

DEPARTMENT OF JUSTICE

MODEL RULES

DIVISION 48

CONSULTANT SELECTION: ARCHITECTURAL, ENGINEERING AND LAND SURVEYING SERVICES AND RELATED SERVICES CONTRACTS

137-048-0100

Application; Effective Date

(1) The Attorney General is required to prepare and maintain model rules of procedure that govern Public Contracting under the Public Contracting Code and that are appropriate for use by all Contracting Agencies. These division 48 rules apply to the screening and selection of Architects, Engineers and Land Surveyors, and providers of Related Services, under Contracts and set forth the following procedures:

(a) Procedures through which Contracting Agencies select Consultants to perform Architectural, Engineering and Land Surveying Services, or Related Services; and

(b) Two-tiered procedures for selection of Architects, Engineers, Land Surveyors and providers of Related Services for certain Public Improvements owned and maintained by a Local Government.

(2) These division 48 rules apply to any Contracting Agency with independent contracting authority that is seeking the services of a Consultant to perform Architectural, Engineering and Land Surveying Services, or Related Services, if the Contracting Agency has not adopted its own rules of procedure for the screening and selection of Consultants to perform Architectural, Engineering and Land Surveying Services or Related Services, as provided in ORS 279A.065(a).

(3) The dollar threshold amounts that are applicable to the Direct Appointment Procedure, OAR 137-048-0200, the Informal Selection Procedure, OAR 137-048-0210, and the Formal Selection Procedure, OAR 137-048-0220, are independent from and have no effect on the dollar threshold amounts that trigger the legal sufficiency review requirement for State Contracting Agencies under OAR 291.047.

(4) Effective Date. These division 48 rules apply to the above-described Contracts first advertised, but if not advertised then entered into, on or after March 1, 2005.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

137-048-0110

Definitions

In addition to the definitions set forth in ORS 279A.010, ORS 279C.100, and OAR 137-046-0110, the following definitions apply to these division 48 rules:

(1) "**Consultant**" means an Architect, Engineer, Land Surveyor or provider of Related Services. A Consultant includes a business entity that employees Architects, Engineers, Land Surveyors or providers of Related Services, or any combination of the foregoing.

(2) "**Estimated Fee**" means Contracting Agency's reasonably projected fee to be paid for a Consultant's services under the anticipated Contract, excluding all anticipated reimbursable or other non-professional fee expenses. The Estimated Fee is used solely to determine the applicable Contract solicitation method and is distinct from the total amount payable under the Contract. The Estimated Fee shall not be used as a basis to resolve other Public Contracting issues, including without limitation, direct purchasing authority or Public Contract review and approval under ORS 291.047.

(3) "**Project**" means all components of a Contracting Agency's planned undertaking that gives rise to the need for a Consultant's Architectural, Engineering and Land Surveying Services, or Related Services, under a Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

137-048-0120

List of Interested Consultants; Performance Record

(1) Consultants who are engaged in the lawful practice of their profession and who are interested in providing Architectural, Engineering and Land Surveying Services or Related Services, may annually submit a statement describing their qualifications and related performance information to Contracting Agencies' office addresses. Contracting Agencies will use this information to create a list of prospective Consultants and will update this list at least once every two years.

(2) Contracting Agencies may compile and maintain a record of each Consultant's performance under Contracts with the particular Contracting Agency, including information obtained from Consultants during an exit interview. Upon request and in accordance with the Oregon Public Records Law (ORS 192.410 through 192.505) Contracting Agencies may make available copies of the records.

(3) State Contracting Agencies shall keep a record of all Contracts with Consultants and shall make these records available to the public, consistent with the requirements of the Oregon Public Records Law (ORS 192.410 through 192.505). State Contracting Agencies shall include the following information in the record:

(a) Locations throughout the state where the Contracts are performed;

(b) Consultants' principal office address and all office addresses in the State of Oregon;

(c) Consultants' direct expenses on each Contract, whether or not those direct expenses are reimbursed. "Direct expenses" include all amounts that are directly attributable to Consultants' services performed under each Contract, including personnel travel expenses, and that would not have been incurred but for the services being performed. The record shall include all personnel travel expenses as a separate and identifiable expense on the Contract; and

(d) The total number of Contracts awarded to each Consultant over the immediately preceding 10-year period from the date of the record.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279C.110

137-048-0130

Applicable Selection Procedures; Pricing Information

(1) When selecting the most qualified Consultants to perform Architectural, Engineering or Land Surveying Services, State Contracting Agencies and Local Contracting Agencies that are contracting with Consultants under the conditions listed in ORS 279C.110(2) shall follow the applicable selection procedure under either OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure) or 137-048-0220 (Formal Selection Procedure). Contracting Agencies subject to this section (1) shall not solicit or use pricing policies and proposals or other pricing information to determine a Consultant's compensation, until after the Contracting Agency has selected the most qualified Consultant in accordance with the applicable selection procedure.

