

**METRO  
LOCAL CONTRACT REVIEW BOARD  
ADMINISTRATIVE RULES**

Effective October 25, 2018

**DIVISION 47 PUBLIC PROCUREMENTS FOR GOODS OR SERVICES**

47-0000	Application .....	1
47-0250	Methods of Source Selection .....	1
47-0255	Competitive Bidding.....	1
47-0257	Multistep Competitive Bidding .....	4
47-0260	Competitive Proposals .....	5
47-0261	Multi-tiered and Multistep Proposals.....	7
47-0265	Small Procurements .....	11
47-0270	Intermediate Procurements.....	12
47-0275	Sole-Source Procurements.....	13
47-0280	Emergency Procurements.....	14
47-0285	Special Procurements .....	14
47-0288	Special Procurements Authorized by Rule.....	15
47-0300	Public Notice of Solicitation Documents for Formal Procurements .....	18
47-0310	Bids and Proposals are Offers .....	19
47-0330	Electronic Procurement .....	20
47-0400	Offer Preparation .....	21
47-0410	Offer Submission.....	22
47-0420	Pre-Offer Conferences .....	22
47-0430	Addenda to Solicitation Document .....	22
47-0440	Pre-Closing Modification or Withdrawal of Offers .....	23
47-0450	Receipt, Opening, and Recording of Bids and Proposals; Confidentiality of Formal Offers .....	24
47-0460	Late Offers, Late Withdrawals and Late Modifications.....	25
47-0470	Mistakes .....	25
47-0480	Time for Acceptance .....	27
47-0490	Extension of Time for Acceptance of Offer.....	27
47-0500	Responsibility of Bidders and Proposers.....	27
47-0525	Qualified Products Lists.....	27
47-0550	Prequalification of Prospective Offerors; Pre-negotiation of Contract Terms and Conditions .	27

47-0575	Debarment of Prospective Offerors.....	28
47-0600	Offer Evaluation and award .....	29
47-0610	Notice of Intent to award.....	31
47-0620	Documentation of award .....	31
47-0630	Availability of Award Decisions .....	31
47-0640	Rejection of an Offer .....	32
47-0650	Rejection of All Offers .....	34
47-0660	Cancellation, Rejection, Delay or Suspension of a Procurement or Solicitation .....	34
47-0670	Disposition of Offers if Procurement or Solicitation Canceled .....	35
47-0700	Protests and Judicial Review of Special Procurements.....	35
47-0720	Protests and Judicial Review of Multi-Tiered and Multistep Solicitations.....	37
47-0730	Protests and Judicial Review of Solicitations .....	39
47-0740	Protests and Judicial Review of Contract Award .....	40
47-0745	Protests and Judicial Review of Qualified Products List Decisions .....	41
47-0750	Judicial Review of Other Violations.....	42
47-0760	Review of Prequalification and Debarment Decisions.....	42
47-0800	Amendments to Contracts and Price Agreements .....	42
47-0820	Records Maintenance; Right to Audit Records .....	44

**METRO  
LOCAL CONTRACT REVIEW BOARD  
ADMINISTRATIVE RULES**

Effective June 15, 2017

**DIVISION 47**

**PUBLIC PROCUREMENTS FOR GOODS OR SERVICES**

**General Provisions**

**47-0000     Application**

These Division 47 rules implement ORS Chapter 279B, Public Procurements and apply to the Procurement of Goods and Services. These Division 47 rules are not applicable to the procurement of Personal Services Contracts. Procurements of Personal Services are governed by Metro's Personal Services Contracting Rules. These Division 47 rules are also not applicable to procurements of Public Improvements, which are governed by ORS Chapter 279C and procured in accordance with the rules set forth in Division 49.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.015

**Source Selection**

**47-0250     Methods of Source Selection**

- (1) Metro may award a Contract for Goods and Services using any method authorized by State Code or these Administrative Rules. Such different methods are called methods of "source selection." Source selection methods include Cooperative Procurements, competitive Bids, competitive Proposals and small, Intermediate, sole-source, Emergency and special procurements.
- (2) State law requires Metro to use the Services of Qualified Rehabilitation Facilities (QRF's) in certain instances. When required, Metro must use a QRF pursuant to ORS 279 before proceeding with a purchase through other methods of source selection.
- (3) The methods of contractor selection must conform to the procedures identified in these Administrative Rules. The Procurement Officer is authorized, but not required, to waive any nonconformity with the rules of contractor selection if the Procurement Officer determines that the defect was minor and likely would not have had an effect on the outcome of the selection process.

**47-0255     Competitive Bidding**

- (1) **Generally.** Metro may procure Goods or Services by competitive sealed Bids as set forth in ORS 279B.055 and these Administrative Rules. Metro may issue a request for information, a request for interest or other preliminary documents to obtain information useful in the preparation of an Invitation to Bid. An Invitation to Bid is used to initiate a Bidding Solicitation, awarded by low cost only, and must contain the information required by ORS 279B.055(2) and by section (2) of this Rule.

Metro shall provide public notice of the competitive Bid Solicitation as set forth below in Administrative Rule 47-0300.

(2) **Invitation to Bid.** In addition to the provisions required by ORS 279B.055(2), the Invitation to Bid must include the following:

(a) **General Information.**

- A. Notice of any pre-Offer conference as follows:
  - (i) The time, date and location of any pre-Offer conference;
  - (ii) Whether attendance at the conference will be mandatory or voluntary; and
  - (iii) A provision that provides that statements made by Metro's representatives at the conference are not binding upon Metro unless confirmed by Written Addenda.
- B. The form and instructions for submission of Bids and any other special information, e.g., whether Bids may be submitted by Electronic means (See Administrative Rule 47-0330 for required provisions of Electronic Bids);
- C. The time, date and place of Opening;
- D. The office where the Solicitation Document may be reviewed;
- E. A statement that each Bidder must identify whether the Bidder is a "resident Bidder," as defined in ORS 279A.120(1);
- F. Bidder's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See Administrative Rule 46-0210(2)); and
- G. How Metro will notify Bidders of Addenda and how Metro will make Addenda available (See Administrative Rule 47-0430).

(b) **Metro's Need to Purchase.** The character of the Goods or Services Metro is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.055, Metro's description of its need to purchase must:

- A. Identify the scope of the work to be performed under the resulting Contract, if Metro awards one;
  - B. Outline the anticipated duties of the Contractor under any resulting Contract;
  - C. Establish the expectations for the Contractor's performance of any resulting Contract;
- and
- D. Unless Metro for Good Cause (as defined below in Section (3) of this Rule) specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that Metro is purchasing.

(c) **Bidding and Evaluation Process.**

A. The anticipated Solicitation schedule, deadlines, protest process, and evaluation process;

B. Metro shall set forth objective evaluation criteria in the Solicitation Document in accordance with the requirements of ORS 279B.055(6)(a). Evaluation criteria need not be precise predictors of actual future costs, but to the extent possible, the evaluation factors must be reasonable estimates of actual future costs based on information Metro has available concerning future use; and

C. If Metro intends to award Contracts to more than one Bidder pursuant to Administrative Rule 47-0600(4)(c), Metro shall identify in the Solicitation Document the manner in which it will determine the number of Contracts it will award.

(d) Applicable preferences pursuant to ORS 279B.055(6)(b).

(e) Contractor's certification of compliance with the Oregon tax laws in accordance with ORS 305.385.

(f) All contractual terms and conditions in the form of Contract provisions Metro determines are applicable to the Procurement. As required by State Code, the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:

A. Metro's reduction or withholding of payment under the Contract;

B. Metro's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the statement of work or to meet the performance standards established by the resulting Contract; and

C. Metro's rights, which Metro may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available under the resulting Contract or applicable law.

(3) **Good Cause.** For the purposes of this Rule, "Good Cause" means a reasonable explanation for not requiring Contractor to meet the highest standards, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of Metro. Metro shall document in the Procurement file the basis for the determination of Good Cause for specification otherwise. Metro will have Good Cause to specify otherwise under the following circumstances:

(a) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;

(b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the Goods or Services will be compatible with or will operate efficiently or effectively with components, equipment, parts, Services or information technology including hardware, Services or software with which the Goods or Services will be used, integrated, or coordinated;

(c) The circumstances of the industry or business that provides the Goods or Services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, scientific developments, that a reliable highest prevalent standard does not exist or has not been developed; and

(d) Any other circumstances in which Metro's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs Metro's practical need for the highest prevalent standard in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract.

Stat. Auth.: ORS 279A.065, OL 2009, ch. 880, sec. 5  
Stats. Implemented: ORS 279B.055

#### **47-0257 Multistep Competitive Bidding**

(1) **Generally.** Metro may procure Goods or Services by using multistep competitive Bidding under ORS 279B.055(12).

(2) **Phased Process.** Multistep competitive Bidding is a phased Procurement process that seeks information or unpriced submittals in the first phase combined with regular competitive Bidding, inviting Bidders who submitted technically eligible submittals in the first phase to submit competitive sealed Bids in the second phase. The Contract must be awarded to the lowest Responsible Bidder.

(3) **Public Notice.** When Metro uses multistep competitive Bidding, Metro shall give public notice for the first phase in accordance with Administrative Rule 47-0300. Public notice is not required for the second phase. However, Metro shall give Notice of the second phase to all Bidders, inform Bidders of the right to protest Addenda issued after the initial Closing under Administrative Rule 47-0430, and inform Bidders excluded from the second phase of the right, if any, to protest their exclusion under Administrative Rule 47-0720.

(4) **Procedures Generally.** In addition to the procedures set forth in Administrative Rule 47-0300 through 47-0490, Metro shall employ the procedures set forth in this Rule for multistep competitive Bidding and in the Invitation to Bid.

#### **(5) Procedure for Phase One of Multistep Competitive Bidding.**

(a) **Form.** Metro shall initiate multistep Bidding by issuing an Invitation to Bid in the form and manner required for competitive sealed Bids except as provided in this Rule. In addition to the requirements set forth Administrative Rule 47-0255(2), the multistep Invitation to Bid must state:

A. That the Solicitation is a multistep competitive Bid Procurement and describe the process Metro will use to conduct the Procurement;

B. That Metro requests unpriced submittals and that Metro will consider price Bids only in the second phase and only from those Bidders whose unpriced submittals are found eligible in the first phase;

C. Whether Bidders must submit price Bids at the same time as unpriced submittals and, if so, that Bidders must submit the price Bids in a separate sealed envelope;

D. The criteria to be used in the evaluation of unpriced submittals.

(b) **Evaluation.** Metro shall evaluate unpriced submittals in accordance with the criteria set forth in the Invitation to Bid.

#### **(6) Procedure for Phase Two of Multistep competitive Bidding.**

(a) After the completion of phase one, if Metro does not cancel the Solicitation, Metro shall invite each eligible Bidder to submit a price Bid.

(b) Metro shall conduct phase two as any other competitive sealed Bid Procurement except:

- A. As specifically set forth in this Rule or the Invitation to Bid; and
- B. No public notice need be given of the invitation to submit price Bids because such notice was previously given.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.055

#### **47-0260 Competitive Proposals**

(1) **Generally.** Metro may procure Goods or Services by competitive Proposals as set forth in ORS 279B.060. Metro shall use a Request for Proposals to initiate a competitive Proposal Solicitation. The Request for Proposals must contain the information required by ORS 279B.060(2) and by section (2) of this Administrative Rule. Metro shall provide public notice of the Request for Proposals as set forth in Administrative Rule 47-0300.

(2) **Request for Proposals.** In addition to the provisions required by ORS 279B.060(2), the Request for Proposals must include the following:

(a) **General Information.**

- A. Notice of any pre-Offer conference as follows:
  - (i) The time, date and location of any pre-Offer conference;
  - (ii) Whether attendance at the conference will be mandatory or voluntary; and
  - (iii) A provision that provides that statements made by Metro's representatives at the conference are not binding on Metro unless confirmed by Written Addenda.
- B. The form and instructions for submission of Proposals and any other special information, e.g., whether Proposals may be submitted by Electronic means. (See Administrative Rule 47-0330 for required provisions of Electronic Proposals);
- C. The office where the Solicitation Document may be reviewed;
- D. Proposer's certification of nondiscrimination in obtaining required subcontractors in accordance with ORS 279A.110(4). (See Administrative Rule 46-0210(2)); and
- E. How Metro will notify Proposers of Addenda and how Metro will make Addenda available. (See Administrative Rule 47-0430).

(b) **Metro's Need to Purchase.** The character of the Goods or Services Metro is purchasing including, if applicable, a description of the acquisition, Specifications, delivery or performance schedule, inspection and acceptance requirements. As required by ORS 279B.060(2)(c), Metro's description of its need to purchase must:

- A. Identify the scope of the work to be performed under the resulting Contract, if Metro awards one;
- B. Outline the anticipated duties of the Contractor under any resulting Contract;
- C. Establish the expectations for the Contractor's performance of any resulting Contract; and
- D. Unless the Contractor under any resulting Contract will provide architectural, engineering, photogrammetric mapping, transportation planning, or land surveying services, or related

services that are subject to ORS 279C.100 to 279C.125, or Metro for Good Cause specifies otherwise, the scope of work must require the Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services that Metro is purchasing.

