

## Special Procurements and Exemptions from Competitive Bidding

1. **Purpose.** The Board, acting as the Local Contract Review Board (LCRB) for the district, has made the findings necessary to support each special procurement (under ORS 279B) and exemption (under 279B or 279c) request. These findings include market research or other documentation indicating that the special procurement or exemption will be unlikely to encourage favoritism in the awarding of public contract or to substantially diminish competition for public contracts and will either: (A) Be reasonably expected to result in substantial cost savings to the district or to the public (under ORS 279B) or will likely result in substantial cost savings to the district or to the public (under ORS 279C), or (B) Otherwise substantially promote the public interest in a matter that could not practicably be realized by complying with requirements that are applicable under ORS 279B.055, 279B.060, 279B.065, 279B.070 or under any related rules (for contracts subject to ORS 279C).
2. **Approval of Additional Special Procurements and Exemptions.** Additional special procurements and exemptions may be approved pursuant to ORS 279B.085, 279C.335 and/or 279C.435. When the LCRB approves a class special procurement the district may award contracts to acquire goods and services within the class of goods and services in accordance with the terms of the approval without making a subsequent request for a special procurement.
3. **Advertising Contracts.** The district traditionally purchases advertising in newspapers and trade journals. The following relates primarily to newspapers, trade journals and written publications; however, the district may also purchase advertising for student activities or educational programs in other media, such as radio or television.
  - a. Purchase of;
    - i. The District may, regardless of dollar value and without competitive bidding, purchase advertising in any media.
    - ii. If the anticipated purchase exceeds \$150,000, the district will publish a notice pursuant to OAR 137-047-0300 Public Notice. The procurement file shall document the reasons why a competitive process was deemed impractical and the resulting contract must be in writing.
    - iii. The contracting procedure for this special procurement is governed by OAR 137-047-0285 Special Procurements. The services that are subject to this special procurement include, but is not limited to, purchases of advertisements in a newspaper, and other written publications, advertising in any media for student activities or educational programs, such as radio or television. Use of the OAR chapter 137 rule procedures constitutes the circumstance that justifies this special procurement. It is unlikely the use of this special procurement will encourage favoritism or substantially diminish competition because pricing of this type of material is fixed by publishers. This special procurement is reasonably expected to result in substantial cost savings to the District and promotes the public interest that could not be realized by complying with the requirements applicable under ORS 279B.055, 279B.065 or 279B.070.
  - b. Sale of;
    - i. The District may, regardless of dollar value and without competitive bidding, sell advertising in any media, including, but not limited to, school newspapers, yearbooks, athletic programs, drama or music programs and the like.

- ii. Sales of advertising for student activities are generally other fund revenues, where student groups solicit advertisements from local businesses to help with the cost of the activity itself. A common example is the sale of advertising in school newspapers and yearbooks. The circulation of the newspaper and yearbook is limited to the students, teachers, parents and interested members of the community associated with the activities of that particular school. Due to the limited circulation and audience, the businesses that participate by purchasing advertising do so partly in the spirit of good will. Any business is welcome to place an advertisement in the school newspaper or yearbook; all it needs to do is to contact any district school which publishes one. The district itself would not achieve any increased revenue to the general fund by seeking competitive bids or proposals for such advertising. This holds true for other student activities, such as athletics, drama or music events and the like. For the reasons stated, it is unlikely this special procurement will encourage favoritism or substantially diminish competition because pricing of this type of material is fixed by publishers. This special procurement is reasonably expected to result in substantial cost savings to the district and promotes the public interest that could not be realized by complying with the requirements applicable under ORS 279B.055, 279B.065 or 279B.070.

#### **4. Contracts for Price Regulated Items.**

- a. Authorization. The district may, regardless of dollar value and without competitive bidding, contract for the direct purchase of goods and services where the rate or price for the goods and services being purchased is established by federal, state, or local regulatory authority.
  - i. Process and Criteria. The district must use competitive methods wherever possible to achieve best value and must document in the procurement file the reasons why a competitive process was deemed to be impractical.
  - ii. The contracting procedure for this sole source procurement is ORS 279A.025(2)(g).