(2) Contracting Agencies selecting Consultants to perform Related Services and Local Contracting Agencies selecting Consultants to perform Architectural, Engineering and Land Surveying Services for Contracts when the conditions under ORS 279C.110(2) do not exist, shall follow one of the following selection procedures:

(a) When selecting a Consultant on the basis of qualifications alone, Contracting Agencies shall follow the applicable selection procedure under either OAR 137-048-0200 (Direct Appointment Procedure), 137-048-0210 (Informal Selection Procedure) or 137-048-0220 (Formal Selection Procedure);

(b) When selecting a Consultant on the basis of price competition alone, Contracting Agencies shall follow either the provisions under OAR chapter 137, division 47 for obtaining and evaluating Bids, or OAR 137-048-0200 (Direct Appointment Procedure) if the requirements of OAR 137-048-0200(1) apply; and

(c) When selecting a Consultant on the basis of price and qualifications, Contracting Agencies shall follow either the provisions under OAR chapter 137, division 47 for obtaining and evaluating Proposals, or OAR 137-048-0200 (Direct Appointment Procedure) if the requirements of OAR 137-048-0200(1) apply. Contracting Agencies subject to this section (2) may request and consider a Proposer's pricing policies, proposals and other pricing information submitted with a Proposal.

(3) Contracting Agencies may use electronic methods to screen and select a Consultant in accordance with the procedures described in sections (1) and (2) of this rule. If a Contracting Agency uses electronic methods to screen and select a Consultant, Contracting Agency shall first promulgate rules for conducting the screening and selection procedure by electronic means, substantially in conformance with OAR 137-047-0330 (Electronic Procurement).

(4) In applying these rules, State Contracting Agencies shall support the state's goal of promoting a sustainable economy in the rural areas of the state.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279C.110

Selection Procedures

137-048-0200

Direct Appointment Procedure

(1) Contracting Agencies may enter into a Contract directly with a Consultant without following the selection procedures set forth elsewhere in these rules if:

(a) **Emergency**. Contracting Agency finds that an Emergency exists; or

(b) **Small Estimated Fee.** The Estimated Fee to be paid under the Contract does not exceed \$25,000; or

(c) **State Contracting Agencies-Continuation of Project With Intermediate Estimated Fee.**

For State Contracting Agencies where a project is being continued, as more particularly described below, and where the Estimated Fee will not exceed \$150,000, the Architectural, Engineering and Land Surveying Services or Related Services to be performed under the Contract must meet the following requirements:

(A) The services consist of or are related to Architectural, Engineering and Land Surveying Services or Related Services that have been substantially described, planned or otherwise previously studied in an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering and Land Surveying Services or Related Services rendered under the earlier Contract;

(B) The Estimated Fee to be made under the Contract does not exceed \$150,000; and

(C) The State Contracting Agency used either the formal selection procedure under OAR 137-048-0220 (Formal Selection Procedure) or the formal selection procedure applicable to selection of the Consultant at the time of selection, to select the Consultant for the earlier Contract; or

(d) **State Contracting Agencies-Continuation of Project With Extensive Estimated Fee.** For State Contracting Agencies where a project is being continued, as more particularly described below, and where the Estimated Fee is expected to exceed \$150,000, the Architectural, Engineering and Land Surveying Services or Related Services to be performed under the Contract must meet the following requirements:

(A) The services consist of or are related to Architectural, Engineering and Land Surveying Services or Related Services that have been substantially described, planned or otherwise previously studied in an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering and Land Surveying Services or Related Services rendered under the earlier Contract;

(B) The State Contracting Agency used either the formal selection procedure under OAR 137-048-0220 (Formal Selection Procedure) or the formal selection procedure applicable to selection of the Consultant at the time of selection, to select the Consultant for the earlier Contract; and

(C) The State Contracting Agency makes written findings that entering into a Contract with the Consultant, whether in the form of an amendment to an existing Contract or a separate Contract for the additional scope of services, will:

(i) Promote efficient use of public funds and resources and result in substantial cost savings to Contracting Agency;

(ii) Protect the integrity of the Public Contracting process and the competitive nature of the procurement by not encouraging favoritism or substantially diminishing competition in the award of the Contract.

(e) **Local Contracting Agencies.** For Local Contracting Agencies, the Architectural, Engineering and Land Surveying Services or Related Services to be performed under the Contract:

(A) Consist of or are related to Architectural, Engineering and Land Surveying Services or Related Services that have been substantially described, planned or otherwise previously studied in an earlier Contract with the same Consultant and are rendered for the same Project as the Architectural, Engineering and Land Surveying Services or Related Services rendered under the earlier Contract; and

- (B) Local Contracting Agency used a formal selection procedure described in rules applicable to Local Contracting Agency under either ORS 279.049 or 279A.065, whichever was in effect at the time Local Contracting Agency selected Consultant for the earlier Contract; or
- (C) Consultant will be assisting Contracting Agency by providing analysis, testing services, testimony or similar services for a Project that is, or is reasonably anticipated to be, the subject of a claim, lawsuit or other form of action, whether legal, equitable, administrative or otherwise.
- (2) Contracting Agencies may select Consultants for Contracts under this rule from the following sources:
- (a) Contracting Agency's list of Consultants that is created under OAR 137-048-0120 (List of Interested Consultants; Performance Record);
 - (b) Another Contracting Agency's list of Consultants that the Contracting Agency has created under OAR 137-048-0120 (List of Interested Consultants; Performance Record), with written consent of that Contracting Agency; or
 - (c) All Consultants offering the required Architectural, Engineering and Land Surveying Services or Related Services that Contracting Agency reasonably can identify under the circumstances.
- (3) Contracting Agency shall direct negotiations with Consultants selected under this rule toward obtaining written agreement on:
- (a) Consultant's performance obligations and performance schedule;
 - (b) Payment methodology and a maximum amount payable to Contractor for the Architectural, Engineering and Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the Contracting Agency as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering and Land Surveying Services or Related Services; and
 - (c) Any other provisions Contracting Agency believes to be in Contracting Agency's best interest to negotiate.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C110 & ORS 279C.115

