

## MEMORANDUM

TO: Mayor and City Council

FROM: Roberta Likens, Finance Director

SUBJECT: JOINT RESOLUTION OF THE CITY COUNCIL AND LOCAL CONTRACT REVIEW BOARD OPTING OUT OF THE ATTORNEY GENERAL'S MODEL PUBLIC CONTRACTING RULES AND AMENDING PUBLIC CONTRACTING RULES FOR THE CITY OF COTTAGE GROVE

DATE: February 7, 2024

### BACKGROUND

The proposed resolution and draft findings accompanying the proposed Public Contracting Rules drafted to replace the City's Rules adopted in 2020, address statutory amendments adopted in the interim are presented to you for consideration. ORS Chapters 279A, 279B and 279C, (Code) have been in place since March 1, 2005. Since that date, the legislature has amended some aspect of the Code nearly every session. The most recent changes took effect January 1, 2024. Per ORS 279A.065, the Attorney General's Model Rules govern government agency public contracting. The statute does allow a public entity to adopt its own procurement rules which may or may not include portions of the Attorney General's Model Rules. Agencies adopting their own rules are required to determine whether updates are required each time the Code is amended to be in compliance with statutory changes. The City's legal counsel has conducted that review.

The proposed rules reflect the substance of the Attorney General's Model Rules to be in compliance with the Code. Rules not dictated by statute have been modified to provide the greatest level of flexibility, and to simplify them as much as possible.

If the City's rule have omitted provisions of the Attorney General's Model Rules, they can be added into a specific solicitation if deemed an important factor at that time.

These proposed updated Rules include refinements to the Attorney General's Model Rules, as well as address legislative amendments adopted through the 2023 legislative session, such as:

- 1.) Effective January 1, 2024, SB 1047 increases: 1) the "Small Procurement/Direct Award" threshold for goods and service (Division 47) and public improvement (Division 49) contracts from \$10,000 to \$25,000; and 2) the Intermediate Procurement threshold for goods and service contracts from \$150,000 to \$250,000 (Division 47). The Legislature did not adopt a similar intermediate procurement increase for public improvement contracts. Therefore, Divisions 47 and 49 intermediate procurements have different upper thresholds. The E-17 personal

service threshold was increased from \$10,000 to \$25,000 to correspond to the Division 47 small procurement increase.

- 2.) HB 2295 expanded the preference for service-disabled veterans to all veterans. This change is reflected in Divisions 46 and 49 or the proposed updated rules. This requires that a business must be 51% owned by a qualifying veteran, the owner must manage the day-to-day operation, and the business must have annual revenues below \$23.98 million. It is recommended to consult ORS 200.005 to determine exactly who qualifies.
- 3.) Rule 137-046-0300(5) allows, but does not require, a public contracting agency to grant a 5% preference to for-profit businesses that benefit society or the environment (known as a certified B-Corp.) HB3572.
- 4.) The proposed rules continue to track state law, making demolition contracts and those for the removal of hazardous waste “public works” subject to prevailing wage laws. SB 594.

#### B. Exemptions

In the final section of the proposed rules it sets forth exemptions addressing standard purchasing needs not otherwise covered by the Code or the Attorney General’s Model rules.

ORS 279C.355 governs the process for granting exemptions to public improvement contracts. It requires a different set of findings, which are included as Exhibit A with the proposed Resolution.


#### RECOMMENDATION

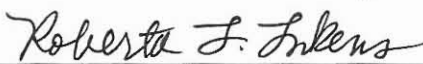
It is staff’s recommendation that the City Council take into consideration any public testimony given at the Public Hearing, make any changes deemed necessary, and consider adopting the proposed resolution and findings presented in Exhibit A. If it is desired to adopt the resolution, the following motion could be used to ensure that both bodies act on the Resolution/Rules:

“I move to adopt Resolution No. \_\_\_\_ on behalf of the City of Cottage Grove and on behalf of the City’s Local Contract Review Board.”

#### COST

As the purchasing limits for procurement are increased, it is anticipated that the City will acquire less cost and more flexibility when seeking public improvement contracts and contracts for goods and services. There is no cost at this time.