#### **5. Copyrighted Materials.**

- a. Authorization.
  - i. By their nature, copyrighted materials are protected for the use of a single owner. Copyrighted materials may not be duplicated by others without the copyright owner's permission or license. Copyrights are established and regulated under federal law. Often, copyrighted materials are produced by only one supplier who may be the owner of the copyright or his/her licensee.
  - ii. Textbooks/Instructional materials are examples of copyrighted materials that the district purchases through a sole source. Textbooks/Instructional materials are adopted through a statewide process under the authority of the Oregon Department of Education. A Textbook/instructional material adoption defines the various materials which the district will purchase for use in its educational programs.
  - iii. The district purchases its textbooks/instructional materials through the Northwest Textbook Depository. This practice enables the regional textbook depository to purchase and warehouse textbooks/instructional materials in conformance with adoptions made in the states of their region. The result is that savings are achieved through the depository's combined purchases on behalf of member districts. Freight costs for individual districts are reduced by the bulk purchases of the depository and the depository takes on the cost of stocking and warehousing enough to meet each member district's needs. The system of textbook/instructional materials distribution enables the district to participate in the largest possible bulk purchasing activity of adopted textbooks/instructional materials in the region. This ensures a cost savings to the district. A savings that would be jeopardized if the district

was to act as an individual purchaser.

- b. In addition to the exemption to purchase and distribute textbooks in ORS 279A.025 (2)(h), the district may, regardless of dollar value and without competitive bidding, purchase copyrighted materials where there is only one known supplier/publisher available. Examples of copyrighted materials covered by this exemption may include, but are not necessarily limited to, new adopted textbooks, workbooks, curriculum kits, reference materials, books, periodicals/subscriptions, audio and visual media, and non-mass-marketed software from a particular publisher or their designated distributor.
  - c. The contracting procedure for this sole source procurement is ORS 279A.025(2)(h). The goods that are subject to this sole source procurement include, but is not limited to, published media center books, textbooks and related educational materials. Use of ORS 279A.025(2)(h) rule procedures constitutes the circumstance that justifies this sole source procurement. In addition, insofar as other copyrighted materials are concerned, such materials may be procured directly as a special procurement in that it is unlikely this special procurement will encourage favoritism or substantially diminish competition because pricing of this type of material is fixed by publishers. This special procurement will result in substantial cost savings to the district and promotes the public interest that could not be realized by complying with the requirements applicable under ORS 279B.055, 279B.065 or 279B.070.
6. **Equipment Repair and Overhaul.** The need for equipment repair or overhaul cannot be anticipated by district staff. If a piece of equipment is broken or not working properly, the district incurs cost of downtime, possible replacement equipment rental fees, staff time and other inconveniences or liabilities to its programs. Generally, there are a limited number of vendors who are able to perform repair or overhaul on a particular piece of equipment because of its make or manufacture. Sophisticated equipment may require specially trained personnel available from only one source. Often, a piece of equipment will have a partial warranty in place which will guarantee some savings to the district in the parts and/or labor needed to do the repair or overhaul. This warranty savings may only be achieved if the original manufacturer or provider of the equipment performs the necessary repair or overhaul.
- a. The district may enter into a public contract for equipment repair or overhaul without competitive bidding, subject to the following conditions:
    - i. Service or parts required are unknown and the cost cannot be determined without extensive preliminary dismantling or testing; or
    - ii. Service or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source; and
    - iii. The district purchases according to the methods in 6.b.
  - b. Process and Criteria. The district must use competitive methods wherever possible to achieve best value and must document in the Procurement File the reasons why a competitive process was deemed to be impractical.
  - c. The contracting procedure for this sole source procurement is OAR 137-047-0275 Sole Source. The goods and services that are subject to this sole source procurement include, but is not limited to, purchases of repairs and overall to equipment of a varied nature. Use of the OAR chapter 137 rule procedures constitutes the circumstance that justifies this sole source procurement. It is unlikely this special procurement will encourage favoritism or substantially diminish competition because typically the manufacturer or representative is the only party authorized to perform the work. This sole source procurement will be reasonably expected to result in substantial cost savings to the District and promotes the public interest that could not be

realized by complying with the requirements applicable under ORS 279B.055, 279B.065 or 279B.070.

**7. Insurance.**

- a. The District may purchase liability and other insurance regardless of dollar amount by selecting either a vendor directly or by appointing an agent of record.
- b. The contracting procedure for this procurement exception is governed by ORS 279A.025(2)(c).