137-048-0210

Informal Selection Procedure

- (1) Contracting Agencies may use the informal selection procedure described in this rule to obtain a Contract if the Estimated Fee is expected not to exceed \$150,000.
- (2) Contracting Agencies using the informal selection procedure shall:
- (a) Create a Request for Proposals that includes at a minimum the following:
 - (A) A description of the Project for which Consultant's Architectural, Engineering and Land Surveying Services or Related Services are needed and a description of the Architectural, Engineering and Land Surveying Services or Related Services that will be required under the resulting Contract;
 - (B) Anticipated Contract performance schedule;
 - (C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including construction services;
 - (D) Date and time Proposals are due and other directions for submitting Proposals;
 - (E) Criteria upon which most qualified Consultant will be selected. Selection criteria may include, but are not limited to, the following:

- (i) Amount and type of resources and number of experienced staff Consultant has available to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the Request for Proposals within the applicable time limits, including the current and projected workloads of such staff and the proportion of time such staff would have available for the Architectural, Engineering and Land Surveying Services or Related Services;
 - (ii) Proposed management techniques for the Architectural, Engineering and Land Surveying Services or Related Services described in the Request for Proposals;
 - (iii) Consultant's capability, experience and past performance history and record in providing similar Architectural, Engineering and Land Surveying Services or Related Services, including but not limited to quality of work, ability to meet schedules, cost control methods and contract administration practices;
 - (iv) Approach to Architectural, Engineering and Land Surveying Services or Related Services described in the Request for Proposals and design philosophy, if applicable;
 - (v) Proposer's geographic proximity to and familiarity with the physical location of the Project;
 - (vi) Volume of work, if any, previously awarded to Proposer, with the objective of effecting equitable distribution of Contracts among qualified Consultants, provided such distribution does not violate the principle of selecting the most qualified Consultant for the type of professional services required;
 - (vii) Ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;
 - (viii) Pricing policies, proposals and other pricing information if the Contracting Agency is a Local Contracting Agency selecting a Consultant when the conditions under ORS 279C.110(2) do not exist.
- (F) A Statement that Proposers responding to the RFP do so solely at their expense, and Contracting Agency is not responsible for any Proposer expenses associated with the RFP; and
- (G) A statement directing Proposers to the protest procedures set forth in these division 48 rules.
- (b) Provide a Request for Proposals to a minimum of five prospective Consultants drawn from:
- (A) Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record);
 - (B) Another Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record); or
 - (C) All Consultants that Contracting Agency reasonably can locate that offer the desired Architectural, Engineering and Land Surveying Services or Related Services, or any combination of the foregoing.
- (c) Review and rank all Proposals received according to the criteria set forth in the Request for Proposals, and select the three highest ranked Proposers.
- (3) If Contracting Agency does not cancel the RFP after it reviews and ranks each Proposer, Contracting Agency will begin negotiating a Contract with the highest ranked Proposer. Contracting Agency shall direct negotiations toward obtaining written agreement on:
- (a) Consultant's performance obligations and performance schedule;
 - (b) Payment methodology and a maximum amount payable to Contractor for the Architectural, Engineering and Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the Contracting Agency as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering and Land Surveying Services or Related Services; and

(c) Any other provisions Contracting Agency believes to be in Contracting Agency's best interest to negotiate.

(4) Contracting Agency shall, either orally or in writing, formally terminate negotiations with the highest ranked Proposer if Contracting Agency and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. Contracting Agency may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, in accordance with section (3) of this rule, until negotiations result in a Contract. If negotiations with any of the top three Proposers do not result in a Contract within a reasonable amount of time, Contracting Agency may end the particular informal solicitation and thereafter may proceed with a new informal solicitation under this rule or proceed with a formal solicitation under OAR 137-048-0220 (Formal Selection Procedure).

(5) Contracting Agency shall terminate the informal selection procedure and proceed with the formal selection procedure under OAR 137-048-0220 if the scope of the anticipated Contract is revised during negotiations so that the Estimated Fee will exceed \$150,000. Notwithstanding the foregoing, Contracting Agency may continue Contract negotiations with the Proposer selected under the informal selection procedure if Contracting Agency makes written findings that contracting with that Proposer will:

(a) Promote efficient use of public funds and resources and result in substantial cost savings to Contracting Agency; and

(b) Protect the integrity of the Public Contracting process and the competitive nature of the procurement by not encouraging favoritism or substantially diminishing competition in the award of the Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.110

137-048-0220

Formal Selection Procedure

(1) Subject to OAR 137-048-0130 (Applicable Selection Procedures; Pricing Information), Contracting Agencies shall use the formal selection procedure described in this rule to select Consultants if the Consultants cannot be selected under either OAR 137-048-0200 (Direct Appointment Procedure) or under OAR 137-048-0210 (Informal Selection Procedure). The formal selection procedure described in this rule may otherwise be used at Contracting Agencies' discretion.