**(c) Proposal and Evaluation Process.**

- A. The anticipated Solicitation schedule, deadlines, protest process, and evaluation process;
  - B. Metro shall set forth selection criteria in the Solicitation Document in accordance with the requirements of ORS 279B.060(3)(e). Evaluation criteria need not be precise predictors of actual future costs and performance, but to the extent possible, the criteria will:
    - (i) Afford Metro the ability to compare the Proposals and Proposers, applying the same standards of comparison to all Proposers;
    - (ii) Rationally reflect Proposers' abilities to perform the resulting Contract in compliance with the Contract's requirements; and
    - (iii) Permit Metro to determine the relative pricing offered by the Proposers, and to reasonably estimate the costs to Metro of entering into a Contract based on each Proposal, considering information available to Metro and subject to the understanding that the actual Contract costs may vary as a result of the statement of work ultimately negotiated or the quantity of Goods or Services for which Metro contracts.
  - C. If Metro's Solicitation process calls for Metro to establish a Competitive Range, Metro shall generally describe, in the Solicitation Document, the criteria or parameters Metro will apply to determine the Competitive Range. Metro, however, subsequently may determine or adjust the number of Proposers in the Competitive Range in accordance with Administrative Rule 47-0261(6).
- (d) Applicable Preferences, including those described in ORS 279A.120, 279A.125(2) and 282.210.
- (e) The Proposers' certification of compliance with the Oregon tax laws in accordance with ORS 305.385.
- (f) All contractual terms and conditions Metro determines are applicable to the Procurement. Metro's determination of contractual terms and conditions that are applicable to the Procurement may take into consideration, as authorized by ORS 279B.060(3), those contractual terms and conditions Metro will not include in the Request for Proposals because Metro either will reserve them for negotiation, or will request Proposers to offer or suggest those terms or conditions. (See Administrative Rule 47-0260(3)).
- (g) As required by ORS 279B.060(2)(h), the Contract terms and conditions must specify the consequences of the Contractor's failure to perform the scope of work or to meet the performance standards established by the resulting Contract. Those consequences may include, but are not limited to:
- A. Metro's reduction or withholding of payment under the Contract;
  - B. Metro's right to require the Contractor to perform, at the Contractor's expense, any additional work necessary to perform the scope of work or to meet the performance standards established by the resulting Contract; and
  - C. Metro's rights, which Metro may assert individually or in combination, to declare a default of the resulting Contract, to terminate the resulting Contract, and to seek damages and other relief available under the resulting Contract or applicable law.



(3) **Applicable Terms.** Metro may include the applicable contractual terms and conditions in the form of Contract provisions, or legal concepts to be included in the resulting Contract. Further, Metro may specify that it will include or use Proposer's terms and conditions that have been pre-negotiated under Administrative Rule 47-0550(3), but Metro may only include or use a Proposer's pre-negotiated terms and conditions in the resulting Contract to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. Metro may not agree to any Proposer's terms and conditions that were expressly rejected in a Solicitation protest under Administrative Rule 47-0420.

(4) **For multiple award Contracts.** Metro may enter into Contracts with different terms and conditions with each Contractor to the extent those terms and conditions do not materially conflict with the applicable contractual terms and conditions. Metro may not agree to any Proposer's terms and conditions that were expressly rejected in a Solicitation protest under Administrative Rule 47-0420.

(5) **Good Cause.** For the purposes of this Rule, "Good Cause" means a reasonable explanation for not requiring Contractor to meet the highest standards prevalent in the industry or business most closely involved in providing the Goods or Services under the Contract, and may include an explanation of circumstances that support a finding that the requirement would unreasonably limit competition or is not in the best interest of Metro. Metro shall document in the Procurement file the basis for the determination of Good Cause for specifying otherwise. Metro will have Good Cause to specify otherwise when Metro determines:

(a) The use or purpose to which the Goods or Services will be put does not justify a requirement that the Contractor meet the highest prevalent standards in performing the Contract;

(b) Imposing express technical, standard, dimensional or mathematical specifications will better ensure that the Goods or Services will be compatible with, or will operate efficiently or effectively with, associated information technology, hardware, software, components, equipment, parts, or on-going Services with which the Goods or Services will be used, integrated, or coordinated;

(c) The circumstances of the industry or business that provides the Goods or Services are sufficiently volatile in terms of innovation or evolution of products, performance techniques, or scientific developments, that a reliable highest prevalent standard does not exist or has not been developed;

(d) That other circumstances exist in which Metro's interest in achieving economy, efficiency, compatibility or availability in the Procurement of the Goods or Services reasonably outweighs Metro's practical need for the highest standard prevalent in the applicable or closest industry or business that supplies the Goods or Services to be delivered under the resulting Contract.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060, OL 2015, ch 325 (HB 2716)

#### **47-0261 Multi-tiered and Multistep Proposals**

(1) **Generally.** Metro may use one or more, or any combination, of the methods of contractor selection set forth in ORS 279B.060(7), 279B.060(8) and these Administrative Rules to procure Goods or Services. In addition to the procedures set forth in Administrative Rules 47-0300 through 47-0490 for methods of contractor selection, Metro may provide for a multi-tiered or multistep selection process that permits award to the highest ranked Proposer at any tier or step, calls for the establishment of a Competitive Range, or permits either serial or competitive simultaneous discussions or negotiations with one or more Proposers.

(2) Multi-tiered and multistep competitions may use any combination or series of Proposals, discussions, negotiations, demonstrations, offers, or other means of soliciting information from Proposers that bear on the selection of a Contractor or Contractors. In multi-tiered and multistep competitions, Metro may use these means of soliciting information from prospective Proposers and Proposers in any sequence or order, as determined in the discretion of Metro, including, but not limited to, processes that embrace:

(a) The evaluation of Proposals only, including the evaluation of serial Proposals (a series of more than one Proposal from each Proposer that remains eligible in the competition at the particular tier of the competition);

(b) The use of Proposals in connection with discussions with Proposers that lead to best and final Offers;

(c) The use of Proposals in connection with serial negotiations with Proposers that lead to best and final Offers or to the award of a Contract;

(d) The use of Proposals in connection with competitive negotiations with Proposers that lead to best and final Offers or to the award of a Contracts; and

(e) The use of Proposals in multi-tiered competition designed to identify, at each stage of the competition, a class of Proposers that fall within a Competitive Range of Proposers that have a reasonable chance of being determined the most Advantageous Proposer or, in multiple-award situations, a reasonable chance of being determined an awardee of a Public Contract.

(3) When Metro's Request for Proposals prescribes a multi-tiered or multistep contractor selection process, Metro nevertheless may, at the completion of any stage in the competition and on determining the most Advantageous Proposer (or, in multiple-award situations, on determining the awardees of the Public Contracts), award a Contract (or Contracts) and conclude the Procurement without proceeding to subsequent stages. Metro also may, at any time, cancel the Procurement when the cancellation or rejection is in the best interest of Metro in accordance with ORS 279B.100.

(4) **Exclusion Protest.** Metro may provide, before the notice of intent to award, an opportunity for a Proposer to protest exclusion from the Competitive Range or from subsequent phases of multi-tiered or multistep competitive Proposals as set forth in Administrative Rule 47-0720.

(5) **Award Protest.** Metro shall provide an opportunity to protest its intent to award a Contract pursuant to ORS 279B.410 and Administrative Rule 47-0740. An Affected Offeror may protest, for any of the bases set forth in Administrative Rule 47-0720(2), its exclusion from the Competitive Range or from any phase of a multi-tiered or multistep competitive Proposal process, or may protest an Addenda issued following initial Closing, if Metro did not previously provide Proposers the opportunity to protest the exclusion or Addenda. The failure to protest will be considered the Proposer's failure to pursue an administrative remedy made available to the Proposer by Metro.

(6) **Competitive Range.** When Metro's Solicitation process conducted under ORS 279B.060(8) calls for Metro to establish a Competitive Range at any stage in the Procurement process, Metro may do so as follows:

(a) **Determining Competitive Range.**

A. Metro may establish a Competitive Range after evaluating all Responsive Proposals in accordance with the evaluation criteria in the Request for Proposals. After evaluation of all Proposals in accordance with the criteria in the Request for Proposals, Metro may determine and rank the Proposers in the Competitive Range. Notwithstanding the foregoing, however, in instances in which Metro

determines that a single Proposer has a reasonable chance of being determined the most Advantageous Proposer, Metro need not determine or rank Proposers in the Competitive Range. In addition, notwithstanding the foregoing, Metro may establish a Competitive Range of all Proposers to enter into discussions to correct deficiencies in Proposals.

B. Metro may establish the number of Proposers in the Competitive Range in light of whether Metro's evaluation of Proposals identifies a number of Proposers who have a reasonable chance of being determined the most Advantageous Proposer, or whether the evaluation establishes a natural break in the scores of Proposers that indicates that a particular number of Proposers are closely competitive or have a reasonable chance of being determined the most Advantageous Proposer.

(b) **Protesting Competitive Range.** Metro must provide Written notice to all Proposers identifying Proposers in the Competitive Range. Metro may provide an opportunity for Proposers excluded from the Competitive Range to protest Metro's evaluation and determination of the Competitive Range in accordance with Administrative Rule 47-0720.

(7) **Discussions.** Metro may initiate oral or Written discussions with all "eligible Proposers" on subject matter within the general scope of the Request for Proposals. In conducting discussions, Metro:

(a) Shall treat all eligible Proposers fairly and may not favor any eligible Proposer over another;

(b) May disclose other eligible Proposers' Proposals or discussions only in accordance with ORS 279B.060(8)(b) or (c);

(c) May adjust the evaluation of a Proposal as a result of discussions. The conditions, terms, or price of the Proposal may be changed during the course of the discussions provided the changes are within the scope of the Request for Proposals.

(d) At any time during the time allowed for discussions, Metro may:

A. Continue discussions with a particular eligible Proposer;

B. Terminate discussions with a particular eligible Proposer and continue discussions with other eligible Proposers; or

C. Conclude discussions with all remaining eligible Proposers and provide, to the then-eligible Proposers, notice requesting best and final Offers.

(8) **Negotiations.** Metro may commence serial negotiations with the highest-ranked eligible Proposer or commence simultaneous negotiations with all eligible Proposers. Metro may negotiate:

(a) The statement of work;

(b) The Contract Price as it is affected by negotiating the statement of work and other terms and conditions authorized for negotiation in the Request for Proposals or Addenda thereto; and

(c) Any other terms and conditions reasonably related to those authorized for negotiation in the Request for Proposals or Addenda thereto. Proposers may not submit for negotiation, and Metro may not accept, alternative terms and conditions that are not reasonably related to those authorized for negotiation in the Request for Proposals or any Addenda.

(9) **Terminating Negotiations.** At any time during discussions or negotiations Metro conducts under this Rule, Metro may terminate discussions or negotiations with the highest-ranked Proposer, or the eligible Proposer with whom it is currently discussing or negotiating, if Metro reasonably believes that:

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

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

(c) **Continuing Serial Negotiations.** If Metro is conducting serial negotiations and Metro terminates negotiations with an eligible Proposer, Metro may then commence negotiations with the next highest scoring eligible Proposer, and continue the sequential process until Metro has either:

A. Determined to award the Contract to the eligible Proposer with whom it is currently discussing or negotiating; or

B. Decided to cancel the Procurement under ORS 279B.100.

(d) **Competitive Simultaneous Negotiations.** If Metro chooses to conduct competitive negotiations, Metro may negotiate simultaneously with competing eligible Proposers. Metro:

A. Shall treat all eligible Proposers fairly and may not favor any eligible Proposer over another; and

B. May disclose other eligible Proposers' Proposals or the substance of negotiations with other eligible Proposers only if Metro notifies all of the eligible Proposers with whom Metro will engage in negotiations of Metro's intent to disclose before engaging in negotiations with any eligible Proposer.

(e) Any oral modification of a Proposal resulting from negotiations must be reduced to Writing.

(10) **Best and Final Offers.** If Metro requires best and final Offers, Metro must establish a common date and time by which eligible Proposers must submit best and final Offers. If Metro is dissatisfied with the best and final Offers, Metro may make a determination that it is in Metro's best interest to conduct additional discussions, negotiations or change Metro's requirements and require another submission of best and final Offers. Metro must inform all eligible Proposers that if they do not submit notice of withdrawal or another best and final Offer, their immediately previous Offers will be considered their best and final Offers. Metro shall evaluate Offers as modified by the best and final Offers. Metro shall conduct the evaluations as described in Administrative Rule 47-0600. Metro may not modify evaluation factors or their relative importance after the date and time that best and final Offers are due.

(11) **Multistep Competitive Proposals.** Metro may procure Goods or Services by using multistep competitive Proposals under ORS 279B.060(8)(b)(g). Multistep competitive Proposals is a phased Procurement process that seeks necessary information or unpriced technical Proposals in the first phase and, in the second phase, invites Proposers who submitted technically qualified Proposals to submit competitive price Proposals on the technical Proposals. Metro must award the Contract to the Responsible Proposer submitting the most Advantageous Proposal in accordance with the terms of the Solicitation Document applicable to the second phase.

(a) **Public Notice.** When Metro uses multistep competitive Proposals, Metro shall give public notice for the first phase in accordance with Administrative Rule 47-0300. Public notice is not required for the second phase. However, Metro shall give notice of the subsequent phases to all Proposers and inform any Proposers excluded from the second phase of the right, if any, to protest exclusion under Administrative Rule 47-0720.

