the benefit of the County. If the County accepts the deposit, the County shall reduce the cash retainage by an amount equal to the value of the bonds and securities, and reimburse the excess to the Contractor.

(B) Bonds, securities or other instruments deposited or acquired in lieu of cash retainage must be of a character approved by the County, which may include, without limitation:

- (i) Bills, certificates, notes or bonds of the United States.
- (ii) Other obligations of the United States or agencies of the United States.
- (iii) Obligations of a corporation wholly owned by the Federal Government.
- (iv) Indebtedness of the Federal National Mortgage Association.
- (v) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.
- (vi) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

(C) Upon the County's determination that all requirements for the protection of the County's interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu of retainage.

(b) Deposit of Surety Bond. The County may, at its discretion, allow the Contractor to deposit a surety bond in a form acceptable to the County in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond shall accept surety bonds from its subcontractors and suppliers in lieu of retainage. In such cases, retainage shall be reduced by an amount

equal to the value of the bond, and the excess shall be reimbursed.

(7) **Recovery of costs**. Pursuant to ORS 279A.560(3), the County may recover from the Contractor all additional costs incurred in the proper handling of retainage alternatives requested by the Contractor, whether a request for the deposit of bonds, securities, or other instruments in lieu of cash retainage, a request for a surety bond in lieu of cash retainage or an election for an interest-bearing account. If the County incurs costs associated with establishing a fund or account under Section (2) of this rule, or establishing an interest-bearing escrow account under Section (3) of this rule, the County is not permitted to recover such costs from the Contractor.

(8) **Additional Retainage When Certified Payroll Statements Not Filed**. Pursuant to ORS 279C.845(7), if a Contractor is required to file certified payroll statements and fails to do so, the County shall retain 25 percent of any amount earned by the Contractor on a Public Works Contract until the Contractor has filed such statements with the County. The County shall pay the Contractor the amount retained under this provision within 14 days after the Contractor files the certified statements, regardless of whether a subcontractor has filed such statements (but see 279C.845(1) regarding the requirement for both Contractors and subcontractors to file certified statements with the County). See BOLI rule at OAR 839-025-0010.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]
Stats. Implemented: ORS 279C.560, ORS 279C.570, ORS 701.420, & OL 2019 ch 486

137-049-0830 Contractor Progress Payments

(1) **Request for Progress Payments**. Unless the Contract requires otherwise, each month the Contractor shall submit to the County its Written request for a progress payment based upon an estimated percentage of Contract completion. At the County's discretion, this request may also include the value of material to be incorporated in the completed Work that has been delivered to the premises and appropriately stored. The sum of

these estimates is referred to as the "value of completed Work." With these estimates as a base, the County shall make a progress payment to the Contractor, which shall be equal to:

- (a) The value of completed Work;
- (b) Less those amounts that have been previously paid;
- (c) Less other amounts that may be deductible or owing and due to the County for any cause; and
- (d) Less the appropriate amount of retainage.

(2) Progress Payments Do Not Mean acceptance of Work. Progress payments shall not be construed as an acceptance or approval of any part of the Work and shall not relieve the Contractor of responsibility for defective workmanship or material.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.570

137-049-0840 Interest

(1) Prompt Payment Policy. The County shall pay promptly all payments due and owing to the Contractor on Contracts for Public Improvements pursuant to the terms of the Contract.

(2) Interest on Progress Payments. Late payment interest shall begin to accrue on payments due and owing on the earlier of 30 Days after receipt of invoice or 15 Days after the County's approval of payment (the "Progress Payment Due Date"). The interest rate shall equal three times the discount rate on 90-day commercial paper in effect on the Progress Payment Due Date at the Federal Reserve Bank in the Federal Reserve district that includes Oregon, up to a maximum rate of 30 percent.

(3) Interest on Final Payment. Final payment on the Contract Price, including retainage, shall be due and owing no later than 30 Days after Contract completion and acceptance of the Work. Late-payment interest on such final payment shall thereafter accrue at the rate of one and one-half percent per month until paid.

(4) Settlement or Judgment Interest. In the event of a dispute as to compensation due a

Contractor for Work performed, upon settlement or judgment in favor of the Contractor, interest on the amount of the settlement or judgment shall be added to, and not made part of, the settlement or judgment. Such interest, at the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District that includes Oregon, shall accrue from the later of the Progress Payment Due Date, or thirty Days after the Contractor submitted a claim for payment to the County in Writing or otherwise in accordance with the Contract requirements.

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.570

137-049-0850 Final Inspection

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

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.570(8)

137-049-0860 Public Works Contracts

(1) Generally. ORS 279C.800 to 279C.870 regulates Public Works Contracts and requirements for payment of prevailing wage rates. Also see administrative rules of the Bureau of Labor and Industries (BOLI) at OAR Chapter 839.