(2) Contracting Agencies using the formal selection procedure shall obtain Contracts through public advertisement of Requests for Proposals, or Requests for Qualifications followed by Requests for Proposals.

(a) Except as provided in subsection (b) of this section, Contracting Agency shall advertise each RFP and RFQ at least once in at least one newspaper of general circulation in the area where the Project is located and in as many other issues and publications as may be necessary or desirable to achieve adequate competition. Other issues and publications may include, but are not limited to, local newspapers, trade journals, and publications targeted to reach the minority, women and emerging small business enterprise audiences.

(A) Contracting Agency shall publish the advertisement within a reasonable time before the deadline for the Proposal submission or response to the RFQ but in any event no fewer than fourteen (14) calendar days before the closing date set forth in the RFP or RFQ.

(B) Contracting Agency shall include a brief description of the following items in the advertisement:

(i) The Project;

(ii) A description of the Architectural, Engineering and Land Surveying Services or Related Services Contracting Agency seeks;

(iii) How and where Consultants may obtain a copy of the RFP or RFQ; and

(iv) The deadline for submitting a Proposal or response to the RFQ.

(b) In the alternative to advertising in a newspaper as described in subsection 2(a) of this rule, Contracting Agency shall publish each RFP and RFQ by one or more of the electronic methods identified in OAR 137-046-0110(13). Contracting Agency shall comply with subsections 2(a)(A) and 2(a)(B) of this rule when publishing advertisements by electronic methods.

(c) Contracting Agency may send notice of the RFP or RFQ directly to all Consultants on the Contracting Agency's list of Consultants that is created and maintained under OAR 137-048-0120 (List of Interested Consultants; Performance Record).

(3) Request for Qualifications Procedure. Contracting Agencies may use the RFQ procedure to evaluate potential Consultants and establish a short list of qualified Consultants to whom Contracting Agency may issue an RFP for some or all of the Architectural, Engineering and Land Surveying Services or Related Services described in the RFQ.

(a) Contracting Agency shall include the following, at a minimum, in each RFQ:

(A) A brief description of the Project for which Contracting Agency is seeking Consultants;

(B) A description of the Architectural, Engineering and Land Surveying Services or Related Services Contracting Agency seeks for the Project;

(C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including construction services;

(D) The deadline for submitting a response to the RFQ;

(E) A description of required Consultant qualifications for the Architectural, Engineering and Land Surveying Services or Related Services Agency seeks;

(F) The RFQ evaluation criteria, including weights, points or other classifications applicable to each criterion;

(G) A statement whether or not Contracting Agency will hold a pre-qualification meeting for all interested Consultants to discuss the Project and the Architectural, Engineering and Land Surveying Services or Related Services described in the RFQ and if a pre-qualification meeting will be held, the location of the meeting and whether or not attendance is mandatory; and

(H) A Statement that Proposers responding to the RFQ do so solely at their expense, and Contracting Agency is not responsible for any Proposer expenses associated with the RFQ.

(b) Contracting Agency may include a request for any or all of the following in each RFQ:

(A) A statement describing Consultant's general qualifications and related performance information;

(B) A description of Consultant's specific qualifications to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFQ including Consultant's available resources and recent, current and projected workloads;

(C) A list of similar Architectural, Engineering and Land Surveying Services or Related Services and references concerning past performance, and a copy of all records, if any, of Consultant's performance under Contracts with any other Contracting Agency;

(D) The number of Consultant's experienced staff available to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFQ, including

such personnel's specific qualifications and experience and an estimate of the proportion of time that such personnel would spend on those services;

(E) Approach to Architectural, Engineering and Land Surveying Services or Related Services described in the RFQ and design philosophy, if applicable;

(F) Proposer's geographic proximity to and familiarity with the physical location of the Project;

(G) Ownership status and employment practices regarding women, minorities and emerging small businesses or historically underutilized businesses;

(H) Pricing policies, proposals and other pricing information if the Contracting Agency is a Local Contracting Agency and the conditions under ORS 279C.110(2) do not exist; and

(I) Any other information Contracting Agency deems reasonable necessary to evaluate Consultants' qualifications.

(c) RFQ Evaluation Committee. Contracting Agency shall establish an RFQ evaluation committee of at least two individuals to review, score and rank the responding Consultants according to the evaluation criteria. Contracting Agency may appoint to the evaluation committee Contracting Agency employees or employees of other public agencies with experience in architecture, engineering, or land surveying, Related Services, construction or Public Contracting. If Contracting Agency procedure permits, the Contracting Agency may include on the evaluation committee private practitioners of architecture, engineering, land surveying or related professions. The Contracting Agency shall designate one member of the evaluation committee as the evaluation committee chairperson.

(d) Contracting Agency may use any reasonable screening or evaluation method to establish a short list of qualified Consultants, including but not limited to, the following:

(A) Requiring Consultants responding to an RFQ to achieve a threshold score before qualifying for placement on the short list;

(B) Placing a pre-determined number of the highest scoring Consultants on a short list;

(C) Placing on a short list only those Consultants with certain essential qualifications or experience, whose practice is limited to a particular subject area, or who practice in a particular geographic locale or region, provided that such factors are material, would not unduly restrict competition, and were announced as dispositive in the RFP.

