



## PUBLIC CONTRACTS AND PURCHASING

***Disclaimer:** These materials are not intended to substitute for obtaining legal advice from a competent attorney. Rather, these materials are intended to provide general information regarding public contracting for public officials to allow the public official to have a working knowledge of the topic.*

The public contracting code refers to the entity procuring the contract as the “contracting agency.” The contracting agency may be the district/city acting through its board/city council, or acting through a manager, or a department head to whom the board/city council has delegated or permitted delegation of authority. The discussion below uses the term “contracting agency” to refer to either the entity or person with delegated authority under the local code.

### **A. Sources of Law**

Public contracting in Oregon is governed by the Oregon public contracting code codified in ORS chapters 279, 279A, 279B, and 279C. All contracting agencies must comply with the requirements of the contracting code in their public contracting.

ORS chapter 279A sets out the general provisions for the entire public contracting code including many terms and their definitions, describes the types of contracts and entities subject to the code, and addresses local rulemaking authority and obligations under the code. This chapter also addresses various policies embodied within the code, affirmative action, contract preferences, and cooperative procurement; and establishes substantive legal requirements applicable to all public contracting.

ORS chapter 279B addresses the procurement of goods and services (excluding professional services). The topics covered include permitted methods of procurement or “source selection” (including exceptions and exemptions), procurement document specifications, and legal remedies.

ORS chapter 279C addresses the procurement of public improvement contracts—generally covering public construction projects that are not emergencies, minor repairs or for maintenance. ORS chapter 279C also addresses the procurement of architectural, engineering and land surveying services from which a local contracting agency can opt out through rulemaking. Lastly, ORS chapter 279C contains provisions pertaining to public works contracts, covering the prevailing wage laws, hours of labor, etc.

### **B. What is a Public Contract?**

Not every agreement is considered a public contract under the public contracting code. In technical terms, a public contract means “a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements,

public works, minor alternations, or ordinary repair or maintenance necessary to preserve a public improvement.”

Thus, a public contract is the purchase of office supplies, equipment, construction services, paving, consultant services, software, cleaning services, to name a few. It is also important to note that that some contracts are excluded from the provisions of the public contracting code. Some of the more common or important exceptions to keep in mind are:

- Intergovernmental agreements under ORS Chapter 190;
- Grants;
- Contracts for purchase or sale of real property;
- Contracts made with qualified nonprofit agencies providing employment opportunities for individuals with disabilities under ORS 279.835 to 279.855;
- Sole-source expenditures when the rates are set by law or ordinance;
- Contracts for professional or expert witnesses or consultants for existing or potential litigation; and
- Certain investment contracts and employee benefit plan contracts under ORS 279A.025(2)(q)&(r).

Contracts that are exclusively among or between governmental bodies, including governmental bodies of other states or countries, are not public contracts subject to the code, although if a private entity is a party to the agreement, then the exclusion for contracts between contracting agencies likely does not apply. There are many more agreements excluded from the definition of a public contract under ORS 279A.025 which is always a good starting place to review to determine the applicability of the code.

### **C. Contract Preferences**

There are a few preferences that a contracting agency must apply to its selection of a contractor.

#### **1) Preferences for Oregon Goods and Services**

The public contracting code requires a contracting agency to give preference to goods and services manufactured and produced in Oregon if “price, fitness, availability and quality are otherwise equal.” This means that a preference for Oregon goods and services may be given only when there is a tie low bid, or two identical proposals or offers.

#### **2) Preferences for Local Goods and Services**

Apart from the statutory preference for Oregon goods and services, local preferences are not expressly permitted under the public contracting code.

#### **3) Preferences for Recycled Goods**

The public contracting code also includes a preference for recycled goods and requires local contracting agencies to give preference to the procurement of goods manufactured from recycled materials on any public contract for goods if: (1) the recycled good is available; (2) the recycled good

meets applicable standards; (3) the recycled good can be substituted for a comparable nonrecycled good; and (4) the recycled good's costs do not exceed the costs of the nonrecycled good by more than 5%, or a higher percentage if a written determination is made by the contracting agency.<sup>14</sup> Unless the findings in (1) to (4) cannot be made, the contracting agency must award a higher priced contract that includes recycled goods instead of a lower priced contract that does not.

