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AGENDA COVER MEMO

AGENDA DATE: December 16, 2009

TO: Board of County Commissioners, sitting as Local Contract Review Board (LCRB) and as Local Contracting Agency

DEPARTMENT: Office of Legal Counsel

PRESENTED BY: Trina Laidlaw, Assistant County Counsel

AGENDA TITLE: In the Matter of Amending Lane Manual Chapter 21 Public Contracting Rules to Reflect Changes in Law and Current Practice (LM 21.104, 21.105, 21.107, 21.108, 21.111, 21.115, 21.116, 21.130)

I. MOTION

Move to amend Lane Manual Chapter 21 public contracting rules to reflect changes in public contracting law, to clarify current practice, to make minor "housekeeping" changes, and to continue to opt out of the Attorney General Model rules.

II. ISSUE OR PROBLEM

Oregon statute requires the Oregon Attorney General to prepare and maintain model rules of procedure governing public contracting under the Oregon Public Contracting Code. After each legislative session the Attorney General is to review all laws that affect public contracting to determine whether the model rules should be amended. A local contracting agency, such as Lane County, may "opt out" of the Attorney General Model rules and adopt its own public contracting rules, but needs to review the model rule changes to determine whether it should modify its rules in order to comply with statutory changes. Certain LM Chapter 21 rules should be revised to reflect statutory changes.

III. DISCUSSION

A. Background

Lane County has "opted out" of the Attorney General model rules, and adopted its own rules in LM Chapters 20, 21, and 60 (sale of personal/surplus property). The Attorney General has revised the model rules based on law changes from the 2009 Legislative Session. The Board has delegated responsibility to the County Administrator, with the assistance of the Office of Legal Counsel, to review amendments to the Attorney General Model rules. LM 20.085 and LM 21.100(5). If this evaluation suggests modification may be necessary, proposed amendments are to be submitted to the Local

Contracting Agency. The Board of Commissioners is both the Local Contracting Agency and Local Contract Review Board for Lane County. In addition, legal counsel has reviewed statutory changes to Oregon's public contract law. Certain LM Chapter 21 rules should be amended to reflect 2009 legislative changes to Oregon public contracting law. In addition, it would be helpful to clarify certain practices and make minor corrections.

B. Analysis

The analysis below includes a summary of the changes proposed in LM Chapter 21. As a preliminary matter, Lane County has traditionally maintained rules adopted by the local contract review board in the LM Chapter 20. LM Chapter 20 rules have primarily included class "exemptions" to formal competitive bidding, special class procurements, and several other matters. No changes are currently proposed to LM Chapter 20.

The LM Chapter 21 rules are primarily procedural rules adopted by the Board as the local contracting agency. The following is a summary of the proposed changes:

1. The following rules have "housekeeping" or minor changes proposed:
 - a. LM 21.105(13). New language clarifies current rule, practice and law to allow protests of intent to award a contract which used a bid or RFP process.
 - b. LM 21.107(1), (2), and (11). Makes minor formatting and word changes.
 - c. LM 21.130(10). This covers a list of other governmental entities who may have adopted regulations covering work performed under the contract. The current reference to the AG's Model Public Contract Rules and OAR is out of date. The change would replace with the list included in the State of Oregon's Standard Specifications for Construction, through ODOT.

2. A new rule is proposed as LM 21.104 to comply with HB 2867 adopted by the 2009 Oregon Legislature. The Legislature added a new process before a public contracting agency conducts a competitive selection for certain services covered by ORS 279B ("goods and services") which exceed \$250,000. The focus of the legislation appears to require a public contracting agency to determine whether it is infeasible for the county to utilize its own resources, or after a cost/benefit analysis it would be better for the county to utilize its own personnel and resources to perform the work. Services excluded under this new law include: client services, public improvement/construction and related architectural and engineering services, and personal services covered by the county's own screening and selection procedures.

A first step is for the County to determine whether it is infeasible to perform using county resources based on statutory factors such as: 1) Lack of specialized capability, experience or expertise, or 2) A special circumstance requires the County to procure the services by contract including: the services are incidental to a contract for purchasing or leasing real or personal property; a grant funding source or federal or state law requires an independent contractor; the services are needed in an emergency or for urgent, temporary or occasional use such that use of County resources would delay and frustrate the purpose of the services; or the services will be completed within six months.

If the County determines it is "not infeasible" (feasible) to use County resources, then the second step is to conduct a cost benefit analysis. The statutory factors include comparing the estimate of the contracting agency's cost to perform the services with the

costs to perform of a potential contractor, including salary or wage and benefit; costs for space, energy, transportation, storage, raw and finished materials, equipment and supplies; costs for planning for, training for, starting up, implementing, transporting and delivering services and costs, etc. A contracting agency may still be required to perform the services "in house" if the sole reason for its higher costs is that salary or wage and benefit costs are higher unless the contracting agency lacks the personnel and resources necessary to perform within the time in which services are required.

The proposed rule would authorize the County Administrator to make the decision about how to proceed before the department conducts a competitive selection. In addition, the County Administrator would report to the Board quarterly about any procurements which have utilized this process. The Oregon Department of Administrative Services, in consultation with contracting agencies are to evaluate the extent to which the new law aided the contracting agency in making a determination as to whether to procure services or perform services with the contracting agency's own resources. DAS is to report to the Legislature on January 10, 2011.

3. LM 21.105(5) (bid process) and LM 21.107(4) (RFP process). Essentially, the same change is proposed for both bid and RFP processes to reflect new law that a bidder or proposer agrees in advance, when submitting a bid or proposal, to meet the performance standards and scope of work as finally negotiated between the parties.

4. LM 21.108 Letters of Interest and LM 21.111 Sole Source. These two rules have related purposes, and the proposed substantive changes are intended to tie them together more clearly, and to better reflect current practice.

Lane County has had a Letter of Interest ("LOI") process for a number of years. One purpose of that process is to quickly identify a circumstance when there is only one qualified seller/provider available to contract (may be several qualified but only one available), including approval of qualifications and capability of performing the work or provide the product. The LOI process allows the County to publicly publish an ad with a description of the prospective purchase, solicit letters of interest, and invite comments/objections to the purchase through this process.

Another purpose of the LOI process has been to notify the public when the fundamental nature of the purchase is so limiting that it is likely that only one seller/provider exists. The LOI process allows the County to publicly publish an ad with the name the contractor, description of the purchase, solicitation of letters of interest and inviting comments/objections to the purchase.

Where two or more letters of interest are received by the County, the County would then conduct a formal bid, RFP, or Request for Personal Services process or other authorized process and select the contractor based on these more formal processes.

The proposed changes to these rules make clear that:

A. If the department uses the LOI process and only one LOI received, the County should also be making sole source findings.

B. There is an opportunity to protest for sole source purchases exceeding \$100,000. However, where the LOI process was used for a purchase exceeding \$100,000, the contractor was named in the County ad because the fundamental nature of the purchase is so limiting, the purchase described and objections solicited - that process should suffice for the opportunity to protest. Where the LOI process is used for a purchase exceeding \$100,000, but the issue was whether there was only one qualified

seller/provider available and thus no prospective contractor named in the LOI ad, then the department would need to provide an additional opportunity to protest the sole source findings under the sole source rule.

3. For contracts under \$100,000, departments typically contact three prospective contractors pursuant to the competitive quote process under Lane County rules. Generally, the LOI and sole source rules are not implicated.

5. New LM 21.112B Exhaustion of Remedies. A new rule requiring exhaustion of administrative remedies first before filing any court action will provide the County with an additional defense in the event of a court action. This is consistent with the Attorney General Model rules and the public contracting statutes.

6. New LM 21.115 (1) reflects new law relating to procuring personal services to administer, manage, monitor, inspect, evaluate compliance, or oversee a public improvement contract (excluding CM/GC and design build contractors). It appears to address conflicts of interest, prohibiting the public entity from choosing such a personal service contractor if they have an interest in the underlying public improvement contract they are to oversee.

7. LM 21.116 Retainage. New law adds new instruments which a public entity may accept in lieu of holding funds as retainage on a public improvement contract. Unless there is a special extraordinary risk, in lieu of withholding funds, a contracting agency is to accept bonds, securities, or other instruments. General obligation bonds of the State of Oregon or a political subdivision of the state and irrevocable letters of credit issued by an insured institution are now acceptable.

IV. ALTERNATIVES/OPTIONS

1. Approve the motion to amend Lane Manual Chapter 21 public contracting rules to reflect changes in public contracting law, to clarify current practice, to make minor "housekeeping" changes, and to continue to opt out of the Attorney General's model rules.

2. Not approve the motion to amend some of the Lane Manual Chapter 21 rules and approve the motion as to others, and continue to "opt out" of the Attorney General's model rules.

3. Not approving the motion would mean that the County's rules would not be consistent with Oregon statutes and that is not recommended.

V. RECOMMENDATION

Option 1, approve the motion.

VI. ATTACHMENTS

Order

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF LANE COUNTY, OREGON
SITTING AS THE LOCAL CONTRACTING AGENCY AND
LOCAL CONTRACT REVIEW BOARD

ORDER NO.

IN THE MATTER OF AMENDING LANE MANUAL
CHAPTER 21 PUBLIC CONTRACTING RULES TO
REFLECT CHANGES IN LAW AND CURRENT
PRACTICE (LM 21.104, 21.105, 21.107, 21.108,
21.111, 21.112B, 21.115, 21.116, 21.130)

WHEREAS, the public contracting law allows a local contracting agency and local contract review board to “opt out” of the State Attorney General’s Model Rules of Public Contracting;

WHEREAS, the Board, sitting as the local contracting agency and local contract review board decided to adopt its own rules for public contracts separate from the Attorney General’s Model Rules and wishes to continue to “opt out”;

WHEREAS, certain amendments in Lane County’s public contracting rules are necessary to better reflect 2009 legislative changes, current practice, and to make “housekeeping changes”;

NOW, THEREFORE, sitting as both the local contracting agency and local contract review board, the Board of Commissioners hereby orders and finds as follows:

1. Lane County has “opted out” out of the State Attorney General’s Model Rules by adopting its own rules in Lane Manual Chapters 20, 21, and 60 and will continue to “opt out” including from January 1, 2010 forward. Lane County’s public contracting rules are those in Lane Manual Chapter 20, 21, and 60 as further amended and readopted by this order, and as they may be further amended in the future.

2. The County Administrator shall take all necessary actions to implement these rules.

AND, FURTHER, the Board, sitting as the local contracting agency hereby orders that:

Lane Manual Chapter 21 is hereby amended by removing, substituting and adding the following sections:

REMOVE THESE SECTIONS

21.104, 21.105
as located on page 21-2 through 21-8
(a total of 7 pages)

21.107, 21.108
as located on pages 21-9 through 21-12
(a total of 4 pages)

21.111
as located on pages 21-13 through 21-14
(a total of 2 pages)

INSERT THESE SECTIONS

21.104, 21.105
as located on page 21-2 through 21-9
(a total of 8 pages)

21.107, 21.108
as located on pages 21-9 through 21-12
(a total of 4 pages)

21.111
as located on pages 21-13 through 21-14
(a total of 2 pages)

None	21.112B as located on page 21-16 (a total of 1 page)
21.115, 21.116 as located on pages 21-15 through 21-17 (a total of 3 pages)	21.115, 21.116 as located on pages 21-17 through 21-18 (a total of 2 pages)
21.130 as located on pages 21-25 through 21-28 (a total of 4 pages)	21.130 as located on pages 21-25 through 21-28 (a total of 4 pages)

Said sections are attached hereto and incorporated herein by reference. The purpose of these substitutions and additions is to implement the revision and readoption of LM Chapter 21 to reflect statutory changes, to clarify county practices, and to make minor corrections (LM 21.140, 21.105, 21.107, 21.108, 21.111, 21.112B, 21.115, 21.116, 21.130)

Adopted this _____ day of _____ 2009.

Chair, Lane County Board of Commissioners

APPROVED AS TO FORM
Date 12/9/09, Lane County


OFFICE OF LEGAL COUNSEL

(h) Personal Services Contract. See LM 20.097; LM 21.117.

(i) Public contract. See ORS 279A.010(1)(z). In addition, a public contract is any written document which sets forth the promises of the parties, one of whom is the County. More specifically, a public contract can cover purchases, sales, leases, or other acquisition or disposal of personal property or public improvements. It can also cover sales and purchases of services, including personal services. Net financial effect for the County is not a factor in determining whether a public contract exists. A public contract may bind the County to incur a financial obligation, may produce revenue, or may have little or no financial implications.

(j) Public improvement. See ORS 279A.010(1).

(k) Public officer. The County Administrator, and where otherwise delegated, Department Directors. This authority may be further delegated. The public officer is also any person authorized to conduct a procurement on the County's behalf.

(l) Request for Proposal. See LM 21.107.

(m) Responsible bidder or proposer. See ORS 279C.375, ORS 279B.110.

(n) Retainage. The difference between the amount earned by the contractor on a public contract and the amount paid, held to guarantee full performance. See ORS 279C.550. *(Revised by Order No. 05-2-16-8, Effective 2.28.05; 08-2-13-1; 2.13.08)*

21.102 Policy on Competition.

It is the policy of Lane County to encourage open and impartial competition and to encourage the economic integration of minorities, women and emerging small businesses into the business sector.

All public contracts shall be awarded by competitive procurement, except as otherwise allowed or required in ORS 279A, B, or C; ORS 282.210; or the County's public contracting policies and exemption rules. If federal funds are involved, federal laws, rules and regulations shall govern, in the event of conflict. *(Revised by Order No. 05-2-16-8, Effective 2.28.05)*

21.103 Contract Execution and Processing.

(1) All contracts shall be in writing and signed by the Board, or a duly authorized delegate. Until a contract is executed by the parties, it shall not be binding.

(2) All contracts shall be processed through procedures prescribed by the County Administrator for review by legal, risk management and budget staff, except where expressly stated otherwise by the County Administrator or these rules. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 04-6-30-12, 6.30.04; 05-2-16-8, 2.28.05)*

COMPETITIVE SELECTION

21.104 Cost and Feasibility Analysis

(1) Before conducting a procurement for certain services covered by ORS 279B and estimated to exceed a \$250,000 contract amount, except as provided in (3) below of this rule, the County department will: prepare proposed written findings that performing the services with the County's own personnel and resources is not feasible or demonstrate by means of a proposed written cost analysis that performing the services by contract would cost less than performing the services with the County's own personnel and resources.

(2) The services subject to this rule are those covered by a contract where service supplier agrees to supply the County's service requirements that arise for a specified time period or an individual project, usually paid based on time and materials. The services are covered by a contract that calls primarily for the contractor's time and effort.

- (3) Procurement of the following services are not covered by (1) of this rule:
- (a) Client services as described in OAR 125-246-0110,
 - (b) Personal services purchased under County rules,
 - (c) Services described in ORS 279C, including but not limited to contracts for architects, engineers and public improvements.
- (4) When determining whether or not using the County's personnel or resources is feasible, factors include but are not limited to the factors found in Section 4, Oregon Laws 2009, Chapter 880, [..\PDF\Oregon Laws 2009 Chapter 880.pdf](#), including:
- (a) The County lacks the specialized capabilities, experience or technical or other expertise necessary to perform the services, comparing the field most closely involved with a potential contractor's capability, experience or expertise in the same or similar field; or,
 - (b) A special circumstance requires the contracting agency to procure the services by contract as set forth in Section 4, Oregon Laws 2009, Chapter 880. [..\PDF\Oregon Laws 2009 Chapter 880.pdf](#). Special circumstances include, but are not limited to, services incidental to primary purchase or lease of real or personal property; services needed in an emergency or for urgent, temporary or occasional use such that use of County resources would delay and frustrate the purpose of the services or they will be completed in six months; where a grant funding source or state or federal law requires an independent contractor.
- (5) Any cost analysis shall be conducted in accordance with Section 2 and 3 of Oregon Laws 2009, Chapter 880. [..\PDF\Oregon Laws 2009 Chapter 880.pdf](#)
- (6) Prior to conducting the procurement, the County department will submit their proposed written findings or cost analysis, including the proposed basis for a decision to proceed, to the County Administrator. The County Administrator is delegated the authority to make the determination of how to proceed based on findings or cost analysis covered by this rule.
- (7) The County Administrator shall collect and provide to the Board each quarter, copies of the record of the written findings or cost analyses, and the basis for the decision to proceed, for each procurement covered by this rule. Upon request, the County Administrator or a designee will consult with Oregon Department of Administrative Services in evaluating the process covered by this rule.