(b) **Procedure for Phase One of Multistep competitive Proposals.** Metro may initiate a multistep competitive Proposals Procurement by issuing a Request for Proposals in the form and manner required for competitive Proposals except as provided in this Rule. In addition to the requirements required for competitive Proposals, the multistep Request for Proposals must state:

- A. That unpriced technical Proposals are requested;
- B. That the Solicitation is a multistep competitive Proposal Procurement and that, in the second phase, priced Proposals will be accepted only from those Proposers whose unpriced technical Proposals are found qualified in the first phase;
- C. The criteria for the evaluation of unpriced technical Proposals; and
- D. That the Goods or Services being procured must be furnished generally in accordance with the Proposer's technical Proposal as found to be finally qualified and must meet the requirements of the Request for Proposals.

(c) **Addenda to the Request for Proposals.** After receipt of unpriced technical Proposals, Addenda to the Request for Proposals must be distributed only to Proposers who submitted unpriced technical Proposals.

(d) **Receipt and Handling of Unpriced Technical Proposals.** Unpriced technical Proposals need not be opened publicly.

(e) **Evaluation of Unpriced Technical Proposals.** Unpriced technical Proposals will be evaluated solely in accordance with the criteria set forth in the Request for Proposals.

(f) **Discussion of Unpriced Technical Proposals.** Metro may seek clarification of a technical Proposal of any Proposer who submits a qualified, or potentially qualified technical Proposal. During the course of such discussions, Metro may not disclose any information derived from one unpriced technical Proposal to any other Proposer.

(g) **Methods of Contractor Selection for Phase One.** In conducting phase one, Metro may employ any combination of the methods of contractor selection that call for the establishment of a Competitive Range or include discussions, negotiations, or best and final Offers as set forth in this Rule.

(h) **Procedure for Subsequent Phases.** On the completion of phase one, Metro shall invite each qualified Proposer to submit price Proposals. Metro shall conduct phase two as any other competitive Proposal Procurement except as set forth in this Rule.

(i) No public notice need be given of the request to submit price Proposals because such notice was previously given.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

#### **47-0265 Small Procurements**

(1) **Generally.** For Procurements of Goods or Services less than or equal to \$10,000, Metro may award a Contract as a Small Procurement pursuant to ORS 279B.065 and in accordance with this Administrative Rule. State Code prohibits a Procurement from being artificially divided or fragmented so as to constitute a Small Procurement under this section.

(2) **Methods Available.** Metro may choose any method of selecting such Contractors, including, but not limited to, offering and directly awarding the Contract to only one firm or conducting a competition for the Contract. However, if the Goods or Services are available from a QRF, they must be purchased as provided under Oregon law.

(3) **Amendments.** Metro may amend a Contract awarded as a Small Procurement in accordance with Administrative Rule 47-0800, but the cumulative amendments may not increase the total Contract Price to a sum that exceeds the higher dollar amount of \$10,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Any amendment that causes Contract to exceed the foregoing limits will be treated as an Unauthorized Purchase and shall be subject to the requirements of Rule 46-0200.

Stat. Auth.: ORS 279A.065 & ORS 279B.065

Stats. Implemented: ORS 279B.065

#### **47-0270 Intermediate Procurements**

(1) **Generally; Price Quotes or Intermediate Proposals.** For Procurements of Goods or Services greater than \$10,000 and less than or equal to \$150,000, pursuant to ORS 279B.070 Metro may award a Contract as an Intermediate Procurement after seeking three Written Intermediate Proposals or Price Quotes. Notwithstanding the foregoing, if the Goods or Services are available from a QRF, they must be purchased as provided under Oregon law.

(a) State Code prohibits a Procurement from being artificially divided or fragmented so as to constitute a Intermediate Procurement under this section.

(b) The Intermediate Request for Proposal and the Request for Quotes are both Written solicitation processes. If three Written Price Quotes or Intermediate Proposals are not reasonably available or Metro concluded that a Written Intermediate solicitation process will not result in a robust, competitive procurement, Metro may proceed with an oral procurement method. Metro shall keep records of the sources of the Quotes or Intermediate Proposals received.

(c) Metro uses ORPIN as a primary tool for contacting potential Contractors. In the event a potential contractor is not registered on ORPIN, Metro may email or otherwise directly distribute the Solicitation document to such potential contractor.

(2) **Negotiations.** Metro may negotiate with a prospective Contractor who offers to provide Goods or Services in response to an Intermediate Procurement to clarify its Price Quote or Intermediate Proposal or to effect modifications that will make the Offer more Advantageous to Metro.

(3) **Award.** If a Contract is to be awarded, Metro shall award the Contract to the responsive, Responsible Offeror who provides the lowest Price Quote, or if criteria other than price are to be considered, whose Intermediate Proposal is the highest scoring. Metro may consider other criteria, in addition to price, in making the award: experience, expertise, product functionality, suitability for a particular purpose, equity, sustainability, and Contractor Responsibility under ORS 279B.110. For Intermediate Request for Proposals, Metro may choose to establish an evaluation committee with various experts from within and outside Metro. For Intermediate Proposals under \$50,000 there is no required minimum number of evaluators on the panel. Intermediate Proposals over \$50,000 shall be evaluated by at least 3 evaluators. The Procurement Officer must approve in advance the composition of any evaluation committee that does not comply with the above requirements.

(4) **Amendments.** Metro may amend a Contract awarded as an Intermediate Procurement in accordance with Administrative Rule 47-0800, but the cumulative amendments may not increase the total Contract Price to a sum that exceeds the higher dollar amount of \$150,000 or one hundred twenty-five percent (125%) of the original Contract Price, whichever is greater. Any amendment that causes Contract to exceed the foregoing limits will be treated as an Unauthorized Purchase and shall be subject to the requirements of Rule 46-0200.

(5) **BOLI Applicability.** For Intermediate Contracts for minor alterations, ordinary repair or maintenance necessary to preserve a public improvement, where applicable Metro shall comply with the prevailing wage provisions of ORS 279C.800 to 279C.870. For Intermediate Contracts that involve Public Works, as defined in ORS 279C.800, Metro shall provide notification of award to BOLI as required by ORS 279C.835.

Stat. Auth.: ORS 279A.065 & ORS 279B.070

Stats. Implemented: ORS 279B.070

#### **47-0275 Sole-Source Procurements**

(1) **Generally.** In accordance with ORS 279B.075, Metro may award a Contract without competition as a sole-source Procurement when it is determined that the Goods or Services, or class of Goods or Services, are available from only one source. Such determination must be made by the Procurement Officer for Procurements under \$150,000. For all other Procurements the determination must be made by the Metro Local Contract Review Board. The determination must be made based on Written findings that include, where applicable, findings:

(a) Based on a brief description of the Contract or Contracts to be covered including volume of contemplated future purchases;

(b) Based on a description of the Goods or Services to be purchased; That current market research supports the determination that the Goods or Services are available from only one seller or source;

(c) That the efficient utilization of existing Goods or Services requires the acquisition of compatible Goods or Services;

(d) 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;

(e) That the required product is data processing equipment which will be used for research where there are requirements for exchange of software and data with other research establishments;

(f) That the Goods or Services are for use in a pilot or an experimental project; or

(g) Other findings that support the conclusion that the Goods or Services are available from only one source.

(2) **Public Notice.** For sole-source Contracts in excess of \$50,000, Metro shall give public notice of its determination that the Goods or Services or class of Goods or Services are available from only one source. Such notice must be published in a manner similar to public notice of competitive Bids under ORS 279B.055(4) and Administrative Rule 47-0300. The public notice must 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. Metro 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.

(3) **Protest.** An Affected Person may protest Metro's determination that the Goods or Services or class of Goods or Services are available from only one source in accordance with Administrative Rule 47-0710.

Stat. Auth.: ORS 279A.065 & ORS 279B.075

Stats. Implemented: ORS 279B.075

#### **47-0280     Emergency Procurements**

- (1) Metro may award a Contract as an Emergency Procurement without the use of competitive Bidding or competitive Proposals when the requirements of ORS 279B.080 and this Administrative Rule are met.
- (2) Metro shall document the nature of the Emergency and describe the method used for the selection of the particular Contractor. Metro shall encourage competition for Emergency Procurements to the extent reasonable under the circumstances.
- (3) The authority to declare an Emergency and authorize an Emergency Procurement is as follows:
  - (a) The Procurement Officer or designee may declare the existence of an Emergency and authorize Metro or any of its departments to enter into an Emergency Procurement Contract under \$150,000.
  - (b) The director of a department may declare the existence of an Emergency and authorize that department to enter into an Emergency Procurement Contract under \$150,000 only if the Procurement Officer or person to whom the powers of the Procurement Officer have been delegated, is not available when the Procurement needs to be made.
  - (c) The Chief Operating Officer may declare the existence of an Emergency and authorize Emergency Procurement Contracts that exceed \$150,000.
- (4) All documentation of Emergency Procurements must be sent to the Procurement Officer for record keeping purposes.
- (5) After the award of an Emergency Procurement Contract, Metro shall execute a Written Contract with the Contractor as soon as possible, and in no event later than sixty (60) Days after the award.
- (6) All Emergency Procurement Contracts, whether or not Signed by the Contractor, will be deemed to contain a termination for convenience clause permitting Metro to immediately terminate the Contract at its discretion and, unless the Contract was void, Metro shall pay the Contractor only for work performed prior to the date of termination plus the Contractor's unavoidable costs incurred as a result of the termination. In no event will Metro pay for anticipated lost profits or consequential damages as a result of the termination.
- (7) In accordance with ORS 279B.080(2), for an Emergency Procurement of construction services that are not Public Improvements, Metro shall ensure competition for a Contract for the Emergency work that is reasonable and appropriate under the Emergency circumstances. In conducting the Procurement, Metro shall set a Solicitation time period that Metro determines to be reasonable under the Emergency circumstances and may issue Written or oral requests for Offers or make direct appointments without competition in case of extreme necessity.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.080

#### **47-0285     Special Procurements**

- (1) **Generally.** Metro may award a Contract as a Special Procurement pursuant to the requirements of this Administrative Rule and ORS 279B.085. Special Procurements allow Metro to enter into a series of Contracts over time pursuant to the authorization provided in regard to the Special Procurement and without necessarily following the requirements for Intermediate Procurement or formal competitive Bids or Proposals.



(2) As used in this Rule and Rules 47-0288, 47-0700 and 47-0730:

(a) “Special Procurement” means, unless the context requires otherwise, a Class Special Procurement, a Contract-Specific Special Procurement or both. A Special Procurement allows Metro to custom-design any contracting approach it determines will meet its procurement needs.

(b) “Class Special Procurement” means a contracting procedure that differs from the procedures described in these rules and is for the purpose of entering into a series of Contracts over time for the acquisition of a specified class of Goods or Services.

(c) “Contract-Specific Special Procurement” means a contracting procedure that differs from the procedures described in these rules and is for the purpose of entering into a single Contract or a number of related Contracts for the acquisition of specified Goods or Services on a one-time basis or for a single project.

(3) The Local Contract Review Board may approve a Special Procurement if it finds that the use of a Special Procurement complies with the requirements set forth in ORS 279B.085(4).

(4) **Public Notice.** Metro shall give public notice of the Local Contract Review Board's approval of a Special Procurement in the same manner as public notice of competitive Bids under ORS 279B.055(4) and Administrative Rule 47-0300. The public notice must describe the Goods or Services or class of Goods or Services to be acquired through the Special Procurement. Metro shall give Affected Persons at least seven (7) Days from the date of the notice of approval of the Special Procurement to protest the Special Procurement. When a Class Special Procurement has been approved, additional future procurements that fall within the class may be awarded according to the terms of the original Special Procurement, without a new request for, notice of, and approval of the Special Procurement.

(5) **Protest.** An Affected Person may protest the request for approval of a Special Procurement in accordance with ORS 279B.400 and Administrative Rule 47-0700.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.085

#### **47-0288 Special Procurements Authorized by Rule**

The Local Contract Review Board declares the following as Class Special Procurements:

(1) **Manufacturer Direct Supplies.** Metro may purchase Goods directly from a manufacturer if the cost from the manufacturer is the same or less than the cost the manufacturer charges to its distributor(s).

(2) **Advertisements.** Metro may directly purchase media advertising, including print (e.g. newspaper), broadcast (e.g. television, radio), display (e.g. billboard), internet (e.g. web based publications) and other electronic media formats.

(3) **Intellectual Property (Periodicals, Books, Proprietary Software Licenses, Art, and Other Products of the Creative Process).** Metro may directly purchase intellectual property (including, but not be limited to, periodicals, books, proprietary software licenses, reference materials, audio and visual media, and other products of the creative process) when the product is protected under intellectual property law (e.g. copyright, patent). If there is more than one source of the intellectual property, and the product is not being purchased directly from the creator or other original source, every attempt should be made to establish a competitive selection process to achieve the greatest economy.

(4) **Financial Products.** Metro may directly purchase financial products such as bond insurance, surety bonds for Metro bond reserves and liquidity facilities such as letters of lines of credit. Metro may pay

fees associated with such transactions, including, but not limited to, registrar, paying agent, and escrow agent fees and fees associated with outstanding debt issues.

(5) **Employee Benefits Contracts.** Metro may purchase employee benefit insurance, and other taxable employee benefits, without a competitive Solicitation process, regardless of dollar amount.

(6) **Insurance Contracts.** Contracts for insurance may be awarded directly to an insurer after Metro obtains Proposals from an insurance consultant. The insurance consultant will be selected in accordance with the applicable procedures set forth in the Personal Services Contracting Rules. Among the services to be provided by the consultant is the securing of competitive Proposals from insurance carriers for all coverages for which the insurance consultant is given responsibility and advice to Metro about the costs and benefits of the various Proposals. Metro may then negotiate or enter into the insurance Contract that appears most Advantageous to Metro without advertisement or issuance of its own Request for Proposals.