  
\_\_\_\_\_  
Mike Sauerwein, City Manager

  
\_\_\_\_\_  
Roberta Likens, Finance Director

**RESOLUTION NO. \_\_\_\_\_**

**JOINT RESOLUTION OF THE CITY COUNCIL AND LOCAL CONTRACT REVIEW BOARD OPTING OUT OF THE ATTORNEY GENERAL'S MODEL PUBLIC CONTRACTING RULES AND AMENDING PUBLIC CONTRACTING RULES FOR THE CITY OF COTTAGE GROVE**

WHEREAS, it is the policy of the City of Cottage Grove (City) that a sound and responsive public contracting system should allow impartial, meaningful, and open competition, preserving formal competitive selection as the standard for public contracts unless otherwise specifically exempted herein, by state law, or by subsequent ordinance or resolutions; and

WHEREAS, in 2016, the City opted out of the Public Contracting Model Rules adopted by the Attorney General under ORS subchapters 279A, 279B, and 279C, as set forth in Oregon Administrative Rules Chapter 137, Divisions 46, 47, 48 and 49 (the "Model Rules") and adopted its own rules; and

WHEREAS, that 2016 Resolution confirmed City's governing body would continue as its Local Contract Review Board; and

WHEREAS, in 2020, the Council updated its rules via Resolution No. 2010; and

WHEREAS, since then state law has changed in ways requiring further updates to accommodate changes in Oregon's public contracting code; and

WHEREAS, City recognizes it may exempt certain public improvement contracts or classes of such contracts under ORS 279C.335; and

WHEREAS, the City Council additionally requests that the City's Local Contract Review Board approve the amendments to various classes of special procurements set forth in the attached rules, based upon the findings set forth in Exhibit A to this Resolution.

NOW, THEREFORE, BE IT RESOLVED as follows:

1. The City Council (Council) shall continue as the Local Contract Review Board of the City and shall have all of the rights, powers and authority necessary to carry out the provisions of Chapters 279A, 279B, and 279C (the "Public Contracting Code") and attached Rules. Except as otherwise provided in this Resolution, the definitions established in the attached Rules apply herein. The term "Contracting Agency" as used in the attached Rules includes Contracting Agency's chief administrative officer, his or her designee, or any other purchasing agent designated by City policy. Those individuals are hereby designated as City's Contracting Agency and may exercise all authorities, powers and duties granted to a Contracting Agency under the Public Contracting Code and attached Rules, unless otherwise established by City policy.

2. The above recitals and Exhibit A are hereby adopted by the Council, sitting as the Local Contract Review Board, as findings of fact supporting approval of the Council's request for amendments to classes of special procurement and public improvement contract exemptions.

3. The Model Rules adopted by the Attorney General pursuant to ORS 279A.065, including any implementing Oregon public contracting amendments from the 2023 legislative session, do not and will not apply to City. Instead, the City hereby prescribes the following Rules, which include portions of the Attorney General's Model Rules, as the Rules of Procedure that the City will use for its public contracting: Public Contracting Rules Chapter 137, Divisions 46, 47, 48 and 49. While the numbering of these Rules reflects the numbering system of the Attorney General's Model Rules, they incorporate City changes to the Model Rules, and, therefore, are not the Attorney General's promulgated administrative rules. City exemptions are also set forth in these Rules, as numbered Exemptions 1 through 18 (E-1 through E-18). All above-referenced Rules are attached to this Resolution as Exhibit B, and incorporated herein by this reference.

4. In accordance with ORS 279A.065(6)(b), the City shall review its Public Contracting Rules adopted herein each time the Attorney General modifies its Model Rules to implement Oregon Public Contracting Code amendments adopted after the 2023 legislative session in order to determine whether amendments are required to ensure statutory compliance.

5. Amendments to these Rules and new rules shall be adopted in accordance with this Resolution and the Public Contracting Code. Special procurement requests and approvals shall be made in accordance with Division 47 of the attached Rules and ORS 279B.085. Public improvement contract exemption procedures, including notice and public hearing requirements, shall be made in accordance with Division 49 of the attached Rules and ORS 279C.335.

6. The Model Cost Accounting Guidelines developed by the Oregon Department of Administrative Services pursuant to Section 3, Chapter 869, Oregon Laws 1979 are hereby adopted as the City's Cost Accounting System to apply to public improvement projects exceeding \$5,000 and constructed with City's own equipment or personnel. ORS 279C.310. For such public improvement projects estimated to cost more than \$200,000, or for certain road maintenance projects exceeding \$125,000, City shall also comply with the requirements of ORS 279C.305.