21.105 Competitive Bidding.

Competitive bidding is a formal process by which departments advertise and issue a written invitation to bid, and receive and open bids as required by ORS Chapter 279A, B, and C and these rules. An invitation to bid is a solicitation of competitive offers in which technical specifications, price and delivery (or project completion) will be the predominant award criteria.

- (1) When Required. Generally, a formal competitive bid process is required for all public contracts unless exempt or excepted pursuant to ORS Chapter 279 A, B or C, or an LM Chapter 20 exemption rule, or such authorities provide formal bidding as an option. Nothing in this rule is intended to prohibit the County, in its discretion, from using formal bidding even though it may not be required.
- (2) In preparation for an invitation to bid, the County may issue a request for information, a request for interest or other preliminary documents. It may also develop and maintain a qualified products list in accordance with LM 20.230.
- (3) Advertisements.
- (a) The contents of advertisements for bids shall include:
 - (i) a description of the project, goods or services;
 - (ii) the office where the specifications for the project or purchase may be reviewed;
 - (iii) name, title and address of person authorized to receive bids;

(iv) if prequalification is required, a statement of the class or classes of work for which bidders must be pre-qualified and the filing deadline;

(v) scheduled bid submission deadline which shall not be less than 7 days after the date of the last publication of the ad;

(vi) scheduled bid opening (immediately after bid submission deadline for public improvement contracts);

(vii) if applicable, that the contract is for a public work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act.

(b) Departments may use either or both of the following advertising methods in (i) or (ii) except as provided in (iii):

(i) Publish at least once in at least one newspaper of general circulation in the Lane County area;

(ii) Publish electronically on a Lane County website or other electronic posting site (e.g. ORPIN) as long as the requirements of (iv) below are met.

(iii) For public improvement contracts estimated to exceed \$125,000, departments shall use: either or both methods in (i) and (ii); and, publication in at least one trade newspaper of general statewide circulation.

(iv) In considering whether to advertise by the method in (i) or (ii) for a particular project, Departments shall weigh advertising cost savings with the method likely to encourage the greatest competition, and decide based on the greatest competition. Nothing in this rule is intended to prohibit the County from using any other method of public notice in addition to (i) or (ii).

(v) In order to conduct an electronic advertisement, a Department shall publish weekly, for no less than 4 consecutive weeks, in at least one newspaper of general circulation, a notice that the Department may publish future advertisements (listing the types) by electronic advertisement, including the world wide web location(s) (i.e., Uniform Resource Locator or URL), and providing a contact person for questions or concerns. It is within the Department's discretion to decide if and how any concerns will be accommodated, subject to use of a method likely to encourage the greatest competition.

(4) Delegations and Authority to Act.

(a) Calling and Opening of Bids. The County Administrator is generally delegated the authority to call and open bids for public contracts, and the following public officers are delegated the same authority for the purposes set forth:

(i) The Director of the Department of Public Works may call and open bids for public contracts for construction and maintenance relating to, and for lease or purchase of materials and equipment and for services related to roads and other transportation-related facilities, including supplies and equipment for Fleet Services, Parks, Land Management and Solid Waste divisions.

(ii) The Director of the Department of Management Services may call and open bids for public contracts for the purchase of goods, services, equipment, supplies, office furniture and other personal property, and for public contracts for construction, renovation, remodeling and maintenance of County facilities and related capital expenditures.

(iii) Pursuant to ORS 565.230 the Fair Board may call and open bids for all contracts relating to fairground facilities and operations.

(iv) The County Administrator may call and open bids for the lease, purchase or sale of computers and related data processing equipment.

(b) The public officer delegated authority to call for and open bids shall be responsible for placing the advertisements for bids and for the remaining obligations of "public officer" and "County" under this rule.

(c) The public officer to whom authority is delegated under this LM 21.105(4) may further delegate this authority to a representative by signed document.

(5) Bids.

To be received and considered, all bids must be in writing and signed by the bidder or authorized representative and submitted in a sealed envelope. No oral, telegraphic, telephonic, or telephonic facsimile bids, modifications of bids, or signatures, will be considered, unless otherwise stated in the bid documents.

(a) An invitation to bid is used to initiate a sealed bidding solicitation. It shall contain the information required by ORS 279B.055(2) for non-public improvement contracts, and by ORS 279C.365 and ORS 279C.830 for public improvement contracts. The county may provide solicitation documents for a public improvement project by electronic means if notice is provided in the ad for the solicitation. The County department shall also develop a procedure for notifying potential bidders accessing electronic documents about addendums.

(b) By signing and returning a bid, the bidder acknowledges it has read and understands the terms and conditions applicable to the solicitation document and that it accepts and agrees to be bound by the terms and conditions of the contract, including to perform the scope of work and meet the performance standards.

(c) The County may allow or require pre-qualification of bidders by setting forth the procedure and criteria in the invitation to bid. The public officer shall determine when a pre-qualification may be mandatory or permissive for a specific contract or class of contracts and the pre-qualification procedure, subject to requirements in this subsection (b) or applicable statutes. See ORS 279B.120, 279B.125, 279C.430.

(i) For public improvement contracts with mandatory pre-qualification, the Department shall include in the invitation to bid the time for submitting written pre-qualification applications, and the general description of the type and nature of the contracts to be awarded. For both mandatory and permissive pre-qualification, the Department shall also provide the standard form to be used.

(ii) In making a determination for non-public improvement contracts, the County will consider applicable standards of responsibility listed in ORS 279B.110(2) and discrimination pursuant to ORS 279A.110, and for public improvement contracts as set forth in ORS 279C.375(3) and ORS 279A.110. For all contracts, if a bidder fails to qualify for a mandatory pre-qualification, notice shall be provided of the reasons, length of proposed disqualification not to exceed three years, the right to a hearing before the LCRB by filing a timely notice of appeal within 3 days with the Department, waiver of the hearing if the deadline is missed, and reference to the sections of the County rules covering the appeal process. For non-public improvement contracts, the Department may revoke or revise and reissue a prequalification approval upon reasonable cause to believe there has been a substantial change in conditions or bidder is no longer qualified or less qualified by providing notice of the grounds and a right to a hearing.

(iii) The County, through the public officer, may also debar a prospective bidder based on standards in ORS 279B.130 and ORS 279C.440. The same procedure for disqualification above shall be followed.

(d) For non-public improvement contracts, the County may use a multi-step invitation to bid seeking technical unpriced bids after providing public notice, and later issue an invitation to bid limited to the bidders whom the public officer has determined to be eligible under criteria set forth in the initial solicitation. The multi-step procedure shall be described in the invitation to bid. Technical unpriced bids need not be opened publicly. The opportunity to protest the solicitation in accordance with (6) below shall be provided prior to the closing of phase one. Unsuccessful bidders may protest the intent to award a contract, which should include the opportunity for affected bidders to protest exclusion from the phase two. See OAR 137-047-0257.

(e) The County may award multiple contracts when specified in the invitation to bid.

(f) Correction, Withdrawal and Late Bids. A bidder may withdraw the bid at any time prior to the deadline set for receipt of bids and deposit a new, sealed bid in

accordance with the initial invitation to bid. The County may release an unopened bid which has been withdrawn to the bidder or authorized representative after voiding any date and time stamp mark. The County will not consider bids received after the time and date indicated for bid opening in the invitation to bid. A bidder may not modify any bid after it has been deposited with the public officer, except for minor informalities. All decisions to permit correction or withdrawal of bids shall be supported by written reasons.

(g) Clarification. If a bidder finds discrepancies or omissions in the drawings or bid documents, or is in doubt as to their meaning, the bidder shall immediately notify the public officer. If the public officer believes a clarification is necessary, an addendum will be issued to all bidders in writing preferably at least five calendar days prior to the deadline set for bid receipt but in no case less than 72 hours prior to the deadline for bid. If there are not five calendar days left before the deadline for bid receipt, the addendum may postpone the date for bid for a minimum of five calendar days. Any addenda so issued are to be covered in the bid proposal and will become part of the contract documents.

(h) Bids Irrevocable. All bids shall be irrevocable for 30 days from the time of opening unless otherwise stated in the bid documents. Further, the bids of the three lowest un-rejected bidders shall be irrevocable and binding and the bid securities shall be retained by the public officer until there is an executed contract and the contractor has provided all required satisfactory performance bonds. All other bid securities shall be returned promptly upon award of the contract or rejection of all bids.

(6) Protest of Process and Solicitation Document.

For non-public improvement contracts, a prospective bidder may protest the competitive selection process or provision(s) in the solicitation document if they believe the process is contrary to law, or that a solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name pursuant to requirements in ORS 279B.405(2)(a) and (4). Unless otherwise specified, the protest must be filed no later than 5 calendar days before bid opening. The County shall issue a written decision no less than three business days before bids are due, unless otherwise decided by the County. The County may exercise the response options set forth in OAR 137-047-0730(4) and (5). For public improvement contracts, a prospective bidder may protest specifications or contract terms and conditions pursuant to OAR 137-049-0260(3), (4) and (5). Unless otherwise specified in the invitation to bid, the protest shall be filed no later than 10 days before bid opening.

(7) Opening of Bids.

The public officer will not examine any bid prior to opening. The officer shall note on the envelope containing the bid the date and hour received. All bids submitted to the County will be opened publicly at the time, date and place designated in the invitation to bid and by the public officer. Any bid or modification received after the designated deadline shall be returned unopened to the bidder. To the extent practicable, the public officer shall read aloud the amount of the bid, the name of the bidder and such other information as the public officer considers appropriate, and record the same. The bid record for a public improvement contract shall be open to public inspection after the opening, with the exception of certain information covered by a public records exemption. The bid record for a non-public improvement contract shall be open to public inspection after the issuance of an intent to award, with the exception of certain information covered by a public records exemption. If the County receives a records request, including subpoena, covering information the bidder believes is covered by an applicable public records exemption, it shall be the bidder's responsibility to defend and indemnify the County for any costs associated with establishing such an exemption. The bidder's act in submitting a bid constitutes its acceptance of this responsibility..

(8) Evaluation of Bids.

(a) Evaluation of bids will be conducted by the public officer in cooperation with the department requesting the bid, if any, and shall be based on minimum requirements established by the bid documents, compliance with public bidding procedures, bidder responsibility, ethical practice, product acceptability, ORS 279B.055(6)(a), and LM Chapter 20. See also, OAR 137-049-0380.

(b) Goods and services that have been manufactured, produced or performed in this state shall be preferred, if price, fitness, availability and quality are otherwise equal. See ORS 279A.120.

(c) The public officer shall, for the purpose of evaluating bids, apply any preference in ORS 279A.120 (resident bidder), ORS 279A.125 (preference for recycled materials) or ORS 282.210.

(d) The public officer shall make all necessary investigation to determine whether the apparent lowest responsible bidder has met responsibility requirements. See ORS 279C.375(3); ORS 279B.110.

(e) Where the methods and factors which have cost implications over the life of the product have been identified in the bid documents pursuant to LM 20.115, a life cycle cost analysis shall be made of all bids to determine the lowest responsible bidder.

(f) Invitations to bid may solicit lump sum offers, unit price offers, or a combination of the two, as well as additive or deductive alternates. The County may use evaluation methods as described in OAR 137-049-0380(2) or any other method reasonably likely to result in similar comparisons.

(g) For public improvement contracts, if all responsive bids from responsible bidders exceed the County's cost estimate, the County may negotiate value engineering and other options (excluding those likely to affect the field of competition) with the lowest responsive, responsible bidder to attempt to bring the bid within the cost estimate. However, a negotiated contract under this provision shall not be awarded if there is significant change in the scope of the project from the original bid proposal. The County may discontinue the negotiation at any time. Nothing in this rule prohibits the County from conducting a new solicitation process. To the extent bidder's records used in the negotiation are public records, they are exempt from disclosure until after contract award or termination of the negotiation, and then subject to disclosure in accordance with ORS 192.410 through ORS 192.505. See OAR 137-049-0430.

(9) Mistakes in Bids.

Minor informalities may be waived. Mistakes discovered in bids after opening where the intended correct bid is clearly evident or properly substantiated may be corrected. Where the intended correct bid is not clearly evident or cannot be substantiated by accompanying documents, the bid may not be accepted. The County reserves the right to waive technical defects, discrepancies and minor irregularities, and to not award a contract when it finds such action to be in the public interest. See OAR 137-049-0350 and OAR 137-047-0470.

(10) Rejection.

The County reserves the right to cancel a solicitation, or reject any or all bids in whole or in part when the cancellation or rejection is in the County's best interests as determined by the County. This includes rejecting any bid not in compliance with all prescribed public bidding procedures and requirements, and for good cause, rejecting all bids upon a finding that it is in the public interest to do so. See OAR 137-049-0440(5), OAR 137-047-0640, OAR 137-047-0650. If all bids are rejected in whole or in part, new bids may be called for as in the first instance or initial bids may be considered with opportunity for supplemental submission. If there is partial rejection, the County may solicit supplemental information only from the bidders who submitted bids and may set an expedited deadline on the conditions that such deadline is within what could reasonably be expected as part of the original competitive process and that it is unlikely readvertising publicly would lead to greater competition. The public officer is delegated

the authority to reject all bids, prepare findings of best interests and provide written notice of rejection of all bids including the reasons therefore to all bidders. The public officer is further delegated authority to reject any bid which does not conform to prescribed public contract procedures and requirements and to reject for good cause any bid upon a written finding it is in the best interest of the County and public to do so. However, if the rejection is of what initially appears to be the successful bid, the Board or the County Administrator, depending upon authority to execute the contract, shall exercise the right to reject the apparent successful bid. In addition, if partial rejection under this rule occurs as a result of the filing of a protest, any portion of the protest not resolved in favor of the protestor shall proceed to the Board or County Administrator. The Board and County Administrator may also exercise authority to act in accordance with this provision.

(11) Authority to Award Contract Subject to Bid.

(a) The County Administrator is delegated authority to award contracts where the authority to execute the contract has been specifically delegated under LM 21.145 below.

(b) Other than as delegated in LM 21.105(11)(a), the Board shall award contracts which have been bid in a public meeting. Generally, public testimony will not be received unless the Board specifically determines otherwise.

(c) Generally, any award shall be made to the lowest responsible bidder consistent with bid documents, may be made by item, groups of items, or as a whole. LM 21.135(2).

(12) Notice of Intent to Award.

The County shall provide written notice of its intent to award to a particular bidder or bidders at least fourteen (14) days before the award, unless the County department determines that a shorter notice period is more practicable.

(13) Protests of Intent to Award.

Unless otherwise specified in the bid documents, all written protests of the intent to award must be filed within seven (7) days of the date of the notice of intent to award. Protests of intent to award shall be considered by the Board if it would approve and award the contract. Protests of intent of award shall be handled by the County Administrator, or designee, for those contracts to be awarded by the County Administrator.

(a) The protest for a non-public improvement contract shall specify the applicable grounds for the protest as set forth in ORS 279B.410(1). The protest for a public improvement contract shall specify the applicable grounds for protest set forth in OAR 137-049-0450(4)(c) which is adopted.

(b) For contracts to be awarded by the Board, if the public officer determines there is sufficient merit to reject bids under LM 21.105(10), he or she may do so. If any portion of the protest remains, the Board shall be provided and may consider a complete copy of the written record, and any other evidence provided at a public meeting and shall issue its decision by Board Order. The Board may affirm, reverse, send back to the Department or revise the award.

(c) For County Administrator awarded contracts, the County Administrator has authority to reject bids pursuant to LM 21.105(10), and authority to affirm, reverse, send back to the Department or revise the award of the contract in order to correct any errors made in the original award, so that the contract is awarded to the bidder legally entitled to receive an award pursuant to public contract law and regulations and the criteria stated in the documents. The County Administrator shall deliver this decision to the Board. The decision shall be final seven days after it is delivered to the Board, unless within that time the Board elects to review the matter. If the Board elects review, a complete copy of the written record shall be delivered to the Board within a reasonable time period. The Board may consider this written record, and any other evidence provided

at a public meeting and shall issue its decision by Board Order. The Board may affirm, reverse, send back to department, or revise the decision of the County Administrator, or his or her designee. Upon adoption of the order, the decision will be final.