(7) **Used Personal Property or Equipment.** Metro may directly purchase used personal property and equipment. Used property and used equipment is property or equipment that has been placed in use by a previous owner or user for a period of time, and which is recognized in the relevant trade or industry, if there is one, as qualifying the personal property or equipment as “used”.

(8) **Hazardous Material Removal and Oil Clean-up.** Metro may enter into a Public Contract without competitive Solicitation when ordered to clean up oil or other hazardous waste pursuant to the authority granted the Oregon Department of Environmental Quality under ORS Chapter 466, and such DEQ order necessitates the prompt establishment and performance of the Contract in order to comply with the statutes regarding spill or release of oil or hazardous materials. Metro shall not contract pursuant to this section in the absence of an order from DEQ to clean up a site with a time limitation that would not permit hiring a Contractor under the usual, required Procurement processes.

(9) **Rating Agency Contracts.** Metro may purchase the services of Moody’s Investors Service, Standard and Poor’s, or similar rating agencies without competitive Solicitation.

(10) **Information Technology (Software and Hardware Maintenance, Licenses, Subscriptions and Upgrades).** Metro may directly enter into a Contract or renew existing Contracts for information technology (including hardware or software maintenance, licenses, subscriptions, and upgrades) where the maintenance, upgrades, subscriptions and licenses are either available from only one source or, if available from more than one source, are obtained from Metro’s current provider in order to utilize the pre-existing knowledge of the provider regarding the specifics of Metro’s information technology system. Metro shall document in the Procurement file the facts that justify either that maintenance, license(s), subscriptions and upgrades were available from only one source or, if from more than one source, that obtaining such Goods and Services from the current vendor is most Advantageous to Metro.

(11) **Equipment Maintenance, Repair and Overhaul.** Metro may directly award a Contract for equipment maintenance, repair and/or overhaul if:

(a) Service and/or parts required are unknown, and the cost cannot be determined without extensive preliminary dismantling or testing;

(b) Service and/or parts required are for sophisticated equipment for which specially trained personnel are required and such personnel are available from only one source; or

(c) Services and/or parts must be acquired from the provider of the equipment and/or software being maintained in order to be compatible, preserve warranties, provide the best possible service, or

conform to other similar agreements being provided by the same provider for maximizing economy and/or servicing functions.

(12) **Price-regulated Goods and Services, utilities and utility related services.** Metro may directly purchase, without a competitive Solicitation process, goods, services, repair, equipment and/or maintenance work, where the rate or price for such Goods and Services is established by federal, state, or local regulatory authority or when the Services can be provided only by a specific utility.

(13) **Goods, Services or Equipment Required by a Federal or State Grant Agreement.** Metro may directly purchase, without a competitive Solicitation process, Goods, Services or equipment when they are required in the federal or state grant agreement to be purchased from a specific source or when a specific brand name is required and no competition is otherwise available.

(14) **Membership Dues.** Metro may directly purchase, without a competitive Solicitation process, dues or memberships in professional or community organizations for the benefit of Metro.

(15) **Services Related to Legal Advice.** Metro may directly enter into a Contract, without a competitive Solicitation process, Services related to the provision of legal advice to Metro.

(16) **Seminar, Training Registration and Conference Fees.** Metro may directly purchase, without a competitive Solicitation process, seminar registrations and training session fees for attendance at seminars, conferences and training courses hosted by outside entities.

(17) **Event Sponsorship Agreements.** Metro may directly pay to sponsor an event, whether or not Metro receives Goods or Services in return for its payment.

(18) **Sponsorship Agreements.** Sponsorship Agreements, under which Metro receives a gift or donation in exchange for recognition of the donor, may be awarded in any manner which Metro deems appropriate to meet its needs, including by direct award.

(19) **Contractor Provided Funding.** Metro may directly award contracts for Goods or Services to a Contractor who provides substantial materials or a substantial portion of the funding for a project.

(20) **Maintenance and Training Services from the Contractor Supplying Goods.** Metro may directly purchase, without a competitive Solicitation process, maintenance or training services directly from a Contractor from whom Metro has previously acquired Goods and the services or training is directly related to such Goods.

(21) **Nonprofit Partnerships.** Metro may directly award Contracts for Goods and Services when the Contractor is a not-for-profit organization and where both parties share in the decision making process work together to define a scope of work, contribute resources, share responsibilities, and accept risk and benefits according to a mutually agreed upon arrangement.

(22) **Zoos and Animal Conservation Organizations.** Metro may directly award Contracts for Goods and Services when the contractor is (a) a not-for-profit entity and (b) a zoo or other organization dedicated to the study, conservation, or care of zoo animals.

(23) **Concession Services Agreements.**

(a) **Small Concessions.** Small Concessions are Concession Services Agreements to sell or promote food, beverages, merchandise or Services, including but not limited to performances and entertainment, to the public for which the concessionaire's projected annual gross revenues are estimated to be \$500,000 or less. Small Concessions shall be awarded based on any method determined by Metro to provide an opportunity to all persons desiring to operate a concession, including without limitation, by direct award, private negotiation, or using a competitive process.

(b) **Major Concessions.** Major Concessions are Concessions Services Agreements to sell or promote food, beverages, merchandise or Services, including but not limited to performances and entertainment, to the public for which the concessionaire's projected annual gross revenues under the Contract are estimated to exceed \$500,000 annually. Major Concessions shall be awarded using a Request for Proposals under these Rules.

(24) **Animals and Animal Transportation.** Contracts for the acquisition or transport of animals may be awarded in any manner which Metro deems appropriate to meet Metro's needs, including by direct award.

(25) **Perishables (e.g. Medication, Food, Plants, Chemicals and Laboratory Supplies).** Metro may directly purchase, without a competitive Solicitation process, perishables, including (without limitation) animal medication, animal food, human food, plants, chemicals and laboratory supplies upon the department's determination that the quality of the desired perishable item is of greater importance than the cost. However if longevity is not an issue and multiple sources exist, standard Procurement practices shall be utilized to the extent possible.

(26) **Items for Resale.** Metro may directly purchase, without a competitive Solicitation process, Goods and Services being purchased for resale (including, without limitation, Zoo gift shop retail inventory and food for resale). This Special Procurement category applies to Goods and Services that are specifically for resale as opposed to internal use or consumption.

## **Procurement Process**

### **47-0300 Public Notice of Solicitation Documents for Formal Procurements**

(1) **Notice of Solicitation Documents.** Metro shall provide public notice of every formal Solicitation in accordance with subsection (2) of this Rule. Metro may give additional notice using any method it determines appropriate to foster and promote competition, including:

(a) Mailing or emailing notice of the availability of the Solicitation Document to Persons that have expressed an interest in Metro's Procurements;

(b) Publishing the advertisement for Offers in newspapers or other publications of general circulation in the area where the Contract is to be performed and in as many additional issues and publications as Metro may determine; or

(c) **Placing Notice on Metro's Internet Web site.**

(2) **Required Advertising.** Metro shall advertise every notice of a formal Solicitation as follows:

(a) Metro shall publish the advertisement for formal Offers in accordance with the requirements of ORS 279B.055(4)(a) and (b) and ORS 279B.060(5); or

(b) Because Metro finds that it would be cost effective to Electronically post notice of Solicitations, Metro will publish advertisements for formal Offers on the Oregon Department of Administrative Services' Electronic Procurement System known as "ORPIN" (Oregon Procurement Information Network).

(3) **Content of Advertisement.** All advertisements for formal Offers must set forth:

(a) Where, when, how, and for how long the Solicitation Document may be obtained;

(b) A general description of the Goods or Services to be acquired;

(c) The interval between the first date of notice of the Solicitation Document given in accordance with subsection (2) above and Closing, which may not be less than fourteen (14) Days for an Invitation to Bid and twenty-one (21) Days for a Request for Proposals, unless Metro determines that a shorter interval is in the public's interest, and that a shorter interval will not substantially affect competition. However, in no event may the interval between the first date of notice of the Solicitation Document given in accordance with subsection (2) above and Closing be less than seven (7) Days as set forth in ORS 279B.055(4)(f). Metro shall document the specific reasons for the shorter public notice period in the Procurement file;

(d) The date that Persons must file applications for prequalification if prequalification is a requirement and the class of Goods or Services is one for which Persons must be prequalified;

(e) The office where Contract terms, conditions and Specifications may be reviewed;

(f) The name, title and address of the individual authorized by Metro to receive Offers;

(g) For formal ITB's, the scheduled Opening; and

(h) Any other information Metro deems appropriate.

(4) **Fees.** Metro may charge a fee or require a deposit for the Solicitation Document.

(5) **Notice of Addenda.** Metro shall provide potential Offerors notice of any Addenda to a Solicitation Document in accordance with Administrative Rule 47-0430.

Stat. Auth.: ORS 279A.065, ORS 279B.055 & ORS 279B.060

Stats. Implemented: ORS 279B.055 & ORS 279B.060

#### **47-0310 Bids and Proposals are Offers**

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

(a) In competitive Bids and competitive Proposals, the Offer is always a "Firm Offer," i.e. the Offer shall be held open by the Offeror for Metro's acceptance for the period specified in Administrative Rule 47-0480. Metro may elect to accept the Offer at any time during the specified period, and Metro's award of the Contract constitutes acceptance of the Offer and binds the Offeror to the Contract.

(b) Notwithstanding the fact that a competitive Proposal is a "Firm Offer" for the period specified in Administrative Rule 47-0480, Metro may elect to discuss or negotiate certain contractual provisions, as identified in these rules or in the Solicitation Document, with the Proposer. Where negotiation is permitted by the rules or the Solicitation Document, Proposers are obligated to negotiate in good faith and only on those terms or conditions that the rules or the Solicitation Document have reserved for negotiation.

(2) **Contingent Offers.** Except to the extent the Proposer is authorized to propose certain terms and conditions pursuant to Administrative Rule 47-0261, a Proposer may not make its Offer contingent upon Metro's acceptance of any terms or conditions (including Specifications) other than those contained in the Solicitation Document.

(3) **Offeror's Acknowledgment.** By Signing and returning the Offer, the Offeror acknowledges it has read and understands the terms and conditions contained in the Solicitation Document and that it accepts and agrees to be bound by the terms and conditions of the Solicitation Document. If the Request for Proposals permits Proposers to propose alternative terms or conditions under Administrative Rule 47-0261, the Offeror's Offer is deemed to have accepted (i) any nonnegotiable terms and conditions and (ii) any proposed terms and conditions offered for negotiation upon and to the extent accepted by Metro in Writing.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065, ORS 279B.055 & ORS 279B.60

#### **47-0330 Electronic Procurement**

(1) **Electronic Procurement Authorized.** Metro may conduct all phases of a Procurement, including without limitation the posting of Electronic Advertisements and the receipt of Electronic Offers, by Electronic methods if and to the extent Metro specifies in a Solicitation Document, a Request for Quotes, or any other Written instructions on how to participate in the Procurement.

(2) Metro shall open an Electronic Offer in accordance with Electronic security measures in effect at Metro at the time of its receipt of the Electronic Offer. Unless Metro provides procedures for the secure receipt of Electronic Offers, the Person submitting the Electronic Offer assumes the risk of premature disclosure due to submission in unsealed form.

(3) Metro's use of Electronic Signatures must be consistent with applicable statutes and rules. Metro may limit the use of Electronic methods of conducting a Procurement as Advantageous to Metro.

(4) If Metro determines that Bid or Proposal security is or will be required, Metro should not authorize Electronic Offers unless Metro has another method for receipt of such security.

(5) **Rules Governing Electronic Procurements.** Metro shall conduct all portions of an Electronic Procurement in accordance with these Division 47 Administrative rules, unless otherwise set forth in this Rule.

(6) **Preliminary Matters.** As a condition of participation in an Electronic Procurement Metro may require potential Contractors to register with Metro before the date and time on which Metro will first accept Offers, to agree to the terms, conditions, or other requirements of a Solicitation Document, or to agree to terms and conditions governing the Procurement, such as procedures that Metro may use to attribute, authenticate or verify the accuracy of an Electronic Offer, or the actions that constitute an Electronic Signature.

(7) **Offer Process.** Metro may specify that Persons must submit an Electronic Offer by a particular date and time, or that Persons may submit multiple Electronic Offers during a period of time established in the Electronic Advertisement. When Metro specifies that Persons may submit multiple Electronic Offers during a specified period of time, Metro must designate a time and date on which Persons may begin to submit Electronic Offers, and a time and date after which Persons may no longer submit Electronic Offers. The date and time after which Persons may no longer submit Electronic Offers need not be specified by a particular date and time, but may be specified by a description of the conditions that, when they occur, will establish the date and time after which Persons may no longer submit Electronic Offers. When Metro will accept Electronic Offers for a period of time, then at the designated date and time that Metro will first receive Electronic Offers, Metro must begin to accept real time Electronic Offers on Metro's Electronic Procurement System, and must continue to accept Electronic Offers in

accordance with section (8)(b) of this Rule until the date and time specified by Metro, after which Metro will no longer accept Electronic Offers.

**(8) Receipt of Electronic Offers.**

(a) When Metro conducts an Electronic Procurement that provides that all Electronic Offers must be submitted by a particular date and time, Metro shall receive the Electronic Offers in accordance with these Administrative Rules.