## **D. Non-Competitive and Alternative Procurement Methods**

Prior to choosing a procurement method, the contracting agency may want to look to non-competitive or alternative procurement methods which do not have the same strict competitive requirements as “traditional” public contract procurement methods. The non-competitive procurement methods outlined below may save the contracting agency time, money and frustration.

### **1) Qualified Rehabilitation Facility**

Pursuant to state policy, a contracting agency must first look to whether a qualified rehabilitation facility or “QRF” is available for the products and services the contracting agency is seeking. The Oregon Department of Administrative Services maintains a list of QRF providers, products, and services. This list is available at: <https://qrf.dasapp.oregon.gov/>.

### **2) Personal Services Procurements**

A local contracting agency has authority to “designate certain service contracts or classes of service contracts as personal services contracts.” Generally, these are contracts for services that require specialized skill, knowledge, and resources in the application of technical or scientific expertise or in the exercise of professional, artistic, or management discretion or judgment. Examples of services a contracting agency may designate as “personal services” may include:

- Services of an accountant, attorney, auditor, information technology consultant.
- Services of expert witnesses or consultants.
- Services of a photographer, film maker, painter, sculptor.

### **3) Cooperative Purchasing**

Contracting agencies are granted cooperating authority to conduct certain public contracting activities on behalf of other contracting agencies, participate in contracts and contracting activities conducted by other contracting agencies, or rely on membership in a cooperative procurement group as the basis for selection of contractors to provide certain goods or services. ORS 279A.205. These contracts may include contracts made by out of state agencies.

The public contracting code describes three types of cooperative or “piggy-back” procurements that are allowed and establishes the conditions under which a local contracting agency may participate in or administer each. The three types of cooperative procurements are: (1) joint cooperative procurement; (2) permissive cooperative procurement; and (3) interstate cooperative procurement. The conditions that must be met to participate in these contracts mostly address the procurement process of the original contract, notice requirements when choosing to participate in certain cooperative procurements, and protest procedures. In all cases, the cooperative procurement must have been

procured using source selection methods that are substantially equivalent to the competitive sealed bid, proposal, or special procurement process in the public contracting code. Cooperative purchasing allows contracting agencies to avoid a having to go through their own tedious procurement process and benefit from group discounts.

## **E. Public Contracting Methods of Source Selection (ORS 279B)**

Except as provided in subsection (2) of ORS 279B.050, a contracting agency shall award a public contract for goods or services by competitive sealed bidding under ORS 279B.055 or competitive sealed proposals under ORS 279B.060. This requirement does not apply to public contracts established as provided in ORS 279B.065, 279B.070, 279B.075, 279B.080 or 279B.085, as detailed below.

### **1) Small Procurements (ORS 279B.065)**

Small procurements for goods and services may be awarded “in any manner the contracting agency deems practical or convenient, including by direct selection or award.” Contracts for goods or services are considered a small procurement if the procurement does not exceed \$10,000. Contracts awarded under this method may amended to exceed \$10,000 so long as the contract does not exceed a total cost greater than \$12,500. However, contracts for goods and services may not be artificially divided so as to constitute small procurements.

### **2) Intermediate Procurements (ORS 279B.070)**

An intermediate procurement is a contract for goods or services for more than \$10,000 but not more than \$150,000. The process for intermediate procurements is set out in ORS 279B.070 and OAR 137-047-0270. All intermediate procurements may be procured by a written or verbal solicitation, but regardless of method, the contracting agency must keep a written record of the source of the quotes or proposals received. At least three competitive quotes or proposals are required, although if that is not possible, fewer will suffice if a written record of the effort to get more than three is kept. Contracts awarded under the intermediate procurement may be amended up to \$150,000, or 125% of the original contract price, whichever is greater. Just like small procurements, a contract cannot be artificially divided so as to constitute an intermediate procurement. If the contract is awarded, it must be awarded to the offeror whose quote or proposal “will best serve the interests of the contracting agency, taking into account price as well as considerations including, but not limited to, experience, expertise, product functionality, suitability for a particular purpose and contractor responsibility under ORS 279B.110.”

### **3) Sole-Source Procurements (ORS 279B.075)**

A public contract for goods and services can be awarded without any competition if a determination is made that “the goods or services, or class of goods or services, are available from only one source.” The determination must be made by the local contract review board, or person delegated authority to do so under the local code. Neither the public contracting code nor the model rules contain a definition of “sole source,” but ORS 279B.075(1) requires a written determination that the goods or services “are available from *only one* source.”