(14) For public improvement contracts, the County shall submit a completed responsibility determination form covering the selected contractor, along with any attachments, to the Construction Contractors Board within 30 days after the contract award. *(Revised by Order No. 05-2-16-8, Effective 2.28.05; 05-12-14-9, 1.1.06; 08-2-13-1; 2.13.08)*

21.106 Bid, Payment and Performance Securities.

(1) Bid Security.

(a) Unless otherwise provided below, all bids shall require as bid security a surety bond, irrevocable letter of credit issued by an insured institution as defined in ORS 706.008, cashier's check or certified check, of the bidder in an amount not to exceed 10 percent of the bid. The dollar amount or percentage required as security shall be stated in the bid documents.

(b) The public officer is delegated the authority to waive the bid security requirement described above prior to bid opening for any goods or services contract, any construction contract as defined in ORS 279C.320(1), and any public improvement contract not exceeding \$100,000 except a contract for highway, bridge, or other transportation projects which cannot exceed \$50,000. The public officer must reasonably believe:

(i) That waiving the bid security requirement will probably result in lower bids or an increased number of bids, and

(ii) That waiving the bid security requirement will not endanger completion of the project if rebidding is necessary because the successful bidder is unable or unwilling to sign the contract or provide any required performance bond, and

(iii) That the potential for cost to the County of rebidding the project is outweighed by the benefits.

(2) Payment and Performance Security.

(a) All bid solicitation documents for public improvement and other construction contracts shall require a payment and performance bond be filed with the County in accordance with ORS 279C.380, unless exempt under LM 20.275. All bids for goods or services contracts may require a payment and performance bond, if the public officer determines it is in the County's best interest to do so.

(b) Payment and performance bonds are not required for public improvement and other construction contracts if the amount of the contract does not exceed \$100,000, except contracts for highway, bridge, or other transportation projects which do not exceed \$50,000 pursuant to LM 20.275.

(c) In cases of emergency or as described in ORS 279C.380(4), the requirement for a performance and payment bond may be excused if the declaration of such emergency is made in accordance with LM 21.128.

(3) Public Works Bond.

(a) The County's solicitation document shall require that each contractor and subcontractor have a public works bond on file with the Construction Contractors Board before starting work on the project unless exempt under ORS 279C.836(4) (not required to pay prevailing rates of wage), or ORS 279C.836(7) (disadvantaged minority, women, or emerging small business), or ORS 279C.836(8) (project price does not exceed \$100,000), or ORS 279C.836(9) (County excuses due to emergency). Except as to emergencies, the Contractor shall notify the County before starting work if it is relying on an exemption to the public works bond requirement. The Contractor shall require each subcontractor to provide a similar notification to the Contractor and County. If requested by County, the contractor shall submit written documentation from the Construction Contractors Board or its website, evidencing the receipt of this bond and receipt of such

bonds for any subcontractors. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 04-6-30-12, 6.30.04; 05-2-16-8, 2.28.0; 05-12-14-9, 1.1.065; 08-2-13-1; 2.13.08)*

21.107 Requests for Proposals.

(1) Description. Requests for proposals (hereinafter RFP) are a means of soliciting competitive proposals or offers for entering into a contract for personal services, goods, goods and services, equipment, non-public improvement construction related services (ORS 279C.320), or public improvement contracts for which an RFP process is appropriately authorized (ORS 279C.335(2)). Generally, an RFP is appropriate when price and specification will not necessarily be the predominant basis for award. An RFP process is one, but not the only means of competition for personal services contracts.

(2) When Required and Requirements. Proposals submitted in response to an RFP are offers as are bids. See OAR 137-047-0310, 137-049-0280. Unless otherwise specified in ORS 279A, B, or C or these rules, references to "bids" and "bidder" and "invitation to bid" shall, to the extent practicable within the proposal process be deemed equally applicable to "proposals," "proposers," and "requests for proposals." The RFP process must generally comply with the requirements stated in LM 21.105 above, unless otherwise stated, and shall comply with requirements in ORS 279B.060 and ORS 279C.400. In addition, all RFP documents shall state:

- (a) The composition and role of the evaluation committee;
- (b) The evaluation criteria to be used in awarding the contract and the weight assigned to each criterion;
- (c) Provide for an opportunity to protest the solicitation in accordance with LM 21.107 (6);
- (d) The contract terms;
- (e) Describe the right to protest as stated in LM 21.107(14);
- (f) Invite the submission of sealed, written offers to be publicly opened at a designated time and place;
- (g) Describe the method of contract selection, including award without negotiation, negotiation with highest ranked proposer, competitive negotiations, multiple-tiered competition or any combination of these methods or any other method authorized by these rules.
- (h) An RFP process, if appropriately authorized for a public improvement contract, is not required to include first-tier subcontractor disclosure and reciprocal preference for non-resident bidders.
- (i) Departments are encouraged to include diversity in the evaluation criteria in RFPs for contracts in which direct services are to be provided to the public. See Lane County Diversity Action Plan.

(3) The County may issue a request for information, a request for interest, a request for qualifications or other preliminary documents, or consult as set forth in ORS 279B.210 (for non-public improvement contracts) and ORS 279C.405(1) (for public works contracts), in order to obtain information in preparation of a request for proposals.

(4) Advertisements and Proposals. LM 21.105(3) and (5). References to "bid" or "bidder" there include "proposal" or "proposer." By signing and returning a proposal, in addition to the acknowledgment in LM 21.105(5)(b), the proposer agrees to be bound by the terms and conditions of the contract, including the final negotiated scope of work and performance standards.

(5) Delegations and Authority to Act. Each Department Director is delegated the authority to call for open, direct evaluation of requests for proposals, and perform all other obligations of the "public officer" under LM 21.107. The Department Directors may further delegate this authority to a representative by a signed written document. The evaluation committee's recommendation for award of the contract shall be considered and

finally decided by either the Board or the County Administrator, depending upon authority to execute the contract per LM 21.145.

(6) Protest of Process and Solicitation Document. LM 21.105(6). References to "bid" or "bidder" there include "proposal" or "proposer."

(7) Opening. LM 21.105(7) above. References to "bid" or "bidder" there include "proposal" or "proposer." However, proposals need not be read aloud, and the County is only required to list and record the names of the proposers at the opening. It may record any additional information deemed necessary in its discretion.

(8) Evaluation of Proposals. The evaluation committee shall evaluate the proposals according to the criteria stated in the RFP, compliance with public contracting procedures, proposer responsibility, ethical practice, product acceptability, and ORS Chapter 279A, B, and C. The award shall be to the responsible proposer whose proposal is determined in writing to be the most advantageous to the County, not restricted to price, based on evaluation factors set forth in the RFP and any authorized negotiations. . The department responsible for issuing the RFP shall mail notice of the evaluation committee recommendation to the proposers within two days of the committee's decision unless otherwise stated in the RFP. Negotiations with proposers regarding contract terms may occur only after the award or only as provided in the RFP. See OAR 137-047-0262, OAR 137-049-0650.

(9) Methods of Selection. For non-public improvement contracts, the County may use any one or combination of methods of contractor selection set forth in ORS 279B.060. See OAR 137-047-0262 and 137-047-0261, except (2) and (6) are adopted. Prior to initial closing, the County shall provide an opportunity to protest as in LM 21.105(6); and after the notice of intent to award, an opportunity to protest the award as in LM 21.105(13) with the ability to protest exclusion from any phase of a multi-step or multi-tiered process based on criteria in OAR 137-047-0720(2) which is adopted, if such opportunity was not previously provided. In addition, the County may use portions of these methods of contractor selection to develop a multi-tiered competitive process designed to identify, at one or more stages, a class of proposers that fall within a competitive range based on criteria established for that stage, or to otherwise eliminate from consideration a class of lower ranked proposers. In doing so, the County shall provide notice of the method of selection in the RFP, evaluate all responsive proposals, and provide at least an opportunity to protest the solicitation process or document, and the award as set forth in this subsection.

(10) Bid, Payment and Performance Security. Unless otherwise provided in the RFP bid, payment and performance security requirements may be waived if the contract will not be a public improvement or other construction contract or if it will be for a public improvement contract not exceeding \$100,000 except for a highway, bridge or other transportation project which does not exceed \$50,000. Bid, payment and performance securities shall be provided if the contract will be for a public improvement exceeding these dollar amounts.

(11) Mistakes in Bids. See LM 21.105(9). References to "bid" includes "proposal."

(12) Rejection. See LM 21.105(10). References to "bid" includes "proposal." References to "bidders" includes "proposers." References to "bid documents" include "request for proposal documents." References to "opening bids" include "opening proposals."

(13) Notice of Intent to Award. LM 21.105(12). References to "bid" and "bidder" shall include "proposal" and "proposer." A notice of the recommendation of the evaluation committee is considered a notice of intent to award the contract, unless stated otherwise.

(14) Protest of Intent to Award/Evaluation Committee Recommendation. Anyone responding to an RFP who is not recommended for award by the evaluation

committee may protest the recommendation to the decision maker, either the Board or the County Administrator, depending upon which has authority to execute the contract pursuant to LM 21.105(13). References to "bid documents" include "request for proposal documents" and references to "bid" include "proposal," except for the grounds in LM 21.105(13)(a). The applicable grounds for this protest are set forth below.

(a) A protest must be made in writing, be received before the contract is awarded by the decision maker, clearly state the ground(s) for the protest, and indicate what condition(s) resulted in the proposal not being recommended for award. Any protest which does not comply with the applicable procedures may be rejected.

(b) Unless otherwise stated in the RFP, the protest must be received by the department which issued the RFP not later than seven (7) calendar days after notice of the evaluation committee's decision was mailed. Upon receipt of the protest, the department shall notify the proposer recommended for award of the protest and the evaluation committee's recommendation. The proposer and the committee shall have three calendar days from the date the protest was filed to respond to the protest in writing if they so desire.

(c) When a protest is filed, the department responsible for preparing the RFP shall prepare a written analysis of the protest and make a recommendation to the decision maker as to appropriate action to be taken.

(d) The grounds for protest include any one or more of the following:

(i) The evaluation committee has failed to conduct the evaluation of proposals in accordance with the criteria or processes described in the solicitation materials.

(ii) Different criteria were used to evaluate different proposals.

(iii) The evaluation committee unfairly applied the evaluation criteria to a proposal.

(iv) A member or members of the evaluation committee had a relationship with a proposer that represented a conflict of interest.

(v) The criteria used to evaluate the proposals did not pertain to the services or products requested.

(vi) A member or members of the evaluation committee demonstrated bias toward a proposal or a proposer.

(vii) The County abused its discretion in rejecting the protestor's proposal as nonresponsive.

(viii) The evaluation of the proposals is otherwise in violation of any provisions of ORS 279A or ORS 279B.

(ix) All higher ranked proposals are nonresponsive.

(e) If the decision maker is the Board, the department which issued the RFP shall present the issues orally or in writing at a public meeting. The appellant shall then have 10 minutes to specifically address the protest criteria, and the evaluation committee's recommendation and the recommended proposer(s) shall have a total of 10 minutes to respond, divided between them as they wish. If the decision maker is the County Administrator, the decision shall be made on the written record.

(f) If a protest is timely filed, the Board or County Administrator, as appropriate, shall consider the evaluation committee's recommendation and the allegations of the protest before rendering a final decision. The decision maker may grant or deny the protest, reject proposals, or cancel the solicitation pursuant to LM 21.107(12) or remand to the department or evaluation committee for further information or consideration. In the event of remand, the department will report back to the decision maker as soon as reasonably possible if the protest remains pending. The County Administrator's response to the protest will be in writing. If the Board is the decision maker, it shall evaluate any protest before rendering a decision and shall state reasons and conclusions reached either in writing or on the record in a public meeting, with a Board

Order referencing reasons for its decision on the protest. Any decision to overturn the recommendation shall be based on a finding that one of the criteria of LM 21.107(14)(d) above occurred to the substantial prejudice of the protestor. The protestor must be eligible and next in line to be awarded the contact if the protest was successful.

(g) The procedures above are mandatory to the extent they establish the time and manner for protests to be submitted to the County, including that the protest be in writing specifying the grounds and timely filed, and that there be a written response. The County will not consider late protests. The other protest procedures above are directory and failure to follow or complete the action in the manner provided shall not invalidate the County's decision, and the goal is to provide a reasonable time and manner process for the County to consider a protest.

(15) Authority to Award Contract Subject to RFP.

(a) The County Administrator is delegated authority to award a contract resulting from an RFP process where authority to execute such contract has been specifically delegated under LM 21.145.

(b) All decisions to award a contract following a request for proposals shall be based on the criteria stated therein, substantial compliance with public contract laws, rules and procedures, and the best interests of the County. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 04-6-30-12, 6.30.04; 05-2-16-8, 2.28.05; 08-2-13-1; 2.13.08)*

21.108 Letters of Interest.

(1) Description. Letters of Interest (LOIs) are expressions of interest in a particular contract by potential contractors. Typically, potential contractors submit a letter in response to the County's solicitation which states they are interested in providing a good or service. This selection process should be used cautiously in order to avoid any chill to competition.

(2) When Applicable.

(a) LOIs may be used as a means of determining whether a potential contractor is a sole source under LM 20.096 and LM 21.111 and to support findings as set forth in LM 21.111. This includes where the fundamental nature of the purchase is so limiting that it is likely that only one seller/provider exists or there is likely only one qualified seller/provider available to contract with the County for the purchase. There may be additional facts to support the sole source findings.

(b) An LOI process may be used as a preliminary phase of an RFP process. If the County receives more than one LOI such responses may be included on a list of potential contractors who will be mailed a bid, RFP or RFPs solicitation document.

(3) Requirements. LOIs may be sought in the following manner:

(a) An advertisement must be run in a newspaper of general countywide circulation and/or electronically as authorized by LM 21.105(3) at least once and not less than five days before the LOIs are due. Additional advertisements may also be published in other newspapers.

(b) The advertisement must contain a description of the nature of the work to be performed or good to be provided, the term of the contract, the person to whom LOIs are to be submitted and the date the LOIs are due. There must be a sufficient description of the service or good that potential competitors will be able to evaluate whether they are qualified, able and wish to perform. The ad shall include an opportunity to submit comments or objections to the prospective purchase using this process or to support findings in LM 21.111

(c) If there is only one LOI submitted, the department shall obtain sufficient proof, as it deems necessary, of basic ability to perform, including but not limited to, an adequate level of professional, fiscal and management capability. These factors may be included in the findings as set forth in LM 21.111.

(d) If the County receives more than one LOI response, all parties responding shall receive an opportunity to compete for the contract pursuant to a bid invitation, RFP, or Request for Personal Services (RFPS) pursuant to LM 21.118(6). If this occurs, the competition must be open to all potential competitors, and not just those submitting LOIs. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 05-2-16-8, 2.28.05)*

21.109 Small Procurements.

The County may award a non-public improvement contract for goods or services, when the amount does not exceed \$5,000 or 3 years in length. See ORS 279B.065, ORS 279C.335. The County may award a public improvement contract when the amount is less than \$5,000 and does not exceed 3 years in length.

(1) The contract award may be direct without competitive selection subject to (2) below. Use of competitive quotes are encouraged, particularly for new purchases or projects.

(2) A small procurement contract should not be considered separately when it is a component of a larger purchase or project in one year, and when considered as a whole would require a competitive selection. Any contract terms should be consistent with the County's legal requirements and limitations, or as may be further described in procedures adopted by the County Administrator.

(3) The Department Directors and County Administrator are delegated the authority to award small procurement contracts, and such authority may be further delegated. *(Revised by Order No. 05-2-16-8, Effective 2.28.05; 05-12-14-9, 1.1.06)*

21.110 Intermediate Procurements.

The County may award an intermediate procurement contract for goods or services, either related to a public improvement or non-public improvement, when the amount does not exceed \$100,000. The County may use any LM Chapter 21 procedures for obtaining information in preparation for soliciting quotes or prequalifying a product. The three quotes as required by LM 20.105(1)(c) may be either oral or written for non-public improvement contracts exceeding \$5,000 but not \$50,000, and for public improvement contracts equal to or greater than \$5,000 but not exceeding \$50,000. The County shall keep a written record of the source and amount of quotes received. For intermediate contracts exceeding \$50,000 but not \$100,000, the County department shall prepare a written solicitation, the quotes must be written, and unsuccessful quoters shall have the right to protest the award decision in accordance with LM 21.105(13)(a) and (b). The written solicitation shall provide notice of the right to protest the award. If three quotes are not available, a lesser number will suffice provided that a written record is made of the effort to obtain the quotes. An intermediate procurement acquisition should not be made when it is a component of a larger purchase or project in any single year, and when considered as a whole would require a different competitive selection than as provided by this or another rule.