(b) When Metro specifies that Persons may submit multiple Electronic Offers during a period of time, Metro shall accept Electronic Offers, and Persons may submit Electronic Offers, in accordance with the following:

A. Following receipt of the first Electronic Offer after the day and time Metro first receives Electronic Offers Metro shall post on Metro's Electronic Procurement System, and updated on a real time basis, the lowest Electronic Offer price or the highest ranking Electronic Offer. At any time before the date and time after which Metro will no longer receive Electronic Offers, a Person may revise its Electronic Offer, except that a Person may not lower its price unless that price is below the then lowest Electronic Offer.

B. A Person may not increase the price set forth in an Electronic Offer after the day and time that Metro first accepts Electronic Offers.

C. A Person may withdraw an Electronic Offer only in compliance with these Administrative Rules.

**(9) Failure of the E-Procurement System.** In the event of a failure of Metro's Electronic Procurement System that interferes with the ability of Persons to submit Electronic Offers, protest or to otherwise participate in the Procurement, Metro may cancel the Procurement in accordance with Administrative Rule 47-0660, or may extend the date and time for receipt of Electronic Offers by providing notice of the extension immediately after the Electronic Procurement System becomes available.

Stat. Auth.: ORS 279A.065 & ORS 279B.055

Stats. Implemented: ORS 279A.065

## **Bid and Proposal Preparation**

### **47-0400 Offer Preparation**

(1) **Instructions.** An Offeror shall submit and Sign its Offer in accordance with the instructions set forth in the Solicitation Document. An Offeror shall initial and submit any correction or erasure to its Offer prior to Closing in accordance with the requirements for submitting an Offer set forth in the Solicitation Document.

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

(3) **Documents.** An Offeror shall provide Metro with all documents and Descriptive Literature required by the Solicitation Document. If the Solicitation Document instructs Offerors not to include documents or literature, such as warranty provisions, Metro is entitled to disregard those documents in determining whether the Offer is responsive to Metro's request.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

#### **47-0410 Offer Submission**

(1) **Product Samples and Descriptive Literature.** Metro may require Product Samples or Descriptive Literature if Metro determines either is necessary or desirable to evaluate the quality, features or characteristics of an Offer. Metro will dispose of Product Samples, or make them available for the Offeror to retrieve in accordance with the Solicitation Document.

(2) **Identification of Offers.**

(a) To ensure proper identification and handling, Offers must be submitted in a sealed envelope appropriately marked or in the envelope provided by Metro, whichever is applicable. If Metro permits Electronic Offers in the Solicitation Document, the Offeror may submit and identify Electronic Offers in accordance with these Administrative Rules and the instructions set forth in the Solicitation Document.

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

(3) **Receipt of Offers.** The Offeror is responsible for ensuring Metro receives its Offer at the required delivery point prior to the Closing, regardless of the method used to submit or transmit the Offer. Offers not so received are late as provided in Administrative Rule 47-0460 and must be returned unopened.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

#### **47-0420 Pre-Offer Conferences**

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

(2) **Required Attendance.** Metro may require attendance at the pre-Offer conference as a condition for making an Offer.

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

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

(5) **Agency Announcement.** Metro must set forth notice of any pre-Offer conference in the Solicitation Document in accordance with Administrative Rule 47-0255(2) or 47-0260(2).

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

#### **47-0430 Addenda to Solicitation Document**

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

(2) **Notice and Distribution.** Metro may notify prospective Offerors of Addenda in a manner intended to foster competition and to make prospective Offerors aware of the Addenda. The Solicitation Document must specify how Metro will provide notice of Addenda and how Metro will make the



Addenda available before Closing, and at each subsequent step or tier of evaluation if Metro will engage in a multistep competitive Bidding process in accordance with Administrative Rule 47-0257, or a multi-tiered or multistep competitive Proposal process in accordance with Administrative Rule 47-0261.

**(3) Timelines; Extensions.**

(a) Metro shall issue Addenda within a reasonable time to allow prospective Offerors to consider the Addenda in preparing their Offers. Metro may extend the Closing if Metro determines prospective Offerors need additional time to review and respond to Addenda. Except to the extent justified by a countervailing public interest, Metro may not issue Addenda related to an Invitation to Bid or a Request for Proposal less than 72 hours before the Closing unless the Addenda also extends the Closing.

(b) Notwithstanding subsection (3)(a) of this Rule, Addenda that modifies the evaluation criteria, selection process or procedure for any tier of competition under a multistep competitive Bid or a multi-tiered or multistep competitive Proposal issued in accordance with ORS 279B.060(6)(d) and Administrative Rule 47-0261 must be issued no fewer than five (5) Days before the beginning of that tier or step of competition, unless Metro determines that a shorter period is sufficient to allow Offerors to prepare for that tier or step of competition. Metro shall document the factors it considered in making that determination, which may include, without limitation, the scope of the changes to the Solicitation Document, the location of the remaining eligible Proposers, or whether shortening the period between issuing an Addenda and the beginning of the next tier or step of competition favors or disfavors any particular Proposer or Proposers.

**(4) Request for Change or Protest.** Unless a different deadline is set forth in the Addenda, an Offeror may submit a Written request for change or protest to the Addenda, as provided in Administrative Rule 47-0730, by the close of Metro's next business day after issuance of the Addenda, or up to the last day allowed to submit a request for change or protest under Administrative Rule 47-0730, whichever date is later. If the date established in the previous sentence falls after the deadline for receiving protests to the Solicitation Document in accordance with Administrative Rule 47-0730, then Metro may consider an Offeror's request for change or protest to the Addenda only, and Metro may not consider a request for change or protest to matters not added or modified by the Addenda. Notwithstanding any provision of this section (4), Metro is not required to provide a protest period for Addenda issued after initial Closing during a multi-tier or multistep Procurement process conducted pursuant to ORS 279B.055 or ORS 279B.060.

Stat. Auth.: ORS 279A.065 & ORS 279B.060  
Stats. Implemented: ORS 279B.060

**47-0440 Pre-Closing Modification or Withdrawal of Offers**

**(1) Modifications.** An Offeror may modify its Offer in Writing prior to the Closing. An Offeror must prepare and submit any modification to its Offer to Metro in accordance with Administrative Rule 47-0400 and 47-0410, unless otherwise specified in the Solicitation Document. Any modification must include the Offeror's statement that the modification amends and supersedes the prior Offer. The Offeror must mark the submitted modification as follows:

- (a) Bid (or Proposal) Modification; and
- (b) Solicitation number (or other identification as specified in the Solicitation Document).

**(2) Withdrawals.**

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

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

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

A. Bid (or Proposal) Withdrawal; and

B. Solicitation number (or other identification as specified in the Solicitation Document).

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

Stat. Auth.: ORS 279A.065 & ORS 279B.055

Stats. Implemented: ORS 279B.055

#### **47-0450 Receipt, Opening, and Recording of Bids and Proposals; Confidentiality of Formal Offers**

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

(2) **Opening and Recording of Bids.** Metro shall publicly open Bids, including any modifications made pursuant to Administrative Rule 47-0440(1). To the extent practicable, Metro will read aloud the name of each Bidder, and such other information as Metro considers appropriate. However, Metro may withhold from disclosure information in accordance with ORS 279B.055(5)(c) and ORS 279B.060(6). In the case of voluminous Bids, Metro may elect not to read Offers aloud and will only disclose the name of each Bidder.

(3) **Availability.** After Opening, Offers will be available for public inspection except for those portions of an Offer that the Offeror designates as trade secrets or as confidential proprietary data in accordance with applicable law. See ORS 192.501(2); ORS 646.461 to 646.475.

(a) To the extent such designation is not in accordance with applicable law, Metro will make those portions available for public inspection. The Offeror must separate information designated as confidential from other non-confidential information at the time of submitting its Offer.

(b) Prices, makes, model or catalog numbers of items offered, scheduled delivery dates, and terms of payment are not confidential, and will be publicly available regardless of an Offeror's designation to the contrary. Metro may determine the appropriate charge to be paid for copies made pursuant to public records requests and may request payment for such copies before they are released.

(c) Notwithstanding anything contrary above, Metro is not required to disclose the contents of Proposals until after Metro posts a notice of intent to award pursuant to Administrative Rule 47-0610.

#### **47-0460 Late Offers, Late Withdrawals and Late Modifications**

- (1) **Any Offer received after Closing is late.** An Offeror's request for withdrawal or modification of an Offer received after Closing is late. Metro may not consider late Offers, withdrawals or modifications except as permitted in Administrative Rule 47-0470 or 47-0261.
- (2) For manual submissions of Offers, the Metro Regional Center reception desk time clock will be the clock of record and the date and time imprint of that clock on an Offer will determine the timeliness of the submission. Late manual submissions must be returned to the Offeror unopened with a copy of the envelope containing the Metro's time stamp on the Offer retained for the Procurement file.
- (3) For Electronic submissions, when permitted, the time shown by Metro as to the date of arrival of the Electronic submission will determine the timeliness of the submission. Late Electronic submissions will be deleted from Metro's files, returned Electronically to the Offeror and the time of the submission and the time of return must be documented in the Procurement file.
- (4) Failure to properly return or dispose of a late submission does not mean an Offer or submission arrived on time.

Stat. Auth.: ORS 279A.065 & ORS 279B.055  
Stats. Implemented: ORS 279B.055

#### **47-0470 Mistakes**

- (1) **Generally.** To protect the integrity of the competitive Procurement process and to assure fair treatment of Offerors, Metro should carefully consider whether to permit waiver, correction or withdrawal of Offers for certain mistakes.
- (2) **Treatment of Mistakes.** Metro may not allow an Offeror to correct or withdraw an Offer for an error in judgment. If Metro discovers certain mistakes in an Offer after Closing, but before award of the Contract, Metro may take the following action:
  - (a) Metro may waive, or permit an Offeror to correct, a minor informality. A minor informality is a matter of form rather than substance that is evident on the face of the Offer, or an insignificant mistake that can be waived or corrected without prejudice to other Offerors. Examples of minor informalities include an Offeror's failure to:
    - A. Return the correct number of Signed Offers or the correct number of other documents required by the Solicitation Document;
    - B. Sign the Offer in the designated block, provided a Signature appears elsewhere in the Offer, evidencing an intent to be bound; and
    - C. Acknowledge receipt of an Addenda to the Solicitation Document, provided that it is clear on the face of the Offer that the Offeror received the Addenda and intended to be bound by its terms; or the Addenda involved did not affect price, quality or delivery.
  - (b) Metro may correct a clerical error if the error is evident on the face of the Offer or other documents submitted with the Offer, and the Offeror confirms Metro's correction in Writing. A clerical error is an Offeror's error in transcribing its Offer. Examples include typographical mistakes, errors in extending unit prices, transposition errors, arithmetical errors, instances in which the intended correct

unit or amount is evident by simple arithmetic calculations (for example, a missing unit price may be established by dividing the total price for the units by the quantity of units for that item, or a missing or incorrect total price for an item may be established by multiplying the unit price by the quantity when those figures are available in the Offer). Unit prices will prevail over extended prices in the event of a discrepancy between extended prices and unit prices.

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

- A. The nature of the error;
- B. That the error is not a minor informality under this subsection or an error in judgment;
- C. That the error cannot be corrected or waived under subsection (b) of this section;
- D. That the Offeror acted in good faith in submitting an Offer that contained the claimed error and in claiming that the alleged error in the Offer exists;
- E. That the Offeror acted without gross negligence in submitting an Offer that contained a claimed error;
- F. That the Offeror will suffer substantial detriment if Metro does not grant the Offeror permission to withdraw the Offer;
- G. That Metro's or the public's status has not changed so significantly that relief from the forfeiture will work a substantial hardship on Metro or the public it represents; and
- H. That the Offeror promptly gave notice of the claimed error to Metro.

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

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

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

(5) **Written Determination.** All decisions to permit the correction or withdrawal of Offers, or to cancel an award or a Contract based on mistakes, must be supported by a Written determination by Metro that states the reasons for the action taken.

Stat. Auth.: ORS 279A.065 & ORS 279B.055  
Stats. Implemented: ORS 279B.055

#### **47-0480 Time for Acceptance**

A Bid or Proposal is a Firm Offer, irrevocable, valid and binding on the Offeror for not less than thirty (30) Days following Closing, unless otherwise specified in the Solicitation Document.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

#### **47-0490 Extension of Time for Acceptance of Offer**

Metro may request, orally or in Writing, that Offerors extend, in Writing, the time during which Metro may consider their Offer(s). If an Offeror agrees to such extension, the Bid or Proposal will continue as a Firm Offer, irrevocable, valid and binding on the Offeror for the agreed-upon extension period. An extension may occur after the expiration of the initial Offer period.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

### **Qualifications and Duties**

#### **47-0500 Responsibility of Bidders and Proposers**

(1) Before awarding a Contract Metro shall determine that the Bidder submitting the lowest Bid or Proposer submitting the most Advantageous Proposal is Responsible. Metro shall use the standards set forth in ORS 279B.110 and Administrative Rule 47-0640(1)(c)(F) to determine if a Bidder or Proposer is Responsible. In the event Metro determines a Bidder or Proposer is not Responsible it shall prepare a Written determination of non-Responsibility as required by ORS 279B.110 and reject the Offer.

(2) For purposes of this Rule, Metro may investigate any Person submitting an Offer. The investigation may include that Person's officers, directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this Rule or to apply the debarment provisions of ORS 279B.130.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.110

#### **47-0525 Qualified Products Lists**

Metro may develop and maintain a qualified products list pursuant to ORS 279B.115.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.115

#### **47-0550 Prequalification of Prospective Offerors; Pre-negotiation of Contract Terms and Conditions**

(1) Metro may prequalify prospective Offerors to submit Bids or Proposals for Public Contracts to provide particular types of Goods or Services pursuant to ORS 279B.120 and ORS 279B.125.