(2) Required Contract Conditions. As detailed in the above statutes and rules, every Public Works Contract must contain the following provisions:

(a) County authority to pay certain unpaid claims and charge such amounts to Contractors, as set forth in ORS 279C.515(1).

(b) Maximum hours of labor and overtime, as set forth in ORS 279C.520(1).

(c) Employer notice to employees of hours and days that employees may be required to work, as set forth in ORS 279C.520(2).

(d) Contractor required payments for certain services related to sickness or injury, as set forth in ORS 279C.530.

(e) A requirement for payment of prevailing rate of wage, as set forth in ORS 279C.830(1). If both state and federal prevailing rates of wage apply, the contract and every subcontract must provide that all workers must be paid the higher of the applicable state or federal prevailing rate of wage.

(f) A requirement for payment of fee to BOLI, as set forth in ORS 279C.830(2).

(3) **Requirements for Specifications.** The Specifications for every Public Works Contract, consisting of the Procurement package (such as the Project Manual, Bid or Proposal Booklets, Request for Quotes or similar Procurement Specifications), must contain the following provisions:

(a) The state prevailing rate of wage, and, if applicable, the federal prevailing rate of wage, as required by ORS 279C.830(1)(a):

(A) Physically contained within or attached to hard copies of Procurement Specifications;

(B) Included by a statement incorporating the applicable wage rate publication into the Specifications by reference, in compliance with OAR 839-025-0020; or

(C) When the rates are available electronically or by Internet access, the rates may be incorporated into the Specifications by referring to the rates and providing adequate information on how to access them in compliance with OAR 839-025-0020.

(b) If both state and federal prevailing rates of wage apply, a requirement that the Contractor shall pay the higher of the applicable state or federal prevailing rate of wage to all workers. See BOLI rules at OAR 839-025-0020 and 0035. A requirement for filing a Public Works bond by the Contractor, and every subcontractor, as set forth in ORS 279C.830(2).

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]

Stats. Implemented: ORS 279C.800 to ORS 279C.870, OL 2011 & ch 458

137-049-0870 Specifications; Brand Name Products

(1) **Generally.** The County'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.** The County 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 County shall determine, in its sole discretion, whether an Offeror's alternate product is "equal" or "equivalent."

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]
Stats. Implemented: ORS 279C.345

137-049-0880 Records Maintenance; Right to Audit Records

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

(2) **Inspection and Audit.** The County may, at reasonable times and places, have access to and an opportunity to inspect, examine, copy, and audit the records of any Person that has submitted cost or pricing data according to the terms of a Contract to the extent that the records relate to

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

(3) Records Inspection; Contract Audit.

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]

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

137-049-0890 County Payment for Unpaid Labor or Supplies

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

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]

Stats. Implemented: ORS 279C.515

137-049-0900 Contract Suspension; Termination Procedures

(1) Suspension of Work. In the event the County suspends performance of Work for any reason considered by the County to be in the public interest other than a labor dispute, the Contractor shall be entitled to a reasonable extension of Contract time, and to reasonable compensation for all costs, including a reasonable allowance for related overhead, incurred by the Contractor as a result of the suspension.

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

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

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

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

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

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

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

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20; amd 2020-163 eff 06/23/20]

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

137-049-0910 Changes to the Work and Contract Amendments

(1) **Changes Provisions.** Changes to the Work are anticipated in construction and, accordingly, the County shall include changes provisions in all Public Improvement Contracts that detail the scope of the changes clause, provide pricing mechanisms, authorize the County or its authorized representatives to issue Change Orders and provide a procedure for addressing Contractor claims for additional time or compensation. When Change Orders are agreed to or issued consistent with the Contract's changes provisions, they are not considered to be new Procurements and an exemption from competitive Bidding is not required for their issuance by the County.

(2) **Change Order Authority.** The County may establish internal limitations and delegations for authorizing Change Orders, including dollar limitations. Dollar limitations on Change Orders are not set by Division 49, but such changes are limited by the above definition of that term.

(3) **Contract Amendments.** Contract Amendments within the general scope of the original Procurement are not considered to be new Procurements and an exemption from competitive Bidding is not required in order to add components or phases of Work specified in or reasonably implied from the Solicitation Document. Amendments to a Public Improvement Contract may be made only when:

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

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

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

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

[Adopted 2005-052 eff 3/1/05; amd 2020-060 eff 03/17/20]

Stats. Implemented: ORS 279A.065, 279C.335 & ORS 279C.400(1)

Statutory References and Other Authorities:
ORS 203; ORS 279A, 279B, 279C; OAR137-049;

Legislative History of LCPR 137-049:

1st Adopted 2005-052 eff 3/1/05; effectiveness reaffirmed 2010-003 eff 1/5/10

Amendments to 2005-052:

#1 2020-060 eff 03/17/20

#2 2020-163 eff 06/23/20

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