The award of any contract as an intermediate procurement under this rule shall be to the offeror whose quote or proposal will best serve the interests of the County, taking into account price as well as considerations including, but not limited to experience, expertise, product functionality, suitability for a particular purpose and contractor responsibility. *(Revised by Order No. 05-2-16-8, Effective 2.28.05; 05-12-14-9, 1.1.06; 08-2-13-1; 2.13.08)*

21.111 Sole Source.

For non-public improvement contracts, if there is only one source for goods or services, or a class of goods or services of the quality required by the County, a contract may be awarded to that source without competition.

(1) The County must make written findings which may include at least one of the following:

(a) That the efficient utilization of existing goods requires acquisition of compatible goods or services;

(b) That the goods or services are required for the exchange of software or data with other public or private agencies and are available from only one source;

(c) That the goods or services are for use in a pilot or an experimental project; or

(d) Other findings that support that the goods or services are available from only one source.

(2) There may be only one qualified seller/provider available to contract, such as in specific circumstances under (1)(c) or (d) of this rule. Prior to awarding a contract, if there are known potential contractors, the County shall make a reasonable effort to notify them of the intended purchase or project. For contracts exceeding \$100,000 "reasonable effort" includes at least one of the following actions in the County's discretion: formal request for information, or request for qualifications or use a Letter of Interest (LOI) selection process as set forth in LM 21.108.

(3) If the County intends to make several purchases of the product or service from a particular seller or provider for a period not to exceed 3 years, it may so state in the documentation required in (1) above and such documentation shall be sufficient notice as to subsequent purchases.

(4) Department directors, or their designee, are delegated authority to make the written findings in (1) and (3) above for contracts equal to or less than \$50,000.

(5) For sole source contracts exceeding \$50,000, Departments shall provide the County Administrator with proposed written findings in (1) and (3) above; and the County Administrator has authority to approve written findings in (1) and (3) of this rule. The proposed findings and the County Administrator's determination shall be documented and maintained by the respective department.

(6) Except as provided in (7) of this rule, if the amount of the purchase exceeds \$100,000, public notice of the determination that goods or services are available from only one source shall be published in accordance with LM 21.105(3) or through other public notice reasonably likely to reach at least as many potential sellers/providers. Unless otherwise specified in the public notice of the sole source procurement, a person or entity whose interests are adversely affected must deliver a written protest within 5 days of the public notice to the County Administrator and to be decided by the Board. The written protest shall include a detailed statement of the legal and factual grounds for the protest based on (1) above, a description of the resulting harm and the relief requested. Unless otherwise specified in the public notice of the sole source procurement, the Board may consider the written record, and any other testimony provided at the public meeting and shall issue its decision by Board Order.

(7) To the extent purchases meeting the circumstances in (1) are covered by an approved special procurement, the terms of the special procurement instead apply. Discretionary use of the LOI process in accordance with LM 21.108 satisfies the public notice and protest requirements for purchases covered by (1)(a) and (b) of this rule in addition to other circumstances where the fundamental nature of the purchase is so limiting that it is likely only one seller/providers exists.

(8) To the extent practicable, the County shall negotiate with the sole source to obtain contract terms advantageous to the County. *(Revised by Order No. 05-2-16-8, Effective 2.28.05)*

21.112 Brand Name.

This rule applies to non-public improvement contracts, and LM 20.210 and LM 20.215 applies to public improvement contracts. Specifications shall not expressly or

implicitly require any product of a particular manufacturer or seller except pursuant to this rule or the class-specific authorizations in LM Chapter 20. The County may identify products by brand names so long as it includes language similar to “or equal,” “or equivalent,” or “equal or superior to.” The County shall determine, in its sole discretion, whether an offeror’s alternative product is “equal” or “equivalent,” or “superior.” The Department directors shall be delegated authority to determine that only an identified brand name will meet the County’s need and shall document such decision in writing, subject to any review and reversal by the County Administrator, in his or her discretion. Any written decision must be based on one or more of the criteria in ORS 279B.215(2). *(Revised by Order No. 05-2-16-8, Effective 2.28.05)*

21.112A Cooperative Procurements.

The County may participate in, sponsor, conduct, or administer cooperative procurements as set forth in ORS 279A.200 through ORS 279A.225. *(Revised by Order No. 05-2-16-8, Effective 2.28.05; 08-2-13-1; 2.13.08)*

21.112B Exhaustion of Remedies .

An adversely affected bidder, proposer, quoter, or person affected by a sole-source procurement requiring public notice and opportunity to protest, must exhaust all avenues of administrative review and relief applicable to the purchase as set forth in these rules before seeking judicial review of the County’s selection or contract award decision. Such review and relief includes, but is not limited to, opportunities to protest or to submit comments or objections to the County through a Letter of Interest process.

TYPES OF CONTRACTS

21.113 Goods, Materials and/or Services Contracts.

(1) A goods or materials contract (excluding personal services) is one that calls primarily for an end product and in which the County purchases, obtains some interest in, or leases personal property. A service contract is one that calls primarily for a contractor’s time and effort, and does not include work connected with manufacturing a product or personal services. A service contract includes one for a trade-related activity to accomplish routine functions of a type that can generally be done by any competent worker, even though a specific license is required. A contract may be a combination of goods, materials and services.

(2) Goods and/or service contracts may only be executed after appropriate competitive selection has been completed.

(3) Title to all personal property shall be described on all formal title documents and bills of sale as: Lane County, Lane County Public Service Building, Eugene, Oregon 97401.

(4) For contracts involving the rental, lease or lease purchase of equipment, the Risk Manager should be consulted regarding insurance requirements.

(5) Departments are encouraged to include a provision concerning equal access and treatment for diverse cultures for contracts in which direct services are to be provided to the public. See Lane County Diversity Action Plan. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 05-2-16-8, 2.28.05; 05-12-14-9, 1.1.06; 08-2-13-1; 2.13.08)*

21.114 Maintenance and Repair Contracts.

Contracts for the maintenance or repair of equipment or public improvements are subject to the public contract laws and regulations.

(1) Contracts for maintenance or repair of equipment must comply with the requirements of LM 20.175. *(Revised by Order No. 98-12-2-4, Effective 12.2.98)*

21.115 Public Improvement and Construction Contracts.

(1) When the County procures personal services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a public contract that is subject to ORS 279C, the County will not:

(a) Procure the personal services from a contractor or an affiliate of a contractor who is a party to the public contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the personal services; or

(b) Procure the personal services through the public contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the personal services.

(2) Section (1) of this rule does not apply to a procurement that qualifies as a construction manager/general contractor procurement or a design-build procurement. "Affiliate" means a person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the contractor.

(3) Public improvements shall usually be performed by contract. When the project is estimated to cost more than \$125,000, the provisions of ORS 279C.305 and LM 21.105(3) shall be followed. Unless otherwise approved by the Board, public improvement projects shall be performed according to the capital improvements list adopted by the Board pursuant to ORS 279C.305.

(4) Public improvement and construction contracts must comply with a number of requirements. Care should be taken to see that any applicable requirements including, but not limited to, from those among the following list are met:

(a) Advertisement (including Asbestos Abatement) - ORS 279C.360 and LM 21.105(3) above. See, OAR 137-049-0210.

(b) Bid security - ORS 279C.365(4), LM 20.275, LM 21.106 above.

(c) Performance security - ORS 279C.380, LM 20.275, LM 21.106 above.

(d) Public Works Bond - LM 21.106.

(e) Responsibility Determination Form - ORS 279C.375, LM 21.105(14).

(f) Prevailing rates of wage - ORS 279C.800 to 279C.855.

(g) Retainage - For project completion, ORS 279C.555 to ORS 279C.565, LM 21.116 below. For untimely filed certified statements of payment of prevailing wages, ORS 279C.845.

(h) Prompt payment policies - ORS 279C.505, ORS 279C.515.

(i) Subcontractor clauses - see ORS 279C.515, ORS 279C.830, ORS 279C.580.

(j) Insurance - see LM 21.305 below.

(k) Exempt contracts over \$100,000 evaluation report required - see ORS 279C.355.

(l) Contractor shall certify that an employee drug testing program is in place at the time of contract execution, and that such a program will be maintained throughout the contract period including any extensions. Failure of contractor to certify, to have, or to maintain such a drug testing program is grounds for rejection of a bid or immediate termination of the contract. Contractor shall also certify that it will require any subcontractors to demonstrate to Contractor that it will have such a drug testing program. ORS 279C.505(2).

(m) First-tier subcontractor disclosure for contracts greater than \$100,000. ORS 279C.370.

(5) The County Administrator is delegated the authority to make final acceptance of a public improvement and may further delegate this authority to a representative by a signed written document. If it is determined that the project should not be finally accepted, the matter shall be brought to the attention of the Board. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 04-6-30-12, 6.30.04; 05-2-16-8, 2.28.05)*

21.116 Retainage.

(1) Retainage of five percent of the contract price of the work completed shall be withheld on all public improvements contracts until the project is at least 50 percent complete, after which the retainage may be reduced, upon the County Administrator's approval, in accordance with ORS 279C.570(7).

(2) Deposit of Securities in lieu of retainage.

(a) Notwithstanding LM 21.116(1) above, Lane County shall reduce the retainage in an amount equal to the market value of bond, securities or other instruments deposited by the contractor in accordance with the procedures set out below. The types of bonds, securities or instruments which may be accepted include those in OAR 137-049-0820(4). Bonds or securities, or other instruments offered for deposit in lieu of retainage shall be as authorized in OAR 137-049-0820(2), which is hereby adopted.

(b) All bonds, securities, or instruments in lieu of retainage shall be deposited with a bank or trust company in Lane County, Oregon, in an account for the benefit of Lane County established for this purpose. Upon deposit, the bank or trust company shall prepare an Assignment and Safekeeping Receipt in the form set out in Exhibit "A." The contractor shall deliver in person one copy of this receipt to the Department of Management Services.

(i) Bonds or securities deposited shall be in fully transferable form. Any nonnegotiable bonds or securities shall have all necessary instruments attached to enable the County to effect transfer of title should the contractor be unable to fulfill the contract obligations.

(ii) Bonds or securities deposited in lieu of retainage shall be released only upon the written instructions and authorization of the County. Upon default, the County may elect to authorize the bank or trust company to transfer any securities deposited under these provisions, rather than undertake to transfer such securities itself.

(c) If at any time the market value of the bonds or securities deposited in lieu of retainage drops below five percent of the contract price of the work completed, the County may withhold from payments due the contractor an amount sufficient to maintain its appropriate retainage protection. Withheld amounts shall only be released to the extent of the market value of additional bonds or securities deposited by the contractor in accordance with this section.

(3) Retainage Deposited in Interest Bearing Account. In accordance with ORS 279C.560(4), cash retainage may be deposited upon the request of the contractor in an interest bearing account with earnings to accrue to the contractor.

(4) Surety Bond in Lieu of Retainage. In accordance with ORS 279C.560(6), upon approval of the County Administrator, the contractor may deposit a surety bond for all or a portion of the retainage. The bond shall be in a form acceptable to the County Administrator. The retainage shall be accordingly reduced, and the contractor shall accept like bonds from subcontractors and suppliers.

(5) All retainage on public contracts for public improvements, less costs as allowed by statute, shall be released within 30 days after the work under the contract has been completed and the County Administrator or the Board has authorized final acceptance thereof. If not so released, interest shall be paid in accordance with ORS 279C.570(8). *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 04-6-30-12, 6.30.04; 05-2-16-8, 2.28.05)*

21.129 Purchase Orders.

Purchase orders may be used to obtain goods, materials, services, personal or professional services, to implement a purchase pursuant to a requirements contract, to implement a purchase utilizing a contract competitively bid by other political subdivisions when the specifications indicated that more than one political subdivision could utilize the bid award, and to purchase price-regulated items when the rate or price has been set by Federal, State or local regulatory authority.

(1) Quotations for purchase orders shall be solicited from appropriate minority, women and emerging small business enterprises, who are certified by the State pursuant to ORS Chapter 200. The County Administrator shall implement this requirement through administrative procedure.

(2) Purchases of more than \$100,000 can be made by purchase order only in implementation of an appropriately awarded written contract or to purchase price-regulated items or the printing of ballots. Appropriate selection procedures in LM Chapters 20 and 21 should be followed. Purchase orders shall not be utilized to circumvent the public contract law or regulations.

(3) A purchase order for goods, materials or services relating to public improvement and construction projects shall comply with and include all applicable contract provisions. .

(4) The Director of Management Services or his or her delegate shall have the discretion to require a written contract in lieu of a purchase order, whenever he or she believes a contract to be in the best interests of the County.

(5) The Director of the Department of Management Services is delegated authority to execute all purchase orders. He or she may further delegate such authority in writing. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 05-2-16-8, 2.28.05)*

STANDARD PROVISIONS**21.130 Standard Contract Provisions.**

The following standard public contract clauses shall be included expressly or by reference where appropriate in every contract of the County.

(1) Contractor shall make payment promptly, as due, to all persons supplying to such contractor labor or material for the prosecution of the work provided for in the contract, and shall be responsible for payment to such persons supplying labor or material to any subcontractor.

(2) Contractor shall pay promptly all contributions or amounts due to the State Industrial Accident Fund and the State Unemployment Compensation Fund from contractor or any subcontractor in connection with the performance of the contract.

(3) Contractor shall not permit any lien or claim to be filed or prosecuted against the County on account of any labor or material furnished, shall assume responsibility for satisfaction of any lien so filed or prosecuted and shall defend against, indemnify and hold County harmless from any such lien or claim.

(4) Contractor and any subcontractor shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167.

(5) For public improvement and construction contracts only, if contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to the contractor or a subcontractor by any person in connection with the public contract as such claim becomes due, the County may pay such claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of the contract. The payment of a claim in the manner authorized hereby shall not relieve the contractor or its surety from the obligation with respect to any unpaid claim. If the County is unable to determine the validity of any claim for labor or services furnished, the County may withhold from any current payment

due contractor an amount equal to said claim until its validity is determined, and the claim, if valid, is paid by the contractor or the County. There shall be no final acceptance of the work under the contract until all such claims have been resolved.

(6) Contractor shall make payment promptly, as due, to any person, co-partnership, association or corporation furnishing medical, surgical, hospital or other needed care and attention, incident to sickness or injury, to the employees of contractor, of all sums which the contractor agreed to pay or collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing payment for such service.

(7) With certain exceptions listed below, contractor shall not require or permit any person to work more than 10 hours in any one day, or 40 hours in any one week except in case of necessity, emergency, or where public policy absolutely requires it, and in such cases the person shall be paid at least time and a half for:

(a) All overtime in excess of eight hours a day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday, or

(b) All overtime in excess of 10 hours a day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday, and

(c) All work performed on the days specified in ORS 279B.020(1) for non-public improvement contracts or ORS 279C.540(1) for public improvement contracts.

For personal/professional service contracts as designated under ORS 279A.055, instead of (a) and (b) above, a laborer shall be paid at least time and a half for all overtime worked in excess of 40 hours in any one week, except for individuals under these contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. Sections 201 to 209, from receiving overtime.

Contractor shall follow all other exceptions, pursuant to ORS 279B.235 (for non-public improvement contracts) and ORS 279C.540 (for public improvement contracts), including contracts involving a collective bargaining agreement, contracts for services, and contracts for fire prevention or suppression. For contracts other than construction or public improvements, this subsection (7) does not apply to contracts for purchase of goods or personal property.

Contractor must give notice to employees who work on a public contract in writing, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

(8) The hourly rate of wage to be paid by any contractor or subcontractor to employed workers or other persons doing or contracting to do all or part of the work contemplated by the public works contract shall be not less than the applicable prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is performed, in accordance with ORS 279C.838 and ORS 279C.840. For projects also covered by the federal Davis-Bacon Act (40 USC §3141 et seq.), contractors and subcontractors shall pay workers or others performing work contemplated by the contract the higher of the state or federal prevailing rate of wage, as determined by the Commissioner of the Bureau of Labor and Industries in accordance with ORS 279C.830.

(9) The contractor, its subcontractors, if any, and all employers working under the contract are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, or otherwise be exempt under ORS 656.126.