(2) When Metro permits or requires prequalification of Offerors, Metro shall prepare a prequalification application setting forth the criteria and qualifications for prequalification. Upon receipt of a prequalification application, Metro shall investigate the prospective Offeror as necessary to determine whether the prospective Offeror is qualified. The determination must be made in less than thirty (30) Days, if practicable, if the prospective Offeror requests an early decision to allow the

prospective Offeror as much time as possible to prepare a Offer for a Contract that has been advertised. In making its determination, Metro shall consider only the applicable standards of Responsibility listed in Administrative Rule 47-0640(1)(c)(F). Metro shall promptly notify the prospective Offeror whether the prospective Offeror is qualified.

(3) Notwithstanding the prohibition against revocation of prequalification in ORS 279B.120(3), Metro may determine that a prequalified Offeror is not Responsible prior to Contract award.

(4) Metro may pre-negotiate some or all Contract terms and conditions including prospective Proposer Contract forms such as license agreements, maintenance and support agreements or similar documents for use in future Procurements. Such pre-negotiation of Contract terms and conditions (including prospective Proposer forms) may be part of the prequalification process of a Proposer in section (1) or the pre-negotiation may be a separate process and not part of a prequalification process. Unless required as part of the prequalification process, the failure of Metro and the prospective Proposer to reach agreement on pre-negotiated Contract terms and conditions does not prohibit the prospective Proposer from responding to Procurements. Metro may agree to different pre-negotiated Contract terms and conditions with different prospective Proposers. When Metro has pre-negotiated different terms and conditions with Proposers or when permitted, Proposers offer different terms and conditions, Metro may consider the terms and conditions in the Proposal evaluation process.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.015, ORS 279B.120

#### **47-0575 Debarment of Prospective Offerors**

(1) **Generally.** Metro may debar prospective Offerors from consideration for Metro Contracts for a period up to three years for the reasons listed in ORS 279A.110 or ORS 279B.130(2). Metro shall comply with the notice and hearing provisions after providing notice and the opportunity for hearing as set forth in this Rule and ORS 279B.130.

(2) **Notice of Intent to Debar.** Metro may notify the Person in Writing of a proposed debarment personally or by registered or certified mail, return receipt requested. This notice must:

(a) State that Metro intends to debar the Person;

(b) Set forth the reasons for the debarment;

(c) Include a statement that the Person has a right to appeal the notice of intent to debar and have a hearing in accordance with Administrative Rule 47-0760 and a statement of the time within which an appeal must be filed;

(d) Include a reference to the particular sections of the statutes and rules involved;

(e) State that the Person may be represented by legal counsel at the hearing.

(3) **Appeal and Hearing.** Appeal of the notice and hearing on the appeal must be in accordance with the provisions of Administrative Rule 47-0760.

(4) **Responsibility.** Notwithstanding the limitation on the term for debarment in ORS 279B.130(1)(b), Metro may determine that a previously debarred Offeror is not Responsible prior to Contract award.

(5) **Imputed Knowledge.** Metro may attribute improper conduct of a Person or its affiliate or affiliates having a contract with a prospective Offeror to the prospective Offeror for purposes of debarment where the impropriety occurred in connection with the Person's duty for or on behalf of, or with the knowledge, approval, or acquiescence of, the prospective Offeror.

(6) **Limited Participation.** Metro may allow a debarred Person to participate in Solicitations and Contracts on a limited basis during the debarment period upon Written determination that participation is Advantageous to Metro. The determination must specify the factors on which it is based and define the extent of the limits imposed.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.130

## **Offer Evaluation and Award**

### **47-0600 Offer Evaluation and award**

(1) **Evaluation.** Metro shall evaluate Offers only as set forth in the Solicitation Document, pursuant to ORS 279B.055(6)(a) and ORS 279B.060(6)(b), and in accordance with applicable law. Metro may not evaluate Offers using any other requirement or criterion.

#### **(a) Evaluation of Bids; Preferences.**

A. **Nonresident Bidders.** In determining the lowest Responsive Bid, Metro shall apply the reciprocal preference set forth in ORS 279A.120(2)(b) and Administrative Rule 46-0310 for Nonresident Bidders.

B. **Public Printing.** Metro shall, for the purpose of evaluating Bids, apply the public printing preference set forth in ORS 282.210.

C. **Award When Bids are Identical.** If Metro determines that two or more Bids are identical under Administrative Rule 46-0300, Metro shall award a Contract in accordance with the procedures set forth in Administrative Rule 46-0300.

#### **(b) Evaluation of Proposals.**

A. **Award When Proposals are Identical.** If Metro determines that two or more Proposals are identical under Administrative Rule 46-0300, Metro shall award a Contract in accordance with the procedures set forth in Administrative Rule 46-0300.

B. **Public Printing.** Metro shall for the purpose of evaluating Proposals apply the public printing preference set forth in ORS 282.210.

(c) **Recycled Materials.** When procuring Goods, Metro shall give preference for recycled materials as set forth in ORS 279A.125 and Administrative Rule 46-0320.

(2) **Clarification of Bids or Proposals.** After Opening, Metro may conduct discussions with apparent Responsive Offerors for the purpose of clarification to assure full understanding of the Bids or Proposals. All Bids or Proposals, in Metro's sole discretion, needing clarification must be accorded such an opportunity. Metro shall document clarification of any Offer in the Procurement file.

#### **(3) Negotiations.**

(a) **Bids.** Metro may not negotiate with any Bidder. After award of the Contract Metro and Contractor may only modify the Contract in accordance with Administrative Rule 47-0800.

(b) **Proposals.** Metro may conduct discussions or negotiate with Proposers only in accordance with ORS 279B.060(6)(b) and Administrative Rule 47-0261. After award of the Contract, Metro and Contractor may only modify the Contract in accordance with Administrative Rule 47-0800.

(4) **Award.**

(a) **General.** If awarded, Metro shall award the Contract to the Responsible Bidder submitting the lowest, Responsive Bid or the Responsible Proposer submitting the most Advantageous, Responsive Proposal. Metro may award by item, groups of items or the entire Offer provided such award is consistent with the Solicitation Document and in the public interest.

(b) **Multiple Items.** An Invitation to Bid or Request for Proposals may call for pricing of multiple items of similar or related type with award based on individual line item, group total of certain items, a "market basket" of items representative of Metro's expected purchases, or grand total of all items.

(c) **Multiple Awards -- Bids.**

A. Notwithstanding subsection (4)(a) of this Rule, Metro may award multiple Contracts under an Invitation to Bid in accordance with the criteria set forth in the Invitation to Bid. A multiple award may be made if award to two or more Bidders of similar Goods or Services is necessary for adequate availability, delivery, service or product compatibility and skills. A notice to prospective Bidders that multiple Contracts may be awarded for any Invitation to Bid may not preclude Metro from awarding a single Contract for such Invitation to Bid.

B. If an Invitation to Bid permits the award of multiple Contracts, Metro shall specify in the Invitation to Bid the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services.

(d) **Multiple Awards -- Proposals.**

A. Notwithstanding subsection (4)(a) of this Rule, Metro may award multiple Contracts under a Request for Proposals in accordance with the criteria set forth in the Request for Proposals. A multiple award may be made if award to two or more Proposers of similar Goods or Services is necessary for adequate availability, delivery, service or product compatibility. A notice to prospective Proposers that multiple Contracts may be awarded for any Request for Proposals may not preclude Metro from awarding a single Contract for such Request for Proposals.

B. If a Request for Proposals permits the award of multiple Contracts, Metro shall specify in the Request for Proposals the criteria it will use to choose from the multiple Contracts when purchasing Goods or Services, which may include consideration and evaluation of the Contract terms and conditions agreed to by the Contractors.

(e) **Partial awards.** If after evaluation of Offers, Metro determines that an acceptable Offer has been received for only parts of the requirements of the Solicitation Document:

A. Metro may award a Contract for the parts of the Solicitation Document for which acceptable Offers have been received; or

B. Metro may reject all Offers and may issue a new Solicitation Document on the same or revised terms, conditions and Specifications.

(f) **All or None Offers.** Metro may award all or none Offers if the evaluation shows an all or none award to be the lowest cost for Bids or the most Advantageous for Proposals of those submitted.

Stat. Auth.: ORS 279A.065 & ORS 279B.060

Stats. Implemented: ORS 279B.055 & ORS 279B.060



#### **47-0610 Notice of Intent to award**

(1) **Notice of Intent to award.** Metro shall provide Written notice of its intent to award to all Bidders and Proposers pursuant to ORS 279B.135 at least seven (7) Days before the award of a Contract, unless Metro determines that circumstances justify prompt execution of the Contract, in which case Metro may provide a shorter notice period. Metro shall document the specific reasons for the shorter notice period in the Procurement file. A Written notice of intent to award is not required for Contracts awarded as a Small Procurement, an Intermediate Procurement, a sole-source Procurement, an Emergency Procurement or a Special Procurement authorized under Rule 47-0288.

(2) **Finality.** Metro's award may not be final until the later of the following:

(a) The expiration of the protest period provided pursuant to Administrative Rule 47-0740; or

(b) Metro provides Written responses to all timely-filed protests denying the protests and affirming the award.

Stat. Auth.: ORS 279A.065 & ORS 279B.135

Stats. Implemented: ORS 279B.135

#### **47-0620 Documentation of award**

(1) **Basis of award.** After award, Metro shall make a record showing the basis for determining the successful Offeror part of Metro's Procurement file.

(2) **Contents of Award Record.** Metro's record must include:

(a) **For Bids:** Bids, the completed Bid tabulation sheet, and Written justification for any rejection of lower Bids.

(b) **For Proposals:** Proposals, the completed evaluation of the Proposals, Written justification for any rejection of higher scoring Proposals, and if Metro permitted negotiations in accordance with Administrative Rule 47-0261, Written documentation of the content of any discussions, negotiations, best and final Offers, or any other procedures Metro used to select a Proposer.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065

#### **47-0630 Availability of Award Decisions**

(1) **Contract Documents.** To the extent required by the Solicitation Document, Metro shall deliver to the successful Offeror a Contract, Signed purchase order, Price Agreement, or other contractual documents as applicable.

(2) **Availability of Award Decisions.** A Person may obtain tabulations of awarded Bids or evaluation summaries of Proposals for a minimal charge, in person or by submitting to Metro a Written request accompanied by payment. The requesting Person shall provide the Solicitation Document number and, if documents must be mailed, enclose a self-addressed, stamped envelope. In addition, Metro may make available tabulations of Bids and Proposals through the Electronic Procurement System of Metro, email, or Metro's website.

(3) **Availability of Procurement Files.** After issuance of the notice of intent to award, Metro shall make Procurement files available in accordance with applicable law. Metro may withhold from disclosure the public materials included in a Proposal that are exempt or conditionally exempt from disclosure under

ORS 192.501 or ORS 192.502 including trade secrets, as defined in ORS 192.501 and information submitted to a public body in confidence, as described in ORS 192.502.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.055 & ORS 279B.060

#### **47-0640 Rejection of an Offer**

##### **(1) Rejection of an Offer.**

(a) Metro may reject any Offer when Metro determines that rejection is in the best interest of Metro, as set forth in ORS 279B.100.

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

A. Is contingent on Metro's acceptance of terms and conditions (including Specifications) that materially differ from the Solicitation Document;

B. Takes exception to terms and conditions (including Specifications) set forth in the Solicitation Document;

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

D. Offers Goods or Services that fail to meet the Specifications of the Solicitation Document;

E. Is late;

F. Is not in substantial compliance with the Solicitation Document;

G. Is not in substantial compliance with all prescribed public Procurement procedures; or

H. Fails to comply with any applicable equity in contracting programs adopted pursuant to Metro's Equity in Contracting Administrative Rules.