**8. Investment Contracts.**

- a. Authorization. Pursuant to ORS 279A.025(2)(q)(C), the district may contract for the purpose of the investment of public funds or the borrowing of funds (collectively, investment opportunities or investment contracts) by the district when such is contracted according to duly enacted statute, or constitution.
- b. Process and Criteria. The district must use competitive methods wherever possible to achieve best value and must document in the procurement file the reasons why a competitive process was deemed to be impractical.

**9. Prequalification.**

- a. Product Prequalifications. There are occasions when the district needs to establish a list of prequalified products before it invites bids or proposals to furnish the products. The district may have a specific performance or design need, but it is impractical for the district to create a specification for the type of products to be purchased. An example is audiovisual equipment. There is a tremendous variety of audiovisual products offered in the market. The equipment technology is complex and constantly changing. It would be very burdensome and time consuming for the district to generate non-brand name, generic performance specifications for such equipment every time it wants to make a purchase.
  - i. When specific design or performance specifications must be met or such specifications are impractical to create or reproduce for a type of product to be purchased, the district may specify a list of approved or qualified products by reference to the prequalified product of particular manufacturers or sellers in accordance with the following product prequalification procedure:
  - ii. Reasonable efforts have been made to notify all known manufacturers and vendors of competing products of the district's intent to compile a list of prequalified products and of the opportunity to submit applications for including their product on the list of prequalified products. Notice may be provided by advertisement in a trade journal of statewide distribution, when possible; or, instead of advertising, the district may provide direct written notice to manufacturers and vendors appearing on the appropriate list maintained by the district; and
  - iii. The district will accept manufacturer and vendor applications to include products in the district's list of prequalified products up to 15 calendar days prior to the initial advertisement for bids or proposals for the type of product to be purchased, unless otherwise specified in the advertisement or the district's written notice.
  - iv. The contracting procedure for this special procurement is OAR 137-47-0285 Special Procurements. The goods and services that are subject to this special procurement are of a varied nature. Use of the OAR chapter 137 rule procedures constitutes the circumstance that justifies this special procurement. It is unlikely this special procurement will encourage favoritism or substantially diminish competition because the design or performance

specification will result in a good or service that is in the best interest of the district. This special procurement will result in substantial cost savings to the district and promotes the public interest that could not be realized by complying with the requirements applicable under ORS 279B.055, 279B.065 or 279B.070.

- b. Prequalification of Offeror. Pursuant to ORS 279C.430 and OAR 137-049-0220, the following prequalification is authorized:
  - i. **Mandatory Prequalification.** The District may require mandatory prequalification of Offeror's using the Contractor Pre-Qualification Application (maintained in the Purchasing Manual). The District must indicate in the Solicitation Document if it will require mandatory prequalification. Mandatory prequalification is when the District conditions an Offeror's submission upon their prequalification. The District shall not consider an Offer that is not prequalified if the District required prequalification.
  - ii. **Standards for Prequalification.** An Offeror may prequalify by demonstrating to the Contracting Agency's satisfaction:
    - a) That the Offeror 's financial, material, equipment, facility and personnel resources and expertise, or ability to obtain such resources and expertise, indicate that the Offeror is capable of meeting all contractual responsibilities;
    - b) The Offeror 's record of performance;
    - c) The Offeror 's record of integrity;
    - d) The Offeror is qualified to contract with the Contracting Agency. (See, OAR 137-049-0390(2) regarding standards of responsibility.)
  - iii. **Notice of Denial.** If an Offeror fails to prequalify for a mandatory prequalification, the Contracting Agency shall notify the Offeror, specify the reasons under item ii. of this section and inform the Offeror of their right to a hearing under ORS 279C.445 and 279C.450.

10. **Requirements Contracts.** The district may need to enter into requirements contracts, in which the vendor agrees to provide specified goods and services over the term of the contract at the bid price or discount rate. A requirements contract is useful when the purchase of the goods or services are routine and repetitive. For example, school, office, custodial and facilities maintenance supplies are customarily purchased through requirements contracts.