(e) After the evaluation committee reviews, scores and ranks the responding Consultants, Contracting Agency shall establish a short list of at least three qualified Consultants, provided however, that if four or fewer Consultants responded to the RFQ, then:

(A) Contracting Agency may establish a short list of fewer than three qualified Consultants; or

(B) Contracting Agency may cancel the RFQ and issue an RFP.

(f) No Consultant will be eligible for placement on Contracting Agency's short list established under subsection (3)(d) of this rule if Consultant or any of Consultant's principals, partners or associates are members of Contracting Agency's RFQ evaluation committee.

(g) Except when the RFQ is cancelled, Contracting Agency shall provide a copy of the subsequent RFP to each Consultant on the short list.

(4) Formal Selection of Consultants Through Request for Proposals. Contracting Agencies shall use the procedure described in section (4) of this rule when issuing an RFP for a Contract described in section (1) of this rule.

(a) RFP Required Contents. Contracting Agencies using the formal selection procedure shall include at least the following in each Request for Proposals, whether or not the RFP is preceded by an RFQ:

(A) General background information, including a description of the Project and the specific Architectural, Engineering and Land Surveying Services or Related Services sought for the Project, the estimated Project cost, the estimated time period during which the Project is to be completed, and the estimated time period in which the specific Architectural, Engineering and Land Surveying Services or Related Services sought will be performed.

(B) The RFP evaluation process and the criteria which will be used to select the most qualified Proposer, including the weights, points or other classifications applicable to each criterion. If Contracting Agency does not indicate the applicable number of points, weights or other classifications, then each criterion is of equal value. Evaluation criteria may include, but are not limited to, the following:

- (i) Proposer's availability and capability to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP;
- (ii) Experience of Proposer's key staff persons in providing similar Architectural, Engineering and Land Surveying Services, or Related Services on comparable Projects;
- (iii) The amount and type of resources, and number of experienced staff persons Proposer has available to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP;
- (iv) The recent, current and projected workloads of the staff and resources referenced in section (4)(a)(B)(iii), above;
- (v) The proportion of time Proposer estimates that the staff referenced in section (4)(a)(B)(iii), above, would spend on the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP;
- (vi) Proposer's demonstrated ability to complete successfully similar Architectural, Engineering and Land Surveying Services or Related Services on time and within budget, including whether or not there is a record of satisfactory performance under OAR 137-048-0120 (List of Interested Consultants; Performance Record);
- (vii) References and recommendations from past clients;
- (viii) Proposer's performance history in meeting deadlines, submitting accurate estimates, producing high quality work, and meeting financial obligations;
- (ix) Status and quality of any required license or certification;
- (x) Proposer's knowledge and understanding of the Project and Architectural, Engineering and Land Surveying Services or Related Services described in the RFP as shown in Proposer's approach to staffing and scheduling needs for the Architectural, Engineering and Land Surveying Services or Related Services and proposed solutions to any perceived design and constructability issues;
- (xi) Results from interviews, if conducted;
- (xii) Design philosophy, if applicable, and approach to the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP;
- (xiii) Pricing policies, proposals and other pricing information if the Contracting Agency is a Local Contracting Agency selecting a Consultant when the conditions under ORS 279C.110(2) do not exist; and
- (xiv) Any other criteria that the Contracting Agency seems relevant to the Project and Architectural, Engineering and Land Surveying Services or Related Services described in the RFP, including, where the nature and budget of the Project so warrant, a design competition between competing Proposers.

- (C) Conditions or limitations, if any, that may constrain or prohibit the selected Consultant's ability to provide additional services related to the Project, including construction services;
 - (D) Whether interviews are possible and if so, the weight, points or other classifications applicable to the potential interview;
 - (E) The date and time Proposals are due, and the delivery location for Proposals;
 - (F) Reservation of the right to seek clarifications of each Proposal;
 - (G) Reservation of the right to negotiate a final Contract that is in the best interest of the Contracting Agency;
 - (H) Reservation of the right to reject any or all Proposals and reservation of the right to cancel the RFP at anytime if doing either would be in the public interest as determined by the Contracting Agency;
 - (I) A Statement that Proposers responding to the RFP do so solely at their expense, and Contracting Agency is not responsible for any Proposer expenses associated with the RFP;
 - (J) A statement directing Proposers to the protest procedures set forth in these rules;
 - (K) Special Contract requirements, including but not limited to disadvantaged business enterprise ("DBE"), minority business enterprise ("MBE"), women business enterprise ("WBE") and emerging small business enterprise ("ESB") participation goals or good faith efforts with respect to DBE, MBE, WBE and ESB participation, and federal requirements when federal funds are involved;
 - (L) A statement whether or not Contracting Agency will hold a pre-Proposal meeting for all interested Consultants to discuss the Project and the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP and if a pre-Proposal meeting will be held, the location of the meeting and whether or not attendance is mandatory;
 - (M) A request for any information Contracting Agency deems reasonably necessary to permit Contracting Agency to evaluate, rank and select the most qualified Proposer to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP; and
 - (N) A sample form of the Contract.
- (b) RFP Evaluation Committee. Contracting Agency shall establish a committee of at least three individuals to review, score and rank Proposals according to the evaluation criteria set forth in the RFP. If the RFP has followed an RFQ, the Contracting Agency may include the same members who served on the RFQ evaluation committee. Contracting Agency may appoint to the evaluation committee Contracting Agency employees or employees of other public agencies with experience in architecture, engineering, land surveying, Related Services, construction or Public Contracting. At least one member of the evaluation committee must be a Contracting Agency employee. If Contracting Agency procedure permits, the Contracting Agency may include on the evaluation committee private practitioners of architecture, engineering, land surveying or related professions. The Contracting Agency shall designate one of its employees who also is a member of the evaluation committee as the evaluation committee chairperson.
- (A) No Proposer will be eligible for award of the Contract under the RFP if Proposer or any of Proposer's principals, partners or associates are members of Contracting Agency's RFP evaluation committee for the Contract;
 - (B) If the RFP provides for the possibility of Proposer interviews, the evaluation committee may elect to interview Proposers if the evaluation committee considers it necessary or desirable. If the evaluation committee conducts interviews, it shall award weights, points or other classifications indicated in the RFP for the anticipated interview; and