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

A. Has not been prequalified under ORS 279B.120 and Metro required mandatory prequalification;

B. Has been debarred as set forth in ORS 279B.130;

C. Has not met the requirements of ORS 279A.105 regarding subcontracting to COBID Certified Businesses, if required by the Solicitation Document;

D. Has not submitted properly executed Bid or Proposal security as required by the Solicitation Document;

E. Has failed to provide the certification of non-discrimination required under ORS 279A.110(4); or

F. Is non-Responsible. Offerors are required to demonstrate their ability to perform satisfactorily under a Contract. Before awarding a Contract, Metro must have information that indicates that the Offeror meets the applicable standards of Responsibility. To be a Responsible Offeror, Metro must determine, under ORS 279B.110, that the Offeror:

(i) Has available the appropriate financial, material, equipment, facility and personnel resources and expertise, or ability to obtain the resources and expertise, necessary to meet all contractual responsibilities;

(ii) Has completed previous contracts of a similar nature with a satisfactory record of performance. A satisfactory record of performance means that to the extent the costs associated with and time available to perform a previous contract were within the Offeror's control, the Offeror stayed within the time and budget allotted for the procurement and otherwise performed the Contract in a satisfactory manner. Metro should carefully scrutinize an Offeror's record of contract performance if the Offeror is or recently has been materially deficient in Contract performance. In reviewing the Offeror's performance, Metro should determine whether the Offeror's deficient performance was expressly excused under the terms of the Contract, or whether the Offeror took appropriate corrective action. Metro may review the Offeror's performance on both private and public contracts in determining the Offeror's record of contract performance. Metro shall make its basis for determining an Offeror non-Responsible under this subparagraph part of the Procurement file as required by ORS 279B.110(2)(b);

(iii) Has a satisfactory record of integrity. An Offeror may lack integrity if Metro determines the Offeror demonstrates a lack of business ethics such as violation of state environmental laws or false certifications made to Metro. Metro may find an Offeror non-Responsible based on the lack of integrity of any Person having influence or control over the Offeror (such as a key employee of the Offeror that has the authority to significantly influence the Offeror's performance of the Contract or a parent company, predecessor or successor Person). The standards for debarment under ORS 279B.130 may be used to determine an Offeror's integrity. Metro may find an Offeror non-responsible based on previous convictions of offenses related to obtaining or attempting to obtain a contract or subcontract or in connection with the Offeror's performance of a contract or subcontract. Metro shall make its basis for determining that an Offeror is non-Responsible under this subparagraph part of the Procurement file as required by ORS 279B.110(2)(c);

(iv) Is legally qualified to contract with Metro. Metro may determine that an Offeror is not legally qualified if (a) the Offeror is unable to warrant that it has all required licenses, insurance and/or registrations or (b) the Offeror is not legally authorized to do business in the State of Oregon. Provided, however, in no event shall these Rules require Metro investigate, enforce or opine as to which licenses law might apply or otherwise interpret licensing rules specifically enforced by other governing agencies;

(v) Has attested in Writing that the Offeror complied with the tax laws of this state and of political subdivisions of this state; and

(vi) Has supplied all necessary information in connection with the inquiry concerning Responsibility. If the Offeror fails to promptly supply information requested by Metro concerning Responsibility, Metro shall base the determination of Responsibility on any available information, or may find the Offeror non-Responsible.

(2) For the purposes of subparagraph (1)(c)F(v) of this Rule:

(a) The period for which the Offeror must attest that it complied with the applicable tax laws must extend no fewer than six years into the past from the date of the Closing.

(b) Tax laws include, but are not limited to, ORS 305.620, ORS chapters 316, 317 and 318, any tax provisions imposed by a political subdivision that apply to the Offeror or to the performance of the Contract, and any rules and regulations that implement or enforce those tax laws.

(c) Metro may exercise discretion in determining whether a particular form of attesting to compliance with the tax laws is “credible and convenient” under ORS 279B.110(2)(e), taking into consideration the circumstances in which the attestation is made and the consequences of making a false attestation. Therefore, Metro may accept forms of attestation that range from a notarized statement to a less formal document that records the Offeror’s attestation. However, Metro may not accept the certificate of compliance with tax laws required by ORS 305.385 unless that certificate embraces, in addition to the tax laws described in ORS 305.380, the tax laws of political subdivisions.

(3) **Form of Business Entity.** For purposes of this Rule, Metro may investigate any Person submitting an Offer. The investigation may include that Person’s officers, directors, owners, affiliates, or any other Person acquiring ownership of the Person to determine application of this Rule or to apply the debarment provisions of ORS 279B.130.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100, ORS 279B.110, OL 2015, ch 454 (SB 491), OL 2015, ch 539 (SB 675)

#### **47-0650 Rejection of All Offers**

(1) **Rejection.** Metro may reject all Offers as set forth in ORS 279B.100. Metro may notify all Offerors of the rejection of all Offers, along with the reasons for rejection of all Offers.

(2) **Criteria.** Metro may reject all Offers based upon the following criteria:

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

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

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

(d) Causes other than legitimate market forces threaten the integrity of the competitive process. These causes may include, without limitation, those that tend to limit competition, such as restrictions on competition, collusion, corruption, unlawful anti-competitive conduct, and inadvertent or intentional errors in the Solicitation Document;

(e) Metro cancels the Procurement or Solicitation in accordance with Administrative Rule 47-0660; or

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

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

#### **47-0660 Cancellation, Rejection, Delay or Suspension of a Procurement or Solicitation**

(1) **Cancellation in the Public Interest.** Any Solicitation or Procurement may be canceled, or any or all Bids or Proposals may be rejected in whole or in part, when the cancellation or rejection is in the best

interest of Metro, as determined by Metro. Any Solicitation or Procurement described in a Solicitation may be delayed or suspended when the delay or suspension is in the best interest of Metro, as determined by Metro. The reasons for the cancellation or rejection will be made part of the Procurement file. Metro may not be liable to any Bidder, Proposer or other Affected Persons for any loss or expense caused by or resulting from the cancellation or rejection of a Solicitation, Bid, Proposal or award.

(2) **Notice of Cancellation Before Closing.** If Metro cancels a Procurement or Solicitation prior to Closing, Metro shall provide Written notice of cancellation in the same manner that Metro initially provided notice of the Solicitation. Such notice of cancellation must:

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

(3) **Notice of Cancellation After Closing.** If Metro cancels a Procurement or Solicitation after Closing, Metro shall provide Written notice of cancellation to all Offerors who submitted Offers.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

#### **47-0670 Disposition of Offers if Procurement or Solicitation Canceled**

(1) **Prior to Opening.** If Metro cancels a Procurement or Solicitation prior to Opening, Metro shall return all Offers it received to Offerors unopened, provided the Offeror submitted its Offer in a hard copy format with a clearly visible return address. If there is no return address on the envelope, Metro shall open the Offer to determine the source and then return it to the Offeror. For Electronic Offers, Metro shall delete the Offers from Metro's Electronic Procurement System or information technology system.

(2) **After Opening.** If Metro rejects all Offers or otherwise cancels a Procurement after Opening, Metro will retain all such Offers as part of Metro's Solicitation file. If a Request for Proposals is cancelled after Proposals are received, Metro may return a Proposal to the Proposer that submitted it. Metro shall keep a list of returned Proposals in the Solicitation file.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.100

### **Remedies**

#### **47-0700 Protests and Judicial Review of Special Procurements**

(1) **Purpose.** An Affected Person may protest the Local Contract Review Board's approval of a Special Procurement. Pursuant to ORS 279B.400(1), before seeking judicial review of the approval of a Special Procurement, an Affected Person must file a Written protest with the Procurement Officer and exhaust all administrative remedies.

(2) **Delivery.** Notwithstanding the requirements for filing a writ of review under ORS Chapter 34 pursuant to ORS 279B.400(4)(a), an Affected Person must deliver a Written protest to the Procurement Officer within seven (7) Days after the first date of public notice of Metro's approval of a Special

Procurement, unless a different protest period is provided in the public notice of the approval of a Special Procurement. Metro may not consider a protest submitted after the timeline established for submitting such protest under this Rule.

(3) **Content of Protest.** The Written protest must include:

- (a) A detailed statement of the legal and factual grounds for the protest;
- (b) A description of the resulting harm to the Affected Person; and
- (c) The relief requested.

(4) **Required Metro Response.** Metro shall take the following actions, as appropriate:

- (a) Inform the Affected Person in Writing if the protest was not timely filed;
- (b) Inform the Affected Person if it failed to meet the requirements of section (3) of this Rule and the reasons for that failure;
- (c) If the protest was timely filed and provides the information required by section (3), issue a decision in Writing and provide that decision to the Affected Person within a reasonable period of time;
- (d) If Metro denies the protest, inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contract Review Board.

(5) **Optional Metro Response:** In addition to the requirements set forth above in section (4), Metro may do any of the following:

- (a) Agree with the protest and take any corrective action necessary;
- (b) Issue a Written response to the protest and provide that decision to the Affected Person;
- (c) Refer the protest and any response from the Procurement Officer to the Local Contract Review Board for decision;
- (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.

(6) **Judicial Review.** An Affected Person may seek judicial review of the Procurement Officer's final decision (or if referred to the Local Contract Review Board by the Procurement Officer, the Board's final decision) denying a protest of the approval of a Special Procurement in accordance with ORS 279B.400. Judicial review is not available if the protest denial is withdrawn by Metro.

Stat. Auth.: ORS 279A.065 & ORS 279B.400

Stats. Implemented: ORS 279B.400

#### **47-0710 Protests and Judicial Review of Sole-Source Procurements**

(1) **Purpose.** For sole-source Procurements requiring public notice, an Affected Person may protest the determination of the Procurement Officer or the Board under Administrative Rule 47-0275 that the Goods or Services or class of Goods or Services are available from only one source. Pursuant to ORS 279B.420(3)(f), before seeking judicial review, an Affected Person must file a Written protest with the Procurement Officer and exhaust all administrative remedies.

(2) **Delivery.** Unless otherwise specified in the public notice of the sole-source Procurement, an Affected Person must deliver a Written protest to the Procurement Officer within seven (7) Days after the first date Metro posts public notice that it will make a sole source purchase. The Procurement Officer may not consider a protest submitted after the timeline established for submitting such protest

under this Rule or such different time period as may be provided in the Notice of Intent to make a Sole Source purchase.

(3) **Content of Protest.** The Written protest must include:

- (a) A detailed statement of the legal and factual grounds for the protest;
- (b) Evidence or supporting documentation that supports the grounds on which the protest is based;
- (c) A description of the resulting harm to the Affected Person; and
- (d) The relief requested.

(4) **Required Metro Response.** Metro shall take the following actions, as appropriate:

- (a) Inform the Affected Person in Writing if the protest was not timely filed;
- (b) Inform the Affected Person if it failed to meet the requirements of set forth above in section (3) of this Rule and the reasons for that failure;
- (c) If the protest was timely filed and provides the information required by section (3) of this Rule, issue a decision in Writing and provide that decision to the Affected Person within a reasonable period of time;
- (d) If Metro denies the protest, inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contracting Board.

(5) **Optional Metro Response.** In addition to the requirements of subsection (4), Metro may do any of the following:

- (a) Agree with the protest and take any corrective action necessary;
- (b) Issue a Written response to the protest and provide that decision to the Affected Person;
- (c) Refer the protest and any response from the Procurement Officer to the Local Contract Review Board for decision;
- (d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.

(6) **Judicial Review.** An Affected Person may not seek judicial review of Metro's approval of a Sole Source Procurement unless it has complied fully with the protest requirements of this Rule and received a final decision denying the protest either from the Procurement Officer of the Local Contract Review Board if referred to the Board by the Procurement Officer. Judicial review of the sole-source Procurement protest will be in accordance with ORS 279B.420. Judicial review is not available if Metro elects not to make a Sole Source Procurement.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.075

#### **47-0720 Protests and Judicial Review of Multi-Tiered and Multistep Solicitations**

(1) **Purpose.** An Affected Offeror may protest exclusion from the Competitive Range or from subsequent tiers or steps of a Solicitation in accordance with the applicable Solicitation Document. When such a protest is permitted by the Solicitation Document, then pursuant to ORS 279B.420(3)(f),

before seeking judicial review, an Affected Offeror must file a Written protest with Metro and exhaust all administrative remedies.

(2) **Basis for Protest.** An Affected Offeror may protest its exclusion from a tier or step of competition only if:

(a) The Affected Offeror is Responsible and submitted a Responsive Offer;

(b) Metro made a mistake that, if corrected, would have made the Affected Person eligible to participate in the next stage of the Procurement;

(c) In the case of a Request for Proposals, the exercise of judgment used by the evaluation committee members in scoring Written Proposals and oral interviews, including the use of outside expertise, was biased or not exercised in good faith. The unbiased, good faith judgment of Evaluation is not grounds for protest. The unbiased, good faith judgment of evaluation committee members will not be a basis for sustaining a protest.

(3) **Delivery.** Unless otherwise specified in the Solicitation Document, an Affected Offeror must deliver a Written protest to the Procurement Officer within seven (7) Days after issuance of the notice of the Competitive Range or notice of subsequent tiers or steps.

(4) **Content of Protest.** The Affected Offeror's protest must be in Writing and must include the following information:

(a) Sufficient information to identify the errors that led to the Affected Person's exclusion from the Competitive Range or from subsequent stages of a Procurement;

(b) A detailed statement of all the legal and factual grounds for the protest;

(c) Evidence or supporting documentation that supports the grounds on which the protest is based;

(d) A description of the resulting harm to the Affected Person; and

(e) The relief requested.

(5) **Required Metro Response.** Metro shall take the following actions, as appropriate:

(a) Inform the Affected Offeror in Writing if the protest was not timely filed;

(b) Inform the Affected Offeror if it failed to meet the requirements set forth above in section (4) of this Rule and the reasons for that failure;

(c) If the protest was timely filed and provides the information required by section (4) of this Rule, issue a decision in Writing and provide that decision to the Affected Offeror within a reasonable period of time.

(d) If Metro denies the protest, inform the Affected Offeror if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contracting Board.

(6) **Optional Metro Response.** In addition to the requirements of subsection (5) of this Rule, the Procurement Officer may do any of the following:

(a) Agree with the protest and take any corrective action necessary;

(b) Issue a Written response to the protest and provide that decision to the Affected Person;

(c) Refer the protest and any response by the Procurement Officer to the Local Contract Review Board for decision; or



(d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.

(7) **Judicial Review.** Judicial review of Metro's decision relating to a multi-tiered or multistep Solicitation protest must be in accordance with ORS 279B.420. An Affected Person may not seek judicial review unless it has complied fully with the protest requirements of this Rule and has exercised all administrative appeal rights. Judicial review is not available if Metro elects not to make a Procurement.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.060

#### **47-0730 Protests and Judicial Review of Solicitations**

(1) **Purpose.** A prospective Offeror may protest the Procurement process or the Solicitation Document for a Contract solicited under ORS 279B.055, 279B.060 and 279B.085 as set forth in ORS 279B.405(2). Pursuant to ORS 279B.405(3), before seeking judicial review, a prospective Offeror must file a Written protest with Metro and exhaust all administrative remedies.