(10) As to public improvement and construction contracts, Contractor shall comply with all applicable federal, state, and local laws and regulations, including but not limited to those dealing with the prevention of environmental pollution and the preservation of natural resources that affect the performance of the contract. A list of entities who have enacted such laws or regulations is found in the Oregon Standard Specifications for Construction, Section 00170.01 currently in effect and published

through Oregon Department of Transportation. If new or amended statutes, ordinances, or regulations are adopted, or the contractor encounters a condition not referred to in the bid document not caused by the contractor and not discoverable by reasonable site inspection which requires compliance with federal, state, or local laws or regulations dealing with the prevention of environmental pollution or the preservation of natural resources, the contractor shall immediately give notice to the County. The County and the contractor shall have all the rights and obligations specified in ORS 279C.525 to handle the situation.

(11) The contract may be canceled at the election of County for any substantial breach, willful failure or refusal on the part of contractor to faithfully perform the contract according to its terms. The County may terminate the contract by written order or upon request of the contractor, if the work cannot be completed for reasons beyond the control of either the contractor or the County, or for any reason considered to be in the public interest other than a labor dispute, or by reason of any third party judicial proceeding relating to the work other than one filed in regards to a labor dispute, and when circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the work. In either case, for public improvement contracts, if the work is suspended but the contract not terminated, the contractor is entitled to a reasonable time extension, costs and overhead per ORS 279C.655. Unless otherwise stated in the contract, if the contract is terminated, the contractor shall be paid per ORS 279C.660 for a public improvement contract.

(12) If the County does not appropriate funds for the next succeeding fiscal year to continue payments otherwise required by the contract, the contract will terminate at the end of the last fiscal year for which payments have been appropriated. The County will notify the contractor of such non-appropriation not later than 30 days before the beginning of the year within which funds are not appropriated. Upon termination pursuant to this clause, the County shall have no further obligation to the contractor for payments beyond the termination date. This provision does not permit the County to terminate the contract in order to provide similar services or goods from a different contractor.

(13) By execution of this contract, contractor certifies, under penalty of perjury that:

(a) To the best of contractor's knowledge, contractor is not in violation of any tax laws described in ORS 305.380(4), and

(b) Contractor has not discriminated against minority, women or small business enterprises in obtaining any required subcontracts.

(14) Contractor agrees to prefer goods or services that have been manufactured or produced in this State if price, fitness, availability or quality are otherwise equal.

(15) Contractor agrees to not assign this contract or any payments due hereunder without the proposed assignee being first approved and accepted in writing by County.

(16) Contractor agrees to make all provisions of the contract with the County applicable to any subcontractor performing work under the contract.

(17) The County will not be responsible for any losses or unanticipated costs suffered by contractor as a result of the contractor's failure to obtain full information in advance in regard to all conditions pertaining to the work.

(18) All modifications and amendments to the contract shall be effective only if in writing and executed by both parties.

(19) The contractor certifies he or she has all necessary licenses, permits, or certificates of registration (including Construction Contractors Board registration or Landscape Contractors Board license, if applicable), necessary to perform the contract and further certifies that all subcontractors shall likewise have all necessary licenses, permits or certificates before performing any work. The failure of contractor to have or

maintain such licenses, permits, or certificates is grounds for rejection of a bid or immediate termination of the contract.

(20) Unless otherwise provided, data which originates from this contract shall be "works for hire" as defined by the U.S. Copyright Act of 1976 and shall be owned by the County. Data shall include, but not be limited to, reports, documents, pamphlets, advertisements, books, magazines, surveys, studies, computer programs, films, tapes, and/or sound reproductions. Ownership includes the right to copyright, patent, register and the ability to transfer these rights. Data which is delivered under the contract, but which does not originate therefrom shall be transferred to the County with a nonexclusive, royalty-free, irrevocable license to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others to do so; provided that such license shall be limited to the extent which the contractor has a right to grant such a license. The contractor shall exert all reasonable effort to advise the County, at the time of delivery of data furnished under this contract, of all known or potential invasions of privacy contained therein and of any portion of such document which was not produced in the performance of this contract. The County shall receive prompt written notice of each notice or claim of copyright infringement received by the contractor with respect to any data delivered under this contract. The County shall have the right to modify or remove any restrictive markings placed upon the data by the contractor.

(21) If as a result of this contract, the contractor produces a report, paper, publication, brochure, pamphlet or other document on paper which uses more than a total 500 pages of 8 1/2" by 11" paper, the contractor shall conform to the Lane County Recycled Paper Procurement and Use policy, LM 2.440 through 2.448, by using recycled paper with at least 25% post-consumer content which meets printing specifications and availability requirements.

(22) The Oregon Standard Specifications for Construction adopted by the State of Oregon, and the Manual on Uniform Traffic Control Devices, each as is currently in effect, shall be applicable to all road construction projects except as modified by the bid documents.

(23) As to contracts for lawn and landscape maintenance, the contractor shall salvage, recycle, compost or mulch yard waste material in an approved site, if feasible and cost-effective.

(24) As to public improvement contracts for demolition, the contractor shall salvage or recycle construction and demolition debris, if feasible and cost-effective.

(25) When a public contract is awarded to a nonresident bidder and the contract price exceeds \$10,000, the contractor shall promptly report to the Department of Revenue on forms to be provided by the department the total contract price, terms of payment, length of contract and such other information as the department may require before the County will make final payment on the contract. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 04-6-30-12, 6.30.04; 05-2-16-8, 2.28.05; 05-12-14-9, 1.1.06; 08-2-13-1; 2.13.08)*

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(h) Personal Services Contract. See LM 20.097; LM 21.117.

(i) Public contract. See ORS 279A.010(1)(z). In addition, a public contract is any written document which sets forth the promises of the parties, one of whom is the County. More specifically, a public contract can cover purchases, sales, leases, or other acquisition or disposal of personal property or public improvements. It can also cover sales and purchases of services, including personal services. Net financial effect for the County is not a factor in determining whether a public contract exists. A public contract may bind the County to incur a financial obligation, may produce revenue, or may have little or no financial implications.

(j) Public improvement. See ORS 279A.010(1).

(k) Public officer. The County Administrator, and where otherwise delegated, Department Directors. This authority may be further delegated. The public officer is also any person authorized to conduct a procurement on the County's behalf.

(l) Request for Proposal. See LM 21.107.

(m) Responsible bidder or proposer. See ORS 279C.375, ORS 279B.110.

(n) Retainage. The difference between the amount earned by the contractor on a public contract and the amount paid, held to guarantee full performance. See ORS 279C.550. *(Revised by Order No. 05-2-16-8, Effective 2.28.05; 08-2-13-1; 2.13.08)*

21.102 Policy on Competition.

It is the policy of Lane County to encourage open and impartial competition and to encourage the economic integration of minorities, women and emerging small businesses into the business sector.

All public contracts shall be awarded by competitive procurement, except as otherwise allowed or required in ORS 279A, B, or C; ORS 282.210; or the County's public contracting policies and exemption rules. If federal funds are involved, federal laws, rules and regulations shall govern, in the event of conflict. *(Revised by Order No. 05-2-16-8, Effective 2.28.05)*

21.103 Contract Execution and Processing.

(1) All contracts shall be in writing and signed by the Board, or a duly authorized delegate. Until a contract is executed by the parties, it shall not be binding.

(2) All contracts shall be processed through procedures prescribed by the County Administrator for review by legal, risk management and budget staff, except where expressly stated otherwise by the County Administrator or these rules. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 04-6-30-12, 6.30.04; 05-2-16-8, 2.28.05)*

COMPETITIVE SELECTION

21.104 Cost and Feasibility Analysis

(1) Before conducting a procurement for certain services covered by ORS 279B and estimated to exceed a \$250,000 contract amount, except as provided in (3) below of this rule, the County department will: prepare proposed written findings that performing the services with the County's own personnel and resources is not feasible or demonstrate by means of a proposed written cost analysis that performing the services by contract would cost less than performing the services with the County's own personnel and resources.

(2) The services subject to this rule are those covered by a contract where service supplier agrees to supply the County's service requirements that arise

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for a specified time period or an individual project, usually paid based on time and materials. The services are covered by a contract that calls primarily for the contractor's time and effort.

(3) Procurement of the following services are not covered by (1) of this rule:

(a) Client services as described in OAR 125-246-0110,
(b) Personal services purchased under County rules,
(c) Services described in ORS 279C, including but not limited to contracts for architects, engineers and public improvements.

(4) When determining whether or not using the County's personnel or resources is feasible, factors include but are not limited to the factors found in Section 4, Oregon Laws 2009, Chapter 880: ..\PDF\Oregon Laws 2009 Chapter 880.pdf, including:

(a) The County lacks the specialized capabilities, experience or technical or other expertise necessary to perform the services, comparing the field most closely involved with a potential contractor's capability, experience or expertise in the same or similar field; or,

(b) A special circumstance requires the contracting agency to procure the services by contract as set forth in Section 4, Oregon Laws 2009, Chapter 880. ..\PDF\Oregon Laws 2009 Chapter 880.pdf. Special circumstances include, but are not limited to, services incidental to primary purchase or lease of real or personal property; services needed in an emergency or for urgent, temporary or occasional use such that use of County resources would delay and frustrate the purpose of the services or they will be completed in six months; where a grant funding source or state or federal law requires an independent contractor.

(5) Any cost analysis shall be conducted in accordance with Section 2 and 3 of Oregon Laws 2009, Chapter 880. ..\PDF\Oregon Laws 2009 Chapter 880.pdf

(6) Prior to conducting the procurement, the County department will submit their proposed written findings or cost analysis, including the proposed basis for a decision to proceed, to the County Administrator. The County Administrator is delegated the authority to make the determination of how to proceed based on findings or cost analysis covered by this rule.

(7) The County Administrator shall collect and provide to the Board each quarter, copies of the record of the written findings or cost analyses, and the basis for the decision to proceed, for each procurement covered by this rule. Upon request, the County Administrator or a designee will consult with Oregon Department of Administrative Services in evaluating the process covered by this rule.

21.105 Competitive Bidding.

Competitive bidding is a formal process by which departments advertise and issue a written invitation to bid, and receive and open bids as required by ORS Chapter 279A, B, and C and these rules. An invitation to bid is a solicitation of competitive offers in which technical specifications, price and delivery (or project completion) will be the predominant award criteria.

(1) When Required. Generally, a formal competitive bid process is required for all public contracts unless exempt or excepted pursuant to ORS Chapter 279 A, B or C, or an LM Chapter 20 exemption rule, or such authorities provide formal bidding as an option. Nothing in this rule is intended to prohibit the County, in its discretion, from using formal bidding even though it may not be required.

(2) In preparation for an invitation to bid, the County may issue a request for information, a request for interest or other preliminary documents. It may also develop and maintain a qualified products list in accordance with LM 20.230.

(3) Advertisements.

(a) The contents of advertisements for bids shall include:

- (i) a description of the project, goods or services;
- (ii) the office where the specifications for the project or purchase may be reviewed;
- (iii) name, title and address of person authorized to receive bids;
- (iv) if prequalification is required, a statement of the class or classes of work for which bidders must be pre-qualified and the filing deadline;
- (v) scheduled bid submission deadline which shall not be less than 7 days after the date of the last publication of the ad;
- (vi) scheduled bid opening (immediately after bid submission deadline for public improvement contracts);
- (vii) if applicable, that the contract is for a public work subject to ORS 279C.800 to 279C.870 or the Davis-Bacon Act.

(b) Departments may use either or both of the following advertising methods in (i) or (ii) except as provided in (iii):

(i) Publish at least once in at least one newspaper of general circulation in the Lane County area;

(ii) Publish electronically on a Lane County website or other electronic posting site (e.g. ORPIN) as long as the requirements of (iv) below are met.

(iii) For public improvement contracts estimated to exceed \$125,000, departments shall use: either or both methods in (i) and (ii); and, publication in at least one trade newspaper of general statewide circulation.

(iv) In considering whether to advertise by the method in (i) or (ii) for a particular project, Departments shall weigh advertising cost savings with the method likely to encourage the greatest competition, and decide based on the greatest competition. Nothing in this rule is intended to prohibit the County from using any other method of public notice in addition to (i) or (ii).

(v) In order to conduct an electronic advertisement, a Department shall publish weekly, for no less than 4 consecutive weeks, in at least one newspaper of general circulation, a notice that the Department may publish future advertisements (listing the types) by electronic advertisement, including the world wide web location(s) (i.e., Uniform Resource Locator or URL), and providing a contact person for questions or concerns. It is within the Department's discretion to decide if and how any concerns will be accommodated, subject to use of a method likely to encourage the greatest competition.

(4) Delegations and Authority to Act.

(a) Calling and Opening of Bids. The County Administrator is generally delegated the authority to call and open bids for public contracts, and the following public officers are delegated the same authority for the purposes set forth:

(i) The Director of the Department of Public Works may call and open bids for public contracts for construction and maintenance relating to, and for lease or purchase of materials and equipment and for services related to roads and other transportation-related facilities, including supplies and equipment for Fleet Services, Parks, Land Management and Solid Waste divisions.

(ii) The Director of the Department of Management Services may call and open bids for public contracts for the purchase of goods, services, equipment, supplies, office furniture and other personal property, and for public contracts for

construction, renovation, remodeling and maintenance of County facilities and related capital expenditures.

(iii) Pursuant to ORS 565.230 the Fair Board may call and open bids for all contracts relating to fairground facilities and operations.

(iv) The County Administrator may call and open bids for the lease, purchase or sale of computers and related data processing equipment.

(b) The public officer delegated authority to call for and open bids shall be responsible for placing the advertisements for bids and for the remaining obligations of "public officer" and "County" under this rule.

(c) The public officer to whom authority is delegated under this LM 21.105(4) may further delegate this authority to a representative by signed document.

(5) Bids.

To be received and considered, all bids must be in writing and signed by the bidder or authorized representative and submitted in a sealed envelope. No oral, telegraphic, telephonic, or telephonic facsimile bids, modifications of bids, or signatures, will be considered, unless otherwise stated in the bid documents.

(a) An invitation to bid is used to initiate a sealed bidding solicitation. It shall contain the information required by ORS 279B.055(2) for non-public improvement contracts, and by ORS 279C.365 and ORS 279C.830 for public improvement contracts. The county may provide solicitation documents for a public improvement project by electronic means if notice is provided in the ad for the solicitation. The County department shall also develop a procedure for notifying potential bidders accessing electronic documents about addendums.

(b) By signing and returning a bid, the bidder acknowledges it has read and understands the terms and conditions applicable to the solicitation document and that it accepts and agrees to be bound by the terms and conditions of the contract, including to perform the scope of work and meet the performance standards.

(cb) The County may allow or require pre-qualification of bidders by setting forth the procedure and criteria in the invitation to bid. The public officer shall determine when a pre-qualification may be mandatory or permissive for a specific contract or class of contracts and the pre-qualification procedure, subject to requirements in this subsection (b) or applicable statutes. See ORS 279B.120, 279B.125, 279C.430.

(i) For public improvement contracts with mandatory pre-qualification, the Department shall include in the invitation to bid the time for submitting written pre-qualification applications, and the general description of the type and nature of the contracts to be awarded. For both mandatory and permissive pre-qualification, the Department shall also provide the standard form to be used.

(ii) In making a determination for non-public improvement contracts, the County will consider applicable standards of responsibility listed in ORS 279B.110(2) and discrimination pursuant to ORS 279A.110, and for public improvement contracts as set forth in ORS 279C.375(3) and ORS 279A.110. For all contracts, if a bidder fails to qualify for a mandatory pre-qualification, notice shall be provided of the reasons, length of proposed disqualification not to exceed three years, the right to a hearing before the LCRB by filing a timely notice of appeal within 3 days with the Department, waiver of the hearing if the deadline is missed, and reference to the sections of the County rules covering the appeal process. For non-public improvement contracts, the Department may revoke or revise and reissue a prequalification approval upon reasonable cause to believe there has been a substantial change in conditions or bidder is no longer qualified or less qualified by providing notice of the grounds and a right to a hearing.

(iii) The County, through the public officer, may also debar a prospective bidder based on standards in ORS 279B.130 and ORS 279C.440. The same procedure for disqualification above shall be followed.

(de) For non-public improvement contracts, the County may use a multi-step invitation to bid seeking technical unpriced bids after providing public notice, and later issue an invitation to bid limited to the bidders whom the public officer has determined to be eligible under criteria set forth in the initial solicitation. The multi-step procedure shall be described in the invitation to bid. Technical unpriced bids need not be opened publicly. The opportunity to protest the solicitation in accordance with (6) below shall be provided prior to the closing of phase one. Unsuccessful bidders may protest the intent to award a contract, which should include the opportunity for affected bidders to protest exclusion from the phase two. See OAR 137-047-0257.