7. All previously adopted resolutions, including Resolution No. 2010, establishing public contracting rules for City are hereby repealed.

BE IT FURTHER RESOLVED that this resolution shall take effect 30 days after adoption.

PASSED BY THE COUNCIL AND APPROVED BY THE MAYOR THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2024.

PASSED BY THE LOCAL CONTRACT REVIEW BOARD AND APPROVED BY THE PRESIDENT THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2024.

\_\_\_\_\_  
Candace Solesbee, Mayor  
City Council

\_\_\_\_\_  
Candace Solesbee, Mayor, as President,  
for the Local Contract Review Board

ATTEST:

ATTEST:

\_\_\_\_\_  
Mindy Roberts  
City Recorder

\_\_\_\_\_  
Mindy Roberts, City Recorder,  
as Secretary for the  
Local Contract Review Board

## EXHIBIT A

### FINDINGS IN SUPPORT OF RESOLUTION NO. \_\_\_\_\_ ADOPTING PUBLIC CONTRACTING CODE RULES

ORS 279B.085 and 279C.335 authorize City of Cottage Grove's (City) Council, sitting as City's Local Contract Review Board, to approve findings submitted and exemptions requested by City's Council upon adoption of appropriate findings, to establish special selection, evaluation and award procedures for, or exempt from competition, the award of a specific contract or classes of contracts.

Pursuant to that authority, the Council makes the following findings in support of Resolution No. \_\_\_\_\_, which establishes exempt classes of contracts and the solicitation methods for their award:

#### **No Findings Required**

Pursuant to ORS 279A.025 and 279A.055, the Council is not required to adopt findings with respect to the solicitation methods and awards of the following classes of contracts identified in City's Public Contracting Rules 2023, Class Exemptions:

E-4	Contracts for Price Regulated Items
E-6	Investment Contracts
E-12	Insurance, Employee Benefit
E-17	Personal Service Contracts
E-18	Liability Insurance Contracts

The above Rules govern subjects specifically authorized by state law and, therefore, require no local exemption.

#### **Specific Findings for Public Improvement Class Exemption**

The Council approves the following specific findings for the use of a Request for Proposal alternative contracting method for public improvement contracts estimated to cost over \$100,000 and also finds that the establishment of this class of contracts and the method approved for their award:

1. Is unlikely to encourage favoritism in the awarding of public improvement contracts or substantially diminish competition for public improvement contracts; and
2. The awarding of public improvement contracts under each exemption will result in substantial cost savings to City.



These conclusions are based on the following general findings:

- A. Operational, budget, and financial data. Where various criteria, which may or may not include cost, must be weighed in order to select an appropriate contractor for the desired project, the formal competitive bidding process costs of up to \$7,000 are a significant budgetary waste in that the most qualified contractor for the project may not be the lowest responsible bidder;
- B. Public benefits. Exempting contracts from competitive bidding requirements and instead utilizing statutory competitive proposal procedures will protect and preserve public funds, enable greater competition between the most qualified contractors, and result in a better product which meets the public's and City's needs;
- C. Value engineering, Specialized expertise required, Technical complexity. Only through a competitive proposal process can City weigh, evaluate and select the type of expertise needed to address the technical complexities of a particular public improvement project. Competitive proposals allow the City to determine which contractor may best provide such services. These are qualities not reflected in cost, where a determination on cost alone could forfeit these valuable and essential attributes;
- D. Public safety. Utilizing a competitive proposal process as opposed to competitive bidding can ensure high quality, more safely constructed facilities through the construction period, and after completion. Capitalizing upon design and construction planning and compatibility can also allow earlier use of public facilities even while construction continues;
- E. Market conditions. The increased availability of and need for technical expertise, value engineering, or other types of specialized expertise, as well as a need to investigate the compatibility, experience and availability of contractors require that certain public improvement contracts be awarded based upon an evaluation of a number of criteria, rather than simply cost.