The written determination must include findings that address:

- That the efficient utilization of existing goods requires the acquisition of compatible goods or services;
- That the goods or services required for the exchange of software or data with other public or private agencies are available from only one source;
- That the goods or services are for use in a pilot or experimental project; or
- Other findings that support the conclusion that the goods or services are available from only one source. The findings should not try to justify or select the best source; that is done competitively. Rather, the findings must justify that there is only one source.

When a contracting agency intends to award a contract without competition as a sole-source procurement, the contracting agency must give public notice of the agency's determination that the goods or services or class of goods or services are available from only one source. The contracting agency shall publish such notice in a manner similar to public notice of competitive sealed bids under 279B.055(4) and OAR 137-047-0300.

The public notice shall describe the goods or services to be acquired by a sole-source procurement, identify the prospective contractor and include the date, time and place that protests are due. The contracting agency shall give affected persons at least seven (7) days from the date of the notice of the determination that the goods or services are available from only one source to protest the sole source determination. An affected person may protest the contract agency's determination that the goods or services or class of goods or services are available from only one source in accordance with OAR 137-047-0710

#### **4) Emergency Procurements (ORS 279B.080)**

A public contract for goods or services may be awarded without competition if an emergency exists. An emergency contract for construction services must be awarded following "reasonable and appropriate competition" except in a case of "extreme necessity." The contracting agency or other person with authority under a local code must authorize the emergency procurement and must document the nature of the emergency and method of contractor selection. Neither the public contracting code nor model rules specify when this written record must be created; therefore, it can be created after the contract is entered into if the nature of the emergency warranted such swift action.

An emergency is defined in ORS 279A.010(1)(f) as circumstances that "(A) could not have reasonably been foreseen; (B) create a substantial risk of loss, damage or interruption of services or a substantial threat to property, public health, welfare or safety; and (C) require prompt execution of a contract to remedy the condition." Although the existence of an emergency will be self-evident in many situations as unforeseeable occurrences, this may not be so clear in less obvious emergency situations. Therefore, the contracting agency should take care to adequately document the circumstances that could not have reasonably been foreseen.

## 5) Special Procurements (ORS 279B.085)

Special procurements are basically exemptions from the statutorily defined standard procurement, intermediate and small procurement methods for goods and services discussed above.

A special procurement can be for a class of contracts—a “class special procurement,” or for a single contract—a “contract-specific special procurement.” A class special procurement would permit a series of contracts for specified goods or services to be entered into without using the prescribed contracting process. For example, a city may wish to designate a class-special procurement for copyrighted material and creative works where the copyrighted materials or creative works is only available from one source. Other examples of class-special procurements may include manufacturer direct supplies and employee benefit contracts. After approval of a class special procurement, the contracting agency may award contracts that fall within the class pursuant to the process adopted by the special procurement process without having to go back to the local contract review board for special procurement authority. The specified goods or services may be defined specifically as to type of goods or services, or as to dollar amounts of goods or services.

A contract-specific special procurement would permit a specific contract or a number of related contracts to be entered into without using the prescribed contracting process. For example, a city may wish to enter designate a contract-specific special procurement for time-sensitive yet non-emergency disaster cleanup services after its city hall suffered damage from a windstorm. The approval of a contract-specific special procurement is valid for that one contract or related contracts only.

Special procurements must be approved by the local contract review board, which must make the findings set forth in ORS 279B.085(4) justifying the special procurement. The findings must address that the use of the special procurement:

- Is unlikely to encourage favoritism in the awarding of public contracts or to substantially diminish competitions for public contracts; and
- Is reasonably expected to result in substantial cost savings to the contracting agency or to the public, or otherwise substantially promotes the public interest in a manner that could not practicably be realized by complying with requirements that are applicable under the ITB, RFP, small or intermediate procurement source-selection methods or under any rules adopted thereunder. A special procurement can be adopted into the local code or adopted as needed under the local code by ordinance or resolution. The required findings should be attached to or within the body of the resolution or ordinance. The findings should be based on specific facts and address each of the four factors above. This is necessary not only to comply with the public contracting code but also to withstand judicial review, which will be held on the record established by the local contract review board.

Lastly, public notice of the approval of a special procurement is required. The notice must follow the requirements for a competitive sealed bid or invitation to bid notice under ORS 279B.055(4), which generally requires publication in a local newspaper at least once, as well as mailing and posting.