(C) The evaluation committee shall provide to Contracting Agency the results of the scoring and ranking for each Proposer.

(c) If Contracting Agency does not cancel the RFP after it receives the results of the scoring and ranking for each Proposer, Contracting Agency will begin negotiating a Contract with the highest ranked Proposer. Contracting Agency shall direct negotiations toward obtaining written agreement on:

(A) Consultant's performance obligations and performance schedule;

(B) Payment methodology and a maximum amount payable to Contractor for the Architectural, Engineering and Land Surveying Services or Related Services required under the Contract that is fair and reasonable to the Contracting Agency as determined solely by the Contracting Agency, taking into account the value, scope, complexity and nature of the Architectural, Engineering and Land Surveying Services or Related Services; and

(C) Any other provisions Contracting Agency believes to be in Contracting Agency's best interest to negotiate.

(d) Contracting Agency shall, either orally or in writing, formally terminate negotiations with the highest ranked Proposer if Contracting Agency and Proposer are unable for any reason to reach agreement on a Contract within a reasonable amount of time. Contracting Agency may thereafter negotiate with the second ranked Proposer, and if necessary, with the third ranked Proposer, and so on, in accordance with section (4)(c) of this rule, until negotiations result in a Contract. If negotiations with any Proposer do not result in a Contract within a reasonable amount of time, Contracting Agency may end the particular formal solicitation. Nothing in this rule precludes Contracting Agency from proceeding with a new formal solicitation for the same Architectural, Engineering and Land Surveying Services or Related Services described in the RFP that failed to result in a Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.110

137-048-0230

Ties Among Proposers

(1) If Contracting Agency is selecting a Consultant on the basis of qualifications alone and determines after the ranking of Proposers that two or more Proposers are equally qualified, Contracting Agency may select a candidate through any process that Contracting Agency believes will result in the best value for Contracting Agency taking into account the scope, complexity and nature of the Architectural, Engineering and Land Surveying Services. The process shall instill public confidence through ethical and fair dealing, honesty and good faith on the part of Contracting Agency and Proposers and shall protect the integrity of the Public Contracting process. Once a tie is broken, Contracting Agency and the selected Proposer shall proceed with negotiations under OAR 137-048-0210(3) or 137-048-0220(4)(c), as applicable.

(2) If a Contracting Agency is selecting a Consultant on the basis of price alone, or on the basis of price and qualifications, and determines after the ranking of Proposers that two or more Proposers are identical in terms of price or are identical in terms of price and qualifications, then the Contracting Agency shall follow the procedure set forth in OAR 137-046-0300, (Preferences for Oregon Goods and Services), to select the Consultant.

137-048-0240

Protest Procedures

(1) **RFP Protest and Request for Change.** Consultants may submit a written protest of anything contained in an RFP and may request a change to any provision, specification or contract term contained in an RFP, no later than seven (7) calendar days prior to the date Proposals are due unless a different deadline is indicated in the RFP. Each protest and request for change must include the reasons for the protest or request, and any proposed changes to the RFP provisions, specifications or contract terms. Contracting Agency will not consider any protest or request for change that is submitted after the submission deadline.

(2) **Protest of Consultant Selection.**

(a) **Single Award.** In the event of an award to a single Proposer, Contracting Agency shall provide to all Proposers a copy of the selection notice that Contracting Agency sent to the highest ranked Proposer. A Proposer who claims to have been adversely affected or aggrieved by the selection of the highest ranked Proposer may submit a written protest of the selection to Contracting Agency no later than seven (7) calendar days after the date of the selection notice unless a different deadline is indicated in the RFP. A Proposer submitting a protest must claim that the protesting Proposer is the highest ranked Proposer because the Proposals of all higher ranked Proposers failed to meet the requirements of the RFP or because the higher ranked Proposers otherwise are not qualified to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP.

(b) **Multiple Award.** In the event of an award to more than one Proposer, Contracting Agency shall provide to all Proposers copies of the selection notices that Contracting Agency sent to the highest ranked Proposers. A Proposer who claims to have been adversely affected or aggrieved by the selection of the highest ranked Proposers may submit a written protest of the selection to Contracting Agency no later than seven (7) calendar days after the date of the selection notices, unless a different deadline is indicated in the RFP. A Proposer submitting a protest must claim that the protesting Proposer is one of the highest ranked proposers because the Proposals of all higher ranked Proposers failed to meet the requirements of the RFP, or because a sufficient number of Proposals of higher ranked Proposers to include the protesting Proposer in the group of highest ranked Proposers failed to meet the requirements of the RFP. In the alternative, a Proposer submitting a protest must claim that the Proposals of all higher ranked Proposers, or a sufficient number of higher ranked Proposers to include the protesting Proposer in the group of highest ranked Proposers, otherwise are not qualified to perform the Architectural, Engineering and Land Surveying Services or Related Services described in the RFP.