**Specific Findings for Special Classes and Methods of Award for Contracts Other Than Public Improvements**

The Council approves the specific findings for the establishment of special solicitation methods for the classes of public contracts described below and also finds that the establishment of each class of contracts and methods approved for their award:

- 1. Is unlikely to encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts because such exemptions still require alternative contracting procedures, ensuring: (1) reasonable competition; (2) the best contract price for the public; and (3) a cost-effective process for both contractors and City;
- 2. The awarding of public contracts under these exemptions will result in substantial cost savings to City because City will avoid costs associated with unnecessary

documentation and procedures, where it is unmerited by the type and/or relatively low cost of the contracts; and

3. The awarding of public contracts pursuant to any of the requested exemptions substantially promotes the public interest in a manner that could not practicably be realized by formal competitive solicitation procedures, given the fact that such exemptions facilitate smooth operation of City's administration and operations, include procedures and mechanisms to ensure the best product, service or outcome is obtained at the least cost to the public and City, and identified classes address areas of public contracting left unresolved by state statute which are essential for City's operations, such as awarding personal service contracts, purchasing used personal property, and disposing of surplus personal property.

Specifically, the Council finds:

#### **E-2 – Advertising Contracts.**

**Alternate Award Process.** In City's discretion. The process selected may be competitive or non-competitive.

**Cost Savings and Other Benefits.** Size of and frequency of average advertisement (including all notices required to be published by City) does not justify the cost of solicitation. Period of time from recognition of need to advertise until advertising date is too short to issue solicitation.

**Effect on Competition.** The potential market is limited because not all advertisers work in every market. Choice of advertising medium is somewhat price sensitive, but primarily driven by location and size of circulation in comparison with City's target audience.

**No Favoritism.** Not applicable due to the lack of competitors and specialized contracting needs.

#### **E-3 – Equipment Repair and Overhaul.**

**Alternate Award Process.** As needed, in City's discretion.

##### **Cost Savings and Other Benefits.**

1. Pre-contract pricing is difficult to obtain and cannot be relied upon.
2. City has discretion to decide whether costs of solicitation are justified in relationship to size of contract and availability of skilled technicians to repair the specific equipment.
3. Delay required for solicitation would impair City's ability to respond to equipment breakdown and be injurious to the public interest.
4. Experience with contractor is crucial because reliability over the course of several projects is important.



**Effect on Competition.** Allows contractor to be selected based on ability to provide accurate, reliable and fast service.

**Effect on Favoritism.** Favoritism will not be greater than if statutory request for proposals process is used.

#### **E-5 - Copyrighted Materials.**

**Alternate Award Process.** As needed, in City's discretion.

**Cost Savings and Other Benefits.** Necessary to allow City to acquire special needs products that are unique.

**Effect on Competition.** None. There is no competitive market for a unique product. Copyrighted materials are generally acquired from a sole-source copyright holder, as used property, or by donation.

**No Favoritism.** Not applicable due to the lack of competitors and specialized contracting needs.

#### **E-7 – Requirements Contracts.**

**Alternate Award Process.** Original contract must be based on a competitive process.

**Cost Savings and Other Benefits.** Size and frequency of procurements does not justify the cost of solicitation. Period of time from recognition of need until good or service required too short to issue solicitation.

**Effect on Competition.** Minimal, due to underlying competitive process and requirement to renew contract via formal solicitation at least every five years.

**Effect on Favoritism.** Minimal, due to underlying competitive process and requirement to renew contract via formal solicitation at least every five years.

#### **E-8 – Office Copier Purchases.**

**Alternate Award Process.** Original contract must be based on a competitive process.

**Cost Savings and Other Benefits.** Size and frequency of procurements does not justify the cost of solicitation. Period of time from recognition of need until good or service required too short to issue solicitation.

**Effect on Competition.** Minimal, due to underlying competitive process and requirement to renew contract via formal solicitation at least every five years. In addition, rule requires evaluation and award based upon multiple factors, not just cost.

**Effect on Favoritism.** Minimal, due to underlying competitive process and requirement to renew contract via formal solicitation at least every five years. In addition, rule requires evaluation and award based upon set factors, in addition to cost.

**Other Factors.** Allows Contracting Agency to address emergency circumstances. Cannot anticipate when immediate replacement or repairs will be needed to ensure normal operations.

#### **E-9 - Manufacturer Direct Supplies.**

**Alternate Award Process.** Subject to cost saving analysis.

**Cost Savings and Other Benefits.** Allowed only after a formal solicitation is completed and manufacturer's price is less than offers received. Cost of formal solicitation, therefore not merited.