- a. Requirements contracts may be established for the purposes of minimizing paperwork, achieving continuity of product, securing a source of supply, reducing inventory, combining District requirements for volume discounts, creating standardization among agencies, and reducing lead time for ordering. The district may enter into Requirements contracts to purchase goods or services for an anticipated need at a predetermined price, but the contract must be let by a competitive procurement process pursuant to the requirements of the Model Rules.
- b. The district may purchase the goods and services from a vendor awarded a Requirements contract without first undertaking additional competitive solicitation.
- c. The term of the contract including renewals, may not exceed the term stated in the original Solicitation.
- d. A requirements contract may be exclusive or non-exclusive.

- e. The use of requirements contracts for the purchases of goods and services covered by ORS 279B is governed by the special procurement provisions of OAR 137-047-0285 Special Procurements. The original contracts were procured by the competitive requirements of 279B, thereby ensuring that competition was not diminished and favoritism was not encouraged, and the use of requirements contracts is reasonably expected to result in substantial cost savings by virtue of reducing administrative time and cost for multiple procurements.

#### 11. **Used Personal Property — Purchase.**

- a. Subject to the provisions of this rule, the district may, without competitive procurement, purchase used property or equipment. "Used personal property or equipment" is property or equipment that has been placed in its intended use by a previous owner or user for a time recognized in the relevant trade or industry as qualifying the personal property or equipment as "used," at the time of the district purchase. "Used personal property or equipment" generally does not include property or equipment if the district was the previous user, whether under a lease; as part of a demonstration, trial or pilot project; or under a similar arrangement.
- b. The use of this rule for the purchases of goods and service covered by ORS 279B is governed by the special procurement provisions of OAR 137-047-0285 Special Procurements. There is generally no competitive marketplace for the procurement of like purchases of used personal property, thereby ensuring that competition was not diminished and favoritism was not encouraged, and the use of this rule is reasonably expected to result in substantial cost savings by virtue of resulting in a lower cost than the procurement of new personal property.

#### 12. **Waiver of Performance and Payment Security Requirements for Public Improvement Contracts under \$50,000.** Notwithstanding the waiver of the bid, performance and/or payment security requirements of ORS 279C.380 and ORS 279C.390, the District may, at its discretion, waive the bid, performance and/or payment security when the amount of a contract for a public improvement contract is less than \$50,000. Waiver of the performance/payment security is provided for by statute without a requirement for findings.

#### 13. **Projects with Complex Systems or Components**

- a. For contracts for public improvements with significant components that are inherently complex and are also complex to procure through competitive bid, the district may, at its discretion, use RFP competitive procurement methods subject to the conditions described in ORS 279C and conditions enumerated in this exemption.
- b. Definitions. For purposes of this exemption only: "Complex Systems" are defined as those systems which incorporate the procurement of materials or other components which are difficult, if not impossible, to create in an "equal" specifications basis for competitive bid. Examples of such systems include but are not limited to, contracts for supplying and installing computerized controls for building heating, venting, air conditioning systems; and contracts for artificial surface outdoor multipurpose athletic fields. "Significant" is intended to mean something more than diminutive, but not necessarily the majority of the project as determined by cost.
- c. Finding of Fact/Conclusion of Compliance with the Law
  - i. It is unlikely that this exemption will encourage favoritism in the awarding of the public contracts or substantially diminish competition for such contracts as required by ORS 279C.335 (2)(a). Contracts for public improvements occasionally incorporate the procurement of systems, materials, or other components (complex systems) for which it is extremely difficult to design bid specifications. In these situations, utilization of an RFP process where each of the systems can be evaluated utilizing a number of factors, in addition to price, will result in costs savings to the district as required by ORS 279C.335 (2)(b).

- ii. ORS 279C enumerates how RFP's are to be used if authorized by the LCRB. This criteria, ensures that competitive means will be used and selection will be fair and impartial. As a result, it is unlikely that this process will encourage favoritism in the awarding of public contracts or substantially diminish competition for such contracts as required by ORS 279C.335 (2)(a). The awarding of contracts pursuant to this process will result in optimal value to the district based on selection by the district of the best competitive proposal that meets the stated evaluative criteria.
- iii. This class exemption is intended to be used for the types of procurements describe in the findings, where the specific system, materials or components represent a significant portion of the project. This class exemption is not intended to be used for CM/GC projects or other methods of alternative procurement unless these projects meet the requirements of this class exemption. The CM/GC and others, not meeting the requirements of this class exemption, may still be procured by RFP, provided that a project or contract specific exemption is promulgated by the LCRB.