(c) **Effect of Protest Submission Deadline.** Contracting Agency will not consider any protest that is submitted after the submission deadline.

(3) **Resolution of Protests.** A duly authorized representative of Contracting Agency shall resolve all timely submitted protests within a reasonable time following Contracting Agency's receipt of the protest and once resolved, shall promptly issue a written decision on the protest to the Proposer who submitted the protest. If the protest results in a change to the RFP, Contracting Agency shall revise the RFP accordingly and shall re-advertise the RFP in accordance with these rules.

(4) **Judicial Review.** Proposers may be able to obtain judicial review of Contracting Agency's protest disposition pursuant to ORS 183.484.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279C.110

137-048-0250

Solicitation Cancellation; Consultant Responsibility For Costs

A Contracting Agency may cancel a solicitation, whether direct appointment, informal or formal, or reject all Proposals or responses to RFQs, or any combination of the foregoing, without liability to Contracting Agency at anytime after issuing a solicitation or RFQ, if Contracting Agency believes it is in the public interest to do so. Consultants responding to either solicitations or RFQs are responsible for all costs they may incur in connection with submitting Proposals and responses to RFQs.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

137-048-0260

Two-Tiered Selection Procedure for Local Contracting Agency Public Improvement Projects

- (1) If a Local Contracting Agency requires an Architect, Engineer or Land Surveyor to perform Architectural, Engineering and Land Surveying Services or Related Services for a Public Improvement owned and maintained by that Local Contracting Agency, and a State Agency will serve as the lead Contracting Agency and will enter into Contracts with Architects, Engineers or Land Surveyors for Architectural, Engineering and Land Surveying Services or Related Services for that Public Improvement, the State Contracting Agency shall utilize the two-tiered selection process described below to obtain these Contracts with Architects, Engineers or Land Surveyors.
- (2) Tier One. State Contracting Agency shall, when feasible, identify no fewer than the three (3) most qualified Proposers responding to an RFP that was issued under the applicable selection procedures described in OAR 137-048-0210 (Informal Selection Procedure) and 137-048-0220 (Formal Selection Procedure), or from among Architects, Engineers or Land Surveyors identified under OAR 137-048-0200 (Direct Appointment Procedure), and shall notify the Local Contracting Agency of the Architects, Engineers or Land Surveyors selected.
- (3) Tier Two. In accordance with the qualifications based selection requirements of ORS 279C.110, the Local Contracting Agency shall either:
- (a) Select an Architect, Engineer or Land Surveyor from the State Contracting Agency's list of Proposers to perform the Architectural, Engineering and Land Surveying Services or Related Services for Local Contracting Agency's Public Improvement; or
 - (b) Select an Architect, Engineer or Land Surveyor to perform the Architectural, Engineering and Land Surveying Services or Related Services for Local Contracting Agency's Public Improvement through an alternative process adopted by the Local Contracting Agency, consistent with the provisions of the applicable RFP, if any, and these division 48 rules. The Local Contracting Agency's alternative process must be described in the applicable RFP, may be structured to take into account the unique circumstances of the particular Local Contracting Agency and may include provisions to allow the Local Contracting Agency to perform its tier

two responsibilities efficiently and economically, alone or in cooperation with other Local Contracting Agencies. The Local Contracting Agency's alternative process may include, but is not limited to, one or more of the following methods:

(A) A general written direction from the Local Contracting Agency to the State Contracting Agency, prior to the advertisement of a procurement or series of procurements or during the course of the procurement or series of procurements, that the Local Contracting Agency's tier two selection shall be the highest-ranked firm identified by the State Contracting Agency during the tier one process, and that no further coordination or consultation with the Local Contracting Agency is required. However, the Local Contracting Agency may provide written notice to the State Contracting Agency that the Local Contracting Agency's general written direction is not to be applied for a particular procurement and describe the process that the Local Contracting Agency will utilize for the particular procurement. In order for a written direction from the Local Contracting Agency consistent with this subsection to be effective for a particular procurement, it must be received by the State Contracting Agency with adequate time for the State Contracting Agency to revise the RFP in order for Proposers to be notified of the tier two process to be utilized in the procurement. In the event of a multiple award under the terms of the applicable procurement, the written direction from the Local Contracting Agency may apply to the highest ranked firms that are selected under the terms of the procurement document.

(B) An intergovernmental agreement between the Local Contracting Agency and the State Contracting Agency outlining the alternative process that the Local Contracting Agency has adopted for a procurement or series of procurements.

(C) Where multiple Local Government Agencies are involved in a two-tiered selection procedure, the Local Government Agencies may name one or more authorized representative(s) to act on behalf of all the Local Government Agencies, whether the Local Government Agencies are acting collectively or individually, to select the Architect, Engineer or Land Surveyor to perform the Architectural, Engineering and Land Surveying Services or Related Services under the tier two selection process. In the event of a multiple award under the terms of the applicable procurement, the authorized representative(s) of the Local Contracting Agencies may act on behalf of the Local Contracting Agencies to select the highest ranked firms that are required under the terms of the procurement document, as part of the tier two selection process.