**Effect on Competition.** None. Allowed only after assessment of manufacturer's costs to distributor within the same pool of potential contractors that would be qualified to respond to an invitation to bid.

**Effect on Favoritism.** None. Allowed only after assessment of manufacturer's costs to distributor within the same pool of potential contractors that would be qualified to respond to an invitation to bid.

**Other Factors.** Allowed on a contract-by-contract basis and shall not result in an ongoing price agreement, further fostering competition.

#### **E-10 – Gasoline, Diesel Fuel, Heating Oil, Lubricants and Asphalt.**

**Alternate Award Process.** Intermediate procurement process.

**Cost Savings and Other Benefits.** Frequency and amount of exempt item purchases do not justify the cost of solicitation. Period of time from recognition of need through contract award too long for needed purchases of exempt fungible goods.

**Effect on Competition.** Minimal. Intermediate procurement process surveys market and ensures level of competition appropriate for these frequently purchased goods.

**Effect on Favoritism.** Purchase based on cost. Intermediate procurement process sufficiently avoids any favoritism.

#### **E-11 – Hazardous Material Removal; Oil Cleanup.**

**Alternate Award Process.** Rule encourages competitive procedures to the extent reasonable under the circumstances.

**Cost Savings and Other Benefits.** Avoids unnecessary cost and delay associated with procurement procedures when most qualified available contractor required for immediate performance. Primary consideration is public safety and compliance with hazardous material laws.

**Effect on Competition.** Minimal, given competitive procedures encouraged by Rule and supporting findings describing circumstance requiring clean up.

**Effect on Favoritism.** Minimal, given competitive procedures encouraged by Rule and supporting findings describing circumstance requiring clean up.

**Other Factors.** Exemption necessary to ensure City's ability to comply with State law governing hazardous materials.

### **E-13 – Medical and Laboratory Supplies.**

**Alternate Award Process.** Direct award to different vendors allowed, following initial competitive solicitation process.

**Cost Savings and Other Benefits.** Frequency and amount of exempt item purchases do not justify the cost of solicitation. Period of time from recognition of need through contract award too long for needed purchases of exempt fungible goods.

**Effect on Competition.** Minimal. Intermediate procurement process surveys market and ensures level of competition appropriate for these frequently purchased goods.

**Effect on Favoritism.** Purchase based on cost. Intermediate procurement process sufficiently avoids any favoritism.

### **E-14 – Concession Agreements.**

**Alternate Award Process.** When in City's best interest, a competitive proposal solicitation will be used.

**Cost Savings and Other Benefits.** Allows City to take advantage of unique revenue opportunities.

**Effect on Competition.** Responds to unique opportunities for which the number of competitors may range from none to many.

**Effect on Favoritism.** No impact. Responds to unique opportunities.

**Other Factors.** Not a contract for the acquisition or disposal of goods, or services or public improvements. Most similar to personal services contract because the quality of the concession may be more important than price factors. Variation in types and sizes of

concession opportunities is too great to provide a single method of solicitation. Statutory public contracting requirements may not apply. May not be a public contract. Most similar to personal services contract. Findings may not be required.

#### **E-15 – Used Personal Property, Purchase of.**

**Alternate Award Process.** Rule requires individualized ORS 279B.085 findings and an intermediate procurement process, where feasible.

**Cost Savings and Other Benefits.** Allows City to take advantage of unique opportunity to acquire needed goods and services for discounted prices.

**Effect on Competition.** No impact. Responds to unique opportunities.

**Effect on Favoritism.** No impact. Responds to unique opportunities.

#### **E-16 – Surplus Personal Property, Disposition of.**

**Alternate Award Process.** Any means in City's best interest, after making individualized ORS 279B.085 findings. Items with a residual value of more than \$10,000 require Local Contract Review Board prior authorization.

**Cost Savings and Other Benefits.**

1. Avoids unnecessary solicitation expense by allowing City to determine whether cost of solicitation is justified by value of surplus property.
2. Allows City to establish programs for donation to charitable organizations.

**Effect on Competition.** No impact. Responds to unique opportunities.

**Effect on Favoritism.** No impact. Responds to unique opportunities.

**Other Factors.** Variations in the type, quantity, quality and opportunities for recycling of surplus property are too large to have this class of contracts governed by a single solicitation method.