(ed) The County may award multiple contracts when specified in the invitation to bid.

(fe) Correction, Withdrawal and Late Bids. A bidder may withdraw the bid at any time prior to the deadline set for receipt of bids and deposit a new, sealed bid in accordance with the initial invitation to bid. The County may release an unopened bid which has been withdrawn to the bidder or authorized representative after voiding any date and time stamp mark. The County will not consider bids received after the time and date indicated for bid opening in the invitation to bid. A bidder may not modify any bid after it has been deposited with the public officer, except for minor informalities. All decisions to permit correction or withdrawal of bids shall be supported by written reasons.

(gf) Clarification. If a bidder finds discrepancies or omissions in the drawings or bid documents, or is in doubt as to their meaning, the bidder shall immediately notify the public officer. If the public officer believes a clarification is necessary, an addendum will be issued to all bidders in writing preferably at least five calendar days prior to the deadline set for bid receipt but in no case less than 72 hours prior to the deadline for bid. If there are not five calendar days left before the deadline for bid receipt, the addendum may postpone the date for bid for a minimum of five calendar days. Any addenda so issued are to be covered in the bid proposal and will become part of the contract documents.

(hg) Bids Irrevocable. All bids shall be irrevocable for 30 days from the time of opening unless otherwise stated in the bid documents. Further, the bids of the three lowest un-rejected bidders shall be irrevocable and binding and the bid securities shall be retained by the public officer until there is an executed contract and the contractor has provided all required satisfactory performance bonds. All other bid securities shall be returned promptly upon award of the contract or rejection of all bids.

(6) Protest of Process and Solicitation Document.

For non-public improvement contracts, a prospective bidder may protest the competitive selection process or provision(s) in the solicitation document if they believe the process is contrary to law, or that a solicitation document is unnecessarily restrictive, is legally flawed or improperly specifies a brand name pursuant to requirements in ORS 279B.405(2)(a) and (4). Unless otherwise specified, the protest must be filed no later than 5 calendar days before bid opening. The County shall issue a written decision no less than three business days before bids are due, unless otherwise decided by the County. The County may exercise the response options set forth in OAR 137-047-0730(4) and (5). For public improvement contracts, a prospective bidder may protest specifications or contract terms and conditions pursuant to OAR 137-049-0260(3), (4) and (5). Unless otherwise specified in the invitation to bid, the protest shall be filed no later than 10 days before bid opening.

(7) Opening of Bids.

The public officer will not examine any bid prior to opening. The officer shall note on the envelope containing the bid the date and hour received. All bids submitted to the County will be opened publicly at the time, date and place designated in the invitation to bid and by the public officer. Any bid or modification received after the designated deadline shall be returned unopened to the bidder. To the extent practicable, the public officer shall read aloud the amount of the bid, the name of the bidder and such other information as the public officer considers appropriate, and record the same. The bid record for a public improvement contract shall be open to public inspection after the opening, with the exception of certain information covered by a public records exemption. The bid record for a non-public improvement contract shall be open to public inspection after the issuance of an intent to award, with the exception of certain information covered by a public records exemption. If the County receives a records request, including subpoena, covering information the bidder believes is covered by an applicable public records exemption, it shall be the bidder's responsibility to defend and indemnify the County for any costs associated with establishing such an exemption. The bidder's act in submitting a bid constitutes its acceptance of this responsibility..

(8) Evaluation of Bids.

(a) Evaluation of bids will be conducted by the public officer in cooperation with the department requesting the bid, if any, and shall be based on minimum requirements established by the bid documents, compliance with public bidding procedures, bidder responsibility, ethical practice, product acceptability, ORS 279B.055(6)(a), and LM Chapter 20. See also, OAR 137-049-0380.

(b) Goods and services that have been manufactured, produced or performed in this state shall be preferred, if price, fitness, availability and quality are otherwise equal. See ORS 279A.120.

(c) The public officer shall, for the purpose of evaluating bids, apply any preference in ORS 279A.120 (resident bidder), ORS 279A.125 (preference for recycled materials) or ORS 282.210.

(d) The public officer shall make all necessary investigation to determine whether the apparent lowest responsible bidder has met responsibility requirements. See ORS 279C.375(3); ORS 279B.110.

(e) Where the methods and factors which have cost implications over the life of the product have been identified in the bid documents pursuant to LM 20.115, a life cycle cost analysis shall be made of all bids to determine the lowest responsible bidder.

(f) Invitations to bid may solicit lump sum offers, unit price offers, or a combination of the two, as well as additive or deductive alternates. The County may use evaluation methods as described in OAR 137-049-0380(2) or any other method reasonably likely to result in similar comparisons.

(g) For public improvement contracts, if all responsive bids from responsible bidders exceed the County's cost estimate, the County may negotiate value engineering and other options (excluding those likely to affect the field of competition) with the lowest responsive, responsible bidder to attempt to bring the bid within the cost estimate. However, a negotiated contract under this provision shall not be awarded if there is significant change in the scope of the project from the original bid proposal. The County may discontinue the negotiation at any time. Nothing in this rule prohibits the County from conducting a new solicitation process. To the extent bidder's records used in the negotiation are public records, they are exempt from disclosure until after contract award or termination of the negotiation, and then subject to disclosure in accordance with ORS 192.410 through ORS 192.505. See OAR 137-049-0430.

(9) Mistakes in Bids.

Minor informalities may be waived. Mistakes discovered in bids after opening where the intended correct bid is clearly evident or properly substantiated may be corrected. Where the intended correct bid is not clearly evident or cannot be substantiated by accompanying documents, the bid may not be accepted. The County reserves the right to waive technical defects, discrepancies and minor irregularities, and to not award a contract when it finds such action to be in the public interest. See OAR 137-049-0350 and OAR 137-047-0470.

(10) Rejection.

The County reserves the right to cancel a solicitation, or reject any or all bids in whole or in part when the cancellation or rejection is in the County's best interests as determined by the County. This includes rejecting any bid not in compliance with all prescribed public bidding procedures and requirements, and for good cause, rejecting all bids upon a finding that it is in the public interest to do so. See OAR 137-049-0440(5), OAR 137-047-0640, OAR 137-047-0650. If all bids are rejected in whole or in part, new bids may be called for as in the first instance or initial bids may be considered with opportunity for supplemental submission. If there is partial rejection, the County may solicit supplemental information only from the bidders who submitted bids and may set an expedited deadline on the conditions that such deadline is within what could reasonably be expected as part of the original competitive process and that it is unlikely readvertising publicly would lead to greater competition. The public officer is delegated the authority to reject all bids, prepare findings of best interests and provide written notice of rejection of all bids including the reasons therefore to all bidders. The public officer is further delegated authority to reject any bid which does not conform to prescribed public contract procedures and requirements and to reject for good cause any bid upon a written finding it is in the best interest of the County and public to do so. However, if the rejection is of what initially appears to be the successful bid, the Board or the County Administrator, depending upon authority to execute the contract, shall exercise the right to reject the apparent successful bid. In addition, if partial rejection under this rule occurs as a result of the filing of a protest, any portion of the protest not resolved in favor of the protestor shall proceed to the Board or County Administrator. The Board and County Administrator may also exercise authority to act in accordance with this provision.

(11) Authority to Award Contract Subject to Bid.

(a) The County Administrator is delegated authority to award contracts where the authority to execute the contract has been specifically delegated under LM 21.145 below.

(b) Other than as delegated in LM 21.105(11)(a), the Board shall award contracts which have been bid in a public meeting. Generally, public testimony will not be received unless the Board specifically determines otherwise.

(c) Generally, any award shall be made to the lowest responsible bidder consistent with bid documents, may be made by item, groups of items, or as a whole. LM 21.135(2).

(12) Notice of Intent to Award.

The County shall provide written notice of its intent to award to a particular bidder or bidders at least fourteen (14) days before the award, unless the County department determines that a shorter notice period is more practicable.

(13) Protests of Intent to Award.

Unless otherwise specified in the bid documents, all written protests of the intent to award must be filed within seven (7) days of the date of the notice of intent to

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Bold indicates material being added

Strikethrough indicates material being deleted

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award. Protests of **intent** to award shall be considered by the Board if it would approve and award the contract. Protests of **intent of** award shall be handled by the County Administrator, or designee, for those contracts to be awarded by the County Administrator.

(a) The protest for a non-public improvement contract shall specify the applicable grounds for the protest as set forth in ORS 279B.410(1). The protest for a public improvement contract shall specify the applicable grounds for protest set forth in OAR 137-049-0450(4)(c) which is adopted.

(b) For contracts to be awarded by the Board, if the public officer determines there is sufficient merit to reject bids under LM 21.105(10), he or she may do so. If any portion of the protest remains, the Board shall be provided and may consider a complete copy of the written record, and any other evidence provided at a public meeting and shall issue its decision by Board Order. The Board may affirm, reverse, send back to the Department or revise the award.

(c) For County Administrator awarded contracts, the County Administrator has authority to reject bids pursuant to LM 21.105(10), and authority to affirm, reverse, send back to the Department or revise the award of the contract in order to correct any errors made in the original award, so that the contract is awarded to the bidder legally entitled to receive an award pursuant to public contract law and regulations and the criteria stated in the documents. The County Administrator shall deliver this decision to the Board. The decision shall be final seven days after it is delivered to the Board, unless within that time the Board elects to review the matter. If the Board elects review, a complete copy of the written record shall be delivered to the Board within a reasonable time period. The Board may consider this written record, and any other evidence provided at a public meeting and shall issue its decision by Board Order. The Board may affirm, reverse, send back to department, or revise the decision of the County Administrator, or his or her designee. Upon adoption of the order, the decision will be final.

(14) For public improvement contracts, the County shall submit a completed responsibility determination form covering the selected contractor, along with any attachments, to the Construction Contractors Board within 30 days after the contract award. *(Revised by Order No. 05-2-16-8, Effective 2.28.05; 05-12-14-9, 1.1.06; 08-2-13-1; 2.13.08)*

21.106 Bid, Payment and Performance Securities.

(1) Bid Security.

(a) Unless otherwise provided below, all bids shall require as bid security a surety bond, irrevocable letter of credit issued by an insured institution as defined in ORS 706.008, cashier's check or certified check, of the bidder in an amount not to exceed 10 percent of the bid. The dollar amount or percentage required as security shall be stated in the bid documents.

(b) The public officer is delegated the authority to waive the bid security requirement described above prior to bid opening for any goods or services contract, any construction contract as defined in ORS 279C.320(1), and any public improvement contract not exceeding \$100,000 except a contract for highway, bridge, or other transportation projects which cannot exceed \$50,000. The public officer must reasonably believe:

(i) That waiving the bid security requirement will probably result in lower bids or an increased number of bids, and

(ii) That waiving the bid security requirement will not endanger completion of the project if rebidding is necessary because the successful bidder is unable or unwilling to sign the contract or provide any required performance bond, and

(iii) That the potential for cost to the County of rebidding the project is outweighed by the benefits.

(2) Payment and Performance Security.

(a) All bid solicitation documents for public improvement and other construction contracts shall require a payment and performance bond be filed with the County in accordance with ORS 279C.380, unless exempt under LM 20.275. All bids for goods or services contracts may require a payment and performance bond, if the public officer determines it is in the County's best interest to do so.

(b) Payment and performance bonds are not required for public improvement and other construction contracts if the amount of the contract does not exceed \$100,000, except contracts for highway, bridge, or other transportation projects which do not exceed \$50,000 pursuant to LM 20.275.

(c) In cases of emergency or as described in ORS 279C.380(4), the requirement for a performance and payment bond may be excused if the declaration of such emergency is made in accordance with LM 21.128.

(3) Public Works Bond.

(a) The County's solicitation document shall require that each contractor and subcontractor have a public works bond on file with the Construction Contractors Board before starting work on the project unless exempt under ORS 279C.836(4) (not required to pay prevailing rates of wage), or ORS 279C.836(7) (disadvantaged minority, women, or emerging small business), or ORS 279C.836(8) (project price does not exceed \$100,000), or ORS 279C.836(9) (County excuses due to emergency). Except as to emergencies, the Contractor shall notify the County before starting work if it is relying on an exemption to the public works bond requirement. The Contractor shall require each subcontractor to provide a similar notification to the Contractor and County. If requested by County, the contractor shall submit written documentation from the Construction Contractors Board or its website, evidencing the receipt of this bond and receipt of such bonds for any subcontractors. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 04-6-30-12, 6.30.04; 05-2-16-8, 2.28.0; 05-12-14-9, 1.1.065; 08-2-13-1; 2.13.08)*

21.107 Requests for Proposals.

(1) Description. Requests for proposals (hereinafter RFP) are a means of soliciting competitive proposals or offers for entering into a contract for personal services, goods, goods and services, equipment, non-public improvement construction related services (ORS 279C.320), or public improvement contracts for which an RFP process is appropriately authorized (ORS 279C.335(2)). Generally, an RFP is appropriate when price and specification will not necessarily be the predominant basis for award. An RFP process is one, but not the only means of competition for personal services contracts.

(2) When Required and Requirements. Proposals submitted in response to an RFP are offers as are bids. See OAR 137-047-0310, 137-049-0280. Unless otherwise specified in ORS 279A, B, or C or these rules, references to "bids" and "bidder" and "invitation to bid" shall, to the extent practicable within the proposal process be deemed equally applicable to "proposals," "proposers," and "requests for proposals." The RFP process must generally comply with the requirements stated in LM 21.105 above, unless otherwise stated, and shall comply with any requirements in ORS 279B.060 and ORS 279C.400. In addition, all RFP documents shall state:

- (a) The composition and role of the evaluation committee;
- (b) The evaluation criteria to be used in awarding the contract and the weight assigned to each criterion;

(c) Provide for an opportunity to protest the solicitation in accordance with LM 21.107 (6);

(d) The contract terms;

(e) Describe the right to protest as stated in LM 21.107(14);

(f) Invite the submission of sealed, written offers to be publicly opened at a designated time and place;

(g) Describe the method of contract selection, including award without negotiation, negotiation with highest ranked proposer, competitive negotiations, multiple-tiered competition or any combination of these methods or any other method authorized by these rules.

(h) An RFP process, if appropriately authorized for a public improvement contract, is not required to include first-tier subcontractor disclosure and reciprocal preference for non-resident bidders.

(i) Departments are encouraged to include diversity in the evaluation criteria in RFPs for contracts in which direct services are to be provided to the public. See Lane County Diversity Action Plan.

(3) The County may issue a request for information, a request for interest, a request for qualifications or other preliminary documents, or consult as set forth in ORS 279B.210 (for non-public improvement contracts) and ORS 279C.405(1) (for public works contracts), in order to obtain information in preparation of a request for proposals.

(4) Advertisements and Proposals. LM 21.105(3) and (5). References to "bid" or "bidder" there include "proposal" or "proposer." **By signing and returning a proposal, in addition to the acknowledgment in LM 21.105(5)(b), the proposer agrees to be bound by the terms and conditions of the contract, including the final negotiated scope of work and performance standards.**

(5) Delegations and Authority to Act. Each Department Director is delegated the authority to call for open, direct evaluation of requests for proposals, and perform all other obligations of the "public officer" under LM 21.107. The Department Directors may further delegate this authority to a representative by a signed written document. The evaluation committee's recommendation for award of the contract shall be considered and finally decided by either the Board or the County Administrator, depending upon authority to execute the contract per LM 21.145.

(6) Protest of Process and Solicitation Document. LM 21.105(6). References to "bid" or "bidder" there include "proposal" or "proposer."

(7) Opening. LM 21.105(7) above. References to "bid" or "bidder" there include "proposal" or "proposer." However, proposals need not be read aloud, and the County is only required to list and record the names of the proposers at the opening. It may record any additional information deemed necessary in its discretion.

(8) Evaluation of Proposals. The evaluation committee shall evaluate the proposals according to the criteria stated in the RFP, compliance with public contracting procedures, proposer responsibility, ethical practice, product acceptability, and ORS Chapter 279A, B, and C. The award shall be to the responsible proposer whose proposal is determined in writing to be the most advantageous to the County, not restricted to price, based on evaluation factors set forth in the RFP and any authorized negotiations. . The department responsible for issuing the RFP shall mail notice of the evaluation committee recommendation to the proposers within two days of the committee's decision unless otherwise stated in the RFP. Negotiations with proposers regarding contract terms may occur only after the award or only as provided in the RFP. See OAR 137-047-0262, OAR 137-049-0650.