(4) State Contracting Agency shall thereafter begin Contract negotiations with the selected Architect, Engineer or Land Surveyor in accordance with the negotiation provisions in OAR 137-048-0200 (Direct Appointment Procedure), OAR 137-048-0210 (Informal Selection Procedure) or 137-048-0220 (Formal Selection Procedure) as applicable.

(5) Nothing in these division 48 rules should be construed to deny or limit a Local Contracting Agency's ability to contract directly with Architects, Engineers or Land Surveyors pursuant to ORS 279C.125(4), through a selection process established by that Local Contracting Agency.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279C.125

Post-Selection Considerations

137-048-0300

Prohibited Payment Methodology; Purchase Restrictions

- (1) Except as otherwise allowed by law, Contracting Agency shall not enter into any Contract which includes compensation provisions that expressly provide for payment of:
- (a) Consultant's costs under the Contract plus a percentage of those costs; or
 - (b) A percentage of the Project construction costs or total Project costs.
- (2) Except as otherwise allowed by law, a Contracting Agency shall not enter into any Contract in which:
- (a) The compensation paid under the Contract is solely based on or limited to the Consultant's hourly rates for the Consultant's personnel working on the Project and reimbursable expenses incurred during the performance of work on the Project (sometimes referred to as a "time and materials" Contract); and
 - (b) The Contract does not include a maximum amount payable to Contractor for the Architectural, Engineering and Land Surveying Services or Related Services required under the Contract.
- (3) Except in cases of Emergency or in the particular instances noted in the subsections below, Contracting Agency shall not purchase any building materials, supplies or equipment for any building, structure or facility constructed by or for Contracting Agency from any Consultant under a Contract with Contracting Agency to perform Architectural, Engineering and Land Surveying Services or Related Services, for the building, structure or facility. This prohibition does not apply if either of the following circumstances exists:
- (a) Consultant is providing Architectural, Engineering and Land Surveying Services or Related Services under a Contract with Contracting Agency to perform Design-Build services or Energy Savings Performance Contract services (see OAR 137-049-0670 and 137-049-0680).
 - (b) That portion of the Contract relating to the acquisition of building materials, supplies or equipment was awarded to Consultant pursuant to applicable law governing the award of such contracts.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

137-048-0310

Expired or Terminated Contracts; Reinstatement

- (1) If a Contracting Agency enters into a Contract for Architectural, Engineering and Land Surveying Services or Related Services and that Contract subsequently expires or is terminated, the Contracting Agency may proceed as follows, subject to the requirements of subsection (2) of this rule:
- (a) **Expired Contracts.** If the Contract has expired as the result of Project delay caused by the Contracting Agency or caused by any other occurrence outside the reasonable control of the Contracting Agency or the Consultant, and if no more than one year has passed since the Contract expiration date, the Contracting Agency may amend the Contract to extend the Contract expiration date, revise the description of the Architectural, Engineering and Land Surveying Services or Related Services required under the contract to reflect any material alteration of the Project made as a result of the delay, and revise the applicable performance schedule. Beginning on the effective date of the amendment, the Contracting Agency and the Consultant shall continue performance under the Contract as amended; or
 - (b) **Terminated Contracts.** If the Contracting Agency or both parties to the Contract have terminated the Contract for any reason and if no more than one year has passed since the

Contract termination date, then the Contracting Agency may enter into a new Contract with the same Consultant to perform the remaining Architectural, Engineering and Land Surveying Services, or Related Services not completed under the original Contract, or to perform any remaining Architectural, Engineering and Land Surveying Services or Related Services not completed under the contract as adjusted to reflect a material alteration of the Project.

(2) The Contracting Agency may proceed under either subsection (1)(a) or subsection (1)(b) of this rule only after making written findings that amending the existing Contract or entering into a new Contract with Consultant will:

(a) Promote efficient use of public funds and resources and result in substantial cost savings to Contracting Agency;

(b) Protect the integrity of the Public Contracting process and the competitive nature of the procurement process by not encouraging favoritism or substantially diminishing competition in the award of Contracts.; and

(c) Result in a Contract that is still within the scope of the final form of the original procurement document.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279C.110

137-048-0320

Contract Amendments

(1) Contracting Agency may amend any Contract if the Contracting Agency, in its sole discretion, determines that the amendment is within the scope of the final form of the original procurement document and that the amendment would not materially impact the field of competition for the Architectural, Engineering and Land Surveying Services or Related Services described in the final form of the original procurement document. In making this determination, the Contracting Agency shall consider potential alternative methods of procuring the services contemplated under the proposed amendment. An amendment would not materially impact the field of competition for the services described in the final form of the original procurement document if the Contracting Agency reasonably believes that the number of Proposers would not significantly increase if the procurement document were re-issued to include the additional services.

(2) The Contracting Agency may amend any Contract if the additional services are required by reason of existing or new laws, rules, regulations or ordinances of federal, state or local agencies, that affect performance of the original Contract.

(3) All amendments to Contracts must be in writing, must be signed by an authorized representative of the Consultant and the Contracting Agency and must receive all required approvals before the amendments will be binding on the Contracting Agency.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065