(2) **Delivery.** Unless otherwise specified in the Solicitation Document, a prospective Offeror must deliver a Written protest to the Procurement Officer within seven (7) Days after a Solicitation Document is first advertised. Metro may not consider a protest submitted after the timeline established for submitting such protest under this Rule or such different time period as may be provided in the Solicitation Document. A Written Protest of any Addenda must be submitted by the close of the next business day after issuance of the Addenda.

(3) **Content of Protest.** In addition to the information required by ORS 279B.405(4), a prospective Offeror's Written protest shall include a statement of the desired changes to the Procurement process or the Solicitation Document that the prospective Offeror believes will remedy the conditions upon which the prospective Offeror based its protest.

(4) **Required Metro Response.** Metro shall take the following actions, as appropriate:

(a) Inform the Affected Person in Writing if the protest was not timely filed;

(b) Inform the Affected Person if it failed to meet the requirements of set forth above in section (3) of this Rule and the reasons for that failure;

(c) If the protest was timely filed and provides the information required by section (3) of this Rule, issue a decision in Writing and provide that decision to the Affected Person no less than three (3) business days before Offers are due, unless a Written determination is made by Metro that circumstances exist that require a shorter time limit;

(d) If Metro denies the protest, inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contracting Board. When the decision is final, the Affected Person must seek judicial review before the Opening of Bids, Proposals or Offers.

(5) **Optional Metro Response.** In addition to the requirements of subsection (4), Metro may do any of the following:

(a) Agree with the protest and take any corrective action necessary;

(b) Issue a Written response to the protest and provide that decision to the Affected Person;

(c) Refer the protest and any response by the Procurement Officer to the Local Contract Review Board for decision;

(d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest, including without limitation, extending Closing if Metro determines an extension is necessary to consider the protest and to issue an Addenda to the Solicitation Document.

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

(7) **Judicial Review.** Judicial review of Metro's decision relating to a Solicitation protest must be in accordance with ORS 279B.405. An Affected Person may not seek judicial review unless it has complied fully with the protest requirements of this section and exercised all administrative appeal rights. Judicial review is not available if Metro withdraws the Solicitation Document that was the subject of the protest.

Stat. Auth.: ORS 279A.065 & ORS 279B.405

Stats. Implemented: ORS 279B.405

#### **47-0740 Protests and Judicial Review of Contract Award**

(1) **Generally.** An Offeror may protest the award of a Contract, or the intent to award of a Contract, whichever occurs first, only if the conditions set forth in ORS 279B.410(1) are satisfied. In the case of a Request for Proposals, disagreement with the judgment exercised in scoring by evaluators is not a basis for protest.

(2) **Exhaustion of Remedies.** An Offeror must file a Written protest with the Purchasing Officer and exhaust all administrative remedies before seeking judicial review of Metro's Contract award decision.

(3) **Delivery.** Unless otherwise specified in the Solicitation Document, an Offeror must deliver a Written protest to Metro within seven (7) Days after the award of a Contract, or issuance of the notice of intent to award the Contract, whichever occurs first.

(4) **Content of Protest.** An Offeror's Written protest shall include the following information:

(a) Sufficient information to identify the award that is the subject of the protest;

(b) A detailed statement of all the legal and factual grounds for the protest (see section (1) of this Rule);

(c) Evidence or supporting documentation that supports the grounds on which the protest is based;

(d) A description of the resulting harm to the Affected Person; and

(e) The relief requested.

(5) **Required Metro Response.** Metro shall take the following actions, as appropriate:

(a) Inform the Affected Person in Writing if the protest was not timely filed;

(b) Inform the Affected Person if it failed to meet the content requirements set forth above in section (4) of this Rule the reasons for that failure;

(c) If the protest was timely filed and provides the information required by ORS 279B.410(2), issue a decision in Writing and provide that decision to the Affected Person within a reasonable time of the receipt of the protest;

(d) If Metro denies the protest, inform the Affected Person if the decision is final or whether the Procurement Officer has decided to refer the protest to the Local Contract Review Board.

(6) **Optional Metro Response.** In addition to the requirements of section (5) above, Metro may do any of the following:

(a) Agree with the protest and issue a revised Notice of Intent to award or take any other corrective action that may be necessary to ensure that the Contract is awarded to the appropriate Offeror;

(b) Issue a Written response to the protest and provide that decision to the Affected Person;

(c) Refer the protest and any response by the Procurement Officer to the Local Contract Review Board for decision;

(d) Take any other action that is in the best interest of Metro while giving full consideration to the merits of the protest.

(7) **Judicial Review.** Judicial review of Metro's decision relating to a Contract award must be in accordance with ORS 279B.415 and this Rule. An Affected Person may not seek judicial review of a Contract award unless it has complied fully with the protest requirements of this section. Judicial review is not available if Metro elects not to make an award.

Stat. Auth.: ORS 279A.065 & ORS 279B.410

Stats. Implemented: ORS 279B.410 & ORS 279B.415

#### **47-0745 Protests and Judicial Review of Qualified Products List Decisions**

(1) **Purpose.** A prospective Offeror may protest Metro's decision to exclude the prospective Offeror's Goods from Metro's qualified products list under ORS 279B.115. A prospective Offeror must file a Written protest and exhaust all administrative remedies before seeking judicial review of Metro's qualified products list decision.

(2) **Delivery.** Unless otherwise stated in Metro's notice to prospective Offerors of the opportunity to submit Goods for inclusion on the qualified products list, a prospective Offeror must deliver a Written protest to Metro within seven (7) Days after issuance of Metro's decision to exclude the prospective Offeror's Goods from the qualified products list.

(3) **Content of Protest.** The prospective Offeror's protest shall be in Writing and must specify the grounds upon which the protest is based.

(4) **Metro Response.** Metro may not consider a prospective Offeror's qualified products list protest submitted after the timeline established for submitting such protest under this Rule, or such different time period as may be provided in Metro's notice to prospective Offerors of the opportunity to submit Goods for inclusion on the qualified products list. Metro shall issue a Written disposition of the protest in a timely manner. If Metro upholds the protest, it shall include the successful protestor's Goods on the qualified products list.

(5) **Judicial Review.** Judicial review of Metro's decision relating to a qualified products list protest must be in accordance with ORS 279B.420.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.115

#### **47-0750 Judicial Review of Other Violations**

Any violation of ORS Chapter 279A or ORS 279B by Metro for which no judicial remedy is otherwise provided in the State Code is subject to judicial review as set forth in ORS 279B.420.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.420

#### **47-0760 Review of Prequalification and Debarment Decisions**

(1) Review of Metro's prequalification and debarment decisions is as set forth in ORS 279B.425.

(2) The Local Contract Review Board hereby delegates its authority to the Chief Operating Officer for the purposes of receiving notice that a Person has appealed. Upon receipt of the notice the Chief Operating Officer may notify the Person appealing of a time and place of a hearing designed to consider the appeal within thirty (30) Days or a date mutually agreed upon by both parties.

(3) The Local Contract Review Board delegates its authority to conduct a hearing to the Chief Operating Officer. The Chief Operating Officer may subdelegate the authority to conduct a hearing to any person the Chief Operating Officer deems appropriate, including the Procurement Officer.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279B.425

#### **47-0800 Amendments to Contracts and Price Agreements**

(1) **Generally.** Metro may amend a Contract reasonably related to the scope of work under the original Contract without additional competition.

(2) **Contract Increases.** Contract amendments for additional Goods and Services are allowed under the following circumstances, without any additional approvals:

(a) The original Contract was issued following a competitive Solicitation or alternative process (e.g. as a Special Procurement or Sole Source Procurement) and unit prices or additive alternates were provided that established the cost basis for the additional Goods or Services and a binding obligation exists on the parties covering the terms and conditions of the additional work;

(b) The original Contract was issued pursuant to a declaration of Emergency, in accordance with Rule 47-0280;

(c) The additional Goods or 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;

(d) The amendment resolves a bona fide dispute with the Contractor and is within the general scope of the original Contract; or

(e) The aggregate increase resulting from all amendments to the Contract does not exceed twenty-five percent (25%) of the original Contract price. Escalation clauses agreed to in the original Contract (e.g. COLA increases) are excluded from the 25% calculation.

(3) **Limits on Contract Increases; Authority.** If the circumstances set forth in section (2) of this Rule are not applicable, Metro may nonetheless amend a Contract for additional Goods and Services if the amendment is Advantageous to Metro. For Contracts that exceed \$150,000, such a determination shall be made by the Chief Operating Officer prior to authorization of delivery of goods or performance of the services. All Contract Amendments processed under this section (3) shall be treated as an Unauthorized Purchase in accordance with Rule 46-0200.

(4) **Renegotiated Contract.** Metro may renegotiate the terms and conditions of a Contract without additional competition and amend a Contract if it is Advantageous subject to the following conditions:

(a) The Goods or Services to be provided under the amended Contract are the same as the Goods or Services to be provided under the unamended Contract; and

(b) Metro determines that, with all things considered, the amended Contract is at least as favorable to Metro as the unamended Contract; and

(c) The amended Contract does not have a total term greater than allowed in the Solicitation Documents, if any, or if no Solicitation Documents, as described in the sole source notice or the approved Special Procurement, if any, after combining the initial and extended terms. For example, a one-year Contract described as renewable each year for up to four additional years, may be renegotiated as a two to five-year Contract, but not beyond a total of five years.

If the circumstances set forth in section (4) of this Rule are not applicable, Metro may nonetheless amend and renegotiate the terms of the Contract if the amendment is Advantageous to Metro and the amendment is approved by the Local Contract Review Board.

(5) **Small or Intermediate Contracts.** Metro may amend a Contract awarded as a small or Intermediate Procurement pursuant Rule 47-0265 for Small Procurements or Rule 47-0270 for Intermediate Procurements.

(6) **Emergency Contracts.** Metro may amend a Contract awarded as an Emergency Procurement if the Emergency justification for entering into the Contract still exists, and the amendment is necessary to address the continuing Emergency.

(7) **Price Agreements.** Metro may amend or terminate a Price Agreement as follows:

(a) As permitted by the Price Agreement;

(b) As permitted by this Rule;

(c) Metro fails to receive funding, appropriations, limitations, allotments or other expenditure authority, including the continuation of program operating authority sufficient, as determined in the discretion of Metro, to sustain purchases at the levels contemplated at the time of contracting;

(d) Any change in law or program termination that makes purchases under the price agreement no longer authorized or appropriate for Metro's use; or

(e) As otherwise permitted by applicable law.

Stat. Auth.: ORS 279A.065

Stats. Implemented: ORS 279A.065 & ORS 279B.140

#### **47-0820     Records Maintenance; Right to Audit Records**

(1) Contractors and subcontractors shall maintain all fiscal records relating to a Contract executed with Metro in accordance with generally accepted accounting principles. In addition, Contractors and subcontractors shall maintain any other records necessary to clearly document:

(a) Contract performance, including, but not limited to, compliance with plans and specifications, compliance with fair contracting and employment programs, compliance with Oregon law on payment of wages and accelerated payment provisions, and any and all requirements imposed on the Contractor or subcontractor under the Contract or subcontract;

(b) Any claims arising from or relating to their performance under a Contract;

(c) Any cost and pricing data; and,

(d) Payment to suppliers and subcontractors.

(2) Such records must be maintained for a period of six years from the date of final completion of the Contract or until the conclusion of any audit, controversy or litigation arising out of or related to a Contract, whichever is longer.

(3) Contractors and subcontractors shall make all their records available to Metro (and its authorized representatives, including but not limited to the staff of any Metro department and the Metro Auditor) within the boundaries of the Metro region, at reasonable times and places regardless of whether litigation has been filed on any claims. If the records are not made available within the boundaries of Metro, the Contractor or subcontractor shall pay all costs for Metro employees, and any necessary consultants hired by Metro, including travel, per diem costs, salary, and any other expenses incurred by Metro in sending its employees or consultants to examine, audit, inspect, and copy those records. If the Contractor elects to have such records outside these boundaries, the costs paid by the Contractor to Metro for inspection, auditing, examining and copying those records are not recoverable costs in any legal proceeding.

(4) Metro and its authorized representatives (including but not limited to the staff of any Metro department and the Metro Auditor) are entitled to inspect, examine, copy and audit the books and records of any Contractor or subcontractor upon request by Metro for any reason, including any documents that may be placed in escrow according to any Contract requirements. The records that may be inspected and copied include financial documents of the Contractor, including tax returns and financial statements. Metro will keep such documents confidential to the extent permitted by Oregon law, subject to subsection 5 below.

(5) Contractors and subcontractors shall disclose the records requested by Metro and agree to their admission as evidence in any proceeding between the parties, including, but not limited to a court proceeding, arbitration, mediation or other alternative dispute resolution process.

(6) In the event that the records disclose that Metro is owed money or establishes that any portion of any claim made against Metro is not warranted, the Contractor or subcontractor shall pay all costs incurred by Metro in conducting the audit and inspection. Such costs may be withheld from any sum due or that becomes due to the Contractor by Metro.

(7) Failure of the Contractor or subcontractor to keep or disclose records as required may result in disqualification as a Bidder or Proposer for future Metro Contracts or may result in a finding that the Contractor or subcontractor is not a Responsible Bidder or Proposer.