(9) Methods of Selection. For non-public improvement contracts, the County may use any one or combination of methods of contractor selection set forth in ORS 279B.060. See OAR 137-047-0262 and 137-047-0261, except (2) and (6) are adopted. Prior to initial closing, the County shall provide an opportunity to protest as in LM 21.105(6); and after the notice of intent to award, an opportunity to protest the award as in LM 21.105(13) with the ability to protest exclusion from any phase of a multi-step or multi-tiered process based on criteria in OAR 137-047-0720(2) which is adopted, if such opportunity was not previously provided. In addition, the County may use portions of these methods of contractor selection to develop a multi-tiered competitive process designed to identify, at one or more stages, a class of proposers that fall within a competitive range based on criteria established for that stage, or to otherwise eliminate from consideration a class of lower ranked proposers. In doing so, the County shall provide notice of the method of selection in the RFP, evaluate all responsive proposals, and provide at least an opportunity to protest the solicitation process or document, and the award as set forth in this subsection.

(10) Bid, Payment and Performance Security. Unless otherwise provided in the RFP bid, payment and performance security requirements may be waived if the contract will not be a public improvement or other construction contract or if it will be for a public improvement contract not exceeding \$100,000 except for a highway, bridge or other transportation project which does not exceed \$50,000. Bid, payment and performance securities shall be provided if the contract will be for a public improvement exceeding these dollar amounts.

(11) Mistakes in Bids. See LM 21.105(9). References to "bid" includes "proposal."

(12) Rejection. See LM 21.105(10). References to "bid" includes "proposal." References to "bidders" includes "proposers." References to "bid documents" include "request for proposal documents." References to "opening bids" include "opening proposals."

(13) Notice of Intent to Award. LM 21.105(12). References to "bid" and "bidder" shall include "proposal" and "proposer." A notice of the recommendation of the evaluation committee is considered a notice of intent to award the contract, unless stated otherwise.

(14) Protest of Intent to Award/Evaluation Committee Recommendation. Anyone responding to an RFP who is not recommended for award by the evaluation committee may protest the recommendation to the decision maker, either the Board or the County Administrator, depending upon which has authority to execute the contract pursuant to LM 21.105(13). References to "bid documents" include "request for proposal documents" and references to "bid" include "proposal," except for the grounds in LM 21.105(13)(a). The applicable grounds for this protest are set forth below.

(a) A protest must be made in writing, be received before the contract is awarded by the decision maker, clearly state the ground(s) for the protest, and indicate what condition(s) resulted in the proposal not being recommended for award. Any protest which does not comply with the applicable procedures may be rejected.

(b) Unless otherwise stated in the RFP, the protest must be received by the department which issued the RFP not later than seven (7) calendar days after notice of the evaluation committee's decision was mailed. Upon receipt of the protest, the department shall notify the proposer recommended for award of the protest and the evaluation committee's recommendation. The proposer and the committee shall have three calendar days from the date the protest was filed to respond to the protest in writing if they so desire.

(c) When a protest is filed, the department responsible for preparing the RFP shall prepare a written analysis of the protest and make a recommendation to the decision maker as to appropriate action to be taken.

(d) The grounds for protest include any one or more of the following:

(i) The evaluation committee has failed to conduct the evaluation of proposals in accordance with the criteria or processes described in the solicitation materials.

(ii) Different criteria were used to evaluate different proposals.

(iii) The evaluation committee unfairly applied the evaluation criteria to a proposal.

(iv) A member or members of the evaluation committee had a relationship with a proposer that represented a conflict of interest.

(v) The criteria used to evaluate the proposals did not pertain to the services or products requested.

(vi) A member or members of the evaluation committee demonstrated bias toward a proposal or a proposer.

(vii) The County abused its discretion in rejecting the protestor's proposal as nonresponsive.

(viii) The evaluation of the proposals is otherwise in violation of any provisions of ORS 279A or ORS 279B.

(ix) All higher ranked proposals are nonresponsive.

(e) If the decision maker is the Board, the department which issued the RFP shall present the issues orally or in writing at a public meeting. The appellant shall then have 10 minutes to specifically address the protest criteria, and the evaluation committee's recommendation and the recommended proposer(s) shall have a total of 10 minutes to respond, divided between them as they wish. If the decision maker is the County Administrator, the decision shall be made on the written record.

(f) If a protest is timely filed, the Board or County Administrator, as appropriate, shall consider the evaluation committee's recommendation and the allegations of the protest before rendering a final decision. The decision maker may grant or deny the protest, reject proposals, or cancel the solicitation pursuant to LM 21.107(12) or remand to the department or evaluation committee for further information or consideration. In the event of remand, the department will report back to the decision maker as soon as reasonably possible if the protest remains pending. The County Administrator's response to the protest will be in writing. If the Board is the decision maker, it shall evaluate any protest before rendering a decision and shall state reasons and conclusions reached either in writing or on the record in a public meeting, with a Board Order referencing reasons for its decision on the protest. Any decision to overturn the recommendation shall be based on a finding that one of the criteria of LM 21.107(14)(d) above occurred to the substantial prejudice of the protestor. The protestor must be eligible and next in line to be awarded the contract if the protest was successful.

(g) The procedures above are mandatory to the extent they establish the time and manner for protests to be submitted to the County, including that the protest be in writing specifying the grounds and timely filed, and that there be a written response. The County will not consider late protests. The other protest procedures above are directory and failure to follow or complete the action in the manner provided shall not invalidate the County's decision, and the goal is to provide a reasonable time and manner process for the County to consider a protest.

(15) Authority to Award Contract Subject to RFP.

(a) The County Administrator is delegated authority to award a contract resulting from an RFP process where authority to execute such contract has been specifically delegated under LM 21.145.

(b) All decisions to award a contract following a request for proposals shall be based on the criteria stated therein, substantial compliance with public contract laws, rules and procedures, and the best interests of the County. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 04-6-30-12, 6.30.04; 05-2-16-8, 2.28.05; 08-2-13-1; 2.13.08)*

21.108 Letters of Interest.

(1) Description. Letters of Interest (LOIs) are expressions of interest in a particular contract by potential contractors. Typically, potential contractors submit a letter in response to the County's solicitation which states they are interested in providing a good or service. This selection process should be used cautiously in order to avoid any chill to competition.

(2) When Applicable.

(a) LOIs may be used as a means of determining whether a potential contractor is a sole source under LM 20.096 and LM 21.111 **and to support findings as set forth in LM 21.111.** This ~~includes~~ ~~contemplates a situation~~ where the fundamental nature of the ~~purchase good or service~~ is so limiting that it ~~is seems~~ likely that only one seller/provider exists ~~or there is likely only one qualified seller/provider available to contract with the County for the purchase.~~ ~~Because it is the County's policy to encourage competition whenever possible, it is not permissible to describe a fundamentally broad need in a narrow or limiting way in order to use this process.~~ The expectation of the funding source is one important factor in determining the fundamental nature of a good or service. There may be additional facts to support the sole source findings.

(b) An LOI process may be used as a preliminary phase of an RFP process. If the County receives more than one LOI such responses may be included on a list of potential contractors who will be mailed a bid, RFP or RFPs solicitation document.

(3) Requirements. LOIs may be sought in the following manner:

(a) An advertisement must be run in a newspaper of general countywide circulation and/or electronically as authorized by LM 21.105(3) at least once and not less than five days before the LOIs are due. Additional advertisements may also be published in other newspapers.

(b) The advertisement must contain a description of the nature of the work to be performed or good to be provided, the term of the contract, the person to whom LOIs are to be submitted and the date the LOIs are due. There must be a sufficient description of the service or good that potential competitors will be able to evaluate whether they are qualified, able and wish to perform. **The ad shall include an opportunity to submit comments or objections to the prospective purchase using this process or to support findings in LM 21.111**

(c) If there is only one LOI submitted, the department shall obtain sufficient proof, as it deems necessary, of basic ability to perform, including but not limited to, an adequate level of professional, fiscal and management capability. **These factors may be included in the findings as set forth in LM 21.111.**
~~prior to awarding the contract.~~

(d) If the County receives more than one LOI response, all parties responding shall receive an opportunity to compete for the contract pursuant to a bid invitation, RFP, or Request for Personal Services (RFPS) pursuant to LM 21.118(6). If

this occurs, the competition must be open to all potential competitors, and not just those submitting LOIs. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 05-2-16-8, 2.28.05)*

21.109 Small Procurements.

The County may award a non-public improvement contract for goods or services, when the amount does not exceed \$5,000 or 3 years in length. See ORS 279B.065, ORS 279C.335. The County may award a public improvement contract when the amount is less than \$5,000 and does not exceed 3 years in length.

(1) The contract award may be direct without competitive selection subject to (2) below. Use of competitive quotes are encouraged, particularly for new purchases or projects.

(2) A small procurement contract should not be considered separately when it is a component of a larger purchase or project in one year, and when considered as a whole would require a competitive selection. Any contract terms should be consistent with the County's legal requirements and limitations, or as may be further described in procedures adopted by the County Administrator.

(3) The Department Directors and County Administrator are delegated the authority to award small procurement contracts, and such authority may be further delegated. *(Revised by Order No. 05-2-16-8, Effective 2.28.05; 05-12-14-9, 1.1.06)*

21.110 Intermediate Procurements.

The County may award an intermediate procurement contract for goods or services, either related to a public improvement or non-public improvement, when the amount does not exceed \$100,000. The County may use any LM Chapter 21 procedures for obtaining information in preparation for soliciting quotes or prequalifying a product. The three quotes as required by LM 20.105(1)(c) may be either oral or written for non-public improvement contracts exceeding \$5,000 but not \$50,000, and for public improvement contracts equal to or greater than \$5,000 but not exceeding \$50,000. The County shall keep a written record of the source and amount of quotes received. For intermediate contracts exceeding \$50,000 but not \$100,000, the County department shall prepare a written solicitation, the quotes must be written, and unsuccessful quoters shall have the right to protest the award decision in accordance with LM 21.105(13)(a) and (b). The written solicitation shall provide notice of the right to protest the award. If three quotes are not available, a lesser number will suffice provided that a written record is made of the effort to obtain the quotes. An intermediate procurement acquisition should not be made when it is a component of a larger purchase or project in any single year, and when considered as a whole would require a different competitive selection than as provided by this or another rule.

The award of any contract as an intermediate procurement under this rule shall be to the offeror whose quote or proposal will best serve the interests of the County, taking into account price as well as considerations including, but not limited to experience, expertise, product functionality, suitability for a particular purpose and contractor responsibility. *(Revised by Order No. 05-2-16-8, Effective 2.28.05; 05-12-14-9, 1.1.06; 08-2-13-1; 2.13.08)*

21.111 Sole Source.

For non-public improvement contracts, if there is only one source for goods or services, or a class of goods or services of the quality required by the County, a contract may be awarded to that source without competition.

(1) The County must make written findings which may include at least one of the following:

- (a) That the efficient utilization of existing goods requires acquisition of compatible goods or services;
- (b) That the goods or services are required for the exchange of software or data with other public or private agencies and are available from only one source;
- (c) That the goods or services are for use in a pilot or an experimental project; or
- (d) Other findings that support that the goods or services are available from only one source.

(2) **There may be only one qualified seller/provider available to contract, such as in specific circumstances under (1)(c) or (d) of this rule.** Prior to awarding a contract, ~~if there are known potential contractors, under (1) above,~~ the County shall make a reasonable effort to notify ~~them all known potential contractors~~ of the intended purchase or project. **For contracts exceeding \$100,000 "reasonable effort" includes at least one of the following actions in the County's discretion: The County may solicit information about the existence of any competition through informal telephone, written contacts or formal request for information, or request for qualifications or — Where one or more known potential contractors are located within Lane County, the County should use a Letter of Interest (LOI) selection process as set forth in LM 21.108.**

(3) If the County intends to make several purchases of the product or service from a particular seller or provider for a period not to exceed 3 years, it may so state in the documentation required in (1) above and such documentation shall be sufficient notice as to subsequent purchases.

(4) Department directors, or their designee, are delegated authority to make the written findings in (1) and (3) above for contracts equal to or less than \$50,000.

(5) For sole source contracts exceeding \$50,000, Departments shall provide the County Administrator with proposed written findings in (1) and (3) above; **and the County Administrator has authority to approve written findings in (1) and (3) of this rule.** The proposed findings and the County Administrator's determination shall be documented and maintained by the respective department.

(6) **Except as provided in (7) of this rule, if the amount of the purchase exceeds \$100,000, public notice of the the County shall provide public notice within 7 days and in accordance with LM 21.105(3) of the County Administrator's determination that goods or services are available from only one source shall be published in accordance with LM 21.105(3) or through other public notice reasonably likely to reach at least as many potential sellers/providers.** —Unless otherwise specified in the public notice of the sole source procurement, a person or entity whose interests are adversely affected must deliver a written protest within 57 days of the public notice to the County Administrator and to be decided by the Board. The written protest shall include a detailed statement of the legal and factual grounds for the protest based on (1) above, a description of the resulting harm and the relief requested. ~~The protest shall be set on the Board's agenda.~~ **Unless otherwise specified in the public notice of the sole source procurement, the Board** —It may consider the written record, and any other testimony provided at the public meeting and shall issue its decision by Board Order.

(7) **To the extent purchases meeting the circumstances in (1) are covered by an approved special procurement, the terms of the special procurement instead apply. Discretionary use of the LOI process in accordance with LM 21.108 satisfies the public notice and protest requirements for purchases covered by (1)(a) and (b)**

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of this rule in addition to other circumstances where the fundamental nature of the purchase is so limiting that it is likely only one seller/providers exists.

(87) To the extent practicable, the County shall negotiate with the sole source to obtain contract terms advantageous to the County. *(Revised by Order No. 05-2-16-8, Effective 2.28.05)*

21.112 Brand Name.

This rule applies to non-public improvement contracts, and LM 20.210 and LM 20.215 applies to public improvement contracts. Specifications shall not expressly or implicitly require any product of a particular manufacturer or seller except pursuant to this rule or the class-specific authorizations in LM Chapter 20. The County may identify products by brand names so long as it includes language similar to "or equal," "or equivalent," or "equal or superior to." The County shall determine, in its sole discretion, whether an offeror's alternative product is "equal" or "equivalent," or "superior." The Department directors shall be delegated authority to determine that only an identified brand name will meet the County's need and shall document such decision in writing, subject to any review and reversal by the County Administrator, in his or her discretion. Any written decision must be based on one or more of the criteria in ORS 279B.215(2). *(Revised by Order No. 05-2-16-8, Effective 2.28.05)*

21.112A Cooperative Procurements.

The County may participate in, sponsor, conduct, or administer cooperative procurements as set forth in ORS 279A.200 through ORS 279A.225. *(Revised by Order No. 05-2-16-8, Effective 2.28.05; 08-2-13-1; 2.13.08)*

21.112B Exhaustion of Remedies .

An adversely affected bidder, proposer, quoter, or person affected by a sole-source procurement requiring public notice and opportunity to protest, must exhaust all avenues of administrative review and relief applicable to the purchase as set forth in these rules before seeking judicial review of the County's selection or contract award decision. Such review and relief includes, but is not limited to, opportunities to protest or to submit comments or objections to the County through a Letter of Interest process.

TYPES OF CONTRACTS

21.113 Goods, Materials and/or Services Contracts.

(1) A goods or materials contract (excluding personal services) is one that calls primarily for an end product and in which the County purchases, obtains some interest in, or leases personal property. A service contract is one that calls primarily for a contractor's time and effort, and does not include work connected with manufacturing a product or personal services. A service contract includes one for a trade-related activity to accomplish routine functions of a type that can generally be done by any competent worker, even though a specific license is required. A contract may be a combination of goods, materials and services.

(2) Goods and/or service contracts may only be executed after appropriate competitive selection has been completed.

(3) Title to all personal property shall be described on all formal title documents and bills of sale as: Lane County, Lane County Public Service Building, Eugene, Oregon 97401.

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(4) For contracts involving the rental, lease or lease purchase of equipment, the Risk Manager should be consulted regarding insurance requirements.

(5) Departments are encouraged to include a provision concerning equal access and treatment for diverse cultures for contracts in which direct services are to be provided to the public. See Lane County Diversity Action Plan. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 05-2-16-8, 2.28.05; 05-12-14-9, 1.1.06; 08-2-13-1; 2.13.08)*

21.114 Maintenance and Repair Contracts.

Contracts for the maintenance or repair of equipment or public improvements are subject to the public contract laws and regulations.

(1) Contracts for maintenance or repair of equipment must comply with the requirements of LM 20.175. *(Revised by Order No. 98-12-2-4, Effective 12.2.98)*

21.115 Public Improvement and Construction Contracts.

(1) **When the County procures personal services for the purpose of administering, managing, monitoring, inspecting, evaluating compliance with or otherwise overseeing a public contract that is subject to ORS 279C, the County will not:**

(a) **Procure the personal services from a contractor or an affiliate of a contractor who is a party to the public contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the personal services; or**

(b) **Procure the personal services through the public contract that is subject to administration, management, monitoring, inspection, evaluation or oversight by means of the personal services.**

(2) **Section (1) of this rule does not apply to a procurement that qualifies as a construction manager/general contractor procurement or a design-build procurement. "Affiliate" means a person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the contractor.**

~~(3)~~ Public improvements shall usually be performed by contract. When the project is estimated to cost more than \$125,000, the provisions of ORS 279C.305 and LM 21.105(3) shall be followed. Unless otherwise approved by the Board, public improvement projects shall be performed according to the capital improvements list adopted by the Board pursuant to ORS 279C.305.

(42) Public improvement and construction contracts must comply with a number of requirements. Care should be taken to see that any applicable requirements including, but not limited to, from those among the following list are met:

(a) Advertisement (including Asbestos Abatement) - ORS 279C.360 and LM 21.105(3) above. See, OAR 137-049-0210.

(b) Bid security - ORS 279C.365(4), LM 20.275, LM 21.106 above.

(c) Performance security - ORS 279C.380, LM 20.275, LM 21.106 above.

(d) Public Works Bond - LM 21.106.

(e) Responsibility Determination Form - ORS 279C.375, LM 21.105(14).

(f) Prevailing rates of wage - ORS 279C.800 to 279C.855.

(g) Retainage - For project completion, ORS 279C.555 to ORS 279C.565, LM 21.116 below. For untimely filed certified statements of payment of prevailing wages, ORS 279C.845.

(h) Prompt payment policies - ORS 279C.505, ORS 279C.515.

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(i) Subcontractor clauses - see ORS 279C.515, ORS 279C.830, ORS 279C.580.

(j) Insurance - see LM 21.305 below.

(k) Exempt contracts over \$100,000 evaluation report required - see ORS 279C.355.

(l) Contractor shall certify that an employee drug testing program is in place at the time of contract execution, and that such a program will be maintained throughout the contract period including any extensions. Failure of contractor to certify, to have, or to maintain such a drug testing program is grounds for rejection of a bid or immediate termination of the contract. Contractor shall also certify that it will require any subcontractors to demonstrate to Contractor that it will have such a drug testing program. ORS 279C.505(2).

(m) First-tier subcontractor disclosure for contracts greater than \$100,000. ORS 279C.370.

(53) The County Administrator is delegated the authority to make final acceptance of a public improvement and may further delegate this authority to a representative by a signed written document. If it is determined that the project should not be finally accepted, the matter shall be brought to the attention of the Board. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 04-6-30-12, 6.30.04; 05-2-16-8, 2.28.05)*

21.116 Retainage.

(1) Retainage of five percent of the contract price of the work completed shall be withheld on all public improvements contracts until the project is at least 50 percent complete, after which the retainage may be reduced, upon the County Administrator's approval, in accordance with ORS 279C.570(7).

(2) Deposit of Securities in lieu of retainage.

(a) Notwithstanding LM 21.116(1) above, Lane County shall reduce the retainage in an amount equal to the market value of bond, ~~or securities or other instruments~~ deposited by the contractor in accordance with the procedures set out below. **The types of bonds, securities or instruments which may be accepted include those in OAR 137-049-0820(4).** Bonds or securities, ~~or other instruments~~ offered for deposit in lieu of retainage shall be as authorized in OAR 137-049-0820(23), which is hereby adopted.

(b) All bonds, ~~or securities, or instruments~~ in lieu of retainage shall be deposited with a bank or trust company in Lane County, Oregon, in an account for the benefit of Lane County established for this purpose. Upon deposit, the bank or trust company shall prepare an Assignment and Safekeeping Receipt in the form set out in Exhibit "A." The contractor shall deliver in person one copy of this receipt to the Department of Management Services.

(i) Bonds or securities deposited shall be in fully transferable form. Any nonnegotiable bonds or securities shall have all necessary instruments attached to enable the County to effect transfer of title should the contractor be unable to fulfill the contract obligations.

(ii) Bonds or securities deposited in lieu of retainage shall be released only upon the written instructions and authorization of the County. Upon default, the County may elect to authorize the bank or trust company to transfer any securities deposited under these provisions, rather than undertake to transfer such securities itself.

(c) If at any time the market value of the bonds or securities deposited in lieu of retainage drops below five percent of the contract price of the work completed, the

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County may withhold from payments due the contractor an amount sufficient to maintain its appropriate retainage protection. Withheld amounts shall only be released to the extent of the market value of additional bonds or securities deposited by the contractor in accordance with this section.

(3) Retainage Deposited in Interest Bearing Account. In accordance with ORS 279C.560(4), ~~cash~~ retainage may be deposited upon the request of the contractor in an interest bearing account with earnings to accrue to the contractor.

(4) Surety Bond in Lieu of Retainage. In accordance with ORS 279C.560(6), upon approval of the County Administrator, the contractor may deposit a surety bond for all or a portion of the retainage. The bond shall be in a form acceptable to the County Administrator. The retainage shall be accordingly reduced, and the contractor shall accept like bonds from subcontractors and suppliers.

(5) All retainage on public contracts for public improvements, less costs as allowed by statute, shall be released within 30 days after the work under the contract has been completed and the County Administrator or the Board has authorized final acceptance thereof. If not so released, interest shall be paid in accordance with ORS 279C.570(8). *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 04-6-30-12, 6.30.04; 05-2-16-8, 2.28.05)*

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21.129 Purchase Orders.

Purchase orders may be used to obtain goods, materials, services, personal or professional services, to implement a purchase pursuant to a requirements contract, to implement a purchase utilizing a contract competitively bid by other political subdivisions when the specifications indicated that more than one political subdivision could utilize the bid award, and to purchase price-regulated items when the rate or price has been set by Federal, State or local regulatory authority.

(1) Quotations for purchase orders shall be solicited from appropriate minority, women and emerging small business enterprises, who are certified by the State pursuant to ORS Chapter 200. The County Administrator shall implement this requirement through administrative procedure.

(2) Purchases of more than \$100,000 can be made by purchase order only in implementation of an appropriately awarded written contract or to purchase price-regulated items or the printing of ballots. Appropriate selection procedures in LM Chapters 20 and 21 should be followed. Purchase orders shall not be utilized to circumvent the public contract law or regulations.

(3) A purchase order for goods, materials or services relating to public improvement and construction projects shall comply with and include all applicable contract provisions.

(4) The Director of Management Services or his or her delegate shall have the discretion to require a written contract in lieu of a purchase order, whenever he or she believes a contract to be in the best interests of the County.

(5) The Director of the Department of Management Services is delegated authority to execute all purchase orders. He or she may further delegate such authority in writing. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 05-2-16-8, 2.28.05)*

STANDARD PROVISIONS

21.130 Standard Contract Provisions.

The following standard public contract clauses shall be included expressly or by reference where appropriate in every contract of the County.

(1) Contractor shall make payment promptly, as due, to all persons supplying to such contractor labor or material for the prosecution of the work provided for in the contract, and shall be responsible for payment to such persons supplying labor or material to any subcontractor.

(2) Contractor shall pay promptly all contributions or amounts due to the State Industrial Accident Fund and the State Unemployment Compensation Fund from contractor or any subcontractor in connection with the performance of the contract.

(3) Contractor shall not permit any lien or claim to be filed or prosecuted against the County on account of any labor or material furnished, shall assume responsibility for satisfaction of any lien so filed or prosecuted and shall defend against, indemnify and hold County harmless from any such lien or claim.

(4) Contractor and any subcontractor shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167.

(5) For public improvement and construction contracts only, if contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to the contractor or a subcontractor by any person in connection with the public contract as such claim becomes due, the County may pay such claim to the person furnishing the

labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of the contract. The payment of a claim in the manner authorized hereby shall not relieve the contractor or its surety from the obligation with respect to any unpaid claim. If the County is unable to determine the validity of any claim for labor or services furnished, the County may withhold from any current payment due contractor an amount equal to said claim until its validity is determined, and the claim, if valid, is paid by the contractor or the County. There shall be no final acceptance of the work under the contract until all such claims have been resolved.

(6) Contractor shall make payment promptly, as due, to any person, co-partnership, association or corporation furnishing medical, surgical, hospital or other needed care and attention, incident to sickness or injury, to the employees of contractor, of all sums which the contractor agreed to pay or collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing payment for such service.

(7) With certain exceptions listed below, contractor shall not require or permit any person to work more than 10 hours in any one day, or 40 hours in any one week except in case of necessity, emergency, or where public policy absolutely requires it, and in such cases the person shall be paid at least time and a half for:

(a) All overtime in excess of eight hours a day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday, or

(b) All overtime in excess of 10 hours a day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday, and

(c) All work performed on the days specified in ORS 279B.020(1) for non-public improvement contracts or ORS 279C.540(1) for public improvement contracts.

For personal/professional service contracts as designated under ORS 279A.055, instead of (a) and (b) above, a laborer shall be paid at least time and a half for all overtime worked in excess of 40 hours in any one week, except for individuals under these contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. Sections 201 to 209, from receiving overtime.

Contractor shall follow all other exceptions, pursuant to ORS 279B.235 (for non-public improvement contracts) and ORS 279C.540 (for public improvement contracts), including contracts involving a collective bargaining agreement, contracts for services, and contracts for fire prevention or suppression. For contracts other than construction or public improvements, this subsection (7) does not apply to contracts for purchase of goods or personal property.

Contractor must give notice to employees who work on a public contract in writing, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

(8) The hourly rate of wage to be paid by any contractor or subcontractor to employed workers or other persons doing or contracting to do all or part of the work contemplated by the public works contract shall be not less than the applicable prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is performed, in accordance with ORS 279C.838 and ORS 279C.840. For projects also covered by the federal Davis-Bacon Act (40 USC §3141 et seq.), contractors and subcontractors shall pay workers or others performing work contemplated by the contract the higher of the state or federal prevailing rate of wage, as determined by the Commissioner of the Bureau of Labor and Industries in accordance with ORS 279C.830.

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(9) The contractor, its subcontractors, if any, and all employers working under the contract are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, or otherwise be exempt under ORS 656.126.

(10) As to public improvement and construction contracts, Contractor shall comply with all applicable federal, state, and local laws and regulations, including but not limited to those dealing with the prevention of environmental pollution and the preservation of natural resources that affect the performance of the contract. A list of entities who have enacted such laws or regulations is found in the Oregon Standard Specifications for Construction, Section 00170.01 currently in effect and published through Oregon Department of Transportation. ~~Attorney General's Model Public Contract Rules Manual, OAR 137-030-0010, Commentary 4.~~ If new or amended statutes, ordinances, or regulations are adopted, or the contractor encounters a condition not referred to in the bid document not caused by the contractor and not discoverable by reasonable site inspection which requires compliance with federal, state, or local laws or regulations dealing with the prevention of environmental pollution or the preservation of natural resources, **the contractor shall immediately give notice to the County.** ~~T, both~~ the County and the contractor shall have all the rights and obligations specified in ORS 279C.525 to handle the situation.

(11) The contract may be canceled at the election of County for any substantial breach, willful failure or refusal on the part of contractor to faithfully perform the contract according to its terms. The County may terminate the contract by written order or upon request of the contractor, if the work cannot be completed for reasons beyond the control of either the contractor or the County, or for any reason considered to be in the public interest other than a labor dispute, or by reason of any third party judicial proceeding relating to the work other than one filed in regards to a labor dispute, and when circumstances or conditions are such that it is impracticable within a reasonable time to proceed with a substantial portion of the work. In either case, for public improvement contracts, if the work is suspended but the contract not terminated, the contractor is entitled to a reasonable time extension, costs and overhead per ORS 279C.655. Unless otherwise stated in the contract, if the contract is terminated, the contractor shall be paid per ORS 279C.660 for a public improvement contract.

(12) If the County does not appropriate funds for the next succeeding fiscal year to continue payments otherwise required by the contract, the contract will terminate at the end of the last fiscal year for which payments have been appropriated. The County will notify the contractor of such non-appropriation not later than 30 days before the beginning of the year within which funds are not appropriated. Upon termination pursuant to this clause, the County shall have no further obligation to the contractor for payments beyond the termination date. This provision does not permit the County to terminate the contract in order to provide similar services or goods from a different contractor.

(13) By execution of this contract, contractor certifies, under penalty of perjury that:

(a) To the best of contractor's knowledge, contractor is not in violation of any tax laws described in ORS 305.380(4), and

(b) Contractor has not discriminated against minority, women or small business enterprises in obtaining any required subcontracts.

(14) Contractor agrees to prefer goods or services that have been manufactured or produced in this State if price, fitness, availability or quality are otherwise equal.

(15) Contractor agrees to not assign this contract or any payments due hereunder without the proposed assignee being first approved and accepted in writing by County.

(16) Contractor agrees to make all provisions of the contract with the County applicable to any subcontractor performing work under the contract.

(17) The County will not be responsible for any losses or unanticipated costs suffered by contractor as a result of the contractor's failure to obtain full information in advance in regard to all conditions pertaining to the work.

(18) All modifications and amendments to the contract shall be effective only if in writing and executed by both parties.

(19) The contractor certifies he or she has all necessary licenses, permits, or certificates of registration (including Construction Contractors Board registration or Landscape Contractors Board license, if applicable), necessary to perform the contract and further certifies that all subcontractors shall likewise have all necessary licenses, permits or certificates before performing any work. The failure of contractor to have or maintain such licenses, permits, or certificates is grounds for rejection of a bid or immediate termination of the contract.

(20) Unless otherwise provided, data which originates from this contract shall be "works for hire" as defined by the U.S. Copyright Act of 1976 and shall be owned by the County. Data shall include, but not be limited to, reports, documents, pamphlets, advertisements, books, magazines, surveys, studies, computer programs, films, tapes, and/or sound reproductions. Ownership includes the right to copyright, patent, register and the ability to transfer these rights. Data which is delivered under the contract, but which does not originate therefrom shall be transferred to the County with a nonexclusive, royalty-free, irrevocable license to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others to do so; provided that such license shall be limited to the extent which the contractor has a right to grant such a license. The contractor shall exert all reasonable effort to advise the County, at the time of delivery of data furnished under this contract, of all known or potential invasions of privacy contained therein and of any portion of such document which was not produced in the performance of this contract. The County shall receive prompt written notice of each notice or claim of copyright infringement received by the contractor with respect to any data delivered under this contract. The County shall have the right to modify or remove any restrictive markings placed upon the data by the contractor.

(21) If as a result of this contract, the contractor produces a report, paper, publication, brochure, pamphlet or other document on paper which uses more than a total 500 pages of 8 1/2" by 11" paper, the contractor shall conform to the Lane County Recycled Paper Procurement and Use policy, LM 2.440 through 2.448, by using recycled paper with at least 25% post-consumer content which meets printing specifications and availability requirements.

(22) The Oregon Standard Specifications for Construction adopted by the State of Oregon, and the Manual on Uniform Traffic Control Devices, each as is currently in effect, shall be applicable to all road construction projects except as modified by the bid documents.

(23) As to contracts for lawn and landscape maintenance, the contractor shall salvage, recycle, compost or mulch yard waste material in an approved site, if feasible and cost-effective.

(24) As to public improvement contracts for demolition, the contractor shall salvage or recycle construction and demolition debris, if feasible and cost-effective.

(25) When a public contract is awarded to a nonresident bidder and the contract price exceeds \$10,000, the contractor shall promptly report to the Department of Revenue on forms to be provided by the department the total contract price, terms of payment, length of contract and such other information as the department may require before the

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County will make final payment on the contract. *(Revised by Order No. 98-12-2-4, Effective 12.2.98; 04-6-30-12, 6.30.04; 05-2-16-8, 2.28.05; 05-12-14-9, 1.1.06; 08-2-13-1; 2.13.08)*